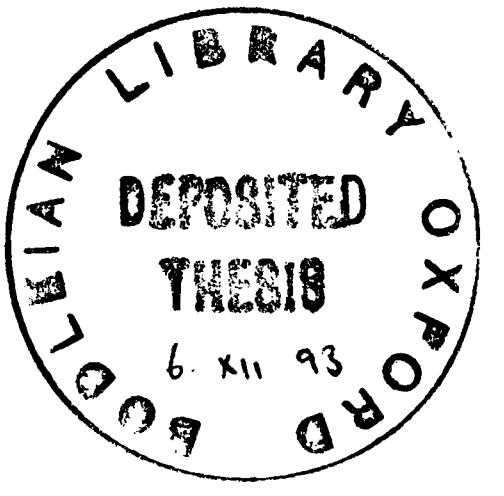
LAND AND MARITIME ZONES OF PEACE IN INTERNATIONAL LAW

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Thesis submitted for the Degree of Doctor of Philosophy

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ABSTRACT

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During the past few decades a number of initiatives have been undertaken both inside and outside the UN to establish Zones of Peace (ZOP) in various parts of the globe. Currently, there are seven declarations and proposals for ZOP relative to the Indian Ocean, the South Atlantic, the South Pacific, the Mediterranean, Southeast Asia, Nepal and Tibet. On the basis of the areas they cover and the legal issues they raise, the first four zones are termed in this thesis 'maritime zones of peace' and the remaining three 'land zones of peace'. The State practice relative to such zones demonstrates a significant move towards the acceptance of a variety of methods of creating different regimes with differing legal content. Yet there has been very little academic discussion on this subject from a legal point of view. Therefore, this thesis is designed to examine the legal aspects of the concept of ZOP.

This study begins by examining the State practice on maritime ZOP and looks at whether the concept of maritime ZOP is consistent with the existing principles of international law, especially the freedom of the seas, and whether the State practice on ZOP has crystallised into a rule of customary international law. In doing so, it will assess the legal status of the UN General Assembly declarations on maritime ZOP. This is followed by an examination of the proposals for land ZOP. The study then assesses the extent to which the principles underlying the traditional concepts such as neutrality or demilitarised zones, as well as similar emerging principles, could be applied to the concept of ZOP.

Another line of enquiry pursued in this thesis is into the concept of objective regimes in international law. After establishing that there exists in international law a rule on objective regimes, this thesis argues that the regimes of ZOP can be regarded as candidates for objective regimes. It is asserted that the methods applied to the creation of various ZOP are among the internationally accepted methods of creating regimes of a dispositive character and the regime of ZOP is similar to other regimes which have generally been regarded as objective regimes in international law. This thesis finds that although the ZOP is a distinct notion developed in response to the peculiar problems of a single State or a territorial entity or a geographical region, it draws upon similar traditional doctrines as well as other emerging rules of international law. On the whole, the declarations on ZOP can be viewed as innovative methods designed to consolidate the already extant and the emerging rules of international law, accord concrete meaning to certain general principles and apply them in the ZOP concerned.

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Finally, I should pay my deepest tribute to my wife Kokila for her support and encouragement, with devotion and good cheer, and children Pranay and Anita for their love and patience.

ABBREVIATIONS

AALCC	Asian African Legal Consultative Committee
AALCC's Report (1988)	Report of the Twenty-Third, Twenty-Fourth and Twenty-Fifth Sessions Held in Tokyo (1983), Kathmandu (1985) and Arusha (1986).
AJIL	*American Journal of International Law*
ASEAN	Association of Southeast Asian Nations
AYBIL	*Australian Yearbook of International Law*
BFSP	British and Foreign State Papers
BJIL	*Brooklyn Journal of International Law*
Bowett, Self-Defence	Self-Defence in International Law (1958)
Brownlie, Use of Force	International Law and the Use of Force by States (1963)
Brownlie, Principles	Principles of Public International Law (4th edn., 1990)
BYIL	*British Yearbook of International Law*
Byers, Denuclearisation	The Denuclearisation of the Oceans (1986)
CILJ	*Cornell International Law Journal*
Crawford, Creation of States	Creation of States in International Law(1979)
CSCE	Conference on Security and Co-operation in Europe
CSEA	*Contemporary Southeast Asia*
CWRJIL	*Case Western Reserve Journal of International Law*
DJILP	*Denver Journal of International Law & Policy*
Disarmament	*Disarmament: A Periodic Review by the United Nations*
EEZ	Exclusive economic zone
Encyclopedia of PIL	Encyclopedia of Public International Law
GYIL	*German Yearbook of International Law*
HILJ	*Harvard International Law Journal*
HSC	Convention on the High Seas, 1958
IAEA	International Atomic Energy Agency
ICJ	International Court of Justice
ICLQ	*International & Comparative Law Quarterly*
IJECL	*International Journal of Estuarine and Coastal Law*
IJIL	*Indian Journal of International Law*
ILC	International Law Commission
ILM	*International Legal Materials*
ILO	International Labour Organisation
ILR	*International Law Reports*
IOZP	Indian Ocean as a Zone of Peace
IPA Report No.24	The Indian Ocean as a Zone of Peace (1987)
ISIA	*Irish Studies in International Affairs*
IYBIA	*Indian Yearbook of International Affairs*
IYBIL	*Italian Yearbook of International Law*
Keesing's	Keesing's Record of World Events

LNTS	*League of Nations Treaty Series*
LOSB	*Law of the Sea Bulletin*
LOSC	Convention on the Law of the Sea, 1982
McNair, Treaties	The Law of Treaties (1961)
Mich.JIL	*Michigan Journal of International Law*
Mich.LR	*Michigan Law Review*
NAM	Non-Aligned Movement
NFZ	Nuclear-Free Zones
NILR	*Netherlands International Law Review*
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NWFZ	Nuclear-Weapon-Free Zones
NWS	Nuclear-weapon States
O'Connell, Sea Power	The Influence of Law on Sea Power (1975)
OAS	Organization of American States
OAU	Organisation of African Unity
ODIL	*Ocean Development and International Law*
Osmanczyk, Encyclopedia of the UN	Encyclopedia of the United Nations and International Organizations (1990)
Oppenheim, 1992	Oppenheim's International Law (Ninth edn., 1992, edited by R. Jennings and A. Watts)
Parry, CTS	Consolidated Treaty Series
PCIJ	Permanent Court of International Justice
Pogany, Nuclear Weapons	Nuclear Weapons and International Law (1987)
PTBT	Partial Test Ban Treaty
RGDIP	*Revue generale de droit international public* (Paris)
RIAA	*Reports of International Arbitral Awards*
SDLR	*San Diego Law Review*
Sloan, Resolutions	`General Assembly resolutions revisited (forty years later)', 58 BYIL (1987), p.39.
Supplement to the Handbook	Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, the U.S. Department of the Navy.
SYBIL	*Soviet Yearbook of International Law*
TSC	Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958
UKTS	United Kingdom Treaty Series
UN Report on NWFZ	Comprehensive Study of the Question of Nuclear-Weapon-Free Zones in All Its Aspects, U.N. Doc.A/10027/Add.1, U.N. Publications Sales No. E.76.I.7.
UNCLOS III	Third United Nations Conference on the Law of the Sea
UNTS	United Nations Treaty Series
U.S. Handbook	Commander's Handbook on the Law of Naval Operations, U.S. Department of the Navy
VJIL	*Virginia Journal of International Law*
YBILC	*Yearbook of the International Law Commission*

YBUN	Yearbook of the United Nations
YLJ	*Yale Law Journal*
ZOP	Zones of Peace
ZOPC	Zone of Peace and Co-operation
ZOPFAN	Zone of Peace, Freedom, and Neutrality

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INTRODUCTION

One of the most innovative developments in the post-World War II period in managing international problems has been the creation of a variety of territorial regimes designed to meet the challenge of militarisation, modern weapons technology and the modern methods of interference that stop short of outright aggression. Consequently, this period has witnessed a tremendous growth in international instruments adopted for the progressive application to certain areas of the world of the principles of demilitarisation, denuclearisation and of exclusion of military competition of various forms.[1] Among them are the measures adopted for the creation of Zones of Peace (ZOP) which seek primarily to insulate the areas within them from militarisation and outside interference that stops short of outright aggression. The initiatives to set up ZOP have been undertaken both inside and outside the UN.

In recent times, the origin of the concept of a ZOP may be traced to the Lusaka Declaration of the 1970 Non-Aligned Summit Conference, in which the Non-Aligned countries called upon the UN General Assembly to adopt a declaration of the Indian Ocean as a ZOP. Subsequently, in 1971 the General Assembly adopted a resolution declaring the Indian Ocean a Zone of Peace (IOZP).[2] The UN General Assembly adopted another Declaration in 1986 creating a Zone of Peace and Co-operation in the South Atlantic (ZOPC).[3] Two other proposals for ZOP relative to the Mediterranean and the South Pacific have been mooted in the UN.[4] The measures adopted outside the UN to create ZOP are the 1971 Declaration of the Association of Southeast Asian Nations (ASEAN) on the creation of a Zone of Peace, Freedom and Neutrality

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1 Examples are the demilitarisation of Antarctica under the Antarctic Treaty of 1959 (402 UNTS 71; entered into force in 1961; 40 States are parties) and Outer Space under the 1967 Treaty on Outer Space (610 UNTS 205; entered into force in 1967; 92 States are parties) and the denuclearisation of the deep sea-bed under the 1971 Sea-bed Arms Control Treaty (UKTS 13 (1973), Cmnd.5266; entered into force in 1972; 86 States are parties).

2 Resolution 2832 (XXVI) of 1971, adopted by 61 votes to 0, with 55 abstentions. See Appendix I, for the text of the Declaration.

3 Resolution 41/11 of 1986, adopted by 124 votes to 1, with 8 abstentions. See Appendix II, for the text of the Declaration.

4 However, since no formal declaration has been adopted with regard to the South Pacific this proposal will not be discussed separately in this thesis. See the 1989 Report of the Conference on Disarmament, U.N.Doc.CD/956 of 1989 for a brief account of various proposals for ZOP.

(ZOPFAN) in Southeast Asia,[5] Nepal's declaration for a ZOP and the proposal of the Dalai Lama, the leader of the Tibetan government-in-exile, for a ZOP for Tibet.[6]

These declarations on ZOP are interesting from an international legal point of view. This is because they rely upon precedents in earlier arrangements relative to neutralisation and demilitarisation and other forms of the disposition of a territory and thus contribute to the corpus of international arrangements relating to the creation of special regimes to regulate specific problems of a region or territory. In addition, the State practice relative to such zones demonstrates a significant move towards the acceptance of a variety of methods of creating different regimes with differing legal content founded on both existing and emerging rules of international law.

Although the concept of 'the Zone of Peace' as such does not find any specific mention in international law until the 1970s, international law recognised the right of a State to neutrality and also the concept of a neutralised State or territory. Equally, the law recognised the concept of a demilitarised zone. The post-WW II period was marked by an unprecedented arms race and the Cold War, during which States not willing to join the opposing Western and Eastern blocs sought to formulate new rules founded both on the traditional rules of neutrality and demilitarisation and on the principles of the Charter of the UN, Panch Shila, the Bandung Declaration and non-alignment. It is in this context that the concepts such as 'Zones of Peace' and 'Nuclear-Weapon-Free Zones' (NWFZ) can be said to have emerged.

The General Assembly has, since 1971, produced a number of resolutions on ZOP raising important legal issues and this topic has attracted the active interest of a considerable majority of member States of the UN. This topic has also been on the agenda of other international organisations and conferences, especially the ASEAN, the Asian African Legal Consultative Committee (AALCC) and the Non-Aligned Movement (NAM), for more than 20 years. There exists a considerable amount of

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5 See Appendix III, for the text of the Declaration.

6 On the basis of the areas they cover and the legal issues they raise, the IOZP, the ZOPC and the proposal for the Mediterranean can be termed 'maritime zones of peace' and the remaining three, i.e., the ASEAN, Nepal and Tibet's proposals, 'land zones of peace'. Accordingly, this distinction will be applied throughout this study when analysing the legal issues associated with these proposals.

State practice on ZOP. Nevertheless, this State practice has remained largely unexplored in the international legal literature. The question as to whether this State practice has crystallised into a rule of customary international law on ZOP merits examination. Further, the attempts to establish various ZOP have given rise to issues of relation with existing rules of international law. This is specially true of the impact of the creation of maritime ZOP on the existing rules of the law of the sea.

Attempts have been made at the UN *Ad Hoc* Committee on the Indian Ocean, the AALCC and the ASEAN to examine the legal ramifications of proposals for ZOP and the ways and means of implementing the declarations on ZOP. As yet, owing partly to the complexity of the topic and partly to the disagreement between the States members, there has been no significant breakthrough with regard to the implementation of the declarations on ZOP.

Certain States have opposed the creation of ZOP in the Indian Ocean and the South Atlantic, maintaining that such zones are inconsistent with the existing rules of international law, especially the freedom of the high seas and the right of self-defence of States. The major maritime Powers have viewed the move to declare the maritime areas beyond national jurisdictions as a roundabout way of extending coastal States' control over the movement of foreign warships in an area of the high seas. Some of these States have also objected to the way such zones have been created, i.e., through General Assembly resolutions rather than international treaties.[7]

Other States, however, maintain that the concept of a ZOP is consistent with a trend witnessed in recent decades in the development of international law and practice towards the principle that areas not assimilated into national jurisdiction constitute an international domain that should be subject to international regulation.[8] They have asserted that the creation of ZOP in maritime areas of *res communis* character is in accordance with the principle of the use of the seas for peaceful purposes and not in

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7 For instance, referring to the IOZP declaration the U.S. rejected the "view that a group of States in a certain region can establish a legal regime for the high seas in that region". U.N. Doc.A/C.1/PV.1849 p.5.

8 See the views of Amerasinghe, the Sri Lankan Ambassador to the UN and the President of UNCLOS III, in U.N.Doc.A/8492 and Add.1.

contravention of the principle of the freedom of the high seas and the right of self-defence of States. Thus, many of the maritime strategic and navigational issues discussed and resolved to a great extent during the lengthy Third United Nations Conference on the Law of the Sea (UNCLOS III) have re-surfaced with the attempts to establish maritime ZOP.

The perceived danger to the freedom of navigation through some of the busiest and strategically placed straits of Southeast Asia seems also to be the reason behind the major Power opposition to the ZOPFAN Declaration of the ASEAN.[9] But the States of the ASEAN assert their right as sovereign States under international law to create a ZOPFAN in areas within their national jurisdiction. Although Nepal's proposal has been endorsed by 109 States,[10] India, which borders Nepal to the east, west and south, has not endorsed the proposal on the grounds that it is not consistent with the Indo-Nepal Peace and Friendship Treaty of 1950 which provides for defence co-operation between the two countries. Yet no serious attempt has been made to analyse the legal ramifications of such declarations of ZOP.

It is in this context that this thesis aims to examine the legal aspects of the concept of ZOP. A careful and comprehensive examination of the concept of ZOP is worthwhile and timely, especially when regional approaches to international peace and security are regaining prominence after the end of the Cold War; calls for a greater role for regional initiatives in resolving regional disputes, tensions and conflicts have been revived.

A thorough study of the legal aspects of the UN Declarations and other proposals for ZOP shows us that there are many legal problems concerning the ZOP concept still to be resolved: Can a single State or a group of States or the General Assembly create ZOP? What are the conceptual components of a ZOP? What are the obligations of zonal and extra-zonal States? Has State practice on ZOP crystallised into a rule of customary international law? If not, are there any independent sources of authority in

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9 For instance, see the then U.S. Secretary of State, George Shultz's letter to the Indonesian Foreign Minister in the International Herald Tribune, 25 June 1962, p.2 and the then U.S. Vice-President Quayle's interview in The Straits Times, 18 April 1990.

10 See Chapter IV, below.

international law to support the creation of ZOP in areas of *res communis* character? To what extent could the principles underlying traditional concepts such as neutrality, neutralised States or demilitarised zones as well as the new principles, e.g., Panch Shila and the Bandung principles, be applied to the concept of ZOP? What are the relations between these doctrines and the concept of ZOP? Is the concept of ZOP compatible with the existing rules of international law, especially the right of self-defence and the freedom of the high seas? Does the law of the sea principle of the use of the seas for peaceful purposes support the concept of maritime ZOP? Does this principle itself, whatever the term 'peaceful purposes' might mean, represent *lex lata*? These are the issues that this thesis seeks to examine.

The thesis is divided into seven chapters. It begins by examining in Chapter I the current proposals for the creation of maritime ZOP. Chapter II analyses various law of the sea principles with a view to ascertaining the compatibility of the institution of ZOP with these principles. Chapter III discusses the relationship of ZOP with other principles of general international law, e.g., the principle embodied in Article 2(4) of the Charter of the UN and the right of self-defence and examines the legal status of ZOP declarations. The proposals for land ZOP are discussed in Chapter IV. This is followed by an examination, in Chapter V, of the State practice on other doctrines and concepts similar to ZOP, namely, the doctrines of permanent neutrality, demilitarised zones, NWFZs and non-alignment and their respective relation with the concept of ZOP. Chapter VI is devoted to the discussion of the doctrine of objective regimes in international law and the objective status of ZOP; Chapter VII analyses the methods of creation of ZOP. The thesis then concludes with some final remarks.

CHAPTER I

The UN Declarations on Maritime Zones of Peace

I. Introduction

This chapter will examine the political background, origin, the drafting of the text, the provisions of the declarations, the voting pattern, the subsequent conduct of States and current status of the UN Declarations on maritime ZOP. The purpose of this chapter is to identify any common legal content of the UN Declarations on ZOP and the legal issues involved in the creation of such zones and set the stage for a detailed discussion of the legal issues raised by such Declarations in subsequent chapters.

II. The Indian Ocean as a Zone of Peace[1]

1. Origin of the Concept of IOZP

The concept of the Indian Ocean as a Zone of Peace (IOZP) originated at the Second Conference of the Heads of State or Government of Non-Aligned Countries, held in Cairo in October 1964. The Conference supported the idea of the establishment of Nuclear-Weapon-Free Zones (NWFZs) in various parts of the world, including Asia.[2] This idea was later broadened to exclude both nuclear and conventional weapons and foreign military bases from the Indian Ocean.

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1 See generally, G.M. Melkov, 'Legal content of the "zone of peace" notion,' 20 Soviet Yearbook of International Law (1979), pp.107-120, English summary, at pp.120-121; B. Buzan, 'Naval power, the law of the sea, and the Indian Ocean as a Zone of Peace,' 5 Marine Policy, (1981), pp.194-204; Y. Vinogradov, 'The Indian Ocean: the problem of demilitarisation,' International Affairs (Moscow), (1987), pp.58-64; M.R. Shyam, 'The U.N. Convention on the Law of the Sea and military interests in the Indian Ocean,' 15 (2) ODIL (1985), pp.147-170; H. Bull, 'The Indian Ocean as a Zone of Peace: a view from outside', in International Peace Academy, Regional Colloquium on Disarmament and Arms Control (New Delhi, 1978) pp.77-88; Idem., The Indian Ocean as a Zone of Peace (hereafter 'IPA Report No.24') (1986); G.W. Shepherd, The Trampled Grass: Tributary States and the Indian Ocean as a Zone of Peace (1987); M.C.W. Pinto, 'The Indian Ocean as a Zone of Peace', in Byers, Denuclearisation, p.146.

2 See in O. Jankowitsch and K.P. Sauvant (ed.), The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries, Vol.I (1978), pp.54-55. The Conference condemned the intention of certain States "to establish bases in the Indian Ocean, as a calculated attempt to intimidate the emerging countries of Africa and Asia". In Part VII of the Cairo Declaration, the Conference recommended the establishment of denuclearised zones in Asia, Africa and Latin America.

The Third Summit Conference of the Non-Aligned Countries held in Lusaka in September 1970 formally endorsed this proposal and called for the adoption of a declaration by the UN General Assembly on the Indian Ocean as a Zone of Peace.[3] As the Non-Aligned Movement (NAM) sought in its early stages to close the territories of the non-aligned States to great Power conflicts and rivalries, it was, in their view, quite reasonable to extend that prohibition to the waters of the Indian Ocean, surrounded mostly by non-aligned States.[4] Thus, the wish to deny the great Powers the use of the Indian Ocean for military purposes seems to be the main motivation behind the proposal for the declaration of the Indian Ocean as a Zone of Peace.

The following year Sri Lanka, as a member of the NAM and a State in the Indian Ocean, took the initiative and requested the UN Secretary-General to include on the agenda for the twenty-sixth session of the General Assembly an item entitled "Declaration of the Indian Ocean as a Zone of Peace." In his letter to the Secretary-General the Sri Lankan ambassador to the UN, Mr. Amerasinghe, spelt out the main features of the Sri Lankan proposal in the following terms:

> "the entire high seas area of the Indian Ocean will be declared a peace zone to be used exclusively for peaceful purposes. This would mean the exclusion of armaments, defensive or offensive, and military installations from the prescribed area. Warships and ships carrying warlike equipment will exercise the right of transit but may not stop other than for emergency reasons of a mechanical, technical or humanitarian nature. The use of the sea-bed area by submarines, except for reasons of a mechanical, technical or humanitarian nature, is to be prohibited. There will be a prohibition on naval manoeuvres, naval intelligence operations and weapons tests in the area."[5]

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3 Paragraph 8 (6) of resolution (K) of the Lusaka Conference of the Non-Aligned Countries reads as follows: "A declaration should be adopted calling upon all States to consider and respect the Indian Ocean as a zone of peace from which great Power rivalries and competition,...either army, navy or air-force bases, are excluded. The area should also be free of nuclear weapons." Jankowitsch and Sauvant, *Ibid.*, p.105.

4 See U.N.Doc.A/C.1./PV.1815 of 2 November 1971, para.39.

5 U.N.Doc.A/8492 and Add.1.

The idea of the application of the principle of 'peaceful purposes' to the ocean space had been endorsed by a General Assembly resolution (Resolution 2749 (XXV))[6] just a year before this proposal was launched. The sponsors of the IOZP proposal seem to have drawn upon the concept embodied in this resolution. Addressing the twenty-sixth session of the General Assembly in October 1971, Mrs. Bandaranaike, the Prime Minister of Sri Lanka, who had come to the UN chiefly to launch the proposal for the establishment of the Indian Ocean as a Zone of Peace, stated that the transformation of the Ocean into a ZOP would make it not only free of nuclear weapons but also free from great Power rivalry and competition. She went on to say that

> "It was the intrusion of those Power rivalries into the Indian Ocean that resulted in the loss of political freedom in Asia in the eighteenth century. We certainly do not wish to see a recurrence of that situation. Our object is to contain the activities of foreign Powers and ensure that they do not make our part of the world a battleground for their rivalries."[7]

While taking part in the debate on the topic in the First Committee of the General Assembly, the Sri Lankan ambassador said that the proposal "seeks to apply the principle of the reservation of an area exclusively for peaceful purposes to one of the major oceans of the world and exclude from it not merely nuclear weapons but even conventional weapons."[8] However, he added:

> "We have no desire whatsoever to interfere with the peaceful use of the sea lanes, uses that do not threaten the security of the littoral States or of the immediate hinterland States or endanger their vital interests in any way. Our proposal will, therefore, take full account of the need for those sea lanes to be kept open to all countries for peaceful purposes."[9]

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6 This resolution was adopted by 104 votes to 0, with 14 abstentions.
7 GAOR, Twenty-Sixth Session, 1962nd Plenary Meeting, 12 October 1971, p.3.
8 U.N.Doc.A/C.1/PV.1815, p.4.
9 *Ibid.*

He argued that the interests of the littoral States in the maintenance of peace in the area were paramount and that all other factors "should be subordinated to this overriding factor."

During the debate on the topic in the First Committee, most major maritime Powers expressed their fear that the proposal might imply that the free and unimpeded use of the high seas and the air space above may be restricted vis-a-vis warships and military aircraft under certain conditions.[10] The Soviet representative said that the declaration of the Indian Ocean as a ZOP must not lead to the undermining or weakening of the existing principles of international law, including the freedom of the high seas, as laid down in the 1958 Geneva Convention on the High Seas (HSC). He maintained that "this Convention provides for freedom of navigation for all vessels, including warships, and freedom to engage in scientific research using such vessels."[11] The U.K. delegate stated that

> "Historically the United Kingdom has played a leading role in preserving peace in the Indian Ocean, an area traversed by some of the most important trade routes in the world. For many decades the protection against piracy afforded by the presence in the area of the Royal Navy has been an important factor in the development of that trade which has been of the greatest mutual benefit to the littoral States and their trading partners... Our military facilities in the area stem from and are related to these responsibilities and in no sense, of course, do they present a threat to any littoral State in the Indian Ocean. We cannot agree to proposals aimed at action which would in practice prevent us from fulfilling these responsibilities which include, in some cases, binding commitments ...we cannot agree to proposals which could result in impediments being placed in the way of our lawful commerce or which could prejudice the facilities which that commerce requires."[12]

The U.S. representative outlined the U.S. difficulties in accepting the proposal:

> "It actually places the General Assembly in the position of approving general language in an area which infringes upon disarmament and the law of the sea without the usual careful consideration associated with these

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10 See U.N.Doc.A/C.1/PV. 1802-1831 in Official Records of the General Assembly, Twenty-sixth Session, First Committee, Vol.I and for U.N.Doc.A/C.1/PV.1832-1857 in Vol.II.

11 U.N.Doc.A/C.1/PV.1841, p.9.

12 A/C.1/PV.1848, pp.11-12.

> subjects ... We reject the view that a group of States in a certain region can establish a legal regime for the high seas in that region. This may affect the fundamental security interests not only of States compelled to maintain significant military preparedness in this all too imperfect world, but also of States that rely on the stability created by a political and military balance in order to pursue other important national goals and to avoid diverting too much of their attention and resources to matters of security."[13]

The New Zealand delegation maintained that the proposal could not limit in any way the right to individual and collective self-defence expressed in Article 51 of the Charter of the UN.[14] Responding to the apprehensions raised by representatives of various States about the possible infringement of the principle of freedom of navigation by the establishment of the Indian Ocean as a ZOP, the Sri Lankan ambassador stated that

> "Freedom has meaning only if it does not result in the destruction of freedom and we cannot possibly subscribe to any definition of the freedom of the seas as implying the right to create conditions of anarchy or to roam at will threatening all and sundry. That was not how the concept of the freedom of the high seas was born. It was born out of the desire to prevent piracy and we want to keep it in that form, to prevent a new form of piracy. What we state in this draft resolution is that we do not need the military protection of great Powers. We want to free ourselves from the necessity of being dependent upon them for military protection and we can achieve that only if we accept in good faith and full determination a concept such as this, the declaration of an area as a zone of peace."[15]

He raised a question:

> "Must the wishes of a large group of small nations...be subordinated to the interests of the great Powers that wish to be free to send their vessels for any purpose whatsoever into the Indian Ocean, not only their vessels of peace but their vessels of war?" He then added that "We cannot possibly in this age and time subordinate the peaceful interests of these small States to the will, to the prejudices and predilections of the great Powers. And it is that understanding that we want from them."[16]

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13 A/C.1/PV.1849, p.3.
14 *Ibid.*, p.5.
15 A/C.1/PV.1842, p.12.
16 *Ibid.*

He interpreted the doctrine of the freedom of the high seas in his own terms and maintained that the IOZP proposal was by no means an infringement of any right that can legitimately be claimed under the doctrine. The proposal

> "would permit vessels, even naval vessels which are engaged in research, to conduct that research without any interference. It would permit warships moving across the Indian Ocean from east to west or west to east going on their mission of war or peace... so long as they are not there to threaten the sovereignty, territorial integrity or independence of any littoral or hinterland State."[17]

Prior to this, in her speech to the General Assembly, Mrs. Bandaranaike had stated that

> "It may be argued that a zone of peace in an ocean area would be incompatible with a body of customary and conventional international law which seeks to preserve the seas beyond territorial waters as open to all nations. There is no reason why this concept should not be modified to accommodate the needs and realities of the world of today. One may go so far as to say that the principle of the freedom of the high seas does not adequately serve the fundamental interests of all nations alike but is clearly weighted in favour of the interests of the dominant user nations. This inequality must be redressed."[18]

Thus, the proposal for the establishment of a ZOP in the Indian Ocean can be regarded as an attempt to define the traditional principle of the freedom of the high seas according to the modern principle of the use of the high seas for peaceful purposes. This approach, which would limit certain activities of the navies of the great Powers, was not acceptable to the major naval Powers. In their view, the IOZP proposal would imply the recognition for certain States of new rights likely to impair or assail the principle of freedom of navigation on the high seas for all types of vessels; the principle of the freedom of navigation being one of the most ancient and unchallengeable rules of international law could not be modified - even in a limited geographical region - by a General Assembly resolution.

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17 *Ibid.* p.14.

18 GAOR, 1962nd Plenary Meeting, 12 October 1971, p.3.

However, on 16 December 1971, the General Assembly adopted a declaration (Resolution 2832 (XXVI)), by 61 votes to 0, with 55 abstentions, declaring the Indian Ocean, within limits to be determined, together with the air space above and the ocean floor subjacent thereto, for all time, a Zone of Peace.

2. The UN Declaration

The operative part of the UN General Assembly declaration on the Indian Ocean reads as follows:

> "The General Assembly,
> ...
> 1. Solemnly declares that the Indian Ocean, within limits to be determined, together with the airspace above and the ocean floor subjacent thereto, is hereby designated for all time as a Zone of Peace;
>
> 2. Calls upon the great Powers, in conformity with this Declaration, to enter into immediate consultations with the littoral States of the Indian Ocean with a view to:
>
> (a) Halting the further escalation and expansion of their military presence in the Indian Ocean;
>
> (b) Eliminating from the Indian Ocean all bases, military installations and logistical supply facilities, the disposition of nuclear weapons and weapons of mass destruction and any manifestation of great Power military presence in the Indian Ocean conceived in the context of great Power rivalry;
>
> 3. Calls upon the littoral and hinterland States of the Indian Ocean, the permanent members of the Security Council and other major maritime users of the Indian Ocean, in pursuit of the objective of establishing a system of universal collective security without military alliances and strengthening international security through regional and other co-operation, to enter into consultations with a view to the implementation of this Declaration and such action as may be necessary to ensure that:
>
> (a) Warships and military aircraft may not use the Indian Ocean for any threat or use of force against the sovereignty and, territorial integrity and independence of any littoral or hinterland State of the Indian ocean in contravention of the purposes and principles of the Charter of the United Nations;

(b) Subject to the foregoing and to the norms and principles of international law, the right to free and unimpeded use of the zone by the vessels of all nations is unaffected;

(c) Appropriate arrangements are made to give effect to any international agreement that may ultimately be reached for the maintenance of the Indian Ocean as a Zone of Peace".[19]

3. Evaluation of the Declaration

As spelt out in the preambular paragraphs, the main objectives of the declaration appear to be to enable the States in the Indian Ocean region to remain aloof from major Power conflicts and military alliances so as to avoid diversion of their scarce resources from the more compelling tasks of economic development and strengthening the security of the States of the region by eliminating the possibility of outside interference in the affairs of the States of the region.

The IOZP proposal is a more complicated proposition than any previously declared NWFZs; it is not confined to nuclear weapons and other weapons of mass destruction but covers in addition military bases and installations conceived in the context of great Power rivalry. The declaration attempts not only to regulate the use of the Indian Ocean by warships but also to impose new restraints on the use of force. It is radical from four different perspectives: firstly, it seeks to transform the entire Indian Ocean, a huge area of the globe, not merely into an NWFZ but into a ZOP, a zone that can be likened to a demilitarised zone. In this sense, paragraph 2(b) of the declaration could be regarded as a measure of limited demilitarisation of the Indian Ocean.

Secondly, such transformation is sought under a General Assembly resolution rather than a multilateral treaty. The declaration does not speak of the need for a multilateral treaty to establish a ZOP in the Ocean. Of course, it mentions the need for multilateral negotiations but such negotiations are required merely to implement the Declaration but not to establish a ZOP in the Indian Ocean.

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19 The General Assembly Declaration (Resolution 2832 (XXVI)) of 16 December 1971, adopted by 61 votes to 0, with 55 abstentions. See Appendix I, for the full text of the Declaration.

Thirdly, the declaration, a resolution of the General Assembly which does not have a binding force, seeks to define the principle of freedom of navigation in the light of the principle of the use of the high seas for peaceful purposes. The restrictions imposed on the movement of warships under paragraph 3(a) of the declaration can be characterised as a measure of limited modification of the principle of freedom of navigation insofar as its application in the Indian Ocean is concerned. Here it is worth noting that these restrictions are aimed at preventing all States, whether regional or non-regional, from using the Indian Ocean for warlike purposes.[20] The purpose of this paragraph seems to be to avoid confrontation in the Indian Ocean in times of peace and confine the hostilities to the areas within national jurisdiction of belligerents in times of war.

Fourthly, the declaration seeks to strengthen and extend the scope of Article 2(4) of the Charter of the United Nations. The IOZP declaration seeks to regulate the use of the Indian Ocean for military purposes and imposes new restrictions on its use. Whereas the prohibition in Article 2(4) does not prohibit the preparations for offensive wars as well as the use of the high seas or any areas of *res communis* character for such purposes in so far as such preparations do not amount to a threat or use of force, the main principles of the IOZP, as set out in the operative paragraphs of the declaration, appear to provide for the:

> (i) Halting of the further escalation and expansion of the military presence of major Powers in the Indian Ocean;
> (ii) Elimination of all bases, military installations and logistical supply facilities from the zone;[21]
> (iii) Disposal of not only nuclear weapons but also other weapons of mass destruction from the zone;

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20 In this sense this provision can be likened to neutralisation. The prevention of the use of the territory in question for military purposes by outside Powers is a major principle of the doctrine of neutralisation. See Chapter V.

21 At the time of the adoption of the declaration the regional States did not have any military bases in the waters of the Ocean beyond their territorial jurisdiction and all military presence that was in the area was in the context of great Power rivalry. That is why the declaration requires the elimination of all military presence conceived in the context of great Power rivalry. But the UN resolutions on the IOZP adopted after the end of the Cold War slightly modify the original version and require the elimination of all military presence conceived initially in the context of great Power confrontation. See General Assembly Resolution 46/49 of 9 December 1991, adopted by 127 votes to 4, with 30 abstentions.

(iv) Prohibition on the use of the maritime area of the ZOP by warships and military aircraft for any threat or use of force in contravention of the Charter of the UN.

These principles are new elements which appear to extend the scope of Article 2(4) as no other rule of international law explicitly prohibits the establishment of military bases in the marine areas beyond the 12-mile territorial waters of other States or requires the disposal of all weapons of mass destruction or restricts the use of such areas by warships and military aircraft. These provisions can be regarded as attempts to formulate third generation rules to avoid confrontation.[22] But the question remains as to whether these attempts are consistent with the existing rules of international law.

4. The Aftermath

Two international conferences, one attended only by the littoral and hinterland States of the Indian Ocean and the other including the great Powers and the major maritime users of the Indian Ocean, were envisaged in order to conduct consultations and negotiations aimed at implementing the Declaration.[23] An *Ad Hoc* Committee on the Indian Ocean was established in 1972 by the General Assembly to study the implications of the IOZP Declaration with special reference to the practical measures that might be taken in furtherance of the objectives of the Declaration.[24]

The Committee was later entrusted with the task of performing the functions of a preparatory committee for the Meeting of the Littoral and Hinterland States of the Indian Ocean. This was held in 1979 and attended by 44 littoral and hinterland States.[25] Another 18 States, including the 'great Powers'[26] and major maritime users

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22 The rules which merely outlaw war as a national policy (e.g. the rules laid down in the Kellogg-Briand Pact of 1928) can be regarded as first generation rules. The second generation rules could be said to be those which are laid down in the Charter of the UN; they go much further than the first generation rules. While Article 2(4) of the Charter broadens the scope of the rule of the prohibition on the use of force, Article 51 limits the scope of the right of States to use force for self-defence; it requires the occurrence of an armed attack to invoke the right to use force for self-defence.

23 Paragraph 4 of resolution 33/68 of 14 December 1978. This resolution was adopted by 84 votes to 0, with 14 abstentions. See also A/C.1/PV.1840 of 30 November 1971, para 76.

24 Resolution 2992 (XXVII) of 15 December 1972, adopted by 95 votes to 0, with 35 abstentions.

25 A/35/45 (Supp. 45).

of the Indian Ocean, participated as observers. Delivering his opening address as President of the Meeting, the Sri Lankan representative stated that a central requirement for genuine peace in the Indian Ocean was demilitarisation and the IOZP Declaration was aimed at achieving the final objective of a demilitarised peaceful Indian Ocean.[27]

At the conclusion of its deliberations the Meeting adopted, without a vote, a Final Document which included a set of seven principles of agreement for the implementation of the 1971 Declaration. It was agreed that "[t]he great Power military activity, conceived in the context of great Power rivalry, is a threat to stability and security in the Indian Ocean". Therefore, the great Powers were called upon to:

> (a) halt forthwith the further escalation and expansion of their military presence in the Indian Ocean;
> (b) desist from conducting military manoeuvres, exploding nuclear devices and the deployment of military forces in contravention of the Charter of the UN;
> (c) enter into consultations with the regional States with a view to formulating an agreed programme for the elimination of their military bases, military installations and other logistical supply facilities, the deployment of nuclear weapons and other weapons of mass destruction.[28]

The Meeting also called upon the littoral and hinterland States to:

> (a) take action to ensure that warships and military aircraft as well as other military forces may not use the Indian Ocean in contravention of the Charter of the UN;
> (b) undertake not to assist the great Powers in their military activities in contravention of the IOZP Declaration and
> (c) to undertake to consider negotiating measures for promoting or enhancing the stability of the Indian Ocean area at lower military level.

The Final Act of the Meeting called upon the nuclear-weapon States "to undertake not to establish nuclear bases in the Indian Ocean and to refrain from conducting nuclear

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26 The IOZP declaration uses the term 'great Powers' without defining it. However, the term seem to have been used to signify the five permanent members of the Security Council. See Pinto, op cit. note 1 p.146.

27 A/AC.199/SR.1, p.4.

28 A/34/45, Supp. 45.

test activities in the Indian Ocean" and to undertake effective arrangements to assure the littoral and hinterland States of the Indian Ocean against the use or threat of use of nuclear weapons. The Act also stated that "the littoral and hinterland States of the Indian Ocean should agree not to acquire or introduce nuclear weapons in the Indian Ocean themselves or to allow their introduction by any external Power." The principle relating to the freedom of navigation reaffirms "the right of all States to use the Indian Ocean for navigation and other peaceful uses, freely and without hindrance, in conformity with international law and custom, provided no threats are posed to the independence, sovereignty or territorial integrity of the littoral and hinterland States in contravention of the Charter of the United Nations."[29]

Thus, the Final Act seeks to strike a balance between the obligations of littoral and hinterland States of the Indian Ocean and the great Powers. The Meeting endeavoured to fill certain gaps and clarify certain ambiguities of the 1971 Declaration. The principles laid down in the Final Act represented a significant step towards the implementation of the Declaration. However, the great Powers, who were invited to express their views on the subject to the Meeting, appeared reluctant to support the position taken by the littoral and hinterland States.[30] For instance, the U.S. stated that the idea that there should be no great Power military presence in the Indian Ocean was completely unacceptable to it. Although the U.S. agreed that warships and military aircraft should not use the Indian Ocean for any threat or use of force against the regional States in contravention of the UN Charter, it maintained that the U.S.

> "did not deploy military forces in the Indian Ocean or anywhere else with the intention of using or threatening to use force in contravention of the Charter...On the contrary, it supported the determination of the States of the Indian Ocean area to preserve their independence, sovereignty and territorial integrity and to solve their political, economic and social problems peacefully and free from unwanted influence from any outside region."[31]

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29 *Ibid.* p.16.

30 The statements made by the representatives of the permanent members of the Security Council participating as observers are reproduced *in extenso* in A/AC.199/SR. 2, 3, 7 and 10 (1979).

31 A/AC.199/SR 8.

The U.S. considered that "zones of peace must be consistent with and could not abridge the inherent right of individual and collective self-defence guaranteed in the Charter or other rights recognised under international law".[32] Further, the U.S. stated that it

> "believed that zones of peace could only come into effect through an agreement of all States concerned, wherever situated. It could not accept the proposition that a regional group of States could declare a legal regime for the seas to which other States were expected to adhere or which could be binding on other States without their consent. Nor could the General Assembly by itself take meaningful action to establish such a legal regime, beyond endorsing what might have been negotiated and agreed among Members by consensus."[33]

The USSR also maintained that the IOZP Declaration must not affect the basic principles of international law relating to freedom of navigation and overflight of international waters.[34]

Since there was no consensus on the methods of the implementation of the IOZP Declaration, the Meeting of the Littoral and Hinterland States recommended to the General Assembly that it convene an international conference on the IOZP and that the permanent members of the Security Council and major maritime users of the Indian Ocean be invited to serve on the expanded *Ad Hoc* Committee on the Indian Ocean in order to facilitate preparations for the conference. Accordingly, the General Assembly, through Resolution 34/80 B of December 1979, decided to convene a conference in 1981 to implement the IOZP Declaration.

The permanent members of the Security Council and major maritime users of the Indian Ocean were invited to serve on the expanded Committee which was then requested to undertake the preparatory work for the Conference.[35] However, the U.S. abstained in the voting for the resolution and stated that it had never agreed with certain basic aspects of the *Ad Hoc* Committee's mandate and could not associate

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32 *Ibid.* p.6.
33 A/AC.199/SR.2. p.7.
34 A/AC.199/SR.3, pp.3, 6.
35 Resolution 34/80 B of 11 December 1979 was adopted by 126 votes to 0, with 14 abstentions.

itself with a decision to call for such a conference until a promising basis existed for it. The US said that if it were to join in the Committee's work it would insist on modest and realistic goals, such as regional military restraint.

Nevertheless, the following year the U.S., the U.S.S.R., the U.K. and France became members of the Committee and for the first time the General Assembly resolution on IOZP was adopted unanimously.[36] It is worth noting that all this happened after the Soviet invasion of Afghanistan in December 1979. Both the U.S. and the U.S.S.R. were keen to use the IOZP agenda and the *Ad Hoc* Committee for their political purposes. The U.S. may have considered it appropriate to use the Committee to unite the Western States as well as the third world States against the Soviet invasion of Afghanistan, a hinterland State of the Indian Ocean. The U.S.S.R., on the other hand, appears to have joined the Committee to defend its position and prevent other States from taking any anti-Soviet measures; the Committee was required to act on the basis of consensus.

The U.S. argued that "military forces deployed in contravention of the purposes and principles of the United Nations Charter undermine the intent of a zone of peace, while those deployed in accordance with these purposes and principles do not" and in its view the U.S. forces deployed in the Indian Ocean were in accordance with the purposes and principles of the Charter.[37] The U.S. stressed the right of all States to make appropriate arrangements for individual and collective self-defence, as provided for in the Charter, and argued that the U.S. military presence in the Indian Ocean was in accordance with the Charter.[38] The member States of the EC supported the U.S. position.

Nonetheless, all States acknowledged unanimously in resolution 35/150 of 12 December 1980 that "the continued danger posed by the military presence of the great Powers in the Indian Ocean area, conceived in the context of their confrontation, gives greater urgency to the need to take practical steps towards the early achievement

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36 Resolution 35/150 of 12 December 1980.
37 A/C.1/35/PV.42.
38 A/C.1/35/PV.35, p.21.

of the objectives of the Declaration of the Indian Ocean as a Zone of Peace". In spite of this unanimity, the *Ad Hoc* Committee's work on the IOZP has continued to suffer from the uncompromising line of arguments and the positions of two groups of States (i.e., the major maritime Powers and the non-aligned States) on the Committee. Since its inception nearly two decades ago the Committee has been trying to harmonise the views of these States on the practical steps to be taken for the implementation of the IOZP Declaration but has achieved no significant success in this area.[39]

Certain major maritime Powers question the validity of certain of the principles of the 1971 declaration. They regard it as faulty and outdated, inconsistent with the right to individual and collective self-defence of States, and difficult to reconcile with freedom of navigation. Although the socialist States did support the idea of eliminating great Power military bases from the Indian Ocean, they reserved their position with regard to the restrictions on the use of the Indian Ocean for other military purposes. The group of non-aligned States, on the other hand, disagrees with the objections of major maritime Powers, remarking that the 1971 Declaration is appropriate and reflects their genuine concerns.

Citing this disagreement, most Western States maintain that it is pointless to convene a conference on the IOZP before agreeing, in the Committee, on its basic principles. In their view, this would not only facilitate the work of the Conference but also ensure a fruitful outcome. But the non-aligned States argue that, since the 1971 Declaration and the 1979 Final Act of the Meeting of the Littoral and Hinterland States spell out the basic principles of the IOZP concept, a complete harmonisation of views is not essential prior to the convening of the Conference. In their opinion, the Conference itself would be a stage in the process of reaching the objective of making the Indian Ocean a ZOP.

Although the non-aligned States are in the majority on the Committee, they are prevented from taking any decisions without the support of the great Powers as the

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39 Anderson, Political Analyst, the U.S. Dept. of State, and Rose write that "It probably is inaccurate to talk in terms of a U.S. 'policy' toward the IOZP formula since Washington has never considered it necessary to define one." W.K. Anderson and L. Rose, 'Superpowers in the Indian Ocean: the goals and objectives,' in IPA Report No.24, *op.cit.* note 1, pp.1, 35.

Committee's rules require consensus in its decisions. Moreover, a Conference not supported by great Powers is unlikely to achieve any significant success. Therefore, the Committee has spent a long time trying to harmonise the views of its members on the subject. The Committee asked all of its members to provide it with their opinion on the steps to be taken to implement the 1971 Declaration. In its response the U.S. stated that

> "The right to peaceful use, transit and overflight of the world's oceans and seas by all nations is fundamental. In fact, naval forces operating on the high seas cannot be considered 'foreign' since these areas are by definition international. Along with many other nations, the United States maintains a limited naval presence in the Indian Ocean region and is a major maritime user of Indian Ocean trade routes. United States exercise of its fundamental right of transit by its naval forces is fully in accordance with international law. Removal of great-Power naval forces from the Indian Ocean would not only set aside this basic international right, but also create the opportunity for an even more dangerous military imbalance to the detriment of regional stability".[40]

Another major argument advanced by the US was based on the right of self-defence: "All United States military activities in the Indian Ocean region are fully consistent with the principles and purposes of the United Nations Charter, in particular Article 51."[41] A proposal for a set of principles on the IOZP submitted to the Committee in 1982 by the U.S., the U.K., Australia, Canada, Germany, Italy, Norway, Japan and the Netherlands presents a different perspective of the IOZP concept: these proposals encompass a variety of principles that are not covered by the 1971 declaration and speak of the establishment of a ZOP in the littoral and hinterland States of the Indian Ocean region rather than in the Ocean itself. According to these States a contemporary IOZP "would encompass three broadly interrelated sets of principles - political, security and economic - which would guide relations among the littoral and hinterland States of the region, as well as relations between these States and States

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40 A/AC.159/L.55. p.29.
41 *Ibid.* p.30.

outside the region."[42] The principles set out for the IOZP by the nine Powers are as follows:

(1) Political Principles
(i) Respect for national sovereignty;
(ii) Peaceful settlement of disputes;
(iii) Ensuring equal rights and self-determination of peoples;
(iv) Non-use of force;
(v) Respect of right to be free from military occupation resulting from the use of force;
(vi) Co-operation in solution of refugee problems; and
(vii) Promotion and respect for human rights.

(2) Security Principles
(i) Respect of the right of individual and collective self-defence;
(ii) Respect of the right of freedom of navigation and over-flight;
(iii) Recognition of the need for undiminished security for all States and adequate verification under arms control or disarmament agreements;
(iv) A declaration that the strengthening of security and peace in the region depends on a climate of confidence and trust at a global and regional levels;
(v) Prevention of the spread of nuclear weapons;
(vi) Creation of appropriate nuclear free zones in the area;
(vii) Withdrawal of foreign occupying forces from States of the region; and
(viii) Refraining from any manifestation or use of force for the purpose of inducing a State of the region to renounce the full exercise of its sovereign rights.

(3) Economic Principles
(i) Encouragement of expansion of mutual trade;
(ii) Recognition of benefits of co-operation in trade, industry, science and technology, transport, health, environment and related activities;
(iii) Promotion of application of new technologies to industrial, scientific and environmental activities in the region; and
(iv) Encouragement of protection of right of migrant labourers in both receiving States and the States of origin.

Although this set of principles includes some very constructive proposals, they do not prescribe any specific and substantive principles for the implementation of the 1971 Declaration. These principles can be regarded as confidence-building measures in the Indian Ocean region rather than establishing a legal regime of ZOP in the Indian Ocean. This was seen by other States as an attempt to divert the focus from the

42 A/AC.159/L.44, p.2.

hard core issues of the IOZP declaration to a broader concept of regional security and co-operation among the States of the Indian Ocean region. This was also viewed as an attempt to justify the great Power military presence in the Ocean on the basis of the right of self-defence.

However, third world States reject this reasoning. For instance, Madagascar, a State in the Indian Ocean, stated that

> "Article 51 of the Charter, it should be noted, regards acts of self-defence as legitimate only in cases where 'an armed attack occurs against a Member of the United Nations'. Such acts should be of an essentially temporary nature 'until the Security Council has taken measures necessary to maintain international peace and security'...
>
> "We question whether there is a single foreign force deployed in the Indian Ocean which meets the above criteria of the Charter. We know of no armed attack perpetrated against any of the countries that invoke here the right of self-defence under Article 51.
>
> "It would be of interest to us to know whether the Charter contains another definition of this concept, which some want to interpret too liberally in their own favour."[43]

Madagascar's statement continued:

> "The States of the region are also reminded that the forces deployed in the Indian Ocean are there in exercise of a freedom recognised by international law, namely freedom of navigation on the high seas applied to ships and warships. But to what extent should we respect the exercise of this right? Should we respect it when deployment assumes a permanent character akin to the appropriation of the high seas...? Should we respect the exercise of a right whose practical result is to establish in our region a balance of terror that threatens our security?"
>
> "The freedom invoked has lost part or all of its justification because of the abuse to which it is being subjected, an abuse started by the colonial Powers whose troops used the Indian Ocean in pursuit of conquest and repression".[44]

Thus, two divergent views have persisted in the Committee on the very concept of the IOZP and steps to be taken to implement it. The non-aligned States have continued

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43 *Ibid.* p.22.
44 *Ibid.* p.68.

their support for the 1971 Declaration and called for its implementation. They have maintained that

> "the presence in the Indian Ocean area of any manifestation of great-Power military presence, foreign bases, military installations and logistical supply facilities, nuclear weapons and weapons of mass destruction conceived in the context of great-Power rivalries, constitute a flagrant violation of the Declaration of the Indian Ocean as a Zone of Peace."[45]

In spite of the differences of opinion as to the very concept of the IOZP, all member States on the Committee continued to participate in its work until 1990. Since no decision could be taken in the Committee without consensus, it was not possible to decide to convene a UN Conference on the IOZP. Nevertheless, the non-aligned States members continued their efforts to find some common ground and a Working Group was set up by the Committee to identify the substantive issues to be considered by such a conference.

In a letter of 13 July 1989 the chairman of the Working Group presented a report which contained a list of substantive issues and principles fundamental to the preparatory work of the Conference. In the list of substantive issues, the Working Group appears to have tried to strike a balance between the views of the major naval Powers and the non-aligned States. Among the issues covered by the Group are those relating to respect for the principle of freedom of navigation and overflight in accordance with international law; the halting of great-Power confrontation in the zone; the halting and reversing of the arms race among militarily significant extra-regional Powers and among littoral and hinterland States; the withdrawal of foreign military presence and dismantling of foreign bases which are contrary to the objectives of the IOZP Declaration, and the assurance by nuclear-weapon States of the non-use of nuclear weapons against littoral and hinterland States of the Indian Ocean.[46]

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45 A/AC.159/L.55/Add.1, p.2.
46 A/AC.159/L.93 of 13 July 1989.

Thus, when these substantive issues and principles had been identified and the preparatory work concerning procedural aspects of the Conference had nearly been completed, the Chairman of the *Ad Hoc* Committee said that this progress warranted the convening of the Conference on the Indian Ocean in 1990. Yet the U.S. representative said that no agreement had been reached on the substantive elements and that therefore further discussion was needed in the Committee before taking any decisions on the convening of the Conference.[47] This was the time when the Soviets had decided to withdraw from Afghanistan and the Iran-Iraq war had come to an end.

A conference on the Indian Ocean could have focused on the actual issues of the IOZP Declaration rather than discussing the slippery political and security problems of the littoral and hinterland States. When the majority of States appeared in favour of holding the Conference, the U.S. found itself isolated as it thought that not enough work had been done in the Committee to harmonise the views of different groups of States. There was then a dramatic change in the U.S. policy towards the implementation of the IOZP Declaration: the U.S. did not demand more discussion on substantive issues but put forward a proposal designed to disband the Committee itself and postpone the Conference. The U.S. representative stated that "the Committee should not now continue with business as usual, which had been conducted to no avail for years."[48] This U.S. proposal changed its own policy pursued since 1980; the U.S. had supported General Assembly resolutions adopted between 1980 and 1988 on the IOZP which called for a Conference to be convened to discuss the IOZP declaration and entrusted the Committee with the preparatory work for the Conference.[49]

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47 See the statement of the U.S. representative to the 351st meeting of the Committee of 7 July 1989 in A/Ac.159/SR.351.

48 A/AC.159/SR.352 of 11 July 1889.

49 The UN General Assembly resolutions on the IOZP adopted since 1971 are as follows: Resolution 2832 (XXVI) of 1971, adopted by 61 votes to 0, with 55 abstentions; Resolution 2992 (XXVII) of 1972, adopted by 95 votes to 0, with 35 abstentions; Resolution 3080 (XXVIII) of 1973, adopted by 95 votes to 0, with 35 abstentions; Resolution 3259 A (XXIX) of 1974 by 103 votes to 0, with 26 abstentions; Resolution 3468 (XXX) of 1975, adopted by 106 votes to 0, with 25 abstentions; Resolution 31/ 88 of 1976, adopted by 106 votes to 0, with 27 abstentions; Resolution 32/86 of 1977, adopted by 123 votes to 0, with 13 abstentions; Resolution 33/68 of 1978, adopted by 130 votes to 0, with 14 abstentions; Resolution 34/80 B of 1979, adopted by 126 votes to 0, with 14 abstentions; Resolution 35/150 of 1980, adopted without a vote; Resolution 36/90 of 1981, adopted without a vote; Resolution 37/96 of 1982, adopted without a vote; Resolution 38/185 of 1983, adopted without a vote; Resolution 39/149

The Sri Lankan representative, speaking on behalf of the group of non-aligned States, said that the U.S. proposal was totally unacceptable to the group and retorted that "[a]ny inadequacy on the part of the Committee was due simply to the lack of political will on the part of a few of its members," a reference to the role played by certain Western Powers.[50]

It had been the practice of the *Ad Hoc* Committee to submit, by consensus, a draft resolution to the General Assembly for its consideration. But this time owing to the difference of opinion no draft resolution was proposed by the Committee; a draft resolution that was proposed by Yugoslavia on behalf of the group of non-aligned States was rejected by the U.S., the U.K., France and Japan.[51] Thus the tradition of consensus, that had prevailed in the General Assembly since 1980, on the IOZP resolutions was broken and in April 1990 the U.S., the U.K. and France notified the Chairman of the *Ad Hoc* Committee of their intention to withdraw from the Committee and not to participate in the preparations for the Conference on the IOZP.[52] Certain other States, including Canada, Germany, Italy, Japan, the Netherlands and Norway, decided not to participate in the work of the Committee.[53]

However, the *Ad Hoc* Committee has continued its work, without the participation of these States, towards the convening of an international Conference on the Indian Ocean. In its July 1991 session held in New York the Committee decided that the Conference should be structured in such a way as to be held in more than one stage. It concluded its 1991 session with a report to the General Assembly proposing a first-stage Conference to be held in Colombo, Sri Lanka, in 1992.

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of 1984, adopted without a vote; Resolution 40/153 of 1985, adopted without a vote; Resolution 41/87 of 1986, adopted without a vote; Resolution 42/43 of 1987, adopted without a vote; Resolution 43/79 of 1988, adopted without a vote; Resolution 44/120 of 1989 adopted by 137 votes to 4, with 14 abstentions; and Resolution 45/77 of 1990, adopted by 128 votes to 4, with 17 abstentions; Resolution 46/49 of 1991, adopted by 127 votes to 4, with 30 abstentions; Resolution 47/59 of 1992, adopted by 129 votes to 3, with 35 abstentions.

50 A/AC.159/SR.352.

51 General Assembly Resolution 44/120 of 15 December 1989 on the implementation of the IOZP Declaration was adopted by 137 votes to 4, with 14 abstentions.

52 A/AC.159/L.99; A/AC.159/L.100; A/AC.159/L.101.

53 A/AC.159/L.102.

The Chairman of the Committee, reporting to the Committee on the outcome of consultations with representatives of boycotting States, said that these States might return if the changed realities of the international situation were taken into account by the Committee in laying the groundwork for the conference.[54] The main points made by the boycotting States appear to be that the 1971 Declaration has been overtaken by events, that the international situation and, consequently, international relations have undergone a dramatic change and there is no longer any rivalry between the great Powers in the Indian Ocean; it is therefore meaningless to speak of bases established in the context of great Power rivalry.[55]

The 44-member *Ad Hoc* Committee, at its 1992 session, recommended that new alternative approaches should be considered by the General Assembly to achieve the goal of establishing the Indian Ocean as a Zone of Peace. It stated that "existing important principles" should be built upon, taking into account the changing international situation.[56]

III. The South Atlantic as a Zone of Peace and Co-operation

1. Origin of the Proposal

The idea of the establishment of a Zone of Peace and Co-operation (ZOPC) in the South Atlantic was first raised officially in 1985 by President Sarney of Brazil, the largest country in the region, in his address to the UN General Assembly. It should be remembered that it was Brazil which had initiated the idea of an NWFZ in Latin America soon after the Cuban missile crisis in 1962. Brazil's initiative had actually resulted in the conclusion of the Tlatelolco treaty.[57] Brazil proposed an even more ambitious disarmament proposal for the region; the ZOPC can be likened to a demilitarised zone. This was after the Falkland Islands war of 1982 (when the British had deployed nuclear warships in the South Atlantic), the alleged testing of a nuclear

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54 A/AC.159/SR. 395.

55 A/AC.159/SR. 395 of 2 July 1991.

56 UN Chronicle, September 1992, p.41. Through its resolutions 46/49 of 9 December 1991 and 47/59 of 9 December 1992, the General Assembly has reiterated its decision to convene a United Nations Conference on the Indian Ocean in the near future.

57 634 UNTS 281.

bombs in the South Atlantic by South Africa in collaboration with Israel[58] and the increase in the military activities of major naval Powers in the region in the 1980s.

President Sarney announced to the UN General Assembly that "Brazil will make every effort within its power to ensure that the South Atlantic is preserved as an area of peace, shielded from the arms race, the presence of nuclear arms and any form of confrontation originating in other regions."[59] Following this announcement, a letter from the Brazilian Minister of External Relations was sent to the Secretary-General of the UN requesting the inclusion of an item entitled "Zone of Peace and Co-operation of the South Atlantic" in the provisional agenda of the forty-first (1986) session of the General Assembly. The letter stated that

> "The international community... has been witnessing recurrent trends of a naval military build-up, quantitative as well as qualitative, with the consequent geographic proliferation of nuclear weapons without regard for the right of non-nuclear countries to live in peace and security."[60]

The Minister continued:

> "In this connection, the declaration of the South Atlantic as a zone of peace and co-operation is a logical follow up for other outstanding initiatives such as the Treaty of Tlatelolco on the prohibition of nuclear weapons in Latin America, and the Organisation of African Unity's Declaration on the Denuclearization of Africa."[61]

The proposed item was included in the agenda of the forty-first session of the General Assembly. Introducing the draft resolution on the ZOPC the Brazilian foreign minister stated that

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58 See T.T. Poulose, 'The United Nations and arms control: nuclear proliferation', in UNITAR, The United Nations and the Maintenance of International Peace and Security (1987), p.392.

59 A/40/PV.4, pp.14-15.

60 A/41/143 of 29 May 1986. It was reported in the press that during the Falkland Islands crisis the British deployed nuclear weapons in the South Atlantic and the Argentineans considered this to be a violation of the Tlatelolco Treaty. The reports said that two British ships which were sunk-the Sheffield and Coventry - were carrying nuclear depth bombs. As cited in W.M. Arkin et al., 'Ocean space and nuclear weapons: the geo-strategic environment,' in Byers, Denuclearisation, pp.21, 32.

61 A/41/143 of 29 May 1986, p.2.

> "The time has come to formulate and proclaim a well-articulated set of principles and norms which, taking into account the legitimate interests of the countries of the region of the South Atlantic, will contribute to the peace and security of that area as well as strengthening the links of co-operation and solidarity between the peoples on both sides of the ocean."

He outlined the necessity for the creation of the proposed zone: "We are convinced of the need to preserve the South Atlantic from measures of militarisation, from the arms race, from the presence of foreign military bases, and above all from nuclear weapons."[62] He went on to say that

> "The moment at which we propose a framework for this new understanding comes shortly after the culmination of a long process of drafting a new law of the sea. The South Atlantic countries, which participated in this undertaking in an effective and constructive way, have every reason to dedicate themselves with enthusiasm to the application of its results. Co-operation within the South Atlantic zone, in all its aspects, must be carried out with full respect for the principles and norms of the law of the sea, and, in particular, with the principle that the oceans shall be used for peaceful purposes."[63]

Thus, Brazil, which had made a declaration while signing the LOSC to the effect that the principle of the use of the high seas for peaceful purposes did not permit certain military activities in the seas,[64] clearly indicated that the ZOPC proposal was an attempt to apply the results of the negotiations conducted at the UNCLOS III, especially those concerning the principle that the oceans shall be used for peaceful purposes. Being fully informed of the Brazilian efforts to link the ZOPC with Articles 88, 138 and 141 of the LOSC, the overwhelming majority of States taking part in the deliberations of the General Assembly on this item supported the Brazilian draft resolution and it was adopted by 124 votes to 1, with 8 abstentions.

2. The UN Declaration

The operative part of the General Assembly Declaration on the South Atlantic reads as follows:

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62 A/41/PV.50, p.7.
63 *Ibid.*, p.8.
64 U.N.Doc.ST/LEG/SER.E/7, p.756 et seq; 5 LOSB (1985), p.46.

"The General Assembly,

...

1. Solemnly declares the Atlantic Ocean, in the region situated between Africa and South America, a "Zone of Peace and Co-operation of the South Atlantic";

2. Calls upon all States of the zone of the South Atlantic to promote further regional co-operation, inter alia, for social and economic development, the protection of the environment, the conservation of living resources and peace and security of the whole region;

3. Calls upon all States of all other regions, in particular the militarily significant States, scrupulously to respect the region of the South Atlantic as a zone of peace and co-operation, especially through the reduction and eventual elimination of their military presence there, the non-introduction of nuclear weapons or other weapons of mass destruction and the non-extension into the region of rivalries and conflicts that are foreign to it;

4. Calls upon all States of the region and of all other regions to co-operate in the elimination of all sources of tension in the zone, to respect national unity, sovereignty, political independence and territorial integrity of every State therein, to refrain from the threat or use of force, and to observe strictly the principle that the territory of a State shall not be the subject of military occupation resulting from the use of force in violation of the Charter of the United Nations, as well as the principle that the acquisition of territories by force is inadmissible".[65]

The U.S. was the only State to vote against the resolution. Abstaining States were Belgium, France, FR Germany, Italy, Japan, Luxembourg, the Netherlands and Portugal. The U.S. opposition was based on the following grounds:

> (a) the resolution inadequately defined the waters that would be covered and specifically excluded the littoral and hinterland States of the South Atlantic region from the zone;
> (b) the resolution attempted to create an internationally recognised zone of peace through the adoption of a General Assembly resolution, rather than as the result of multilateral negotiations;
> (c) the resolution continued to imply that restrictions should be placed on naval access to and activity in the South Atlantic Ocean. Such restrictions would be inconsistent with the generally recognised principles under international law of the freedom of navigation on the high seas and the right of innocent passage through territorial waters.[66]

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65 Resolution 41/11 of 27 October 1986, adopted by 124 votes to 1, with 8 abstentions. See Appendix II, for the full text of the Declaration.

66 A/41/PV.50, pp.51-52.

But other States, such as Brazil and Colombia, have maintained that the ZOPC Declaration is consistent with the principle of the use of the high seas for peaceful purposes.[67] Therefore, in their view, if the establishment of the ZOPC affects the freedom of the high seas it affects only a non-peaceful use of the high seas. From this standpoint the limitations imposed by the ZOPC Declaration on the use of the South Atlantic for military purposes are not incompatible with the freedom of navigation.[68]

Among the eight abstaining States, France and FR Germany gave reasons similar to those of the U.S. for their abstention: like the U.S., they were concerned about the effect of the resolution on the freedom of navigation. Significantly, the UK which had voted against the General Assembly resolution 2832 (XXVI) on the IOZP on these grounds voted for the resolution on the South Atlantic.

3. Evaluation of the ZOPC Declaration

According to the preambular paragraphs of the 1986 declaration, the main objectives of the ZOPC appear to be to preserve the region from measures of militarisation, the arms race, the presence of foreign military bases and, above all, nuclear weapons and to promote co-operation for economic development and peace between the States of the region and eliminate the causes of regional instability. In order to achieve these objectives, the declaration requires three different courses of action from three different sets of States.

While the States of the South Atlantic region are called upon to co-operate *inter alia*, for social and economic development, the protection of the environment, the conservation of living resources and peace and security of the whole region, all States of other regions, in particular the militarily significant States, are called upon scrupulously to respect the region of the South Atlantic as a zone of peace and co-

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67 See the statements by the representatives of Colombia in A/43/PV.47, p.16 and Brazil in A/41/PV.50, p.8.

68 Since the adoption of the 1986 Declaration, the regional States of the South Atlantic have held two meetings for the furtherance of the Declaration. The first meeting was held in Rio de Janeiro in July 1988 (see the Final Document of the meeting in A/43/512) and the second in Abuja, Nigeria, in June 1990 (see the Final Document of the meeting in A/45/474). These two meetings focused more on economic, marine and pollution issues rather than on the legal, political and military implications of the ZOPC Declaration.

operation, especially through the reduction and eventual elimination of their military presence there, the non-introduction of nuclear weapons or other weapons of mass destruction and the non-extension into the region of rivalries and conflicts that are foreign to it. The declaration also calls upon all States of the region and of all other regions to co-operate in the elimination of all sources of tension in the zone, to respect national unity, sovereignty, political independence and territorial integrity of every State therein, to refrain from the threat or use of force, and to observe strictly the principle that the territory of a State shall not be the subject of military occupation resulting from the use of force in violation of the Charter of the United Nations, as well as the principle that the acquisition of territory by force is inadmissible.

Thus, the objectives and major legal questions raised by the IOZP and the ZOPC declarations are very similar: both seek to halt militarisation of the zone and eliminate military bases that are already there. Like the IOZP declaration, the ZOPC declaration creates a ZOP in the areas of *res communis* character without requiring a multilateral treaty. The ZOPC also resembles the IOZP in the sense that it attempts to create only a semi-demilitarised zone in the South Atlantic as it requires the elimination only of nuclear weapons and other weapons of mass destruction from the zone; it does not seek to interfere with the peaceful transit of all ships.

However, unlike the IOZP declaration, the ZOPC declaration does not explicitly impose any restrictions on the use of the waters of the South Atlantic by warships on any type of missions. Although the call for the non-introduction of nuclear weapons in the area may be interpreted as meaning non-introduction of nuclear-weapons carrying vessels in the area, the declaration is not clear on the matter. Nevertheless, the ZOPC declaration cites the international law principle of the peaceful use of the oceans as a legal basis of the idea of ZOPC. Therefore, it is necessary to examine the scope and meaning of this law of the sea principle in order to ascertain the legal ramifications of the ZOPC declaration.[69]

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69 See Chapter II, below.

4. The Aftermath

Every year since the adoption of the 1986 Declaration the General Assembly has adopted a resolution on the ZOPC,[70] and every year the US has voted against the adoption of the resolution for the same reasons as those given by it in opposing the 1986 declaration. But other States, including France and Germany, who had abstained in the voting of the 1986 declaration later joined the UK and other Western States in supporting the idea of the establishment of ZOPC and voted for subsequent resolutions on the subject.

Following the adoption of the 1986 declaration, the Secretary-General of the UN submitted a report to the General Assembly on the implementation of the declaration. The report included the views of various States on the subject. Argentina, Brazil and Uruguay expressed their concern over the U.K.'s introduction of a 150-mile Interim Conservation and Management Zone and a 150-mile Protection Zone around the Falkland Islands.[71] The U.K. maintained her right to establish such zones under international law.[72] Spain made it clear that the establishment of the ZOPC "cannot be construed as modifying in any way the norms of international law- whether treaty or customary law, including maritime law".[73]

The ZOPC was again on the agenda of the Forty-Second Session (1987) of the General Assembly. During the discussion on the topic several States maintained that the ZOPC declaration was only a general framework, one that required the elaboration of legal and political formulae to give the declaration real content. The representative of Uruguay said that the declaration provided

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70 Resolution 42/16 of 10 November 1987, adopted by 122 votes to 1 (the U.S.), with 8 abstentions; Resolution 43/23 of 14 November 1988 adopted by 144 votes to 1 (the U.S.), with 7 abstentions; Resolution 44/20 of 14 November 1989 adopted by 146 votes to 1 (the U.S.), with 2 abstentions; resolution 45/36 of 27 November 1990 adopted by 150 votes to 1 (the U.S.), with 1 abstention; Resolution 46/19 of 25 November 1991 adopted by 141 votes to 1 (the U.S.), with no abstentions; and Resolution 47/74 of 14 December 1992 adopted by 144 votes to 1 (the U.S.), with no abstentions.

71 U.N.Doc.A/42/557, p.8.

72 *Ibid.*, p.24. See also UKMIL 1988 in BYIL (1988), pp.540-542; C. R. Symmons, 'The maritime zones around the Falkland Islands', 37 ICLQ (1988), pp.283-324.

73 U.N.Doc.A/42/557, p.19.

> "only an outline of the beginning of a process designed to establish more precisely its specific elements and features and the right and duties it implies, both for the States of the zone and for third States, in particular those of military influence and significance."[74]

The discussion culminated in the adoption of a resolution by the General Assembly reaffirming the 1986 declaration.[75] A significant event towards the realisation of the ZOPC declaration took place in 1988 with the holding of a meeting of States of the South Atlantic region at Rio de Janeiro. Twenty-two States bordering the South Atlantic attended the meeting which adopted a Final Act embodying various principles necessary for the implementation of the ZOPC.[76] The Final Act stated, *inter alia*, that

> 1. The questions of peace and security and those of development are interrelated and inseparable and co-operation among the States of the region for peace and development is essential to promote the objectives of the ZOPC;
> 2. The States of the region have a special responsibility for the preservation of peace and security in the zone;
> 3. The outside States having military presence in the region should take measures to ensure the reduction and eventual elimination of their military presence therein;
> 4. The dispute between the U.K and Argentina over the Malvinas Islands should be resolved in accordance with the Charter of the UN;
> 5. The attainment of the objectives of the 1964 Declaration of the OAU on the denuclearisation of Africa and the 1967 Tlatelolco treaty is important in the context of the fulfilment of the ZOPC declaration;
> 6. The transfer of hazardous wastes from other parts of the world into the region should be condemned and the South Atlantic marine environment should remain free from pollution.

The meeting also decided to create the post of co-ordinator to be responsible for fostering actions and measures to facilitate the achievement of the objective of the ZOPC declaration. The second meeting of the States of the South Atlantic region was held at Abuja, Nigeria, from 25 to 29 June 1990. The meeting adopted a Final Act containing principles similar to those contained in the Final Act of the first meeting.[77] Further, the twelfth regular session of the General Conference of the Agency for the

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74 U.N.Doc.A/42/PV.63, p.17.
75 Resolution 42/16 of 10 November 1987, adopted by 122 votes to 1, with 8 abstentions.
76 U.N.Doc.A/43/512.
77 U.N.Doc.A/45/474, annex.

Prohibition of Nuclear Weapons in Latin America (OPNAL) adopted a resolution on the co-operation between the Latin American NWFZ and the ZOPC.[78]

IV. The Mediterranean as a Zone of Peace and Co-operation[79]

Mention should also be made of the attempts to declare the Mediterranean as a Zone of Peace and Co-operation (ZOPC). The Mediterranean Sea is the largest semi-enclosed sea and connects the Atlantic Ocean with the Black Sea, the sea of Marmara and the Red Sea (through the Suez Canal). It has been observed that the Mediterranean "is a barometer of the world's political climate."[80] Of course, during the Cold War period, developments in the 19 Mediterranean countries[81] often mirrored the state of relations between the Western and the Eastern bloc countries.

Situated at the cross-roads of three continents, Asia, Africa and Europe, the Mediterranean Sea has served as an active zone of trade and communication between States for centuries. In modern times the Mediterranean has become a sea of great strategic significance. Every day it is crossed by numerous ships going in all directions, engaged not only in traditional trade but also in carrying strategic goods, especially oil from West Asia and North Africa for industrial Europe. Today the Mediterranean region has become the theatre of some of the most complicated issues of our time. They include the Middle East conflict, war in former Yugoslavia, the crisis over Cyprus, the dispute over the control of the Gulf of Sidre, the Greek-Turkish dispute over the Aegean Sea and the Spanish dispute with the UK over Gibraltar.

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78 U.N.Doc.A/46/297, annex.

79 See, generally, A. Pardo, 'Foreword' to The Denuclearisation of the Oceans (1986), edited by R.B. Byers; N. Ronzitti, 'Demilitarisation and neutralisation in the Mediterranean,' 6 IYBIL (1985), pp.33-54; N. Ronzitti, 'Malta's permanent neutrality,' 5 IYBIL (1983), p.171 ff.; A.K. Abbadi, 'Security and Co-operation in the Mediterranean Basin,' 14 (1) ODIL (1984), pp. 55-78; J.W. Lewis, Jr., The Strategic Balance in the Mediterranean, American Enterprise Institute for Public Policy Research, Washington, D.C., 1976; G.G. Rosenthal, The Mediterranean Basin, Its Political Economy and Changing International Relations (1982); S.C. Truver, International Straits of the World: the Strait of Gibraltar and the Mediterranean (1980).

80 Abbadi, *op.cit.* note 79, p.56.

81 They are: Albania, Algeria, Bulgaria, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Rumania, Spain, Syria, Tunisia, Turkey and the then Yugoslavia.

All the major Powers of Europe and North America have maintained a strong military presence in the Mediterranean region including a large number of warships, both conventional and nuclear aircraft carriers, nuclear-powered and nuclear-weapon-carrying submarines and surveillance ships and devices.

Although different Mediterranean States have allegiance to different great Powers, and some have declared their non-alignment and neutrality, the heavy foreign military presence in the area created a feeling of a Mediterranean community of interests which was characterised by a growing concern about the need for a common approach to peace, security and co-operation in the region. When certain non-aligned Mediterranean States (such as Malta, Egypt, Yugoslavia, etc.) began to comprehend the effects of the presence off their shores of powerful naval fleets, over which they had no control and whose strategic objectives they may not have shared, and therefore worried that they would be engulfed in a conflict between major Powers for global security reasons, they put forward a proposal for the transformation of the Mediterranean as a Zone of Peace and Co-operation (ZOPC).

Although the idea of the demilitarisation or denuclearisation of the Mediterranean has been on the international political agenda since 1961, when the Soviet Union proposed the denuclearisation of the Mediterranean, it was the non-aligned countries of the Mediterranean who proposed the establishment of a ZOPC in the Mediterranean.[82] Nevertheless, the question relating to peace and security in the Mediterranean has been discussed in four international fora, namely, the NAM, the

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82 There exist a number of territories in the Mediterranean which have been demilitarised under various treaties concluded before and after World War II. The Peace Treaties concluded after the end of World War II demilitarise certain Italian islands in the Mediterranean. They are Pantelleria islands (Lampedusa, Lampione and Linosa) and Pianosa (in the Adriatic). Certain military restrictions were imposed in the larger islands of Sicily and Sardinia by Articles 50 and 51 of the Peace Treaty of 1947 (49 UNTS 31). The Island of Pelagosa was ceded by Italy to Yugoslavia under the Treaty and demilitarised. Several of the Greek islands adjacent to Turkey are also demilitarised. They are Lemonos and adjacent islands, the islands of central Aegean, Lesbos, Chios, Samos, Nikeria and the islands of the Dodecanese. See Ronzitti, 6 IYBIL (1986), pp.33-54; Fitzmaurice, 'The Juridical Clauses of the Peace Treaties,' 73 Hague Recueil (1948). Malta, a Mediterranean State, follows a policy of permanent neutrality: See Chapter V.

UN, the Middle East peace process[83] and the Conference on Security and Co-operation in Europe (CSCE).

1. The CSCE process

Questions relating to security and co-operation in the Mediterranean were discussed during the Helsinki Conference 1973-1975 which culminated in the adoption of the Mediterranean Document of the Helsinki Act of 1975. The participating States declared their intention, *inter alia*, "to seek, by further improving their relations with non-participating Mediterranean States, to increase mutual confidence, so as to promote security and stability in the Mediterranean area as a whole" and to maintain and amplify the contacts and dialogue with all States of the Mediterranean with the "purpose of contributing to peace, reducing armed forces in the region, strengthening security, lessening tensions in the region, and widening the scope of co-operation".[84]

This purpose was reaffirmed by the Madrid Conference on Security and Co-operation in Europe, 1980-1983. Certain non-participating Mediterranean States, namely, Algeria, Egypt, Israel, Morocco and Tunisia, participated in and contributed to the work of the CSCE on the Mediterranean. The concluding Document of the Madrid Conference expressed the will of the participating States "to take positive steps towards lessening tensions and strengthening stability, security and peace in the Mediterranean" and "to take measures designed to increase confidence and security."[85] A similar view was expressed in the concluding Document of the Vienna Conference on Security and Co-operation in Europe, 1986-1989.[86] The Charter of Paris for a New Europe, adopted in November 1990 by the leaders of the 34 participating States of the CSCE, touched upon the question of peace, security and co-operation in the Mediterranean. The leaders pledged that they would "continue efforts

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83 The Middle East peace process began in 1991. The Madrid Peace Conference on the Middle East was opened on 30 October, 1991 and was co-sponsored by the U.S. and the then Soviet Union.

84 Cmnd.6198, 1975, pp.31-32.

85 22 ILM (1983), pp.1395, 1402.

86 28 ILM (1989), pp.531, 542.

to strengthen security and co-operation in the Mediterranean as an important factor for stability in Europe."[87] They stated that

> "We are concerned with the continuing tensions in the region, and renew our determination to intensify efforts towards finding just, viable and lasting solutions, through peaceful means, to outstanding crucial problems, based on respect for the principles of the [Helsinki] Final Act."[88]

2. The Non-Aligned Movement (NAM)

The deployment of powerful navies in the Mediterranean and their support for a particular ally or friend during several crises in the region, including the Lebanese crisis of 1958 and the Middle East crises of 1967 and 1973, encouraged demands for the demilitarisation or neutralisation of the Mediterranean. The presence of fleets of outside Powers in the region has been considered to be against the principles of the NAM by most Asian and African and certain European Mediterranean non-aligned States.

Since the NAM had already espoused the idea of the establishment of the Indian Ocean as a zone of peace, the member States embraced the idea of the creation of a zone of peace and co-operation in the Mediterranean at the Fourth NAM Summit Conference held in Algiers in 1973.[89] The Fifth Conference held in Sri Lanka in 1976 called upon the non-aligned States of the Mediterranean

> "to act in concert in accordance with the decisions and resolutions of Non-Aligned Conferences, in order to remove all obstacles that prevent the conversion of the Mediterranean into a zone of peace and co-operation for the benefit of the countries concerned and in the interests of international peace and security."[90]

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87 30 ILM (1991), pp.193, 205.

88 *Ibid.*, p. 205.

89 Paragraph 68 of the political declaration of the Conference stated that it supported the endeavour of the States of the Mediterranean "to establish an area of peace and co-operation on the basis of respect for the interests of the countries concerned and of non-interference in the international affairs of States." U.N.Doc.A/9330, p.16.

90 U.N.Doc.A/31/197.

The Sixth Conference of the Non-Aligned Countries, held in Havana in 1979, endorsed the decisions of the Fifth Conference on making the Mediterranean a ZOPC and urged all States to co-operate in implementing this decision.[91] The Seventh Conference held in New Delhi in 1983 stressed the need to reverse the arms race, reduce confrontation and tension in the Mediterranean region, and supported the efforts made by Malta, which had declared itself a permanently neutral country not long before the Conference, for the creation of a ZOPC in the Mediterranean.[92] Just a few months before the convening of the Eighth Conference of the NAM in Harare, Zimbabwe, in September 1986, the US had carried out air strikes against Libyan targets on suspicion of Libyan involvement in certain terrorist activities against U.S. interests in Western Europe. This operation was supported by the US navy stationed in the Mediterranean. This attack against a Mediterranean non-aligned country by an outside Power was condemned by the Eighth NAM Conference which also expressed grave concern over the escalation and aggravation of the situation and the extent of military and other forms of pressure on the non-aligned countries in the area.[93]

3. The United Nations

Encouraged by the support of other non-aligned countries, the non-aligned States of the Mediterranean, in particular Malta and Yugoslavia, introduced the idea of the establishment of the Mediterranean as a ZOPC to the agenda of the UN General Assembly in 1981. This question was discussed under the item entitled "Review of the implementation of the Declaration on the strengthening of international security."

By resolution 2606 (XXIV) of 16 December 1969 the General Assembly had expressed the desire that the twenty-fifth year of the UN's existence be marked by new initiatives to promote peace, security, disarmament and economic and social

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91 U.N.Doc.A/34/542.

92 U.N.Doc.A/38/132.

93 The Eighth Conference of Heads of State or Government of Non-Aligned Countries, Harare, Sept. 1-6, 1986, in Review of International Affairs (Belgrade), Vol. 37, no. 875, pp. 56-57. The Ninth Summit Conference of Non-Aligned Countries held in 1989 in Belgrade expressed its hope that the CSCE process will contribute to the strengthening of confidence and security in the Mediterranean region. U.N.Doc.A/44/551, p.25.

progress for all mankind. In accordance with this desire, proposals to strengthen international security were submitted by various groups of States for consideration by the General Assembly during its 1970 session.

Subsequently, on 16 December 1970 the General Assembly adopted a Declaration (Resolution 2734 (XXV)) on the Strengthening of International Security by 120 to 1 (South Africa), with 1 abstention (Portugal). The Assembly recommended in paragraph 11 of the Declaration that "all States contribute to the efforts to ensure peace and security for all nations and to establish, in accordance with the Charter, an effective system of universal collective security without military alliance." (emphasis added) During the 1981 General Assembly discussion on the implementation of this Declaration, several States supported the Yugoslav proposal for the transformation of the Mediterranean as a ZOPC.

Malta stated that the establishment of such a zone would enable the regional States to tackle their own problems, free from superpower influence, and could eventually entail the creation of a political forum for periodic discussion on the Mediterranean.[94] The USSR welcomed the proposal and suggested an agreed reduction of armed forces, withdrawal of ships carrying nuclear weapons, renunciation of the stationing of nuclear weapons on the territory of non-nuclear weapon States, and acceptance by nuclear weapon States of the obligation not to use nuclear weapons against a Mediterranean State which did not permit such weapons to be placed on its soil.[95] On 9 December 1981 the General Assembly adopted a resolution (Resolution 36/102) on the Implementation of the Declaration on the Strengthening of International Security.[96] Paragraphs 14 and 15 of this resolution dealt with the question of peace and security in the Mediterranean. The General Assembly stated in paragraph 14 that "further efforts are necessary for the transformation of the Mediterranean into a zone of peace and co-operation."

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94 YBUN, 1981, p.142.

95 *Ibid.*

96 Resolution 36/102 was adopted by 127 votes to 0, with 20 abstentions.

This issue was raised at the General Assembly's 1982 special session devoted to disarmament. By a *note verbale* to the Secretary-General dated 5 July 1982, Yugoslavia submitted a working paper endorsing efforts to transform the Mediterranean into a sea of peace and co-operation.[97] In the general debate at that session, Cyprus, Greece, Libya, Malta, Mauritania and Tunisia supported the Yugoslav proposal and called for the gradual reduction and ultimate withdrawal of foreign military forces from the region.[98]

By a resolution of 16 December 1982 the General Assembly called for "the creation of conditions of security and fruitful co-operation in all fields for all countries and peoples of the Mediterranean."[99] This resolution decided to include in the agenda of the General Assembly a separate item on the Mediterranean entitled "Strengthening of Security and co-operation in the Mediterranean region." Since then the General Assembly has annually adopted unanimous resolutions on the Mediterranean calling for the creation of conditions of security and fruitful co-operation in all fields for all countries and peoples of the Mediterranean.[100] The 1990 resolution on the Mediterranean notes the widespread support among Mediterranean countries for the proposal to convene a Conference on Security and Co-operation in the Mediterranean.

Nevertheless, the General Assembly has not decided to convene such a Conference. Moreover, while the decisions of the NAM Conferences express the intention of the non-aligned countries of the Mediterranean to transform the Mediterranean Sea into a zone of peace and co-operation, the General Assembly resolutions appear to have concentrated on the need to create confidence-building measures in the Mediterranean region.[101] The 1983 Report of the Secretary-General

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97 A/S-12/AC.1./64.

98 YBUN, 1982, p.132.

99 Paragraph 15 of resolution 37/118, adopted by 116 votes to 0, with 19 abstentions.

100 Resolution 38/189 of 20 December 1983; Resolution 39/153 of 17 December 1984; Resolution 40/157 of 16 December 1985; Resolution 41/89 of 4 December 1986; Resolution 42/90 of 7 December 1997; Resolution 43/84 of 7 December 1988; Resolution 44/125 of 15 December 1989 and Resolution 45/79 of 12 December 1990. All of these resolutions were adopted without a vote.

101 For instance, the Final Declaration adopted by the Mediterranean members of the Non-Aligned Movement on 11 September 1984 in Valletta, Malta refers to the efforts of the Mediterranean

on the Mediterranean Question includes an analysis of the proposal for the creation of a zone of peace in the Mediterranean on the basis of the replies of Governments.

Among the measures suggested were the settlement of existing conflicts among the States of the region, co-ordinated reduction of armed forces, non-deployment of nuclear weapons in non-nuclear weapon states, non-use of nuclear weapons against States which had renounced such weapons on their territories, and withdrawal of foreign fleets and military bases.[102]

V. The Legal Content of Maritime ZOP

Although the basic objective of all ZOP declarations is to transform the marine areas covered by them into demilitarised zones with exception being made for peaceful navigation by all ships of all States, it is difficult to define with precision the legal content of the concept of ZOP since the elements of each proposal differ considerably from one another. Like other doctrines, e.g. demilitarisation and neutralisation,[103] different ZOP could have different content and it is up to the interested States in each case to define that content. But that does not mean that the concept of ZOP is a vague abstraction. The State practice examined in this chapter shows that the concept of maritime ZOP entails the following:

1. Halting of the further escalation and expansion of military presence in the zone;[104]
2. Elimination from the zone of all military bases and installations;[105]
3. The disposition of nuclear weapons and other weapons of mass destruction from the zone and observance of the rules of NWFZ in the zone;[106]

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non-aligned countries to transform the Mediterranean into a region of peace, security and co-operation. A/39/526-S/16758.

102 A/38/395 of 30 December 1983.

103 See Chapter V, below for an examination of the regimes of demilitarisation and neutralisation.

104 Operative Paragraph 2(a) of the IOZP declaration, paragraph 3 of the ZOPC declaration on the south Atlantic (hereafter ZOPC declaration) and principle 2(a) of the Final Document of the Meeting of the Littoral and Hinterland States of the Indian Ocean of 1979. U.N.Doc.A/34/45 (Supp.45) (hereafter referred to as the '1979 Final Document').

105 Operative paragraph 2(b) of the IOZP declaration, paragraph 3 of the ZOPC declaration and principle 2(c) and 3 of the 1979 Final Document.

106 *Ibid* and principle 4 of the 1979 Final Document.

4. Ban on military manoeuvres in the zone for the purposes of threatening or using force against other States in contravention of the principles of the Charter of the UN;[107]
5. Ban on the testing of nuclear weapons and other weapons of mass destruction in the zone;[108]
6. Prohibition on the use of the zone by warships and military aircraft for any threat or use of force against other States in contravention of the principles of the Charter of the UN;[109]
7. Respect for the freedom of navigation and overflight of the high seas by all ships and aircrafts of all States provided that the passage is consistent with the principles of the Charter of the UN, in particular Article 2(4), and other rules of international law, including the principle of the use of the seas for peaceful purposes and the rule that the warships and military aircraft must have reasonable regard to the interest of other States in their exercise of such freedom;[110]
8. Renunciation by the States of the area of ZOP of the threat or use of force against any other State of the area and a firm affirmation by the States of the area of ZOP to resolve their disputes with one another by peaceful means;[111]
9. Respect for the principles of sovereign equality, the territorial integrity and political independence and non-interference in each other's internal affairs;[112]
10. Reaffirmation of the right of self-defence in accordance with the Charter of the UN.[113]

VI. Legal Issues Arising

As the above-listed content of ZOP demonstrates, the concept of ZOP seems quite comprehensive as it in effect seeks to turn extensive areas of the high seas into demilitarised,[114] denuclearised and neutralised zones. That is one reason why the debate inside and outside the UN on the topic of the establishment of maritime ZOP has gone on for more than two decades without much success towards the holding of an international conference on the implementation of the ZOP declarations.

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107 Principle 2(b) of the 1979 Final Document.
108 Principle 2(b) of the 1979 Final Document and the letter of the Sri Lankan and Tanzanian representatives to the Secretary-General of the UN of 1 October 1971. U.N.Doc.A/8492 and Add.1.
109 Operative paragraph 3(a) of the IOZP declaration and principle 3(a) of the 1979 Final Document.
110 Operative paragraph 3(b) of the IOZP declaration and principle 7 of the 1979 Final Document.
111 Principle 5(a) of the 1979 Final Document.
112 Operative paragraph 4 of the ZOPC declaration and Principle 5(b) of the 1979 Final Document.
113 Principle 5(c) of the 1979 Final Document.
114 For instance, as President of the former USSR, Gorbachev said in 1988 in his speech made in the Indian Parliament that the ultimate objective of the IOZP is demilitarisation of the Indian Ocean. A/AC.159/L.73, p.2. See for the similar views of the sponsors of the IOZP resolution of 1971 A/C.1/PV.1815, para.30.

The principles listed above suggest that the concept of ZOP is a blend of principles that fall into two categories: *lex lata* and *de lege ferenda*. Items 1 to 4 could be said to be new principles as no other rule of existing international law explicitly prohibits such activities in the high seas. The legal status of the fifth item is debatable because the Partial Test Ban Treaty of 1963 has not been ratified by two recognised nuclear Powers, China and France.[115] Although items 6 to 10 appear to be in effect re-statements of the already existing rules of international law,[116] the precise manner of the application of the principles included in these items is still a matter of acute controversy.

However, the proponents of ZOP proposals have claimed that even the new principles of ZOP (i.e., items 1 to 4) are consistent with the existing rules of international law, in particular, Article 2(4) of the Charter of the UN and the law of the sea principle of the use of the seas for peaceful purposes. But the opponents have argued that the new principles as well as the manner in which the existing principles are interpreted undermine some of the well-established rules of international law, including the freedom of the high seas and the right of self-defence of States. Moreover, certain States appear entirely to reject the notion that ZOP can be created under General Assembly resolutions.

Thus, the whole saga of the establishment of maritime zones of peace has centred on these very fundamental issues of public international law, e.g., the principle of the prohibition on the use of force, the right of self-defence, the principle of the freedom of the high seas and the principle of the use of the seas for peaceful purposes. Paradoxically, both groups of States have found support for their positions in international law.[117]

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115 This issue is discussed in greater detail in Chapter III, below.

116 These items seem to be restatements of the principles of the Charter of the UN, in particular Articles 2(3), 2(4), 33 and 51, and operative paragraphs 1, 9, 14, 20, 21, 23, and 35 of the 1970 UN Declaration on Friendly Relations Among Nations (Resolution 2625 (XXV), adopted without a vote).

117 Therefore, it is necessary to examine these competing arguments. This I will do in Chapters II and III, below.

VII. Problems Associated with the Declarations on ZOP

The above examination of the declarations and proposals for maritime ZOP shows that transforming the legal status of large areas of the seas and oceans into ZOP is a difficult undertaking. A very important factor is the procedure required for the implementation, observation, verification, control and follow-up of the declarations on ZOP. The views of States[118] expressed in relation to the creation of ZOP and NWFZs show that an instrument creating a ZOP should contain: (i) a precise geographical delimitation of the zone, (ii) the definition of the obligations of regional and non-regional States vis-a-vis the zone, and (iii) a verification and enforcement mechanisms. Although the UN Declarations on maritime ZOP contain a definition of the zones concerned, there remain a number of ambiguities and problems concerning the practical aspects of their implementation. Therefore, it is necessary to examine some of the major problems in some depth.

1. The Problem with Geographical Delimitation of Maritime ZOP

Neither the ZOP declarations themselves nor the subsequent State practice provide a satisfactory definition of the geographical limits of the ZOP concerned. The idea of maritime ZOP was conceived in 1970, before the UNCLOS III began. In the early 1970s there was no consensus among States as to the breadth of the territorial sea and the recognition of the concept of the EEZ was remote. The IOZP declaration did not define the geographical limits of the zone. It merely stated that "the Indian Ocean within limits to be determined, together with the air space above and the ocean floor subjacent thereto, is hereby designated for all time as a zone of peace."[119] (emphasis added) Two considerations seem to have influenced this provision of the declaration. First, a wish not to prejudice the outcome of the UNCLOS III and second, to allow negotiations on the exact limits of the ZOP.[120]

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118 For instance, see for the views of the delegation of the U.K. on the creation of a ZOP in the Indian Ocean, A/C.1/PV.1848, pp.11-12; Sri Lanka, A/C.1/PV.1815, p.5; New Zealand, A/C.1/PV.1849, p.5.

119 Resolution 2832 (XXVI) of 16 December 1971.

120 See the statement made by the Sri Lankan representative in the First Committee of the General Assembly in U.N.Doc.A/C.1/PV.1815, para.38.

When Sri Lanka and Tanzania introduced the proposal for a ZOP in the Indian Ocean they said that they would like to have "the entire high seas area of the Indian Ocean" declared a ZOP. But certain other States argued that the declaration should cover the entire Indian Ocean, from coast to coast, without any exceptions for territorial waters.[121] Malaysia and Thailand, on the other hand, stated that the proposed zone should not cover the areas within national jurisdiction of coastal States. The representative of Thailand said that "the designation of the zone of peace should be qualified by 'beyond the limits of national jurisdiction', as was done in the case of the sea-bed."[122] This was also the intention of the sponsors of the proposal. The deliberations at the First Committee and the General Assembly on the IOZP indicate that States voted for the declaration with an understanding that the Zone will include the entire Indian Ocean beyond the limits of national jurisdiction, meaning beyond the 12-mile territorial waters.[123]

Since the UNCLOS III was to be convened in the near future, the task of the precise geographical definition of the IOZP was left for future determination because the UNCLOS III was likely to make significant changes in the rules concerning the seaward limits of the coastal States. This flexible provision later led to attempts to include the entire Indian Ocean region comprising the territories of more than 36 littoral and 11 hinterland States of Africa, Asia and Oceania in the definition of the IOZP. This attempt made the implementation of the 1971 IOZP declaration more complicated as it took the attention away from the zone itself to the political and security problems which exist in the coastal and hinterland States of the Indian Ocean.

Political issues ranging from the crisis in the Horn of Africa to the Iran-Iraq War, the Indo-Pakistan problem, the Soviet invasion of Afghanistan, the impact of Soviet nuclear weapons and conventional forces deployed within its borders to the south and south-east, as well as the superpower rivalry in the littoral and hinterland States of the

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121 For instance, see the statement made by the delegation of El Salvador, U.N.Doc.A/C.1/PV.1849, para.35.

122 A/C.1/PV.1848, para.122.

123 See the statement made by the Sri Lankan representative when introducing the draft IOZP declaration U.N.Doc.A/C.1/PV.1815 (2 November 1971), p.5.

Indian Ocean, were all considered directly relevant to the implementation of the IOZP.

The idea of the inclusion of the territories of the littoral and hinterland States in the definition of the IOZP was first espoused chiefly by certain Western States in order to re-define the scope of the IOZP declaration, to evict the Soviets from Afghanistan (a hinterland State of the Indian Ocean) and to prevent the proliferation of nuclear weapons in the littoral and hinterland States; the latter was regarded by India as a move directed against it since it had become in 1974 the first State in the Indian Ocean region successfully to carry out the test of a nuclear device.[124]

Although the 1971 IOZP declaration does not include the land territories of the coastal States in the definition of the zone, the Final Document of the 1979 Meeting of the Littoral and Hinterland States of the Indian Ocean adopted a broader definition of the IOZP by including the territory of the littoral and hinterland States in the definition of the IOZP and providing for some additional obligations for these States. Nevertheless, the Final Document prescribed different sets of rules for different parts of the zone. While the principles of the 1971 declaration were to be applied, as envisaged in the declaration, to the high seas area of the ZOP, new obligations were prescribed for the littoral and hinterland States of the Indian Ocean region.

The 1986 Declaration on the South Atlantic was adopted after the conclusion of the LOSC, but it too fails to define the exact limits of the South Atlantic ZOPC. There was no discussion as to whether or not the territorial waters and the EEZ of the coastal States of the South Atlantic should be included in the definition of the ZOPC. This was one of the reasons why certain Western Powers abstained in the vote on the declaration. Given the 200-mile territorial sea claims of certain South American States bordering the South Atlantic,[125] it is difficult to ascertain the precise definition of the ZOPC of the South Atlantic; does the zone include the territorial waters of the coastal

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124 This may be one reason why India objected to a clause in the Final Document of the 1979 Meeting of the Littoral and Hinterland States which called upon the littoral and hinterland States of the Indian Ocean to uphold the principles of the non-proliferation of nuclear weapons.

125 Among them include: Argentina, Ecuador, El Salvador, Nicaragua, Panama, Peru and Uruguay. Brazil, which used to claim 200 miles territorial sea, recently changed its position and now its territorial sea claim is 12 miles.

States? If not, does it cover the ocean area lying beyond an outer limit of 12-mile territorial waters or beyond 200 miles from the baselines? If the latter is the case, other States would have serious difficulties in supporting the South Atlantic ZOPC. This lack of clarity was one of the reasons given by the U.S. for voting against the declaration on the South Atlantic as a ZOPC.

The 1986 declaration speaks of the South Atlantic ZOPC in the "region situated between Africa and South America". Although this declaration does not make it clear whether the territorial waters of the coastal States are included in the zone, the terms used in the declaration imply the inclusion of the water column of the South Atlantic together with the air space above and the ocean floor subjacent thereto in the zone beyond 12-mile territorial waters. Although in geographical terms the 'South Atlantic' means the entire ocean area of the South Atlantic, coastal States have sovereign rights over 12-mile territorial waters. The same argument seems to apply with regard to the geographical delimitation of the Indian Ocean as a Zone of Peace.[126]

However, the problem with the geographical delimitation does not end there. The above discussion raises the question as to whether the land territories of outside Powers (termed as the 'great Powers' in the IOZP declaration) in the Indian Ocean and the South Atlantic are to be regarded as part of the ZOP concerned or not. When the Sri Lankan ambassador to the UN introduced the proposal for a ZOP in the Indian Ocean he said that he would have the UN declare, *inter alia*, 'all land areas', including the Non-Self Governing Territories, in the Indian Ocean, with the exception of the Malagasy Republic and Mauritius (which were to be considered as littoral States or coastal States), as a ZOP.[127] Since then, two other States in the Indian Ocean, the Maldives and Seychelles, have become independent. Will they also be regarded as coastal States or littoral States? If so, what would be the criteria for including certain land territory in the Indian Ocean within the definition of the ZOP while excluding the remaining land areas from the definition. Since the outside States

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126 That was also the intention of the sponsors of the IOZP proposal. See A/C.1/PV.1815 (2 November 1971), p.5.

127 U.N.Doc.A/C.1/PV.1815 (2 November 1971), p.5.

have land territory in the Indian Ocean they may also claim the status of a coastal State or littoral State and refuse the inclusion of their land territory in the definition of a ZOP.

In fact, the representative of the U.K. to the UN said during the deliberations on the IOZP declaration that the territories of outside States in the Indian Ocean "are an integral part" of these States.[128] In that case, like all other coastal or littoral States of the Indian Ocean, they will also be entitled to have armed forces, maintain military bases, store weapons, carry out the exercise with weapons, etc. in their territory for self-defence. What would be the status of other small islands in the Indian Ocean belonging to the coastal and littoral States of the Indian Ocean? These and many other questions concerning the geographical delimitation of the IOZP have not been dealt with by the 1971 Declaration.

Further, with regard to the geographical delimitation of the ZOPC, there is yet another unresolved problem. The geographical area of the ZOPC overlaps with the Latin American NWFZ. In its interpretative statement of the declaration on the ZOPC the U.K. maintained that it had supported the declaration with the understanding that the ZOPC would cover the area of the South Atlantic Ocean between Africa and South America not already covered by the Treaty of Tlatelolco.[129]

Yet this view conflicts with those of Brazil and others who regard the ZOPC declaration as an additional measure taken to strengthen the Tlatelolco Treaty regime as well as the UN declaration on the denuclearisation of Africa (Resolution 1652 (XVI) of 24 November, 1961). Where is a line to be drawn to separate the South Atlantic from the North Atlantic? Neither the sponsors of the ZOPC proposal nor other States supporting it have stated anything that provides any clue as to the geographical delimitation of the zone.

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128 U.N.Doc.A/C.1/PV.1848 (10 December 1971), pp.11-12, para.139.
129 U.N. Doc. A/42/557, p. 24.

2. The problem with defining the obligations of States

The cases of demilitarisation of Antarctica, outer space and the sea-bed were not markedly difficult as they referred to a well defined area of the globe and did not threaten to affect the balance of power because these areas had not been militarised. The purpose of such demilitarisation was to prevent future militarisation rather than to eliminate the military presence already there. Moreover, although the Antarctic Treaty completely demilitarises the Antarctic, the demilitarisation does not apply to the high seas area of the Antarctic waters: the legal status of these waters is subordinated to the preservation of the freedom of navigation.[130] Similarly, the Treaty on Outer Space does not restrict the use of the empty space between celestial bodies for military purposes; the principle of the use of the moon and other celestial bodies for peaceful purposes does not apply to this area.[131]

Even the conclusion of the Tlatelolco Treaty was not an onerous undertaking. This is because the States of Latin America subjected themselves to more rigorous commitments than the commitments they sought from nuclear-weapon States (NWS) under the treaty. The treaty sought to fulfil the interests of both the regional States as well the NWS. While the NWS were keen to see all non-nuclear-weapon States remaining as such forever, the regional States were keen to obtain a negative security assurance from the NWS that they would refrain from using nuclear weapons against the States within an NWFZ. The Tlatelolco Treaty was, in a sense, an extension of the Non-Proliferation Treaty in Latin America. Both groups of States had something to gain and something to give. Even the requirement of the 'total absence' of nuclear weapons in the zone stipulated in the definition of an NWFZ by the General Assembly has been interpreted in such a way that the navigation of the waters of the zone by nuclear-weapon-carrying vessels is not ruled out:[132] the Tlatelolco and

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130 Article VI of the Antarctic Treaty of 1959.

131 See B. Cheng, 'The military use of outer space and international law', in E.G. Bello and B. A. Ajibola (eds), Essays in Honour of Judge Taslim Olawale Elias, Vol. I (1992), pp.63-75.

132 For instance, see the U.S. understandings made at the time of ratification of Additional Protocol I to the Treaty of Tlatelolco: 28 ILM (1989), pp.1400, 1410.

Rarotonga Treaties do not prohibit the mere transit of nuclear-powered or nuclear-weapon-carrying vessels in the areas covered by the treaties concerned.[133]

The concept of ZOP goes much further than any regimes created so far in the field of disarmament in many important respects. The main purpose of the concept of maritime ZOP is not only to demilitarise and neutralise the extensive marine areas of the zone, but also to impose certain restrictions on the activities of the navies in the zone. In this sense, the concept of ZOP is an unprecedented one. However, this is not a totally unrealistic concept. Proposals of this kind have been put forward on a number of occasions. For instance, the Black Sea was neutralised under the 1856 Treaty of Paris. Owing to the abuses of the freedom of the high seas by the belligerents, proposals were mooted as early as 1915 for the neutralisation of the seas.[134]

As will be discussed in Chapter II, during the debate on the Sea-Bed Committee and the Committee on the Conference for Disarmament an overwhelming majority of States had argued for the complete demilitarisation of not only the sea-bed but also the water column above.[135] When the U.S. and the U.S.S.R. were engaged in bilateral negotiations to reduce their naval presence in the Indian Ocean in 1977, President Carter proposed that the Indian Ocean be completely demilitarised and the U.S.S.R. showed its willingness to participate in such negotiations.[136] A Security Council (Resolution 687 (1991)) has emphasised the need for the creation of an equally ambitious zone in the Middle East; the proposal for the creation of a zone free from all weapons of mass destruction in the Middle East has been on the international

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133 For instance, Article 2(2) of the Rarotonga Treaty provides that "Nothing in this 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."

134 See N. Angel, 'America and the neutralisation of the sea' The North American Review (May 1915), p. 694.

135 See Chapter II, below.

136 See W. M. Arkin et al., 'Ocean space and nuclear weapons: the geo-strategic environment', in Byers, Denuclearisation, pp.21, 38; R. Haass, 'Naval arms limitation in the Indian Ocean', Survival (March/April 1978), pp.50 ff.

agenda for some time now and is likely to be one of the most important issues at the Middle East peace conference currently under way in Washington.[137]

The demilitarisation of the bed of all seas and oceans of the world and the creation of an NWFZ in the Latin American region covering a large and busy area of the high seas are some of the powerful examples that if there is political will on the part of the States concerned, the size of the zone or the gravity of the rules proposed for such zones should not pose a problem.

A further problem with the declarations on ZOP relates to those provisions of the declarations which call for the elimination of 'foreign' military bases from the areas covered by the ZOP concerned. Since a large area of a maritime ZOP falls under the definition of the high seas no State is 'foreign' in the high seas. Moreover, some of the outside Powers have territories in the maritime ZOP concerned. As will be discussed in Chapter VI, below, no other States can legitimately impose a regime on a territory without securing either the implied or explicit consent of the territorial State.

Of course, the restrictions imposed on the activities of warships under the IOZP declaration is applicable to the warships of all States, both coastal and non-coastal States. This means that neither an outside Power nor a coastal State can use the Indian Ocean for any threat or use of force against another coastal State. But the declarations on ZOP do not make it clear whether the prohibition on the maintenance of military bases applies also to the regional States of the zone involved. Although at the time of the adoption of the IOZP and the ZOPC declarations no coastal State had military bases in the areas of the oceans concerned lying beyond their territorial limits, there is no guarantee they would not establish such bases in the future. It is difficult to envisage how these areas could be transformed into 'Zones of Peace' without eliminating or prohibiting the military presence of all States.

This may be one reason why the major maritime Powers stress that the methods prescribed for the implementation of the ZOP declarations should be reviewed in the light of the current reality. Indeed, the *Ad hoc* Committee on the Indian Ocean has

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137 See FCO (U.K.), Press Release of 24 April 1990 on the Middle East Zone free from weapons of mass destruction.

recently recommended that new alternative approaches should be considered by the General Assembly to implement the IOZP declaration.[138] In fact, the principles of IOZP adopted by the 1979 Meeting of the Littoral and Hinterland States of the Indian Ocean[139] appear to be the principles designed to strike a balance between the obligations of regional and non-regional States. This could constitute a basis for developing a balanced approach with regard to the implementation of the IOZP declaration.

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138 UN Chronicle, September 1992, p.41: 'Indian Ocean Committee calls for new approaches'. This has been endorsed by the 1992 General Assembly resolution on the IOZP: Resolution 47/59 of 9 December 1992, adopted by 129 votes to 3, with 35 abstentions.

139 U.N.Doc.A/34/45, Supp.45 (1979).

CHAPTER II

Maritime Zones of Peace and the Law of the Sea

I. Introduction

The examination of the UN Declarations on maritime ZOP in Chapter I shows that several of the issues concerning the establishment of such zones are related to various rules of the law of the sea. Therefore, this chapter will examine the relationship of the principles of maritime ZOP with the principles of the law of the sea.

II. Maritime ZOP and Other Regimes of the Law of the Sea

Since, as seen in the preceding Chapter, the zone of application of the UN Declarations on ZOP is not clear, it is first proposed briefly to examine the rules governing military activities in all maritime areas lying beyond the baselines of the coastal States.

1. The Territorial Sea

The sovereignty of a coastal State extends to the territorial sea and the regime of innocent passage[1] applies to territorial waters. The right of innocent passage is part of conventional[2] as well as customary[3] international law. However, the meaning of innocent passage is a matter of some controversy. Although a strongly held view is that the right of innocent passage is not subject to any restrictions and restraints other than those specifically mentioned in Article 19 of the LOSC and all warships, including submarines, "enjoy the right of innocent passage on an unimpeded and

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1 See for a detailed examination of the topic, F. Ngantcha, The Right of Innocent Passage and the Evolution of International Law of the Sea (1990).

2 Article 14 of the Convention on the Territorial Sea and the Contiguous Zone, 1958 (TSC) (516 UNTS 205; 52 AJIL 834; entered into force on 10 September 1964; there are 46 States party to it) and Articles 17, 18 and 19 of the Convention on the Law of the Sea, 1982 (LOSC) (21 ILM 1261; not yet in force; signed by 159 States and entities; as of 1st January 1993, 55 States had ratified it).

3 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.A.), ICJ Reports 1986, p.14 at p.111.

unannounced basis",[4] there are some 39 States who do not fully share this view.[5] They require prior authorisation or permission, prior notice or limitations on numbers at any one time for entry of foreign warships into their territorial waters.

The 39 States maintain that the principle of innocent passage is not absolute and certain restraints and restrictions can be imposed on warships, especially nuclear-powered or nuclear weapon carrying vessels,[6] traversing their territorial waters.

Rieman writes that

> "[a]ny nuclear weapon carrying warship or aircraft (or, indeed, any warship or warplane capable of carrying nuclear weapons) is a nuclear target regardless of its locale. An attack on such a plane or ship would unleash the destructive potential of a nuclear weapon against the state within whose territory the ship or plane was transiting. Such an attack would obviously violate 'the sovereignty, territorial integrity or political independence of the coastal State,' even if the involved territory were not the intended target of the attack."[7]

Since innocent passage must be continuous and expeditious and must not be prejudicial to the peace, good order or security of the coastal State, the rules of maritime ZOP seem consistent with the principles of innocent passage. "Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security

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4 The U.S. Handbook, p.2-3. See also the joint statement by the US and the Soviet Union concerning the Uniform Interpretation of Rules of International Law Governing Innocent Passage: 28 ILM 1444 (1989).

5 They are: Albania, Algeria, Antigua and Barbuda, Bangladesh, Barbados, Brazil, Bulgaria, Burma, Cape Verde, China, Denmark, Djibouti, Egypt, Finland, Grenada, Guyana, India, Iran, North Korea, South Korea, Lebanon, Libya, Maldives, Malta, Mauritius, Nicaragua, Norway, Pakistan, Poland, Rumania, Seychelles, Somalia, Sri Lanka, Sudan, Sweden, Syria, Vietnam, Yemen and Yugoslavia. See The Supplement to the Handbook, p.2-17.

6 A coastal State could regard the transit of nuclear weapon carrying or nuclear-powered ships as prejudicial to the peace, good order or security of that State. Oman's declaration upon ratification of the LOSC requires such ships to obtain prior permission before traversing the Omani territorial sea. UN Division for Ocean Affairs and the Law of the Sea, The Law of the Sea: Current Developments in State Practice No.III (1992), p.1. Article 6 of the 1992 Law on the Territorial Sea and the Contiguous Zone of the People's Republic of China states that "To enter into the territorial sea of the People's Republic of China, foreign military ships must obtain permission from the Government of the People's Republic of China." 21 LOSB (August 1992), p.24. Egypt requires prior notification for warships and prior authorisation for nuclear-powered ships and ships carrying nuclear or other inherently dangerous and noxious substances. See Egypt's declaration made upon the ratification of the LOSC: LOSB (Special Issue I, March 1987), p.3.

7 A. M. Rieman, 'Creating a nuclear free zone treaty that is true to its name: the nuclear free zone concept and a model treaty,' 18 (2) DJILP (1990), pp. 209, 235.

of the coastal State" if in the territorial sea it engages in, *inter alia*, "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State".[8]

Under Article 19 of the LOSC other States have no right in the territorial waters of a coastal State to exercise or practice with weapons of any kind, deploy their navies, emplace or emplant military structures, installations and devices or conduct the testing of weapons of any kind. This provision effectively serves the objectives of a maritime ZOP. Since the right of innocent passage is protected under the concept of maritime ZOP[9] and other States do not have any other rights concerning military activities in the territorial waters of a coastal State, the establishment of a maritime ZOP does not affect the regime of innocent passage.

A coastal State that consents to the creation of a ZOP covering its territorial waters accepts obligations as far as its territorial sea is concerned. For instance, under the concept of IOZP the coastal State will be required not to assist foreign military Powers in their military activities in contravention of the 1971 declaration on the Indian Ocean.

2. International Straits[10]

Under the LOSC the regime of transit passage applies to straits that are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ.[11] Although the right of transit passage in the LOSC has no counterpart in the TSC, the LOSC provision could be regarded as an enhanced form of the older concept of straits passage recognised in Article 16(4) of the TSC

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8 Article 19 of the LOSC.

9 See Chapter I, above.

10 See generally, J.A. de Yturriaga, Straits Used for International Navigation: A Spanish Perspective (1991); Judge S. Oda, 'The passage of warships through straits and archipelagic waters', in J.M. Van Dyke et al. (eds.), International Navigation: Rocks and Shoals Ahead? (Proceedings of the Law of the Sea Institute) (1988), pp.155 ff; R.P. Anand, 'Transit passage and overflight in international straits', in *Ibid.*, pp.125 ff.

11 Article 37 of the LOSC.

and the Corfu Channel case.[12] However, it is not certain whether the right of transit passage as provided for in the LOSC represents custom.[13]

Under Article 38(1) of the LOSC all ships and aircraft enjoy the right of transit passage in straits used for international navigation. Nevertheless, such ships and aircraft, while exercising the right of transit passage, must proceed without delay[14] and must refrain from "any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the Strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations"[15] and from "any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress."[16] The restrictions imposed are in line with the objectives of maritime ZOP. In other words, in international straits no naval forces can be deployed, either temporarily or permanently, no exercise or practice with weapons of any kind can be conducted and no military structures, installations and devices can be emplaced or emplanted by foreign Powers. Thus the rules of ZOP do not affect the right of transit passage as they are consistent with the regime of transit passage under the LOSC.

3. The Archipelagic Waters[17]

The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with Article 47 of the LOSC as well as to

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12 ICJ Reports, 1949, p.4, 35.

13 The U.K. and the U.S., which are not signatories to the LOSC, regard this right as already stating customary law. See for the views of the U.K. Hansard, H.L., Vol.484, col.382 (5 February 1987) and a note concerning passage through the Persian Gulf in 77 AJIL (1984), p.884 for the views of the U.S.

14 Articles 38(2) and 39(1)(a).

15 Article 39(1)(b) of the LOSC.

16 Article 39(1)(c) of the LOSC.

17 C.F. Amerasinghe, 'The problem of archipelagos in the international law of the sea', 23 ICLQ (1974), 538-75; B.H. Dubner, The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States (1976); Kusumaatmadja, 'The Legal Regime of Archipelagos: Problems and Issues', in Alexander (ed.), The Law of the Sea: Needs and Interests of Developing Countries (1973), 166; O'Connell, 'Mid-Ocean Archipelagos in International Law', 45 BYIL (1971), pp.1-72.

the air space above and the bed and subsoil thereof.[18] All ships and aircraft enjoy the right of archipelagic sea lanes passage in sea lanes and air routes thereabove designated by the archipelagic State in its archipelagic waters for the continuous and expeditious passage of foreign ships and aircrafts.[19]

However, the passage of foreign ships and aircraft, while exercising the right of archipelagic sea lanes passage, will have to proceed without delay through or over the archipelagic waters, refrain from any activities inconsistent with the principles of the Charter of the UN and from any activities other than those incidental to their normal modes of continuous and expeditious transit.[20] Although Article 53(2) of the LOSC, which provides for the right of archipelagic sea lanes passage, does not include submarines, it is claimed that this right includes submerged transit because it was so understood by the participants in UNCLOS III.[21]

Foreign States have no right in the archipelagic waters of an archipelagic State to deploy their navies, conduct military manoeuvres and the testing of weapons of any kind and to implant or emplace weapons, military installations, structures and devices. Therefore, there is nothing in the declarations on maritime ZOP that will require any change in the regime of archipelagic sea lanes passage; the rules of ZOP are compatible with this regime of the law of the sea.

4. The Contiguous Zone

Under the 1958 Convention the contiguous zone was part of the high seas and the principle of the freedoms of the high seas applied to the zone. But the LOSC changes the juridical character of the contiguous zone. Although the 1982 Convention does not, unlike the 1958 Convention, explicitly indicate whether the zone is part of the high seas or of the EEZ, Article 55 of the LOSC suggests that the contiguous zone is

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18 Article 49 of the LOSC.

19 Paragraph 2 and 3 of Article 53 of the LOSC.

20 Articles 52 and 54 of the LOSC.

21 See K. Booth, 'Historic compromise or paradigm shift? Naval mobility versus creeping jurisdiction in the 1982 Convention on the Law of the Sea', in A.W. Kores & B.H. Oxman (eds), The 1982 Convention on the Law of the Sea (1982), pp.312, 324.

part of the EEZ.[22] Accordingly, in so far as the foreign military activity in the contiguous zone is concerned, the LOSC regime of the EEZ seems to apply to the contiguous zone. Therefore, the regime of the contiguous zone need not detain us any further for purposes of this study as the next section will deal with the issues relating to the use of the EEZ for military purposes.

5. The Exclusive Economic Zone[23]

There is little doubt that the EEZ regime is part of customary as well as conventional law.[24] The use of the EEZ of a coastal State for a variety of purposes by other States is regulated by a number of provisions of the LOSC, which are, as stated in the Gulf of Maine case, "consonant at present with general international law on the question."[25] Although the LOSC does not contain any specific and explicit provision designed to prohibit the use of foreign EEZ for military purposes, there are a number of articles in the Convention which implicitly prohibit certain military activity. A particular military activity will have to meet the test of (i) the 'due regard' principle,[26] (ii) the 'peaceful purposes' principle (Articles 58(2) and 88 of the

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22 Under Article 55 the EEZ "is an area beyond and adjacent to the territorial sea" extending up to 200 n.m. from the baselines from which the breadth of the territorial sea is measured. This definition of the EEZ includes the area covered by the contiguous zone.

23 See generally, D. Attard, The Exclusive Economic Zone in International Law (1987); B. Kwiatkowska, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989); E. Mann Borgese, 'Boom, doom and gloom over the oceans: the exclusive economic zone, the developing nations, and the Conference on the Law of the Sea', 11 SDLR (1974), pp.541 ff.; J.C. Phillips, 'The exclusive economic zone as a concept in international law', 26 ICLQ (1977), pp.585 ff.; H.B. Robertson, 'Navigation in the exclusive economic zone', 24 VJIL (1984), pp.865 ff.; E.L. Richardson, 'Law of the sea: navigation and other traditional national security considerations', 19 SDLR (1982), pp.553-576.

24 See materials cited in *supra* note 23 and J.K. Gamble, Jr. and M. Frankowska, 'The 1982 Convention and customary law of the sea: observations, a framework, and a warning', 21 SDLR (1984), pp.495 ff.

25 ICJ Reports 1984, p.246 at p.295. See also Continental Shelf (Libya v. Malta) case: ICJ Reports 1985, p.13 at p.30.

26 Article 58(3) of the LOSC. But this is a 'double-edged weapon' which could be used to justify the use of the EEZ of a coastal State by foreign States for military purposes as well as by the coastal State to argue against such use. See for an interesting discussion of the principle of 'due regard' and 'reasonable use' J. M. Van Dyke, 'Military exclusion and warning zones on the high seas', 15 Marine Policy (May 1991), pp.147, 159, 163-164.

LOSC),[27] (iii) the principles of the Charter of the UN,[28] especially those embodied in Article 2(4),[29] and (iv) the provisions of Articles 56, 58(1) and 60 of the LOSC.

Under Article 56 of the LOSC the coastal States have sovereign rights for the purpose of, *inter alia*, exploring and exploiting, conserving and managing the natural resources in their EEZ and have jurisdiction with regard to, *inter alia*, the establishment and use of artificial islands, installations and structures and the protection and preservation of the marine environment. Although Article 60 accords exclusive right to a coastal State with regard to the construction, operation and use of certain types of installations and structures in its EEZ, it does not exclude the possibility of other States constructing, operating or using such installations and structures which are not covered by this article. However, it should be borne in mind that Article 56 accords jurisdiction to coastal States with regard to the establishment and use of all types of artificial islands, installations and structures and Article 58 does not include the freedom to construct artificial islands and installations among the freedoms available for other States in the EEZ of a coastal State.

The coastal State may claim that any installations or structures of any foreign Power in its EEZ interferes with the exercise of its rights granted under the LOSC. Article 58(3) of the LOSC provides that other States "shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations" adopted by the coastal State in accordance with the provisions of the LOSC and other rules of international law. The coastal State could also claim that foreign military installations and structures are prohibited in its EEZ also on the basis of Article 88 in that they are not the sort of activities that could be regarded as activities for peaceful purposes.

Under Articles 58(1) and 87 of the LOSC foreign warships enjoy freedom of navigation in the EEZ, but this article does not seem to include freedoms relating to the establishment and maintenance of military bases, deployment of navies, naval

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27 See Section III of this chapter, below, for a detailed discussion of the scope and meaning of the principle of the use of the seas for peaceful purposes.

28 Cf. Article 301 of the LOSC.

29 See Chapter III, below for a fuller discussion of this topic.

exercises and weapon testing in foreign EEZ without the consent of the coastal State concerned since such activities are difficult to include either in the definition of 'freedom of navigation'[30] or in the phrase 'other internationally lawful uses of the sea related to these freedoms':

> "In the exclusive economic zone, all States, whether coastal or land-locked, enjoy subject to the relevant provisions of this Convention, the freedom referred to in Article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with other provisions of this Convention." (emphasis added)

Thus, the other uses allowed are only those uses of the sea which are (i) internationally lawful (ii) related to the freedoms enumerated in Article 58(1) and (iii) consistent with other provisions of the LOSC, including Articles 88 and 301.

However, the problem lies in defining the scope of the term 'navigation' since the use of the seas related to this freedom is one of the rights accorded to other States in the EEZ of a coastal State. 'Navigation' is not defined in the LOSC or in any other international instrument. Nevertheless, one might define the freedom of navigation as a continuous movement of a vessel from one port or a place to another.[31] Kinley writes that

> "the notion of continuous movement as a feature of the freedom of *navigation* is brought out by implication in the Convention's [i.e. the LOSC] formulation of the freedom in Article 87(1), in that certain freedoms which may require a vessel to stop, or manoeuvre on occasion in a random fashion - such as the freedoms of fishing and scientific research - are separately identified."[32]

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30 See Section III, below, on the high seas.

31 Of course, 'navigation' embraces the right to anchor or stop when so required by bad weather, *force majeure*, distress or other physical constraints.

32 G. Kinley, 'The law of self-defence, contemporary naval operations and the United Nations Convention on the Law of the Sea', in E.D. Brown & R.R. Churchill (eds.), The UN Convention on the Law of the Sea: Impact and Implementation (1987), pp.10, 18.

Freedom of navigation in the EEZ does not mean freedom to use the EEZ by foreign warships for whatever military purposes they deem fit. A coastal State could argue that the conduct of naval exercises, permanent deployment of navies and the testing of weapons in the EEZ are not covered by the freedoms of navigation, overflight and the laying of submarine cables and pipelines that are available for other States in its EEZ under Article 58(1). Such assertions may be justified on the basis of the views of the delegates to the UNCLOS I who considered that such military activities fell within the clause "others [i.e. other freedoms] which are recognised by the general principles of international law" in the last paragraph in Article 2 of the HSC rather than the freedom of navigation.[33]

With regard to the phrase 'other internationally lawful uses of the sea related to these freedoms' in Article 58(1), this article provides examples of such uses of the sea to clarify matters and these examples do not suggest that this phrase includes the right to test weapons and conduct naval exercises. Are these activities associated with the operation of ships and aircraft? Does the freedom of navigation cover a right to conduct military exercises and the testing of weapons? If not, why were such activities not expressly prohibited in the EEZ as they are in the territorial waters?[34] The difference between the key provisions of the LOSC on territorial waters (i.e. Article 19(2)) and the EEZ (i.e. Article 58(1)) is that they were formulated with two different purposes: while the purpose of Article 19(2) is to define the meaning of innocent passage by enumerating non-innocent activities, the purpose of Article 58(1) is to define the rights of other States in the EEZ of a coastal State. Taking into account the interpretative canon expressed in the maxim of *expressio unius est exclusio alterius* or in *expressum facit cessare tacitum*,[35] one can hold that the

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33 The version of Article 2 of the HSC considered by the delegates to the UNCLOS I was Article 27 of the ILC's 1956 draft proposal and the views referred to here are on draft Article 27: Report of the ILC to the General Assembly, 11 U.N. GAOR, Supp.(No.9) 12; 2 YBILC (1956), 253, 256. The draft article 27 did not contain the clause "others which are recognised by the general principles of international law". This clause was added when a proposal for such addition put forward by the U.K. and Ireland was accepted at UNCLOS I. U.N. Docs.A/CONF.13/C.2/L.68 and A/CONF.13/40 (1958).

34 Articles 19(2) and 25(3) of the LOSC.

35 Although this rule of interpretation does not find expression in the 1969 Vienna Convention on the Law of Treaties, it would find, as stated by McNair, "a place in the logic of the nursery."

activities not included in Article 19(2) are permitted in territorial waters and the rights not included in Article 58(1) are not available in the EEZ.

Of course, it could be argued, that deployment of foreign navies, the testing of weapons and the conduct of naval exercises are internationally lawful uses of the sea.[36] But what is contended here is that these activities are not related to the freedoms of navigation and overflight and of the laying of submarine cables and pipelines. What is lawful in the high seas is not necessarily lawful in the EEZ. Unlike Article 87, which enumerates the freedoms all States are entitled to exercise in the high seas but is, nonetheless, open-ended with the inclusion of the phrase '*inter alia*' before this article begins enumerating the freedoms of the high seas,[37] Article 58(1) is not open-ended with regard to the list of high seas freedoms available in the EEZ. Article 58(1) is open-ended only with regard to the phrase 'other internationally lawful uses' of the sea, ones that are related to the freedoms of navigation and overflight and of the laying of submarine cables and pipelines.

Oxman argues that in so far as warships are concerned, this phrase is, "in effect, the functional substitute for the '*inter alia*' in Article 87."[38] It is, however, difficult to agree with him since this interpretation would have the implication of disregarding the significance of the words 'related to' in the phrase.[39] Richardson's assertions are similar to those of Oxman:

He states: "That there is a substantial element of truth in this maxim is obvious." McNair, Treaties, p.399. Moreover, certain writers have argued that the Convention does not provide an exhaustive list of rules of the interpretation of treaties. See I. Sinclair, The Vienna Convention on the Law of Treaties (2nd edn., 1984), p.153.

36 For instance, Kwaitkowska argues that "military uses associated with the operation of ships and aircraft such as naval manoeuvres are clearly the 'internationally lawful uses' of the sea governed by the freedom of navigation and overflight." B. Kwaitkowska, 'Military uses in the EEZ- a reply', 11 Marine Policy (July 1987), p.249. But see also somewhat cautious approach of Lowe in A. V. Lowe, 'Rejoinder', 11 Marine Policy (July 1987), pp.250, 251.

37 Zedalis rightly argues that "The inclusion of the words '*inter alia*' before the lengthy recitation would appear to mean that, even though not listed, other freedoms recognised by the general principles of international law continue to exist, and that, as a consequence, the concepts of navigation and the laying of cables and pipelines are to be construed narrowly." R. Zedalis, 'Military Installations, Structures and Devices on the Seabed: A Response', 75 AJIL (1981), pp.926, 931.

38 B.H. Oxman, 'The regime of warships under the United Nations Convention on the Law of the Sea', 24 VJIL (1984), pp.809, 837.

39 According to Oxman insofar as the activities of warships are concerned, there is nothing that is not covered by the word 'navigation'. He states that it is "a futile exercise to engage in speculation as to whether naval manoeuvres and exercises within the economic zone are

> "It was understood [i.e. at the UNCLOS III] from the outset that the willingness of the maritime States to back off their insistence on explicit high-seas status for the exclusive economic zone must be compensated for by coastal State recognition that the high seas freedoms exercisable in the zone are qualitatively and quantitatively the same as the traditional high-seas freedoms recognised by international law."[40]

If there had been such an understanding, it should have been reflected in Article 58 of the LOSC. Since this article does not appear to reflect this understanding, it is difficult to interpret it in the light of the understanding alleged by Richardson. However, the 1983 U.S. Presidential Proclamation proclaiming the U.S. EEZ and asserting the U.S. navigational rights in foreign EEZs seems to have followed the interpretation offered by Oxman and Richardson with regard to the rights of foreign States in the EEZ of a coastal State. The Proclamation states that in the EEZ of the U.S. "all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea."

Although this Proclamation appears to follow the provision of Article 58(1) of the LOSC, it omits a very important clause of this article; while this article limits the scope of the phrase 'other internationally lawful uses of the sea' by adding immediately after this phrase the words "related to these freedoms", the U.S. Proclamation stops after the phrase 'other internationally lawful uses of the sea' and does not incorporate the words "related to these freedoms" of Article 58(1).

The U.S. which, on the one hand, offers wider rights and freedoms of navigation and overflight to other States in its EEZ, accepts, on the other hand, that "it will exercise and assert its navigation and overflight rights and freedoms on a world-wide basis in a manner that is consistent with the balance of interests reflected in the Convention." (emphasis added) The whole of Article 58(1) is part of the Convention, not only the part of this article liked and selected by the U.S.

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permissible. In principle, they are." *Ibid.*, p.838. But these assertions seem to have emanated from his views that the principle of 'peaceful purposes' as embodied in the LOSC is of no legal significance, with which the present writer finds it difficult to agree.

40 Richardson, *op.cit.* note, note 23, pp.572-573.

If the States which participated in the UNCLOS III had intended to provide for wider rights for other States in the EEZ of a coastal States than those specifically included in Article 58(1) they would have followed the model prescribed in Article 78(2) which is very wide in character and safeguards the rights of other States in the continental shelf of a coastal State. This article reads:

> "The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in the Convention." (emphasis added)

The absence of unqualified 'other rights' and 'freedoms' or the phrase '*inter alia*' in Article 58(1) means that the phrase "navigation [and] the laying of cables and pipelines" embraces only navigation and the laying of cables and pipelines and not other activities of a military nature.

Supposing that Article 58(1) does not resolve the question concerning the testing of weapons, naval exercises and permanent naval deployment and a dispute arises between States party to the Convention reference could be made to Article 59 to resolve such dispute; according to this article such conflicts "should be resolved on the basis of equity and in the light of all relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole." If the EEZ of a coastal State is part of a ZOP endorsed by an overwhelming majority of States, the coastal State may strengthen its case by identifying its interests with those of the international community and prohibiting certain military activities in its EEZ by other States. The coastal State may also invoke Article 88 to claim preference for peaceful activities over military ones in its EEZ in case of competing uses.[41]

Indeed, several States made conflicting declarations with regard to the activities permitted in the EEZ under the LOSC when signing the Convention. While Brazil, Cape Verde, and Uruguay made declarations to the effect that foreign naval exercises

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41 Attard, *op.cit.* note 23, p.68.

were not permitted by the LOSC in the EEZ of a coastal State, Italy made a declaration to the contrary. Brazil held that in its view the LOSC did not authorise other States to conduct in the EEZ military exercises or manoeuvres.[42] Uruguay[43] and Cape Verde[44] declared that naval exercises were 'non-peaceful' uses of the EEZ and the LOSC excluded such use in the EEZ without the consent of the coastal State. Italy, on behalf of the Western States, asserted that "the rights and jurisdiction of the coastal State in such zone do not include the right to obtain notification of military exercises or manoeuvres or to authorise them".[45] Brazil and Cape Verde reaffirmed their position upon ratification of the LOSC.[46] If other States do not object to such an interpretation, it could be argued in future that other States acquiesced in such an interpretation.[47]

There are other LOSC provisions which provide a potentially effective means for coastal States to restrict the military activities of other States in their EEZ. Under these rules a coastal State may argue that the presence of foreign navies with nuclear powered and nuclear weapon carrying submarines and surface warships poses a threat to the marine environment of its EEZ.[48] Accordingly, the coastal State may enact laws designed to prevent or remove such a threat.[49] A coastal State could claim that naval manoeuvres or testing of weapons of mass destruction by foreign States in its EEZ cause ecological harm or interfere with its economic rights granted under the Convention.

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42 5 LOSB (1985), p.4. Brazil has shown its determination to protect its EEZ from foreign military activities. For instance, in November 1990 a Brazilian judge ordered a nuclear powered U.S. submarine out of Brazil's EEZ, saying that it posed environmental danger. See 'Judge orders US sub[marine] out of Brazilian waters', Honolulu Advertiser, 5 November 1990, p.D1., as mentioned in J.M. Van Dyke, 'Military exclusion and warning zones on the high seas', 15 Marine Policy (May 1991), pp.147, 155.

43 5 LOSB (1985), p.46.

44 5 LOSB (1985), p.45.

45 *Ibid.*, p.46.

46 The UN Division for Ocean Affairs and the Law of the Sea, Current Developments in State Practice No.II (1989), pp.88, 89.

47 See the opinion of a Panel of the Law of Ocean Uses 'U.S. interests and the United Nations Convention on the Law of the Sea', 21 ODIL (1990), pp.373, 375.

48 Articles 56 (1)(b)(iii) and 192-196 of the LOSC.

49 Article 58(3) of the LOSC calls for compliance with the laws and regulations adopted by the coastal States to prevent marine pollution or protect its legitimate interests under Article 56(1)(b)(iii) and other articles of the Convention.

Thus, the conclusion to be drawn from the above discussion is that: so far as the use of the EEZ for military purposes by foreign States is concerned, the restrictions imposed on foreign military activity in the EEZ of a coastal State under the LOSC appear to be similar to those sought under the concept of maritime ZOP. In other words, the EEZ regime in effect realises most of the objectives of ZOP within 200 nautical miles off the coasts of the coastal States.

6. The Continental Shelf

Like the EEZ, the continental shelf is primarily a resource-oriented zone. The coastal State has sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources.[50] The 1958 Convention on the Continental Shelf provides a balance between the resource-oriented rights of the coastal States and the high seas freedom of navigation and fishing or the conservation of the living resources of the sea of other States;[51] the exercise of the resource-oriented rights would not affect the status of the superjacent waters as high seas or that of the airspace.[52] But under the LOSC the superjacent waters up to 200 n.m. and the air space above may be subject to the regime of the EEZ discussed above and may not retain the status of the high seas. The high seas status of the superjacent waters of the continental shelf would apply only to the superjacent waters of a continental shelf extending beyond 200 n.m., as only the waters beyond this limit fall under the definition of high seas.

Although the LOSC definition of the EEZ[53] covers the same sea-bed and subsoil up to 200 n.m. referred to in the definition of the continental shelf,[54] under Article 56(3) of the LOSC the coastal States must exercise their EEZ rights over the sea-bed and the subsoil of their EEZ in accordance with the LOSC provisions on the continental shelf; these provisions do not impose any specific restrictions upon the use

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50 Article 2 of the CSC and Article 77 of the LOSC.
51 Article 5(1) of the CSC.
52 Article 3 of the CSC.
53 Articles 56(1) and 57.
54 Article 76(1).

of the continental shelf for military purposes. However, there are a number of provisions in both the CSC and the LOSC that limit the right of a foreign military Power to use the continental shelf of another coastal State for military purposes. Like the provision of Article 58(1) of the LOSC on the EEZ, Article 5(1) of the CSC does not encompass all freedoms of the high seas. Absent from this provision is the language in Article 2 of the HSC relating to the other freedoms "recognised by the general principles of international law". Thus, it could be contended that apart from the navigation of the warships from one place to another, other military activities of other States are not permitted in the waters above the continental shelf of a coastal State. However, Article 78(2) of the LOSC departs to a considerable extent from Article 5(1) of the 1958 Shelf Convention and provides for wider rights.

Nevertheless, since the provision of Article 60 of the LOSC, which accords exclusive rights to the coastal States to construct and to authorise and regulate the construction, operation and use of artificial islands, installations and structures on its EEZ, applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf, the provision of Article 78(2) does not mean that other States can emplace military objects on the continental shelf of a coastal State without its approval. Even those writers who seem to argue that other States have a right to emplace military objects on the continental shelf of a coastal State under certain conditions,[55] admit that "[a]s to whether military objects fall within the purview of Articles 4 and 5(1) of the Geneva Continental Shelf Convention, it can be conceded, as it was, that this may be claimed with difficulty and, indeed, is possible only in marginal cases."[56] Zedalis rejects the interpretation that foreign States can undertake such activities in the continental shelf of a coastal State.[57]

There are other provisions of the LOSC which govern the activities of all States, both coastal and non-coastal States, in the continental shelves. Since the definition of the EEZ includes the sea-bed and its subsoil up to 200 miles offshore, the principle of

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55 T. Treves, 'Military installations, structures, and devices on the seabed', 74 AJIL (1980), pp.808 ff.

56 T. Treves, 'Reply' in 75 AJIL (1981), pp.933, 934.

57 Zedalis, *op.cit.* note 37, p.926.

peaceful purposes as embodied in Article 88 of the LOSC seems to apply also to the continental shelf up to such distance.

Finally, the sea-bed area beyond the 12 mile limit from the coastline is subject to the 1971 Sea-Bed Arms Control Treaty which prohibits States from emplanting or emplacing "any nuclear weapons or any 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."[58] This prohibition applies to all States, whether coastal or non-coastal States.

7. Conclusion

Thus, the conclusions to be drawn from this discussion are very similar to those conclusions drawn from the discussion with respect to the regime of the EEZ above: the military activities in foreign continental shelves are subject to quite a number of restrictions under the CSC and the LOSC and they are similar in many respects to those envisaged under the declarations on maritime ZOP.

III. The High Seas, the Peaceful Purposes Principle and ZOP

The main argument of the proponents of all proposals for ZOP is that the creation of ZOP is in accordance with the law of the sea principle of the reservation of the high seas for peaceful purposes. Article 88 of the LOSC reads: "The high seas shall be reserved for peaceful purposes."[59] This article is, as Booth writes, "the shortest Article in the Convention, but in spirit it is the most far-reaching: ostensibly it challenges the historic role of oceans as battlegrounds, roads to war and areas for the peacetime demonstration of military power."[60]

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58 Article 1 of the Treaty: 995 UNTS 115; entered into force in 1972; 86 States are parties to it.

59 Other articles of the LOSC incorporating this principle are: 19(2), 27(1)(b), 39(1)(b), 58(2), 138, 141, 143(1), 147(2)(d), 155(2) and (3), 240(a), 242(2), 246(3), 279 and 301 of the LOSC. This principle first found expression in the 1970 'common heritage' declaration of the General Assembly (Resolution 2749 (XXV), operative para.5), adopted by 104 votes to 0, with 14 abstentions.

60 K. Booth, Law, Force and Diplomacy (1985), p.82.

The legality of the requirement in the ZOP declarations of the elimination of military bases and installations, the disposition of nuclear weapons and other weapons of mass destruction, the prohibition on military exercises and weapon tests seems to depend chiefly on how the term 'peaceful purposes' is defined. This is because the ZOPC declaration cites in its Preamble "the principles and norms of international law applicable to ocean space, in particular the principle of the peaceful uses of the oceans" as a legal basis for the establishment of a ZOPC in the South Atlantic.[61] The sponsors of the IOZP proposal also invoked this principle to support their case.[62] Therefore, the questions to be asked in this regard are as follows: Is this principle a rule of general international law and, if so, what does it mean and does it support the concept of maritime ZOP?

The phrase 'peaceful purposes' has been interpreted differently by various States. While certain States say that the term 'peaceful purposes' in the LOSC articles and the 1970 'common heritage' Declaration means 'non-aggressive', other States contend that it means 'non-military'. The term 'peaceful purposes' is not defined in the Convention and the opinion of publicists is divided.[63] Lowe maintains that Articles 88 and 301 "are practically devoid of meaning, adding nothing to the UN Charter provisions".[64] Oxman doubts whether this term has legal content at all and if it has legal content it means 'non-aggressive'.[65] Treves suggests that the principle of the use

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61 Para. 6 of the preamble to the 1986 Declaration. See Appendix II, below. An overwhelming majority of States Member of the UN supported the 1986 Declaration (the U.S. was the only State which voted against it).

62 Defending the proposal for a ZOP in the Indian Ocean, the Sri Lankan ambassador to the UN, Amerasinghe, said that the Sri Lankan proposal "seeks to apply the principle of the reservation of an area exclusively for peaceful purposes to one of the major oceans of the world." U.N. Doc. A/C.1/PV.1815 (2 Nov. 1971), p.4.

63 See, generally, Treves, *op.cit.* note 55; A.V. Lowe, 'Some legal problems arising from the use of the seas for military purposes', 10 Marine Policy (July 1986), pp.171 ff.; E.D. Brown, Arms Control in Hydrospace: Legal Aspects (1971); D.L. Larson, 'Security issues and the law of the sea: a general framework,' 15(2) ODIL (1985), p.99 and 'Naval weaponry and the law of the sea,' 18 ODIL (1987), p. 125; B.A. Boczek, 'Peaceful purposes provisions of the United Nations Convention on the Law of the Sea,' 20 ODIL (1989), pp.359-389; R. Wolfrum, 'Restricting the use of the sea to peaceful purposes: Demilitarization in being?,' 24 GYIL (1982), pp.200-241; Oxman, *op.cit.* note 38; F. Francioni, 'Peace time use of force, military activities and the law of the sea,' 18 CILJ (1985), pp.203-206; Richardson, *op.cit.* note 40; E. Young, 'New laws for the old navies: military implications of the new law of the sea,' XVI Survival (1974), 269; E. Rauch, 'Military uses of the oceans,' 28 GYIL (1985), 229.

64 A.V. Lowe, 'Rejoinder', 11 Marine Policy (July 1987), pp.250 at 251.

65 Oxman, *op. cit.* note 38, p.831.

of the oceans for peaceful purposes "seems more a part of the United Nations resolution-generated 'soft law' than a rule (or a component of rules) of customary law."[66] Birnie acknowledges that this term has legal consequences "since it makes illegal use for non-peaceful purposes".[67] Borgese states that this principle "may be assumed as comprehensive in character and comes closer to the concept of demilitarisation than to that of the denuclearisation."[68] Referring to the deployment of Cruise missiles off the shores of Nordic countries, Evensen argues that such deployment "violates the provisions contained in the 1982 Law of the Sea Convention, including the general principles that the oceans shall be used exclusively for peaceful purposes and specific provisions contained in Article 301 pertaining to the 'peaceful uses of the seas.'"[69]

The debate in the UN on the use of the oceans for peaceful purposes was initiated by Ambassador Pardo of Malta through his famous 'common heritage of mankind' address before the First Committee of the General Assembly in 1967. His proposal called for a "Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind."[70] The General Assembly heeded Pardo's words and adopted Resolution 2340 (XXII) of 1967 which created an *Ad Hoc* Committee to study the peaceful uses of the sea-bed and ocean floor, beyond the limits of national jurisdiction. The idea of the peaceful use of the oceans was one of the highly debated topics in the Sea-Bed Committee.[71] The debates culminated in the adoption of the 1970 Declaration on the deep sea-bed which stated in paragraph 5 that the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction "shall

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66 Treves, *op.cit.*, note 55, p.819.

67 P. Birnie, 'Law of the sea and nuclear weapons: Legal aspects', in Pogany, Nuclear Weapons, pp.142, 165.

68 E.M. Borgese, 'The Sea-Bed Treaty and the law of the Sea: prospects for harmonisation', in Byers, Denuclearisation, pp.88, 91.

69 J. Evensen, 'The law of the sea regime' in Byers, Denuclearisation, pp.77, 85.

70 U.N. Doc. A/16695, 17 August 1967.

71 See especially, U.N. Docs. A/Ac.135/SR. 14,16,17 and A/AC.135/20,24,26,27 (1968); A/AC.138/SR.5,6,8,10,12,13 (1969); A/AC.138/SR.22 and A/C.1/PV.1798-1799 (1970).

be open to use exclusively for peaceful purposes by all States ...in accordance with the international regime to be established".[72] But this declaration provided no clue as to the meaning of the term 'peaceful purposes'.

The following year the Conference of the Committee on Disarmament produced the Sea-Bed Arms Control Treaty of 1971 which prohibits the emplacing and emplanting of nuclear weapons and other weapons of mass destruction on the sea-bed. During the deliberations on the draft proposals for the treaty the meaning of the term 'peaceful purposes' again became the subject of controversy. A majority of the States, including the non-aligned States and the Soviet Union and its allies, favoured a total demilitarisation of the sea-bed under the principle of peaceful purposes.[73] In their view no military use whatsoever, even for defensive purposes, could be regarded as peaceful. But the Western States, in particular the U.S., rejected these proposals and the issue of the reservation of the high seas for peaceful purposes remained unresolved. They insisted on interpreting the phrase 'peaceful purposes' to mean use that is consistent with the purposes and principles of the Charter of the United Nations. Hence, in their view, the use of the sea-bed and ocean floor for self-defensive purposes was considered to be peaceful.[74] Since no consensus was reached in the Committee as to the meaning of the phrase 'peaceful purposes' the Sea-Bed Arms Control Treaty mentions this phrase only in its preamble, without defining it.

Thus, these two interpretations of this term, i.e., 'non-military' and 'non-aggressive', came to be one of the complicated issues at UNCLOS III when the agenda item entitled "Peaceful uses of ocean space: zones of peace and security" was debated. This subject was discussed at the Fourth Session of the UNCLOS III held in New York in 1976; the problem was not resolved on this occasion either. Speaking in

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72 General Assembly resolution 2749 (XXV) of 17 December 1970, adopted by 104 votes to 0, with 14 abstentions.

73 See, for example, the statements of the representative of the USSR in A/AC.135/SR.16, A/AC.135/WG.1/SR.8 and A/C.1/PV.1592 (1968); A/AC.138/SR.6,10,12,22,56 (1969); A/C.1/PV.1798, Bulgaria, Poland and Libya A/AC..135/SR.16; Peru A/AC.135/SR.17; Malta A/C.1/PV.1598 and Trinidad and Tobago A/AC.138/SR.50.

74 See the statements of the representative of the U.S. in U.N. Doc.A/AC.135/SR.17, A/C.1/PV.1590 (1968); A/AC.138/SR.6,12 (1969); U.K., A/AC.135/SR.17 (1968), A/C.1/PV.1594; Norway, A/AC.135/SR.17.

the Plenary Committee several delegates, in particular from the developing countries, argued that the use of the seas for peaceful purposes meant a complete prohibition of all military activities at sea.[75] For instance, the Ecuadorian delegate argued that it had been already recognised by many international bodies and agreements that the use of the ocean space for exclusively peaceful purposes "must mean complete demilitarisation and the exclusion from it of all military activities."[76] The representative of Madagascar expressed the view that "not only should all activities which might produce conflict at sea be avoided, but also that all preparations for a situation of violent conflict should be banned."[77] But the U.S. representative argued that

> "The term 'peaceful purposes' did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement. The Conference [on the Law of the Sea] was not charged with such a purpose and was not prepared for such negotiation."[78]

The Soviet Union and its allies came close to supporting the position taken by the developing States: they interpreted the principle of the reservation of the high seas for peaceful purposes as prohibiting all military activities for offensive purposes, but not, for instance, the use of military means of communication or the use of military personnel for scientific research purposes. Ultimately, the debate at the UNCLOS III on the topic produced no consensus on this issue. Nevertheless, a number of articles of the 1982 Convention on the Law of the Sea regulating a variety of marine activities include the concept of the use of the seas for peaceful purposes.[79] The most

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75 See for the statements made by various States at the 66th meeting of 19 April, 1976; 67th meeting of 23 April 1976; and 68th meeting of 26 April 1976 in R. Platzoder, Third United Nations Conference on the Law of the Sea: Documents, Vol. XVI, (1988), pp.421-434.

76 *Ibid.*, p. 423.

77 *Ibid.*, p. 425, para. 26.

78 *Ibid.*, p. 429. See for similar interpretation of the term 'peaceful purposes' by some American jurists Restatement of the Law Third, Vol. 2, Section 521, p. 79.

79 Articles 19 (2), 27(1) (b), 39 (1)(b), 58 (2), 88, 138, 141, 143(1), 147 (2) (d), 155 (2) and (3), 240 (a), 242 (2), 246 (3), 279 and 301 of the LOSC.

significant article for the purposes of this study is Article 88 which reads: "The high seas shall be reserved for peaceful purposes."

Thus, insofar as the application of the principle of peaceful purposes to the use of the seas is concerned, the meaning and scope of this phrase remains undefined and controversial; neither the 1970 Declaration nor the 1982 Convention define the term 'peaceful purposes.' Articles 88, 141 and other provisions of the LOSC incorporate the term in deceptively simple terms. Unlike the Antarctic and Outer Space Treaties, the LOSC does not elaborate on the specifics of the principle. In signing the LOSC Brazil, Cape Verde and Uruguay asserted in their interpretative declarations that military exercises are not a peaceful use of the oceans.[80] Italy contradicted this view.[81]

This undefined concept of the use of the high seas for peaceful purposes is one of the justifications given for the establishment of maritime zones of peace. The combined effect of the desire to halt militarisation of the areas beyond national jurisdiction and the attempt by the developing countries to define the principle of the freedoms of the high seas in line with their aspirations seems to have led to the inclusion of the principle of peaceful purposes first in the 1970 'common heritage' declaration and then in the LOSC and the peace zone proposals; they are in effect attempts to apply the principle of peaceful purposes in the zones concerned. This is one of the reasons why the 'non-military' *versus* 'non-aggressive' interpretations of this principle have continued to dominate the issue of the establishment of the maritime ZOP.

So far as the customary legal status of the peaceful purposes principle in the law of the sea is concerned, it has been embodied in two important international instruments: the 1970 'common heritage' declaration and the LOSC. The incorporation of the principle in the 1970 declaration and in several articles of the LOSC demonstrates that it is more than a part of the UN resolution-generated 'soft law.' A considerable body of opinion attaches a significant weight to the 1970

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80 LOSB, No. 5, July 1985, pp.6-9.
81 *Ibid.*, pp. 15-16.

'common heritage' declaration and maintains that it pronounces the general principles of law of the sea concerning the sea-bed.[82] The status of this declaration can be compared with that of the declaration on the principles governing the activities of States on the moon and other celestial bodies of 1963, which many writers regard as constituting customary international law on outer space.[83] But the 1970 declaration covers only the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction and not the water column of the high seas.

Therefore, the principle of the reservation of the sea-bed and ocean floor for peaceful purposes embodied in the 1970 declaration does not seem to affect the status of the water column of the high seas. So far as the significance of Article 88 of the LOSC is concerned, none of the States participants in the UNCLOS III opposed the inclusion of this provision in the LOSC. This principle has been recognised as a rule of the sea by the parties and non-parties alike;[84] the controversy is about its meaning. The 1986 ZOPC declaration of the UN, supported by an overwhelming majority of States (the U.S. was the only State that voted against it), invokes this principle of the law of the sea as a basis of the declaration of the South Atlantic as a ZOPC.

However, the acceptance of this principle as a customary rule depends on whether a reasonably precise meaning of this principle is generally recognised. It is not difficult to define the term 'peaceful purposes' if this principle is defined according to the meaning given to it in international practice. It appears reasonable to argue that the law of the sea principle of the use of the seas for peaceful purposes should be interpreted in accordance with the noticeable trend in the development of international

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82 A. Cassese, International Law in a Divided World (1986), pp.376-92; L. Henkin, 'General Course in Public International Law', Recueil Des Cours (1989-IV), pp.105-26; Mahamoudi, The Law of Deep Seabed Mining (1987). Oppenheim's International Law states that the principle embodied in this Declaration "is one of general law; its precise meaning and its practical implications are another matter". Oppenheim (1992), Vol.I, Part 2, p.813, note 5.

83 See generally, Fawcett, International Law and the Uses of Outer Space (1968), pp.4-14; Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 IJIL (1965), p.23; Christol, The Modern International Law of Outer Space (1982).

84 For instance, 1983 U.S. Presidential Statement on the law of the sea reads: "The United States has long been a leader in developing customary and conventional law of the sea. Our objectives have consistently been to provide a legal order that will, among other things, facilitate peaceful, international uses of the oceans and provide for equitable and effective management and conservation of marine resources. The United States also recognises that all nations have an interest in these issues." (emphasis added) 22 ILM (1983), p.462.

law and practice towards the prevention of militarisation of the seas and other uninhabited parts of the world, in particular in accordance with the use of the term in similar disarmament treaties, namely, the Outer Space Treaty, the Antarctic Treaty and the Moon Treaty, which do imply 'non-military.' These treaties contain a good working definition of the term 'peaceful purposes.' Article 1(1) of the 1959 Antarctic Treaty reads as follows:

> "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."[85]

Under this article 'peaceful purposes' means complete demilitarisation. Similarly, Article 4(2) of the Outer Space Treaty provides that

> "The moon and other celestial bodies 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."[86]

Although, unlike the Antarctic Treaty, the Outer Space Treaty does not impose a blanket ban on all measures of a military nature, it too prohibits the establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon and other celestial bodies.[87] Nevertheless, Boczek argues that this provision still has to be interpreted "in accordance with the underlying policy objectives, as denoting complete demilitarisation of the moon and other celestial bodies."[88] Under Article 3 of the Moon Treaty[89] the peaceful purposes principle embraces both non-military and non-aggressive definitions:

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85 UKTS 97 (1961), Cmnd. 1535; 402 UNTS 71.
86 UKTS 10 (1968) Cmnd. 3519; 610 UNTS 205.
87 Article 4(2) of the Outer Space Treaty.
88 Boczek, *op.cit.* note 63, pp.359, 362.
89 The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 1979: 18 ILM 1434; there are 7 States party to it.

"1. The moon shall be used by all States Parties exclusively for peaceful purposes.
2. Any threat or use of force or any other hostile act or threat of hostile act on the moon is prohibited. It is likewise prohibited to use the moon in order to commit any such act or to engage in any such threat in relation to the earth, the moon, spacecraft or man-made space objects.
3. States parties shall not place in orbit around or other trajectory to or around the moon objects carrying nuclear weapons or any other kinds of weapons of mass destruction or place or use such weapons on or in the moon.
4. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military manoeuvres on the moon shall be forbidden".

This is the latest and most comprehensive definition of the term 'peaceful purposes' in a multilateral treaty. It is also worth noting that the term 'peaceful purposes' is used in the Non-Proliferation Treaty of 1968,[90] the 1972 Biological and Toxin Weapons Convention,[91] the Tlatelolco Treaty of 1967,[92] and the Statute of the International Atomic Energy Agency[93] to denote non-military purposes; like the LOSC, these treaties use this term without defining it, but it is clear from the object and purpose of these treaties that this term means 'non-military' under these treaties. Thus it does not necessarily follow from the absence of a definition of the term 'peaceful purposes' in the LOSC that this term should be interpreted as 'non-aggressive' rather than 'non-military'. There is no example of a treaty which defines the term 'peaceful purposes' as 'non-aggressive'.

However, since the implication of the 'non-military' definition of the term 'peaceful purposes' would be the demilitarisation of the oceans, one may ask whether the object and purpose of Articles 88 and 141 of the LOSC is to demilitarise the

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90 Preamble and Articles 3 and 4 of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968: 729 UNTS 161; 7 ILM 809; entered into force in 1970; as of 1st January 1992 there were 143 States party to it.

91 Articles 1 and 2 of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 1972: UKTS 11 (1976), Cmnd. 6397. There are 108 States party to it.

92 634 UNTS 326; 6 ILM 521. There are 25 States party to it. Brazil and Chile have ratified it but have not made declarations under Article 28(2).

93 Open for signature, 26 October 1956: 276 UNTS 3; 51 AJIL (1957), p.466. There are 113 States party to it.

world seas and oceans. Was it agreed during the UNCLOS III that the term 'peaceful purposes' means 'non-military'? Can these two short articles of the LOSC change the fundamental nature of the law of the sea?

Under Article 31(1) of the Vienna Convention on the Law of Treaties a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." (emphasis added) This means that the ordinary meaning of the term 'peaceful purposes' must be determined not in the abstract but in its context and in the light of the object and purpose of the LOSC. A special meaning can be given to a term in a treaty if it can be established that the parties to the treaty so intended.[94] The legislative history of the LOSC does not show that the States participating at the UNCLOS III intended to give a special meaning to the term 'peaceful purposes'. Therefore, one has to give the ordinary meaning to this term under the law of the interpretation of treaties. As suggested by Dekanozov,[95] the ordinary meaning of the term peaceful purposes would be 'non-military' because, as stated earlier, in State practice (i.e. in other treaties to which a vast majority of States are party) the term peaceful purposes has been employed to denote 'non-military' rather than 'non-aggressive' and there was no agreement at the UNCLOS III to give a special (or different) meaning to the term 'peaceful purposes'.[96]

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94 Article 31(4) of the Vienna Convention on the Law of Treaties.

95 R.V. Dekanozov, 'The principle of peaceful use in the law of the sea and space law', 12 Marine Policy (July 1988), pp.271, 275. But he argues that the term 'peaceful purposes' in the LOSC should be given a special meaning and interpreted as 'non-aggressive' rather than 'non-military'. In that case the States contending for a special meaning of the term will have to "demonstrate convincingly the use of the term with that special meaning": Advisory Opinion on the Western Sahara Case, ICJ Reports, 1975, pp.12, 53.

96 In the Admission of a State to the United Nations case the ICJ said that "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the one hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words." Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, ICJ Reports 1950, p.8. See also for similar views, Advisory Opinion, the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, ICJ Reports 1960, p.150; Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), ICJ Reports 1991, pp.53, 69-70.

According to Article 31(2) of the Vienna Convention, the context for the purpose of the interpretation of a treaty comprises, in addition to the text, including its preamble and annexes, any agreement or instrument relating to the treaty made in connection with the conclusion of the treaty. Hence, it could be argued that since the 1970 'common heritage' Declaration of the General Assembly was one of the instruments which constituted the foundation of the UNCLOS III process resulting in the conclusion of the LOSC, this Declaration and other subsequent agreements and resolutions adopted or concluded in connection with the achievement of the objectives of the Declaration, including the 1971 Sea-Bed Arms Control Treaty,[97] under which the term 'peaceful purposes' seems to imply 'non-military' rather than 'non-aggressive'[98] and the ZOP declarations should be taken into account while interpreting the 'peaceful purposes' provision of the LOSC. If the LOSC had defined the term 'peaceful purposes' it would not have been in accordance with the principles of the interpretation of treaties to argue that treaties concluded before the conclusion of the LOSC should be taken into account in interpreting the provisions of the LOSC.[99] Since the LOSC does not define this term, it can be argued that the whole network of treaties and instruments on the law of the sea that have emanated from the 1970 'common heritage' Declaration could be regarded as constituting the context for the interpretation of the LOSC.

Oppenheim's International Law puts it that: "[p]revious treaties between the parties, and treaties between one of the parties and a third State, particularly if *in pari materii* with the treaty being interpreted, may sometimes be referred to for purposes of clarifying the meaning of the text, as by showing the then contemporary usage of terms used".[100] Indeed, as stated by Thirlway, one aid to interpretation which has

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97 Cf. paras. 1 and 3 of the preamble to the Treaty.

98 Cf. para. 1 of the preamble and Article 1 of the Treaty.

99 This is because there exist a rule to the effect that the intentions of the parties are to be discerned from the object and purpose of the treaty. Moreover, the latest treaty is the most recent and normally the only authentic expression of the intention of the parties: See Oppenheim (1992), p.1271.

100 Oppenheim (1992), p.1274. See also the German Settlers in Poland case, PCIJ, Ser. B, No.6, pp.25-6, 38; Rights of United States Nationals in Morocco case, ICJ Reports, 1960, pp.6, 38; Italy-United States Air Transport Arbitration (1965), 45 ILR, pp.393, 417 and 420.

been employed by the ICJ from time to time "is reference to other treaties, particularly treaties of a similar nature, either between the same parties as the treaty which fails to be interpreted, or between one of those parties and a third State."[101]

According to Article 32 of the Vienna Convention on the Law of Treaties recourse may be had to supplementary means of interpretation, including the *travaux preparatoires* and the circumstances of the conclusion of a treaty, if the interpretation of a treaty provision under Article 31 leaves the meaning ambiguous or leads to a result which is manifestly absurd or unreasonable. However, as examined earlier, the *travaux preparatoires* of the LOSC is inconclusive with regard to the scope and meaning of the principle of the use of the seas and oceans for peaceful purposes; the disagreement between States on this issue was not resolved at the UNCLOS III.

Supposing that the term 'peaceful purposes' has more than one meaning and 'non-military' is not the only ordinary or natural meaning of the term, according to Article 31 of the Vienna Convention on the Law of treaties, the ordinary meaning must be understood not in isolation but in its context and in the light of the treaty's object and purpose.[102] McNair writes that "the true duty of the judge is to search for the common intention of the parties in using the language of the text".[103] Therefore, in this case it is difficult to establish that the authors of the LOSC intended completely to demilitarise the seas and oceans through the LOSC.

Although no State, including those States who did not sign the Convention for a variety of reasons (that includes Germany, the U.K. and the U.S.), objected to the inclusion of Articles 88 and 141 in the LOSC, there was no consensus in the

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101 H. Thirlway, 'The law and procedure of the International Court of Justice 1960-1989 (Part Three)', 61 BYIL (1991), pp.1, 66; See Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt case: ICJ Reports 1980, pp.92-93, para.43.

102 The PCIJ observed in its Advisory Opinion on the Competence of the ILO case that "[i]n considering the question before the Court upon the language of the Treaty, it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture, PCIJ Ser.B., No.2, p.23.

103 McNair, Treaties, p.373. According to Lauterpacht, "[i]t is the intention of the authors of the legal rule in question-whether it be a contract, a treaty or statute - which is the starting-point and the goal of all interpretation." H. Lauterpacht, 'Restrictive interpretation and the principle of effectiveness in the interpretation of treaties', 26 BYIL (1949), pp.48, 83.

UNCLOS III on the meaning of the term 'peaceful purposes'. While the Antarctic Treaty, the Treaty on Outer Space and the Moon Treaty provide certain specifics of the term 'peaceful purposes', the LOSC does not provide any such guidance. Further, the definitions of the term contained in these treaties are not identical. Which of the three treaties i.e. the Antarctic Treaty or the Outer Space Treaty or the Moon Treaty should be relied upon in interpreting Articles 88 and 141 of the LOSC?

Therefore, the phrase 'peaceful purposes' should be interpreted in a way which is not incompatible with other provisions of the LOSC, especially the freedom of navigation. Accordingly, the writer considers that this term means neither total prohibition on military activities nor the prohibition only on aggressive activities.

A legally justifiable definition of this term would ban military activities but allow peaceful navigation of warships and submarines because the freedom of navigation through the EEZ and the high seas is guaranteed for all ships, including warships, under the law of the sea and a reasonable definition of the term 'peaceful purposes' would have to accommodate this fundamental principle of the law of the sea. In other words, the law of the sea principle of the use of the seas and oceans for peaceful purposes would seem to entail the following:

1. Respect for the freedom of peaceful navigation of all ships, including surface warships and submarines, and military aircraft, provided that they do not engage in activities that are inconsistent with the principles of the Charter of the UN and other rules of international law.
2. Prohibition in the sea and ocean areas beyond the limits of national jurisdiction on the deployment of nuclear weapons and other weapons of mass destruction, the establishment of military bases and installations, the testing of nuclear weapons and other weapons of mass destruction and the conduct of military manoeuvres which amount to the creation of 'danger zones' or 'military zones' in an extensive area of the high seas or are directed against a coastal State.
3. Prohibition in such areas on the threat or use of force or any other hostile act or threat of hostile act that are inconsistent with the principles of the Charter of the UN and other rules of international law.

It is interesting to note that even in the Antarctic Treaty which completely demilitarises the Antarctic, the legal status of these waters is subordinated to the

preservation of the freedom of navigation.[104] Even the Tlatelolco and Rarotonga Treaties do not prohibit the mere transit of nuclear powered or nuclear weapon carrying vessels in the areas covered by the treaties concerned.[105]

If the purpose of the LOSC provisions on peaceful purposes was merely to imply 'non-aggressive' then such provisions would be superfluous in this Convention; there was already a universally accepted provision to the same effect in the Charter of the UN (i.e. Article 2(4)) and the LOSC had reiterated this provision in Articles 138 and 301. As suggested by Boczek, "in accordance with the principle of effectiveness, it could be argued that the peaceful purposes clauses must be allowed some legal effect other than that meant by Article 301; otherwise they would be redundant".[106]

The States which took part in the UNCLOS III debate on the item entitled "Peaceful uses of ocean space: zones of peace and security" seem not to have regarded the item merely as a reaffirmation of the provision of Article 2(4) of the Charter. If that were the case they would not have included the peaceful purposes principle in Article 141, after affirming the principles of the Charter in Article 138 in the same Section 2 of Part XI.[107] It is also arguable that the LOSC is not, and was not meant to be, a disarmament agreement and, therefore, the 'non-military' definition of the term 'peaceful purposes' would be incompatible with the "object and purpose" principle of the interpretation of treaties under Article 31(1) of the Vienna Convention on the Law of Treaties. The counter-argument for this would be that since paragraph 1 of the Preamble[108] to the LOSC states that its conclusion was "[p]rompted by the

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104 Article VI of the Antarctic Treaty of 1959.

105 For instance, Article 2(2) of the Rarotonga Treaty provides that "Nothing in this 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." See Chapter V, below, for a detailed discussion of the provisions of the Treaties of Tlatelolco and Rarotonga.

106 B.A. Boczek, 'The peaceful purposes reservation of the Convention on the Law of the Sea', in 8 Ocean Yearbook (1989), pp.329, 358.

107 Myjer writes that "[t]o interpret 'peaceful purposes' as a simple repetition of the principle of the ban on the use of force as embodied in the UN Charter would be without meaning. These general principles in the Charter have to be regarded as automatically forming part of such a UN convention and merely to repeat one of them several times serves no real purpose." E.P.J. Myjer, 'The law of disarmament and arms control: implications for the law of the sea', in Byers, Denuclearisation, pp.104, 112.

108 According to the ICJ in the Rights of the United States Nationals in Morocco case, the preamble of a treaty could be regarded as showing its object and purpose: ICJ Reports, 1952, pp.176,196.

desire to settle... all issues relating to the law of the sea" (emphasis added) and paragraph 4 speaks of the desire of the contracting parties to, *inter alia*, "promote the peaceful uses of the seas and oceans" it is difficult either to rule out or rule in anything concerning military activities from the 'object and purpose' of the LOSC.

According to the ILC, Article 31(1) of the Vienna Convention on the Law of Treaties "requires that a treaty shall be interpreted in good faith" and "in the light of its object and purpose".[109] The Commission goes on to state that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."[110] (emphasis added) Therefore, it can be argued that the definition just offered by the present writer of the term 'peaceful purposes' is in accordance with the principle that treaties should be interpreted in good faith[111] and in the light of the object and purpose of the treaty. This definition seems to be consonant with the intention of an overwhelming majority of States, which opposed at the UNCLOS III the view of the few developed States that the term 'peaceful purposes' meant merely 'non-aggressive,' and the subsequent State practice,[112] especially the 1986 ZOPC declaration which invokes the peaceful purposes principle as its main basis. Since an overwhelming majority of States Members of the UN supported the 1986 declaration (the U.S. was the only State to vote against it), such State practice may be invoked to elucidate the meaning of this principle. This declaration constitutes evidence as to the contemporary views of the States on the meaning of the term 'peaceful purposes.'[113]

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109 Commentary on the Draft Articles on the Law of Treaties by the ILC at its 80th Session: United Nations Conference on the Law of Treaties, Official Records (First and Second Sessions), 1971, p.39.

110 *Ibid.*

111 Cf. Article 26 of the Vienna Convention on the Law of Treaties which imposes upon parties to a treaty the obligation to perform it in good faith.

112 Article 31(3)(b) of the Vienna Convention on the Law of Treaties provides that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should be taken into account in interpreting the provisions of a treaty.

113 The ICJ has taken into account resolutions of the General Assembly in a number of cases in determining the existence of a rule of law or in ascertaining the meaning and scope of a rule of international law. See the Namibia case, ICJ Reports, 1971, pp.31, 78; the Western Sahara case, ICJ Reports, 1975, pp.31-33 and the Nicaragua case, ICJ Reports, 1986, pp.100-1, 103, 106-8.

The absence of a definition of the term 'peaceful purposes' in the LOSC does not mean that the term is of no significance. There are a number of other equally important principles and terms incorporated in the LOSC which are not defined; it does not follow from this that these principles are of no significance. The LOSC looks like a *loi cadre* or 'framework treaty' which enunciates principles, but leaves the practical aspects of the principles unresolved in the hope that they will be fleshed out by other arrangements among the parties. Even some of the crucial terms and principles of the Charter of the UN are not defined. For instance, international lawyers across the globe have been struggling since 1945 to ascertain the scope and meaning of the principle on the prevention of the use of force and the right of self-defence in international law.

It is not implied here that the mere incorporation of the principle of the use of the seas for peaceful purposes in the LOSC is enough for the demilitarisation of all oceans of the world and that no naval disarmament negotiations and treaties are necessary for this purpose. What is claimed here is that this principle offers a legal basis for taking further steps in this direction, i.e., towards gradual demilitarisation of the seas and oceans; the concept of the maritime ZOP could be one such step. The purpose of Article 88 seems to be to enunciate a general principle to govern control of various types of military activities in the high seas. Different methods could be adopted to develop detailed rules covering specific types of military activities through special arrangements; the concept of ZOP could be one of such arrangements.

It is worth noting that the ZOPC declaration, adopted after the conclusion of the LOSC, invokes as one of its legal bases the principle of the use of the high seas for peaceful purposes. In this state of affairs one could argue that the provisions of this declaration reflect the views of States supporting the declaration as to the meaning of the principle of peaceful purposes. From this stand-point a parallel could also be drawn between the 1970 Declaration on the Friendly Relations Among States, which has the function of interpreting and elaborating the principles of the Charter, and the

ZOPC declaration, which seems to elaborate the peaceful purposes principle with respect to the activities of States in the South Atlantic.[114]

IV. The Principle of the Freedom of the High Seas and ZOP

One of the hotly debated issues in the UN on the topic of ZOP is its consistency with the principle of the freedom of the high seas. The proponents of the concept of ZOP, who started the debate in the early 1970s by saying that if the concept of ZOP were incompatible with the freedom of the high seas it was appropriate to modify the latter in favour of the former, later started to maintain that the concept of ZOP is consistent with the modern principle of the freedom of navigation that encompassed the principle of the use of the high seas for peaceful purposes.

The opponents of the ZOP proposals, on the other hand, have kept changing their position on such proposals according to their political and security postures in any given period of time. For instance, the U.S. changed its position on the IOZP proposal at least three times in the period between 1971 and 1990 in response to the changing global and regional political climate. Similarly, the U.K., which had opposed throughout the 1970s the UN resolutions on IOZP saying that the 1971 IOZP declaration posed a danger to the freedom of navigation, broke ranks with its Western allies and voted for the 1986 UN declaration on the South Atlantic as a ZOPC- a declaration very similar to the IOZP declaration; France, the then FR Germany and the U.S. did not support the 1986 ZOPC declaration saying that it undermined the freedom of navigation. After a few years both France and the then FR Germany began to support the ZOPC Declaration, but the U.S. has continuously opposed it on the same grounds as those it invoked in 1986.[115]

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114 Although the General Assembly has no express authority to interpret treaties, "the scope of its competence is so broad that in the course of its deliberations it must necessarily deal with treaty situations... In making a declaration or recommendation based on a treaty interpretation, the resolution gains strength from the treaty obligation and may add strength to the treaty by affirming, clarifying or elaborating the obligation." Sloan, Resolutions, p.66.

115 See Chapter I, above.

As Potter writes, "[t]he phrase 'the freedom of the seas' means, and has always meant, many things to many men."[116] Several Western writers hold the view that the concept of the freedom of the high seas, like the law of nations, owes its birth to European or Western Christian civilisation.[117] Accordingly, the modern concept of the freedom of the seas, we are told, was propounded by Hugo Grotius, the famous Dutch jurist, in 1609 when his celebrated work *Mare Liberum* was published and this concept of *mare liberum* means an unlimited freedom of the seas.[118] This supposition of the concept of the freedom of the high seas has been relied upon to defend the use of the high seas for military purposes, including the testing and deployment of nuclear weapons and other weapons of mass destruction. However, there are authorities who disagree with this line of argument. Scott writes that Grotius made only "trifling additions" to the modern law of nations developed before him by the Spanish theologians.[119] Potter mentions several Spanish theologians and publicists, such as Vasquez, Donellus, and the Italian jurist Gentilis, who had argued before Grotius for freedom of navigation based upon the tenets of Roman law.[120] Anand argues that Grotius, an advocate of the Dutch East India Company, was influenced by the maritime practices of Asian States based on freedom of navigation.[121] He writes that

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116 P.B. Potter, The Freedom of the Seas in History, Law and Politics (1924), p.1.

117 J.H.W. Verzijl, 'Western European Influence on the Foundations of International Law,' in his International Law in Historical Perspective, Vol.I (1968),pp.435-36, 442; B.V.A. Roling, International Law in an Expanded World (1960), p.10; J.L. Kunz, 'Pluralism in legal and value systems and international law,' in his The Changing Law of Nations (1968), p.48; L. Oppenheim, International Law: A Treatise, Vol. I (edited by H. Lauterpacht, eighth edition, 1955), p.6.

118 H. Vreeland, Hugo Grotius: The Father of the Modern Science of International Law (1917), pp.44-59; W.S.M. Knight, The Life and Works of Hugo Grotius (1925), p.112; C. Meurer, The Program of the Freedom of the Seas: A Political Study in International Law (Translated from German by L.J. Frechtenberg, 1919), p.7; A. Nussbaum, A Concise History of the Law of Nations (1962), p.111; C.S. Edvards, Hugo Grotius: The Miracle of Holland: A Study in Political and Legal Thought (1981); E. Dumbauld, The Life and Legal Writings of Hugo Grotius (1964).

119 J.B. Scott, 'Introduction' to Grotius' De Jure Belli Ac Pacis Libri Tres, The Classics of International Law (1925). See also his other work: The Spanish Origin of International Law (1928); The Catholic Conception of International Law (1935).

120 Potter, *op.cit.* note 116, pp.51 ff. See also W.F. Butler, 'Grotius and the law of the sea,' in H. Bull et al. (eds), Hugo Grotius and International Relations (1990), pp.209-220; B. Kingsbury and A. Roberts, 'Introduction: Grotian thought in international relations,' in *Ibid.*, pp. 1-64; M. Disselhorst, 'Hugo Grotius and the freedom of the seas,' Grotiana, 3 (1983), pp.11-26.

121 "Hugo Grotius...taking his cue from the Asian maritime practice of free navigation and trade, propounded his famous doctrine of freedom of the high seas..." R.P. Anand, 'Recent

Grotius' "greatness lies in observing and presenting the maritime customs of Asian countries in the form of a doctrine, supported by logical arguments, Christian theology and the authority of venerable Roman law".[122] He argues that owing to the Asian States'

> "liberal traditions of freedoms of peaceful navigation and trade, and permission to foreign merchants to establish themselves by their own laws, the Europeans got an easy foothold in Asia ... The East Indies constituted the meeting ground of the Portuguese and the Dutch, the English and the French East Indian Companies, on the one hand, and the Asian sovereigns, on the other. The more these contacts became intensified, the more they affected each other's practices with a common framework of diplomatic exchanges and treaty making. Grotius, Spanish theologians, and other classical jurists, writing in the sixteenth and early seventeenth centuries, were not ignorant of these exchanges and Asian State practices, and were well aware of the newly emerging contacts between Europeans and Asians. Indeed, they actively participated in the process of formulating rules and procedures facilitating these contacts."[123]

Alexandrowicz writes that when the European adventurers arrived in Asia "they found themselves in the middle of a network of States and inter-state relations based on traditions which were more ancient than their own and in no way inferior to notions of European civilisation."[124] It appears that before the European adventurers set out for the exploration of the outside world, some of the ancient countries such as China, India, Egypt and Assyria, with advanced forms of civilisations, were practising peaceful and free navigation for their commercial trade.[125] "In fact the absence of

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developments in the law of the sea,' 26(3) International Studies (New Delhi, 1989), pp. 247-255, at 248.

122 R.P. Anand, Origin and Development of the Law of the Sea: History of International Law Revisited (1983), p.228.

123 *Ibid.* p.5.

124 C.H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries (1967), p.224. See also G.F. Hourani, Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times (1963); J.I. Miller, The Spice Trade of the Roman Empire: 29 B.C. to A.D. 641 (1969).

125 See, generally, H.G. Rawlinson, Intercourse Between India and the Western World: From the Earliest Times to the Fall of Rome (1926), pp.9-10; R.P. Anand, 'Maritime practices in Southeast Asia until 1600 A.D. and the modern law of the sea,'in his Confrontation or Cooperation?: International Law and the Developing Countries (1986), pp.60 ff; K.M. Panikkar, Asia and Western Dominance, 1498-1945 (1953).

armed shipping in the Indian Ocean helped the Portuguese when they arrived in Asia in gaining a foothold on the mainland and the islands."[126] Pinto writes that

> "The title '*Mare Liberum*', perhaps translated with more elegance than accuracy into English by generations of scholars as 'The Freedom of the Seas' may have been responsible (together with a certain predilection in the prevailing political climate for interpretations that tended toward maximum naval mobility) for the formulation of a principle somewhat wider than that contemplated by Grotius himself. Grotius' immediate objective was to establish a principle of freedom of trade, an activity which Portugal in the East, and Spain in the West, claimed to monopolise It was freedom of navigation for commercial purpose in the open sea, rather than a general theory of 'freedom of the seas' designed to limit coastal State jurisdiction, that is the aim of *Mare Liberum*."[127]

Writing in 1689 Sir Philip Meadows said of the high seas that "It is a way, it is common to the peaceable traders of all nations."[128] (emphasis added)

It is interesting to note that Grotius' idea was not greeted with acclaim by all European States; this principle became universally accepted when, following the Industrial Revolution in Europe, the European Powers found it useful and necessary for their world-wide trade. In the search for markets, cheap labour and raw materials the European States were competing for the colonisation of the countries of other continents. The principles of freedom of the high seas served the interests of the Western States in their exploitation of the countries of other continents. Since colonisation was achieved often through ruthless policy and the use of violent means against what the European Powers considered as the "backward peoples" of Asia and Africa, the European Powers began to interpret the freedom of the high seas according to their own convenience and in broader terms, meaning essentially non-regulation and *laissez-faire*. Prior to the colonisation process the high seas were regarded as free highways to be used for commerce and communication. Although the

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126 Anand, op. cit. note 122, p.227.

127 M.C.W. Pinto, 'The new law of the sea and the Grotian heritage,' in International Law and the Grotian Heritage: A Commemorative Colloquium held at the Hague on 8 April 1983 on the Occasion of the Fourth Centenary of the Birth of Hugo Grotius (edited and published by T.M.C. Asser Instituut, 1985), p.54, at 65-66.

128 P. Meadows, Observations Concerning the Dominion and Sovereignty of the Seas (1689), pp. 6-7. As quoted in Colombos, International Law of the Sea (3rd ed., 1954), p.53.

modern world has done away with colonisation, it still holds on to some of the legacies of the old world; the interpretation of the freedom of the high seas to mean non-regulation, or permitting the use of the high seas for unrestricted military purposes, is one such legacy of the old world.

Although the great Powers appear to defend the sanctity of the principle of the freedom of the high seas, they, along with other States, have modified this principle on a number of occasions when necessitated by their political, military and economic interests. The Truman Proclamation of 1945 could be regarded in effect as a first notable challenge to the freedom of the seas in modern times; it introduced the idea of the appropriation of the sea-bed. During both World Wars large areas of the seas were closed by the belligerent maritime Powers to the great inconvenience of smaller, neutral and non-belligerent States.[129] The abuse of the principle of *mare liberum* intensified after World War II. The great Powers carried out hydrogen and nuclear weapon tests and naval military exercises thus creating 'danger zones' in vast areas of the high seas;[130] they, in effect, temporarily appropriated parts of the high seas.

The States supporting the idea of maritime ZOP do accept the validity of the principle of the freedom of the high seas, but not to the extent claimed by the great Powers. They consider that the interpretation by the great Powers means unequal freedom or freedom only for the few and mighty. They wish to replace non-regulation with international regulation and management and claim that the concept of maritime ZOP is one of the measures designed to regulate the use of the seas and oceans of the regions concerned.

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129 For instance, during World War I, the U.S. established 30 such areas and, during World War II, over 40. See G.P. Politakis, 'Waging war at sea: the legality of war zones', 38(2) NILR (1991); K. Zemanek, 'War Zones', in Bernhardt, Encyclopaedia of PIL, Vol.4 (1982); Choon-ho Park, 'The 50-mile military boundary zone of North Korea', 72 AJIL (1978) p.866.

130 During French nuclear tests on Mururoa Atoll in the South Pacific the French government had designated 'prohibited zones' or 'dangerous zones' covering a large area of the high seas. See N. Grief, 'Nuclear tests and international law' in Pogany, Nuclear Weapons, p.229. Similarly, the U.S. during its nuclear tests in the Marshall Islands established 'danger areas' sometimes covering an extensive area of the high seas. Margolis says that the establishment of such areas "cannot be reconciled with freedom of navigation on the high seas and in the air space above the seas." E. Margolis, 'The hydrogen bomb experiments and international law' 64 (5) YLJ (April, 1955), pp.629, 635. See also Boczek, *op.cit.* note 63, pp.359, 367. Nagendra Singh and E. McWhinney, Nuclear Weapons and Contemporary International Law (1989), pp.185-203.

All States agree that commercial shipping must be protected: the question is, how to protect it. Many developing States maintain that the best way of protecting commercial shipping is by the regulation of the seas, by creating maritime ZOP and by adhering to the principle of the use of the high seas for peaceful purposes and not by deploying armed forces in the seas. The great Powers, however, oppose this idea and maintain that their naval presence enhances the security climate in a region, deters dictators from disrupting peaceful passage and inhibits otherwise potentially unchecked terrorist and pirate activities and similar attempts to disrupt commercial shipping.

Yet the issue becomes more complicated when the navies intended to protect commercial shipping seek to influence the affairs of the States ashore and intervene when their governments consider it necessary. These are the situations the States supporting the concept of ZOP would like to avoid by establishing a ZOP in the area. The purpose of the deployment of their navies by naval Powers in the high seas is not only to protect commercial shipping but also to enhance their own economic and strategic interests.

It is interesting to note that, following the Soviet invasion of Afghanistan in December 1979, the U.S. asserted that "[a]n attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force."[131] This shows that the outside military presence in the Indian Ocean is not only to protect commercial shipping but also to influence the affairs of the States of the region. Most third world States therefore argue that the great Power military presence in a region poses a threat to the sovereignty and independence of the States of the region. This view has been endorsed by the General

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131 This statement was made by President Carter in his 23 January 1980 State of the Union address to the Congress of the U.S. quoted in R.N. Haass, 'Arms control at sea: the United States and the Soviet Union in the Indian Ocean, 1977-78,' The Journal of Strategic Studies (1987), p.231,241.

Assembly resolutions on the IOZP and the declarations of the meetings of the Non-Aligned countries.[132]

The major maritime Powers, too, do acknowledge this fact; when it suits them politically they even support this view. For instance, in the aftermath of the Soviet invasion of Afghanistan, the U.S., the U.K., France and other like-minded States supported the General Assembly resolution on the IOZP which states, *inter alia*, that "the continued danger posed by the military presence of the great Powers in the Indian Ocean area, conceived in the context of their confrontation, gives greater urgency to the need to take political steps towards the early achievement of the Declaration of the Indian Ocean as a Zone of Peace".[133] The Western States continued to support this type of resolution until the Soviets had left Afghanistan. Since the Soviet withdrawal from Afghanistan, these States have reverted to their pre-1980 position and opposed the view that their military presence in the region poses any threat to the security of the States of the region.

The opponents of the concept of maritime ZOP have also argued that the transformation of the high seas areas into ZOP would mean reverting from the age-old principle of *mare liberum* to the concept of *mare clausum*. Yet it should be emphasised here that international regulation is not the same as *mare clausum*. As Allott writes, the sea is "neither *mare liberum* (Grotius) nor *mare clausum* (Selden) but *mare nostrum* (our sea)."[134] He argues that the word 'our' is a participatory pronoun rather than a possessive pronoun. Therefore, the concept of *mare nostrum* indicates "a relationship not of possession but of participation"[135] and participation naturally entails a regulated participation.

This idea of *mare nostrum* has been a driving theme in the post-WW II period and is likely to gain in strength in the years to come. Indeed, strictly speaking, the deep sea-bed mining regime of the LOSC, the 1971 Sea-Bed Arms Control Treaty and

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132 For instance, see the Final Political Declaration of the Conference of Foreign Ministers of Non-Aligned Countries held at Luanda, Angola in 1985 in A/40/854-S/17610.

133 Resolution 35/150 of 12 December 1980, adopted unanimously.

134 P. Allott, 'Mare Nostrum: A New International Law of the Sea' 86 AJIL (1992), pp.764, 773.

135 *Ibid.*

other environmental protection regimes are all steps towards *mare nostrum*. Many international conventions on the law of the sea concluded in the second half of this century have incorporated the theme of international regulation of the seas in the interests of humankind as a whole. These conventions have modified the principle of the freedom of the high seas in a dramatic way and the concept of maritime ZOP is presented as just another step in this direction. This idea of *mare nostrum* of the seas and oceans is perhaps one of the major contributions of our generation to the age-old history of the international law of the sea. And it is this contribution that has changed the fundamental character of this branch of the law.

The idea of the creation of special regimes in the high seas is not completely new to international law. For instance, Article II of the Treaty of Paris of 1856 had neutralised the Black Sea.[136] Oppenheim writes that "certain parts of the open sea [by which he means the high seas] can become neutralised and thereby be excluded from the region of war".[137] O'Connell also agrees that "a regional cordon of neutral waters" could be drawn to insulate neutrals from belligerency:

> "This could be conceived as an analogue of the various extraterritorial zones which some States are advocating to cope with pollution or the protection of natural resources. The fact that belligerency at sea could interfere with anti-pollution measures or with exclusive exploitation of the sea and its bed adds plausibility to the idea. As it stands, international law would not directly countenance such measures, but the history of the South American neutrality zone of 1939 does underscore the fact that such a zone can be made effective up to a point if the diplomatic situation is such as to require that the neutrals be placated."[138]

The 1939 Declaration of Panama, adopted by the foreign ministers of the American States, established a South American neutrality zone in the high seas extending roughly 300 miles offshore. The objective of the zone was to prohibit "the

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136 46 BFSP 13. This neutralisation was abolished by Article 1 of the Treaty of London of 1871: 61 BFSP 7.

137 L. Oppenheim, International Law Vol. I (eighth edition, 1955, edited by H. Lauterpacht), p.591.

138 O'Connell, Sea Power, p.162.

commission of any hostile act by any non-American belligerent nation, whether such hostile act be attempted or made from land, sea or air."[139]

As O'Connell writes,

> "[t]he concept of the freedom of the high seas is neither absolute nor static: it embodies the balance of jurisdictional functions among States which any time best serve the community of nations, and its content is subject to constant modification as the community adjusts itself to the solution of new problems. Where it is generally thought acceptable that States should insist upon certain conduct on or over the high seas, the abstract freedom of the sea will not stand in the way."[140]

Of course, the ZOP implies the imposition of certain restrictions on the navigation of the waters of the zone by warships but they are designed to restrict those activities of warships that are inconsistent with the principles of the Charter of the UN and other rules of international law. The mere transiting of a ZOP by warships is not prohibited under the concept of ZOP; nor are goodwill visits or stopovers to deal with accidents, the rendering of humanitarian assistance, hot pursuits and the use of military personnel or equipment for peaceful scientific research. The same conditions apply to navigation by military aircraft. Thus, it could be argued that the idea of limited demilitarisation of a ZOP with exception being made for 'peaceful passage'[141] by all ships, including warships, would not be inconsistent with the principle of freedom of navigation.

Oxman states that Article 87 of the LOSC and its customary character "supports the conclusion that warships, absent specific new restraints to the contrary, remain

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139 As quoted in O'Connell, *Ibid.*

140 He cites the case of Air Defence Identification Zones, which extend far into the high seas off the coasts of certain States, as one of the examples of the general acceptance of new regimes. D.P. O'Connell, The International Law of the Sea, Vol. II (1984) (edited by I.A. Shearer), p. 796. Burma, Canada, Iceland, India, Japan, North Korea, Oman, the Philippines, Sweden, Vietnam and the USA have declared such zones and the US zone off the shores of Alaska extends up to 380 miles. See E. Caudra, 'Air Defence Identification Zones: creeping jurisdiction in the airspace,' 18(4) VJIL (1978-79), p. 485.

141 The present writer would define the term 'peaceful passage' as meaning a peaceful navigation by surface warships and submarines during which they must refrain from: any threat or use of force against the sovereignty, territorial integrity or political independence of the States of the region concerned; any interference in the affairs of these States; any exercise or practice with weapons of any kind; and other activities inconsistent with the principles of the Charter of the UN and other rules of international law.

free in principle to do things that warships have customarily done, including manoeuvres, patrol, anchoring, surveillance, and weapons exercises."[142] However, there seems to be no principle under international law that provides for a positive right to deploy weapons and conduct naval manoeuvres and weapons exercises in the high seas. If such activities are inconsistent with any rule of international law, such practice of States cannot be considered to have created new rules of customary international law permitting such activities.

The practice that writers, like Oxman, invoke in support of their argument is a relatively new practice. The deployment of nuclear weapon-carrying vessels, the testing of nuclear and other weapons of mass destruction, the creation of 'danger zones' for such purposes in the high seas are all practices of few States which began less than five decades ago when advances in modern technology made such activities possible.[143]

This may be one reason why such activities have been justified under the right of self-defence rather than the freedom of the high seas. It is worth noting here that during nearly 20 years of debate on the IOZP in the UN General Assembly, its First Committee and in the *Ad Hoc* Committee on the Indian Ocean, none of the naval Powers invoked the principle of the freedom of the seas to justify their military presence in the high seas: the argument invoked in this regard has always been the right of self-defence.[144]

When the U.S. ratified Additional Protocol I to the Treaty of Tlatelolco it said in its Understandings that the Treaty does not "affect rights under international law of a State adhering to this Protocol regarding the exercise of the freedom of the seas, or regarding passage through or over waters subject to the sovereignty of a State."[145] In the face of this understanding and the prohibition in the Treaty of, *inter alia*, the

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142 Oxman, *op.cit.* note 63, pp.809, 826.

143 O'Connell states that "There is a misconception running through the literature of international law that, in the past, battle fleets in time of peace could occupy great tracts of ocean while on manoeuvres, and that limitation on the freedom of the seas are thus inherent." O'Connell, Sea Power, p.164.

144 See Chapter I, above.

145 28 ILM (1989), pp.1400, 1410.

testing, use, installation and deployment of nuclear weapons in the Latin American NWFZ, it could be said that the U.S. did not regard such activities as falling within the scope of the principle of the freedom of the high seas. Unlike the U.S., France said in its interpretative declaration on signing Protocol II to the Treaty that the undertakings set forth in the Protocol did not present an obstacle to the full exercise of the right of self-defence.[146]

The scope of the freedom of navigation is not absolute. This freedom is subject to the principle of 'reasonable regard' for the interests of other States (who may claim that their interests lie in the observance of the rules of ZOP), to Article 2(4) of the Charter of the UN and to the principle of the use of the high seas for peaceful purposes. In fact, as discussed in the chapter that follows, the third restraint emanates in part from the second. Because the Charter outlaws the use of force and the only exception to Article 2(4) is the right of self-defence, O'Connell advances the hypothesis that the high seas are an area in which belligerent operations are now prohibited.[147] "In this case", Young argues, "only the territorial seas of the belligerent States would remain available as locations for a legitimate sea-battle or perhaps (as a further consequence) for any offensive naval deployment, except those specifically demanded by the defence and maintenance of the neutrality of the high seas."[148]

Indeed, both O'Connell and Young appear vindicated through the incorporation of the peaceful purposes principle in the LOSC. This principle forbids non-peaceful use of the high seas and the EEZ. Thus, the institution of the freedom of the high seas has been modified to a considerable extent by the Charter of the UN and other long established as well as emerging rules of the law of the sea, including the peaceful purposes principle, and the concept of maritime ZOP finds a legal basis within this modified framework of the new law of the sea.

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146 *Ibid.*, p.1415.

147 D. P. O'Connell, 'Naval policy and international law and international relations', in Britain and the Sea (the Collected Papers and Records of the Conference held at the Royal Naval College, Greenwich, 12-14 September 1973), pp.23-35 at 30.

148 E. Young, 'New laws for old navies: military implications of the new law of the sea', XVI(6) Survival (Nov/Dec 1974), pp.262, 267.

CHAPTER III

The Relationship of Maritime Zones of Peace with other Principles of International Law

I. Introduction

The examination of the UN Declarations on ZOP in Chapter I demonstrates that while the principle of the prohibition on the use or threat of force is relied upon by the proponents of ZOP, the right of self-defence is invoked by those States which show caution in supporting the attempts of the UN to create ZOP through General Assembly resolutions.[1] Thus, the whole saga of the establishment of maritime zones of peace has centred on these very fundamental issues of international law, e.g., the principle of the prohibition on the use of force and the right of self-defence, and paradoxically, both groups of States have found support for their positions in international law.

Therefore, an attempt will be made in this chapter to examine the relationship of ZOP with these principles of international law and other principles concerning the use of the seas and oceans for military purposes and assess the legal status of the UN General Assembly declarations on ZOP.

II. The Principle of the Non-Use of Force and Maritime ZOP

All ZOP proposals cite the general international law principle of the prohibition on the use of force as a legal basis. Of course, all States recognise that the warships and military aircraft of the maritime Powers should not use any part of the oceans for

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1 Nevertheless, when it is politically convenient States have frequently changed their generally held positions on a given issue. For instance, as Muni points out, while the ZOPFAN proposal, which has the endorsement of all the sub-regional members, is rejected by the U.S., similar proposals, such as the proposal for the creation of a NWFZ in South Asia, which do not command unanimity among regional or sub-regional States are enthusiastically supported. S.D. Muni, 'Peace through confidence-building: prospects in the Indian Ocean', Disarmament, Vol. XII, No.3 (Autumn 1989), pp.129-139, at 137.

the threat or use of force against the independence, sovereignty and territorial integrity of other States.

However, the problem lies in defining which activities are contrary to Article 2(4) and which are not. The major naval Powers maintain that their military presence in a ZOP is not inconsistent with the Charter of the UN because such presence is for peaceful purposes and in accordance with their right to individual and collective self-defence. They argue that their military presence is to safeguard the commercial shipping in the seas and oceans from a potential threat not only from terrorists and pirates but also from the coastal States. Yet, the developing coastal States consider great Power military presence in the marine zones near their shores to pose a threat to the sovereignty and independence of coastal States. Article 2(4) of the Charter reads as follows:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

This article requires States to refrain not only from the use of force but also the threat of force in their international relations. Insofar as the effect of the provision 'against the territorial integrity or political independence of any State' is concerned, according to Brownlie, this provision "was intended not to be restrictive in effect but, on the contrary, to give more specific guarantees to small States."[2] Of particular significance for the purpose of this study is the phrase 'in any other manner inconsistent with the Purposes of the United Nations'. Referring to this phrase Henkin writes that "[t]hat provision would seem to mean that force may not be used contrary to the purposes of the United Nations that are formally expressed in the Charter... It would seem to suggest that any use of force between States whatsoever, if not prohibited by the first

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2 I. Brownlie, 'The maintenance of international peace and security in outer space', 40 BYIL (1965), pp.1, 8.

clause of Article 2(4), is prohibited by the last phrase".[3] Therefore, there can be little doubt that the principle of the prohibition on the threat or use of force applies to the activities in the high seas. This position is strengthened by Article 301 of the LOSC.

It is submitted that one of the principal objectives of the deployment of navies in various parts of the globe is, *inter alia*, to exert pressure on the States of the region concerned. Shyam argues that "[i]t is difficult to justify the naval-presence mission in terms of the good of the international community since its objective is to threaten and impose."[4] O'Connell describes the role of the navies of major naval Powers in the following terms:

> "navies can play the part of the criminals as well as of regional crime squads, and it is sometimes difficult to know which of the two roles they are in fact playing, especially when their missions are invariably veiled in the garb of 'self-defence.' This ambiguity of character is intensifying, and with it the difficulty of legal control of the functions of sea power."[5]

He goes on to state that

> "navies can introduce into a situation an element of uncertainty that serves the diplomacy of tension by increasing the options of either intimidation or withdrawal."[6]

Owing to this aspect of the role of navies, the military presence of major Powers off the shores of third world littoral States in various regions has been perceived by these States, who have no or very little capability to counter the threat posed, as a force ready for intervention as and when deemed necessary by the great Power concerned. "Naval Presence", according to the U.S. Department of the Navy, "can be modulated to exert the precise influence best suited to U.S. interests. Depending upon the

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3 L. Henkin, 'General Course on Public International Law', Recueil Des Cours (1989-IV), p.148.
4 M.R. Shyam, 'The Convention on the Law of the Sea and military interests in the Indian Ocean', 15 ODIL (1985), pp. 147, 164.
5 O'Connell, Sea Power, p.1.
6 *Ibid.*, pp.3-4.

magnitude and immediacy of the problem, naval forces may be positioned near areas of potential discord as a show of force or as a symbolic expression of support and concern."[7]

This is one reason why several of the third world countries view the great Powers' activities in their regions as a destabilising factor; the great Powers' presence fosters instability because it allows them to be involved in regional issues and thereby secure access to regional life - its resources, markets, elite contact and military activities.[8] They add that since World War II the so-called 'blue water navies' of the great Powers have played a vital role in intimidating several third world countries on a number of occasions in pursuit of the great Powers' political, economic and strategic objectives.

Indeed, the UN General Assembly resolutions on the IOZP adopted unanimously between 1980 and 1989 not only acknowledge "the continued danger posed by the military presence of the great Powers in the Indian Ocean area, conceived in the context of their confrontation" but also states that "all other foreign military presence in the area whenever it is contrary to the objectives of the Declaration of the Indian Ocean as a Zone of Peace and the purposes and principles of the Charter of the United Nations, further gives greater urgency to the need to take practical steps towards the early achievement of the objectives of the Declaration."[9]

During the Cold War period both the U.S. and the USSR claimed that each other's military presence in the Indian Ocean area was against Article 2(4) of the Charter. For instance, the excerpts cited above from the 1980 resolution on the IOZP (Resolution 35/150, adopted unanimously) were considered by each side to be directed against not its own military presence but against the other side's military presence in the region. However, the third world States, especially the non-aligned States, regarded all foreign military presence in the area as contrary to the purposes and principles of the UN Charter. For instance, the Final Document of the 1979

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7 The U.S. Handbook, p.4.3.
8 See A. Kapur, The Indian Ocean (1985), p.xxi.
9 See Resolution 35/150 of 12 December, 1980.

Meeting of the Littoral and Hinterland States of the Indian Ocean considered the great Power military activity in the region as "a threat to stability and security in the Indian Ocean".[10]

The question here is whether or not such perceived threat amounts to the threat of force in the sense of Article 2(4) of the Charter.[11] Until the naval forces play a role in threatening or using force against an individual State or States it seems difficult to establish that the deployment of naval forces or the establishment of military bases by outside Powers in a region constitutes a threat or use of force against these States in the sense of the first clause of Article 2(4). If, however, it can be established that the deployment of the navies or the maintenance of military bases is directed against an individual State or a group of States, which is very difficult to establish, then such deployment would be inconsistent with Article 2(4).

Schachter implies that since the deployment of military forces or missiles has unstated aims and its effect is equivocal, a disproportionate deployment of such forces and missiles by States in the context of their political relations with political target States "may justifiably lead to an inference of a threat of force against the political independence of the target State. An examination of the particular circumstances is necessary to reach that conclusion, but the applicability of Article 2(4) in principle can hardly be denied."[12]

Further, if an overwhelming majority of States declares a maritime zone as a ZOP for the maintenance of international peace and security in accordance with the Purposes of the UN, then other States which violate the rules of ZOP by deploying their navies or maintaining military bases could be regarded as acting against the last clause of Article 2(4). The measures of forcible preventive self-defence taken outside national territories and in a ZOP against the principles of the zone could be regarded as use of force against Article 2(4). This is because under this article, States must

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10 U.N.Doc.A/34/45, p.14.

11 See for a discussion on the nature and scope of the notion of 'threats of force' R. Sadurska, 'Threats of force', 82 AJIL (1988), p.239 ff.

12 O. Schachter, 'The right of States to use armed force', 82 Mich.LR (April/May 1984), p.1620 at p.1625.

refrain in their international relations from the threat or use of force in any other manner inconsistent with the Purposes of the UN.

The creation of ZOP by the General Assembly is an act of the UN since it is in accordance with the Purposes of the UN.[13] Crawford's opinion is illuminating:

> "where an organ of the United Nations performs an act pursuant to and *intra vires* the Charter, that act is an act of the United Nations for all purposes. Where an act is not illegal... and is authorised by the appropriate organ by its normal voting procedure, that act will be an act of the Organisation, provided that it comes within the purposes of the United Nations under Articles 1 and 2."[14]

Thus the establishment of a ZOP by the General Assembly, since it is *intra vires*, would be an act of the UN falling under Article 1 of the Charter; it can be regarded as a collective act designed to prevent threats to the peace under paragraph 1 of Article 1 of the Charter.[15] Indeed, the authority of the General Assembly to establish a peace-keeping force rested on this provision of the Charter.[16] As acknowledged in the UN resolutions on IOZP, the deployment of powerful navies with nuclear weapons[17] and other weapons of mass destruction in the marine zones near the shores of the coastal States of the respective maritime zones can amount to a threat to the peace of the region,[18] the prevention and removal of which is one of the fundamental purposes of the UN.[19]

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13 See D. J. Harris, Cases and Materials on International Law (4th edn., 1991), p.824.

14 Crawford, Creation of States, pp.327-28.

15 Halderman suggests the development of General Assembly powers in reliance on this provision of the Charter: J.H. Halderman, 'Legal basis for United Nations armed forces', 56 AJIL (1962), pp.971-96.

16 Expenses case, ICJ Reports, 1962, pp.163, 168 and separate opinion of Judge Spender, pp.185-7. See N.D. White, The United Nations and the Maintenance of International Peace and Security (1990), Part III.

17 The use of these weapons has been declared illegal and a crime against humanity by the General Assembly. Resolution 1653 (XXVI) of 1961 and 33/71 B. This view is generally supported by publicists. See I. Brownlie, 'Some legal aspects of the use of nuclear weapons,' 14 ICLQ (1965), p. 437 at 440; G. Schwarzenberger, The Legality of Nuclear Weapons (1958); N. Singh, Nuclear Weapons and International Law (1959); A.S. Miller and M. Feinrider (eds), Nuclear Weapons and Law (1984).

18 According to Sadurska "a threat can be deduced from certain positive actions (for instance, ... engaging in military manoeuvres ... or deploying certain weapons)". Sadurska, *supra* note 11, p.243. In fact, when the Soviet Union began to construct sites for ballistic missiles in Cuba and to deliver weaponry to the island in 1962 the U.S. regarded these activities as "offensive

III. The Right of Self-defence and ZOP

During the debate on the ZOP proposals in the UN in the last two decades the scope and nature of the right of self-defence has been a matter of acute controversy. While the proponents of the proposals for ZOP have argued that the creation of ZOP is a measure of self-defence designed to protect the security of the States within the zone,[20] certain maritime Powers have objected to ZOP proposals because they view the concept of ZOP as a danger to the right of self-defence.

These Powers invoke the right of self-defence to justify the deployment of their navies in the zone. For instance, the U.S. representative said in a statement in 1983 to the *Ad Hoc* Committee on the Indian Ocean that the U.S. military personnel in the Indian Ocean "perform duties well established by international custom and practice. All United States military activities in the Indian Ocean region are fully consistent with the principles of the United Nations Charter, in particular Article 51."[21] However, this attempt to dress such military presence in legal garb has come under sustained criticism from other States.

Article 51 of the Charter of the UN does not define the right of self-defence;[22] nor does it accord this right to States.[23] This right could be regarded as an attribute of state sovereignty as implied by the phrase "inherent right of individual and collective

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military preparations" and a strategic threat. President Kennedy's broadcast to the nation on 22 October 1962. As cited in Sadurska, *Ibid.*, pp.254-5. This is also the line of argument invoked by the littoral and hinterland States of the Indian Ocean against the deployment of nuclear and other weapons of mass destruction by the major Powers in the Indian Ocean and especially the establishment of a permanent military base by the U.S. in Diego Garcia, an Indian Ocean island. See also J. Evensen for similar line of arguments, 'The law of the sea regime,' in Byers, Denuclearisation, pp.77 at 85.

19 Article 1(1) of the Charter of the UN.

20 Pinto writes that the IOZP declaration "finds a legal basis in the right of the States to take measures of self-defence appropriate in an era when the speed of ships, aircraft and weapons delivery systems make obsolete the rigid adherence to any principle that such measures may only be legitimised in the face of armed attack." M.C.W. Pinto, 'The Indian Ocean as a Zone of Peace' in Byers, Denuclearisation, pp. 147-148.

21 A/AC.159/L.55, p.30.

22 See for an analysis of two different schools of thought about the nature and scope of the right of self-defence, O. Schachter, 'Self-defence and the rule of law' 83 AJIL (1989), pp.259-277.

23 See generally for opposing views: D. Bowett, Self-Defence; H. Waldock, 'The control of the use of force by States in international law', 81 Recueil des Cours (1952), pp.455-514; J. Brierly, The Law of Nations (6th edn., edited by H. Waldock (1963)), pp.397-402; O. Schachter, 'The right of States to use armed force', 82 Mich.LR (April/May 1984), pp.1620-1646.

self-defence" in Article 51. The purpose of Article 51 is to prescribe the conditions under which States can use force to defend themselves. It regards acts of forcible self-defence as legitimate only in cases where an "armed attack occurs against a Member of the United Nations." Such acts of self-defence should be of an essentially temporary nature: "until the Security Council has taken measures necessary to maintain international peace and security."

If we were to accept that preventive measures should also be included in the broader definition of self-defence[24] then we will have also to recognise that the States of a region have a right to prevent the military Powers from stationing their war machine in the region concerned. If certain States can create 'defensive sea areas' or 'maritime control areas' under the 'right of self-defence'[25] there is no reason why other States cannot create ZOP in the areas off their shores requiring other States to observe certain rules designed to protect their security.

It could also be argued that, if the military Powers have a right to use the high seas for preparations for self-defensive war purposes, other States with neither the means nor the desire to confront such military Powers also have a right to take preventive measures by creating maritime ZOP or demilitarised zones in order to prevent the military Powers from stationing their war machine in the zones concerned. Referring to the IOZP declaration Pinto argues that

> "The peace zone concept, in essence, is a manifestation of the right of collective self-defence evolving in response to the development of modern weaponry and the complex shifting patterns of derived political tensions."[26]

Both measures, i.e., the creation of military zones and ZOP, are preventive measures designed to enhance the security of the States concerned.

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24 This is how the right of self-defence has been interpreted in The U.S. Handbook, p.2.7.

25 The creation of such areas is regarded as permissible in *Ibid.*

26 Pinto, *op.cit.* note 20, p.147-148.

Moreover, while preventive measures in the form of preparations for a situation of violent conflict are subject to criticisms under contemporary law of self-defence (because, strictly speaking, no right of self-defence may be claimed without the occurrence of an armed attack), the preventive measures in the form of preparations for a non-violent and conflict-free zone (i.e., the zones of peace) are not open to such criticisms since these preventive measures do not envisage the use of force. Additionally, since States must have "reasonable regard to the interest of other States in their exercise of the freedom of the high seas,"[27] the naval Powers should respect the principles of the maritime zones of peace in their exercise of the freedom of the high seas for any purpose, including self-defence.

The reliance of the naval Powers on the right of self-defence to justify their military presence in the oceans of the world suffers from a number of legal flaws. Of course, States are entitled to maintain and develop their defence capability within their territorial limits, including their territorial waters and to protect their independence and sovereignty.

That is not to say that such right outside the territorial sea falls under the purview of the right of self-defence embodied in Article 51 of the Charter of the UN and permits States to use the areas of *res communis* character for individual preparations for self-defensive wars.[28] It is also accepted that the right of States to defend their national territory also covers the right to defend their warships and military aircraft, wherever they may be located.[29] Since they are the direct organs of a State they can exercise the right of self-defence, i.e., the right to defend themselves from attack from the armed forces of other States, wherever they may be, should this occur.

But it is doubtful whether the right of self-defence extends to the protection of merchant shipping and civil aircraft outside national territory. The opinion of

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27 Article 2 of the HSC and Article 87 of the LOSC.

28 See for a very useful discussion of this topic A.V. Lowe, 'Self-defence at sea', in W.E. Butler (ed.), The Non-Use of Force in International Law (1989), pp.185-202.

29 See on self-defence by vessels on the high seas: Brownlie, Use of Force, p.305; McNair, International Law Opinions, vol.I, p.274; Hackworth, Digest of International Law, vol.7, pp.365-6; Lowe, *op.cit.* note 28.

publicists is divided on the issue.[30] Supposing that the case in favour of such extension can be made, the degree of force employed in self-defence must be proportionate to the original threat or use of force.

Even if the existence of a right of anticipatory self-defence were to be accepted the deployment of navies in the high seas cannot be justified under such a right. The notion of anticipatory self-defence is based on the presumption that Article 51 of the Charter is not an exclusive definition of the right of self-defence and the 'inherent right' of self-defence which was vested in States prior to, and independent of, the Charter, i.e., customary law, still exists. If so, the 'Caroline doctrine' comes into play and under this doctrine an anticipatory right of self-defence can be exercised if a State can establish the existence of: "the necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation".[31]

The 'Caroline doctrine' or the pre-Charter customary rule of self-defence that could be said to exist independently of the Charter does not encompass the right to use areas outside national jurisdiction to prepare for self-defence or to use the high seas for either offensive or self-defensive war purposes.[32] Further, the exercise of this right is also subject to the requirement of proportionality. The essence of the right of self-defence is the right to restore the military and political *status quo ante* and not a right to prepare for self-defence.[33] Brownlie rejects the theory that the right of self-defence under the Charter of the UN includes a right to prepare for self-defensive wars. He states that: "[t]his argument seems to be only a sophisticated variant of

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30 See generally, Kelsen, The Law of the United Nations (1950), p.791 *et seq.*; Waldock, 'The regulation of the use of force by individual States in international law', Recueil Des Cours (1952-II), 451-517; Bowett, Self Defence, Part I; Brownlie, Use of Force, Chapt. XIII; Stone, Legal Controls of International Conflict (1959), pp.243-281; Lowe, *op.cit.* note 28.

31 29 BFSP 1137-1138; 30 BFSP 195-196.

32 Brownlie holds the view that the Caroline doctrine does not represent the law today and points out certain organic faults in this doctrine. Brownlie, Use of Force, pp.42-43, 429. See also I. Brownlie, 'The principle of non-use of force in contemporary international law', in Butler, *supra* note 28, pp.17-27.

33 Bowett, Self-Defence, pp. 5-6, 11; Kinley, 'The law of self-defence, contemporary naval operations, and the United Nations Convention on the Law of the Sea', in E.D. Brown & R.R. Churchill (eds), The UN Convention on the Law of the Sea: Impact and Implementation (1987) (Law of the Sea Institute), pp.10.

arguments based on security, necessity, self-preservation, and other forms of the broad doctrines of the nineteenth-century jurists".[34]

The attempt by the major military Powers to justify on the basis of Article 51 of the Charter their military presence in areas thousands of miles from their coasts is hardly credible. This is more clearly so after the end of the Cold War, the collapse of communism in Europe, the abrogation of the Warsaw Pact and the disintegration of Soviet military power. The perceived threat by one party in the Cold War to the other party has evaporated. No right of self-defence can be invoked where there is no credible threat from any quarter, let alone the occurrence of armed attack. The U.S. representative acknowledged in the 1979 Meeting of the Littoral and Hinterland States of the Indian Ocean that the U.S. "reserved the right enjoyed by all members of the United Nations and embodied in the Charter to join in collective self-defence against armed attack."[35] (emphasis added)

The right of self-defence invoked by the major military Powers in order to justify their military presence in the areas outside their national territory is perhaps based on the broader concept of self-defence that belongs to the political and security arena rather than to that of international law. Dinstein makes this point clearer:

> "The legal term 'self-defence' must not be confused with either the same or similarly sounding idioms fashionable in political rhetoric. Statesmen, in justifying the legal conduct of their respective countries, often claim that what has been (or is being) done predicated on imperative requirements of self-defence, self-preservation, protection of vital interests, and the like. The juridical concept of self-defence does not necessarily coincide with such political slogans."[36]

Perhaps, it is this broader political concept of self-defence that has been invoked by major naval Powers to deploy their navies in the high seas. For instance, in order to

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34 Brownlie, Use of Force , p.304.

35 A/AC.199/SR.2. See also the 1987 General Assembly Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations. The Declaration, adopted unanimously, reaffirms in principle 13 that "States have the inherent right of individual or collective self-defence if an armed attack occurs, as set forth in the Charter." Resolution 42/22 of 18 November 1987.

36 Y. Dinstein, War, Aggression and Self-Defence (1988), p.165.

justify the U.S. military presence in the Indian Ocean the U.S. Secretary of Defence, Weinberger, stated that as "international law recognises an inherent right to employ proportional force as necessary in self-defence, this right will be exercised in the face of attack or hostile intent indicating imminent attack."[37]

It is not clear to which rule of international law he was referring in order to justify such military deployment since the right of self-defence, as embodied in the Charter of the UN, seems not to encompass the right to deploy force in anticipation of an armed attack and there appears to be no other international instrument or a customary rule which accords such a right to States. Of course, the U.S. and certain other major maritime States having land territory in the Indian Ocean and the South Atlantic can argue that they are entitled to deploy their navies or establish or maintain their military bases in their own territory for the defence of that territory.[38] If this involves the deployment of force of an intensity which could have no reasonable relation to proportionate reaction to any conceivable form of attack on that territory, then that deployment could also be regarded as unlawful.

Of course, States have for a long time deployed their navies in areas outside their national jurisdiction to protect their strategic, economic and other interests and other States have not opposed it. That does not mean that such deployment of navies is justifiable under the right of self-defence: it may arguably be justifiable under the principle of the freedom of the high seas. Further, it is doubtful whether the use of the international waters for military purposes, whether offensive or defensive (in whatever way the right of self-defence is construed), is permitted at all under international law.

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37 His report to the Congress on the Persian Gulf security arrangements, 26 ILM (1987), p.1437 and 1454.

38 The U.S. has a permanent military base on Diego Garcia, a British Indian Ocean island, which Mauritius claims to be her territory. See International Herald Tribune, 4 January 1988, p.3 and O. Ogunbadejo, 'Diego Garcia and Africa's security', 4(1) Third World Quarterly (Jan. 1982), p.104 ff. France has sovereignty over a number of Indian Ocean islands, including Reunion Island, Crozet Island, Amsterdam Island and Kerguelen Island. The U.K. has sovereignty over the British Indian Ocean Territory in the Indian Ocean and the Falkland Islands in the South Atlantic.

Referring to the UN Security Council debate on the Egyptian attack against an Israeli destroyer on October 21, 1967 in the high seas during the Arab-Israeli war, O'Connell observes that "[e]ven if these debates were somewhat inconclusive they did reveal a consciousness of the notion that the right of territorial self-defence does not extend to the high seas."[39]

To summarise: if the right of self-defence is defined narrowly, i.e., according to Article 51 of the Charter under which this right arises only in the face of actual armed attack, then the concept of maritime ZOP does not pose any danger to the right of self-defence of any State. This was also the approach taken by most experts of the Ad Hoc Group of Qualified Governmental Experts in relation to the creation of NWFZs.[40]

IV. Maritime ZOP and other Restrictions on the Use of the Seas for Military Purposes

1. Testing of weapons in the high seas and ZOP

It has already been argued that the principle of the use of the seas for peaceful purposes should be interpreted as 'non-military' with an exception being made for freedom of navigation by all ships of all States.[41] Although certain writers argue, with some plausibility, that the testing of conventional weapons and/or, missiles, is lawful in the high seas and in the airspace above,[42] such military activities are subject to a number of restrictions.

The most controversial is the testing of nuclear weapons and other weapons of mass destruction since the legality of such weapons themselves is contentious. If these weapons are illegal then testing is also unlawful. McDougal has argued that the testing of nuclear weapons is legal in that they are part of preparations for self-

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39 O'Connell, Sea Power, P.129.
40 The UN Report on NWFZ, p.49.
41 See Chapter II.
42 R. R. Churchill and A. V. Lowe, The Law of the Sea (4th edn., 1988), p.168.

defence,[43] but it is doubtful whether there is any rule in international law which positively prescribes a right to use areas beyond national jurisdiction to prepare for self-defence. Further, "if the testing is part of preparation for the use of massive thermonuclear retaliation it cannot be properly described as preparation for measures of self-defence."[44]

Among the rules concerning such tests are those to be found in the Partial Test Ban Treaty of 1963 (PTBT).[45] Article 1(1) of this Treaty prohibits nuclear tests in the atmosphere, outer space and under water, including territorial waters or high seas. Although the three 'Original Parties', namely, the U.K., the U.S. and the U.S.S.R., declared their determination in the Preamble to the treaty to continue negotiations in order to achieve "the discontinuance of all test explosions of nuclear weapons for all time" and expressed their desire "to put to an end to the contamination of man's environment by radioactive substances", the treaty does not completely prohibit the testing of nuclear weapons.[46]

Nevertheless, this issue need not detain us any further since the tests in the territorial sea, the EEZ and the high seas are prohibited by this Treaty. There are 116 States party to it not including China and France. Even France after 1973 and China since 1980 have refrained from carrying out nuclear tests in the atmosphere and under water.[47] Although one could dispute the existence of *opinio juris* in such general observance of the principles of the Treaty by France and China,[48] in the light of such widespread observance and the number of States that are party to this Treaty it could

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43 M.S. McDougal, 'The hydrogen bomb tests and the international law of the sea', 49 AJIL (1955), pp.356, 361.

44 Brownlie, *op.cit.* note 2, p.18.

45 The Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Underwater, 1963, 480 UNTS 43; entered into force on 10 October 1963.

46 Although the efforts within the UN and elsewhere to conclude a Comprehensive Test Ban Treaty prohibiting all nuclear test explosions have not culminated in the conclusion of such a treaty, the U.S., France and Russia have recently decided to halt their nuclear tests: The Guardian, 22 October 1992, p.9. However, there is no guarantee that they will not resume testing in the future. Further, the U.K. and China have not undertaken such steps.

47 N. Grief, 'Nuclear tests and international law', in Pogany, Nuclear Weapons, p.231.

48 *Ibid.*

be argued that the provision of this treaty concerning the prohibition of nuclear tests in the high seas has generated a rule of customary international law.[49]

In his Separate Opinion in the Nuclear Test Cases Judge Gros held that the PTBT was not opposable to France since the Treaty was *res inter alios acta* for France. He said that "[n]one of the three nuclear Powers described as the 'Original Parties'...has ever informed the other nuclear Powers, not Parties thereto, that this text imposed any obligation whatever upon them; on the contrary, the three Original Parties, even today, call upon the Powers not Parties to accede to the Treaty."[50]

Similarly, Judge Petren did not find the existence of necessary practice and *opinio juris* to hold that the Treaty had generated a rule of customary law.[51] But it is now nearly two decades since the Opinions were delivered and the present position is that France (since its promise in 1973 not to conduct nuclear tests in the atmosphere or underwater) and China (since 1980 through its conduct) have refrained from carrying out nuclear weapon tests in these areas.

The legality of the testing of nuclear weapons in the high seas has attracted a considerable amount of legal interest: firstly, in relation to the tests as such as part of a broader debate concerning the legality of nuclear weapons themselves[52] and secondly, in relation to the manner the tests are carried out. A considerable weight of authority holds the view that the tests, that involve the establishment of danger zones or safety zones covering a large area of the high seas, are inconsistent with the principle of the freedom of the high seas.[53]

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49 The AALCC, at its session held in Cairo in 1964, concluded that nuclear weapon tests in the atmosphere constitute an international wrong, are contrary to the principles of the charter of the UN, and those carried out in the high seas violate the principle of the freedom of the high seas. As cited in SIPRI, French Nuclear Tests in the Atmosphere: The Question of Legality (1974), p.9.

50 ICJ Reports, 1974, p.269, at 286-7.

51 *Ibid.*, pp.304, 488, 490.

52 See, generally, G. Schwarzenberger, The Legality of Nuclear Weapons (1958); N. Singh and E. McWhinney, Nuclear Weapons and Contemporary International Law (1989); Singh, *op.cit.* note 17; Brownlie, *op.cit.* note 17, pp.437 ff.; A. Rubin, 'Nuclear weapons and international law', Fletcher Forum (1984), pp.50 ff.; Miller and Feinrider, *op.cit.* note 17; L. T. Lee, The Legality of Nuclear Tests and Weapons, World Rule of Law Book Series, No. 45 (1968).

53 M. Whiteman, Digest of International Law, Vol. 4, pp.553-607; Brownlie, *op.cit.* note 17; E. Margolis, 'The hydrogen bomb experiments and international law', 64 YLJ (1955), pp.629 ff.;

The establishment of the danger zones and the carrying out of the tests themselves in the late 1940s and the 1950s by the U.S. in the Pacific, and in the late 1950s by the U.K. around Christmas Island and in the Pacific, provoked controversy as to their compatibility with the freedom of the high seas. Protests were made, particularly by the Japanese Government, against such tests as the tests conducted by the U.S. caused the death of a Japanese fisherman and injury to other Japanese fishermen.[54]

Margolis argued that the establishment of danger zones by the U.S. in the Pacific extending up to 400,000 square miles could not be reconciled with the freedom of the high seas.[55] He also invoked the Trail Smelter principle against such tests.[56] Although McDougal and Schlei argued that the U.S. tests and the establishment of the danger zones constituted lawful measures for security and thus were within the purview of the right of self-defence of States, their argument became largely irrelevant, at least in the context of the U.S. nuclear weapon tests, when the Partial Test Ban Treaty was concluded between the U.S., the U.K. and the then U.S.S.R.[57] It has also been widely agreed that nuclear tests in the subsoil of the high seas are also prohibited under international law because of the likelihood of their leaving radioactive debris in the water column or in the atmosphere.[58]

Grief, *supra* note 47; A. D'Amato, 'Legal aspects of the French nuclear tests', 61 AJIL (1967), p.66.

54 See the position taken by the Japanese Government in face of the U.S. atmospheric nuclear bomb tests in the Pacific in the 1950s, Whiteman, Digest of International Law, Vol.4, pp.585-86 (1965). See the U.S. reply in *Ibid.*, pp.586-87. See also the debate in the British parliament, Hansard, H.C. Debates, Vol.550, col.29 (12 March 1956); vol.568, Written Answers, cols.27-29 (2 April 1957).

55 Margolis, *op.cit.* note. 53, pp.635-645.

56 According to the Trail Smelter principle, "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory or another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." Trail Smelter Arbitration (U.S. v. Canada) (1938 and 1941), 3 R.I.A.A. 1905, 1965.

57 M.S. McDougal and N.A. Schlei, 'The hydrogen bomb tests in perspective: lawful measures for security', 64 YLJ (1955), pp.648 ff.

58 See B.A. Boczek, 'Peaceful purposes provisions of the United Nations Convention on the Law of the Sea', 20 ODIL (1989), pp.359, 367; E.D. Brown, Arms Control in Hydrospace: Legal Aspects (1971), 60, 73; T. Treves, 'Military installations, structures, and devices on the sea-bed' 74 AJIL (1980), pp.808, 821.

With regard to the prohibition on the testing of other weapons of mass destruction,[59] they are also regulated by a number of treaties. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction[60] and the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction are examples.[61]

Although at the UNCLOS III, the U.K. maintained that rocket and other weapons (but not necessarily weapons of mass destruction) testing on the high seas does not contravene the peaceful purposes principle,[62] the testing of such weapons in the high seas should be consistent with the 'due regard' principle of Article 2 of the HSC and Articles 87 and 88 of the LOSC. If an overwhelming majority of States declare, through the declarations on ZOP or otherwise, that the testing of other weapons of mass destruction in the high seas is against the interests of the international community intent on promoting the conditions of peace through disarmament measures, then the testing of such weapons could be regarded as inconsistent with the 'due regard' obligation. Because of the nature of the testing of weapons of mass destruction and the extent of the danger zones required, such tests may result in unjustifiable interference with the freedom of navigation and overflight of other States.

Moreover, it is submitted that the obligation to protect and preserve the marine environment is also a rule of customary international law. Principle 7 of the 1972

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59 Although the phrase 'weapons of mass destruction' is rather imprecise, the UN Commission for Conventional Armaments defined the terms as follows: "weapons of mass destruction should be defined to include atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of the atomic bomb or other weapons mentioned above". UN S/C.3/32/Rev.1 of 18 August 1958. See for a similar definition of the term offered by a U.S. arms negotiator in the Seabed Arms Control Treaty: Hearing on EX.H.92-1 before the Senate Comm. on Foreign Relations, 92nd Cong., 2nd Sess.13 (1972).

60 UKTS 11 (1976), Cmnd., 6397. There are 108 States party to it.

61 The Convention was concluded on 3 September 1992 and was opened for signature in Paris on 13 January 1993. See Official Records of the General Assembly, Forty-seventh Session, Supplement No. 27 (U.N.Doc.A/47/27), Appendix I.

62 Hansard, House of Lords, Vol.388, col.842 (1 February 1978); UKMIL 1978, 49 BYIL (1978), p.397.

Stockholm Declaration on the Human Environment requires States to take "all possible steps to prevent pollution of the high seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."[63] The use of the high seas not only for nuclear testing but also for the testing of other weapons of mass destruction would also appear to be inconsistent with Article 25(2) of the 1958 Geneva Convention on the High Seas:

> "All States shall co-operate with the competent international organisations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents." (emphasis added)

Further, the argument concerning the incompatibility of the establishment of danger zones in the high seas for weapon-testing with the freedom of the high seas applies also to the testing of other weapons of mass destruction. Of course, Article 87(1)(f) of the LOSC guarantees the freedom of scientific research in the high seas. But this freedom applies only to peaceful purposes.[64] Firstly, it is difficult to include the testing of weapons in the category of 'scientific research.' Secondly, even if such tests were to be regarded as 'scientific research' they are for military purposes and arguably not for peaceful purposes.

2. Demilitarisation of the Deep Sea-Bed and ZOP

There is another very important treaty governing certain specific military activities in the deep sea-bed: the 1971 Sea-Bed Arms Control Treaty.[65] Unlike Articles 138 and 141 of the LOSC, which apply only to the area beyond the limits of the continental shelf, the 1971 treaty applies to the entire sea-bed area beyond 12 miles

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63 11 ILM (1972), p.1416. This Declaration was adopted by acclamation by the 113 States which participated in the UN Conference on the Human Environment.

64 Articles 88 and 240(a) of the LOSC.

65 995 UNTS 115; came into force on May 18, 1972; on 1 January 1992 there were 90 States party to it.

from the baselines from which the breadth of the territorial sea is measured. Further, the Sea-Bed Treaty of 1971 prohibits emplanting or emplacement on the sea-bed of world oceans not only of nuclear weapons, but also other weapons of mass destruction as well as structures, launching installations, or any other facilities designed for storing, testing or using such weapons.

The attempts to demilitarise the deep sea-bed started with the 1967 Maltese proposal for the reservation of the sea-bed and the ocean floor exclusively for peaceful purposes.[66] The objective of the proposal was the demilitarisation of the ocean along the lines of the Antarctic Treaty and the Outer Space Treaty. When this issue was discussed at the Conference of the Committee on Disarmament, the vast majority of States opted for the complete demilitarisation of the sea-bed. However, the Sea-Bed Arms Control Treaty concluded in 1971 followed the U.S. draft proposal whose aim was to prohibit the emplanting and emplacing of nuclear weapons and other weapons of mass destruction and not completely to demilitarise the sea-bed. Nevertheless, as one commentator has observed, the Treaty was "adopted - according to the vast majority of delegations - as a first step towards the total demilitarisation of the sea-bed."[67] Paragraphs 3 and 4 of the Preamble to the Treaty and its Article V seem to support this view.

On this basis Borgese argues that the establishment of the International Sea-Bed Authority and the reservation of the sea-bed exclusively for peaceful purposes in Article 141 of the LOSC "should be interpreted as the prohibition of uses for military purposes".[68] Indeed, as stated by Myrdal, "[o]ne can hardly imagine that international machinery could fulfil its task if States were permitted secretly to use the [sea-bed] for military purposes. The development of peaceful international activities on the sea-bed

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66 At the 22nd session of the UN General Assembly, Malta initiated resolution 2340 (XXII) which established an ad hoc committee to examine, inter alia, the use of the sea-bed for peaceful purposes.

67 E.M. Borgese, 'The Sea-Bed Treaty and law of the sea: prospects for harmonisation', in Byers, Denuclearisation, pp.88, 91.

68 Borgese, *Ibid.*, p.92.

cannot co-exist with national military uses."[69] Of course, it is not logical to conclude that the participants in the UNCLOS III intended through Articles 138, 141 and 143(1) to achieve a total demilitarisation of the sea-bed. Rather, it is conceivable that if the exploitation of the sea-bed resources gets under way under the auspices of the Sea-Bed Authority a sort of *de facto* restriction on the use of the sea-bed for certain national military activities, e.g., the deployment of weapons of any kind, military installations, structures and devices or military exercises, will take effect. Articles 138 and 141 may be relied upon to develop detailed provisions designed to restrict certain military activities on the sea-bed and that is where the significance of the proposals for ZOP lie.

Of course, Article 1 of the 1971 Treaty suggests that the Sea-Bed Treaty is a 'half-way house'; it does not ban all types of conventional weapons. Nevertheless, this treaty shows that a vast area of the oceans can be denuclearised. This precedent is helpful, from both a legal and a military point of view, in promoting the idea of maritime ZOP covering a large part of the oceans.

3. Creation of NWFZ and NFZ[70]

Apart from the above-mentioned international agreements there are certain regional treaties that impose restraints on the use of the seas of the regions concerned for military purposes. Most significant of them are the Tlatelolco Treaty of 1967 on the establishment of the Latin American NWFZ and the Rarotonga Treaty of 1985 on the creation of an NFZ in the South Pacific; these two treaties are discussed in some depth in Chapter V.

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69 A. Myrdal, 'Preserving the oceans for peaceful purposes' 133 Recueil Des Cours (1971-II), pp.5, 9. Myrdal adds that "There is an inherent contradiction and incompatibility in legislating internationally to use the sea-bed and ocean floor exclusively for peaceful purposes and at the same time allowing nations to pursue clandestine military activities of any kind in that area." *Ibid.*

70 See the UN Report on NWFZ for a very useful analysis of legal issues relating to the creation of NWFZs.

4. The Law of Naval Warfare and Maritime ZOP

The UN declarations on ZOP are in effect measures designed to regulate the military activities in the oceans concerned. Since the declarations speak of the designation of the marine zones concerned for all time as ZOP, the rules of ZOP will be applicable both in times of peace and war. Therefore, it is necessary briefly to review the rules of the law of armed conflict applicable in maritime ZOP in times of war.

The laws of war consist of the limits established by international law within which the belligerents may use force required to overpower the enemy.[71] These laws have arisen from the long-standing practices of States and various international treaties and conventions. Among the principal instruments providing for the laws of war are the Declaration of Paris of 1856,[72] the Geneva Convention of 1864,[73] the Declaration of St. Petersburg of 1868,[74] the Hague Conventions of 1899 and 1907,[75] the Four Geneva Red Cross Conventions of 1949,[76] the 1972 Biological Weapons Convention[77] the 1977 Protocols I and II to the Geneva Conventions of 12 August 1949,[78] and the 1992 Chemical Weapons Convention.[79]

Article 22 of the Hague Convention (IV) of 1907 provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited". Its Article 23(e)

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71 See generally, Tucker, The Law of War and Neutrality at Sea (1957); E. Castren, The Present Law of War and Neutrality (1954); L. Friedman, The Law of War: A Documentary History (1972); A. Roberts and R. Guelff (ed), Documents on the Laws of War (2nd edn., 1989); A.V. Lowe, 'The laws of war at sea and the 1958 and 1982 Conventions', Marine Policy (July 1988), pp.286 ff; N. Ronzitti, The Law of Naval Warfare: A Collection of Documents with Commentaries (1988); The U.S. Handbook; I.F. Dekker and H.G. Post, The Gulf War of 1980-1988 (1992), Part III: Armed Conflict at Sea and Neutrality.

72 Declaration of Paris Respecting Maritime Law, 46 BFSP (1855-1856), pp.26-7; 1 AJIL, Supp., pp.89-90. Privateering, a term denoting the practice of commissioning merchant ships for purposes of war, was abolished between the signatories under this Declaration.

73 International Red Cross Handbook (International Committee of the Red Cross, Geneva, 1971) pp.7-8.

74 58 BFSP (1867-1868), pp.16-17; 1 AJIL, Supp., p.95. This Declaration established the principle that war must have limits and weapons that cause excessive pain and suffering should be forbidden.

75 91 BFSP (1898-1899), pp.1014-19; 1 AJIL, Supp., pp.155 ff. and 2 AJIL, Supp., pp.90 ff.

76 75 UNTS 32 ff.

77 UKTS 11 (1976), Cmnd., 6397. This Convention prohibits, inter alia, all biological weapons and or methods of warfare whether directed against persons, animals or plant life.

78 1125 UNTS 3 and 609.

79 U.N.Doc.A/47/27.

prohibits the use of "arms, projectiles or material calculated to cause unnecessary suffering." Under Article 1 of the Hague Convention IX (Naval Bombardment), the naval bombardment of undefended ports, towns, buildings, etc., is forbidden, provided that the local authorities comply with a formal requisitioning demand for provisions and supplies. The Hague Convention VII (Submarine Contact Mines) states that floating mines must not be sown indiscriminately. It requires the belligerents laying such mines to take all possible precautions for the safety of peaceful navigation. Hospital ships are immune from attack and capture by the enemy under the Hague Convention X of 1907 and Geneva Red Cross Convention II of 1949. Similarly, Hague Convention XI exempts bona fide coastal fishing vessels and small boats engaged in local trade from capture. The same applies to ships engaged in scientific, religious or philanthropic missions.

The conclusion to be drawn from these rules is that neither the right of self-defence is absolute nor are the methods of warfare. States are under a number of obligations under traditional international law not to use the seas and oceans for certain military purposes that would undermine the provisions of the treaties and conventions just outlined.

However, history demonstrates that wars render most rules of the law of the sea, including the freedom of the high seas, ineffective. This has been the case in most great wars fought in modern history. Attempts have been made and treaties have been concluded to prevent this from happening, yet law-making on the subject has not been able to keep pace with changes in naval technology. Rapidly developing naval technology and weaponry have rendered the law of naval warfare, formulated mostly in the pre-World War I period, largely obsolete.[80] Gray states that "[t]he laws of war at sea are in a very unsatisfactory state today. There is no up-to-date codification; the early treaties have only a limited number of parties and have been overtaken by

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80 See, generally, the Manual adopted by the Institute of International Law, The Laws of Naval War Governing the Relations between States (Oxford, 1913); Tucker, 'Law of war and neutrality at sea,' 62 US Naval War College, International Law Studies, 1955; J.H.W. Verzijl, International Law in Historical Perspective (1978), Part IX-A and B.

subsequent developments in the methods of warfare."[81] According to Larson, "there is an urgent need to hold a third Hague Conference on the laws of war in general and naval warfare in particular."[82]

Thus, in the event of a war the belligerent States could abuse the freedoms of the high seas and degrade these freedoms into licence; there is no proper check against such abuses,[83] widespread during both World Wars. During World War I, war zones were created in large areas of the high seas by different Powers. Enemy merchant ships were warned that if found in such zones they would automatically be destroyed, either by mines or other methods. Even neutral vessels were warned to stay clear for their own safety. Such declarations of war zones were coupled with unrestricted submarine warfare and the laying of extensive minefields.

Unfortunately, the experiences of World War I were repeated in World War II, and to an even greater degree.[84] The experiences of World War II have been repeated in different forms in several wars fought in the post-WW II period.[85] Therefore, a modern approach is needed to guarantee the freedom of navigation in the high seas in times of modern warfare. New measures are necessary to keep commercial shipping in the high seas immune from both peace-time intimidation and war-time attacks, seizures, arbitrary search and hindrance, and the rules of ZOP seem to be one such measure adopted for the marine ZOP concerned.

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81 Christine Gray, 'The British position in regard to the Gulf Conflict', 37 ICLQ (1988), pp.420-428, at 422.

82 D. L. Larson, 'Naval weaponry and the law of the sea', 18 ODIL (1987), pp.125, 156.

83 McDougal and Schlei, *supra* note 57, pp.648, 681-2.

84 See generally on war zones G.P. Politakis, 'Waging war at sea: the legality of War Zones', 38(2) NILR (1991), pp.125-172.

85 For instance, Great Britain created such exclusion zone around Falkland Islands during and after the 1982 Falkland Islands War. Both Iran and Iraq established war zones and other military exclusion zones in the Persian Gulf beyond their territorial limits during the eight-year Gulf War. See generally, Politakis, *op.cit.*, note 84; Gray, *op.cit.*, note 81; R. Leckow, 'The Iran-Iraq conflict in the Gulf: the law of war zones', 37 ICLQ (1988), pp.629-644; F.L. Wiswall, Jr., 'Neutrality, the rights of shipping and the use of force in the Persian Gulf', 31(4) VJIL (Summer 1991), pp.619 ff.; J.H. McNeil, 'Neutral rights and maritime sanctions: the effect of two Gulf Wars', idem., pp.631 ff.

5. Conclusion

The discussion in Chapter II and in this chapter shows that the use of the seas and oceans for military purposes is controlled by a number of rules and principles of general international law and the law of the sea.[86] This demonstrates the gradual erosion of the classical high seas principle based on *mare liberum* which is being replaced by the notion of *mare nostrum*. This has meant greater control on the use of the oceans for military purposes. The traditional freedom of the high seas regime, enforced by the major maritime Powers to protect their interests, has given way to a new regime in which the use of the seas and oceans are regulated in the interests of all States in a manner similar to that which the States who mooted the proposals for ZOP have intended with the establishment of maritime ZOP.

V. The Legal Status of the UN Declarations on ZOP

Having said in the foregoing sections of this chapter and in Chapter II that the principles of maritime ZOP are not incompatible but in accordance with the existing rules of international law, this section will now explore the legal status of the UN Declarations on ZOP. This thesis examines the legal status of the UN General Assembly declarations on ZOP from two different angles: (i) their role in declaring existing law or crystallising emerging law or creating customary international law and (ii) the dispositive function of the ZOP declarations since they attach a special status to a territory rather than just enunciate rules in abstract. As the dispositive character of these declarations and the dispositive powers of the General Assembly will be examined in Chapter VII, this section will focus mainly on the examination of the question as to whether the principles of ZOP embodied in the Declarations of the UN General Assembly and other resolutions adopted by regional and international conferences on ZOP have crystallised into rules of customary international law.

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86 As will be discussed in the next chapter, the process of limiting the exercise of the freedom of the high seas gained in strength with the adoption of Article 2(4) in the Charter of the UN.

To begin with, the Charter of the UN does not provide a legislative or even quasi-legislative role for the General Assembly. A proposal to confer such a role was overwhelmingly rejected at the San Francisco Conference.[87] From this premise, most writers hold the view that since Article 10 of the Charter states that the General Assembly issues only 'recommendations' and because of the very nature of recommendations there is no legal obligation to compliance.[88] In practice, however, not all resolutions have merely recommendatory value; some resolutions are declaratory of existing international law, some are interpretative and others are related to territorial arrangements and are regarded as legally binding.

Being the most representative organ of the most representative international organisation, the UN General Assembly has asserted a certain authority with regard to the development of international law, especially concerning the areas of *res communis* character. The resolutions of the Assembly carry with them the expectation that the States Member of the UN voting for it would comply with them.

In fact, as Sloan points out, the meaning of the term 'recommendation' has not been clearly established in legal and diplomatic practice. He cites certain examples of treaties under which the term 'recommendations' has been used for binding international instruments.[89] Rejecting the theory that General Assembly resolutions are merely recommendations and may therefore be ignored, Sloan argues that such an argument "is clearly in violation of obligations under the Charter of good faith and

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87 Doc.507, II/2/22, p.2, UNCIO Documents (1945), vol.9, p.70.

88 See the Separate Opinion of Judge Lauterpacht in the South West Africa - Voting Procedure case (ICJ Reports, 1955, p.67, at p.115) for a concise and lucid view of the legal significance of the General Assembly resolutions. See for an excellent analysis of the legal status of General Assembly resolutions B. Sloan, 'General Assembly resolutions revisited (forty years later)', 58 BYIL (1987) (hereafter 'Sloan, Resolutions'), pp.39-142.

89 Among the examples cited by Sloan are Article 15 of the Covenant of the League of Nations, Articles 19, 28, and 33 of the ILO Constitution and Article 14 of the 1951 Treaty Establishing the European Coal and Steel Community. The latter article provides: "Recommendations shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed." UNTS, vol.261, p.141: see Sloan, Resolutions, pp.42-43 and note 9.

duty to co-operate."[90] Indeed, the declaratory and interpretative resolutions of the General Assembly "cannot be dismissed as 'recommendations' which they are not."[91]

When the Western Powers were able to dictate their terms to the General Assembly it was these States who sought to vest the Assembly with wider powers in the early days of the UN. The 'Uniting for Peace Resolution' of the General Assembly (Resolution 377 (V) 3 November 1950) is an example. After the Third World countries achieved numerical majority in the Assembly these countries have been attempting to vest it with still wider powers, but at the same time the Western countries seem to have reverted to the 'merely-recommendatory' theory of the General Assembly resolutions.

Whatever the political considerations of States may be, from the legal point of view it has been widely accepted that those resolutions of the General Assembly - or at least the votes of States on resolutions - are part of State practice. "At the very least," Sloan writes, "every resolution is a part of the raw material from which custom is made."[92] According to Brownlie, resolutions concerned with general norms of international law and which are adopted by a vast majority of States present evidential value as to the formation of a customary rule of international law.[93] Schachter writes that the fact that General Assembly resolutions have no binding effect "does not mean that they lack 'authority'". He states that resolutions adopted by two-thirds majority under Article 18(2) of the UN Charter can be regarded as "expressing the 'general will' of the international community and as persuasive evidence of legal obligation."[94]

Oppenheim's International Law affirms that "it is an over-simplification to deny to all General Assembly resolutions any legally binding effect." It adds: "[a]lthough

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90 Sloan, *supra*, note 88, p.43. Article 2(2) of the Charter of the UN provides: "All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter." (emphasis added) See also Article 26 of the Vienna Convention on the Law of Treaties.

91 Sloan, *supra*, note 88, p.45.

92 See Sloan, *Ibid.*, p.87. See also *Ibid.*, p.74 and the materials there cited.

93 Brownlie, Principles, p.14.

94 O. Schachter, 'The right of States to use armed force', 82 Mich.LR (April/May 1984), pp.1620, 1622.

General Assembly resolutions are generally not legally binding, they are not without any legal significance. They may help to create new rules of customary international law or to establish an existing rule of customary international law, by providing evidence of State practice."[95] Higgins emphasises the affirmative votes of States for a resolution: "It is not the recommendation that binds, but the acceptance of States through the vote."[96]

Further, a significant proportion of writers supports the view that certain resolutions of the General Assembly are of a 'law-making' character.[97] This relates to resolutions that affirm the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal;[98] the Declaration on the Granting of Independence to Colonial Countries and Peoples;[99] the Declaration on Permanent Sovereignty over Natural Resources;[100] and the Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space,[101] etc. Such assertions render the 'recommendations-only' theory increasingly hollow.

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95 Oppenheim (1992), Vol.I, Chapter 1, p.46.

96 R. Higgins in S.M. Schwebel (ed.), The Effectiveness of International Decisions (1971), p.399.

97 See generally Brownlie, Principles, p.14; Sloan, Resolutions; G. Arangio-Ruiz, 'The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 Recueil des Cours (1972-III), pp.419 ff.; L. Gross, 'The United Nations and the role of law', International Organisation (Summer, 1965), pp.537-561; R. Higgins, The Development of International Law Through the Political Organs of the United Nations (1963) pp.4-5; O.Y. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations (1966); H.W.A. Thirlway, International Customary Law and Codification (1972), Ch. V.

98 Resolution 95 of 11 December 1946, adopted unanimously.

99 Resolution 1514 (XV) of 14 December 1960 adopted by 89 votes to 0, with 9 abstentions.

100 Resolution 1803 (XVII) of 14 December 1962, adopted by 87 votes to 2, with 12 abstentions.

101 Resolution 1962 (XVIII) of 13 December 1963, adopted unanimously. But MacGibbon makes the point that: "The Outer Space resolution of 1963 may not, when it was adopted, have created international custom, but it became law for those States which unequivocally indicated their consent to its provisions as law for them... The States which made those declarations of consent, unlike those which merely voted in favour of the resolution without undertaking any explicit commitment, are surely estopped from denying its binding force, so far as they are concerned, by virtue of their own clear, public statements." I. MacGibbon, 'Means for the identification of international law: General Assembly resolutions: custom, practice and mistaken identity', in B. Cheng (ed.), International Law: Teaching and Practice (1982), pp.10, 25.

It is also correct to say that the "UN resolutions are not an independent source of customary international law."[102] Nevertheless, as Cheng argues, "there appears to be no reason why an Assembly resolution may not be used as a means for identifying the existence and contents of a new *opinio juris.*"[103] According to Brownlie, the General Assembly resolutions "may prescribe principles of international law and be, or purport to be, merely declaratory. However, the mere formulation of principles may elucidate and develop the customary law."[104] Higgins writes that "[i]t is now fairly widely accepted that United Nations resolutions, under certain conditions, can be treated as sources of international law."[105] De Arechaga writes that General Assembly resolutions may declare existing law, crystallise emerging law or be focal point for the future development of a customary rule.[106]

The General Assembly, indicating its own view concerning its resolutions, stated in 1974 that "the development of international law may be reflected *inter alia*, by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the International Court of Justice."[107] In fact, the ICJ has taken into account General Assembly resolutions in a number of cases, including the Namibia,[108] Western Sahara,[109] and Nicaragua[110] cases. In the last case the ICJ was prepared to take note of "statements of representatives of the Parties (or of other States) in international organisations, as well as the resolutions adopted or discussed by such organisations, in so far as factually relevant".[111] Referring to the legally

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102 E. McFadden, 'Nuclear weapons free zones: toward an international framework', 16 CWILJ (1986), pp.217, 244.

103 B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" international customary law?', 5 IJIL (1965), pp.23, 46.

104 Brownlie, Principles, p.699.

105 R. Higgins, 'The identity of international law', in Cheng, *supra* note 101, pp.27, 28.

106 Jiminez de Arechaga, 'General course in public international law', 159 Recueil des Cours (1978-I), pp.12, 31.

107 Resolution 3232 (XXIX) of 12 November 1974.

108 ICJ Reports, 1971, pp.31, 78.

109 ICJ Reports, 1975, pp.31-3.

110 ICJ Reports, 1986, pp.16, 100-1, 103, 106-8.

111 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua V. U.S.A.) (Merits), ICJ Reports, 1986 pp.14, at 44, para.72.

'non-binding'[112] character of the Helsinki Final Act of 1975 and General Assembly Resolution 2625 (XXV) the Court stated that

> "Texts like these, in relation to which the Court has pointed to the customary content of certain provisions such as the principles of the non-use of force and non-intervention, envisage the relations among States having different political, economic and social systems on the basis of co-existence among their various ideologies; the United States not only voiced no objection to their adoption, but also took an active part in bringing it about."[113]

The ICJ recognised that the UN General Assembly Resolution 3314 (XXIX) on the definition of aggression "may be taken to reflect customary international law".[114] The judgment of the Court in this case is illuminating and the background leading up to this opinion of the Court is relevant to this study: the U.S. had voted for the General Assembly Resolution 2131 (XX) on the Inadmissibility of Intervention of 1965. At the time of its adoption in the First Committee of the General Assembly the U.S. had, however, declared that it considered the declaration in that resolution to be "only a statement of political intention and not a formulation of law." On this basis the U.S. argued before the Court that firstly, the resolution did not constitute a customary rule and secondly, it was not binding on the U.S. The ICJ, rejecting this submission, held that

> "However, the essentials of resolution 2131 (XX) are repeated in the Declaration approved by resolution 2625 (XXV), which set out principles which the General Assembly declared to be 'basic principles' of international law, and on the adoption of which no analogous statement was made by the United States representative."[115]

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112 See O. Schachter, 'The twilight existence of non-binding international agreements' 71 AJIL (1977) 296 at 301.

113 ICJ Reports 1986, pp.14, 133, para 264. See also p.107, paras. 203 and 204.

114 ICJ Reports 1986, pp.14, at 103, para.195.

115 *Ibid* p.107, para.203.

The above discussion shows that the principles embodied in non-binding General Assembly resolutions may bind States through their crystallisation into custom; State practice before, during and following the adoption of the resolution can crystallise a principle of a resolution into a customary rule which binds all States, except persistent and subsequent objectors. Thus, it is necessary to assess each individual resolution in the light of all the events leading up to its adoption and the subsequent practice of States on the subject.

With regard to the legal status of the General Assembly Declarations on ZOP and the subsequent State practice, since it is generally agreed that the UN General Assembly resolutions relating to legal questions may be, in certain cases, regarded as capable of constituting a rule of customary international law,[116] the UN declarations on maritime ZOP, which are designed to create a legal regime of special character in the zones concerned, seem capable of constituting custom. The reasons can be explained as follows:

First, as discussed in the preceding sections of this Chapter and in Chapter II, the ZOP declarations are based on, *inter alia*, Articles 2(4) and 51 of the Charter of the UN and the 1970 Declaration on Friendly Relations Among States and the law of the sea principle of the use of the seas for peaceful purposes.

Second, the declarations on ZOP have gained support from a wide spectrum of States; the ZOPC declaration was adopted by an overwhelming majority of States (the U.S. was the only State which voted against the declaration) and the IOZP declaration, albeit adopted initially by a simple majority,[117] was later endorsed several times by other resolutions adopted unanimously.[118] These declarations have

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116 See the opinion of the ICJ in the Nicaragua case, ICJ Reports, 1986 (Merits), pp.14, 97-100, 103.

117 The IOZP declaration was adopted by 61 votes to 0, with 55 abstentions and the ZOPC declaration with 124 votes to 1, with 8 abstentions.

118 See Chapter I, above. The General Assembly has adopted nearly unanimously every year since the original declarations were adopted resolutions which endorse the validity and the need for the implementation of the declarations. According to Judge Tanaka, an accumulation of resolutions could result in the formation of a rule of customary international law. Dissenting Opinion, South West Africa cases, ICJ Reports, 1966, pp.291-3. Though, MacGibbon maintains that since General Assembly resolutions have no legal value, repetition and recitation of such resolutions would make no difference: however many times nothing is multiplied the result is

also been endorsed quite frequently by various regional and international conferences (see Chapter I, above). As discussed earlier, such practice of States is capable of constituting custom.

Third, the States who voted for the ZOPC Declaration (including the U.K.) acknowledged that the declaration finds a legal basis in the law of the sea principle of the use of the seas and oceans for peaceful purposes.

Fourth, the declarations exhibit that their aim is to develop a legal regime on the basis of already existing principles of international law and apply them to the maritime zone concerned, rather than to prescribe totally new rules or modify the existing rules. Thus, a rule of law on the prohibition of the use of the maritime ZOP for certain military activities could be said to be in the process of formation through the practice of States within and without the UN in the last 20 or so years.

Even those States who voted against the General Assembly resolutions on ZOP did not reject the idea of creating ZOP in maritime areas concerned. They opposed the methods prescribed for the creation of ZOP and the implementation of the UN Declarations; they had political motives rather than legal reasons for doing so. What is more, these States were inconsistent in their opposition to the resolutions. As seen in Chapter I, they changed their policy according to the political climate in a given period of time. When they considered that the resolutions were able to enhance their military posture in the zone they even went so far as to commit themselves to achieving the objectives of the UN Declarations on ZOP.

However, the problem may lie in the satisfaction of the second condition of custom, the element of *opinio juris* in the practice of States on ZOP. This is because it is difficult to establish whether the States voting for the UN declarations on ZOP were stating that the principles embodied in the declarations were *lex lata* or merely

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still nothing. I. MacGibbon, 'Means for the identification of international law: General Assembly resolutions: custom, practice and mistaken identity', in Cheng, *supra* note 101, pp.10, 17. Sloan's response to such assertions is interesting: "Most will concede that they [i.e the G.A. resolutions] are at least a material source, or evidence, or require good faith consideration. If one grants some, however minimal, effect, there is something to accumulate, and after all it is the accumulation of material sources (with opinio juris) which makes law." Sloan, Resolutions, p.132.

stating that they ought to be the law (*de lege ferenda*). Nevertheless, the subsequent State practice on the subject provides some support for the assertion that the concept of ZOP has become *lex lata* through subsequent practice of States. It has been generally accepted that "[a] resolution whose norms are clearly *de lege ferenda* when adopted may become the basis for State practice, and thus be transformed into customary law."[119]

Most developing countries appear to regard the military presence of maritime Powers in the ZOP as a violation of the declarations on ZOP. For instance, the Political Declaration of the 1983 Summit Conference of the Non-Aligned Countries (the NAM consists of more than 108 States) asserts that any military presence in the Indian Ocean "constitutes a flagrant violation" of the IOZP declaration.[120] Individual States have also protested occasionally against the use of the zone by other States for certain military purposes.[121]

Such statements made in the context of a certain concrete situation and not merely *in abstracto* could be relied on, if we borrow Thirlway's definition of State practice as being supplementary evidence both of State practice and the existence of *opinio juris*.[122] According to Akehurst, even "[a]ssertions made *in abstracto* concerning the content of existing law are sometimes found in resolutions passed by the representatives of States at the meetings of international organisations."[123] He adds that:

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119 Sloan, Resolutions, p.70 and materials there cited (note 139).

120 See in U.N.Doc.A/AC. 159/L.55/Add.1. Similarly, the 1989 report of the Conference on Disarmament calls for the scrupulous respect for the declaration on the South Atlantic ZOPC, "especially through the reduction and eventual elimination" of military presence in the South Atlantic: U.N.Doc.CD/956, p.365.

121 One example of such protest came from Argentina against the UK military manoeuvres in the South Atlantic from March 7 to 31, 1988. Argentina stated that the manoeuvres and the UK's declaration of the 150 miles Total Exclusion Zone (TEZ) was against the UN Declaration on the South Atlantic ZOPC and a breach of the commitment the UK undertook in voting for the Declaration. U.N. Doc. A//43/512. See also A/42/557. However, the legal weight of Argentina's objection to such military manoeuvres in the South Atlantic are obscured by its dispute with the U.K. over the sovereignty of the Falkland Islands.

122 Thirlway, International Customary Law and Codification (1972), p.58.

123 M. Akehurst, 'Custom as a source of international law', 47 BYIL (1974-75), pp.1, 5.

> "These resolutions are important because they are voted for by representatives of States. The fact that they are passed at meetings of international organisations is of no importance; they would have the same effect if they were passed at an international conference, meeting outside the framework of any international organisation."[124]

Similar views were expressed by Judge Ammoun in the Barcelona Traction case[125] and by Judge Tanaka in the South West Africa cases.[126]

In the Nicaragua case the Court said that *opinio juris* of States "may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly Resolutions".[127] Thus, General Assembly resolutions may also satisfy in certain cases the subjective element (*opinio juris*) of customary international law if they articulate a belief concerning the existence of principles of international law.[128] This is what the ZOPC declaration seems to have accomplished in relation to the principle of the use of the seas and oceans for peaceful purposes.

Further, a major point of assertion made by the proponents of ZOP is that the arguments concerning the absence of *opinio juris* or the non-binding character of General Assembly resolutions do not affect the validity of the concept of ZOP because the UN declarations on ZOP do not introduce totally new rules, as they are largely attempts to consolidate the already existing rules of international law pertaining to the realm of the law of the sea; they also accord concrete meaning to certain general principles, especially the principle embodied in Article 2(4) of the Charter of the UN and the principle of the use of the high seas for peaceful purposes, and apply them in the maritime ZOP concerned.

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124 *Ibid.*, p.5, note 5.

125 ICJ Reports 1970, pp.3, 302-303.

126 ICJ Reports 1966, pp.3, 291-292.

127 ICJ Reports, 1986, pp.14, at 99-100, para.188. See for a critical analysis of this aspect of the judgment of the ICJ: M.H. Mendelson, 'The Nicaragua Case and customary international law', in Butler, *supra* note 28, pp.85-99.

128 But MacGibbon writes that votes of States for or against General Assembly resolutions are votes for or against a recommendation. Therefore, to focus a search for the existence of the element of opinio juris "exclusively on a General Assembly resolution is bound to prove profitless because such an instrument of an essentially recommendatory character is incapable of exhibiting such an attribute." MacGibbon, *supra* note 118, pp.10, 13, 23.

In that case a parallel could be drawn between the 1970 Declaration on Friendly Relations and the declarations on ZOP; while the 1970 Declaration defines and elaborates the principles of the Charter of the UN, the declarations on ZOP define and elaborate certain principles of international law, especially the principles of the freedom of navigation, the use of the high seas for peaceful purposes, the principle of the non-use of force and the right of self-defence, *vis-a-vis* the maritime zone concerned.

Further, like various environmental protection zones,[129] which are created by special protocols or supplementary treaties but are part of a framework or 'umbrella' convention, spelling out general principles to govern control of various types of pollution, the maritime ZOP could also be viewed as special arrangements created to tackle specific problems of the zone concerned under the existing rules of general international law, especially the principle embodied in Article 2(4) of the Charter and the principle of the use of the seas for peaceful purposes.

Thus, if the General Assembly resolution is based on the internationally accepted principles of international law, it can be regarded as evidence of the views of States on the meaning of such principles and their applicability to a given situation. As seen above, when the declarations on ZOP were adopted by the UN there was no legal vacuum waiting to be filled with a composite body of rules having a special nature; there were a number of principles of general international law that were applicable to the areas to be covered by ZOP declarations. The LOSC has added a few principles that have the effect of constraining the use of the seas and oceans for military purposes.

What the ZOP declarations aim to achieve is to prescribe a detailed regime designed to deal with the problems of militarisation in the area concerned. These detailed provisions require the assent of States to be effective. Evidence of the assent of States to such provisions could be found in the records of the General Assembly,

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129 See Chapter VI.

its Committees and in the practice of States outside the UN, e.g., the meetings of the littoral and hinterland States of the Indian Ocean and the South Atlantic.[130]

Moreover, the proponents of the ZOP declarations seem to attach considerable weight to operative paragraph 1 of the Declarations on IOZP Declaration and the ZOPC, which establish a ZOP in the oceans concerned, and regard the UN declarations themselves as enough to create a ZOP in the Indian Ocean and the South Atlantic.[131] The main contention of the States supporting the creation of a ZOP under a General Assembly resolution is that the oceans are *res communis* and the international community acting in concert, by whatever means, is capable of establishing ZOP in such areas for the common good[132] as the purpose of ZOP is to promote disarmament and strengthen the principles of the Charter of the UN.

In that case a parallel could be drawn between the 1970 'common heritage' Declaration of the General Assembly (Resolution 2749 (XXV)) and the UN Declarations on ZOP. The basis for the 'common heritage' declaration is the assertion that the sea-bed is *res communis* rather than *res nullius*. When this declaration was adopted it attracted no dissent. Of course, States disagree sharply as to what the 'common heritage' principle implies and differed at the time of the adoption of the 1970 declaration as to what they hoped to make of it. Almost all States, however, accept that the common heritage principle is a general principle of international law. *Oppenheim's International Law* rightly states that this principle "is one of general law; its precise meaning and its practical implications are another matter".[133]

Thus, if the sea-bed can be regarded as *res communis* and a special status be attached to it under a resolution of the General Assembly, there is no reason why the entire area of an ocean or sea beyond territorial limits cannot be regarded as *res*

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130 See on the significance of the records of international conferences, the Fisheries Jurisdiction case, ICJ Reports 1974, pp.3, 25, para. 53; the Anglo-French Arbitral Award of 1977 on the Delimitation of the Continental Shelf, Decision of 30 June 1977: 8 ILM (1979), p.398, para. 47.

131 See Chapter I.

132 See Chapter VII for a detailed discussion on the competence of the General Assembly to create ZOP in areas of *res communis* character.

133 Oppenheim (1992), Vol.I, Part 2, p.813, note 5. See also B.H. Oxman, 'The high seas and the international seabed area', 10 Mich.JIL (Spring 1989), pp.526-542.

communis and granted a ZOP status. Moreover, it was the 1970 'common heritage' declaration that for the first time demonstrated its acceptance of the idea that the entire sea-bed area beyond national jurisdiction can be reserved for peaceful purposes.

In a letter from the Group of Legal Experts on the Question of Unilateral Legislation (the 12-member Group included no fewer than 5 members of the ILC) to the Chairman of the Group of 77, it is asserted that all the principles contained in the Declaration "form a normative unity that is indivisible and applicable to the area [i.e., the sea-bed]."[134] The Group also maintains that "[t]he principles set out in the Declaration contained in resolution 2749 (XXV) are legally binding principles which were proclaimed in this Declaration and upheld by the affirmative vote of 108 States."[135] Legally speaking, there is little ground for differentiation between the reservation of the sea-bed for peaceful purposes and the creation of a ZOP for the entire area of an ocean or a sea.

This practice of reserving the areas not assimilated to national jurisdiction for peaceful purposes actually started with the demilitarisation of Antarctica under a treaty concluded by a dozen or so States in 1959. After three years, it was General Assembly resolution 1962 (XVIII) of 1963 on outer space which demilitarised outer space.

On the basis of the foregoing, it could be said that the law on the use of the seas and oceans for military purposes is being shaped by State practice on ZOP and a customary law on ZOP is in the process of being formed by such practice inside and outside the UN. This is because customary international law is shaped by the changing patterns of State practice; the ZOP declarations and subsequent State practice demonstrate such a pattern. The significance of the State practice on ZOP lies also in the fact that a rule of customary law which is now in progress may provide evidence of the assent of the States concerned to the modification or enlightened interpretation of previously existing rights and obligations of States and to the 'non-

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134 Third United Nations Conference on the Law of the Sea: Official Records, Vol.XI, pp.80-82.
135 *Ibid.*

military' definition of the peaceful purposes principle rather than merely the 'non-aggressive' definition.

CHAPTER IV

The Declarations on the Creation of Land Zones of Peace

I. Introduction

Smaller, weaker and strategically placed States, anxious about their very survival as independent and sovereign States, have pursued a variety of policies to safeguard their interests. While some of these States have adopted a policy of alliance with major powers, certain other States have pursued a policy of permanent neutrality. There is yet another group of such States which has opted for a ZOP. The idea of a ZOP, espoused first in relation to a region, was later applied in relation to the territory of a single State.

Two types of proposals have been put forward for the creation of land ZOP: collective and individual. While the ASEAN's proposal is collective in the sense that it covers the territories of more than one State, Nepal's proposal concerns the territory of a single, individual State. This chapter will examine the legal content of these proposals and discuss the legal issues involved in the creation of land ZOP.

II. The Zone of Peace, Freedom and Neutrality Declaration of the ASEAN[1]

1. The Background to the Declaration

In the post-World War II period Southeast Asia has witnessed more disruptive events caused by outside interference than any other region in the world. Examples

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1 See generally, W. Stargardt, Problems of Neutrality in Southeast Asia: the Relevance of the European Experience, Occasional Paper No. 12 (ISEAS, 1972); V. Suryanarayan, 'Neutralisation of Southeast Asia: Problems and Perspectives', 31(1) India Quarterly (January/March 1975); T.B. Koh, 'The neutralisation of Southeast Asia', Lecture delivered to the Commonwealth Society, Singapore, 18 January 1972; H. Hanggi, ASEAN and the ZOPFAN Concept (1991); B. Singh, ZOPFAN & the New Security Order in the Asia-Pacific Region (1992); M. Ghazali bin Shafie, 'The neutralisation of Southeast Asia', 3(1) Pacific Community (Oct. 1971), p.110; J. Saravanamuttu, 'ASEAN security for the 1980s: the case for a revitalised ZOPFAN', 6(2) CSEA (Sept. 1984), p.186; M. Alagappa, 'Regional arrangements and international security in Southeast Asia: going beyond ZOPFAN', 12 (4) CSEA (March, 1991), p.269; D. Wilson, The Neutralisation of Southeast Asia (1975).

are the wars in Indo-China, especially the Vietnam War. The idea of neutralising Southeast Asia goes back to the early 1950s when several proposals were put forward to this effect during the Indo-China phase of the 1954 Geneva Conference.[2] However, apparently owing to the U.S.'s dislike of the idea of permitting States to become permanently neutral in the aftermath of WW II and especially in view of the collective security system of the Charter of the UN, the Geneva Conference omitted to deal with this issue. Soon after the Conference, however, Cambodia and Laos declared their intention to pursue a policy of permanent neutrality like Switzerland's.

Consequently, another peace conference was convened in 1962 in Geneva which, after 14-month long negotiations, issued the Declaration on the Neutrality of Laos.[3] However, following the involvement of Laos and Cambodia in the Vietnam War, the multilateral agreement on Laos and unilateral declaration of Cambodia to pursue a policy of permanent neutrality became obsolete.

During the Vietnam War several proposals were put forward for the neutralisation of Indo-China.[4] Although the U.S., which was still committed to a military solution in Vietnam, initially cold-shouldered such proposals, later it became increasingly interested in the idea of neutralisation of Indo-China. Consequently, the U.S. Senate's Committee on Foreign Relations commissioned a study by a group of scholars from Princeton University to "examine the concept of neutralisation ...and ...to frame a plan for the neutralisation of South-east Asia".[5] The study stated that "the idea of neutralisation merits serious consideration on the part of the U.S. Government."[6] In the light of the fact that the Vietnam War entered its crucial phase, this report was largely ignored by the U.S. Government.

Nevertheless, the report, which was later enlarged and published as a book,[7] seems to have influenced the leaders of Southeast Asia. Consequently, Malaysian

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2 A. Eden, The Memoirs of Anthony Eden: Full Circle (1960), pp.44, 46.

3 J.J. Czyzak and C.F. Salans, 'The International Conference on the Settlement of the Laotian Question and the Geneva Agreements of 1962', 57 AJIL (1963), pp.300-17.

4 Singh, *op.cit.* note 1, pp.12-13.

5 See Neutralization in Southeast Asia: Problems and Prospects, A Study Prepared at the Request of the Committee on Foreign Relations, United States Senate, October 10, 1966, p.iii.

6 *Ibid.*, p.17.

7 C. E. Black et al., Neutralization and World Politics (1968).

leaders came up with a proposal in 1968 for the neutralisation of Southeast Asia.[8] This was also the time when the U.K. had announced its plan to accelerate the process of withdrawal from its bases in Malaysia and Singapore and the Vietnam War had engulfed Cambodia and Laos. That is why Malaysia was keen to promote the idea of regional neutrality as a means of protecting the security of the ASEAN nations. This idea seems to be the driving force behind the resolve of the ASEAN countries to limit and eventually to eliminate foreign military bases already established in the region. Preambular paragraph 6 of the 1967 Bangkok Declaration of ASEAN States (this Declaration established ASEAN) provides that

> "all foreign bases are temporary and remain only with the expressed concurrence of the countries concerned and are not intended to be used directly and indirectly to subvert the national independence and freedom of States in the area or prejudice the orderly processes of their national development".[9]

When the military involvement of the outside Powers in the region kept growing certain States of the ASEAN felt the need for the early neutralisation of Southeast Asia. Consequently, the Malaysian Deputy Prime Minister, Tun Abdul Razak, proposed the neutralisation of Southeast Asia at the Non-Aligned Summit in Lusaka in September 1970.[10] His proposal consisted of two elements: the first was the collective neutralisation of Southeast Asia under a multilateral agreement between the U.S., the USSR and China and the second was that member States of the ASEAN pledged to work together to secure the recognition of, and respect for, Southeast Asia as a Zone of Peace, Freedom, and Neutrality ('ZOPFAN'); this was adopted in a Declaration known as the "Kuala Lumpur Declaration" on 27th November 1971.

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8 Foreign Affairs Malaysia, Vol.1, Nos.7 and 8, March 1979, p.49; Malaysia Parliamentary Debates, House of Representatives, Vol.4, No.22, pp.3615-6.

9 See the text of the Bangkok Declaration of 1967 in ASEAN Documents Series: 1967-1988 (3rd edn., 1988), p.27.

10 See Foreign Affairs Malaysia 3, No.2 (December 1970), p.16.

2. The Declaration

The ASEAN's declaration is not only a first declaration for the creation of a ZOPFAN in a geographical region but also a first collective declaration for the transformation of a region into a ZOP. The operative paragraph of the Declaration reads as follows:

> "We, the foreign ministers of [the ASEAN countries], ...
> DO HEREBY STATE:
> 1. That Indonesia, Malaysia, the Philippines, Singapore and Thailand are determined to exert efforts to secure the recognition of and respect for the neutrality of Southeast Asia as a Zone of Peace, Freedom, and Neutrality, free from any form or manner of interference by outside Powers..."[11]

3. Evaluation of the Declaration

The main objectives behind the Kuala Lumpur declaration seem to be to commit the member States of the ASEAN to a regime much wider than any hitherto known regimes in international law in order to achieve a lasting peace in the region. Although the declaration does not explicitly define the concept of ZOPFAN, the main objective of this declaration seems to be to usher Southeast Asia onto the road to an Asian version of permanent neutrality. That is to say, it would be a neutrality not only based on classical rules of neutrality but also on the Bandung principles. In other words, the Southeast Asian States have apparently added the words 'peace' and 'freedom', partly to extend the scope of the institution of neutrality in time of peace and partly to embody the principles of the Bandung Declaration.[12]

However, there are a number of international legal questions which this Declaration does not answer. Firstly, the Declaration speaks of exerting efforts to secure recognition of Southeast Asia as a ZOPFAN; it does not make it clear whether

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11 ASEAN Documents Series: 1967-1988 (3rd edn., 1988), p.34. See Appendix III, for the full text of the Declaration.

12 See Chapter V for a fuller discussion of the institution of permanent neutrality and the Bandung Declaration. See for the text of the Declaration, Documents on International Affairs (1955), p.429.

the Southeast Asian States have formally and legally committed themselves to the rules of ZOPFAN.

Secondly, although it is not necessary to spell out the rules of neutrality in the Declaration since international law contains such rules, there exists no agreed definition in international law of the terms 'peace' and 'freedom' and, consequently, these terms could be defined variously by different States. Even if these terms were meant to encompass the Bandung principles the declaration omits to say so explicitly.

Thirdly, the declaration does not explicitly require the ASEAN nations to withdraw from military alliances with outside Powers, nor does it require the closure of foreign military bases in the region. Both of these elements form certain of the hard-core rules of permanent neutrality.[13] Of course, the ZOPFAN refers to the Bangkok declaration's provision that foreign military in the region are temporary. Since the term 'temporary' has not been defined in any of the Declarations, individual States appear to be free to interpret it according to their convenience.

Fourthly, it is not clear whether the Declaration applies to the whole of the Southeast Asian region or solely to the land areas within national jurisdiction of the States of Southeast Asia. If it applies to the whole region including the maritime areas, which include some of the strategically significant and busiest straits in the world, the rules of ZOPFAN will have to be compatible with the law of the sea regimes of transit and innocent passage.[14]

Although the neutralisation of a country or region as such does not require a change to the right of passage of other States through neutral territorial waters,[15] major maritime Powers seem apprehensive about the effects of ZOPFAN for Southeast Asia because of the tendency of certain States of the region to interpret narrowly the right of transit and archipelagic sea lanes passage.[16] However, when a

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13 R. Binschedler, 'Neutrality Concept and General Rules', in Encyclopaedia of PIL, Vol.4,: Use of Force. War and Neutrality. Peace Treaties (1982). See Chapter V, below.

14 See Chapter II, above.

15 See the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War of 1907.

16 For instance, see the Indonesian announcement of 1957 in Whiteman, Digest of International Law, vol.4, p.284 and the Philippines' declaration made on signing the LOSC and the

draft treaty was prepared by a Committee of Senior Officials of the ASEAN in 1984 to establish an NWFZ in Southeast Asia it provided that the establishment of an NWFZ in Southeast Asia will not affect port calls, transit and overflights by nuclear-armed vessels and aircraft or innocent passage through archipelagic waters of the zone.[17] This means that the zone of application of the ZOPFAN Declaration is not intended to affect the law of the sea regime of navigation. It is worth mentioning that similar regional initiatives, viz., the Treaty of Tlatelolco as well as the Rarotonga Treaty, contain safeguards for the navigational rights of other States in the waters covered by the treaties concerned.[18]

However, since the adoption of the Declaration in 1971 some significant steps have been taken to achieve its objectives. Most significant of these are the 1976 Conceptual Framework and Proposals Concerning Steps for the Creation of ZOPFAN and the Treaty of Amity of 1976.

4. The Blueprint for ZOPFAN

The 'Conceptual Framework and Proposals Concerning Steps for the Creation of ZOPFAN' (also known as the 'blueprint for ZOPFAN'), prepared by a Committee of Senior Officials and adopted by the ASEAN heads of government at their Bali summit in 1976, defines the terms 'peace', 'freedom' and 'neutrality' in the Declaration of Zone of Peace, Freedom, and Neutrality (ZOPFAN).[19] 'Peace' is defined as a condition in which the region is free of conflicts:

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objections of other States in UN. Doc.ST/LEG/SER. E/7, p.764 et seq. See also Rodgers, Mid-ocean Archipelagos and International Law (1981).

17 Since principle 11 of the code of conduct prohibits the use, storage, passage, or testing of nuclear weapons and their components within the zone, attempts have been made to prepare a treaty to establish an NWFZ in the zone and to secure respect and recognition of nuclear Powers. The establishment of an NWFZ is regarded by the ASEAN countries as an important step in the efforts for the realisation of ZOPFAN. See 'Manila Declaration of 15 December 1987', in the ASEAN Documents Series 1967-1988, p.48 and Hanggi, *op.cit.* note 1, p.32.

18 See Chapter V, below, for a fuller discussion of this topic.

19 See Hanggi, *op.cit.* note 1, pp.21-27. I was unable to locate the original document. When I wrote to the Institute of Southeast Asian Studies in Singapore enquiring about the document I was told in a personal letter that the document was deemed confidential by the ASEAN officials. Nevertheless, several writers have published excerpts from the document quoting several sources and Hanggi's work, cited above, contains the most detailed information on the document.

> "Peace is a condition where the prevalence of harmonious and orderly relations between and among States; no reference is hereby made to the internal state of affairs in each of the zonal States. A situation of ideological, political, economic, armed or other forms of conflict, either among the zonal States themselves, between one or more zonal States and outside Powers, or between outside Powers affecting the region, is not a condition of peace."[20]

'Freedom' is defined as the right of States of the region to resolve their domestic problems without any outside interference whatsoever and to assume the primary responsibility for security and stability in the region:

> "Freedom means the freedom of States from control, domination or interference by other States in the conduct of their [internal] and external affairs. This means the right of zonal States to solve their domestic problems in terms of their own conditions and aspirations, to assume primary responsibility for the security and [stability] of the region and to arrange their regional and international relations on the basis of sovereign equality and mutual benefit."[21]

The definition of neutrality runs thus:

> "Neutrality means the maintenance of a state of impartiality in any war between other States as understood in international law and in the light of the United Nations Charter. Taken in the context of the Kuala Lumpur Declaration, however, it means that zonal states shall undertake to maintain their impartiality and shall refrain from involvement directly or indirectly in ideological, political, economic, armed or other forms of conflict, particularly between Powers outside the zone, and that outside Powers shall not interfere in the domestic or regional affairs of the zonal States."[22]

Although this document seems to define neutrality in wide, classical terms, it is silent on two of the key features of permanent neutrality: it mentions neither non-participation in military alliances nor the absence of foreign military bases in the zone.[23] Notably, this neutrality is operative not only in times of war but also in peace

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20 As quoted in Hanggi, *Ibid.*, p.22.
21 *Ibid.*, p.23.
22 *Ibid.* pp.23-24.
23 See Chapter V, below.

time; not only in armed conflicts but also in other types of conflicts. It is this aspect of neutrality which shows that the concept of ZOPFAN is greater than permanent neutrality. The concept of ZOPFAN is based primarily on non-interference by outside powers in the affairs of the zone and non-participation and observance of impartiality by the zonal States in all types of conflicts between other States.

This document also provides a code of conduct for the regional States as well as for the States supporting the ZOPFAN proposal. The 14 points of the code of conduct are as follows:

1. Observance of the UN Charter, the Declarations of Bandung (1955), Bangkok (1967) and Kuala Lumpur (1971).
2. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations.
3. The right of every State to lead its national existence free from external interference, subversion or coercion.
4. Non-interference in the internal affairs of zonal States.
5. Refraining from inviting or giving consent to intervention by external Powers in domestic or regional affairs of zonal States.
6. Settlement of differences or disputes by peaceful means in accordance with the UN Charter.
7. Renunciation of the threat, or use, of force in the conduct of international relations.
8. Refraining from the use of armed forces for any purpose in the conduct of international relations except for individual or collective self-defence in accordance with the UN Charter.
9. Abstention from involvement in any conflict of powers outside the zone or entering into any agreements which would be inconsistent with the objectives of the zone.
10. Absence of foreign military bases in the territories of zonal States.
11. Prohibition of the use, storage, passage or testing of nuclear weapons and their components within the zone.
12. The right to trade freely with any country or international agency irrespective of differences in socio-political systems.
13. The right to receive aid freely for the purpose of strengthening national resilience except when the aid is subject to conditions inconsistent with the objectives of the zone.
14. Effective regional co-operation among zonal States.[24]

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24 H. Djalal, 'Gagasan ZOPFAN-KBSN-AT dalam Upaya Peningkatan Stabilitas Kawasan Asia Tenggara', [The ZOPFAN-SEANWFZ concept as a means to enhance the stability of the Southeast Asian region] in Journal Luar Negeri, no.12 (April 1989), pp.131-132. As quoted in Hanggi, *op.cit.*, note 1, p.25.

The code also provides for measures to be adopted in the event of violations of the rules of ZOPFAN by regional and non-regional States. If a violation by a zonal State occurs, it calls for consultation, negotiation and the employment of other pacific means of dispute settlement consistent with the Charter of the UN. If the violation is by an external actor the code provides for appeal to the UN by the zonal States.[25] The code of conduct is highly comprehensive in character and encompasses the principles of the Charter of the UN, the Bandung Declaration, almost all principles of classical neutrality and certain elements of NWFZ.

5. The Treaty of Amity of 1976[26]

In order to strengthen the institution of ZOPFAN the Southeast Asian nations adopted in 1976 a Treaty of Amity embodying many items of the code of conduct. Since the ASEAN comprises several States of Southeast Asia, the question of the implementation of the 1971 Kuala Lumpur declaration has embraced two elements: first, establishing co-operation among the States of the region on the basis of the principles of peaceful co-existence and the peaceful settlement of all disputes, and second, securing outside recognition of their policy of ZOPFAN. As far as the first objective is concerned, the adoption of the Treaty of Amity and Co-operation in Southeast Asia between the ASEAN members in 1976 has been regarded as the most significant achievement in this direction. As Hanggi writes, "the treaty is an original and indigenous Southeast Asian answer to the question of how to cope with intra-regional conflicts and disputes ...the treaty if signed by all Southeast Asian States, would constitute the regional foundations for regional neutrality."[27] It contains a code of conduct for regional States.

Article 2 of the Treaty states that "[i]n their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

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25 See in Alagappa, *op.cit.* note 1, pp.269-276.

26 27 ILM (1988), p.610. The treaty has been ratified by Brunei, Thailand, Indonesia, Malaysia, Singapore, the Philippines, Vietnam, and Laos. When Cambodia was neutralised under an international agreement concluded at the Paris Peace Conference in 1991 the terms of neutrality included almost all elements of the Treaty of Amity. See 31 ILM (1992), p.200.

27 Hanggi, *op.cit.*, note 1, pp.31-32.

a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
b. The right of every State to lead its national existence free from external interference, subversion and coercion;
c. Non-interference in the internal affairs of one another;
d. Settlement of differences or disputes by peaceful means;
e. Renunciation of the threat or use of force;
f. Effective co-operation among themselves."[28]

The most significant of all is Article 10, which commits the ASEAN States to far more onerous undertakings towards each other than any of the international instruments concerning the prohibition on the use of force and non-intervention:

> "Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party."

Through Article 13, the States of Southeast Asia commit themselves to settle at all times the disputes likely to disturb regional peace and harmony among themselves through friendly negotiations. Accordingly, Article 14 constitutes a permanent body to settle such disputes through regional processes. The recent decision of Vietnam and Laos to accede to the Treaty and the conclusion of an international agreement on the neutralisation of Cambodia[29] in Paris in 1991 may help to accelerate the achievement of the objectives of the 1971 Declaration on ZOPFAN.[30]

6. International recognition of ZOPFAN

No State has indeed formally recognised the ZOPFAN. International recognition of this declaration is of practical significance: this region includes some of the world's most important sea lanes. Owing to its strategic value and economic potential, Southeast Asia is, and will remain, vulnerable to major Power interference in the

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28 See for text of the Treaty ASEAN Documents Series: 1967-1988 (3rd edn., 1988), p.39; 27 ILM (1988), p.610.
29 See 31 ILM (1992), p.200. This agreement is examined in Chapter V, below.
30 See The Independent (London), 23 July 1992, p.14.

absence of a multilateral agreement between major Powers to respect the ZOPFAN status of Southeast Asia. All maritime Powers and especially the U.S., the U.K., Russia, China, Japan, India, Australia and New Zealand, have considerable interests and certain of them also have military involvement in the affairs of the region. Therefore, the successful establishment of the ZOPFAN in Southeast Asia naturally requires the recognition and co-operation of these countries.

The question of the implementation of the ZOPFAN was mentioned several times in the United Nations; but there was no consolidated move aimed at securing international support for ZOPFAN. The Cold War, the Cambodian conflict and the large American military presence in the Philippines were some of the major obstacles. The UN General Assembly urged the countries of Southeast Asia to exert renewed efforts to establish a ZOPFAN in the region once a comprehensive political solution to the Kampuchean conflict was achieved.[31] Since these obstacles have now been largely removed,[32] the realisation of the ZOPFAN declaration should be possible if there exists the political will on the part of the States of the region to effect it.

With regard to the external aspect of ZOPFAN, the absence of foreign military bases and abrogation of military pacts with outside Powers seem to be among the principal characteristics of permanent neutrality.[33] In order to make Southeast Asia a permanently neutral region, the States of the region will have to withdraw from military alliances with other States and terminate agreements regarding bases concluded with foreign States. Currently, several States of Southeast Asia are party to various military alliances and pacts which permit foreign Powers to maintain their military bases in the region.[34] Although the Philippines has terminated its base

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31 General Assembly Resolution 37/6 of 1982, adopted by 104 votes to 2, with 24 abstentions.

32 As stated earlier, Cambodia has been neutralised under an international peace settlement of 1991. See *supra* note 29.

33 Binschedler, *op.cit.* note 13. See Chapter V, below.

34 Among such treaties are: the Five-Power Defence Agreement of 1971 between the U.K., Australia, New Zealand, Malaysia, and Singapore which provides for continued stationing of U.K. Australian and New Zealand armed forces in Malaysia and Singapore; the 1983 agreement between Brunei and the U.K. providing for the maintenance of one battalion of regular British Army Gurkhas in Brunei and the Manila Pact of 1954 between the U.S., Thailand and the Philippines. Vietnam had concluded a number of defence pacts with the then Soviet Union. But following the collapse of the Soviet Union the status of such treaties remain uncertain. See K.U.

agreements of 1947 with the U.S. and required the U.S. to close down its military bases in the Philippines,[35] other ASEAN countries have not terminated their defence pacts with foreign Powers.

7. Conclusion

The ASEAN's ZOPFAN policy represents a radical step in the annals of international law and practice. The idea of transforming a whole geographical region consisting of many sovereign States into a single permanently neutral zone such as this is without precedent. The Southeast Asian States have laid down an interesting model for regional policies of ZOP. The item of first and foremost importance for a regional ZOP or ZOPFAN is legally to commit the regional States themselves to the rules of such a zone and establish a procedure for the resolution of disputes arising from the application of such rules by different countries. The Southeast Asian States have done so through the Treaty of Amity of 1976. In short, as Alagappa writes, the thrust of the ZOPFAN appears to be "the creation of an indigenous regional order in Southeast Asia that would be respected by the outside powers"[36] and this indigenous order is consistent with international law.

III. Nepal's Proposal for a ZOP[37]

1. The background to the proposal

Nepal, wedged between two colossal powers, China and India, each with its respective social, economic and political systems, has since its unification in 1769 tried to maintain a stance of political neutrality.[38] With a view to consolidating and

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Menon, 'A Six-Power Defence Arrangement in Southeast Asia?', 10(3) Contemporary Southeast Asia (1988), p.306; N.J. Rengger, Treaties and Alliances of the World (1990), pp.380, 520.

35 The Times (London), 17 September 1991, p.9.

36 Alagappa, *op.cit.* note 1, p.274.

37 See generally, T.B. Singh, 'Nepal a Zone of Peace - a legal perspective', in G.R. Agrawal, et al. (eds.), Fundamentals of Nepalese Foreign Policy (1985), p.39; D.B.S. Thapa, 'Nepal's Peace Zone Proposal and International Law', Nepal Law Review, No. 19 (January 1982); R. Shaha, Politics in Nepal 1980-1990: Referendum, Stalemate and Triumph of People Power (1990), Ch.7: Nepal as a Zone of Peace.

38 This policy was in fact propounded by King Prithvinarayan Shah (who ruled from 1768-75), the founder of modern Nepal. See in R. Shaha, Nepali Politics: Retrospect and Prospect (1978), p.104.

strengthening this policy Nepal proposed to the world community in 1975 that it be declared a Zone of Peace.

2. The Proposal

Addressing a farewell reception for visiting royalty, Presidents, Prime Ministers and other foreign guests in Kathmandu to attend the King's Coronation in February, 1975, King Birendra of Nepal stated that

> "As heirs to one of the most ancient civilisations in Asia, our natural concern is to preserve our independence, a legacy handed down to us by history ...We need peace for our security, we need peace for our independence, and we need peace for development. And if today, peace is an overriding concern with us, it is only because our people genuinely desire peace in our country, in our region and everywhere in the world. It is with this earnest desire to institutionalise peace that I stand to make a proposition - a proposition that my country, Nepal, be declared a Zone of Peace."[39]

The King further reasoned:

> "As heirs to a country that has always lived in independence, we wish to see that our freedom and independence shall not be thwarted by the changing flux of time when understanding is replaced by misunderstanding, when conciliation is replaced by belligerency and war."[40]

The Third Amendment to the Constitution of Nepal incorporated the proposal in the following terms:

> "The foreign policy of the panchayat system shall be to strive to make Nepal a Zone of Peace in pursuance of the basic purposes of the United Nations Organisation and the principles of non-alignment."[41]

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39 See for full text of the speech J. Sharma, Nepal: Strategy for Existence (1986), appendix III, pp.297-299.

40 As quoted in Shaha, *op.cit.*, note 37, p.103.

41 Article 19(3) of the Constitution of Nepal of 1962. This is my own translation from the Nepali text of The Constitution of Nepal (1989, Ministry of Communications, Kathmandu).

The basic features of the proposal were later outlined by Nepal; it was prepared to assume the following obligations on a reciprocal basis with those countries which would support the proposal:

> "1. It would adhere to the policy of peace, non-alignment and peaceful co-existence and would constantly endeavour to develop friendly relations with all countries of the world, regardless of their social and political system, and particularly with its neighbours, on the basis of equality and respect for each other's independence and sovereignty.
> 2. It would not resort to the threat or use of force in any way which might endanger the peace and security of other countries.
> 3. It would seek peaceful settlement of all disputes between it and other State or States.
> 4. It would not interfere in the internal affairs of other States.
> 5. It would not permit any activities on its soil that were hostile to other States supporting its proposal and in reciprocity, States, supporting its proposal, could not permit any activity hostile to Nepal.
> 6. It would continue to honour the obligations under all the existing treaties which it had concluded with other countries as long as they remained valid.
> 7. It would not enter into military alliance nor would it allow the establishment of any foreign military bases on its soil. In reciprocity, other countries supporting its proposal would not allow establishment of military base on their soil directed against Nepal."[42]

3. Evaluation of the proposal

Nepal could have adopted the policy of permanent neutrality,[43] but it preferred the policy of ZOP.[44] Das sums up the rationale behind the ZOP proposition in the following terms:

> "The peace zone proposition is, no doubt, a subtle attempt on his [the King of Nepal] part to give a new dimension to Nepal's policy of non-alignment so as to withstand the land-locked kingdom's growing vulnerability to international pulls and pressures. It is a proposal for 'guarantee of peace'; not 'guarantee of neutrality'. On the one hand, the proposition represents a desire to look for a permanency for the country's

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42 AALCC Report 1988, pp.190-193, at 192.

43 See Chapter V for a comparative analysis of the principles of ZOP and the rules of permanent neutrality.

44 See K.B. Singh, 'Non-Alignment and Nepal as a Zone of Peace', in Agrawal, et al., *op.cit.* note 37, pp.173-187, at 181.

destiny, on the other it is a desire to be immune from tensions, fear and anxiety."[45]

As of 1 January 1990 this proposal was supported by 109 States.[46] Among them are China, U.S., U.K., France, Germany, Japan, Italy, Canada, Australia, Egypt and Brazil. However, India's reluctance to support the proposal has been a major obstacle towards its realisation. India has not as yet formally made its view clear on Nepal's proposal for a Zone of Peace put forward nearly 20 years ago. China, Nepal's northern neighbour, supported this proposal and made a firm commitment that it was prepared to assume any obligations arising from its support.[47] Although certain writers have stated that the Chinese statement does not make it clear what these commitments are and how they arise,[48] the commitments of the States supporting Nepal's proposal, including China, U.K., U.S. and France, seem to be those outlined in Nepal's seven-point features mentioned above since Nepal has made it clear that these commitments are reciprocal; it is not necessary for every supporting State to spell out its commitments arising from its support to a proposal. The State that puts forward the proposal defines the commitments of the supporting States by defining the range and scope of its proposal. If other States support such a proposal without making any reservation, then they would be considered under the obligations outlined above.

What matters most in practical terms for Nepal's proposal is India's support. This point was highlighted in 1981 by Kurt Waldheim during his visit to Nepal as Secretary-General of the UN.[49] A similar view was expressed by Britain and the U.S. when they endorsed the proposal.[50] A generally held view in India[51] seems to be that

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45 R. K. Das, Nepal and Its Neighbours: Quest for Status of a Land-Locked State (1986), p.124.

46 This information was supplied to the author by the Royal Nepalese Embassy, London.

47 See in B. Rana, HM King Birendra's Peace Proposal for Nepal (1983), p.12.

48 M. Kurve, 'Nepal's Peace Zone move: attempt to change 1950 treaty', The Times of India, 14 January 1981, p.8.

49 As quoted in Rana, *op.cit.*, note 47, p.6.

50 The Foreign and Commonwealth Office of the U.K. stated that "HMG's general approach to Zone of Peace proposals is well known. We support them providing they enjoy the support of all countries concerned. Consequently, we support the Nepalese proposal in principle and view it with much sympathy and interest." As quoted in Rana, *Ibid.*, p.17. See for similar remarks made by U.S. President Ronald Reagan in S.C. Regmi (comp.), The Peace Zone Proposal of Nepal (1985), p.30.

the 1950 treaty and the concept of Zone of Peace cannot go together;[52] the 1950 treaty provides for common defence and the Peace Zone proposal undermines this policy. Given the strategic situation of Nepal, India cannot afford to release the former from the common defence principle enshrined in the 1950 treaty: this is a valid treaty and India is not prepared to accept any limitations that are inconsistent with it.[53] Certain prominent Nepalese writers too appear to have subscribed to the view that changes in Nepal's treaty relationship would be necessary to make Nepal a Zone of Peace.[54] No serious and comprehensive attempt has been made to analyse the compatibility of this proposal with the 1950 treaty with India. Some scholars have ventured into this area, but their writing is largely confined to political issues.[55]

4. The 1950 Peace and Friendship Treaty[56]

In the aftermath of World War II, numerous changes took place in the region of South Asia. India gained independence in 1947. The Communists came into power in China in 1949. With the aim of preventing the communist influence from spilling over into the neighbouring Himalayan kingdoms, the newly independent India wished

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51 For instance, see The Times of India, editorial of 21 February 1976 and S. K. Datta-Ray of The Statesman (India), as quoted in Shaha, *op.cit.* note 37, p.119.

52 Officially, India has been stating for the last 15 years that it is studying the proposal with a view to examining its implications on Indo-Nepal relations. See President Reddy's views in The Hindustan Times, 9 December 1981; Mrs. Gandhi's views in S.D. Muni, 'Nepal as a Zone of Peace', Strategic Analysis (New Delhi), January 1984, p.789; Indian External Affairs Minister's speech to the Lok Sabha (the lower house of Indian parliament) Das, *op.cit.* note 45, p.145. Das claims that certain principles of Nepal's proposal "apparently conflict with the 1950 Treaty of Peace and Friendship between the two countries and India's perception of security in the sub-continent in the light of Sino-Indian hostility." Das, *Ibid.*

53 When Nepal suggested to the then Indian foreign minister, Mr Rao (now Prime Minister), during his visit to Nepal in August 1989 that Nepal's Zone of Peace proposal should form part of discussions on security perceptions between the two countries, Mr Rao seems to have skirted the issue. See 'Nepal Suggested Treaty Review, ZOP inclusion in talks: Upadhyaya', in The Rising Nepal of 27 August 1989.

54 See Shaha, op. cit. note 37, ch.7: 'Nepal as a Zone of Peace'; and *supra* note 40, p.169: "Nepal's attempt to have itself declared a zone of peace may require a change in mutual obligations and understandings." See also Shaha, 'Indo-Nepalese Treaty: A Nepali scholar's case for revision', The Times of India, 3 September 1986, p.8.

55 See generally, Shaha, *op.cit.* notes 37 and 38; Leo E. Rose, Nepal: Strategy for Survival (1971); S.D. Muni, Nepal: An Assertive Monarchy (1977); Das, *op.cit.*, note 45; G.R. Agrawal, et.al. (eds.), Fundamentals of Nepalese Foreign Policy (1985).

56 See for text of the treaty 94 UNTS (1950), 3; A.S. Bhasin (comp.), Documents on Nepal's Relations with India and China 1949-66 (1970), p.32. See for the letters of exchange concluded on the same date between the two countries and attached to the Treaty, R. Shaha, Nepali Politics: Retrospect and Prospect (1978), p.252.

to strengthen the 'Himalayan frontier policy' of British India under which the Himalayas were regarded as its ultimate frontier, its proper line of defence.[57] For this, India concluded three treaties of peace and friendship with her three small neighbouring kingdoms - Nepal, Bhutan[58] and Sikkim[59] - in order to bring them within her sphere of influence. The treaty with Nepal, and especially letters exchanged on the day the treaty was concluded (hereafter the letters of exchange), deal with a number of bilateral matters, including certain matters of defence. The treaty was concluded in such a discreet manner that most of the provisions concerning defence were included in the letters of exchange and the existence and the contents of the letter were kept secret for nine years. The letters of exchange were not attached to the treaty when the treaty was registered with the Secretary-General of the UN. The principal provisions of the treaty and the letters of exchange concerning security and defence matters are as follows:

Article II of the Treaty
"The two Governments hereby undertake to inform each other of any serious friction or misunderstanding with any neighbouring State likely to cause any breach in the friendly relations subsisting between the two Governments."[60]

Paragraph 1 of the Letters of Exchange
"Neither Government shall tolerate any threat to the security of the other by a foreign aggressor. To deal with any such threat, the two governments shall consult with each other and devise effective countermeasures."[61]

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57 The then Prime Minister of India, Nehru, said in March 1950 that "any possible invasion of Nepal [by a foreign Power] would inevitably involve the safety of India." In December he further justified his argument: "Now we have had from immemorial times, a magnificent frontier that is to say, the Himalayas... Now so far as the Himalayas are concerned, they lie on the other side of Nepal, mostly, not on this side. Therefore, the principal barrier to India lies on the other side of Nepal and we are not going to tolerate any person coming over that barrier." Parliamentary Debates, Part II: March 17, 1950: 1697-98 and December 6, 1950: Cols.1267-71. Quoted in Bhasin, *op.cit.* note 56, pp.23-26.

58 Article 2 of the Indo-Bhutan treaty of 1949 provides that "The Government of India undertakes to exercise no interference in the internal administration of Bhutan. On its part the Government of Bhutan agrees to be guided by the advice of the Government of India in regard to its external relations." See in Nagendra Singh, Bhutan: A Kingdom in the Himalayas (1978), pp.254-255.

59 Article III(1) of the Indo-Sikkim treaty of 1950 provided that India will be "responsible for the defence and territorial integrity of Sikkim". Sikkim was later incorporated into the union of India: Keesing's Vol. VIII (1950-1952), p.11147 and Vol. XXI (1975), p. 27062.

60 Article II of the 1950 Peace and Friendship Treaty.

61 Paragraph 1 of the Exchange of Letters.

5. The concept of common defence

It is doubtful whether the 1950 treaty, basically a political treaty, provides for common defence. Article II merely requires exchange of military information. This requirement of exchange of information in no way indicates that the treaty provides for common defence. This article requires neither a regular nor an immediate supply of information. It is up to each side to judge whether its friction with third countries is likely to cause any breach in the friendly relations with the other contracting party. It is not necessary to inform others of friction or a misunderstanding unlikely to cause such breach even if it is likely to affect such friendly relations: the friction or misunderstanding must be a serious one and likely to cause breach in the friendly relations subsisting between the two countries in the view of the government concerned.

Moreover, the requirement is limited to the information that is likely to breach the friendly relations between the two contracting parties. In other words, Nepal is not required to inform India of any friction or misunderstanding that it may have with other States if it is unlikely to affect Indo-Nepal relations. The same is true with regard to India's obligation. That is why India did not inform Nepal when it went to war twice with Pakistan and once with China after the conclusion of the 1950 treaty. Certain Nepalese writers and officials have overlooked this fact and asserted that India's failure to inform Nepal during these wars amounted to non-observance of the treaty.[62] India was under no obligation to inform Nepal since these wars were unlikely to affect Indo-Nepalese relations. This simple duty to exchange information does not undermine Nepal's efforts to become a Zone of Peace.

However, paragraph 1 of the letter exchanged with the treaty has often been cited to show that the 1950 treaty is a military pact. Although at first glance this paragraph appears to provide for common defence, at closer examination it is no more than a poorly formulated provision that suffers from a number of deficiencies. First, from the structure of this provision, one cannot infer a clear meaning from this paragraph.

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62 For instance, see an interview of the then Nepalese Prime Minister, Bista in The Rising Nepal of 25 June 1969, p.1.

Under this provision a threat must have come from a foreign aggressor. But under the 1974 UN General Assembly resolution on the Definition of Aggression, widely regarded as the most authoritative definition of aggression, aggression is the use of armed force by a State against another State in contravention of international law.[63] This definition was adopted unanimously: both India and Nepal supported it. A State which merely threatens another State or is using armed force in self-defence is not an aggressor, although a threat of force is illegal under international law.[64]

If section 1 of the letters of exchange provides for the use of force it seems inconsistent also with the provisions of the Charter of the United Nations and thus, perhaps, incapable of operation.[65] Both multilateral military pacts and bilateral alliances provide for collective military measures only in the event of a breach of peace or an armed attack by a foreign aggressor against the contracting parties.[66] A mere threat by a foreign Power does not activate the right of self-defence under Article 51 of the Charter of the UN. If a State or States members of the UN perceive a threat from a foreign aggressor they should not resort to self-help; they are obliged to follow the provisions of the Charter of the UN under which the Security Council has been designated the authority to determine the existence of any threat to the peace and decide measures necessary to maintain or restore international peace and security (Article 39 of the Charter).

Pointing to paragraph 1 of the letters of exchange, which requires the contracting parties to devise counter-measures in the event of a threat to the security of either contracting party by a foreign aggressor, and attaching special weight to the term

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63 General Assembly resolution 3314 (XXIX) of 1974, G.A.O.R. 29th Session, Supp.21; 69 AJIL (1975), p.480. See on aggression Bernhardt, Encyclopedia of PIL, Vol. 3, pp.1-6; Cassin et al., 'The Definition of Aggression', 16 HILJ (1975), pp.589-613.

64 Article 2(4) of the Charter of the United Nations.

65 Cf. Article 103 of the Charter of the United Nations.

66 See for an analysis of a number of bilateral treaties concluded by the former USSR with other countries Z. Imam, Towards a Model Relationship: A Study of Soviet Treaties with India and other Third World Countries (1983), pp.105-178; for bilateral defence treaties concluded between the Western States, S.D. Murphy, 'The role of bilateral defence agreements in maintaining the European security equilibrium', 24(3) CILJ (1991), pp.414 ff. See also for defence treaties of the USA with other countries N.J. Rengger, Treaties and Alliances of the World (5th edn. 1990), pp.460-469. With regard to multilateral treaties see Article 5 of the North Atlantic Treaty of 1949 (34 UNTS 243) and Article 4 of the former Warsaw Pact of 1955 (49 AJIL, Supp. 194 (1955)).

'devise effective counter-measures', Rishikesh Shaha, a prominent Nepalese scholar, claims that this provision "implies nothing short of a military pact between Nepal and India."[67] However, his assertions seem based only on the term 'devise effective counter-measures'. In international law the term 'counter-measures' means both forcible and non-forcible measures. According to Jakobson, the essential characteristics of a treaty of alliance include regular consultations in time of peace and automatic mutual assistance in the event of war.[68] After analysing several peace, friendship and mutual assistance agreements concluded by the former Soviet Union with other countries Imam also states that all such treaties "commit the signatories to regular consultation, meetings and contacts on vital issues of the day affecting the interests of both the parties."[69] Nepal's peace and friendship treaty lacks all such essential characteristics of a treaty of alliance.[70] This treaty is not a military pact.

Such has been the position of both India and Nepal. For instance, the then Prime Minister of India, Nehru, said in 1959 that the 1950 treaty was "not a military alliance by any means".[71] His counterpart in Kathmandu, Koirala, affirmed in 1960 that he did not envisage a joint defence between India and Nepal as military alliances were "worse than useless," especially between Nepal and India.[72] Nepal's 1950 treaty

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67 R. Shaha, 'Himalayan Impasse: Need for New Perspectives', The Times of India, 7 June 1989, p.4.

68 M. Jakobson, Finland: Myth and Reality (1987), p.69.

69 Imam, *op.cit.* note 66, p.81.

70 The provisions of the 1950 treaty could be compared and contrasted with the 1948 Treaty of Friendship, Cooperation and Mutual Assistance between Finland and the former Soviet Union. Article 1 of the treaty reads that "Should either Finland, or the Soviet Union through the territory of Finland, become the object of military aggression ..., Finland will carry out its duty as a sovereign State and will fight to repel aggression." In such cases Finland would fight, if necessary, with the assistance of, or jointly with, the Soviet Union. According to Article 2, the two countries "will consult together in case there is found to be a threat of the military aggression referred to in Article 1." (48 UNTS 149, 156) In spite of such arrangements Finland was able to pursue a policy of permanent neutrality because the obligation of Finland to fight to expel the aggressor was limited to its territory and accepting Soviet help or fighting jointly with the Soviet Union was dependent on the discretion of Finland. Nepal's obligations under the 1950 treaty with India are significantly less exacting than the obligations of Finland under the Soviet-Finnish treaty. Nepal is under no obligation to fight any war jointly with India or to assist India in a war, not even to expel the aggressor.

71 Nehru's statement at a press conference in New Delhi on 3 December 1959: Bhasin, op. cit. note 56, p.28.

72 *Ibid.* pp.49-50.

with India does not even resemble the somewhat modest 1971 Indo-Soviet security treaty,[73] let alone other alliances.

For the purpose of comparison Article 9 of the Indo-Soviet treaty is worth mentioning: "In the event of either party being subjected to an attack or a threat thereof, the High Contracting Parties shall immediately enter into mutual consultations in order to remove such threat and to take appropriate effective measure to ensure peace and the security of their countries."[74] (emphasis added) Nepal's treaty with India requires neither immediate consultation nor joint measures to repel the aggressor.

Therefore, Rishikesh Shaha's assertion that paragraph 1 of the 1950 treaty "has more teeth to it than the Indo-Soviet Treaty of 1971"[75] is not justifiable. The 1950 treaty has no teeth at all and if any teeth are seen in it they are obsolete teeth. This is because under the Indo-Nepal treaty the consultation required of the two governments is to deal with any threat, but not, surprisingly enough, to expel the aggressor. The same is true of the requirement relative to devising effective countermeasures. If the devising of countermeasures is to expel the aggressor, one could plausibly argue that the term 'effective counter-measures' generally means military measures, although military measures may not always be 'effective countermeasures.' Further, the requirement envisaged in the letters of exchange is not to repel the aggression but to deal with any threat to the security of the other. Such a threat may be dealt with in a number of ways, including diplomatic and economic measures; such measures may be more effective than provocative military measures to counter any threat.

Paragraph 1 of the letters of exchange has a number of other weaknesses: first, this provision seems to go beyond the scope of Article II of the main treaty, which merely requires the exchange of military information. According to the opening paragraph of the letters of exchange the two Governments had agreed to regulate certain matters of details through the exchange of letters. That regulation of certain

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73 10 ILM (1971), p.904.
74 *Ibid.*
75 Shaha, *op.cit.* note 37, p.121.

matters of details should not have exceeded the provisions of the main treaty and require the contracting parties to devise effective counter-measures to deal with any threat from any foreign aggressor.

Second, before invoking paragraph 1 of the letters of exchange, a contracting party must establish that there is a threat to its security by a foreign Power and the other State must believe that there exists such a threat. One State's perception of the existence of a threat may not coincide with the other State's perception.

Thus, it seems to be an unfounded claim that the 1950 treaty provides for common defence. In fact, India did not consult with Nepal when it went to war with China and Pakistan after the conclusion of this treaty. Paragraph 1 of the letters of exchange remains riddled with ambiguities and problems. One may argue that under the 'object and purpose' principle of the interpretation of treaties[76] or the principle of effectiveness,[77] a reasonable meaning would have to be accorded to this paragraph: the main purpose of this paragraph seems to be to provide legal ground for India's intervention in the event of a direct Chinese threat to Nepal, a country referred to by Nehru as "almost geographically a part of India."[78] Even in that case, however, such help may come only if all of the following conditions are met:[79]

(1) Nepal itself decides that a threat to its security by a foreign Power exists;

(2) Nepal of its own free will decides to consult with India in its own time to deal with such threat;

(3) Nepal proposes during the consultation that devising effective counter-measures is necessary to deal with such threat.

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76 Article 31(1) of the Vienna Convention on the Law of Treaties. UKTS No.58 (1980), Cmnd.7964; 8 ILM 679 (1969). It entered into force in 1980. As at January 1, 1989 there were 58 States party to it.

77 Although this principle is not, as such, provided for in the Vienna Convention on the Law of Treaties, it has been regarded as a canon of interpretation of treaties. See H. Thirlway, 'The law and procedure of the International Court of Justice 1960-1989 (Part Three)', 61 BYIL (1991), pp.1, 44.

78 Nehru's statement in the Indian Parliament. See in Bhasin, *op.cit.* note 56, p.23.

79 The ICJ held in the Nicaragua case that "There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation." ICJ Reports, 1986, p.104, para.195.

Under no circumstances can India unilaterally decide to take action to deal with any threat to the security of Nepal.[80] Further, since it is the Security Council of the UN that has the competence to determine the existence of any threat to the security of the States members of the UN and take necessary steps to deal with such a threat,[81] India cannot unilaterally decide to take action to deal with any threat to the security of Nepal. Under Article 103 of the Charter of the UN the obligations undertaken by the Member States of the UN prevail over any other obligations undertaken under any other international agreement.

6. Conclusion

The above discussion shows us that the 1950 Treaty of Peace and Friendship does not commit Nepal to common defence. Therefore, Nepal as a sovereign nation is free to opt for a Zone of Peace, even in the event of a war between India and any other States. Indeed, Nepal remained neutral in armed conflicts between India and China and India and Pakistan. No change is actually necessary in Nepal's bilateral treaties in order to have this country declared a Zone of Peace since no bilateral treaty with India or with any other country limits Nepal's freedom of action in foreign, security and defence policy matters. Therefore, Nepal maintains that the Peace Zone proposal is not inconsistent with the 1950 treaty. Nepal as a sovereign country has a right to pursue a foreign policy which serves the interests of the country better.

Most of the features of Nepal's ZOP correspond to the Laotian Declaration of Neutrality, 1962.[82] Unlike the Laotian Declaration Nepal's proposal does not explicitly mention the institution of neutrality, but most of the obligations assumed by Nepal are very similar to those assumed by Laos under that Declaration. From this standpoint one might be tempted to equate Nepal's ZOP with permanent neutrality. In

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80 The 1950 treaty is not as wide as the 1978 friendship treaty between the former USSR and Afghanistan, under which the Soviets tried to justify their invasion of the latter in 1979. Article 4 of the USSR-Afghanistan treaty provided that the two contracting parties "shall consult with each other and shall, by agreement, take the necessary steps to safeguard the security, independence and territorial integrity of the two countries." 19 ILM (1980), p.1.

81 Article 39 of the Charter of the UN.

82 The Laotian neutrality is discussed in some detail in Chapter V.

fact, this proposal was characterised in certain quarters as an attempt to make Nepal a 'Switzerland' of the East.[83]

So far as the legal content of this proposal is concerned, except the fifth (i.e., prohibition on the basis of reciprocity on any activities that are hostile to other States) and seventh (i.e., the commitment on the basis of reciprocity not to enter into military alliance nor to allow the establishment of any foreign military bases directed against other States) items of the seven-point principles of Nepal's ZOP, all other items represent mere reaffirmation of generally accepted principles. Although the fifth and seventh items contain new commitments, they are not inconsistent with Nepal's obligations under bilateral treaties. A broader interpretation of the principle of non-interference in the affairs of other States seems to encompass the provisions of the fifth item, yet the seventh item is consistent with the doctrine of permanent neutrality and every sovereign State is entitled to adopt such policy. That is why the assertion that these items "appear to be irreconcilable in view of the existing treaty and agreements between India and Nepal on mutual security" is not valid;[84] nor is the argument justifiable that "[t]he peace zone proposal has thus sought to illegalise possible Indian intervention in Nepal, which is legalised by the 1950 treaty".[85] As discussed earlier, the 1950 treaty does not legalise any foreign intervention.

Of course, the fifth item appears to have introduced an innovative element in the sense that the State supporting the proposal must not only desist from interfering in the international affairs of the zone but also must take all necessary measures to ensure that no activities hostile to the zone takes place within its national jurisdiction. It is designed to insulate the zone from outside interference which is difficult to attribute to any foreign government but nevertheless comes from foreign territory. For instance, in the early 1960s some supporters of a Nepalese political party carried out a number of raids into Nepal from Indian territory; the Indian government was supportive of such attacks but was not directly involved.

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83 See Shaha, *op.cit.* note 37, p.115.

84 Shaha, *Ibid.*, p.130.

85 Manasa, a weekly Nepali news-magazine, of 9 December (1981), as quoted in Shaha, *Ibid.*, p.128.

Such activities are not, however, left unregulated because the principles of peaceful co-existence, the 1965 Declaration on the Inadmissibility of Intervention (Resolution 2131 (XX)), the 1970 Declaration on Friendly Relations Among Nations (Resolution 2625 (XXV)) and the 1987 Declaration on the Enhancement of the Effectiveness of the Principles of Refraining from the Threat or Use of Force in International Relations (Resolution 42/22) could be invoked to argue that a State must not allow within its national boundaries activities that are harmful to the independence and sovereignty of another State. So far as the seventh item is concerned, it appears to be a new rule designed to protect the interests of the zone but consistent with international law.

This may be the reason why Nepal's proposal was well received: many States enthusiastically supported it immediately and no objections to the proposal were raised. Even the U.S. which has traditionally regarded neutrality and neutralisation as obstacles to the collective security system and has refrained from endorsing cases of self-neutralisation endorsed Nepal's ZOP proposal. This may be partly be due to U.S. hostility to India during the 1970s and 1980s and partly due to the fact that Nepal's proposal does not seek any positive guarantee of Nepal's status as a ZOP from the States supporting it but merely a reciprocal undertaking of commitments arising from the endorsement of the proposal.

IV. The Dalai Lama's Proposal for a ZOP for Tibet[86]

Mention should also be made of the proposal put forward by His Holiness the Dalai Lama, the temporal and spiritual leader of the Tibetan people, for the transformation of Tibet into a ZOP. It should be noted here that the Dalai Lama heads a Tibetan government-in-exile in India since Tibet is under Chinese control. Whether Tibet was an independent State before its annexation by China in the 1950s or

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86 See for an analysis of various legal questions concerning Tibet M. C. Van Walt van Praag, The Status of Tibet (1987); Tieh-Tseng Li, 'The legal position of Tibet', 50 AJIL (1956), p.394; D. McCabe,'Tibet's Declarations of Independence', 60 AJIL (1966), pp.369-71; A. Rubin, 'Tibet's Declaration of Independence?', 60 AJIL (1966), p.812; the International Committee of Jurists, The Question of Tibet and the Rule of Law (1959) and Tibet and the Chinese People's Republic (1960).

whether it still retains statehood is a matter of controversy among publicists.[87] Tibet is now under *de facto*, if not *de jure*, control of China and no State has recognised the Tibetan government in exile as a *de jure* government of Tibet.

After fleeing his country in the wake of the final Chinese invasion in 1959,[88] the Dalai Lama has been trying to secure independence for Tibet. Accordingly, he proposed in his address to the U.S. Congress on 21 September 1987 that his country be given the status of a ZOP.[89] In his Nobel Lecture on 11 December 1989, the Dalai Lama spelt out the key elements of his proposal for a ZOP[90] for Tibet:

> "- the entire Tibetan plateau would be demilitarised;
> - the manufacture, testing, and stockpiling of nuclear weapons and other armaments on the Tibetan plateau would be prohibited;
> - the Tibetan plateau would be transformed into the world's largest natural park or biosphere...;
> - the manufacture and use of nuclear power and other technologies which produce hazardous wastes would be prohibited;
> - national resources and policy would be directed towards the active promotion of peace and environmental protection".[91]

He reasoned:

> "For the stability and peace of Asia, it is essential to create peace zones to separate the continent's biggest Powers and potential adversaries ... A true peace zone must, clearly, also be created to separate the world's two most populous States, China and India."

He added that the establishment of such a Zone

> "would require the withdrawal of troops and military installations from Tibet, which would enable India and Nepal also to withdraw troops and military installations from the Himalayan region bordering Tibet. This

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87 See generally materials cited in op.cit note 86 and Crawford, Creation of States, pp.212-3.

88 The Chinese invasion of Tibet began in 1950 and culminated in the complete control of Tibet in 1959.

89 The idea of a ZOP for Tibet was first briefly mentioned in a Tibetan statement issued in response to a Chinese statement on its position on Tibet after a round of negotiations between the Chinese and the representatives of the Tibetan government in exile in 1982 to bring about a rapprochement. See Tibetan Review (New Delhi), 20, No.1 (Jan. 1985), p.6.

90 He uses the terms 'Zone of Peace' and 'Zone of Ahimsa' (non-violence) interchangeably.

91 The Tibet Society Bulletin, Vol. 21, March 1990, p.29.

> would have to be achieved by international agreements. It would be in the best interest of all States in Asia, particularly China and India, as it would enhance their security, while reducing the economic burden of maintaining high troop concentrations in remote areas."[92]

Thus, the main substance of his proposal seems to be to demilitarise the Tibetan plateau to facilitate the independence of Tibet. The proposal is designed to remove the conditions of possible outside interference in the affairs of the zone and to assure neighbouring States that the State within the zone will not pose any danger to their security; also to assure the major power players that the State within the zone will not act in such a manner as to upset the existing balance of Power. Unlike other proposals, however, the status of the Dalai Lama's proposal is controversial because the Dalai Lama has no *de facto* control over the affairs in Tibet; the Chinese government has ignored his proposal and despite considerable public sympathy for it in the outside world no other State has formally supported it.

Nevertheless, Van Walt van Praag writes that "[t]he invasion of Tibet by the armies of the People's Republic of China was an illegal act under both customary and conventional international law."[93] He adds that:

> "As Tibet was fully independent prior to 1950, and as no sufficient legal grounds can be found to support the contention that since that time the Tibetan State ceased to exist and was legally incorporated to form an integral part of the People's Republic of China, the State of Tibet still exists ... as an independent legal entity, with a legitimate government, in exile in Dharmasala [India], to represent it. Accordingly, that government and the people of Tibet have the right to resume the exercise of sovereignty over their own territory, free from the interference of other States."[94]

In this case the Dalai seems to have the authority to enter into legal relations with other States on the ZOP status of Tibet.[95] But since no State has recognised either the Tibetan government-in-exile or the independent status of Tibet, it is difficult to

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92 *Ibid.* p.31.
93 Van Walt van Praag, *op.cit.*, note 86, p.154.
94 *Ibid.*, p.188.
95 See the Dalai Lama's appeal to the UN in U.N.Doc.A/1549 (11 Nov. 1950).

maintain that the Dalai represents the State of Tibet. Although several General Assembly resolutions on Tibet, especially Resolution 1723 (XVI),[96] call, *inter alia*, for respect for the right of self-determination of the people of Tibet, the support for the right of self-determination,[97] this does not imply recognition of the Government of Tibet or the independent statehood of Tibet.

It is also true that several States during the debate in the UN on these resolutions regarded the Chinese invasion of Tibet as an act of aggression.[98] Notably, the disapproval of the annexation of Tibet by China of a few States does not accord recognition to the Tibetan Government-in-exile as a representative of the State of Tibet or of the independent status of Tibet.[99]

The U.S. Senate by a resolution of May 23 1991 (the House of Representatives concurring) stated that Tibet "is an occupied country under the established principles of international law whose true representatives are the Dalai Lama and the Tibetan Government-in-exile as recognised by the Tibetan people."[100] A government can, however, be recognised as a legitimate government to represent a State if that State's Statehood can be established under international law. Tibet was regarded as a protectorate of China even before the Chinese invasion of Tibet. In international legal literature Tibet has been mentioned as a State under the suzerainty of China.[101]

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96 Adopted by 56 votes to 11, with 29 abstentions.

97 See generally, M. Pomerance, Self-Determination in Law and Practice (1982); P. Thornberry, 'Self-determination, minorities, human rights: a review of international instruments', 38 ICLQ (1989), p.867; A. Rigo Sureda, The Evolution of the Right of Self-Determination: A Study of the United Nations Practice (1973).

98 See the following U.N. documents: Philippines, U.N.Doc.A/PV.1394 (1965), p.27; El Salvador, U.N.Doc.A/PV.898 (1960), pp.36-37; Ireland, U.N.Doc.A/PV.898 (1960), pp.47-50; Nicaragua, U.N.Doc.A/PV.1401 (1965), pp.52-56, New Zealand, U.N.Doc.A/PV.1401 (1965), p.2; U.S.A., U.N.Doc.A/PV.1401 (1965), pp.42-45; the Bureau of the Dalai Lama, Tibet in the United Nations, 1950-1961 (1962).

99 See generally on recognition in international law, Oppenheim (1992), Vol.1, Part 1, pp.126 ff; H. Lauterpacht, Recognition in International Law (1947); I. Brownlie, 'Recognition in theory and practice', 53 BYIL (1982), pp.197-211; J. Crawford, The Creation of States (1979), pp.10-25; Sen, A Diplomat's Handbook of International Law and Practice (3rd edn., 1988), pp.501-45.

100 Calender No. 92, 102nd Congress, 1st Session, S. Con. Res.41. The full text of the resolution is reproduced in Tibet Press Watch, Vol.III, No.3 (July, 1991), p.17.

101 Oppenheim (1992), Vol. I, Part 1, p.267. Article 2 of the Treaty of 3 July 1914 (concluded between Great Britain, China and Tibet) recognised that Tibet was under the suzerainty of China. This status was strengthened by an agreement concluded in 1951 between China and Tibet which provided for China to be responsible for the foreign relations of Tibet: BFSP, 158

Unfortunately, the State practice on the status of protectorate States is not consistent and the law on the subject is not clear.[102]

If States had recognised Tibet before the Chinese invasion as an independent State and regarded the Chinese annexation as an illegal act the status of Tibet would have remained intact in law.[103] An example of the non-recognition of an attempt to annex an independent State is resolution 662 (1990) of the Security Council which declared Iraq's attempt to annex Kuwait to be "null and void". This did not happen in the case of Tibet because Tibet was regarded by many States as a protectorate of China. Following the incorporation of Tibet into China States have generally regarded Tibet as an autonomous part of China. For instance, in trade treaties concluded by both Nepal and India since 1954, Tibet has been referred to as the 'Tibet autonomous region of China'.[104] This seems also to reflect the position of the British Government.[105]

The Dalai Lama is himself not consistent in his demand for the complete independence of Tibet. For instance, in 1988 he proposed that China handle Tibet's foreign affairs but that Tibet would have a locally elected government.[106] Recently, he stated that he was prepared to accept an autonomous status for Tibet, on similar

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(1951), p.731. This position was recognised by India in 1954 and Nepal in 1956: see A.P. Rubin, 'Sino-Indian border dispute', 9 ICLQ (1960), p.96.

102 Oppenheim's International Law states that "Protectorate is, however, a conception which lacks exact legal precision, as its real meaning depends very much upon the special case." Oppenheim (1992), Vol.I, Part 1, p.268. For instance, under the peace and friendship treaty of 1950 India was allowed to conduct the foreign relations of Sikkim. Articles 3 and 4 of the treaty: 2 IYBIA (1953), p.319. When India annexed Sikkim in 1974 the event passed largely unopposed. Although a few States, mainly China and Pakistan (who were at odds with India), opposed this annexation, other States were generally indifferent. See Keesing's Vol. XXI (1975), p.27062. Nevertheless, Bhutan which has a similar treaty with India became a Member of the UN as a fully independent State in 1972. Article 2 of the Indo-Bhutanese treaty of 1949 provides that "The Government of India undertakes to exercise no interference in the internal administration of Bhutan. On its part the Government of Bhutan agrees to be guided by the advice of the Government of India in regard to its external relations." 2 IYBIA (1953), p.295.

103 See Marek, Identity and Continuity of States in Public International Law (1954).

104 See BFSP, 161 (1954), p.518.

105 See for the views of the British Government, Parliamentary Debates (Commons), vol.602, col.126 (written answers, 25 March 1959); Parliamentary Debates (Lords), vol.346, col.239 (6 November 1973) and vol.520, col. 2011 (3 July 1990). The Minister of State, Lynda Chalker, said in 1990 in the House of Commons that "Successive British Governments have regarded Tibet as autonomous, although recognising the special position of the Chinese authorities." UKMIL (1990) in 61 BYIL (1990), p.493.

106 The Daily Telegraph (London), 2 September 1991.

lines to Hong Kong.[107] His proposal is significant because he is the key person to demonstrate the continuity of the government of Tibet that existed before the Chinese invasion of Tibet. If he himself does not say that the independent status of the State of Tibet must be reinstated it will be difficult to argue that the State of Tibet still exists as an independent legal entity, with a legitimate government-in-exile to represent it. It could also mean that the Dalai Lama does not demand a complete independence of Tibet which it did not possess before the Chinese invasion.[108]

This does not mean that the Dalai has no right to propose the establishment of ZOP in Tibet. He is the leader of the Tibetan people and the Tibetan people have the right of self-determination under international law. Therefore, the attempt to establish a ZOP in Tibet could be regarded as part of the exercise of their right of self-determination because, as stated earlier, the aim of the proposal seems to be to pave the way for peaceful independence of Tibet (albeit the right of self-determination does not inevitably lead to independence).[109] Moreover, as will be seen in Chapter V of this thesis, like the neutralisations of the Free City of Danzig, the Free Territory of Triste, the Ionian Islands and the Free City of Cracow or the internationalisation of Jerusalem, it is quite possible to grant a ZOP status to a protectorate or a region of a State under international law if there is the political will on the part of the international community to do so.

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107 The Guardian (London), 13 May 1993, p.12.

108 However, the resolution of the U.S. Congress mentioned above says that "at the time of the Chinese occupation, Tibet possessed all the attributes of statehood under international law" and the Chinese occupation of Tibet to this day is illegal. It is difficult to regard this statement of the U.S. as the U.S. recognition of the State of Tibet or of the Tibetan government in exile headed by the Dalai since under the U.S. constitutional arrangement it seems to be the U.S. President who has the power to recognise States and governments. See P.R. Trimble, 'The President's foreign affairs power', 83 AJIL (1989), pp.75-757; T.M. Frank, The Power of Legitimacy Among Nations (1990), pp.53, 130-131.
A Report commissioned by the International Committee of Jurists agrees with this position: "Tibet was at the very least a de facto independent State when the agreement on Peaceful Measures in Tibet was signed in 1951, and the repudiation of this agreement by the Tibetan Government in 1959 was ... fully justified." See International Committee of Jurists, Tibet and the Chinese People's Republic (1960), p.5. The U.K. Government Minister in the House of Lords, Lord Reay, said in 1991 in the House of Lords that "Tibet never enjoyed *de jure* independence. Tibet was never internationally recognised as independent." UKMIL (1991) in 62 BYIL (1991), p.564.

109 See Pomerance, *op.cit.* note 97, pp.10, 37-42.

V. The Legal Content of Land Zone of Peace

The above examination of the declarations and proposals of land ZOP demonstrates that the concept of land ZOP is a new phenomenon in international law. As stated in the introduction to this thesis, little attention has been paid to this concept in international legal literature. That is why no definition of ZOP exists in the legal literature and the State practice does not provide a uniform definition of the concept of ZOP. For instance, the King of Nepal with a view to securing the U.S. endorsement of his proposal outlined the essentials of the proposal in the following terms during his visit to the U.S. in 1983:

> "Nepal's Zone of Peace proposal would essentially be non-alignment, non-aggression, peaceful settlement of disputes and peaceful economic and social development for the causes of peace and justice. As we have conceived it, the Zone of Peace proposal does not fall into any such obvious precedents as neutralisation, demilitarisation, mutual defence system, or a regional peace-keeping system. We think that this proposal adds up to something distinct from all such precedents. What it implies in the final analysis is that the creation of a status which is possessed by an individual State is given legal force by its recognition by other States."[110] (emphasis added)

A former foreign minister of Nepal implies that Nepal could not become a permanent neutral country because of its membership of the UN. He states that although a Member-State of the UN could remain neutral if the Security Council is employing measures not involving the use of force under Article 41 of the Charter of the UN, it cannot remain neutral if the UN is acting under Article 42 of the Charter.[111]

Nevertheless, the ASEAN States have based their ZOPFAN policy on the doctrine of neutrality. The Dalai Lama's ZOP proposal is, on the other hand, similar to demilitarisation. Therefore, although the basic objective of all land ZOP proposals is to prevent outside interference, it is difficult to define the legal content of the concept of land ZOP with precision since the elements of each proposal differ considerably

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110 The Statesman (India), 10 December 1983.

111 K.B. Singh, 'Non-Alignment and Nepal as a Zone of Peace', in G.R. Agrawal et al. (eds.), Fundamentals of Nepalese Foreign Policy (1985), pp.173-187, 181.

from the others. Moreover, one may also dispute the need for a hard-and-fast definition of a flexible concept such as the ZOP. As will be discussed in Chapter V, no universally accepted definition exists of similar doctrines of international law, e.g., neutrality, neutralisation and demilitarisation. All cases of neutralisation differ from each other.

As with other doctrines, different ZOP could have different content and it is up to the interested States in each case to define that content. Indeed, a report prepared by the AALCC states that "there might be different types of peace zones and instead of defining a peace zone either in abstract or in general, it would be more practical to identify the main possible features of peace zones to be established on a case by case basis."[112] That does not mean that the concept of ZOP is a vague abstraction. The State practice examined in this thesis illustrates certain typical attributes of a ZOP regime. Therefore, what one can do is to identify the main common attributes of a ZOP on the basis of the practices of States on Nepal, Tibet and ASEAN's proposals which have shown certain common norms and standards of a ZOP. Accordingly, the following appear to be the legal content of a land ZOP:

(1) prohibition on the threat or use of force in any way which might endanger the peace and security of other States;[113]
(2) mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;[114]
(3) peaceful resolution of all disputes with other States;[115]
(4) peaceful co-existence;[116]
(5) non-interference in the internal affairs of other States;[117]
(6) prohibition on the use of the zone against the sovereignty and territorial integrity of other States;[118]
(7) non-participation in military alliances;[119]

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112 AALCC's Report, 1988, pp.192-191.
113 Principle 2 of Nepal's proposal, principle 7 of the ASEAN's code of conduct and paragraph 3 of the Preamble to the ASEAN's 1971 Declaration.
114 Article 10 of the Treaty of Amity of 1976 concluded by the ASEAN as a step towards the implementation of the ZOPFAN declaration and principle 2 of the ASEAN's code of conduct.
115 Principle 6 of the ASEAN's code of conduct, paragraph 3 of the Preamble to the ASEAN's 1971 declaration and principle 3 of Nepal's proposal.
116 Principle 1 of Nepal's proposal and paragraph 4 of the Preamble to the ASEAN's declaration.
117 Principle 3 and 4 of the ASEAN's code of conduct, paragraph 3 of the Preamble to the ASEAN's declaration and principle 4 of Nepal's proposal.
118 Principle 5 of Nepal's proposal and principle.
119 Principle 7 of Nepal's proposal and principle 9 of the ASEAN's code of conduct.

(8) prohibition on the use of the zone for military purposes by outside Powers;[120]
(9) absence of foreign military bases;[121]
(10) prohibition against the acquisition, production testing, deployment and stockpiling of nuclear weapons and other weapons of mass destruction;[122]
(11) respect of the existing treaty obligations.[123]

VI. Legal Status of the Concept of Land ZOP[124]

With regard to the legal status of land ZOP, it has two facets: one being the status of the emerging concept in international law in general and the other being the contractual status accorded to it by the States concerned through their recognition or endorsement from which flows certain rights and obligations for the States involved.

It is obvious from the above list of the constituent elements of ZOP that this concept is based on the principles of the Charter of the UN, the 1965 Declaration on the Inadmissibility of Intervention, the 1970 Declaration on Friendly Relations Among States, the 1974 Resolution on the Definition of Aggression, Panch Shila, the Bandung Declaration and the doctrine of permanent neutrality.[125] The Charter enjoins all members of the UN to promote and maintain international peace and security. Every State has a right as well as a duty to fulfil this obligation; States are entitled to devise appropriate measures for strengthening peace in their territories and in the world as a whole. The concept of ZOP appears to be one such measure.

The renunciation of the threat or use of force, peaceful settlement of all disputes with other States and respect for the five principles of peaceful coexistence, in

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120 Principles 5 and 7 of Nepal's proposal and principle 1 of the Tibetan proposal.

121 Principles 5 and 7 of Nepal's proposal, principle 1 of the Tibetan proposal and principle 10 of ASEAN's code of conduct. This is also one of the principles of the Bangkok Declaration of 1967 of the ASEAN, which constitutes the foundations of the ASEAN's 1971 Declaration.

122 Principle 11 of the ASEAN's code of conduct and principles 2 and 4 of the Tibetan proposal. See also the decision of the ASEAN of 1987 to create an NWFZ in Southeast Asia as a step towards the implementation of the 1971 ZOPFAN Declaration: the Manila Declaration of the Meeting of the ASEAN Heads of Government in ASEAN Documents Series: 1967-1988 (3rd edn. 1988), p.47.

123 Principle 6 of Nepal's proposal and principle 1 of the ASEAN's code of conduct.

124 See generally, AALCC's Report 1988: 'The Concept of Peace Zone in International Law and Its Framework', pp.189-193; G. M. Melkov, 'Legal content of the "zone of peace" notion,' SYBIL (1979),pp. 107-120, English summary, at pp. 120-121; D.B.S. Thapa, 'Zone of peace: a concept in international law,' Quest for Peace (1989), pp.81-93; His Majesty's Government of Nepal, The Concept of Peace Zone in International Law and Its Framework, Kathmandu, Nepal, 1986.

125 See Chapter V, below.

particular non-interference in the internal affairs of other States, are some of the hard-core principles of the concept of ZOP which further the objectives of the Charter. Thus the principles of the ZOP are complementary to the principles embodied in Article 2, especially Article 2(4) of the Charter. The establishment of regional ZOP is also consistent with the provisions of Article 52 (1) of the Charter of the UN, which envisages the existence of regional arrangements for dealing with matters of peace and security at a regional level.

Thus, it could be argued that the law on ZOP is being shaped by State practice on ZOP and a customary law on ZOP is in the process of being formed by such practice. Excepting Burma, all States of Southeast Asia have, through the conclusion of the Treaty of Amity of 1976, legally bound themselves by most principles of ZOPFAN. Nepal has legally committed itself to observe the principles of ZOP through its incorporation in the Constitution of Nepal, the fundamental law of the land, and 109 States have endorsed this proposal. As the changing pattern of State practice gives rise to the emergence of new rules of customary international law and causes the disappearance of the old rules, a customary rule on ZOP seems to be in the making as the ZOP declarations and the subsequent State practice demonstrates such a pattern.

VII. The Question of International Recognition

At first, it might appear obvious that the establishment of a ZOP should be recognised by the international community; through the land ZOP proposals the proposer States wish to be ensured of an international recognition of their independence, sovereignty and neutrality. Of course, the recognition of the international community would help the ZOP proposals to materialise. Indeed, all proposals for land ZOP seek international recognition. While Nepal has sought international recognition through bilateral channels,[126] the Dalai Lama and the ASEAN countries have sought recognition of their proposals in the form of an

126 However, the King of Nepal stated in 1981 that he might take his proposal to the UN in order to secure wider international support. The Rising Nepal, 5 September 1981.

international settlement between major Powers. Nepal stated that the creation of ZOP by an individual State acquires legal force "by its recognition by other States."[127]

But that is not to say that recognition is an essential feature of the ZOP which does not contain any element that has not been accepted in international practice. From a purely legal standpoint, the existence of a ZOP does not depend on recognition or guarantees from outside States; such a zone comes into *de jure* existence if a State or group of States decide to observe and enforce the rules of the zone in the territory or territories under their sovereignty. Policies similar to ZOP have been adopted without securing international recognition or even showing a desire to seek such recognition. For instance, if a State declares itself to be a permanently neutral State in accordance with the generally accepted principles of permanent neutrality then the declaration does not actually require endorsement from other States. A notification of such a declaration seems to suffice.[128] Strictly speaking, consent of other States to a new regime in the form of recognition would be necessary only if that regime contains elements which are additional to the existing rules of international law.

However, recognition of ZOP of a State by other States has some practical value. The recognition of ZOP by major Powers carries a significant political, as well as some legal weight. *A de jure* creation of a ZOP is not sufficient unless the zone works *de facto*. If the neighbouring Powers and other major Powers do not recognise the ZOP status of a State the policy is unlikely to achieve its objective fully. For instance, when the U.S. President Ronald Reagan endorsed Nepal's proposal for ZOP during the Nepalese King's State visit to the U.S in 1983, the King hailed this "recognition" as an "important landmark" in the history of relations between the two countries.[129]

Whether the recognition creates a positive or negative obligation depends on the terms of the recognition sought from the zonal States and the terms specified by outside Powers when granting their recognition. If the recognition is accompanied by

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127 The Statesman (India), 10 December 1983.

128 See Chapter V.

129 'Reagan endorses Nepal's peace zone proposal' in The Statesman (India), 9 December 1983, p.8.

a guarantee of the ZOP status of a State or territory then the State granting such recognition may be under a positive obligation, i.e. to take action necessary to restore the *status quo ante* in the event of violation of the rules of ZOP by other States. However, after the establishment of the UN no State has guaranteed the neutrality or ZOP status of other States partly because of its possible conflict with the obligations of Members States of the UN under the Charter of the UN. The States participating at the 1962 peace conference on the neutralisation of Laos and the 1991 Paris peace conference on the neutralisation of Cambodia appeared very careful in not using the word 'guarantee' in the declarations adopted.

Italy was also very careful in not guaranteeing the permanent neutrality of Malta when it concluded a bilateral treaty with Malta to recognise and respect the Maltese neutrality. The ZOP declarations and proposals are in keeping with this practice since no zonal State has sought a guarantee from outside States; what is sought from outside Powers is only recognition and respect for the zone. As will be argued in Chapter VI of this thesis, however, outside States may be regarded to be under an obligation under international law to respect the ZOP even without expressly guaranteeing it.

VIII. Other Suggested Legal Justifications for Land ZOP

In international law all sovereign States have exclusive jurisdiction over the affairs within their territory. This means that every State is free to judge for itself as to what type of foreign policy is best for it and to adopt that policy. Such foreign policy decisions are political acts which acquire legal status if they conform to generally accepted rules of international law, or if they come to be generally regarded in State practice as valid exercise of sovereignty.

Therefore, if a State decides of its own free will to pursue a policy of ZOP and other States endorse it or do not register their objection to it, such policy acquires legal force, provided that the policy does not contravene the rules of international law or any existing bilateral treaty obligations. Whether such an endorsement or tolerance is coupled with *opinio juris* to constitute custom or even creates a status *erga omnes*

may be a matter for argument, but what seems to be generally accepted is that such general tolerance creates a legally operative regime independently of custom.[130] A valid policy adopted by a State or a group of States should be respected by other States; according to the principle of sovereign equality of States, all States are under a duty of non-intervention in the area of exclusive jurisdiction of other States.

Moreover, as discussed earlier in relation to the UN declarations on maritime ZOP,[131] the declaration of a State or States to pursue a policy of ZOP may be regarded as a legitimate measure of self-defence. The argument that the creation of ZOP falls under the right of self-defence seems to be a difficult argument to reject. The term 'inherent right of self-defence' seems to imply not only the right to use force to defend oneself from an armed attack, but also the right to resort to other options deemed appropriate for such purpose; the policy of ZOP seems to be one such option.

There are a number of ways of defending oneself[132] and the use of force is one such way. The Charter regulates the right of forcible self-defence but not the non-forcible right of self-defence which is also inherent in every State. The cases of self-neutralisation of States could be regarded as measures of non-forcible self-defence designed to protect the State from outside attack and interference. If a State can declare itself to be neutral, there is no reason why a group of States cannot adopt similar non-forcible self-defensive measures, including the establishment of a ZOP.

Under international law States have a right to peace.[133] The 1978 UN Declaration on the Preparation of Societies for Life in Peace states that "Every nation and every

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130 See Chapter V, below.

131 See Chapter III, above.

132 Among the principal ways of defending oneself are: first, by taking up arms against armed attack (this is regulated by Article 51 of the Charter of the UN), second, by raising unarmed hands in the air, and third, by declaring that one is to remain neutral in a particular conflict or in all future conflicts.

133 This right follows mainly from the principles on the prohibition on the use of force. Among the sources of this right the following can be mentioned: the Covenant of the League of Nations; the Kellogg-Briand Pact (1928); the Charter of the United Nations, especially Article 2(4); the 1970 UN Declaration on Friendly Relations Among Nations; the 1974 resolution on the definition of aggression. See A. Nastase, 'The right to peace', in M. Bedjaoui, International Law: Achievements and Prospects (1991), pp.1219, 1223; Canadian Human Rights Foundation, Human Rights and Peace (1985).

human being... has the inherent right to life in peace."[134] (emphasis added) This provision perhaps expresses in a nutshell the essence of the international legal order developed under the United Nations system in the last five decades. Indeed, the desire to live in peace was the predominant objective behind the establishment of the UN. Accordingly, the right to peace of States and individuals has been evolving as a positive norm in international law. Consequently, the UN Declaration on the Right of Peoples of Peace of 1984 states that

> "ensuring the exercise of the right of peoples to peace demands that the policies of States be directed towards the elimination of the threat of war, particularly nuclear war, the renunciation of the use of force in international relations and the settlement of international disputes by peaceful means on the basis of the Charter of the United Nations".[135]

Thus the declarations on ZOP can be regarded as the exercise of the right to peace of States and its subjects; the right to peace of States is derived from the right of individuals who reside within them.

Further, so far as the regional ZOP is concerned, they may be justified under Article 52(1) of the Charter which recognises the existence of regional arrangements to achieve the objectives of the UN. Additionally, since the concept of ZOP also includes the concept of NWFZ, Article VII of the Non-Proliferation Treaty,[136] which recognises the creation of regional arrangements to promote the objectives of the treaty, lends some legal credibility to the creation of regional ZOP.

IX. The Obligations of Extra-zonal States

The creation of a ZOP, like permanent neutrality, is an exercise of sovereign rights inherent in every sovereign State. The difference is that unlike neutrality, the rules of the ZOP are still being crystallised into customary international law.

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134 UN General Assembly resolution 33/73 of 15 December 1978.

135 General Assembly resolution 39/11 of 12 November 1984.

136 729 UNTS 161; 7 ILM 809; entered into force on 1 July 1968. As of 1st January 1991 there were 143 States party to the treaty. Recently, North Korea withdrew from the treaty. See News Summary (the UN Information Centre for the U.K. and Ireland), NS/10/93 of 17 March 1993, p.1.

Although many elements of ZOP are similar to those of permanent neutrality, the scope of the rules of the ZOP is broader than that of permanent neutrality. Therefore, the obligations of extra-zonal States towards a ZOP depend largely on how an individual ZOP is defined by the State concerned. So far as the general obligations of extra-zonal States towards a ZOP is concerned, the basic obligation would be to respect the will of the State or States within the zone. In other words, they could be said to be under the following obligations:

(1) to respect and observe in every way the sovereignty, independence, neutrality and territorial integrity of the State enveloped within a ZOP;
(2) to seek peaceful settlement of all disputes with that State;
(3) to refrain from the threat or use of force which might endanger the peace and security of that State;
(4) to refrain from all direct or indirect interference in the internal and external affairs of that State;
(5) not to bring that State in any way into any military alliance;
(6) not to establish, facilitate or connive at the establishment in that State of any foreign military base;
(7) not to use the territory of that State for interference in the internal affairs of other States;
(8) not to allow the use of its territory for interference in the external and internal affairs of that State.

These are the natural consequences arising from the recognition of a proposal for ZOP relative to a State or a territory. For instance, Nepal has stated that it expects those States which endorse its ZOP proposal to undertake commitments very similar to those just outlined.[137] These are also the principal commitments sought from the major Powers under the 'Conceptual Framework and Proposals Concerning Steps for the Creation of ZOPFAN', adopted by the ASEAN heads of government at their Bali summit in 1976.

While supporting Nepal's ZOP proposal, China stated that it was prepared to assume "commitments arising therefrom." Although certain writers have stated that the Chinese statement fails to make it clear what these commitments are and how they

137 This is because the seven principles outlined by Nepal as the features of its ZOP proposal are based on the principle of reciprocity. In other words, they are reciprocal obligations.

arise,[138] the commitments of the States supporting Nepal's proposal, including China, U.K., U.S. and France, seem to be those just outlined; it is not necessary for every supporting State to spell out its commitments arising from its support to a proposal. The State that puts forward the proposal defines the commitments of the supporting States by defining the range and scope of its proposal. If other States support such a proposal without making any reservation, then they would be considered to have assumed the obligations outlined above.

Since the relationship of third States with a ZOP will be considered in Chapter VI on the objective status of ZOP, it suffices here to state that a third State which neither formally recognises the ZOP nor registers its objection to the assumption of such a status by another State could be considered to be under a duty to respect the zone by virtue of its acquiescence or its alleged duty to respect a lawful regime created by other sovereign States.[139] For instance, Austria notified her constitutional law of 1955 on permanent neutrality to all States with whom she had diplomatic relations. Some of them recognised through *note verbals* the permanent neutral status of Austria. As will be discussed in Chapter VI and VII, below, even other States, which simply took note of the Austrian law, are widely regarded as implicitly agreeing to the permanent neutral status of Austria.[140] Thus, not only those States which have expressly recognised the ZOP declarations of Nepal and the States of Southeast Asia, but also those States which have not after being formally notified of the declarations or approached with a view to securing their recognition of such declarations objected to the declarations but simply taken note of them may be said to have incurred legal obligations to respect the principles of the declarations of ZOP.[141]

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138 M. Kurve, 'Nepal's Peace Zone move: attempt to change 1950 treaty', The Times of India, 14 January 1981, p.8.

139 The views expressed by Fitzmaurice on the effects of neutralisation in describing the scope of his draft article 18 of the draft convention on the Law of Treaties seems worth noting. Referring to a situation where a State declares itself to be neutral, he argues that in such cases "it seems reasonable to postulate an international duty for all States to recognise and respect any status of neutrality validly created and not in contravention of the rights of any other States or of any relevant existing treaty obligations." The YBILC, 1960, Vol.II, p.99. The same argument can be invoked in relation to the creation of a ZOP.

140 For instance, see K. Skubiszewski, 'Unilateral acts of States' in M. Bedjaoui (ed.), International Law: Achievements and Prospects (1991), pp.221, 226.

141 This point is discussed in some depth in Chapters VI and VII, below.

CHAPTER V

The Relation of the Doctrine of Zones of Peace with Other Doctrines of Similar Character

I. Introduction

As seen in Chapter IV, the proposals for ZOP draw upon similar doctrines, such as permanent neutrality and demilitarisation, Panch Shila and the Bandung Declaration. This chapter aims to examine the legal content of such doctrines and consider the extent to which the principles underlying these doctrines could be applied to the concept of ZOP.

II. The Doctrine of Permanent Neutrality[1]

1. Definition of permanent neutrality

A simple definition of permanent neutrality is that a state adopting the policy of permanent neutrality must observe the rules of neutrality not only in all future wars but also in peacetime. Castren defines permanent neutrality as opposed to temporary neutrality in the following terms:

> "By the former is meant that a State stands aside from all inter-state armed conflicts and not merely, as in the latter case, from some particular war... In this sense even permanent neutrality is connected with a state of war and only acquires practical significance during a war."[2]

However, as will be seen below, permanently neutral States must also refrain from those activities in peacetime which could involve them in future wars between belligerents. Black, Falk, Knorr and Young define neutralisation as "a special

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1 C.F. Wicker, Neutralization, (1911); W.G. Malbone, 'Neutralization as a movement in international law,' XXI AJIL (1927), pp.79-94; G.E. Sherman, 'The permanent neutrality treaties,' XXIV YLJ (1915), pp.217-241; M.M. Whiteman, Digest of International Law, Vol. I, pp.342 ff.; H. Neuhold, 'Permanent neutrality in contemporary international relations: A comparative perspective,' I ISIA (1982), pp.13-26; H.F. Koeck, 'A permanently neutral State in the Security Council,' 6 CILJ (1973), 137 ff.; W.P. Grieve, 'The present position of 'neutral States,' 33 The Grotius Society, Transactions for the Year 1947 (1948), 99 ff.; T. Komarnicki, 'The place of neutrality in the modern system of international law,' 80 Recueil des Cours (1952-I), pp.399-510; P. Lyon, Neutralism (1963); C.E. Black et al., Neutralization and World Politics (1968).

2 E.Castren, The Present Law of War and Neutrality (1954), 449.

international status designed to restrict the intrusion of specified state actions in a specified area."[3]

There is no universal international treaty or convention which prescribes the general rules of permanent neutrality. Before the neutralisation of Laos in 1962 treaties concluded for the neutralisation of various States or territories did not contain any provision concerning the rights and duties of neutralised States. Switzerland was neutralised in 1815 long before the rules of neutrality in war were consolidated and codified by the Declaration of Paris of 1856 and the Hague Peace Conferences of 1899 and 1907.

Nevertheless, through the practice of States over the last few centuries a number of rules of permanent neutrality have arisen and most such rules have been regarded as representing custom. Most of these rules are based on the idea that a permanently neutral State must not follow even in times of peace any policy which might involve it in war[4] because it is obliged to observe the rules of neutrality in all future wars. Therefore, it seems necessary briefly to examine the rules of neutrality in war before examining the rules of permanent neutrality.[5]

Oppenheim defines neutrality as "the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents, such an attitude creating rights and duties between the impartial States and the belligerents."[6] A neutral state neither participates in the hostilities nor provides any assistance to any of the belligerents; the neutrality must be declared after the outbreak of war and notified to

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3 Black et al., *op.cit.* note 1, p. xi.

4 J.L. Kunz, 'Austria's permanent neutrality,' 50 AJIL (1956), 418, 419; Castren, *op.cit.* note 2, p.449.

5 See generally Oppenheim, International Law, Vol.II: Disputes, War and Neutrality (edited by H. Lauterpacht, 7th ed., 1952), p.624 ff.; D.C. Brewer, Rights and Duties of Neutrals: A Discussion of Principles and Practices (1916); W.E. Hall, The Rights and Duties of Neutrals (1874); P.C. Jessup and F. Deak, Neutrality: Its History, Economics and Law (1935): Four volumes; Q. Wright, 'Neutrality and neutral rights following the Pact of Paris for the Renunciation of War,' Proceedings of the American Society of International Law, 1930,79 *et seq.*; Dehn, 'The effect of the United Nations Charter on the development of international law with special reference to the status of neutrality and the Hague and Geneva Conventions,' Report of the International Law Association (1946), p.39 et seq.; Lalive, 'International organization and neutrality' XXIV BYIL (1947), 72 *et seq.*; Castren, *op.cit.* note 2; K.R.R. Sastry, 'Hinduism and international law,' pp.586-614 in Recueil Des Cours (1966-I).

6 Oppenheim, *op.cit.*, note 5, p.653.

the belligerents as well as to the whole international community. A permanently neutral State is not required to issue such a declaration after a outbreak of hostilities.

Nevertheless, Switzerland issued such declarations in World Wars I and II. A declaration of neutrality entails a special legal status in international law. In other words, the neutral state acquires certain special rights, incurs duties and enjoys privileges of a neutral State under international law.

The rules of neutrality are numerous and governed by a number of international instruments and by customary international law. Principal instruments are the Declaration of Paris of 1856 on maritime warfare[7] and the Hague Conventions of 1899 and 1907. Conventions V[8] and XIII[9] of 1907 concern themselves exclusively with neutrality.

Whereas Convention V deals with the rights and duties of neutral States in land warfare, Convention XIII deals with the rights and duties in naval warfare. Concerning the legal status of these Conventions Roberts and Guelff write that "[a]t the time of its adoption, 1907 Hague Convention V was regarded as being largely declaratory of customary international law... In hostilities since 1907, including both world wars, the Convention was frequently referred to by both neutrals and belligerents."[10] The same applies to Convention XIII.[11] According to Schwarzenberger most of the rules laid down in this Convention are "chiefly declaratory of international customary law."[12]

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7 Roberts and Guelff write that "Although the Declaration was only signed by seven States, virtually all other maritime Powers acceded to it over time, and many non-parties acted in accordance with the rules, which acquired the status of customary international law." They add: "Because the Declaration has never been formally been abandoned, it may still be formally regarded as valid." The Declaration entered into force in 16 April 1856 and 51 States are parties to it. A. Roberts and R. Guelff (eds.), Documents on the Laws of War (2nd ed., 1989), 23.

8 100 BFSP (1906-1907), pp.359-64; 2 AJIL (1908), Supp. pp.117-27.

9 100 BFSP (1906-1907), pp.448-54; 2 AJIL (1908), Supp. pp.202-16.

10 Roberts and Guelff, *op.cit.* note 7, p.61.

11 These Conventions entered into force on 26 January 1910. There are 34 States parties to Convention V and 30 States to Convention XIII. Roberts and Guelff, *Ibid*, pp.61, 62, 69 and 108. See also D. Schinder and J. Toman (eds.), The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents (3rd ed., 1988); J.B. Scott (ed.), The Proceedings of the Hague Peace Conferences: Translations of Official Texts, 4 vols. (1920-1921).

12 G. Schwarzenberger, A Manual of International Law, vol.I (4th ed., 1960), 213.

According to Article 1 of Convention V neutral territory is inviolable. The belligerents must not carry out any attacks or commit warlike acts on neutral territory, in neutral waters and in the air space above neutral territory. Maritime belligerents may not commit hostile acts in the territorial sea of a neutral Power nor use these areas as bases for hostile operations. While the passage of belligerent troops through neutral land territory is forbidden, mere passage through neutral territorial sea is permitted.

Moreover, belligerent warships may be permitted to enter neutral waters and ports for purposes of obtaining emergency supplies and carrying out such urgent repairs as are absolutely necessary to render them seaworthy.[13] Nevertheless, under the Havana Convention on maritime neutrality of 1928, damage caused by enemy fire may not be made good in neutral ports. It is also worth noting that in time of war the rights of neutral shipping on the high seas are seriously curtailed by virtue of the rules of blockade, the right of visit and search and contraband, etc. This is because the neutral Power must not interfere in the measures taken by one belligerent State against the other.[14] In the event of violation of such duties both belligerents and neutral States are liable for the damage caused and must furnish pecuniary satisfaction to the other.[15]

On its part, the neutral State must give no assistance, direct or indirect, to either belligerent; nor should the neutral State allow its territory and facilities to be used for warlike purposes by either belligerent side. A neutral Power must use the means at its disposal to prevent belligerents from using its territory, territorial waters and the airspace above its territory and territorial waters. Neutral envoys, neutral subjects and neutral property are entitled to due protection on enemy territory occupied by either belligerent. The neutral State must maintain impartiality, which means treating

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13 Schwarzenberger, *Ibid.*, 214.

14 See generally J.A. Hall, The Law of Naval Warfare (1912); F. Piggott, The Declaration of Paris of 1856: A Study (1919).

15 In the Alabama Claims Arbitration of 1872 the arbitrators awarded the U.S. a sum of 15,500,000 dollars in gold as indemnity arising out of Great Britain's failure to observe the rules of neutrality. Moore, International Arbitrations, vol. I, pp.495, 656; S. Rhee, Neutrality As Influenced by the United States (1912), 90-102.

belligerents on an equal footing in all military and non-military sectors, including economic embargo, trade sanctions, etc.

2. The Practice of Permanently Neutral States

(a) Switzerland[16]

The Congress of Vienna of 1815 included the neutralisation of Switzerland as part of a general settlement in Europe after the Napoleonic Wars. By the Act of Paris of November 20, 1815, Austria, France, Great Britain, Prussia and Russia declared "their formal and authentic acknowledgement of the perpetual neutrality of Switzerland; and they guarantee to that country the integrity and inviolability of its territory".[17]

Since 1815 Swiss neutrality has passed the tests of several wars and accumulated a wealth of experience upon which the rules of permanent neutrality have been built. The 'Official Interpretation of Permanent Neutrality' adopted by the Swiss Government on November 26, 1954 sets out the basic features of this institution.[18] Although this is a unilateral interpretation by Switzerland of the rules of her permanent neutrality, none of the Powers that were parties to the treaty on the neutralisation of Switzerland objected to this interpretation. In the absence of any objection from other States this interpretation can be regarded as a legitimate interpretation of Swiss neutrality and a reliable guide to the principles of permanent neutrality. In addition to the obligations of neutrality during war, the interpretation specifies the following obligations of a permanently neutral State in time of peace:

> (i) duty to abstain: the neutral State must abstain from starting a war;
> (ii) duty to defend: the permanently neutral State must defend its neutrality; and
> (iii) duty to take preventive measures: the permanently neutral State must avoid policies and actions that might in future involve it in hostilities with other States.

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16 Concerning Swiss permanent neutrality see E. Bonjour, Swiss Neutrality: Its History and Meaning (1946); Political Department of the Swiss Government, 'Conception officielle Suisse de la neutralite' 14 Schweizerisches Jahrbuch fuer Internationales Recht (1957), 195.

17 M. M. Whiteman, Digest of International Law, vol. I, 345.

18 The Political Department of the Swiss Government, *op.cit.* note 16.

The last point covers a variety of legal and political situations. It prevents the permanently neutral state from entering into military alliances, both defensive and offensive, or from permitting the establishment of foreign military bases on its soil or use of its military facilities by foreign Powers.

(b) Austria[19]

The neutralisation of Austria in 1955 marked the revival of interest in neutralisation after a period of controversy as to its usefulness in the aftermath of WW II. The Moscow Memorandum of April 15, 1955, concluded between the USSR and Austria, outlined the terms and conditions of Austrian permanent neutrality.[20] Austria agreed to practice permanent neutrality of the type maintained by Switzerland. The four occupying Powers then consented to the Austrian State Treaty of May 15, 1955, with a firm commitment to respect the independence and territorial integrity of Austria.[21]

On 26 October 1955 the Austrian Parliament enacted a Constitutional Federal Statute which made permanent neutrality an integral part of the constitutional arrangement of Austria. Article 1 of the Statute reads as follows:

> "Article I.1. For the purpose of the permanent maintenance of its external independence and for the purpose of the inviolability of its territory Austria, of its own free will, declares herewith its permanent neutrality. Austria will maintain and defend it with all means at its disposal.
>
> 2. In order to secure these purposes Austria will never in the future accede to any military alliances nor permit the establishment of military bases of foreign states on its territory."[22]

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19 J.L. Kunz, 'Austria's permanent neutrality,' 50 AJIL (1956), 418; A. Verdross, 'Austria's permanent neutrality and the United Nations Organizations,' *Ibid.*, p.61; D. Kennedy and L. Specht, 'Austrian membership in the European Communities,' 31(2) HILJ (1990), 407; W.B. Bader, Austria Between East and West, 1945-1955 (1966); K. Zemanek, 'Neutral Austria in the United Nations,' 15 International Organization (1961), 408; Stourzh, 'The Austrian State Treaty and the origins of Austrian neutrality,' in K. Misra (ed.) Non-Alignment and Neutrality (1982).

20 Text in 49 AJIL (1955) 191-194.

21 217 UNTS 223; 49 AJIL (1955), p.162;

22 In Whiteman, *op.cit.*, note, 17, vol. I, pp.348-349.

As Kunz says, the Austrian Statute "expressly mentions only three duties: the negative duties not to accede to alliances, not to grant military bases on its territory to foreign States, and the positive duty to defend its neutrality with all means at its disposal."[23]

This declaration of neutrality was subsequently recognised by the four Powers and other states having diplomatic relations with Austria. The recognition from the four Powers came in the form of individual notes verbal. It is worth noting that the recognition was not coupled with a guarantee. For instance, the U.S. merely stated that it "has taken cognisance of this constitutional law and recognises the perpetual neutrality of Austria as defined therein."[24] The four Powers, who are also permanent members of the UN Security Council, found it difficult to guarantee Austrian neutrality because this might lead to some conflict with their obligations under the Charter of the UN.[25]

(c) Malta[26]

Malta adopted the status of permanent neutrality in 1981 under a unilateral declaration of 14 May 1981.[27] Maltese neutrality brings the principles of non-alignment into the picture. The Maltese Declaration of neutrality says that her neutrality is "strictly founded on the principles of non-alignment."[28] According to operative paragraphs 1 and 2 of the Maltese Declaration of neutrality, Malta appears to have tried to reconcile three things in its declaration: its obligations under the Charter of the UN, its obligations as a member of the Non-Aligned Movement and, of course, its duties as a permanently neutral State. These two paragraphs read as follows:

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23 Kunz, *op.cit.* note 19, p.424.
24 Whiteman, *op.cit.* note 17, Vol. I, p.349.
25 See *Ibid*, p.350.
26 N. Ronzitti, 'Malta's permanent neutrality,' 5 IYBIL (1983), 171.
27 See for the full text of the Declaration, the Malta Government Gazette, 15 May 1981, no.13846. This Declaration was then incorporated in Article 1 of Chapter 1 of the Constitution of Malta. A copy of the Declaration and the Constitution was supplied to the author by the Ministry of Foreign Affairs of Malta. The text of the Declaration is reproduced in 5 IYBIL (1983), pp.352-357.
28 Preamble to the Declaration of Malta: *Ibid.*

"[Malta]
1. Solemnly declares that the Republic of Malta is a neutral State actively pursuing peace, security and social progress among all nations by adhering to a policy of non-alignment and refusing to participate in any military alliance;
2. Affirms that such a status will, in particular, imply that:
(a) no foreign military base will be permitted on Maltese territory;
(b) no military facilities in Malta will be allowed to be used by any foreign forces except at the request of the Government of Malta".[29]

With regard to the recognition of this neutrality by other States, Italy, through an exchange of diplomatic notes, recognised and committed itself to respect in the future the sovereignty, independence, neutrality, unity and territorial integrity of Malta. Italy undertook, in particular:

"a) not to take any action whatsoever which would in any way, directly or indirectly endanger the sovereignty, independence, neutrality, unity or territorial integrity of the Republic of Malta;
b) not to take any action whatsoever which could in any way, directly or indirectly, endanger peace and security in the Republic of Malta;
c) not to take any part in any act of such a nature;
d) not to induce the Republic of Malta to enter into a military alliance, or to sign an agreement of this kind, or to accept the protection of a military alliance".[30]

Italy also agreed that at the request of Malta Italy would adopt any measures, not excluding military assistance, to preserve Maltese neutrality. Maltese neutrality also attracted formal support from the then USSR through an exchange of diplomatic notes of 8 October 1981, from Libya under a bilateral agreement of 19 November 1984 and from the members of the Non-Aligned Movement (NAM) under a resolution adopted at the meetings of the NAM countries. The States members of the CSCE took note of Malta's new status of neutrality at their Madrid meeting of September 1983.[31]

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29 *Ibid.* pp.352-353.
30 The text of the exchange of notes is reproduced in 5 IYBIL (1983), pp.352-357.
31 This information was supplied to the author by the Ministry of Foreign Affairs of Malta.

(d) Costa Rica[32]

Through a Presidential Proclamation of November 17, 1983, Costa Rica adopted a policy of Permanent, Active, and Unarmed Neutrality.[33] Costa Rica had been pursuing a peaceful policy for a long time; Article 12 of the 1949 Constitution of the country abolished the army.[34] In the presidential explanation of the Neutrality Proclamation it is stated that

> "In line with our vocation to peace, Costa Rica freely assumes full responsibility before the community of world nations, of all duties inherent to its new condition as a permanently neutral State. We commit ourselves to start no war, to use no force, including threats or military retaliation; to participate in no war between third States; to effectively defend our neutrality and independence with all the material, legal, and moral resources available; and to conduct a general policy of neutrality in order not to be drawn in reality or in appearance into an armed conflict. Moreover, we commit ourselves to extend our duties as a perpetually neutral state to armed conflicts within states."[35]

Thus Costa Rican neutrality departs from certain of the traditional rules of permanent neutrality. It is based on the following principles: (i) a complete renunciation of the use or threat of force; (ii) renunciation of military retaliation; (iii) unarmed neutrality, and (iv) extension of the duties of a neutral State to armed conflicts within States. Costa Rica adopted permanent neutrality by a unilateral act; it did not seek bilateral or multilateral recognition or guarantee. It communicated the Proclamation to all nations with whom it maintained diplomatic relations. In this context other States who failed to register their disapproval can be said to have acquiesced in this neutrality and, thus, are bound to respect and recognise it.

Also interesting is the fact that Costa Rica is not only a member of the O.A.S. but also party to the Inter-American Treaty for Reciprocal Assistance concluded at Rio de

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32 H.G. Espiell, 'Costa Rica's permanent neutrality and the Inter-American System,' 11(2) The Dalhousie Law Journal (1988), 663; L.A. Monge, The Neutrality of Costa Rica (1984).

33 Proclama Presidencial sobre la Neutralidad Perpetua, Activa, y No Armada de Costa Rica, November 17, 1983, San Jose. Monge, *op.cit.* note 32; Espiell, *op.cit.* note 32, pp.663-665.

34 Constitution of the Federal Republic of Costa Rica, 1949 (as amended through June 15, 1977) in A.B. Blaustein and G.H. Flanz (eds.), The Constitutions of the Countries of the World, vol. IV.

35 As quoted in Espiell, *op.cit.*, note 33, pp.665, note 11.

Janeiro in 1947.[36] Both the Charter of the O.A.S.[37] and the Rio Treaty provide for common action to deter and counter aggression. The justification proffered for Costa Rica's neutrality is the same as those given for Austrian neutrality in relation to its membership of the UN (discussed below).

(e) Laos[38]

The Declaration of the Neutrality of Laos[39] was signed on 23 July 1962 by 13 States which took part in the International Conference on the Settlement of the Laotian Question, 1961-1962. The participants[40] were Burma, Cambodia, Canada, China, Vietnam (then both North and South), France, Laos (Laos was party only to the Protocol attached and not to the Declaration itself), India, Poland, Thailand, the USSR, the U.K. and the U.S. The Declaration contains a long list of commitments undertaken by Laos as a neutral State. They include, *inter alia*, commitments to apply the five principles of peaceful co-existence in foreign relations, to protect and ensure respect for the sovereignty, independence and neutrality of Laos, not to resort to the use or threat of force and not to interfere in the internal affairs of other countries, not to enter into any military alliances and not to allow the establishment of any foreign military bases on Laotian territory and not to allow any foreign interference in the internal affairs of Laos.

This Declaration is by far the most comprehensive document in spelling out the obligations of a neutral State as well as the guarantor States. Given the wider participation of States in this process (it included all Permanent members of the UN Security Council) and the intensive negotiations that led to the conclusion of this

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36 21 UNTS 324.

37 30 UNTS 449.

38 G. Modelski, International Conference on the Settlement of the Laotian Question, 1961-62 (1962); J.J. Czyzak and C.F. Salans, 'The International Conference on the Settlement of the Laotian Question and the Geneva Agreements of 1962,' 52 AJIL (1963) 300; A.J. Dommen, Conflict in Laos: the Politics of Neutralization (1964).

39 456 UNTS 301, 303.

40 Cambodia, China, France, Laos, the USSR, the UK, Vietnam participated as parties to the 1954 Geneva Accords. Canada, India and Poland participated as members of the International Commission for Supervision and Control in Laos established by the 1954 Accords. The United States, Burma and Thailand participated as interested parties.

Declaration, it can be considered the most authoritative view of States on the rules of permanent neutrality.

The 13 States committed themselves to respect and observe in every way the sovereignty, independence, neutrality, unity and territorial integrity of Laos. They undertook, in particular, that: they will not commit or participate in any way in any act which might directly or indirectly impair the sovereignty, independence, neutrality, unity or territorial integrity of the Kingdom of Laos; they will refrain from all direct or indirect interference in the international affairs of the Kingdom of Laos; they will not attach conditions of a political nature to any assistance which they may offer or which the Kingdom of Laos may seek; they will not bring the Kingdom of Laos in any way into any military alliance or any other agreement, whether military or otherwise, which is inconsistent with its neutrality, nor invite or encourage it to enter into any such alliance or to conclude any such agreement; they will not introduce into the Kingdom of Laos foreign troops or military personnel in any form whatsoever, nor will they in any way facilitate or connive at the introduction of any foreign troops or military personnel; and they will not establish nor will they in any way facilitate or connive at the establishment in the Kingdom of Laos of any foreign military base, foreign strong point or other foreign military installation of any kind.[41]

These States also appealed to all other States to recognise, respect and observe in every way the sovereignty, independence, neutrality, unity and territorial integrity of Laos and to refrain from any action inconsistent with the provisions of the Declaration. In the event of violation or threat of violation of the principles of the Declaration, the States Parties agreed to consult jointly with the Laotian Government and among themselves in order to consider necessary measures to ensure the observance of these principles. However, as Neuhold observes, this neutralisation

> "solution to the Laotian issue failed to achieve its objectives. Internal unrest and foreign interference soon became the order of the day again. Eventually, the communists took over in Laos, too. The Treaty on

41 *Supra* note 39.

Friendship and Co-operation of 18 July 1977 between Laos and Vietnam marked the formal end to Laotian neutrality."[42]

(f) Cambodia

The international settlement concluded at the Paris peace conference in 1991 on the Cambodian problem[43] is the most recent example of the neutralisation of a Member State of the UN under an international agreement.[44] It is interesting to note that the neutralisation of Cambodia, agreed after the end of the Cold War, is very similar to the Laotian neutralisation of 1962, which was concluded at the height of the Cold War. The Paris peace Conference of 1991 was convened to find a permanent solution to the problem of Cambodia and one such solution was its neutralisation under an international agreement.

Under the terms of the agreement Cambodia undertook to maintain, preserve and defend its sovereignty, independence, territorial integrity, national unity and neutrality.[45] The 19 States participating at the conference, which included all permanent members of the Security Council and all members of the ASEAN,[46] agreed to recognise and respect the sovereignty, independence, territorial integrity and neutrality of Cambodia.[47] The commitments they undertook under the Agreement are very similar to those of the commitments undertaken by the States who agreed to neutralise Laos in 1962.

(g) Other permanently neutral States

During the nineteenth and early twentieth centuries a number of other States and territories were neutralised, but such neutralisations did not last long, for various

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42 Neuhold, *op.cit.*, note 1, p.15.

43 31 ILM (1992), p.200.

44 See for a very interesting account of the background to the Conference, the process of negotiations and an analysis of the Agreements concluded at the Conference, S.R. Ratner, 'The Cambodian Settlement Agreements', 87 AJIL (1993), pp.1-41.

45 Article 1 of the Agreement.

46 The following States were represented at the Conference: Australia, Brunei, Cambodia, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, the Philippines, Singapore, Thailand, the Soviet Union, the U.K., the U.S., Vietnam and Yugoslavia.

47 Article 2 of the Agreement.

reasons.[48] The neutralisation of the Vatican City State is an exception in this respect. The Vatican City was neutralised under a treaty of 11 February 1929 with Italy which is still valid.[49]

There are a few other States that have been pursuing a foreign policy of permanent neutrality. They are self-neutralised. After its independence from Great Britain the Republic of Ireland has occasionally claimed that it is a permanently neutral state.[50] Sweden has pursued a neutral foreign policy for a long time; 'not allied between power blocs in peace in order to be able to remain neutral in a war'[51] is the Swedish definition of its neutrality. Finnish neutrality[52] was to a certain extent attributed to a preambular clause in the 1948 Treaty of Friendship, Co-operation and Mutual Assistance with the Soviet Union. The relevant clause mentions Finland's "desire to remain outside the conflicting interests of the Great Powers."[53] This neutrality was often described as 'asymmetrical neutrality' with a pro-Soviet bias.

3. The Rules of Permanent Neutrality

The practice of States discussed above exhibits that neutrality is a flexible doctrine. There is no uniformity in the method of the adoption of permanent neutral status. Different States have become neutral through different procedures, including unilateral declarations, bilateral and multilateral treaties, and other States have become bound to respect such neutrality through (i) unilateral endorsement of such neutrality (ii) bilateral or multilateral treaties and (iv) acquiescence and recognition.[54]

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48 Among the examples are the neutralisation of Belgium (1831), Luxembourg (1867), Chablais and Faucigny (1815), the Ionian Islands (1963), the Free City of Danzig (1919) and the Free City of Triste (1945).

49 'Vatican City, Declaration of Continued Neutrality of the Holy See, June 7, 1944,' 20 AJIL (1945),538; D. Anzilotti, 'La Condizione Giuridica de la Santa Sede in Seguito agli accordi del Laterno,' 21 Rivista di diritto Internazionale (1929), 129.

50 R. Fanning, 'Irish neutrality-an historical review,' 1 ISIA (1982), 27; D. Driscoll, 'Is Ireland really 'neutral'?,' *Ibid.*, 55; M.M. MacSweeny, 'Irish neutrality and international law,' 1-2 The Irish Law Times (1983-84),143.

51 N. Andren, 'The neutrality of Sweden - background factors,' in K.E. Birmbaum and H. Neuhold (eds.), Neutrality and Non-Alignment in Europe (1981).

52 G. Maude, The Finnish Dilemma: Neutrality in the Shadow of Power (1976); B.S. Faloon, 'Aspects of Finnish neutrality,' 1 (3) ISIA (1982), 3; M. Jakobson, Finnish Neutrality (1968).

53 48 UNTS 149 and 203. This treaty was recently abrogated and replaced by another treaty between Finland and Russia in 1991.

54 See Chapter VII below.

Although most neutral States seem to have conformed to certain principles of neutrality, they are equally divergent with regard to other principles as well as to the application of the generally accepted principles. The following seem to be the principles generally accepted by neutral States:

(a) Renunciation of the right to go to war;
(b) Non-participation in war between belligerents;
(c) Prohibition on the use of neutral territory for military purposes by belligerents;
(d) Absence of foreign military bases;
(e) The duty to defend its neutrality;[55]
(f) The duty to maintain impartiality;[56]
(g) Non-participation in military alliances.

The way these principles are applied in practice by individual neutral States does vary considerably. For instance, while Switzerland has traditionally observed strict rules of permanent neutrality and refrained from entering into both offensive and defensive alliances, Costa Rica saw no problem in becoming a permanently neutral State while remaining a member of the O.A.S. and party to the Inter-American Treaty for Reciprocal Assistance concluded at Rio de Janeiro in 1947. The O.A.S.[57] may be likened to the former Warsaw Pact and N.A.T.O.[58] Article 2(c) of the O.A.S. Charter provides for common defence. The Rio Treaty concluded within this O.A.S. system provides yet another proof of the assertion that the Organization is a military alliance. Article 27 of the Rio Treaty provides that

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55 Traditionally the permanently neutral State had not only a right but also a duty to defend its neutrality. This was interpreted as requiring an adequate army to defend the neutrality. However, an exception was made by Great Britain, Austria, France, Prussia and Russia in the case of Luxembourg. Its neutrality was coupled with its demilitarisation. The neutrality of the Vatican City is also an unarmed neutrality. Yet in both of these cases the guarantor States took the responsibility of guaranteeing such neutrality. In this sense Costa Rica's unarmed permanent neutrality is unique: it has not sought guarantees from other States to maintain its neutrality nor has it an army to defend itself.

56 But this does not mean that the neutral State has a duty to adopt ideological neutrality. Nor has it a duty to restrict the freedom of the press and of opinion.

57 See Article 2 of the Charter of the O.A.S.: 30 UNTS No.449.

58 See for the text of the NATO treaty 34 UNTS 243 and the Warsaw Pact Treaty in 49 AJIL (1955), Supp.194.

> "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."[59]

The argument advanced in this regard is that since Article 20 of this treaty states that "no State shall be required to use armed force without its consent," a permanently neutral State can remain in this sort of regional regime as long as it does not give its consent to use its armed forces. Moreover, the case of Costa Rica is unique because there is no question of asking it to provide military assistance or to use armed force since it has no army.

Further, Costa Rica has declared its permanent neutrality and other American States after being formally informed of this status have not so far registered their disapproval or have failed to state that this neutrality goes against the O.A.S. Charter or the Rio Treaty. Thus they can be said to have acquiesced in this neutrality and may be barred in the future from asking Costa Rica to implement the military measures decided upon by the O.A.S.

Similarly, Ireland, Sweden and Finland have pursued the policy of permanent neutrality of their own free will. The diversity demonstrated by the practice of these States with regard to the methods of the adoption of permanent neutrality is illuminating. No State has challenged the permanent neutrality of these States. Rather, during the Cold War all other States valued and respected the Irish, Swedish and Finnish neutrality as these neutral States were able chiefly owing to their neutral policy to play the role of intermediary between the opposing Western and Eastern bloc countries.

4. Neutral States' membership of international organisations

The question of neutral States' membership of the UN and other international organisations is highly controversial.[60] Switzerland is not a member of the UN; Swiss

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59 30 UNTS 449.

60 See this author, 'Neutrality in a changing world: European neutral States and the European Community' 42(2) ICLQ (1993), pp.238-268.

concern seems to be that membership of the UN is incompatible with its neutrality because it could involve Switzerland in military actions under Chapter VII of the UN Charter.[61] But Austria, whose permanent neutrality is required to be "of the type maintained by Switzerland," became a member of the UN in 1955 and no State opposed this.

Articles 2(5), 25, and 49 require all members of the UN to provide necessary assistance, including military assistance, to the Security Council upon its request. Moreover, Article 2(6) appears to have imposed certain obligations even upon non-member States to act in accordance with the principles of the UN "so far as may be necessary for the maintenance of international peace and security."

On this evidence it has been often argued that neutrality has been implicitly rejected by the UN Charter.[62] This attitude is not a new one; similar views were expressed in the aftermath of World War I. In delivering his opinion to the Belgian Academy of Sciences in 1924, Rolin appeared dismissive of the institution of neutrality:

> "The organization of the federation of states is the negation of neutrality. The Covenant of the League of Nations has abolished this neutrality. It will be the end of neutrality when all the nations which are not yet admitted to the League of Nations join the League and thereby make it a powerful organization."[63]

Article 16 of the Covenant of the League of Nations had, indeed, imposed certain obligations on the members of the League. Although Switzerland was allowed to become a member after making a special arrangement with the League, the Council of the League stated that the idea of permanent neutrality was not compatible with the

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61 See Robertson, 'Switzerland rejects the United Nations,' 12 Fletcher Forum (1988), 312.

62 Concerning the question of the 'obsolescence' of neutrality see J.F. Lalive, 'International organization and neutrality,' 24 BYIL (1947), 72-89; H.F. Koeck, 'A permanently neutral State in the security council,' 6 CILJ (1973), 137 ff.; S. Roy Choudhury, Military Alliances and Neutrality in War and Peace (1966), Chapt.3, 137 ff.; Kelsen, The Law of the United Nations (1950), p.94; Dehn, 'The effect of the United Nations Charter on the development of international law with special reference to the status of neutrality and the Hague and Geneva Conventions,' Report of the International Law Association, 1946, p.39 et seq.; Robertson, 'Switzerland rejects the United Nations,' 12 Fletcher Forum (1988) 312-320; Komarnicki, *op.cit.* note 1, pp.399-510.

63 As quoted in Verdross, *op.cit.* note 19, pp.61 at 64.

principles of the Covenant of the League which included provision for common action against an aggressor. Article 16 of the Covenant of the League of Nations reads:

> "Should any member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of Covenant-breaking State and the nationals of any other State, whether a Member of the League or not."[64]

The conclusion drawn by the League Council on the basis of this provision was as follows:

> "It cannot be denied that the abstract meaning of neutrality does not agree with the idea of the League of Nations. Neutrality means maintenance of peace by non-interference, the League, however, wants the maintenance of peace by joint action of its members. At a moment when so many nations have made sacrifices because of their faith in the justice of this cause, they may have lost understanding of the value of neutrality and consider it to be indifference to the just cause. The neutrality of Switzerland is, however, not connected with a neutrality supporting selfish aims. Its neutrality is a principle and a durable one and marked by its absolute reliability. Switzerland does not want to join a war because of the possibility of a momentary advantage. This neutrality is not indifferent but impartial."[65]

Since the Charter of the UN contains even stronger provisions for common action, the position of neutral States has become more controversial.[66] During and after the San Francisco Conference considerable opposition was expressed against neutrality. A

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64 Parry, CTS, vol. 225 (1919), 201.

65 As quoted in Verdross, *op.cit.* note 19, pp.67-68.

66 For instance, referring to the collective security system of the UN, a White House press release of 7 June 1956, said that the U.S. President "believes in the principle of collective security for all...The President does not believe that there are special conditions which justify political neutrality but that no nation has the right to be indifferent to the fate of another or, as he put it, to be 'neutral as between right and wrong or decency or indecency'." Whiteman, Digest of International Law, vol.I, 358-359. D. Healey, the former Defence Secretary of Great Britain, states that neutralism "means an abdication of responsibility to play an active role in progressing beyond power politics towards an international society." D. Healey, When Shrimps Learn to Whistle (1990), p.124.

French proposal to the Conference said that participation in the UN implied obligations which were incompatible with the obligations of a neutral State.[67] The most famous opponent of neutrality was Dulles, the then U.S. Secretary of State, who said that neutrality "pretends that a nation can best gain safety for itself by being indifferent to the fate of others... It is an immoral and short-sighted conception."[68]

However, State practice of the last four or five decades reveals that it is possible for a member of the UN to adopt a limited policy of neutrality.[69] Article 2(5) of the Charter is often cited to rule out the possibility of neutrality of a member of the UN. Although all Members of the UN must carry out the decisions of the Security Council taken under Chapter VII, the Council does not always take mandatory decisions under this Chapter; even if the Council determines that there exists a threat to the peace, breach of peace, or act of aggression it may make non-mandatory recommendations.

As far as implementation of mandatory economic sanctions under Article 41 is concerned it has been often argued that States do not compromise their neutrality by employing measures not amounting to armed conflict. Neutrality is related to the idea of war and neutral States are required to observe impartiality in their behaviour towards belligerents.

The first instance of collective imposition of economic sanctions was against Italy by the League of Nations in the Italo-Ethiopian War of 1935. The permanently neutral Switzerland was a member of the League and she had accepted the fact that in becoming a member the obligation under the Covenant of the League to execute economic and financial measures was not incompatible with a neutral policy.[70]

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67 The French amendment to Article 2(5) of the U.N. Charter at the San Francisco Conference read (in English): "without it being possible for a State to escape such an obligation by relying on a status of neutrality." U.N.C.I.O. Documents vol.VI, Doc.944, p.459.

68 In P. Willetts, The Non-aligned Movement: the Origins of a Third World Alliance (1978), p.20.

69 Oppenheim states that "While the Charter has affected in a decisive way the right of the members of the United Nations to remain neutral, it has not substantially abolished their right to neutrality either in wars between Members of the United Nations or in wars between non-Members or between Members and non-Members." Oppenheim, *op.cit.*, note 5, p. 647. Both Kunz and Verdross see no problem in a permanently neutral State becoming a Member of the UN. See Kunz, *op.cit.* note 19, p.418; Verdross, *op.cit.* note 19, p.61.

70 This position was confirmed by the Swiss *Bundesrat* in a message of 4 August, 1919. In connection with the Swiss position with regard to economic sanctions see Verdross, *Ibid.*, p.65; League of Nations, Official Journal, Special Supplement, no.146, p.41; C.L. Brown-John, Multilateral Sanctions in International Law: A Comparative Analysis (1975), pp.81-83.

Switzerland was released by the League Council only from the duty of participating in military sanctions and allowing transit of foreign troops.

When the Security Council of the United Nations decided to impose economic sanctions against Rhodesia in 1968 the Council sought to extend its sanctions policy to the broadest number of States. The Council called upon not only all Members of the UN but also the members of the UN Specialised Agencies which included, *inter alia*, Switzerland.[71] While maintaining that as a neutral State it could not join in the mandatory sanctions of the UN, Switzerland agreed, nonetheless, to ensure "that Rhodesian commerce will be given no opportunity to circumvent United Nations sanctions on Swiss territory."[72] Further, Switzerland took some measures to limit trade with Rhodesia and imposed restrictions on the exports of war materials to Rhodesia.[73]

The Security Council resorted to economic sanctions again in 1990 against Iraq for not withdrawing from Kuwait in the 1991 Gulf crisis. Under Resolution 661 (1990) of 6 August 1990 and Resolution 670 (1990) of 25 September 1990 the Security Council decided that "all States shall" (not only all Member States) impose economic sanctions upon Iraq.[74] Paragraph 5 Resolution 661 (1990) made it even clearer by calling upon "all States, including States non-Members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or licence granted before the date of the present resolution."[75] All States, including permanently neutral Austria and Switzerland,[76] observed the resolutions of the Security Council.[77] Traditionally

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71 Although the non-Members of the UN may be required under Article 2(6) to act in accordance with certain decisions of the Security Council taken under Chapter VII of the Charter, the Council distinguished very carefully between decisions that were directed exclusively to Members and requests that were directed to non-Members in its Resolution 253 (1968) of May 29, 1968.

72 Fourth Report of the Sanctions Committee of the United Nations, U.N. Doc. S/10229, p.15. See also Doc. S/7781, annex II for the text of the official statement of the Swiss government.

73 R. Zacklin, The United Nations and Rhodesia: A Study in International Law (1974), pp.84-86. See also Brown-John, *op.cit.* note 70, pp.82-83, 358-359.

74 29 ILM (1990), 1325-1327, 1334-1336.

75 *Ibid.* 1327.

76 However, Austria stated that it would "autonomously apply all the sanctions" imposed by the Security Council against Iraq. See D.L. Bethlehem (ed.), The Kuwait Crisis: Sanctions and Their Economic Consequences (Cambridge International Documents Series, Vol.2, Part I,

speaking, this step may be considered as a deviation from the rule of impartiality. But it is in accordance with the call of the Security Council to all states to act in accordance with its decision.

Even Iran and Jordan, who had declared themselves to be neutral in the armed hostilities between the Allied forces and Iraq, did not challenge the economic embargo imposed by the Security Council. By 'neutrality' they seem to have understood impartiality in armed conflicts, but not in applying economic sanctions.[78]

Obviously, a neutral state's participation in measures amounting to armed force cannot be considered compatible with the traditional idea of neutrality. Therefore, if the Security Council in order to maintain or restore international peace and security decides to take measures including the use of force under Article 42 and calls upon all States, including neutrals, to make available to the Security Council, armed forces, assistance, and facilities etc., no State, let alone the Members of the UN, can assert that because it is a neutral it is thus duty bound to be impartial towards the belligerents.

Under the collective security system of the Charter, the Members of the UN have relinquished largely, though not completely, the free choice of whether to participate directly in a war between other States or to remain neutral. A neutral can invoke neither its Constitution or legislation nor any other treaty in order to escape from the obligations imposed by the Charter;[79] the obligations of the Charter take precedence over specific treaty obligations.[80] No treaty or convention, including the Hague Conventions of 1907 relative to neutrality, can be invoked to escape from the

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1991), p.30. Switzerland stated that: "As a non-member of the United Nations, Switzerland is not in fact legally bound by the decisions of the Security Council nor, in this case, by resolution 661 (1990)." Nevertheless, Switzerland stated that it imposed sanctions "independently" which corresponded "in substance to the resolutions adopted by the Security Council." *Ibid.*, p.306-307.

77 See the report by the U.S. Secretary of Defence Chenny to the U.S. Congress on the Gulf War of 1991, 31 ILM (1992), p.612, 638-640.

78 *Ibid.*

79 Articles 103, 2(5) and 2(2) of the Charter of the UN and the Advisory Opinion of the PCIJ on the Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory case in which the court said that "A State cannot invoke its own constitution, as regards another State, in order to withdraw from the obligations imposed by International Law or by the treaties in force." PCIJ Ser. A/B, No.44, p. 24.

80 Article 103 of the Charter of the UN.

obligations assumed under the Charter. Thus, neutrality has, since the inception of the UN, entered a new stage of development and that stage is often characterised as 'qualified neutrality.'[81] This is because, the permanent neutrality of a Member State is dependent on the discretion of the members of the Security Council[82] and, strictly speaking, no member of the UN can remain a perfectly neutral State.[83] The ICJ in its Advisory Opinion on the Namibia case[84] said that all States, both members and non-members of the UN, had a duty to act in accordance with Security Council resolution 276 (1970) which called upon them to give every assistance in the action taken by the UN with regard to Namibia.

The international agreement on the neutralisation of Cambodia in 1991 represents yet another example of State practice contrary to the view that the doctrine of neutrality is not compatible with the collective security system of the Charter of the UN. The States party to the Cambodian Agreement recall their obligations under the Charter of the United Nations and undertake to recognise and respect the neutrality of Cambodia. In the event of violation of the Cambodian neutrality there is provision in the Agreement to refer the case to the Security Council of the UN. The Framework agreement was unanimously endorsed by the Security Council[85] and the General Assembly[86] before it was adopted by the Paris Conference. Actually, the annual

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81 Referring to the provisions of Chapter VII of the Charter, Brownlie states that "under Article 48 States may be ordered to adopt only a 'qualified neutrality' and to apply economic sanctions. Brownlie, Use of Force, pp.403-404.

82 The permanently neutral States are not, however, barred from becoming members of regional or international organisations of a non-military character. Nevertheless, the membership of the EC has been a subject of acute controversy. After considering the possibility of joining the EC, Sweden announced on 18 March 1971 that it found it impossible "to reconcile Sweden's neutrality with membership of the Community." Keesing's 1970/71, p.24536. But Ireland became a member of the EC in 1972 stating that "The Treaties of Rome and Paris do not entail any military or defence commitments, and no such commitment are involved in Ireland's acceptance of these Treaties." See The Accession of Ireland to the European Communities, Irish Government White Paper (January 1972).

83 The U.S. position in this question is illustrative: "traditional concepts of neutral rights and duties are substantially modified when ... the United Nations authorises collective action against an aggressor nation. It was the US position during the Persian Gulf crisis that, regardless of assertions of neutrality, all nations were obliged ... to provide whatever assistance possible." See the report of the US Secretary of Defence Chenny to the Congress in 31 ILM (1992), pp. 637-638.

84 ICJ Reports 1971, p.16, para 123 and 126.

85 Security Council resolution 668 (1990) of 20 September 1990, adopted unanimously.

86 General Assembly resolution 45/3 of 15 October 1990, adopted unanimously.

General Assembly resolutions on Cambodia had identified Cambodian neutrality as an essential part of the solution to the Cambodian problem.[87]

Since every State's sovereignty and territorial integrity has been guaranteed under Article 2(4) of the Charter, no neutral State actually requires such guarantee under a separate agreement. A violation of this article should activate the collective security system of the UN under Chapter VII of the Charter. This may be one reason why the concept of guarantee of any neutral State has become the thing of the past.

In the absence of any requirement to guarantee a State's neutrality under a separate system, which might in certain cases clash with the collective security system of the UN, there is nothing inconsistent in making the institution of neutrality part of the UN system designed to prevent conflict or restore peace in any country. Moreover, strictly speaking, the recognition of the neutrality of a State by other States does not release that State from its obligations under the Charter of the UN to implement the decisions of the Security Council with regard to the use of force or the employment of economic measures to restore international peace and security even against a State party to the Agreement.[88] This could be the approach taken by the States party to the Cambodian Agreement.

5. Permanent Neutrality and Zones of Peace

The foregoing reveals that the status of permanent neutrality is not directly linked to any specific conflict, war or belligerency and States are entitled to formulate their own policy of neutrality provided that they conform to the basic principles of permanent neutrality under international law. The basic objective of permanent neutrality and ZOP is the same; both aim to insulate from outside interference the territory involved in times of peace as well as in times of war.

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87 The General Assembly resolution 43/19 is an example.

88 In the light of the PCIJ's decision in the Wimbledon (PCIJ Reports, Ser. A, No.1.) case it can be said that if there is a conflict between the rules of neutrality and the rules laid down in the general interest of the international community of states the neutral State would be expected to respect the latter rule.

Non-participation in any military alliances and complete prohibition on the establishment of foreign military bases are the most vital elements of both permanent neutrality and ZOP. Other principles, especially the prohibition on the use of force, the right of self defence if attacked, non-interference in the internal affairs of other States, and peaceful settlement of all disputes are to be found in both permanent neutrality and ZOP. Therefore there seems to be no reason why ZOP, like permanent neutrality, cannot be regarded as contributing to the corpus of international law. Similarly, if States can become permanently neutral through a variety of methods, including unilateral declarations, there is no reason why States cannot become ZOP through similar methods.

Of course, the ZOP is more than permanent neutrality in certain respects and less than neutrality in other respects; certain aspects of collective neutrality may not appear to be in complete harmony with the principles of permanent neutrality. For instance, the ASEAN's code of conduct requires the Southeast Asian States to refrain from entering into not only military alliances but also other agreements which would be inconsistent with the objectives of the zone. Although this restriction does not seem to prevent the zonal States from forming a military alliances among themselves, the rules of permanent neutrality rule out the prospect of a neutral state joining all types of military alliances.[89] In this sense the Southeast Asian nations could be said to be under an obligation not to form a military alliance among themselves.

The code imposes restrictions even on receiving foreign aid that would be inconsistent with the objectives of the zone. Although this is not required under the principle of permanent neutrality, it is not inconsistent with international law.[90] This would seem to make sense for Southeast Asian nations because many developing countries are vulnerable to interference by militarily significant aid donors. This condition is also in keeping with classical rules of neutrality which require a neutral

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89 R. Binschedler, 'Neutrality Concept and General Rules', in Bernhardt, Encyclopaedia of PIL, Vol.4,: Use of Force. War and Neutrality. Peace Treaties (1982).

90 *Ibid.*

State to do nothing in peacetime that could put it in a difficult position in any future wars.

Although the code does not make it clear whether the Southeast Asian nations will have to observe the rules of neutrality in the case of war, it would seem to be quite logical to maintain that because of the policy of ZOPFAN they are under an obligation, as are other permanent neutral States, to observe the rules of neutrality in the event of war between outside States.

But the problem does not end there. What would be the obligations of a zonal State in the event of war between other zonal States? Also, what would be the position of a zonal State if another zonal State is attacked by an outside Power? If attack against one zonal State is to be considered as attack against other zonal States, the policy of ZOPFAN would resemble a regional military pact rather than a regional neutrality zone. The very idea of neutrality is that neutral States must remain neutral and observe impartiality in conflicts between other States; they are not supposed to join any military alliance.

Moreover, if the zonal State is regarded as the aggressor by the international community, especially by the Security Council of the UN, other zonal States must refrain from supporting that aggressor zonal State. These are some of the problems of collective neutrality. The principle of armed neutrality seems to be a major problem for creating a regional neutrality zone. International legal literature does not deal with problems such as these as the concept of neutrality is regarded as a policy suitable for individual independent sovereign States.

However, certain classical rules of neutrality could be invoked to support the concept of ZOPFAN. For instance, under classical international law of permanent neutrality neutral States are required to defend their neutrality. Since States are entitled under international law collectively to exercise their sovereign rights and create a regional neutrality zone that does not contravene any rules of international law, it would seem to be quite logical to have a system of co-operation in defence

matters among the zonal States in order to defend their neutrality yet without actually forming a military alliance.

The law of neutrality does not seem to forbid such co-operation designed to defend neutrality. This seems to be the approach adopted by the 1976 and 1987 Summit Meetings of the ASEAN Heads of Government. While the 1976 Meeting agreed on a formula of "co-operation on a non-ASEAN basis between member States in security matters with their mutual needs and interests,"[91] the 1987 Meeting stated that "each member State shall be responsible for its own security."[92]

Further, modern State practice shows that it is not indispensable for a permanently neutral State to commit itself to defend its neutrality by armed force. For instance, since Costa Rica has no army it has decided to defend its neutrality through other means at its disposal. No State has challenged the Costa Rican decision. This being so, a group of States of a region can pursue a policy of collective neutrality without needing a common defence policy to defend their neutrality.

With regard to the position of a zonal State in the event of an outright violation of the neutrality of another zonal State by an outside Power, the situation is not clear. Under the classical rules of neutrality those neutral States which are not victims of aggression would be obliged to remain neutral. Although the collective security system of the Charter of the UN has modified this rule in cases where the UN becomes involved, in situations where the UN does not become involved the law remains unclear.

However, there are two observations to be made: first, the violation of the neutrality of a zonal State by an outside Power amounts to a violation of the neutrality of the zone as a whole because the neutrality of that zonal State is based on collective neutrality arrangement. In this case, the other zonal States would no longer be obliged to stay neutral. Second, because all zonal States are under a duty under the classical law of neutrality to defend the neutrality of the zone as a whole, the other zonal States

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91 The Declaration of ASEAN Concord of 24 February 1976, in The ASEAN Documents Series 1967-1988, p.38.

92 The Manila Declaration of 1987, in *Ibid.*, p.47.

would no longer be required to observe neutrality in a conflict between the aggressor and the victim State.

If a zonal State attacks an outside State or another zonal State the other zonal States would not be required to observe neutrality for two reasons: first, according to the ASEAN's definition of neutrality the ASEAN States are required to remain neutral in conflicts "particularly between Powers outside the zone,"[93] and second, as will be seen in the next section of this chapter, a major component of ZOPFAN is the principle of mutual non-aggression and the renunciation of the use of force in international relations. The violation of these rules of ZOPFAN by a zonal State would amount to a material breach of the regime of ZOPFAN which would in turn entitle other States to invoke the breach as ground for non-observing neutrality.[94]

To summarise: the concept of neutrality is no longer the same as that which existed before the establishment of the League of Nations, and especially before the inception of the UN. Therefore, those States who still perceive neutrality to be a favourable option in time of peace as well as in time of war and wish at the same time to reconcile their objective with their other regional policy goals have opted for ZOP rather than the concept of permanent neutrality.

It is not necessary for States wishing to pursue a policy of neutrality to cling to the doctrine of permanent neutrality. They are perfectly entitled to devise other methods to achieve their objective, as long as they are compatible with their obligations under bilateral and multilateral treaties, including the UN Charter; the concept of ZOP seems to be a device of this nature. Thus, the conclusion to be drawn from this discussion is that the idea of ZOP, which is more suitable and adaptable to modern realities and includes most of the modified rules of traditional permanent neutrality,[95]

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93 See the definition of neutrality in H. Hanggi, ASEAN and the ZOPFAN Concept (ISEAS, 1991), pp.23-24.

94 Article 60 of the Vienna Convention on the Law of Treaties. This principle has been regarded as customary international law. Oppenheim (1992), Vol.I, Part 4, p.1300; McNair, Treaties 91961), Ch.36; Sinha, Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party (1966).

95 The absence of foreign military bases and non-participation in military alliances are central to both the doctrine of permanent neutrality and the concept of ZOP. However, as stated earlier, the membership of international organisations, such as the UN and the European Communities, may pose a problem for neutral States. But in the case of the States pursuing the policy of ZOP

seems to stand as a viable option for States willing to pursue a policy of peace, peaceful co-existence, and permanent and active neutrality in times of peace as well as in times of war.

III. Demilitarisation and ZOP

The concept of the demilitarised zones has long been recognised as part of international law. The main purpose of the establishment of demilitarised zones has been to reduce tension by prohibiting military operations in the zone and by requiring withdrawal of forces, weapons and military installations. Demilitarised zones also act as a legal shield against aggression as the zone cannot be used to mount attacks.

Traditionally only territories under national jurisdictions have been demilitarised under peace settlements concluded after a war. Under the doctrine of demilitarisation the State having territorial competence over the territory is responsible for maintaining the demilitarised status of the territory concerned. Although the term 'demilitarisation' generally denotes "the prohibition or limitation of, armed forces, war materials, armaments factories in a given territory,"[96] the scope of the demilitarisation of various territories varies. For instance, the demilitarisation of the Rhineland under Articles 42 and 43 of the treaty of Versailles of 1919 appears to be wider than that of the Aaland Islands under the 1856 Convention. Article 3 of the 1856 Convention on the demilitarisation of the Aaland Islands provides that

> "No military or naval establishments or base of operations, no military aircraft establishment or base of operations, and no other installation used for war purposes, shall be maintained or set up in the [Aaland Islands]."[97]

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such membership would not pose any problem because under the principles of ZOP membership in international organisations of non-military character is not ruled out.

96 Osmanczyk, Encyclopedia of the UN, p.219. Oppenheim's International Law defines the term 'demilitarisation' meaning "the agreement of two or more States by treaty not to fortify, or station troops upon, a particular zone of territory; the purpose usually being to prevent war by removing the opportunity of conflicts as the result of frontier incident or to gain security by prohibiting the concentration of troops on the frontier." Vol. II: War and Neutrality, H. Lauterpacht (ed), 7th edition, 1952, p. 244, note 1.

97 BFSP, 1855-1856 (1865), 24.

Article 42 of the Treaty of Versailles is similar to Article 3 of the Aaland Islands Convention; Article 43 is wider and prohibits, *inter alia*, the maintenance and assembly of armed forces and military manoeuvres of any kind. The two articles read:

> Article 42
> "Germany is forbidden to maintain or construct any fortifications either on the left bank of the Rhine or on the right bank to the west of a line drawn fifty kilometres to the east of the Rhine."
>
> Article 43
> "In the area defined above the maintenance and the assembly of armed forces, either permanently or temporarily, and military manoeuvres of any kind, as well as the upkeep of all permanent works for mobilisation, are in the same way forbidden."[98]

Traditionally demilitarised zones have been created by agreement between States, but there is no reason why such zones cannot be created by other means: "Demilitarisation may be stipulated by bilateral or multilateral treaties, or by unilateral declarations if due notification is given and if the intent to be bound by such declaration under international law is clearly established."[99]

Bailey[100] writes that "[d]demilitarisation may come about following a recommendation of the Security Council, as happened in Yemen in 1963,[101] and in the Golan Heights and Sinai in 1974 and 1975.[102]" Indeed, the demilitarised zone along the border between Iraq and Kuwait was created under a resolution of the Security Council after the recent Gulf War (Resolution 687 (1991)). This demilitarisation is a radical step taken by the Security Council which had never in the past sought to impose demilitarisation by a mandatory resolution.[103]

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98 Parry, CTS, vol. 225 (1919). See also the Treaty Relating to Spitzbergen of February 9, 1920 on the demilitarisation of Spitzbergen in 2 LNTS 7.

99 J. Delbruck in Bernhardt, Encyclopedia of PIL, Vol.3: Use of Force, War and Neutrality, Peace Treaties (1982), p.150.

100 S.D. Bailey, 'Nonmilitary areas in UN practice', 74 AJIL (1980), pp.499, 501.

101 SC Res.179, 18 SCOR, Res. and Dec.2, U.N.Doc.S/5331 (1963).

102 SC Res. 242, 22 SCOR, Res. and Dec. 8, U.N.Doc.S/8247 (1967).

103 Bailey, *op.cit.*, note 100, p.502.

Modern examples of demilitarisation in the post-World War II period[104] include a demilitarised zone in 1948 in Indonesia by an agreement between Indonesia and the Netherlands,[105] in Kashmir along the cease-fire line negotiated between India and Pakistan in 1949,[106] in Korea separating the North from the South after the Korean War,[107] in Vietnam separating the North from the South after the Geneva Agreement of 1954[108] and along the border between Kuwait and Iraq after the Gulf War of 1991 under Resolution 687 (1991). Although most such demilitarised zones are conceived as a temporary measure to facilitate a cease-fire between the warring factions, to reduce tension by withdrawal of forces and to provide a base for negotiation, certain such zones have acquired a semi-permanent (e.g., the demilitarised zone separating South Korea from the North) or even permanent character (e.g., the Aaland Islands).

Although traditionally the concept of demilitarised zones has been essentially linked with belligerency or a state of war, the application of the term 'demilitarisation' to disarmament measures covering regions such as Antarctica and Outer Space shows that this concept has relevance in the evolution of new principles of conflict avoidance and management of international affairs in times of peace. Article 1 of the Antarctic Treaty reserves Antarctica for peaceful purposes. It prohibits, *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 weapons. Article V specifically prohibits any nuclear explosions and disposal of radioactive materials in Antarctica.

General Assembly resolutions have also been used to demilitarise a territory. The demilitarisation of outer space was initially effected through a resolution of the General Assembly of the UN. Similarly, the 1970 Declaration of the General Assembly on the deep sea-bed (Resolution 2749 (XXV)) was the starting-point for the

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104 See Bailey, *op.cit.* note 100, pp.499 ff.

105 3 UN SCOR, Spec. Supp. (No.1), U.N.Doc.S/649/Rev.1 (1948), App.Xi, Art.2.

106 4 SCOR, Spec. Supp. (No.7), U.N.Doc.S/1430 (1949), Ann.26, paras.D and E.

107 8 SCOR, Supp. (July-Sept. 1953), U.N.Doc.S/3079 (1963), para.4; 19 SCOR, Supp. (Jan.-March 1964), U.N.Doc.S/5501 (1964), para.13.

108 Geneva Conference on the Problem of Restoring peace in Indo-China, Final Declaration, 21 July 1954, 935 UNTS 95.

demilitarisation of the sea-bed that eventually led to the conclusion of the 1971 Sea-Bed Arms Control Treaty. The importance of the application of the doctrine of demilitarisation as a measure of preventive diplomacy has been recognised in a recent report on preventive diplomacy, peacemaking and peace-keeping submitted to the Security Council, by the Secretary-General of the UN, Boutros-Ghali.

The report states that the demilitarised zones should be used as a form of "preventive deployment" to prevent potential conflicts.[109] Thus, the doctrine of demilitarisation is evolving as a device for conflict avoidance rather than a measure of conflict management and the creation of ZOP is also one such measure. After all, the doctrine of demilitarisation is not an immutable dogma that must either be obeyed or totally rejected: it is a flexible instrument of policy that States can use in accordance with the need of a given situation. Thus, the UN declarations on ZOP and the proposal of the Dalai Lama for a ZOP for Tibet, which is a proposal for the demilitarisation of the entire Tibetan plateau, can be regarded as an attempt to apply the principles of the institution of demilitarisation to a marine region or a territory in times of peace.

IV. Nuclear-Weapon-Free Zones and ZOP[110]

1. The Treaty of Tlatelolco[111]

The Tlatelolco Treaty envisages the banning of testing, production, acquisition, or any form of possession of nuclear weapons in a large area of the Pacific and Atlantic Oceans off the shores of the Latin American States, going beyond 200-mile EEZ,

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109 Boutros-Ghali, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping (United Nations, 1992), pp.18-19.

110 See generally D. Freestone and S. Davidson, 'Nuclear weapon free zones', in Pogany, Nuclear Weapons, p.176; E. McFadden, 'Nuclear weapon free zones: toward an international framework', CWILJ (19860, p.217; W. Sutherland, 'South Pacific Nuclear Free Zone Treaty', I(2) IJECL (1986), p.218; Y. Poksteel, 'The development and present State of negotiations on disarmament', in International Association of Democratic Lawyers, Contributions to the Study of the Problems of Disarmament (1958), p.25; D. Pitt and G. Thompson (eds), Nuclear-Free Zones (1987), p.67.

111 634 UNTS 281.

once the treaty has been ratified by all Latin American States situated in their entirety south of the line of latitude 35 degrees north.[112]

However, the Treaty becomes effective within the territory of a State when it ratifies the Treaty. Under Article 1 of the Treaty the contracting parties undertake to use exclusively for peaceful means the nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their territories the testing, use, manufacture, production, acquisition, receipt, storage, deployment and possession by any means whatsoever of any nuclear weapons, by the Parties themselves, directly or indirectly, on behalf of anyone else or in any other way.

Thus, unlike the 1971 Sea-Bed treaty, the Tlatelolco Treaty prohibits the emplacement of nuclear weapons and installations in the territorial sea and on or beneath the bed of the territorial sea of the States parties because the Treaty applies to the territory of the contracting parties, over which the State exercises sovereignty in accordance with its own legislation.[113]

However, in order to bring the Treaty into force in the entire area of the zone, the contracting parties considered it vital to ensure that the zone was respected not only by all nuclear Powers but also those States outside Latin America which have *de facto* or *de jure* responsibility for territories within the zone of application of the Treaty.

Two Additional Protocols were therefore attached to the Treaty: Protocol I,[114] which binds all overseas States having responsibility for territories within the zone, has been ratified by all overseas States, namely, the U.K., the U.S., the Netherlands and France, albeit with some reservations or declaratory statements on some issues, including the freedom of navigation of warships through the zone,[115] and Protocol

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112 On 2 May 1989 the main Treaty was in force in 23 Latin American States. Argentina, Belize, Cuba, Dominica and Guyana were not parties for a variety of reasons. See for updated information on the main Treaty and its Protocols 18 ILM (1989), p.1400. But the recent decisions of Argentina and Brazil to open all their nuclear installations to IAEA inspection are likely to speed up the process of bringing the Treaty into force. News Summary, UN Information Centre, London, NS/37/92 (29 October 1992), p.2.

113 Article 3 of the Tlatelolco Treaty.

114 634 UNTS 362.

115 The main Treaty or the Protocols omit any specific reference to the question of navigation of nuclear-weapon carrying vessels through the zone. While Mexico and Panama forbid the transit of such vessels through their territorial waters, Brazil has legalised the transit of such vessels through its territorial waters. With regard to the nuclear weapon States, the U.K., the U.S. and

II,[116] which seeks an undertaking of all nuclear weapon States to respect Latin America as an NWFZ, has been ratified by all recognised nuclear Powers.[117]

Thus, the fate of the Treaty now depends on the ratification of it by those Latin American States who have not as yet done so. Among them are Argentina and Brazil who have recently taken steps towards the ratification of the treaty.

It should be mentioned that compared to the 1971 Sea-Bed Treaty, the prohibition in the Tlatelolco Treaty is narrower in scope as it does not concern other weapons of mass destruction. Similarly, compared to the Partial Test Ban Treaty, the prohibition in the Tlatelolco Treaty is also narrower in scope in that it does not prohibit nuclear explosions in the zone for peaceful purposes.

2. The Rarotonga Treaty

The Rarotonga Treaty,[118] negotiated under the auspices of 13 States of the South Pacific Forum, declares a nuclear free zone in an area covering most of the Pacific Ocean south of the equator. Under Article 3 of the Treaty each contracting party undertakes to not manufacture or otherwise acquire, possess or have control over any nuclear explosive device inside and outside the zone.

However, the obligation of the States party to the Treaty to prevent the stationing of any nuclear explosive device is limited to their territory,[119] as is the obligation to prevent the testing of any nuclear explosive device.[120] 'Territory' is defined in Article 1(b) as "internal waters, territorial sea and archipelagic waters, the seabed and subsoil beneath, the land territory and the airspace above them." Thus the Treaty does not seek to limit passage and transit in the high seas areas within the zone or the EEZ of the coastal States. Article 2(2) of the Treaty makes it clear that

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France have rejected the contention that the transit of nuclear weapons through the zone is affected by the treaty.

116 634 UNTS 364.

117 They are the U.S., the U.K., France, China and Russia.

118 The South Pacific Nuclear Free Zone Treaty of 1985. See for the text of the Treaty 6 LOSB (Oct. 1985), p.24.

119 Article 5 of the Treaty.

120 Article 6 of the Treaty.

> "Nothing in this 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."

It is interesting to note that, in the territorial sea and archipelagic waters, the Treaty prohibits only the stationing of nuclear explosive devices. 'Stationing' is defined in Article 1(d) as "emplantation, emplacement, transportation on land or inland waters, stockpiling, storage, installation and deployment." The regime of innocent passage and transit passage are not affected. Moreover, port visits are not regarded as stationing and each contracting party

> "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 lanes passage or transit passage of straits."[121]

In short, although this Treaty creates an NFZ in a large area of the South Pacific, it is, as stated by Keating, "carefully designed so as to impose obligations only on the countries of the region, and it does so by excluding nuclear weapons from their territories."[122] However, the success of the Treaty depends on the support of nuclear Powers through a protocol or protocols. Three nuclear weapon States, the U.S., France and the U.K., have territory within the zone and their approval of the rules of the zone would be vital.

Yet the attempts made so far by the States of the South Pacific Forum to secure the support of these States have failed to achieve much success.[123] Although the Rarotonga Treaty is modelled on the Treaty of Tlatelolco, which has been ratified by the U.S., the former treaty has not been supported by the U.S. on political grounds;

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121 Article 5(2) of the Treaty.

122 C. Keating, 'The Nuclear Free Zone in the South Pacific', in Law of the Sea: What Lies Ahead? (Law of the Sea Institute Proceedings, edited by T.A. Clingan, Jr., (1988), pp.150, 153.

123 These States have refused to sign any of the two protocols to the Rarotonga treaty, which would guarantee their respect for the South Pacific NFZ, as well as a third protocol calling for the prohibition of the testing of nuclear explosive devices within the zone. A.M. Rieman, 'Creating a nuclear free zone treaty that is true to its name: the nuclear free zone concept and a model treaty', 18(2) DJILP (1990), pp.209, 220 and the materials there cited.

the U.S. maintains that the proliferation of such zones could limit the U.S. policy of deterrence.[124]

3. Conclusion

The experience gained with NWFZs is directly relevant to the establishment of both land and maritime ZOP. If States can create an NWFZ in a large area of the high seas there is no reason why similar ZOP cannot be established in the seas and oceans by General Assembly resolutions. When several proposals for NWFZs were put forward in the early 1970s the UN commissioned a study on the question of NWFZs in all its aspects. The study was carried out by an *Ad Hoc* Group of Qualified Governmental Experts under the auspices of the Committee on Disarmament.

In its report the Group identified certain conditions for the establishment of NWFZs.[125] On the basis of this report the General Assembly adopted a resolution in 1975 (Resolution 3472 B (XXX))[126] defining the concept of an NWFZ according to which the General Assembly can endorse an NWFZ created by a group of States. If the General Assembly can endorse such zones there is no reason why it cannot endorse the proposals for ZOP. Although the concept of ZOP is much broader than NWFZ it also contains, like the treaties of Tlatelolco and Rarotonga, enough safeguards for the freedom of navigation.[127] What is more, according to the definition of NWFZ by the General Assembly there must be a "total absence of nuclear weapons" in NWFZs.

Whether the term 'total absence' of nuclear weapons means general absence or absolute absence is a matter of acute controversy. If it is absolute absence then the vessels carrying nuclear weapons would be prevented from traversing an NWFZ. The Treaty of Tlatelolco does not clarify this point. While Mexico and Panama expressly forbid the transit of nuclear weapons through their territory, some other Latin

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124 See in The Supplement to the Handbook, p.2.37, note 71.

125 The UN Report on NWFZ, pp.31-32.

126 Adopted by 82 votes to 10, with 36 abstentions. The U.S., the U.K., France voted against the resolution and the Soviet Union abstained.

127 A ZOP means not only general absence of nuclear weapons but also of other weapons of mass destruction and military bases and installations in the zone.

American States, such as Brazil, have legalised the transit of nuclear-powered ships through their territorial waters.

The concept of ZOP is free from such controversy as the declarations on ZOP contain a clause stating that the freedom of navigation of all ships will be respected provided such navigation is peaceful and is not directed against the sovereignty, territorial integrity and independence of the littoral and hinterland States of the marine zone concerned.

Thus, although the scope and effect of ZOP is much wider than that of an NWFZ, from a legal point of view the establishment of a maritime ZOP seems less controversial than the NWFZ. This is because the ZOP does not mean complete demilitarisation of the maritime area covered by the zone: it is a limited demilitarisation to the extent justified under the principle of the use of the high seas for peaceful purposes.

V. Emergence of New Principles Relative to Peace, Co-operation and Co-existence and ZOP

1. The Principles of Panch Shila

Soon after the inception of the UN the Cold War broke out between the Western and Eastern bloc countries. The increasingly escalating tension between these opposing blocs led to attempts to widen the superpower sphere of influence to other parts of the world. Those States which refused to choose sides in major Power alliances, and others who had newly become independent, sought to lay down certain principles of international behaviour to prevent major Power involvement in their affairs. This desire was first expressed in the principles of Panch Shila. These principles, which are also known as the five principles of peaceful co-existence, first found expression in a bilateral agreement between India and the People's Republic of China signed on April 29, 1954. The Preamble to the Agreement stated that the two countries had resolved to enter into Agreement based on the following principles:

"(1) mutual respect for each other's territorial integrity and sovereignty,
(2) mutual non-aggression,
(3) mutual non-interference in each other's internal affairs,
(4) equality and mutual benefit and
(5) peaceful co-existence."[128]

These principles have since been incorporated in numerous bilateral peace and friendship treaties concluded between various States of Asia, Africa and Latin America. Brownlie mentions that 80 international instruments have expressly incorporated these five principles and states that it is probable that the Panch Shila would now rank with and supplement the UN Charter and the Pact of Paris.[129]

2. The Bandung Declaration

With a view to developing friendly co-operation between the nations of Asia and Africa, a Conference was convened in Bandung, Indonesia, in 1955. The Communique issued by the participating Heads of State or Government of the independent and near independent nations of Asia and Africa stated that States should develop friendly co-operation on the basis of the following principles:

"1. Respect for fundamental human rights and for the purposes and principles of the Charter of the United Nations.
2. Respect for the sovereignty and territorial integrity of all nations.
3. Recognition of the equality of all races and of the equality of all nations large and small.
4. Abstention from intervention or interference in the internal affairs of another country.
5. Respect for the right of each nation to defend itself singly or collectively, in conformity with the Charter of the United Nations.
6. (a) Abstention from the use of arrangements of collective defence to serve the particular interests of any of the big powers.
(b) Abstention by any country from exerting pressures on other countries.
7. Refraining from acts or threats of aggression or the use of force against the territorial integrity or political independence of any country.
8. Settlement of all international disputes by peaceful means, such as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties' own choice, in conformity with the Charter of the United Nations.

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128 BFSP, 161 (1954), p.518.
129 Brownlie, Use of Force, p.119.

9. Promotion of mutual interests and co-operation.
10. Respect for justice and international obligations."[130]

Like the principles of Panch Shila, the principles of the Bandung Declaration have been reaffirmed and reiterated in a number of international declarations and resolutions, including the ZOPFAN declaration of the ASEAN. Those States who wished to strengthen the principles of Panch Shila and the Bandung Declaration went on to form the Non-Aligned Movement in 1961 in an attempt to thwart the Cold War.

3. The Principles of the Non-Aligned Movement and ZOP[131]

Before the first Non-Aligned gathering in Belgrade in 1961, the Cairo Preparatory Meeting of June 1961 of the foreign ministers of like-minded non-aligned countries drew up the following criteria to determine which States were supposed to be invited to the first summit:

> "(i) an independent policy based on the co-existence of states with different political and social systems and non-alignment or a trend in favour of such a policy;
> (ii) consistent support to movements for national independence;
> (iii) non-membership of a multilateral military alliance concluded in the context of Great Power conflicts;
> (iv) in case of bilateral military agreement with a Great Power, or membership of a regional defence pact, the agreement or pact should not be one deliberately concluded in the context of Great Power conflicts; and
> (v) in case of lease of military base to a foreign power, the concession should not have been made in the context of great Power conflicts."[132]

The principles of non-alignment were laid down and specified at Non-Aligned Summit Conferences held in Belgrade in September 1961 and in Cairo in October 1964. Among these principles are: peaceful co-existence; the right of peoples not yet

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130 Documents on International Affairs (1955), p.429.

131 See generally Bedjaoui, 'Non-Alignment et Droit International,' 151 Recueil Des Cours (1976-III), 349; H. Neuhold, 'Permanent neutrality and Non-alignment: similarities and differences,' 35 India Quarterly (1979), 285; P. Willetts, The Non-Alignment Movement: the Origins of a Third World Alliance (1978); D. Frei, Neutrality and Non-Alignment: Convergencies and Contrasts (1979); P. Lyon, Neutralism (1963); O. Jankowitsch and K.P. Sauvant, The Third World Without Superpowers: The Collected Documents of the Non-Aligned Countries (1978); M.S. Rajan, 'The sovereign-nation-State system, the nonaligned, and the democratisation of international relations', 28(2) International Studies (New Delhi, 1991), pp.111 ff.; M.S. Rajan, V.S. Mani and C.S.R. Murthy (eds.), The Nonaligned and the United Nations (1987).

132 As quoted in Willetts, *op.cit.* note 131, pp.18-19.

free to gain their freedom; the right of self-determination and independence; the right of every State to sovereignty and territorial integrity; the right of every State to equality and active participation in the resolution of international issues; and the right of every sovereign nation to determine in a completely free manner its own way of political, economic, social and cultural development.[133]

At the Lusaka Conference in September 1970, the heads of state or government of non-aligned countries added peaceful resolution of disputes and abstention from the big-power military alliances and pacts and opposition to the stationing of military bases in foreign countries to the aims of the Non-Aligned Movement.[134]

Thus, although the concept of ZOP is founded partly on the principles of the NAM, it is different from the NAM in many respects. The elements of non-alignment include support for movements for national independence and exemption to enter into, first, military alliance, both bilateral and multilateral, with States other than the Great Powers, secondly, bilateral military alliance with the Great Powers, and thirdly, even multilateral military alliance with the Great Powers but not concluded in the context of Great Power conflicts. This element of non-alignment is incompatible with the idea of ZOP since these activities may lead to the involvement in conflicts with other States. It was hard to distinguish which alliances are concluded in the context of the Great Power rivalry and which are not. Willetts rightly says that

> "To make any distinctions as to the 'context of Great Power conflicts' is to make distinctions that are too fine to be recognised in the real world. With such an approach membership of the O.A.S., multilateral links with France or bilateral links with the U.S.A., the U.K. or France all imply military alignment with the West."[135]

The prohibition on the leasing of a military base to a foreign Power is also confined by the same condition, i.e., the facility to establish such bases should not have been granted in the context of Great Power conflicts.

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133 Background Briefing to the Eight Non-Aligned Movement Summit Conference, Harare, August-Sept 1986, pp.2-3.

134 *Ibid.*

135 Willetts, *op.cit.* note 131, p.128.

An intriguing feature of non-alignment is that several non-aligned States are tied up with the Great Powers either through a bilateral military treaty or a regional defence treaty. According to an empirical study, in 1961 "one-sixth of the Belgrade group were aligned, while at the second summit in Cairo in 1964 and the third summit at Lusaka in 1970 one-third attendants were aligned."[136] Non-aligned countries have no legal commitment either to each other or to other States. Willetts correctly writes that "Non-alignment is a complex and fluid ideology encompassing anti-colonialism, and North-South issues, as well as the East-West disputes."[137] Since its inception the Movement has embraced a number of international economic, social, political and humanitarian issues, including North-South issues, NIEO, apartheid, disarmament, support for national liberation movements, etc.[138]

Non-alignment is a political doctrine. The principles of non-alignment are not binding. However, there are some similarities between the NAM and ZOP. The most evident similarity is non-participation in military alliances and absence of foreign military bases. Yet in the case of non-alignment, bilateral military alliances even with the Great Powers are not ruled out. The non-aligned countries must only refrain from entering into multilateral military alliances conceived in the context of great Power conflicts. The same condition applies to leasing military bases to a foreign Power.

However, in the case of a ZOP the prohibition is without qualification: as with neutrality a State within a ZOP can enter into no military alliance whatsoever with a foreign Power. The use of military facilities by a foreign Power is also prohibited. A total absence of foreign military bases is another condition attached to the idea of ZOP.

After the end of the Cold War, non-alignment seems to have lost its main purpose; non-alignment was founded chiefly to oppose the Cold War. Prime Minister Nehru of India, who conceived the idea of non-alignment together with President Tito of Yugoslavia and President Nasser of Egypt, defined non-alignment as "meaning

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136 *Ibid.*, p.129.
137 *Ibid.*, p.114.
138 See the Final Act of the Eighth Conference of Heads of State or Government of Non-Aligned Countries, in 37 Review of International Affairs (Belgrade, 1986), No. 875, ff.

non-aligned with the great Power blocs of the world."[139] The non-alignment is a movement of nations "which object to this lining-up for war purposes - military blocs, military alliances and the like."[140]

The Indonesian President Soekarno, a leading figure of non-alignment, said in the first conference of non-aligned countries that "non-alignment is not neutrality."[141] Nyerere, the African leader, said in 1970 that non-alignment was "a refusal to be party to any permanent diplomatic and military identification with the Great Powers."[142]

The basic policy of their non-alignment had been to dissociate themselves from the East-West antagonism. The Non-aligned Movement's appeal to all independent nations was to "unite against the division of the world into ideological blocs" and "to strive to end the Cold war."[143] The ZOP has never been tied to the Cold War and is not likely to lose its importance in the post-Cold War era because it is a policy of non-alignment with regard to all blocs and Powers.

4. Conclusion

The above discussion demonstrates that concept of ZOP is founded on the principles of Panch Shila and the Bandung Declaration and the NAM, all of which are recognised and respected by a large majority of States. It was the 1970 Declaration of the Lusaka Conference of the NAM that gave rise to the concept of ZOP. Through the establishment of a ZOP the minor States could be said to have advanced in relation to their neighbours and regional Powers exactly the same ideals that inspired non-aligned States *vis-a-vis* the U.S. and the former USSR. The minor States are

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139 See The Conference of Heads of State or Government of Non-Aligned Countries, Belgrade, September 1-6 1961 (1961), p.108.

140 *Ibid.*

141 *Ibid.*, p.27.

142 As quoted in Willetts, *op.cit.* note 131, p.114.

143 See Background Briefing to the Eighth Non-Aligned Movement Summit Conference, Harare, August-September 1986 (1986),p.2.

trying, as one writer observes, "to make the philosophy of non-alignment directly applicable to small nations that are caught between medium Powers."[144]

The ideas incorporated in the institution of non-alignment, which are also aimed at maintenance of international peace and security, have some relevance also to the concept of ZOP and permanent neutrality. The principles of non-alignment constitute the foundation of Nepal's ZOP declaration and Malta's declaration of permanent neutrality. Although non-alignment is basically a political concept, States members of the Non-Aligned Movement consider themselves under an obligation to abide by its principles. For instance, while permanently neutral Austria and Switzerland granted permission for overflights by US warplanes during the Gulf War, India, a non-aligned country, refused such permission on the grounds that this permission would be inconsistent with her obligations as a non-aligned State.[145]

To summarise: the Charter of the UN initiated a new dimension in the growth and development of international law based on the prohibition on the use of force and promotion of friendly relations among nations. The law that has evolved since then has centred around these key principles of the Charter. Consequently, several traditional doctrines of international law have been modified to suit these principles and new principles have come into being to achieve the objectives of these principles. Among these new concepts is the concept of ZOP, founded not only on the traditional concepts of permanent neutrality and demilitarised zones but also on the 1970 UN Declaration on the Friendly Relations Among Nations and other newly emerging principles embodied in the Bandung Declaration and the principles of non-alignment.

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144 S.K. Datta-Ray, 'Peace in the Himalayas: Nepal's Seven points for survival', The Statesman (India), 1 January 1982, p.6.

145 31 ILM (1992), p.640.

CHAPTER VI

The Doctrine of Objective Regimes in International Law and Zones of Peace

I. Introduction

As discussed in Chapter I, two maritime ZOP have been created by the General Assembly in relation to areas of *res communis* character and the land ZOP have been created under a unilateral declaration endorsed by other States or under a collective declaration by a group of States of a region with regard to the territory of that region. Can a single State under a unilateral declaration create a ZOP within its territory? Can a group of States, acting within the UN or outside the UN system, declare under a collective decision a particular region of the world to be a ZOP? If so, what are the implications of such acts for other States under international law? Are third States obliged to respect such regimes? Is there any doctrinal legal basis in international law to support the establishment of ZOP?

Consent is a fundamental principle of international law and under the principle of *pacta tertiis nec nocent nec prosunt* treaties are binding only for those who are party to it.[1] Yet a review of State practice and the jurisprudence of international tribunals shows that certain territorial regimes can become valid *erga omnes*. In the international legal literature such regimes are characterised as 'objective regimes'. In the jurisprudence of international tribunals and the writings of publicists frequent reference is made to the treaties providing for international settlements, 'status treaties' (i.e., treaties attaching special status to a territory or area e.g., neutralisation

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1 This principle is a corollary of the principle of sovereignty and independence of States. Article 34 of the Vienna Convention on the Law of Treaties accommodates this principle: "A treaty does not create either obligations or rights for a third State without its consent." UKTS No.58 (1980), Cmnd.7964; 8 ILM 679 (1969); 63 AJIL 875 (1969). It entered into force in 1980. As at 1 January 1989 there were 58 States party to it. The jurisprudence of international tribunals as well as the opinion of publicists support the view that this principle constitutes the foundation of the rules of treaty law relating to third States. For instance, see the German Interests in Polish Upper Silesia case, PCIJ, Ser. A, No.7, at 28,29; the Free Zones of Upper Savoy and District of Gex case, PCIJ, Ser. A/B, No.46. at 141. See also Ser. A, No.22 and Ser. A, No. 24; the Territorial Jurisdiction of the International Commission of the River Oder case. PCIJ, Ser. A, No. 23 at 19, 21; and Judge Huber in the Island of Palmas case, RIAA, vol.II, at 842, 850 and 870.

of a State or territory or demilitarisation of an area), treaties creating a regime for international waterways and other 'dispositive' or 'real' treaties e.g., treaties of cession, frontier demarcation and creation of territorial entities, as treaties creating regimes valid against all States.

An attempt will be made in this chapter to explore whether the concept of objective regimes is accepted in international law and, if so, what are the attributes of such concept and whether the ZOP can be regarded as candidates for such regimes. The literature on objective regimes is sparse and little attempt has been made to deal with the matter systematically. Since the publication of Roxburgh's excellent work on the effects of treaties on third States in 1917,[2] little has been written on the subject. This may partly be due to the ILC's decision in 1964 not to propose any special article on objective regimes in the Vienna Convention on the Law of Treaties. The crux of the problem is the absence of some unifying legal basis to which the validity of all types of objective regimes can be attributed.

II. The ILC Discussions

Although the concept of objective regimes appears to have come into currency in relation to describing the effects of Belgian neutrality,[3] which derived from the Treaties of 15 November 1831 and 18 April 1839, the topic attracted elaborate discussion only in the early 1960s during the ILC deliberations on the draft articles of the Vienna Convention on the Law of Treaties. It was Fitzmaurice who introduced the subject of objective regimes onto the agenda of the ILC in 1960.[4]

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2 R.F. Roxburgh, International Conventions and Third States (1917).

3 Writing in 1916 Visscher coined the expression 'objective situation' to characterise the neutrality of Belgium which was created by the treaties of 1839. Referring to the German violation of these treaties at the outbreak of WW I, he wrote that "the violation of the treaties implies more than the rupture of a contract: it constitutes a disregard of an objective rule of international law." Ch. de Visscher, Belgium's Case: A Juridical Enquiry (translated from the French by E.F. Jourdain) (1916), p.17. According to de Visscher these treaties were designed to make a permanent element in the European political order. Therefore, the effects of the permanent neutrality of Belgium were not limited to the mutual relations of the contracting parties. Neutrality affects the legal position of all members of the community of nations. See *Ibid.*, pp.92, 142-143.

4 See YBILC, vol. II (1960) pp.72 ff.

The ILC discussed the subject in considerable depth. As a Special Rapporteur to the ILC, Fitzmaurice wrote, in his fifth report on the law of treaties, that certain treaties affect third parties for a variety of reasons. For instance, referring to treaties on international waterways he stated that these treaties become "valid as against third states because the latter actively avail themselves of the treaty."[5] As to the objective effects of treaties providing for international settlements, he stated that "it is less easy to see why others, even if they do embody 'international settlements' should be regarded as having an automatic effect *erga omnes*." Nevertheless, he accepted that in fact such treaties do have effects *erga omnes*. Yet his line of argument in accepting the objective effects of such treaties was not based on the

> "esoteric basis of some mystique attaching to certain type of treaties, but simply on that of a general duty for states - which can surely be postulated at this date (and which is a necessary part of the international order if chaos is to be avoided) - to respect, recognise and, in the legal sense, accept the consequences of lawful and valid international acts entered into between other States, which do not infringe the legal rights of States not parties to them in the legal sense."[6]

Fitzmaurice approached this topic from two different angles. He divided treaties producing effects on third parties into two groups: (i) treaties implying active involvement on the part of third States, e.g., requiring compliance with the provisions of a treaty regulating the use of a means of international communications, in particular a waterway; and (ii) treaties implying passive support from third States, e.g., requiring respect and recognition of the regime of demilitarisation or status of permanent neutrality set up by the treaty. In the latter case third States are not called upon to do more than recognise, accept, not intervene in or obstruct the functioning of the regime. He dealt with the question of treaties having objective effects under three main rubrics: (i) Cases of the use of maritime or land territory under a treaty or international regime; (ii) General duty of all States to respect and not impede or interfere with the operation of lawful and valid treaties entered into between other

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5 *Ibid.* p.98.
6 *Ibid.*

States; and (iii) General duty of all States to recognise and respect situations of law or of fact established under lawful and valid treaties. Accordingly, he wrote in Article 18 that subject to certain conditions

> "all States are under a duty to recognise and respect situations of law or of fact established by lawful and valid treaties tending by their nature to have effect *erga omnes*. The following are amongst the more important types of treaties producing effects of this kind:
> (a) Peace treaties, and other treaties containing political or territorial settlements;
> (b) Treaties creating a general regime or status of neutralisation, or demilitarisation, for particular territories or localities;
> (c) Treaties of a dispositive character, such as treaties of cession, frontier demarcation, or treaties creating a servitude."

However, Fitzmaurice made it clear that this stipulation

> "did not involve or imply that the treaties specified can impose any direct or positive obligations on States not parties to them, but only that, subject to the conditions indicated, such States cannot deny the validity of the treaty, must respect its provisions, and must also conform to them in so far as any such States avail themselves of facilities created by the treaty, or have dealings in or relative to the locality or region which is the subject matter of the treaty."[7]

Fitzmaurice's proposal opened up a serious discussion of the idea of objective regimes. The discussion was advanced by Waldock who succeeded Fitzmaurice as Special Rapporteur. Waldock's 1964 report to the ILC[8] included an elaborate discussion of the subject. He proposed a draft article on treaties providing for objective regimes. Paragraphs 1 and 2 of draft Article 63 read as follows:

> "1. A treaty establishes an objective regime when it appears from its terms and from the circumstances of its conclusion that the intention of the parties is to create in the general interest general obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, sea-bed, or air-space; provided that the parties include among their number any State having territorial competence with reference to the subject-matter of the treaty, or that any such State has consented to the provision in question.

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7 *Ibid.* pp.79-81.
8 YBILC, Vol.II (1964), pp.26 ff.

> 2.(a) A State not a party to the treaty, which expressly or implicitly consents to the creation or to the application of an objective regime, shall be considered to have accepted it.
> (b) A State not a party to the treaty, which does not protest against or otherwise manifest its opposition to the regime within a period of X years of the registration of the treaty with the Secretary-General of the United Nations, shall be considered to have impliedly accepted the regime".[9]

In his commentary to this draft article Waldock says that "[i]t may freely be conceded that certain kinds of treaty, e.g., treaties creating territorial settlements or regimes of neutralisation or demilitarisation, treaties of cession and boundary treaties, either have or acquire an objective character."[10] But his concern was whether this objective character derived from an alleged general duty on the part of third States to recognise and respect situations of law as argued by Fitzmaurice or from the particular nature of the treaty, or from the subsequent recognition or acquiescence of other States, or indeed from a combination of these elements. He went on to say that "State practice furnishes considerable evidence of the admission in international law of a concept of international regimes or settlements affecting territory or waterways and applicable *erga omnes*; but the evidence is not equally clear as to the legal process by which they come into existence."[11] He elected, nevertheless, to support the idea that objective character of a treaty derives from the particular nature of that treaty and its subsequent recognition by other States. He rejected Fitzmaurice's theory of general duty saying that a doubt arises

> "in regard to the existence in international law of the general duty...Every treaty sets up a situation of law between the contracting parties, and in that sense every treaty creates an 'international regime.' Yet the general opinion certainly is that the question of 'objective effects' arises only with regard to certain categories of treaties."[12]

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9 *Ibid.* at pp.26-27.
10 *Ibid.* at p.26.
11 *Ibid.* at p.29.
12 *Ibid.* p.28, para 6.

Waldock then referred to those treaties concluded for the neutralisation or demilitarisation of specific territories or localities, e.g., the 1815 treaty on the permanent neutralisation of Switzerland, the 1856 Convention on the demilitarisation of the Aaland Islands, and the Antarctic Treaty of 1959, as examples of treaties having objective character. He emphasised the intention of the parties to set up a regime applicable *erga omnes*. He explained that the common elements present in these treaties were that "in all of them the parties intend in the general interest to create a regime of general obligations and rights for a region, territory or locality which is subject to the treaty-making competence of one or more of them." He includes two elements in the definition of an objective regime: "(i) the intention of the parties must be to create general rights and obligations in the general interest relating to a particular region, State, territory etc., and (ii) the parties must include among their number the State or States having territorial competence with reference to the subject-matter of the treaty or at least, that State or States must have expressly assented to the provisions creating the regime."[13]

At its 738th, 739th and 740th meetings the ILC considered whether treaties creating objective regimes should be dealt with separately as a special case as proposed by Waldock. However, after intensive discussions it was decided not to propose any special provision on this subject. The following passage, which comes from the ILC report to the UN General Assembly on the Convention on the Law of Treaties, summarises its discussion on this subject:

> "Since to lay down a rule recognising the possibility of the creation of objective regimes by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present

13 *Ibid.* p.31-33, paras.13 and 18.

possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective regimes."[14]

Those members of the ILC who opposed Waldock's formulation were mainly concerned with the imposition by the great Powers of their will on other States. As de Luna (Spain) said,

> "it was to be feared that states might regard such an article as approval of *de facto* legislation or of government of the world by the Great Powers; for 'objective regimes' had in fact been used to impose certain conditions on small States at a time when the sovereign equality of States had not been much respected".[15]

The members of the ILC from the developing countries were concerned with the possible continuance of the major Power domination of the world through the mechanism of objective regimes. Jimenez de Arechaga (Uruguay) said that through the door of objective regimes "certain groups of States might acquire a sort of legislative power over the rest of the world" and that power "would be exercised mainly by the Great Powers, as in the case of the so-called 'international settlements'."[16] Elias (Nigeria), Pal (India), El-Erian (United Arab Republic), Ruda (Argentina), Yasseen (Iraq), Amado (Brazil), Paredes (Ecuador) and Tabibi (Afghanistan) were among the members of the ILC who opposed Waldock's draft article.[17]

Here it is worth mentioning that until the late 1960s the States of Asia, Africa and Latin America seemed very cautious in accepting the idea of objective regimes. They may have thought that, firstly, they were still not in a position to play a substantial role in formulating such regimes, and secondly, that any such regime was likely to be in the interest of great Powers rather than the third world countries.

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14 YBILC, (1966), vol.II, pp. 230-231. ILC footnotes omitted. This passage's reference to Article 32 is to treaties providing for rights for third States (now Article 36 of the Vienna Convention) and this comment of the ILC on objective regimes comes from its commentary to draft Article 34 which is now Article 38 of the Convention.

15 YBILC, Vol.I (1964) at pp.99-100.

16 *Ibid.* at pp.100-101.

17 *Ibid.*, pp.96-105.

From the late 1960s onwards the developing countries were more forthcoming in welcoming the idea of such regimes, or even proposing new regimes, as their number dramatically increased in the UN and other international fora. By this time they were in the majority in the UN and they could now play an influential role in formulating the terms and conditions of an objective regime to be established under the auspices of the UN.[18] Most of the regimes proposed after the late 1960s in relation to the regulation of the areas of the sea beyond territorial limits, sea-bed, or air-space were brought onto the international agenda by third world countries. For instance, Sri Lanka and Tanzania, with the support of other non-aligned countries, proposed the declaration of the Indian Ocean as a Zone of Peace in 1971.[19] It was the Maltese Ambassador Pardo who, in 1967, proposed the demilitarisation of the deep sea-bed and high seas and the establishment of an international regime for the deep sea-bed.[20] But during the preparations for the Convention on the Law of Treaties, developing countries were reluctant to accept the idea that treaties concluded by States may have objective effects on third parties.

Nevertheless, it appears from the deliberations of the ILC that it did not reject the idea in its entirety: rather, the subject was set aside as being outside the scope of the draft Convention;[21] the issue was not fully resolved. The discussion of objective regimes did not evaporate at the ILC meetings on the law of treaties. The issue arose again during the ILC deliberations over the 1978 Vienna Convention on Succession of States in Respect of Treaties. This time the ILC acknowledged not only the existence

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18 This assertion is based on my own assessment of the behaviour of the third world countries in the UN and other international fora during the last three decades.

19 See Chapter I.

20 On 1 November 1967, Pardo presented a proposal to the First Committee of the UN General Assembly regarding the creation of an international regime for the use of the deep sea-bed resources. His proposal included the idea of the demilitarisation of the high seas and the deep sea-bed. U.N.Doc.A/16695 of 17 August 1967. See generally, A. Pardo, 'Who will control the seabed?' 47 Foreign Affairs (October 1968), pp.123-127; a Report of the First Committee of the UN General Assembly on the question of the reservation of the seabed for peaceful purposes U.N.Doc. A/7477 of 20 December 1968; a Canadian Working Paper on the 1970 'common heritage' Declaration, U.N.Doc.A/AC.138/59 of 24 August 1971; R.P. Anand, Legal Regime of the Seabed and the Developing Countries (1976).

21 Among the reasons given by the ILC for dropping proposed draft Article 63 was that this article "might be unlikely to meet with general acceptance." The Commission did not reject the idea of objective regimes but "decided to leave this question aside." See the ILC commentary to draft Article 34 (now Article 38 of the Vienna Convention).

of a category of treaties creating objective regimes but also the need for a special provision to cover the particular case of such treaties.[22]

In his first report to the ILC on Succession of States and Governments in Respect of Treaties Waldock stated that "The weight both of opinion and practice seems clearly to be in favour of the view that boundaries established by treaties remain untouched by the mere fact of succession."[23] Consequently, Waldock proposed an article relative to a succession of States in respect of treaties which was finally adopted as Article 11 of the Convention on Succession of States in Respect of Treaties:[24]

> "A succession of States does not as such affect:
> (a) a boundary established by a treaty; or
> (b) obligations and rights established by a treaty and relating to the regime of a boundary."[25]

Boundary treaties, because of their sensitivity in international relations, have always been considered a classic example of objective regimes.

More controversial than the question of treaties establishing boundaries was the problem of treaties creating other territorial regimes, e.g., 'dispositive,' 'real' or 'localised' treaties. The reason for this is that a successor State may accept that it must respect the boundary established by its predecessor but that State may be reluctant to accept other executory obligations attached to the territory under the 'dispositive' or 'real' treaties concluded by its predecessor. At the Vienna Conference several States appeared reluctant to accept the theory that territorial treaties other than boundary treaties bind a successor State. According to these States such a theory

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22 YBILC, Vol. II (1974) 204. See also S.P. Sharma, International Boundary Disputes and International Law (1976).

23 YBILC, vol.II (1968) at 92-93 (footnotes omitted).

24 This Convention was adopted by the Vienna Conference on Succession of States In Respect of Treaties by 82 votes to 0, with two abstentions: U.N.Doc.A/CONF.80/15 and U.N.Doc. A/CONF.80/31. For the text of the Convention see 17 ILM 1488; 72 AJIL 971. It is not yet in force; on January 1, 1991 there were 8 contracting parties.

25 The draft article was adopted by the Committee of the Whole without a vote.

would go against the principles of self-determination and the sovereign equality of States.[26]

However, the ILC and the majority of the States participating in the Conference took the view that not only treaties establishing a boundary but also other territorial treaties i.e., 'dispositive,' 'real' or 'localised' treaties remain unaffected by state succession. This view is incorporated in Article 12 of the Vienna Convention on Succession of States In Respect of Treaties.[27] The following passage taken from the ILC's commentary to articles 11 and 12 is of interest:

> "[under the rules concerning succession of States in respect of treaties] there are cases where the treaty intended to establish an objective regime would not be binding upon a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a treaty establishing an objective regime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents."[28]

Among the convincing precedents referred to by the ILC were the Free Zones[29] case and the Aaland Islands[30] question, in both of which the tribunal considered the successor State to be bound by a treaty regime of a territorial character partly because the regimes were established as part of a 'European settlement'. The ILC also referred to Belgium's position concerning the obligations provided for by the Peace Settlements concluded at the Congress of Vienna with respect to fortresses on the Franco-Netherlands boundary, the French position with respect to the provisions of the neutralisation of Chablais and Faucigny and Belgium's position with respect to the Berlin Act of 1885 which established, *inter alia*, a regime of free navigation on the Rivers Congo and Niger; in all these cases the successor State concerned was

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26 For instance, Zambia, Rumania, Afghanistan, Swaziland, and Syria. See U.N.Doc.A/CONF.80/5, pp.139,143, 149,170-71; YBILC (1969), vol. II, 76, 75.

27 *Supra* note 24.

28 YBILC, vol. II (1974), p.204.

29 PCIJ, Ser. A. No. 24 at 17 and Ser. A/B No. 46 at 145.

30 League of Nations, Official Journal, Special Supplement No. 3 (October 1920) 16, 18.

considered bound by the pre-succession arrangements attaching to the territory concerned.[31] "It must not therefore be assumed," as Sinclair says, "that the deliberate decision of the Commission and the Conference not to make special provision for treaties creating 'objective regimes' in the series of articles on treaties and third States in the Vienna Convention on the Law of Treaties constitutes a denial of the existence of this category of treaties. It constitutes at the most a denial of the need for a special rule to explain the relationship between treaties creating objective regimes and third States."[32]

Moreover, the purpose of the 1969 Convention on the Law of Treaties was not to regulate in detail all the aspects of the law of treaties. As Reuter says, "many questions were left open, especially with regard to the effect of treaties on third States."[33]

III. State practice

State practice, and more especially modern State practice, shows that there are certain exceptions to the *pacta tertiis* rule. Although the nature and scope of treaties having objective effects has been a matter of acute controversy, State practice furnishes considerable evidence of the existence of treaties creating regimes valid *erga omnes*.

1. International settlements

International settlements incorporated in peace treaties after a major war or international upheaval have always enjoyed special status and are regarded as valid *erga omnes*. Principal international settlements concluded between major Powers since the Peace of Westphalia (1648) have demilitarised certain territories, neutralised certain areas, created an entity with a special international character, redrawn the

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31 YBILC, vol. II (1974) 204-205.
32 I. Sinclair, The Vienna Convention on the Law of Treaties (1984) 105-106.
33 P. Reuter, Introduction to the Law of Treaties (English translation) (1989) 81.

political map of certain States, abolished certain States from the political map of the globe and created new States.

The Treaty of Utrecht of 1713, the treaties concluded by the Congress of Vienna in 1815 and the Treaty of Versailles of 1919 are some of the examples. This role of the major Powers has not changed even since the establishment of the UN. Although 50 States became party to the Charter of the United Nations adopted after World War II, it was only four victorious Powers that concluded the Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany and Peace Treaties with Italy, Bulgaria, Hungary, Rumania and Finland. The Austrian, Laotian and Cambodian neutralisations are also part of international settlements that resulted from agreement between the major Powers.

Another example is the recently concluded Two-plus-Four Countries Treaty on German reunification.[34] Article 1(1) of the Treaty on the Final Settlement with respect to Germany states that "[t]he confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe." (emphasis added) Article 1(2) states that "the united Germany and the Republic of Poland [which is not a party to the Treaty] shall confirm the existing border between them in a treaty that is binding under international law." Although this provision was incorporated in view of the Polish fears of a possible German demand for the re-demarcation of the German-Polish border in order to recover certain territories lost by Germany to Poland after WW II,[35] this article can be interpreted to obligate Poland, a third State, to conclude a border treaty with the united Germany on certain terms.[36]

The demilitarisation of the Iraqi territory along the border with Kuwait after the recent Gulf War is also an international settlement. But this settlement is significant and different from previous settlements in that it was not concluded by the major

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34 Text of the treaty is reproduced in 29 ILM (1990) 1187. See J.A. Frowein, 'The reunification of Germany', 86 AJIL (1992), pp.152-163.

35 See W. Czaplinski, 'The new Polish-German treaties and the changing political structure of Europe', 86 AJIL (1992), pp.163-173.

36 Of course, what this treaty really does is bind Germany to act in a certain way in its dealing with Poland regarding the Polish-German border.

Powers or by the victorious Powers acting individually. This time it was concluded collectively under the UN. This settlement under the Security Council's permanent cease-fire resolution can be regarded as an objective regime established by the UN.[37]

2. Treaties on international waterways and rivers

During the nineteenth century several treaties were concluded providing for the free navigation of certain rivers. The regimes established under such treaties were regarded as conferring rights on third States. Although many of these treaties have now been widely regarded as constituting rules of customary international law, such treaties were regarded from the beginning as having created objective regimes. For instance, within two years of the conclusion of the Berlin Act of 1885, which provided for a regime of free navigation on the Rivers Congo and Niger, the U.S., not itself a party to the Act, opposed a decree of the State of Congo as being against the Act.

The right of the U.S. to challenge the decree was not contested.[38] The Suez Canal Convention of 1888 has been frequently cited as a convention having objective character. The Convention seems to have conferred the right of free passage to parties and non-parties alike.[39]

Even when Egypt nationalised the Suez Canal Company in 1956 she promised to honour the regime of free navigation of the Canal.[40] Following the nationalisation, the U.S. maintained that the 1888 convention had internationalised the right of use of the Canal and every beneficiary of the treaty had the right to make use of the Canal.[41] Where a regime of this kind has been maintained for over a century, custom as well as treaty may be invoked as the basis of the right of third States to navigation.

The Montreux Convention of 20 July 1936 provides for complete freedom of transit and navigation for merchant-vessels of all nations in time of peace and war

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37 Security Council Resolution 687 (1991).
38 See Roxburgh, *op.cit.* note 2, pp.49-50 and YBILC, Vol.II (1964) 29.
39 Convention Respecting Free Navigation of Suez Canal 1888. Text in 3 AJIL, Supp. 123 (1909); 79 BFSP 18.
40 M.M. Whiteman, Digest of International Law, vol. 3 at 1102.
41 *Ibid.*

through the Straits of Bosphorus and the Dardanelles while forbidding or limiting their use by military vessels. The Convention obligates every State, whether it be a party to the Convention or not, wishing to use the Straits to conform to the conditions attaching to it.[42] Thus, it appears from the very nature of these two Conventions that the intention of the States parties to them is to set up a regime applicable *erga omnes*.

The regime of navigation of the Panama Canal is also noteworthy. Article 2 of the 1977 Protocol concerning the Permanent Neutrality and Operation of the Panama Canal provides that the Canal "shall remain ... open to peaceful transit by the vessels of all nations on terms of entire equality."[43] Article 1 of this Protocol declares the Canal to be permanently neutral. This Protocol was concluded between the U.S. and the State of Panama together with the 1977 bilateral Panama Canal Treaty. Nevertheless, the Protocol has an accession clause; as of 1 January 1992, 38 States had acceded to it.[44]

The effect of the neutralisation and internationalisation of the Canal goes beyond the circle of the contracting and acceding parties. The Canal has been used for a long period of time by States whether or not parties to the Protocol. Those States who have not acceded to the Protocol can, nonetheless, be considered to have acquiesced in the regime created by the Protocol: they have used the Canal and complied with the rules prescribed for the user under the Protocol. Hence, it can be stated that all States have the right to make use of the Canal and they are bound by the rules in the treaty to which they are not party.[45]

3. Neutralisation and demilitarisation arrangements

In State practice frequent reference is made to treaties providing for demilitarisation and neutralisation as producing effects *erga omnes*. State practice supports the traditional doctrine that treaties of a territorial character constitute a

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42 Cmnd, 5249, (1936); AJIL 31 (1937), Special Supp., 1.
43 16 ILM (1977), p.1022.
44 The Protocol entered into force on 1 October 1979.
45 The Wimbledon principle supports this view. PCIJ Ser. A/1, p.28 (1923). See also Chapter IV, above.

special category. The most famous precedent of State practice on a treaty producing objective effects is the Aaland Islands Convention, which was adopted as part of the Peace Settlement of 1856. Under this convention three powers, France, Great Britain and Russia, declared that "the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there."[46]

As we shall see in the next section of this chapter, the Committee of Jurists appointed by the Council of the League of Nations recognised the objective character of this Convention in the case of Aaland Islands. The reason given by them for attaching this special status was that the treaty was part of a European Settlement and thus in the general interest of Europe:

> "An examination of the political conditions in which this agreement was entered into shows that the convention in reality has a much more extended bearing ... the provisions settled upon in Paris between the Powers and Russia went beyond the ambit of purely Swedish interests. What was involved was a European interest deriving from the great strategic importance of the Aaland group".[47] (emphasis added)

An earlier case involving the same element of a treaty made allegedly in the 'general interest' concerned Belgium's position. Under the Peace Settlements concluded at the Congress of Vienna between the four Powers (Great Britain, Austria, Prussia and Russia) rules were laid down with respect to fortresses on the Franco-Netherlands boundary. After Belgium's separation from the Netherlands the four Powers considered Belgium to be under the same obligations with respect to these fortresses as the Netherlands before the separation. In spite of initial reluctance to be bound by a treaty to which it was a stranger, Belgium seems in a later treaty to have acknowledged its obligations with respect to certain of the frontier fortresses imposed under the Peace Settlements concluded at the Congress of Vienna.[48]

The theory of general interest was recognised by France in upholding Article 92 of the Act of Congress of Vienna, which provided for the neutralisation of Chablais

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46 BFSP, 1855-1856 (1865) 24.

47 League of Nations Official Journal, Special Supplement No. 3 (October, 1920), pp. 17 ff.

48 See YBILC, vol.II(i), 1974, at 205 and the three treaties on the neutralisation of Belgium.

and Faucigny, then under the sovereignty of Sardinia. In 1860, when Sardinia ceded Nice and Savoy to France the latter recognised that it was her obligation to continue to maintain the neutralisation of these territories on the grounds that the neutralisation was agreed in the general interest of Europe.[49] Some further precedents may be found in international practice; one such precedent is the opinion of the English Law Officers of the Crown with regard to treaties providing for permanent neutralisation. Acknowledging the theory of 'general interest,' they argued that Swiss neutrality, established under the Treaty of 20 March 1815, was not violable since it was established and guaranteed on the grounds of the general interest of Europe.[50]

Among the most significant modern examples of neutralisation of the territory of a State is the neutralisation of Austria. Although the neutralisation was brought about by a unilateral act followed by its endorsement from major Powers, Austrian neutralisation is widely regarded as valid *erga omnes*.[51] No State has registered its opposition to this neutralisation. Since Austria is placed in a strategically significant position, her neutralisation has been in the interest of Europe in particular as well as in the general interest of the international community of States.

When a State or territory is permanently neutralised the States concerned do usually intend to attach objective status to the regime created. By three treaties of 19 April 1839, one concluded between Great Britain, Austria, France, Prussia, and Russia on the one hand and the Netherlands on the other, a second between the same five Great Powers and Belgium, and the third between the Netherlands and Belgium, it was agreed that "Belgium ... shall form an Independent and perpetually Neutral State. It shall be bound to observe such neutrality towards all other States."[52] (emphasis added) A similar provision was incorporated in Article 2 of the Treaty of London of 11 May 1867, concluded between Great Britain, Austria, Belgium, France, Italy, the Netherlands, Prussia, and Russia on the neutralisation of Luxembourg.

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49 YBILC, *Ibid*, and BFSP, 1814-1815 (1839) 45-46.
50 McNair, Treaties, p.262-263.
51 J.L. Kunz, 'Austria's permanent neutrality,' 50 AJIL (1956), p.418.
52 27 BFSP, p. 990.

Although this neutrality was guaranteed only by Great Britain, Austria, France, Prussia, and Russia, Luxembourg was bound to observe her neutrality "towards all other States."[53] Since Belgium and Luxembourg were bound to observe their neutrality towards all other States, these two States could in turn expect respect and recognition of their neutrality from all other States. Every sovereign State has a right to adopt a policy of neutrality. Therefore, other States have no legal right to register their disapproval even if they do not like such neutralisation, provided the neutralisation is not inconsistent with the obligations of the neutralised State under other bilateral and multilateral treaties. Moreover, it can be argued that Belgium and Luxembourg were neutralised in the general European interest. Hence, other States were under an obligation to respect and not impede the regime created by the Great Powers and the affected States.

This shows that a regime created by the Great Powers could become an objective regime valid against all States. This was not a custom limited to the nineteenth century; such practice can be found in the cases of neutralisation in the post-World War II period. For instance, by Article 5 of the 1962 Declaration on the Neutrality of Laos, Cambodia, China, France, Laos, the then U.S.S.R., the U.K., Vietnam, Canada, India, Poland, the U.S., Burma and Thailand decided to communicate the Declaration to all other states of the world and appealed to other States to recognise, respect and observe the neutrality of Laos.[54] Since the Declaration has no accession clause, the recipient States of such communication can be expected to react only if they are unhappy with such neutralisation.

In the absence of such objection all States receiving the communication would be considered to have acquiesced in such neutralisation and bound by it. This appears to be the purpose of the provision relative to the communication of the Declaration to third States. A survey of some of the early multilateral treaties shows that if States parties to such treaties did not wish to attach a special status to the regime created under the treaty they would then merely invite the third States to accede to the treaty

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53 Hertslet, Map of Europe by Treaty, iii, 1801-5.

54 See for text of the Declaration 456 UNTS at 301.

and clearly stipulate in the treaty that it would not apply to States not party to the treaty.[55]

In the face of such practice, the absence of an accession clause in a treaty concerning a territorial regime and the decision of the States parties to communicate the treaty to third States shows an intention to create an objective regime. That is one reason why, writing at the beginning of this century, Roxburgh stated that there were grounds for suggesting that "in International Law a treaty intended to make an International Settlement, but containing no accession clause, is regarded as an offer to third States, capable of acceptance by conduct, and that by acceptance third states acquire rights and incur obligations."[56]

Costa Rica did the same after declaring itself a permanently neutral State. Costa Rica communicated her declaration to all States with whom she maintained diplomatic relations.[57] If other States fail to register their timely disapproval then they would be considered to have acquiesced in the Costa Rican declaration of permanent neutrality and would be debarred in the future from challenging this neutrality.

When Malta decided to become a permanently neutral State it notified its declaration of neutrality to all neighbouring Mediterranean States and secured recognition from a large number of States in the form of bilateral exchange of notes, unilateral *aides memoires* and resolutions adopted at international conferences, especially the meetings of the Non-Aligned Movement. The member States of the CSCE took note of Malta's neutral status at their Madrid meeting in 1983.[58] Another recent example is the neutralisation of Cambodia under the 1991 agreement concluded at the Paris Conference on Cambodia. This time the contracting parties did not appeal

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55 There are numerous treaties which contain such provisions. It is not possible here to list all such treaty provisions. Examples are the 1856 Declaration of Paris on maritime law and the 1868 St Petersburg Declaration. The Declaration of Paris states that "The present Declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it." This is the general practice. See for the text of the Declarations, A. Roberts and R. Guelff (eds.) Documents on the Laws of War (2nd ed., 1989), pp.25.

56 Roxburgh, *op.cit.* note 2, p.60.

57 See in L.A. Monge, The Neutrality of Costa Rica (1984).

58 Among the States who formally endorsed Malta's neutrality are Italy, the then USSR, Libya and the States members of the Non-Aligned Movement. This information was supplied to the author by the Ministry of Foreign Affairs of Malta.

but actually called all other States to recognise and respect in every way the neutrality of Cambodia and "refrain from any action" inconsistent with the neutrality of Laos.[59] This puts such neutrality on the footing of an objective regime.

4. Boundary arrangements

Another category of treaties often invoked as having objective character consists of boundary treaties and treaties for the cession of territory. State practice supports the traditional doctrine that boundary treaties are not affected by succession of States. A convenient starting point for discussing this subject is Article 62, paragraph 2(a), of the Vienna Convention on the Law of Treaties, which provides that "[a] fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: ...if the treaty establishes a boundary".[60]

The exception of treaties establishing a boundary from being affected by fundamental changes of circumstances rule was endorsed by a large majority of States at the Vienna Conference on the Law of Treaties.[61] Further, both the writings of jurists and the proceedings of international tribunals support this position. In the Free Zones of Upper Savoy and the District of Gex[62] both France and Switzerland appear to have recognised the Treaty of Turin of 1816, which fixed the frontier between Sardinia and Switzerland, as being outside the fundamental change of circumstances rule.

Similarly, both Thailand and Cambodia appear to have made an assumption in the Temple of Preah Vihear[63] case of the latter country's succession to the boundary established by the Franco-Siamese treaty of 1904. Such recognition and assumption of

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59 Article 4 of the Agreement: See 31 ILM (1992), pp.200, 202 and Chapter V, above. Although, unlike the agreement on Laos, the Agreement on Cambodia contains an accession clause (Article 7), this clause is largely redundant since other States are expected to respect the Cambodian neutrality even without acceding to the Agreement. See also S.R. Ratner, 'The Cambodia Settlement Agreements', 87 AJIL (1993), pp.1-41.

60 *Supra* note 1.

61 See UN Conference on the Law of Treaties, Official Records, First Session, 371 and 380 and *Ibid.*, Documents of the Conference, 108 and 184.

62 PCIJ, Ser. A/B, No. 24 and Ser. A/B No.46.

63 ICJ Reports, 1962, p.6.

States of the boundary treaties reflects the general understanding that boundary treaties have objective effects.

The position taken by the UK with regard to the delimitation of the boundary between the Philippine Archipelago and North Borneo and the boundary between Afghanistan and the then British Dominion of India support the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States.[64]

Although certain newly independent States have sometimes reacted against the maintenance of "colonial" frontiers and insisted on their freedom to maintain or terminate their predecessor's treaties, such claims are isolated and patchy;[65] the general understanding being in favour of the maintenance of boundary treaties. For instance, a Resolution adopted by the Conference of Heads of State or Government of Non-Aligned Countries held in Cairo in 1964 expressed their commitment to respect the borders existing on the achievement of independence of States concerned.[66] A similar Resolution was adopted by the Conference of African Heads of State or Government held also in Cairo in the same year.[67] Although there are a number of frontier disputes based on "colonial" frontiers, the weight of evidence of State practice and of legal opinion is in favour of the maintenance of boundary treaties regardless of the occurrence of a succession of States.

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64 See United Nations Legislative Series, Materials on Succession of States (1967), pp.185-190.

65 In the Case Concerning the Arbitral Award of 31 July 1989 Guinea-Bissau argued that the 1960 agreement between Portugal (as the colonial Power of Guinea-Bissau) and France (as the colonial Power of Senegal) fixing the maritime boundaries between Guinea-Bissau and Senegal before their independence was not opposable to it. But the Arbitration Tribunal rejected this argument and held that the 1960 agreement was opposable to Guinea-Bissau which had attained independence from Portugal. Although Guinea-Bissau had declared *tabula rasa* as regards the application of treaties concluded by Portugal, it was not a persistent objector to the principle of *uti possidetis*. Guinea-Bissau had voted for the OAU resolution embodying this principle (OAU Res. of 21 July 1964, Doc. AGH/Res. 16 (I): Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 83 ILR, p.1.

66 See in YBILC (1974), II (i), 199. Iraq, which is a member of the Non-Aligned Movement, implicitly raised the issue of a "colonial" frontier during the Gulf conflict of 1990/91 to dispute its border with Kuwait. See the Press Release of 12 September 1990 by the London Embassy of Iraq in Lauterpacht et al. (eds.), The Kuwait Crisis: Basic Documents (Cambridge International Documents Series, Vol.1, 1991), pp.73-77.

67 AGH/Res.16 (I) adopted at the first session of the Conference of African Heads of State and Government, Cairo, 1964. See for the text of the resolution and African attitude to this issue, I. Brownlie, African Boundaries: A Legal and Diplomatic Encyclopedia (1979), pp. 9-12; Touval, Int. Organization, vol.21 (1967).

As mentioned earlier, Articles 11 and 12 of the Vienna Convention on Succession of States in Respect of Treaties furnish evidence of the acceptance of the objective character of treaties relating to a territory. These articles are in line with the decisions of international tribunals in the cases of Aaland Islands[68] and Free Zones of Upper Savoy and the District of Gex.[69]

5. Internationalised territories

Mention should also be made of the practice of States concerning the internationalisation of a territory e.g., the establishment of an autonomous but not a sovereign entity, or a city or province which is placed under the administration of foreign Powers or of an international organisation. Such internationalisation often results from attempts to establish a new political order in the territory concerned following major international upheavals.

The classic case of the setting up of separate entities placed under an international regime was the case of the Free State of the Ionian Islands and the Free City of Cracow in 1815. Under the treaty of 1815 the Ionian Islands were granted a special autonomous status as a free State under British protection.[70] This status lasted for 50 years until the islands were incorporated into Greece.[71]

Likewise, under the Act of the Congress of Vienna the three Powers, Russia, Prussia and Austria, constituted the city and territory of Cracow as a free, neutralised and demilitarised territory, drew up an agreed constitution for the city and placed it under their collective guarantee.[72] This special status continued until 1846 when the three Powers abrogated the treaty and the city was incorporated into Austria.

Another instance of the internationalisation of territories occurred after World War I under the mandate system of the League of Nations.[73] The mandate system was

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68 League of Nations, Official Journal, Special Supplement, No.3 (October 1920), pp.16, 18.

69 Order of 6 December 1930: PCIJ, Ser.A,No.24, p.17.

70 Treaty of 5 November 1815 between Great Britain, Austria, Prussia and Russia, 3 State Papers (1815-1816),250.

71 Treaty of 29 March 1864 between Great Britain, France and Russia, on the one side, and Greece, on the other.

72 Congress of Vienna, Arts. 6-10, 118. 2 State Papers, 3.

73 Article 22 of the Treaty of Versailles, 1919.

designed not only to establish a new political order in the territories concerned after the War but also to promote the well-being and development of the people of such territories as a sacred trust of civilisation. These mandates were later to be recognised by the ICJ as objective regimes valid *erga omnes* (see Section IV below).

The Treaty of Versailles granted semi-independent status under the protection of the League of Nations to the city of Danzig[74] which enjoyed a privileged position in many respects until it was forcibly incorporated into Germany at the beginning of World War II.

The practice of States on the internationalisation of territories continued into the post-WW II era. The Peace Treaty of 1947 between the Allied and Associated Powers and Italy created the Free Territory of Trieste.[75] However, within a few years this arrangement ran into difficulties. The territory was later divided up between Italy and Yugoslavia by the 1954 memorandum of understanding between the parties to the treaty.[76]

A very important example of the internationalisation of a territory in the post-WW II era is the city of Berlin. Following the defeat of German Reich at the end of World War II, the victorious Powers, the U.S., the U.S.S.R. and the U.K. concluded a protocol in London in September 1944 in which they decided to divide Germany into four zones of occupation (France acceded to the protocol on 26 July 1945) to be allotted to each Power with a special status territory of Berlin to be occupied in common.[77] The city of Berlin was later divided and controlled by the four Powers under various agreements and decisions until German reunification in 1990. Another important example of the internationalisation of a territory is the city of Jerusalem.[78]

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74 Articles 100-8 of the Treaty of Versailles.

75 Under the Italian Peace Treaty the territory of Trieste was placed under the direct control of the UN Security Council. Verzijl, International Law in Historical Perspective, 504-5; 49 UNTS 3.

76 The partition was made definitive by the Treaty of Osimo which came into force on 3 April 1977. Brownlie, Principles, p.62, note 19.

77 Official Gazette of the Control Council for Germany, Nos. 1-19 and Supplement No.1.; Documents on Germany, 1944-1985, U.S. Dept. of State Publication 9446; I.D. Hendry and M.C. Wood, The Legal Status of Berlin (1987).

78 See Chapter VII.

6. Extra-territorial Regimes

Owing to an unprecedented escalation in the arms race in the aftermath of World War II, many States became anxious about the possible deployment and testing of nuclear weapons and other weapons of mass destruction in the uninhabited parts of the globe. Various efforts were made to preserve these areas from such activities. Among them the Antarctic Treaty of 1959 is a noteworthy example.

Article 1 of this Treaty provides for the demilitarisation of Antarctica.[79] Although the Treaty has as yet been ratified by only 40 States as of 1 January 1992, the demilitarisation regime of this treaty is widely considered to be valid against all States.[80] Under Article X of the Treaty the contracting parties can require third States to comply with the demilitarisation provision of the Treaty. This Article as well as Article IV imposes negative obligations on third States. Article X reads as follows:

> "Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present treaty."[81]

Not only the 12 original States[82] party to the Treaty but also 26 other States who have subsequently ratified the Treaty have in effect accepted that not the treaty as such but the regime created under a treaty concerning the maintenance of international peace and security and concluded in the general interest of the international community can produce binding effects on third States.

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79 UKTS 97 (1961), Cmnd. 1535; 402 UNTS 71. The Treaty entered into force on June 23, 1961; G.D. Triggs (ed.), The Antarctic Treaty Regime: Law, Environment and Resources (1987).

80 Crawford and Rothwell argue that Article IV of the Treaty, which purports to prevent third States as well as States parties to it from making new territorial claims over Antarctica, cannot be regarded as an objective regime. But with regard to the significance of Article I and V, which reserve Antarctica for peaceful purposes, they agree that these provisions have been effective: "not even the Falklands War between Argentina and the United Kingdom resulted in any breach." J. Crawford and D.R. Rothwell, 'Legal issues confronting Australia's Antarctica', 13 Australian Yearbook of International Law (forthcoming), pp.12 and 40. See also E.J. Rey Caro, 'Antarctica', in M. Bedjaoui, International Law: Achievements and Prospects (1991), pp.977, 979; F.O. Vicuna and M.T. Infante, 'Le Droit de la Mer dans l'Antarctique', 84 RGDIP (1980-I) (Paris), p.349.

81 402 UNTS 71.

82 The original parties to the treaty are: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the USSR, the U.K. and the U.S.

Similarly, Article 4 of the 1967 Treaty on Outer Space demilitarises Outer Space.[83] Although the provisions of this Treaty are widely accepted as part of customary international law, both treaty and custom may be invoked to justify the universal applicability of these provisions.

Article 1 of the 1971 Treaty on the demilitarisation of the deep sea-bed prohibits the emplacement of nuclear and other weapons of mass destruction in the sea-bed.[84] Although the Treaty has been ratified as yet by only 90 States, it may be regarded as valid against all States. This is partly due to the legal weight attached to the 1970 Declaration on the Deep Sea-Bed[85] (paragraph 8 of which declares that the deep sea-bed shall be reserved for peaceful purposes) and subsequent accommodation of this provision in the 1971 treaty, and partly due to the nature of the treaty. In other words, the regime created under the treaty is of dispositive character; it could also be said to be in the general interest.

There are two treaties relative to the denuclearisation of regional areas. The 1967 Treaty of Tlatelolco[86] creates a Nuclear-Weapon-Free Zone in the Latin American region which covers not only the territories of contracting parties but also a large part of the high seas of the region. This was not challenged by any State. Rather, all officially declared nuclear Powers ratified Protocols I and II to the Treaty.[87] Under these Protocols the nuclear Powers, namely, the U.S., the U.K., the then U.S.S.R., China and France committed themselves to respect the Zone. The South Pacific Nuclear Free Zone Treaty also aims to make a large part of the high seas of the region a Nuclear-Free Zone. However, the Treaty obligates only States party to the Treaty to implement the rules of the Zone and only members of the South Pacific Forum can become party to the treaty. Efforts have been made to secure recognition

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83 See UKTS 10 (1968), Cmnd. 3519; 610 UNTS 205. The Treaty came into force in October 1967. On 1 January 1992 there were 97 States party to it.

84 UKTS 13 (1973), Cmnd. 5266; 955 UNTS 115; 23 UST 701. On 1 January 1992 there were 90 contracting parties.

85 G.A.Res. 2749 (XXV) of December 17, 1970. The resolution was adopted by 104 votes to 0, with 14 abstentions.

86 634 UNTS 281; 6 ILM (1967), p.521.

87 France had resisted pressures to ratify Protocol I until recently. But France's recent decision to ratify this Protocol seems to speed up the process of the early realisation of the Treaty of Tlatelolco: The Times (London), 26 August 1992. p.6.

of other States, especially the nuclear Powers, to the Zone through the adoption of protocols but such efforts have as yet achieved no significant success.

7. Environmental Protection Zones[88]

Since the late 1950s we have witnessed a noticeable trend in the development of international law and practice towards the idea that areas not assimilated to national jurisdiction constitute an international domain that should be subject to international regulation and international responsibility. In accordance with this a number of treaties have been concluded which deal with the specific problems of particular areas of the seas for the protection of the environment.

Since pollution does not stop at the limits of territorial waters certain special measures are needed to combat pollution. This is particularly true with regard to the areas of the sea highly vulnerable to pollution due to their special ecological and hydrological character. For instance, the International Convention for the Prevention of Pollution of the Sea by Oil 1954 prohibits discharge of oil or oil mixture from ships in 'prohibited zones' which consist of the sea within 50 miles from land.[89] Likewise, the 1973 International Convention for the Prevention of Pollution from Ships, establishes more rigorous rules for the 'special areas' established for the prevention of pollution not only by oil but also by noxious substances, garbage and sewage.[90]

Owing to special oceanographical and ecological conditions of the Baltic Sea, the Black Sea, the Red Sea, and the Persian Gulf, these are considered 'special areas' under the 1973 Convention that provides for special mandatory methods for the prevention of sea pollution. A number of treaties have been concluded to control the

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88 See generally on marine regionalism, B.A. Boczek, 'Global and regional approaches to the protection and preservation of the marine environment', 16 CWRJIL (1984), pp.39-70; L.M. Alexander, 'Regional arrangements in the oceans', 71 AJIL (1977), pp. 84-109; Okidi, 'Toward regional arrangements for regulation of marine pollution: an appraisal of options', 4 ODIL (1977), pp.1-25.

89 Articles II, III and Annex 4 of the Convention: UKTS 56 (1958), Cmnd.595; 327 UNTS 3. The Convention entered into force in 1958. On Jan 1, 1989 there were 71 parties to it. But this Convention will be replaced by the International Convention for the Prevention of Pollution from Ships 1973 for the parties of the latter when the latter enters into force.

90 Cmnd., 7347; 12 ILM 1319 (1973). On 1 January 1992 there were 70 contracting States.

pollution in different regional seas under the UNEP's Regional Seas Programme[91] under which obligations are imposed on States parties to ensure comprehensive protection for designated marine areas.

The arrangements made for the prevention of pollution in the Baltic could be presented as an illustrative example of the protection of particular maritime regions from pollution. The Baltic is very shallow; its average depth is only 60 meters and at the shallowest point the inlets are only 17 meters deep. The sea has very low salinity. It receives the drainage of a land area more than four times as large as its own area. The exchange of water is very slow in the Baltic. Organic materials discharged from a variety of sources into the sea need oxygen to decompose but the Baltic water has a very low amount of oxygen. All of these factors make the Baltic very vulnerable to pollution and therefore render it in need of special protection.

This is why the States bordering the Baltic adopted the 1974 Convention for the Protection of Marine Environment of the Baltic Sea Area.[92] It provides special measures for the protection of the area. The Convention covers not only the water column of the Baltic Sea Area but also its sea-bed. Since the Baltic States would suffer the most from marine pollution of the Baltic they can be said to have the competence to create a regime to control the pollution in the Baltic. This would be an interesting analogy to draw on in support of the idea of the creation of objective regimes in the waters of a region by the regional Powers.

In fact, the regime provided for in the Baltic Convention expects non-Baltic States using the Baltic area to comply with the rules prescribed for the control of pollution. A resolution accompanying the Convention requests the States Parties to act to prevail upon other States and extra-regional ships to comply with relevant provisions of the Convention. Part of that resolution reads as follows:

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91 See V.A. Kiselev, "'Special areas' for preventing pollution of the sea', Marine Policy (July 1988), pp.241-246 and the Report of the International Meeting of Legal Experts on Particularly Sensitive Areas, 20-21 July 1992, Law School, University of Hull (unpublished).

92 13 ILM (1974) 544, 546; B.A. Boczek, 'International protection of the Baltic Sea environment against pollution: a study in marine regionalism,' 72 AJIL (1978), pp. 782 ff.

[the Conference]
"Recognizing the importance of these provisions [i.e., the provisions of the Convention] being applied also by ships flying the flag of other States,

Requests the Participating States to act in order to prevail upon other States and ships flying the flag of other States to act in accordance with the above mentioned provisions for the protection of the Baltic Sea Area".[93]

Similar treaties have been adopted with regard to other regions of the sea.[94] Under these conventions and protocols the States of the region concerned have undertaken to prevent pollution not only within their territorial limits but also in the region as a whole. Such regional approach has broad appeal in the management of the ocean environment because levels of pollution in certain regions are greater than in other regions and thus require a regional approach.

8. The Internationalisation of the Deep Sea-Bed

Another significant step towards the creation of a regime concerned with natural resource exploitation is the 1970 Common Heritage Declaration on the deep sea-bed.[95] It declares the deep sea-bed and its resources to be the common heritage of mankind. The Declaration forbids the appropriation of the deep sea-bed and also any claim or exercise of sovereignty or sovereign rights by any State or person, natural or juridical, over any part of the deep sea-bed beyond internationally recognised limits of State jurisdiction.

As envisaged by the Declaration, most of its provisions have now been incorporated into the Convention on the Law of the Sea of 1982. The Convention internationalises the deep sea-bed and its resources under a regime provided for in

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93 Resolution 1 on Application by Other States of Special Rules for Ships Operating in the Baltic Sea Area. 13 ILM (1974) 585.

94 Examples are the 1976 Convention for the Protection of the Mediterranean Sea against Pollution and the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (15 ILM 1976, 290, 300, 306), the 1980 Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources (19 ILM 1980, 863, 869), the 1987 Convention for the Protection of the Natural Resources and Environment of the South Pacific Region and its Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (LOSB, No.10, Nov. 1987, pp. 59, 78), the 1989 Protocol for the Protection of the South-East Pacific Against Radio Active Pollution (LOSB, No. 15, May 1990, p.41).

95 The UN General Assembly Resolution 2749 (XXV) of December 17, 1970.

Part XI of the Convention which may also be regarded as an objective regime, although custom is also invoked to argue the universal applicability of the regime.[96] The deep sea-bed is a specified geographical area, with the regime established for it under the LOSC enjoying the support of a vast majority of States; the LOSC attaches a special status to the deep sea-bed area which is necessary for maintaining law and order in the area.

Even the few States which have stayed out of the 1982 Convention on the Law of the Sea, mainly the U.S., the U.K., and Germany, have not disputed the legal significance of the common heritage principle of the Declaration; they have presented their own interpretation of the meaning and scope of the Declaration, which, of course, differs from that of the other States.

IV. Decisions of International Tribunals

The jurisprudence of international tribunals acknowledges the existence of treaties which establish objective regimes. A classic example is the Aaland Islands case.[97] By the Treaty of Paris of 30 March 1856, concluded between France, Great Britain, Russia, Prussia, Austria and Turkey, the Aaland Islands were placed under a permanent regime of demilitarisation. These Islands were under Russian sovereignty by virtue of Russia's sovereignty over Finland to whom the Islands belonged. When Finland became independent after World War I, it acquired sovereignty over the Islands. In 1920, as a State directly affected, Sweden sought Finland's compliance with the demilitarisation regime imposed on the Islands under the Treaty. This issue was referred to the Council of the League of Nations. Since the matter involved various legal questions, the Council appointed a Committee of Jurists to consider the matter.

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96 This is the view held by the Group of 77 (actually consisting of nearly 130 States). See for the statement by the Chairman of the Group and a 1979 resolution of the Group on this issue D.J. Harris, Cases and Materials on International Law (4th edn., 1991) 448-449 and Oxman, 74 AJIL 8 (1980).

97 BFSP,1855-1856 (1865) and League of Nations, Official Journal, Special Supplement No.3 (Oct.1920) 16.

In its decision on the issue, the Committee upheld Sweden's claim on the grounds of the objective nature of the 1856 Treaty: "by reason of the objective nature of the settlement of the Aaland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested, insist upon compliance with the provisions of this treaty in so far as the contracting parties have not cancelled it."[98] (emphasis added) The Committee reasoned that the provisions of the Treaty were

> "laid down in European interests. They constituted a special international status, relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarisation established by these provisions."[99] (emphasis added)

The Committee referred to the fact that the Great Powers have, "on many occasions since 1815, and specially at the conclusion of peace treaties, tried to create true objective law, a real political status the effects of which are felt outside the immediate circle of contracting Parties". (emphasis added) A similar position was taken by Justice Huber, the Vice-President of the PCIJ, in 1930, delivering his Individual Opinion in the Advisory Opinion relating to the Free city of Danzig and the ILO.[100]

In its Advisory Opinion on the International Status of South West Africa the International Court of Justice treated the international rules regarding the Mandates as possessing an objective character. The Court took the view that the Mandate held by the Union of South Africa under Article 22 of the Covenant of the League of Nations in respect of the former German territory was not affected by the dissolution of the League of Nations in 1946. The Court said:

> "The mandate was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object- a sacred trust of civilisation ...The international rules regulating the Mandate constituted an international status for the

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98 *Ibid.* p.17.
99 *Ibid.* p.18.
100 PCIJ, Ser. B, No.18, at 29.

> Territory recognised by all the Members of the League of Nations, including the Union of South Africa."[101]

In his Separate (concurring) Opinion attached to the Advisory Opinion of the ICJ on this case McNair elaborates his ideas of objective regimes as follows:

> "From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multi-partite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it an objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war."[102]

In its Judgement in the South West Africa cases (Preliminary Objections) the ICJ regarded the Mandate as a "special type of instrument composite in nature and instituting a novel international regime."[103] Although the ICJ's decision on the Reparation for Injuries Suffered in the Service In the United Nations case is not related to any territorial question, the decision is of importance as it throws some light on the process by which a treaty could create an objective regime. In this case the Court held that the UN possessed international personality and that personality was of an objective character not limited to the parties to the Charter of the United Nations. The Court said:

> "Fifty states, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely personality recognised by them alone, together with capacity to bring international claims."[104]

The PCIJ in the Wimbledon case regarded all artificial waterways as being "permanently dedicated to the use of the whole world."[105] In this case the Court was

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101 ICJ Reports, 1950, p.132. See also the Certain Phosphate Lands in Nauru (Nauru V. Australia) (Preliminary Objections), ICJ Reports, 1992, pp.240, 251-253.
102 ICJ Reports, 1950, pp.153-155.
103 ICJ Reports, 1962, pp. 329 and 331.
104 ICJ Reports, 1949, p. 185.
105 PCIJ, Ser. A/1, p.28 (1923).

considering the legal position of the Kiel Canal. Nevertheless, this general remark made by the court provides some authority for the international status of all international waterways. Article 380 of the Treaty of Versailles of 1919 provided that "[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[106]

Soon after the end of World War I Russia and Poland were at war over territorial disputes. Germany had declared her neutrality in this war. Together with certain other States, Great Britain and France had supported Poland. In 1921 the Wimbledon, a British merchant ship chartered by French shippers and carrying a cargo of munitions for Poland, was denied access to the Kiel Canal by the German Government. They did this on the grounds that the Wimbledon's passage through the canal would involve Germany in a breach of her neutrality. The question before the PCIJ was whether or not Article 380 of the Treaty of Versailles had objective character and, if the answer was in the affirmative, whether that article would take precedence over the observance by Germany of her obligations as a neutral State.

The Court rejected the German contention and held that the terms of Article 380 were categorical; it went on to say that

> "[i]t follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world."

The court reasoned:

> "The intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the Canal open at all times to foreign vessels of every kind".[107] (emphasis added)

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106 Treaty of Versailles of 18 June 1919: 112 BFSP pp.1, 22.

107 PCIJ, Ser.A/1, p.28 (1923).

This is another illustration of the acknowledgement of the creation of an objective regime by a large number of States for the benefit of all nations of the world. Here it is also worth noting that, although Russia was not then party to the treaty of Versailles, the Court treated this article as having effects *erga omnes* and prevailing over German neutrality *vis-a-vis* Russia.

The proceedings of international tribunals on cases of the succession of States in respect of treaties throw some light on the question of the objective status of territorial treaties. Apart from the Aaland Islands case which has already been discussed,[108] the case concerning the Free Zones of Upper Savoy and the District of Gex[109] represents the most weighty endorsement of the existence of the principle that certain treaties of a territorial character are binding

on a successor State. At the conclusion of the Napoleonic Wars certain international arrangements were made by the Congress of Vienna of 1815.

The Treaty of Turin of 1816, in fixing the frontier between Switzerland and Sardinia, imposed restrictions on the levying of customs duties in the Zone of St. Gingolph of Sardinia for the benefit of Switzerland. On the basis of this Treaty Switzerland claimed that the customs line should be withdrawn from the Zone. After initial reluctance, Sardinia met this claim by a unilateral Manifesto. After France succeeded Sardinia in the sovereignty of that territory, Switzerland contended the benefit of a customs zone on the basis of these agreements, on Article 435 of the Treaty of Versailles, and on the 'real' character of these arrangements.

Since Switzerland was not a party to the Treaty of Versailles, France contested the Swiss claim. France also maintained that the provisions of earlier arrangements of 1815 and 1816 were no longer applicable to this claim because they lacked validity on the grounds of the rule of *rebus sic stantibus*. However, the PCIJ rejected the French submissions and held that France was bound to respect the rights contended by Switzerland.

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108 See Section III(3), above.

109 PCIJ, Ser. A/B, No. 24 and Ser. A/B No.46.

More recently, in the case Concerning the Land, Island and Maritime Frontier Dispute (Application by Nicaragua for Permission to Intervene)[110] between El Salvador and Honduras, El Salvador argued in its Memorial that a judgement of an international tribunal may also result in an objective regime. Referring to a judgment of the Central American Court of Justice of 1917 concerning the Gulf of Fonseca in which the Court had held that the ownership of the waters of the Gulf belonged in common to the three riparian States of the Gulf, El Salvador argued that

> "On the basis of the 1917 judgement an objective legal regime has been established in the Gulf. Even if initially the judgement was binding only in respect of the direct parties to the litigation, Nicaragua and El Salvador, the legal status recognised therein has been consolidated in the course of time; its effects extends to third States, and in particular, they extend to Honduras."[111]

Although Honduras rejected the El Salvadorian claim of the existence of an objective legal regime, the ICJ Chamber allowed, albeit under narrowly specified conditions, Nicaragua to intervene in the case on the grounds of "community of interests" of the riparian states of the Gulf.[112]

V. Publicists' Views

The question as to whether certain treaties can create objective regimes has attracted a number of prominent jurists and it has been a matter of acute controversy among publicists. Their opinion is divided as to the conclusions to be drawn from international practice and the proceedings of international tribunals. Nevertheless, most authorities admit to varying degrees that there are in practice certain exceptions to the *pacta tertiis* principle and the objective regime is one of them. Although Schwarzenberger and Reuter appear very hesitant to accept that there can be any

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110 ICJ Reports 1990, p.92. When the ICJ delivered its Judgment in this case (ICJ Reports 1992, p.351) the Court did not deal with the question of objective regimes raised by El Salvador.

111 ICJ Reports, 1990, p.105. See the judgement of the Central American Court of Justice in AJIL (1917) p. 677.

112 ICJ Reports, 1990, p.106.

exceptions to this principle, they do not deny the possibility of certain treaties binding third States without their explicit consent.

Schwarzenberger admits that third States may be bound by a treaty not only by their consent but also through the institutions of recognition, acquiescence and estoppel. He writes that to create a rule of an absolute or objective character "it is ... necessary to show that either all subjects of international law are parties to any particular treaty or that, by recognition, acquiescence or estoppel, such a treaty has become opposable to all non-parties."[113] Reuter, while taking the view that, strictly speaking, no treaty can be regarded as having, by its very nature, objective effects upon third States, admits the fact that the application of the *pacta tertiis* principle in a given case "depends on the essential elements of the treaty." He then goes on to say that "when a territorial settlement is at stake, very naturally it should be possible to invoke such a situation against other states".[114]

McNair regards certain treaties, e.g., 'dispositive' or 'real' treaties, as having effects *erga omnes* because of some inherent and distinctive juridical element present in them. He cites, as an example of such treaties, the Vienna Treaty of 20 March 1815 which established the permanent neutralisation of Switzerland. He argues that this Treaty "now forms part of the public law of Europe and that the status thus created possesses universal validity..."[115]

Rousseau distinguishes between treaties creating objective regimes and other treaties. According to him the former type of treaties are exceptions to the general *pacta tertiis* rule. He states that "[i]t happens fairly frequently that treaties establishing a political and territorial regime are regarded as being good against Powers, other than the signatory States."[116] With respect to the treaties relating to international waterways he says that "[i]t has happened on a number of occasions that treaties relating to communications, fluvial as well as rail road, have been regarded as

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113 G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. I (3rd edn., 1957) p.458.

114 Reuter, *op.cit* note 33, p.99.

115 McNair, Treaties, pp.255 ff.

116 C. Rousseau, Principles Generaux du Droit International Public, vol.2, 452-484, as cited and translated by Fitzmaurice in YBILC, vol.II (1960) 98.

binding equally all riparian or interested states, which are deemed to constitute a special group and on that basis, to be subject to a common ordinance valid even without express consent."[117] Describing the nature of international regimes Mosler states that the intention of the States

> "is to create indefinitely or for a long period a lasting state of affairs which forms part of the international political scene and is not limited to relations within the group which created it but also be respected by others. The purpose is to introduce an element of stability into international politics which, although brought about only by a limited number of states, has a certain importance for the international society as a whole."[118]

He then specifies the criteria for the creation of such regimes as follows:

> "(1) a treaty between States which does not create an international organisation but rather regulates the position of a territory or an object of common use such as water (including the high seas and the seabed), air and outer space, or means of communication;
> (2) a general interest lying behind the regulation;
> (3) acceptance of the regulation by other states not party to the treaty or at least acquiescence by them;
> (4) continuance as long as the general interest exists or at least for a prolonged transitional period."[119]

Crawford writes that "apart from any asserted primacy or hegemony of groups of States either generally or with respect to a particular region, multilateral territorial settlements may well possess certain special features as a matter of general international law."[120]

According to Greig, "[t]here is evidence to suggest that a number of what are sometimes termed 'constitutive treaties,' treaties establishing a special regime or an international institution do create rights and obligations under international law which non-parties cannot ignore."[121] Discussing the effects of treaties on third States he

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117 *Ibid.* p.92.
118 H. Mosler, 'The International Society as a Legal Community,' 140 Recueil des Cours (1974-IV), 11 at 235.
119 *Ibid.* p.236. Yet he does not clarify the reasons for choosing the above criteria for objective regimes.
120 Crawford, Creation of States, p.318.
121 D.W. Greig, International Law (1976), p.14.

states that "[o]nly in exceptional circumstances has international law recognised the binding nature of a treaty as direct source of obligation to third parties. However, it has long been accepted that a treaty (often termed a 'dispositive treaty') can create a special territorial regime which goes beyond a purely contractual relationship."[122]

Kunz and Neuhold appear to have taken the view that the establishment of permanent neutrality is valid against all States. While writing about Austria's permanent neutrality Kunz states that "[i]t is agreed that such permanent neutrality creates a legal situation valid *erga omnes*."[123] Likewise, referring to the legal effect of the 1929 Lateran Treaty of permanent neutrality of the Vatican City concluded between the Vatican and Italy, Neuhold writes that "[t]his originally bilateral arrangement can be considered to have acquired validity *erga omnes* in the meantime."[124]

There are other authorities who approach this issue with a good deal of caution. For instance, the Harvard Research volume on treaties, 1935, while summarising the position taken by the writers, observes that the alleged exception to the *pacta tertiis* rule with regard to collective treaties in the nature of 'international settlements' is based not upon legal principles

> "but upon the acquiescence, of the States upon which they are imposed, or upon the ground that they are intended to serve the general interest. Examples of such treaties are those regulating the status or use of international waterways, treaties imposing a regime of neutralisation or demilitarisation upon a State, and others of a like character."[125]

Roxburgh, who carried out a thorough study on the impact of international conventions on third parties, does not, however, subscribe to the idea that a treaty can be regarded as having, by its very nature, objective effects on third states.

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122 *Ibid.* p.15. Lachs and Shaw also acknowledge the existence of objective regimes. M. Lachs, Recueil des Cours (1957-II), pp.315-317; M. Shaw, Title to Territory in Africa: International Legal Issues (1986), p.205.

123 Kunz, *op.cit.* note 51, p.418.

124 H. Neuhold, 'Permanent neutrality in contemporary international relations: a comparative perspective,' ISIA, vol. I, (1982), p.13.

125 Harvard Law School, Research in International Law: Law of Treaties, Vol. III, 29 AJIL, Supp., (1935), pp.922-23.

Nevertheless, he implies that 'international settlements' such as the permanent neutralisation of a state should be respected even by States which have not expressly agreed to it.[126]

VI. Conclusion

The conclusion to be drawn from the above discussion is that objective regimes do exist in international law as is evidenced by international conventions, State practice, decisions of international tribunals and the opinion of writers. Running through the State practice discussed above and precedents are strong indications of the admission of objective regimes in international law. However, neither State practice nor precedents give clear guidance as to the definition of objective regimes. While some decisions of international tribunals and jurists seem to require the element of 'general interest' lying behind the regime (yet without defining the term) State practice does not show that it is a necessary condition in all circumstances. An objective regime may be only in the interest of the States of the region or even in the interest of the people of a single State or territory; examples of the latter are the regimes concerning the mandate and trusteeship systems.

Similarly, certain jurists and international tribunals attach significant weight to the participation of a vast majority of States creating objective regimes; others do not regard this element as indispensable for an objective regime. What is, nonetheless, accepted by all the writers mentioned above is that a multilateral treaty concluded between a set of States designed to establish a political order in international society following major upheavals and concerning territorial arrangements can acquire objective status. The institution of objective regimes is not only accepted but practised by States yet without defining its components in any international instruments. Thus, it can be concluded that there exists in international law a rule of objective regimes according to which regimes concerning the finality of boundaries, maintenance of peace and security in troubled areas, preservation of independence and existence of

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126 Roxburgh, *op.cit.* note 2, pp.58-60.

strategically located States and the regulation of the objects of common use and exploration, produce effects valid *erga omnes*.

VII. Objective Status of Zones of Peace

So far as the objective status of various ZOP is concerned, we should note that the concept of ZOP is relatively new in international law. That is why authorities rarely refer to zones of peace in discussing the notion of objective regimes. Waldock's third report on the law of treaties, which forms one of the most comprehensive contemporary discussions on objective regimes, was submitted to the ILC in 1964, i.e., before any significant move was made towards the creation of ZOP.[127] The General Assembly had adopted a resolution on the denuclearisation of Africa before he prepared his report.

Yet Waldock, who frequently cites the demilitarisation of Antarctica under the Antarctic Treaty of 1959 as an example of objective regime, fails to refer to the denuclearisation resolution of the UN General Assembly of 1961[128] and the resolution on the demilitarisation of Outer Space (Resolution 1962 of 1963) in his report. Although the Treaty of Tlatelolco,[129] which establishes the Latin American NWFZ was concluded before the Vienna Convention on the Law of Treaties, the question of the effects of such a treaty on third States seems to have passed unnoticed at the last stages of the adoption of the Vienna Convention.

Nevertheless, both the Waldock report and the ILC commentary to the draft Vienna Convention mention the Antarctic Treaty, which, *inter alia*, demilitarises Antarctica, as a recent example of treaties creating objective regimes. Moreover, to date the notion of objective regimes has mainly been discussed within the purview of the law of treaties. This is because Roxburgh, McNair, Fitzmaurice and Waldock all touch upon objective regimes while discussing the effects of treaties on third

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127 YBILC (1964) Vol. II, pp.5 ff.
128 Resolution 1652 (XVI) of 24 November 1961.
129 634 UNTS 281; 6 ILM (1967) p.521.

States.[130] However, the establishment of a ZOP is analogous to an international settlement.

Most international settlements and the treaties on neutralisation and demilitarisation were concluded to maintain a balance of power, preserve peace and security and establish a new political order in the whole or part of international society: these are also the purposes of the States creating a zone of peace. Accordingly, both land and maritime ZOP could be regarded as regimes having objective character just as State practice and international jurisprudence regard similar international regimes, e.g., demilitarisation, permanent neutralisation and denuclearisation, as having objective effects.

130 But as will be examined in Chapter VII, treaty is not the only method of creating objective regimes. There are a number of methods by which States become bound by a rule of international law.

CHAPTER VII

Methods of Creation of Zones of Peace

I. Introduction

The State practice examined in the preceding chapters shows that a legal relationship can be created between States through a number of methods. Treaties are still one of the most popular and reliable forms for creating legal relations between States, but other devices, such as the resolutions of international organisations and conferences, unilateral declarations, estoppel, acquiescence and recognition also establish legal relations between States and determine the existence of a particular rule in international law. Provided that there is the intention on the part of the States concerned to create legal relations between them, any of the methods described above may be equally effective as treaties. It is in this context that this chapter will assess various possible methods of creating ZOP and evaluate the actual methods applied to establish ZOP in various parts of the globe.

II. Treaties

As *Oppenheim's International Law* writes, "as international society becomes a more integrated community, a departure from the accepted principles becomes unavoidable, in particular in the sphere of preservation of international peace and security."[1] Accordingly, the great Powers have, through treaties between them, imposed their will upon smaller or even middle-ranking States or defeated States, particularly at the end of a major war or world crisis. Such measures were considered binding upon other states because they were established in the 'general interest'. In the absence of an international legislative body, such legislation by great Powers was supported under theories borrowed from constitutional and administrative law. McNair's opinion can be cited as an example of the application of such theory:

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1 Oppenheim (1992), Vol. I, Part 4, p.1264.

> "When it is remembered that international society has at present no legislature, the treaty is the only instrument available for doing many of the things which an individual State would do by means of its legislature; and the of making the rules of law is not the only function of a legislature. It is therefore not surprising that from time to time groups of States should have assumed the responsibility of leadership and used the instrument of a treaty to make certain territorial or other arrangements required, or which they considered to be required, in the interest of this or that particular part of the world... Strictly speaking, a treaty of this kind ... binds at first the parties thereto and no other States. But it is undeniable that after a period of time, to which no fixed duration can be attributed, the mere lapse of time and the acquiescence of other States in the arrangement thus made have the effect of reinforcing the essential juridical element of the treaty and of converting what may at first have been a partly *de facto* situation into a *de jure* one."[2]

The majority of such regimes relate to international peace and security. Regimes of this nature have always been characterised in international law as a special category of regimes. According to Visscher a multilateral treaty concluded between the great Powers concerning the preservation of peace can itself lead to the creation of legal situation which is not confined to the contracting parties.[3] Peace settlements reached after a major conflict have long been regarded as settlements concluded in the general interest and all States have been expected to respect them.

Article 75 of the Vienna Convention on the Law of Treaties accommodates this idea: "The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression."[4] As Reuter says, "the theory that the victors in a major world conflict enjoy some kind of special authority entitled to universal recognition is still accepted in contemporary international relations and is presently even further justified by another argument based on the punishment of aggression."[5]

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2 McNair, Treaties, p.259.

3 Ch. de Visscher, Theory and Reality in Public International Law (translated from the French by P.E. Corbett, 1957), pp.258-263.

4 UKTS No. 58 (1980), Cmnd 7964; 8 ILM 679 (1969).

5 P. Reuter, Introduction to the Law of Treaties (1989), p.95.

The importance and universal support required for initiatives aimed at maintaining international peace and security is recognised in Article 2(6) of the Charter of the United Nations. A more relevant example for the purpose of this study is Article X of the Antarctic Treaty of 1959. This article in effect imposes negative obligations on third States.[6] Not only the 12 original States[7] party to the Treaty but also the other 26 States who have subsequently ratified the Treaty have in effect accepted that not the treaty as such but the regime created under a treaty concerning the maintenance of international peace and security and concluded in the general interest of the international community can produce binding effects on third States.

Another line of justification concerns the theory that the due execution of lawful treaties ought not be impeded by third States. Fitzmaurice, who regards this theory as a qualification or quasi-exception to the *pacta tertiis* principle, elaborates upon his theory in the following terms:

> "The due execution of lawful treaties ought not to be impeded by third States. If an area is demilitarised by treaty, States not parties to it ought, in general, to respect this. If a territory is transferred by treaty, third States not themselves possessing a valid claim to the territory ought to recognise and respect the transfer. Equally, a third State has no legal cause of complaint merely because a treaty operates unfavourably for it, if the treaty is lawful, and infringes no actual legal right of the third State."[8]

Several authorities appear inclined to attach an objective character to those treaties which are concluded in the general interest providing for general rights and general obligations. Although this is a very attractive justification, it is very difficult to define the term 'general interest' and State practice does not show that this is a decisive factor in determining the objective character of a regime. Of course, the participation of a vast majority of States would be helpful in swiftly establishing an objective regime, but in practice this factor does not seem to have played a vital role in creating objective regimes.

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6 402 UNTS 71.

7 The original parties to the treaty are: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the then USSR, the U.K. and the U.S.

8 YBILC, vol. II (1960), p.73.

Objective regimes include regimes created by a few major Powers or regional Powers or even by a single State followed by international recognition. For instance, traditionally States were neutralised under a treaty by major Powers in the general interest of the international community. Although the treaty on Swiss neutrality corresponded to the practice and wish of the Swiss people, Switzerland was neutralised by the major European Powers, as noted by McNair, in the general European interests.[9]

Belgium and Luxembourg were neutralised by five major European Powers, namely, Austria, France, Great Britain, Prussia and Russia, primarily in their interests to create a barrier in order to check possible foreign aggression. But such neutralisations were considered to be valid against all States; they were justified as being in the general interest of the international community or, rather, in the general European interest. But since the establishment of the UN no State has been neutralised without its consent.[10] This may be due in part to the greater awareness of the implications of the principle of sovereign equality of States after its incorporation in the Charter of the UN.

III. Unilateral Declarations[11]

A treaty is a statement, a promise, or a commitment to create legal relations. The intention of the parties to create legal relations is of greater importance than the form of expressing such intention. If such intention can be established, no matter what form is used to express that intention, the form used can be regarded as being capable of creating legal relations between States.[12] According to the decision of the ICJ in the

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9 McNair, Treaties, pp.259-260.

10 The Agreements on Laos and Cambodian neutrality invoke the will of the people of the State concerned to become a neutral country. Although one could say by examining the background leading up to the settlements that these States were pushed into consenting to such neutralisation, these two countries have since early 1950s actually sought to pursue a neutral policy and the international settlements recognise this will.

11 A.P. Rubin, 'The international legal effects of unilateral declarations,' 71 AJIL (1977), p.1; K. Skubiszewski, 'Unilateral acts of States', in M. Bedjaoui (ed.), International Law: Achievements and Prospects (1991), p.221.

12 Brownlie gives greater weight to such intention while considering the legal significance of unilateral declarations. Brownlie, Principles, p.638. Lachs says that permanent neutralisation

Aegean Sea case,[13] a treaty may also take the form of a joint communiqué issued by Government Ministers to the press at the end of a meeting, provided that the intention to create legal relations is present. The Court was considering the legal effects of a Communiqué of 31 May 1975 issued to the press in Brussels by the Prime Ministers of Greece and Turkey at the conclusion of their meeting on that date.

The Brussels Communiqué, which bore neither signature nor initials, had said that the two States would refer the dispute concerning the Aegean Sea to the ICJ. When the case was brought before the ICJ Turkey disputed the Greek claim that through the Brussels Communiqué the two countries had agreed to refer the case to the ICJ. The Court said:

> "On the question of the form, the Court need only observe that it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement."[14]

In the Eastern Greenland[15] case the PCIJ held that Norway's unilateral declaration acknowledging the Danish sovereignty over the whole of Greenland was capable of creating legal relation between Norway and Denmark with regard to the disputed territory. Referring to the Norwegian Foreign Minister's reply to his Danish counterpart with regard to the question of Danish sovereignty over the whole of Greenland, the PCIJ said that

> "The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs."[16]

"could be created by a treaty or it could result from internal legislation, later confirmed by an international document." YBILC, Vol.I (1964), p.107-108.

13 ICJ Reports, 1978, p.3.

14 *Ibid.*, p.39, para.96. However, the Court in its conclusion held that the Brussels Communique did not furnish a valid basis for establishing the Court's jurisdiction to entertain the case. *Ibid.*, p.44, para.107-108.

15 PCIJ, Ser.A, No.53, at 68.

16 PCIJ, Ser.A/B, 1933, No.53, p.19, at pp.71 and 73.

In the Nuclear Test cases[17] the court treated the unilateral public announcements of France as being just as binding as a treaty. The ICJ said:

> "It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding."[18]

The Court reasoned:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based in good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus States may take cognisance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."[19]

In fact, recognition of States and governments can be regarded as one of the most important unilateral legal acts. The unilateral recognition by States of the birth of States, non-constitutional change of governments, the status of insurgents, territorial change and revision of frontiers have always produced far-reaching legal effects in international relations between States.

Fieldler writes that

> "[t]he binding force of an unilateral act, in particular of an operative act, is a direct result of the sovereignty of the acting States which in the context of international law has the right to undertake legally binding acts unilaterally. Through the binding force of the declaration, the declaring

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17 ICJ Reports, (1974), (Australia v. France) p. 253 at 267-271 and (New Zealand v. France) p.457 at 472-5.

18 *Ibid.*

19 *Ibid.* paras. 43 and 46 (Australia v. France) and paras. 46 and 49 (New Zealand v. France).

> subject of international law (the State) undertakes a unilateral obligation to act in compliance with the declaration."[20]

Robinson[21] goes farther and maintains that

> "[w]hen any nation, for economic, moral, or political reasons, determines to assume the obligations and to demand the rights of a permanently neutral State, and when it has proclaimed that fact ... the world must accept such a nation's act as binding, sanctioned by that ideal of law which has alone inspired all international life."[22]

According to him, "[a]s a *sine qua non* for neutralisation, a guarantee is of no value at all."[23]

Although it has often been said that a State "cannot become permanently neutral in international law by its own unilateral declaration",[24] there is no customary or treaty law rule which states that a State must be neutralised under a treaty. The U.S., which has traditionally maintained that it does not regard a unilateral declaration or domestic legislation proclaiming self-neutralisation as binding on other States, did not find it difficult to endorse Nepal's unilateral proposal for a ZOP. Even in the case of self-neutralisation the U.S. has shown its preparedness to respect the neutrality, saying that it is under no obligation to defend such neutralisation unless it has explicitly agreed to guarantee it.[25] This was the position adopted by the U.S. with regard to the Austrian neutrality.[26]

International law recognises the legal effects of unilateral declarations. For instance, although Austria's neutralisation emanated from a understanding reached between the four Powers, namely, the U.S., the U.K., the then U.S.S.R. and France, before signing the State Treaty of Austria, it was the Constitutional Federal Statute on

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20 W. Fieldler, 'Unilateral acts in international law,' in Bernhardt, Encyclopaedia of PIL, Vol.7, p.517.

21 Stewart. M.M. Robinson, 'Autonomous neutralization,' 11 AJIL (1917) 607.

22 *Ibid.* p. 609.

23 *Ibid.*

24 For instance, Kunz, 'Austria's permanent neutrality', 50 AJIL (1956), p.418.

25 C.E. Black et al., Neutralization and World Politics (1968), pp.48-50;

26 'Nature of Austria's Neutrality and Legal Implication of United States response to the Neutrality Declaration', dated 16 November 1955, by the Office of the Legal Adviser of the Department of State. See in Black et al., *op.cit.* note 25, p.49.

Austria's neutrality that established the permanent neutrality of Austria. The Moscow Memorandum of 1955 agreed between Austria and the Soviet Union requires Austria to practice in perpetuity a neutrality "of the type maintained by Switzerland." But Article 1 of the Statute states that Austria adopted the policy of permanent neutrality "of its own free will."[27]

This holds true in the case of Swiss neutralisation, too. The Final Act of the Congress of Vienna of 1815 had confirmed the desire of the Swiss people declared in a proclamation of 1813 to remain permanently neutral. Lawrence states that the agreement of the five Great Powers in Vienna in 1815 on the neutralisation of Switzerland "was held sufficient to elevate [implying that the Swiss neutrality was established by the Swiss people in 1813 under a proclamation] the neutralisation of Switzerland into a policy of public law of Europe".[28] (emphasis added)

Costa Rica adopted its permanent neutrality under a presidential declaration. Such a declaration is a valid juridical act. Malta also adopted a policy of permanent neutrality under a unilateral declaration which was followed by the support of other States. A significant weight of authority supports the view that a State can become permanently neutral by its own unilateral declaration.

Castren acknowledges that such declaration of permanent neutrality has certain legal effect if it is "supported by a guarantee of other States or some kind of recognition."[29] (emphasis added) Black, Falk, Knorr and Young maintain that "A State may also neutralise itself by means of a unilateral declaration, an act which acquires international status as soon as it is recognised by other States."[30] As discussed in Chapter V, some States, e.g., Sweden, Ireland and Finland, considered that they could pursue a policy of permanent neutrality under unilateral undertakings even without formally notifying other States of their neutrality. They did not seek formal recognition of their neutral policy from other States, but no State challenges their neutrality. Rather, other States have generally regarded these States as neutral

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27 See in Whiteman, Digest of International Law, Vol. I, pp.348-349.
28 T.J. Lawrence, Essays on Modern International Law, p. 487.
29 Castren, The Present Law of War and Neutrality (1954), 449.
30 Black et al., *op.cit.* note 25, pp.xii-xiii.

States and treated them as such at the UN and the CSCE meetings. The bridge-building role played by these States as neutral States during the Cold War period between the Eastern and Western bloc countries is well known, as is their contribution to the peace-keeping operations of the UN during this period.

Thus, it seems that neutralisation can be established by a unilateral act followed by international recognition or acquiescence. If a self-neutralised State seeks guarantee of its permanent neutrality from other States then it would have to secure other States' agreement to its neutrality. If, however, mere recognition and respect is sought from other States, no agreement of other States is required. Other States are bound to take account of the permanently neutral policy of that State in their international relations and especially in the event of hostilities breaking out with or between other States.

The self-declared permanently neutral State need not even make another declaration of neutrality following the outbreak of hostilities between the belligerents, providing it had already let all States know of its declaration of permanent neutrality through appropriate channels of communication. This shows that a unilateral declaration of a State may produce effects on third States.

The view taken by an *Ad Hoc* Group of Qualified Governmental Experts, set up under the auspices of the Conference of the Committee on Disarmament in its comprehensive study of the question of a nuclear-weapon-free zone in all its aspects, is of interest.[31] The Group stated that

> "obligations relating to the establishment of nuclear-weapon-free zones may be assumed not only by groups of States, including entire continents or large geographical regions, but also by smaller groups of States and even by individual countries."[32]

IV. Acquiescence, Recognition and Estoppel

Apart from explicit consent, there are a number of other devices through which States become bound by the obligations in an international instrument to which they

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31 UN Report on NWFZ, pp.31-32.
32 *Ibid.* p. 31.

are not parties. Acquiescence, estoppel and recognition are all examples of such devices. The importance of such devices in validating regimes of navigation and territorial disposition is well recognised. Several treaties, e.g., the Suez Canal Convention, have been considered to have been tacitly accepted by a large number of States.

In the Anglo-Norwegian Fisheries case[33] the ICJ gave considerable weight to the U.K.'s failure to register timely, active and consistent protest against the drawing of Norwegian baselines. If a State does not register its protest to a situation created by other States, with the full knowledge of the facts and where it may generally be expected to act, then its failure to do so would amount to consent. This is termed in international law as acquiescence.

MacGibbon says that "[a]cquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection."[34] States usually speak out against a regime which they consider detrimental to their interests. It is a general practice of States that through diplomatic protests and notes or through issuing a statement States make their position clear on disputed issues which they consider to be either a significant issue of international relations or an issue relevant to their interests. Therefore, if a State fails to register its disapproval of the creation of a regime by other States its silence may amount to acquiescence.

In the case concerning a frontier dispute between Burkina Faso and Mali, Judge Luchaire stated that "acquiescence may result from silence and absence of protest; it may therefore be given implicitly."[35] Canada, while trying to prove U.S. acquiescence in the rule of a median line as the boundary between the maritime jurisdictions of Canada and the U.S. in the Gulf of Maine case, defined the rules relating to acquiescence as follows:

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33 ICJ Reports, 1951, p.116.
34 I.C. MacGibbon, 'The scope of acquiescence in international law,' 31 BYIL (1954) 143.
35 ILR Vol. 80, 556.

> "One government's knowledge, actual or constructive, of the conduct or assertion of rights of the other party to a dispute, and the failure to protest in the face of that of that conduct, or assertion of rights, involves a tacit acceptance of the legal position represented by the other party's conduct or assertion of rights."[36]

Although the ICJ Chamber did not agree that the U.S. had acquiesced in the delimitation of the George's Bank continental shelf by a median line, the Chamber explicated the nature of acquiescence and its relation with estoppel:

> "[T]he concept of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion."[37]

The Chamber then concludes that "since the same facts are relevant to both acquiescence and estoppel, except as regards the existence of detriment, it is able to take the two concepts into consideration as different aspects of one and the same institution."[38] The doctrine of estoppel is based on the idea that a State should be prevented from acting contrary to its notified intent.[39] This doctrine requires a State to be consistent in its attitude to a given factual or legal situation.

This doctrine is found in most jurisdictions and known as 'estoppel', 'preclusion' or 'forclusion.'[40] As McNair writes,

> "[i]t is reasonable to expect that any legal system should possess a rule designed to prevent a person who makes or concurs in a statement upon which another person in privity with him relies to the extent of changing his position, from later asserting a different state of affairs."[41]

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36 ICJ Reports, 1984, p.246 at p.304.
37 *Ibid.* p.305.
38 *Ibid.*
39 See H. Thirlway, 'The law and procedure of the International Court of Justice 1960-1989 (Part One)', 60 BYIL (1989), pp.1, 29-49.
40 The Iran-U.S. Claims Tribunal applied this principle in the Phillips Petroleum Co. Iran v. Iran case. Iran-U.S. Claims Tribunal Reports, Vol.21 (1989-I), p.79, at pp.155 ff.
41 McNair, Treaties, p.484.

The doctrine of estoppel was applied by the PCIJ in the Eastern Greenland case.[42] Norway had by conduct in the past acknowledged that Denmark was the sovereign of the whole of Greenland. Later, Norway claimed certain territories in Eastern Greenland as being under her sovereignty. In support of her arguments against the Norwegian claim, Denmark was able to produce certain bilateral and multilateral agreements to which both Denmark and Norway were parties and in which Denmark had asserted her sovereignty over the whole of Greenland.

The Court held that in accepting these bilateral and multilateral agreements as binding upon herself, Norway had impliedly recognised the Danish sovereignty. Therefore, Norway was prevented from claiming sovereignty over certain territories of Eastern Greenland. Although, as McNair writes, "[t]he court did not use the word estoppel and did not indicate the precise legal character of this consequence ... this can fairly be described as an estoppel."[43]

In the case concerning the Temple of Preah Vihear[44] the ICJ applied the doctrine of preclusion. Article 1 of the 1904 Treaty between Thailand (then the Kingdom of Siam) and France had provided for a watershed formula to fix the boundary between Thailand and Cambodia, which was under French rule. However, Article 3 stated that the actual delimitation of the boundary would be done by a Mixed Commission. Accordingly, the Commission surveyed the frontier and prepared a series of maps, copies of which were presented to senior Thai officials. Among the maps was one showing the Temple of Preah Vihear in Cambodian territory. In that particular spot the surveyors had deviated from the watershed formula. Nevertheless, the Thai authorities did not object to the maps.

After a long period of silence Thailand claimed that the Temple belonged to her. When the case was brought before the ICJ Thailand argued that "a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party to a departure at Preah Vihear from the watershed line specified by article 1 of the treaty

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42 PCIJ, Ser. A, No.53, at 68.
43 McNair, Treaties, p.487.
44 ICJ Reports, 1962, p.6.

of 1904 so great as to affect the sovereignty over the temple area."[45] But the court rejected the Thai argument and held that

> "an acknowledgement by conduct was undoubtedly made in a very definitive way, but even if it were otherwise, it is clear that the circumstances were such as called for reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced".[46]

The Court then concluded that

> "Thailand is now precluded by her conduct from asserting that she did not accept it ... France, and through her Cambodia, relied on Thailand's acceptance of the map ... It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."[47]

Outlining the basic features of the doctrine of estoppel Judge Fitzmaurice stated in his Separate Opinion (concurring) that

> "[t]he essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's disadvantage."[48]

The rule of estoppel was applied by the ICJ also in the Arbitral Award made by the King of Spain on 23 December 1906 case.[49] Honduras and Nicaragua had concluded a treaty on 7 October 1894 under which a Mixed Commission was to be set up to settle their boundary disputes. The Commission did succeed in fixing the boundary between certain points, but failed to agree upon certain other points. Upon

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45 *Ibid.* p.22.
46 *Ibid.* pp.29-31.
47 *Ibid.* p.32.
48 *Ibid.* p.63. In the Tinoco Arbitration case the Arbitrator, U.S. Chief Justice Taft, after considering the applicability of the rule of estoppel, found that the concept of 'equitable estoppel' was inapplicable in that case because no detrimental reliance by Costa Rica could be shown to have resulted from the British act of nonrecognition. 1 R.I.A.A. 369 (1948).
49 ICJ Reports 1960, p.192.

the request of Honduras and Nicaragua the King of Spain handed down on 23 December 1906 an arbitral award fixing the boundary in the disputed areas. Initially both Honduras and Nicaragua expressed their satisfaction with this Award. After some years Nicaragua disputed the validity of the Award and eventually, the case was brought to the ICJ. In its judgment the Court stated that

> "Nicaragua, by express declaration and by conduct, recognised the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."[50]

In the Argentina-Chile Frontier case[51] the Court of Arbitration recognised that there is in international law a principle of estoppel - a principle of substantive law and not just a technical rule of evidence. The applicability of the rule of estoppel in international litigation is widely acknowledged by the jurists. Bowett summarises the scope of the rule of estoppel in the following terms:

> "The rule of estoppel, whether treated as a rule of evidence or as a rule of substantive law, operates so as to preclude a party from denying before a tribunal the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit. The basis of the rule is the general principle of good faith".[52]

On the basis of this analysis it can be argued that States who recognise or endorse a ZOP declaration or vote for or do not object to a General Assembly resolutions which attach a special character to a territory could be prevented in future from denying the validity of the regime thus created. Rejecting the theory that because of the 'recommendatory' character of the resolutions they preclude legitimate expectations, Sloan correctly writes that such an objection "overlooks the fact that while the

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50 *Ibid.* p.213.
51 ILR Vol. 38, p.10.
52 D.W. Bowett, 'Estoppel before international tribunals and its relation to acquiescence,' 33 BYIL (1957) 176.

character of a resolution has some relevancy, it is not the principal factor. It is the conduct of States that is important."[53]

V. Resolutions of international organisations

The world has witnessed in the latter half of this century a tremendous development towards regulating the areas of the high seas, polar regions and outer space. As technological advances opened up new areas not only of the uninhabited parts of the globe but also other areas of the universe for possible human activities, the international community of States has laid down rules for those areas both through the resolutions of the UN and through treaties. In order to create conditions appropriate for meeting new challenges and changes in international relations, the international community of States has been taking measures through a variety of methods to regulate situations in areas hitherto unregulated in international law.

The question here is whether a resolution of the UN General Assembly can create any legal relation between States and eventually an objective regime.[54] As the ICJ said in its Advisory Opinion on the Namibia case, "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design."[55] Indeed, as pointed out by Bailey, there are dicta in the Court's opinion "that indicate that even non-binding resolutions may create legal regimes with objective reality for third parties."[56] In this case the Court was considering the legal significance of Resolution 2145 (XXI) which terminated the Mandate held by South Africa with regard to South West Africa.

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53 Sloan, Resolutions, p.123.

54 The role of the UN General Assembly resolutions has in generating custom has already been addressed in Chapter III, above.

55 ICJ Reports, 1971, p.16 at p.50, para.105.

56 S.D. Bailey, 'Nonmilitary areas in UN practice', 74 AJIL (1980), pp.499, 521.

As Mendelson writes, "the General Assembly can be given the power to dispose of territory" and this sort of decision "can have a dispositive effect."[57] Crawford points out in the context of trusteeship and similar regimes that: "Just as States may delegate to groups of States authority to dispose of their territory, so they may delegate such authority to international organisations."[58] He adds: "United Nations practice supports the conclusion that at least certain delegated functions may properly be exercised by United Nations organs without the consent of all Member States."[59] Sloan writes that

> "The General Assembly, as the organ in which all members are represented, has the best claim to represent the international community of States as a whole. This representative capacity should give weight to Assembly resolutions in general ... where sovereignty is in abeyance, the Assembly has played a special role as in the case of mandated territories".[60]

Indeed, the General Assembly resolutions relating to the status of a territory seem to have played a significant role in establishing the rules of international law applicable to such territories.[61] The resolutions attaching a special status to a specified geographical area are not regarded merely as recommendatory resolutions.[62] This is one reason why certain resolutions concerning a specific geographical area, a part of the sea or sea-bed have been regarded as constituting custom or objective regimes. The cases in point are the resolutions on outer space[63] and the deep sea-bed.[64] These

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57 M. Mendelson, 'The legal character of General Assembly resolutions: some considerations of principle', in K. Hossain (ed.), Legal Aspects of the New International Economic Order (1980), pp.95, 96.

58 Crawford, Creation of States, p.323.

59 *Ibid.*, pp.323-4.

60 Sloan, Resolutions, p.94.

61 See, generally, V. Gowlland-Debbas, 'Collective responses to the unilateral Declarations of Independence of Southern Rhodesia and Palestine: an application of the legitimising function of the United Nations', 61 BYIL (1990) pp. 135-153; Claude, 'Collective legitimization as a political function of the United Nations', 20 International Organisation (1966), pp. 367-379; Franck, 'Legitimacy in the international system', 82 AJIL (1988), pp. 705-59.

62 For instance, the General Assembly resolution on the denuclearisation of Africa (Resolution 1652 (XVI) of 24 Nov. 1961), which calls upon Member States to refrain from testing, storing and transporting nuclear weapons in Africa, has been generally respected.

63 See Chapter III, above.

64 For instance, see Oppenheim (1992), Vol.I, Part 2, p.813, note 5. See also B.H. Oxman, 'The high seas and the international seabed area', 10 Mich.JIL (Spring 1989), pp.526-542.

resolutions embody a set of rules governing not only the area or region or territory concerned but also relations between all States *vis-a-vis* the area or territory. Sloan writes that "the text of a resolution may itself constitute an agreement among the member States ... The resolution could be drafted in terms that express a clear intent to constitute an agreement, or the intention might be found in statements made at the time of the vote."[65] In fact, as stated by Sloan, the 1963 UN General Assembly Declaration of outer space (Resolution 1962 (XVIII)) of 1963 on outer space has been considered to be such a resolution.[66]

The recommendatory function of the General Assembly is not a bar to adopting, in special cases, within the framework of its competence, resolutions establishing an objective regime. The partition of Palestine and the internationalisation of Jerusalem is an example. This case is unique in the sense that the city of Jerusalem was granted a special status by a UN General Assembly resolution (Resolution 181 (II)) which is known as the 'Partition Resolution.' Palestine had been placed under the British mandate under Article 22 of the Covenant of the League of Nations after World War I. After World War II, when Great Britain notified the UN of its intention to relinquish the mandate the General Assembly decided to create two independent States - one for the Jewish community and the other for the Arab-Palestinians in Palestine with a special territory of the city of Jerusalem to be administered by the UN. Part III of Resolution 181 (II) concerning the city of Jerusalem reads: "The City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations".

When Israel later adopted measures to exercise complete control over Jerusalem, both the General Assembly and the Security Council adopted a number of resolutions declaring the measures taken by Israel to change the status of Jerusalem as being invalid and deploring the failure of Israel to show any regard for the General

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65 Sloan, Resolutions, p.65.
66 *Ibid.*

Assembly and Security Council resolutions.[67] Although Jerusalem is now under Israeli control, the legal issues surrounding Israeli control are still extant.[68]

Another recent example of the legitimisation by the General Assembly of the situation created in respect of territory includes the recognition of the Declaration of Independence of Palestine by the Palestine National Council. By a resolution of 15 December 1988 the General Assembly acknowledged the proclamation of the State of Palestine by the Palestine National Council.[69] The Declaration of 15 November 1988[70] was broadly in accordance with the Partition Resolution of the General Assembly (Resolution 181 (II)) of 1947.[71] Other examples of the measures taken by the General Assembly relate to the creation of the new States of Libya and Somalia and the transfer of Eritrea to Ethiopia.[72] It was the General Assembly Resolution 289A (IV) which established the state of Libya; the Assembly was acting under delegated authority of the four Allied Powers under Article 23 of the Italian Peace Treaty which had placed the Italian colonies in Africa at their disposal. No State contended that the exercise of such power was in any way improper or *ultra vires*.[73]

The Trusteeship Agreements were created by UN General Assembly resolution 63 (I) of 13 December 1946. Another significant example in this respect is the question of South West Africa (Namibia). By Resolution 2145 (XXI) of 27 October 1966 the General Assembly assumed the power to terminate the mandate for this territory. It established the United Nations Council for South Africa, appointed a United Nations Commissioner to administer the territory and renamed the territory 'Namibia.' The

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67 For instance, Res. 2253 (ES-V) of 4 July 1967 and 2254 (ES-V) of 14 July 1967 of the General Assembly and Res. 252 of 21 May 1968 and Res. 267 of 3 July 1969 of the Security Council concerning measures taken by Israel to change the status of Jerusalem.

68 H. Cattan, Palestine and International Law (1973); J. Stone, Israel and Palestine: Assault on the Law of Nations (1981).

69 Resolution 43/177 of 15 December 1988 was adopted by 104 votes to 2 (Israel and the U.S.A.), with 36 abstentions. See for the text of the resolution U.N. Doc.A/43/827-S/20278.

70 See this Declaration of Independence in 27 ILM (1988), p.1688.

71 However, it is doubtful whether the 1988 resolution has made any significant difference in this context. The whole spectrum of legal and political issues concerning the Middle East problem seems to be under consideration at the ongoing Middle East Peace Conference in Washington, D.C. The outcome of the Conference is likely to determine the legal status of the 'State of Palestine' rather than the 1988 resolution of the General Assembly.

72 Resolutions 289 (IV)A of 21 November 1949, 387 (V) of 17 November 1950, 1418 (XIV) of 5 December 1959 and 515 (VI) of 1 February 1952.

73 See Crawford, Creation of States, p.331.

resolutions of the Assembly on these matters were recognised by the Security Council (Resolution 276 (1970)). When the ICJ was requested to give its advisory opinion on the legal consequences of such measures, the Court considered the validity of Resolution 2145 (XXI) in terms of the UN Charter and found both members and non-members of the UN under an obligation to abstain from activities inconsistent with the measures taken by the UN.[74]

The role of the General Assembly in creating regimes of territorial character was recognised in its Resolution 3472 B (XXX) of 11 December 1975 on the definition of an NWFZ. Prior to this the General Assembly had adopted a resolution on the demilitarisation of Africa.[75] When several proposals for NWFZs were put forward in the early 1970s the UN commissioned a study on the question of NWFZs in all its aspects.

The study was carried out by an *Ad Hoc* Group of Qualified Governmental Experts under the auspices of the Committee on Disarmament. In its report the Group identified certain conditions for the establishment of NWFZs.[76] On the basis of this report the General Assembly adopted the Resolution (Resolution 3472 B (XXX)) defining the concept of an NWFZ.[77] Although this definition requires a treaty for the establishment of an NWFZ, it nevertheless recognises the significance of the General Assembly resolutions on the subject; it implies that an NWFZ established by a group of States might be recognised by the General Assembly. The *Ad Hoc* Group states in its report on NWFZs that "[T]he attitude of other States *vis-a-vis* the zone could be specifically established in some cases or recommended in a general way, for example,

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74 ICJ Reports, 1971, p.16, paras.122-126.

75 Resolution 1962 of 1963, adopted by 55 votes to 0, with 44 abstentions.

76 The UN Report on NWFZ, pp.31-32.

77 The definition reads as follows:
"1. A nuclear-weapon-free zone shall as a general rule be deemed to be any zone, recognised by the General Assembly of the United Nations, which any group of States in the free exercise of their sovereignty has established by virtue of a treaty or convention whereby: a) The statute of total absence of nuclear weapons to which the zone shall be subject, including the procedure for the limitation of the zone, is defined; b) An international system of verification and control is established to guarantee compliance with the obligations deriving from the statute."
This resolution was adopted by 82 votes to 10, with 36 abstentions. The U.S., the U.K., France voted against the resolution and the Soviet Union abstained.

by means of resolutions of an appropriate body of the United Nations or of a regional organ."[78]

As Freestone and Davidson write, it is possible for NWFZs to be created through a resolution of the General Assembly.[79] "[I]t is, perhaps, arguable that those States which vote for such a resolution, especially the NWSs [nuclear weapon States], may be estopped from subsequently denying the juridical effectiveness of the zone."[80] Schwarzenberger's comments on the analysis by the ICJ of the relevant resolution of the UN General Assembly on Genocide appear to support this view. He argues that since the resolution was unanimously adopted "its contents may be considered to have become binding on all the members of the United Nations by way of estoppel."[81] He implies that the doctrine of estoppel can be applied in assessing the legal effects of UN General Assembly resolutions.[82] MacGibbon advances a similar argument with regard to the States who made declarations to become bound by the 1963 Declaration of the General Assembly on Outer Space.[83]

Therefore, it may be argued that on the basis of the principle of good faith States voting for a particular resolution of the General Assembly may be estopped from frustrating the aims of the resolution. The position of a State with regard to a treaty which it has signed but not ratified where ratification is required for it to enter into force may be regarded as comparable with the position of a State voting for a General Assembly resolution concerning legal issues.[84]

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78 The UN Report on NWFZ, p.40.

79 D. Freestone and S. Davidson, 'Nuclear weapon-free zones,' in Pogany, Nuclear Weapons, p.176 at pp.185-86.

80 *Ibid.* p.183.

81 G. Schwarzenberger, International Law, Vol. I (3rd ed., 1957), Part 1, p.51. MacGibbon has some reservations about this view. See I.C. MacGibbon, 'Estoppel in international law,' 7 ICLQ (1958), p.468, at p.476, note 45.

82 G. Schwarzenberger, International Law as Applied by International Courts (1976) vol.III, 285.

83 I. MacGibbon, 'Means for the identification of international law: General Assembly resolutions: custom, practice and mistaken identity', in B. Cheng (ed.), International Law: Teaching and Practice (1982), pp.10, 25.

84 Cf. Article 18 of the Vienna Convention on the Law of Treaties.

VI. Evaluation of the Rules

The above discussion shows that the consent of States to a regime is more important than the form in which such intention is expressed. As discussed earlier, while Cambodian, Laotian, Belgian and Luxembourg's permanent neutrality were created through multilateral treaties, Switzerland, Austria and Malta's permanent neutrality were created by unilateral measures followed by international support. Nevertheless, in all of these cases some sort of formal international recognition is involved. But the permanent neutrality of Costa Rica, Finland, Ireland and Sweden is based solely on unilateral measures; these States did not consider it necessary to seek formal recognition of their neutrality from other States.

Further, as discussed in Chapter V, although the demilitarisation of the Aaland Islands, the Rhineland and Antarctica was through multilateral treaties, the demilitarisation of outer space and the declaration of the deep sea-bed as a 'common heritage of mankind' was initially through the resolutions of the UN General Assembly. Africa was denuclearised also through a resolution of the Assembly which has generally been respected.

These and other practices of States in the preceding chapters show that an objective regime may be established by any internationally accepted method, provided it disposes of a territory or attaches a special status to a territory or a geographical area for an indefinite period with an intention to create an objective regime and other States accept or acquiesce in the terms of the regime established. Accordingly, the principles to be derived from this State practice is that an objective regime may be established by groups of States, including entire continents or large geographical regions, or by smaller groups of States or even individual States through a treaty, whether bilateral or multilateral, or a declaration adopted at the conclusion of an international conference or a resolution of the UN General Assembly or even by unilateral declarations provided other States acquiesce in the latter cases.

The intention of the States creating such regimes must be to create general obligations and rights for a region, territory or locality in the general interest. States

not involved in the creation of such a regime, who expressly or implicitly consent to the creation or to the application of an objective regime, are to be considered to have accepted it. A third State, which does not protest against or otherwise manifest its opposition to the regime within a reasonable period of time could be considered to have impliedly accepted the regime. In other words, objective regimes become valid against third States if any objection to that regime is not registered by them within a reasonable period of time, that absence of opposition would be considered as tacit consent.

To invoke such a regime against or on behalf of a third State a tacit consent of the terms in question would have to be established and such consent may be shown through a variety of means including recognition and acquiescence and even an affirmative vote in adopting a resolution not only by the UN General Assembly but also by other international conferences, e.g., the summit conferences of the Organisation of the African Unity[85] or Non-Aligned Movement. The doctrine of estoppel could also be invoked to debar the State voting for the resolution from asserting that it was not obliged to respect the regime created by the resolution. As Akehurst writes, "in a sense, any statement by a State gives rise to some degree of commitment, even though the commitment is usually political rather than legal".[86]

VII. Methods Applied for Creating Individual ZOP

As far as the method of creation of individual ZOP discussed in this thesis is concerned, this has been achieved through different methods. Nepal's ZOP was created through a unilateral declaration followed by the endorsement of other States. Given the practice of other permanently neutral States, this seems to be a legitimate method. The Tibetan proposal is also a unilateral proposal but it has not acquired legal force partly due to the absence of international support for the proposal and

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85 See Burkina Faso v. Mali, 80 ILR, p. 470 and Guinea-Bissau v. Senegal, 83 ILR, p.1 on the legal significance attached by the international tribunals to the OAU resolution concerning African frontiers.

86 M. Akehurst, 'Custom as a source of international law', 47 BYIL (1974-75), pp.1, 3.

partly due to the controversy surrounding the authority of the Dalai Lama to propose the demilitarisation of Tibet without the consent of Peking which has *de facto* control over the affairs of Tibet. The ZOPFAN proposal of the ASEAN States is based on a collective declaration which has not attracted any formal endorsement from other States.

However, if the proposal is intended to cover only the territory of the ASEAN countries[87] its validity does not, strictly speaking, depend on international recognition because as sovereign States the countries of the ASEAN are entitled to adopt a policy of their choice, provided that such a policy does not undermine any bilateral treaty obligations of the countries concerned or any rule of international law. A third State which neither formally recognises the ZOP nor registers its objection to the creation of such zones by other States could be considered to be under a duty to respect the zone by virtue of its acquiescence or its alleged duty to respect a lawful regime created by other sovereign States.[88]

With regard to the method of creation of maritime ZOP, they have been created through the resolutions of the UN General Assembly and the practice of States examined above shows that such resolutions are legitimate means of creating regimes which attach special character to territories of *res communis* character. The UN can even be a guarantor of these zones in accordance with Chapter VII of the Charter.[89] The Charter of the United Nations enjoins all members of the Organisation to

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87 The 1971 Kuala Lumpur declaration does not provide any clue as to the geographical delimitation of the Zone. It speaks of creating a ZOPFAN in Southeast Asia, but does not say whether this reference is to the whole region of Southeast Asia, including the territorial waters, the EEZ and the high seas areas of the region, or merely to the territory of the States of Southeast Asia.

88 The views expressed by Fitzmaurice on the effects of neutralization in describing the scope of his draft article 18 of the draft convention on the Law of Treaties seems worth noting. Referring to a situation where a State declares itself to be neutral, he argues that in such cases "it seems reasonable to postulate an international duty for all States to recognise and respect any status of neutrality validly created and not in contravention of the rights of any other States or of any relevant existing treaty obligations." YBILC, 1960, Vol.II, p.99. The same argument can be invoked in relation to the creation of a ZOP.

89 See for similar views of a UN *Ad Hoc* Group of Qualified Governmental Experts on the question of NWFZs: the UN Report on NWFZ.

maintain international peace and security, and to that end: to take effective collective measures for, *inter alia*, the prevention and removal of threats to the peace.[90]

The General Assembly resolutions establishing maritime ZOP could be regarded as collective measures designed to prevent or remove threats to peace as envisaged in Article 1(1) of the Charter. The general responsibilities of the UN, such as that relating to the prevention of threats to peace under Article 1(1), which are not specifically assigned to any particular organ by the Charter, can be fulfilled both by the General Assembly and the Security Council.[91] Moreover, the General Assembly is entitled to make recommendations on a wide range of subjects, including those relating to the maintenance of international peace and security which are not being considered or being dealt with by the Security Council. Article 14 of the Charter explicitly vests the General Assembly with a power to recommend any measures designed to promote friendly relations among nations.

From this stand-point it can be said that the Members of the UN are perfectly entitled to take measures, through the adoption of resolutions in the General Assembly, designed to prevent or remove threats to peace. Such measures fall within the purview of the Purposes of the UN to take "effective collective measures for the prevention and removal of threats to the peace" (emphasis added).[92] Of course, the Security Council has primary responsibility to maintain international peace and security. But that does not mean that the General Assembly is debarred from adopting resolutions designed to promote the principles and purposes of the UN; the Uniting for Peace resolution (Resolution 377 (V)) is an example.

Article 18(2) of the Charter of the UN requires two-thirds majority to take decisions of the General Assembly to recommend measures with respect to the maintenance of international peace and security. One can infer from this provision a *prima facie* presumption of the legality of such decisions. It is a fact that the General Assembly has asserted authority in adopting measures of operative design especially

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90 Article 1(1) of the Charter of the United Nations.

91 See for the UN practice, N.D. White, The United Nations and the Maintenance of International Peace and Security (1990).

92 Article 1(1) of the Charter.

in matters relating to peace-keeping. It has also taken the lead in disarmament efforts as well as laying down and clarifying the rules of behaviour among States.[93]

Except for the U.S. no other State has argued that the General Assembly has no power to create a ZOP.[94] Yet even the U.S. has no consistent policy on this issue. It is not a persistent objector to the establishment of ZOP by the General Assembly. The concept of an NWFZ is similar in many ways to the concept of a ZOP.

When the question of the establishment of a Latin American NWFZ was raised in the UN in the early 1960s the U.S. did not raise any objections to the idea of the establishment of NWFZs through the resolutions of the General Assembly nor did it state that the NWFZs could be established only under a treaty. The U.S. did not oppose the General Assembly resolution (Resolution 1652 (XIV)) on the denuclearisation of the African continent.[95] The emphasis was on the free will of the States of the region to establish such zones, but not on the method of their creation.[96]

Further, during the UN debate on security guarantees to non-nuclear-weapon States, the U.S. resisted efforts towards the conclusion of a treaty on the subject and maintained that a General Assembly resolution on the subject would have the same legal effect as a treaty. The U.S. even submitted a working paper[97] explaining its approach and containing an illustrative General Assembly resolution on the subject.[98]

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93 Examples of such resolutions are: resolution 2749 (XXV) of 17 December 1970 on the Declaration on the Deep Sea-Bed (which reserves the deep sea-bed for peaceful use), resolution 2734 (XXV) of 16 December 1970 on the Strengthening of International Security, resolution 1 (I) of 24 January 1946 on nuclear disarmament, resolution 1652 (XVI) of 24 December 1961 on the denuclearisation of Africa and resolution 1962 (XVIII) of 13 December 1963 on the demilitarisation of outer space.

94 The U.S. stated when voting against the IOZP and ZOPC declarations that the General Assembly does not have the power to establish maritime ZOP through its resolutions. See Chapter I and U.N. Doc. A/AC.199/SR.2 (5 July 1979), p.7.

95 This resolution was adopted by 55 to 0, with 44 abstentions.

96 The US pronounced certain criteria for accepting the validity of a NWFZ. They are: (i) the initiative must come from the States of the region, including all States in the region whose participation is deemed important; (ii) the creation of the zone should not disturb necessary security arrangements; (iii) the freedom of navigation must not be infringed; and (iv) provisions must be made for adequate verification. See for the criteria listed by U.S. Admiral Crowe in L.B. Sohn, 'International navigation: interests related to national security', in International Navigation: Rocks and Shoals Ahead? (Proceedings of the Law of the Sea Institute), edited by J.M. Van Dyke, L.M. Alexander and J.R. Morgan (1988), pp.307 ff; the Supplement to the Handbook, p.2.33, note 68. For similar views of the U.K. see U.N. Doc. A/10027/Add.1., p.91-93.

97 U.N.Doc.CD/27.

98 U.N.Doc.A/AC.206/5, 15 April 1981, p.11.

Similarly, the U.S. preferred a General Assembly resolution to a treaty during the debate in the UN in the early 1960s on the draft of what later became Resolution 1962 (XVIII) of 1963 on the declaration of principles governing the activities in Outer Space.[99]

An overwhelming majority of States saw fit to create Zones of Peace in the Indian Ocean and the South Atlantic through the resolutions of the General Assembly. All relevant resolutions of the General Assembly adopted since 1972 are entitled "Implementation of the Declaration of the Indian Ocean as a Zone of Peace" rather than the establishment of the IOZP. In the case of the South Atlantic ZOPC, all States excepting the U.S. voted for the resolution. Except for the U.S., no State raised any objection to the establishment of the ZOP through the adoption of a General Assembly resolution.[100] It is the aim of States to create a legal regime that is more important than the form of the instrument embodying the terms of the regime.

It should be made very clear here that it is neither claimed that the General Assembly resolutions have legally binding effects nor asserted that a unilateral declaration of a single State or a regime created by a group of States binds third States. What is argued here is that a General Assembly resolution adopted unanimously or by an overwhelming majority of States and declaring the maritime areas of *res communis* character as ZOP carry different legal weight from other

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99 The U.S. delegate stated that "A General Assembly resolution would be the most appropriate instrument for a declaration of general principles. Some delegations had argued that only an international agreement signed by governments would be legally binding. International agreements were not, however, the only sources of law. As stated in Article 38 of the Statute of the International Court of Justice, decisions of international tribunals and the growth of customary law as evidenced by State practice should also be taken into consideration. When a General Assembly resolution proclaimed principles of international law -as resolution 1721 (XVI) had done - and was adopted unanimously, it represented the law as generally accepted in the international community." U.N.Doc.A/AC.105/C.2/SR.20 (22 April 1963), pp.10-11, as quoted in B. Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?', 5 IJIL (1965), pp.34-35.

100 It is well known that both formal and informal, sometimes even protracted, consultations and negotiations take place in the working groups, committees and the plenary of the General Assembly before adopting resolutions on major issues of international concern. For instance, the records demonstrate that an extensive process of consultation took place among the Member States of the UN before adopting the IOZP declaration. Such consultations and the debates in the committees and plenary meetings of the General Assembly are not very different from the proceedings of an international conference organised to discuss a particular topic or to reach an agreement on a given issue.

resolutions of recommendatory character because they attach a special status to a territory or a geographical area in the general interest of the international community. The consent of the State or States having territorial competence over the territory is necessary for the creation of an objective regime relative to the territory. Since no single State or a group of States has any sovereign rights over the marine areas covered by the declarations on ZOP, the declarations cannot be regarded as imposing a territorial regime on any State; through the declarations the international community regulates the activities of States in the zone.

In the past the great Powers used to impose their will on other States through treaties supposedly concluded in the general interest. This was a kind of 'legislation' by the great Powers for other States. Today, especially after the greater awareness of the principle of sovereign equality and the inception of the UN, no set of great Powers could now legally legislate for others without the backing of the international community. The decision to destroy Iraq's weapons of mass destruction and the demilitarisation of the Iraqi territory along the border with Kuwait after the recent Gulf War can be cited as an example. This settlement is significant and different from previous settlements in the sense that the decision was not made by the major Powers or by the victorious Powers acting individually as in the past: this time it was decided collectively by the UN.

This settlement under the Security Council's permanent cease-fire resolution can be regarded as an objective regime established by the UN.[101] Although Iraq's consent was not secured before the adoption of the resolution, Iraq later agreed to the terms and conditions of the resolution. Even if Iraq had not consented to it the Council was empowered under Chapter VII of the Charter to take measures to secure Iraq's compliance with the resolution. Under this Chapter and Articles 2(5), 24 and 25 the Security Council has powers to take such measures designed to restore and maintain international peace and security. McNair rightly observes that

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101 Security Council Resolution 687 (1991).

> "It would appear that no society can become a real society unless it endows an organ with the power of binding all its members, and that the society of States is being gradually driven to develop this power by less direct methods. In other words, these instances of the attribution of an objective obligation to certain kinds of treaties represent the groping of the society of States in its effort to fill up this *lacuna*. Sooner or later, it may be, the political atmosphere will become such that it will be possible to generalise this power and place it in the hands of some organ. In the meantime, it is useful to call attention to particular instances of it wherever they occur in the belief that eventually something more systematic will emerge."[102]

Perhaps this is the path the UN is trying to take. The UN has been widely accepted "as the paramount world organisation, something more than *primus inter pares* in the UN system."[103] Indeed, as stated earlier, both the General Assembly and the Security Council have now and then asserted the nineteenth-century role of the great Powers[104] in 'legislating' for the international community through the adoption of a number of resolutions carrying legal weight of differing degrees. One type of such resolution is that which declares certain areas of the high seas as Zones of Peace because such resolutions apparently contain the elements of an objective regime; by establishing a ZOP States attach special status to the area covered by the zone as in the cases of neutralisation, demilitarisation and other types of international settlements.

If States wish to create such regimes under the General Assembly resolutions, they are entitled to do so. Thus, it could be argued in conclusion that the regimes created by resolutions of on ZOP might also produce objective effects, provided the resolutions embody the elements of an objective regime outlined in Chapter VI of this thesis, above. The substantive content - whether it declares or recommends - is significant, rather than is the title 'recommendation' of resolutions of the Assembly. Accordingly, the resolutions on ZOP are declarations rather than recommendations:

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102 McNair, Treaties, pp.270-71.

103 Sloan, Resolutions, p.126.

104 In fact, Douglas Hurd, the Foreign Secretary of the U.K., said recently that the UN has to gear itself up to take on an 'imperial role', usurping national sovereignty and taking over as controlling power when there is chaos in a country. He said: "When bits of Africa collapsed in chaos in the last century, colonial powers came in and there was the scramble for Africa. But that's not on; they're not going to do that again, and therefore it is only going to be the UN... It is putting UN blue on the map. It is an imperial role, but it's more a mandate". "Hurd urges UN to take 'imperial' role", in The Independent (London), 19 September 1992, p.1.

they declare the maritime zones as 'Zones of Peace' and prescribe rules for the maintenance of such zones.[105]

105 It is true that even the name or the title alone cannot change the nature of a resolution. See on the "Use of the Terms 'Declaration and Recommendation'", U.N.Doc.E/CN.4/L/610 of 2 April 1962, pp.1-2.

CONCLUSION

The conclusion to be drawn from the above discussion is that the concept of maritime ZOP is a synthesis of already existing and emerging principles of international law concerning the regulation of the seas and oceans. Through the IOZP and ZOPC Declarations of the UN General Assembly, States have brought into existence a new concept, the concept of ZOP, in international law. Through these declarations they have created regimes of *sui generis* character for the Indian Ocean and the South Atlantic chiefly on the basis of the principles of the Charter of the UN, especially the principle embodied in Article 2(4) and the right of self-defence; also, the law of the sea principles of 'due regard' and the use of the high seas for peaceful purposes.

These declarations of the General Assembly are in line with the internationally accepted trend towards the creation of similar regimes in other parts of the globe. There exists an adequate legal normative base in the present legal order of the seas and oceans that provides the legal base for these declarations of the UN. For instance, it is the view of States and publicists alike that non-peaceful activities are not permitted in the seas and oceans. Admittedly, the meaning and scope of the law of the sea principle of the use of the seas for peaceful purposes is a matter of acute controversy. But this controversy about the meaning of this principle does not mean that it is not *lex lata.* It is quite plausible to argue that this principle is *lex lata*; its precise meaning and its practical implications are another matter.

Therefore, while the concept of ZOP as such can be considered as *lex lata*, the methods prescribed for the realisation of an individual ZOP declaration or proposal may be regarded as *de lege ferenda* as they are still in the process of international negotiation and deliberation. In other words, not all provisions of the UN General Assembly Declarations on ZOP can be treated on an equal footing: one has to draw a distinction between the provisions concerning the declaration of a maritime zone, a

Zone of Peace and other provisions, which prescribe measures for the implementation of the Declarations.

Nevertheless, since the measures prescribed for the achievement of maritime ZOP seem broadly consistent with the principles of international law, they too appear eligible to enter into the body of international law. In this sense, the concept of maritime ZOP can be regarded as an emerging rule of international law.

The concept of maritime ZOP as it has been expressed in General Assembly declarations and in other resolutions of the UN and other international conferences is clear in many respects, while leaving some other practical aspects unclear and vague. However, the practice of States within and without of the UN system over the last two decades, especially in relation to the IOZP and ZOPC declarations, set out certain norms and standards that may generally be regarded as the attributes of a maritime ZOP.

Although the creation *de jure* of ZOP has not transformed *de facto* the maritime areas concerned into a 'Zone of Peace' as major maritime States have in general failed to refrain from the activities that are inconsistent with the declarations, the principles laid down in the declarations on the IOZP and ZOPC are regarded as valid by an overwhelming majority of States;[1] these declarations are regarded as proper and consistent with existing international law by most States.

All General Assembly resolutions adopted after the establishment of the maritime ZOP in the regions concerned and other efforts made in this direction speak of the implementation of the declarations on the zones rather than the establishment of such zones. The absence of consensus on the measures and methods for the implementation of these declarations does not mean that the validity of the declarations themselves is assailable.

Of course, it would be desirable to conclude agreements to implement the ZOP declarations in order to achieve the optimum conditions required for such

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1 For instance, the Political Declaration of the 1983 Summit Conference of the Non-Aligned Countries (the NAM consists of more than 108 States) states that the presence in the Zones of Peace of any military presence "constitute a flagrant violation" of the IOZP declaration. See in U.N.Doc.A/AC.159/L.55/Add.1.

implementation, including the political understanding between the major Powers. But that does not mean that in the absence of such agreements States are completely free to engage in military activities of their choice in the ZOP. The general principles relating to the ZOP apply even in the absence of such agreements.

Although the prime purpose of an individual maritime ZOP is to enhance the national interests of the State or States within the zone, the process has also been viewed as part of the process of fostering and strengthening through the progressive development of legal principles the objectives of international community of maintaining international peace and security. From this standpoint the concept of ZOP, like similar measures of neutralisation and demilitarisation, seems eligible to acquire an objective character having effects *erga omnes* as the territorial element is fundamental in attaching objective status to an international regime relating to international peace and security.

Because the UN Declarations on the Indian Ocean and the South Atlantic attach a special status to the territory they cover, i.e., the *res communis* areas of the maritime ZOP concerned, these declarations are, strictly speaking, no less significant than other international instruments creating similar regimes of objective character having effects *erga omnes*.[2] It is not implied that the General Assembly resolutions *per se* can produce legally binding effects. What is argued is that because of the consent of States implicit in the creation of such a territorial regime designed to change the fundamental character of the maritime zone concerned, the ZOP regime could be said to have acquired validity regardless of the recommendatory character of the resolutions.

The few developed States who have opposed the UN declarations on ZOP have tried to base their opposition on legal grounds, but, as discussed in the foregoing chapters, their arguments are not sustainable nor have they followed a consistent policy in this matter. Imposing on third States obligations affecting matters within

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2 The UN has tried to do through its Declarations on ZOP for the marine areas of ZOP what the contracting States (initially only 12 States) did for Antarctica under the Antarctic Treaty of 1959. In fact since a treaty creates rights and obligations only *inter partes*, there is no justification for attributing less weight to General Assembly resolutions than to treaties when it comes to ascertaining the implications of such instruments for third States.

their territorial jurisdiction is one point (which would generally be inconsistent with international law)[3] but creating dispositive regimes to regulate the activities in the areas of *res communis* character by a vast majority of States in accordance with the Charter of the UN and other rules of international law in the general interest is another (which seems permissible under narrowly defined conditions).

With respect to the concept of land ZOP, it also represents an innovative piece of statecraft designed to protect the interests of the States within the zone. While it draws upon the doctrines of demilitarisation, permanent neutrality, neutralisation and NWFZ, it is a new doctrine suitable to the conditions of smaller and weaker States, which have different political convictions and social and cultural values from those neutral States of the West that have developed the doctrine of permanent neutrality to further their national interests.

States and entities such as Nepal and Tibet, located at the strategic heart of Asia, have, as have the strategically located States of Europe, Switzerland and Austria, demonstrated their resolve to subject themselves to the rules of ZOP; rules more onerous than somewhat vague commitments assumed under the UN Charter. In return, they seek similar commitments from other States, in particular from their larger neighbours.

While this concept of ZOP is in conformity with the existing rules of international law, it is a distinct measure adopted in response to the peculiar problems of the States and territories concerned. The features of the concept of land ZOP could be said to be a blend of the Western concept of permanent neutrality with the Asian version of neutrality based on the modern concept of non-alignment, the principles of Panch Shila and the Bandung Declaration. The significance of the concept of land ZOP lies here.

It is widely accepted that every sovereign State is entitled to declare itself a ZOP. The endorsement of other States gives this act legal force. Nepal and the States members of the ASEAN have thus sought international recognition of their proposals

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3 Cf. Article 34 of the 1969 Vienna Convention on the Law of Treaties. This article embodies the principle expressed in the maxim *pacta tertiis nec nocent nec prosunt*.

without going through the process of international negotiation. An overwhelming majority of States has accepted the legality and usefulness of the concept of land ZOP through unilateral endorsement of Nepal's proposal. For instance, during the AALCC deliberation on the topic of the concept of ZOP in international law, an overwhelming majority of the delegations generally endorsed the relevance and importance of the concept of a ZOP and stated that it conformed to basic principles of international law.[4]

Thus, the concept of ZOP could be considered as an instrument of peacekeeping, complementary to the Charter of the United Nations. The containment and management of regional conflicts and tensions could best be achieved by developing and strengthening regional mechanisms such as the ZOP. This concept could also be used as a means of preventive diplomacy, designed to enhance the security of smaller and weaker States, which have become or threaten to become focal points of the contest for control or influence between regional and major Powers.

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4 AALCC's Report 1988, pp.191-2.

APPENDIX I

The UN General Assembly Declaration on the Indian Ocean as a Zone of Peace (Resolution 2832 (XXVI) of 16 December 1971)

The General Assembly,

Conscious of the determination of the peoples of the littoral and hinterland States of the Indian Ocean to preserve their independence, sovereignty and territorial integrity, and to resolve their political, economic and social problems under conditions of peace and tranquillity,

Recalling the Declaration of the Third Conference of Heads of State or Government of the Non-Aligned Countries, held at Lusaka from 8 to 10 September 1970, calling upon all States to consider and respect the Indian Ocean as a Zone of Peace from which great Power rivalries and competition as well as bases conceived in the context of such rivalries and competition should be excluded, and declaring that the area should also be free of nuclear weapons,

Convinced of the desirability of ensuring the maintenance of such conditions in the Indian Ocean area by means other than military alliances, as such alliances entail financial and other obligations that call for the diversion of the limited resources of the States of the area from the more compelling and productive task of economic and social reconstruction and could further involve them in the rivalries of power blocs in a manner prejudicial to their independence and freedom of action, thereby increasing international tensions,

Concerned at recent developments that portend the extension of the arms race into the Indian Ocean area, thereby posing a serious threat to the maintenance of such conditions in the area,

Convinced that the establishment of a Zone of Peace in the Indian Ocean would contribute towards arresting such developments, relaxing international tensions and strengthening international peace and security,

Convinced further that the establishment of a Zone of Peace in an extensive geographical area in one region could have a beneficial influence on the establishment of permanent universal peace based on equal rights and justice for all, in accordance with the purposes and principles of the Charter of the United Nations,

1. Solemnly declares that the Indian Ocean, within limits to be determined, together with the airspace above and the ocean floor subjacent thereto, is hereby designated for all time as a Zone of Peace;

2. Calls upon the great Powers, in conformity with this Declaration, to enter into immediate consultations with the littoral States of the Indian Ocean with a view to:

(a) Halting the further escalation and expansion of their military presence in the Indian Ocean;

(b) Eliminating from the Indian Ocean all bases, military installations and logistical supply facilities, the disposition of nuclear weapons and weapons of mass destruction and any manifestation of great Power military presence in the Indian Ocean conceived in the context of great Power rivalry;

3. Calls upon the littoral and hinterland States of the Indian Ocean, the permanent members of the Security Council and other major maritime users of the Indian Ocean, in pursuit of the objective of establishing a system of universal collective security without military alliances and strengthening international security through regional and other co-operation, to enter into consultations with a view to the implementation of this Declaration and such action as may be necessary to ensure that:

(a) Warships and military aircraft may not use the Indian Ocean for any threat or use of force against the sovereignty and, territorial integrity and independence of any littoral or hinterland State of the Indian ocean in contravention of the purposes and principles of the Charter of the United Nations;

(b) Subject to the foregoing and to the norms and principles of international law, the right to free and unimpeded use of the zone by the vessels of all nations is unaffected;

(c) Appropriate arrangements are made to give effect to any international agreement that may ultimately be reached for the maintenance of the Indian Ocean as a Zone of Peace;

4. Requests the Secretary-General to report to the General Assembly at its twenty-seventh session on the progress that has been made with regard to the implementation of this Declaration;

5. Decides to include in the provisional agenda of its twenty-seventh session an item entitled "Declaration of the Indian Ocean as a Zone of Peace."

APPENDIX II

The UN General Assembly Declaration on the South Atlantic as a Zone of Peace and Co-operation (Resolution 41/11 of 27 October 1986)

The General Assembly,

Conscious of the determination of the peoples of the States of the South Atlantic region to preserve their independence, sovereignty and territorial integrity and to develop their relations under conditions of peace and liberty,

Convinced of the importance of promoting peace and co-operation in the South Atlantic for the benefit of all mankind and, in particular, of the peoples of the region,

Convinced further of the need to preserve the region from measures of militarisation, the arms race, the presence of foreign military bases and, above all, nuclear weapons,

Recognising the special interest and responsibility of the States of the region to promote regional co-operation for economic development and peace,

Fully conscious that the independence of Namibia and the elimination of the racist regime of apartheid are conditions essential to guaranteeing the peace and security of the South Atlantic,

Recalling the principles and norms of international law applicable to ocean space, in particular the principle of the peaceful uses of the oceans,

Convinced that the establishment of a Zone of Peace and Co-operation in the South Atlantic would contribute significantly to the strengthening of international peace and security and to promoting the principles and purposes of the United Nations,

1. Solemnly declares the Atlantic Ocean, in the region situated between Africa and South America, a "Zone of Peace and Co-operation of the South Atlantic";

2. Calls upon all States of the zone of the South Atlantic to promote further regional co-operation, *inter alia*, for social and economic

development, the protection of the environment, the conservation of living resources and peace and security of the whole region;

3. Calls upon all States of all other regions, in particular the militarily significant States, scrupulously to respect the region of the South Atlantic as a zone of peace and co-operation, especially through the reduction and eventual elimination of their military presence there, the non-introduction of nuclear weapons or other weapons of mass destruction and the non-extension into the region of rivalries and conflicts that are foreign to it;

4. Calls upon all States of the region and of all other regions to co-operate in the elimination of all sources of tension in the zone, to respect national unity, sovereignty, political independence and territorial integrity of every State therein, to refrain from the threat or use of force, and to observe strictly the principle that the territory of a State shall not be the subject of military occupation resulting from the use of force in violation of the Charter of the United Nations, as well as the principle that the acquisition of territories by force is inadmissible;

5. Reaffirms that the elimination of *apartheid* and the attainment of self-determination and independence by the people of Namibia, as well as the cessation of all acts of aggression and subversion against States in the zone, are essential for peace and security in the South Atlantic region, and urges the implementation of all United Nations resolutions pertaining to colonialism, racism and *apartheid*;

6. Requests the Secretary-General to submit to the General Assembly at its forty-second session a report on the situation in the South Atlantic and the implementation of the present declaration, taking into account the views expressed by Member States;

7. Decides to include in the provisional agenda of its forty-second session the item entitled "Zone of Peace and Co-operation of the South Atlantic".

APPENDIX III

Declaration on Peace, Freedom, and Neutrality of
Foreign Ministers of ASEAN Countries of
26 November 1971
Kuala Lumpur

We, the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore and the special envoy of the National Executive Council of Thailand,

Firmly believing in the merits of co-operation which has drawn our countries to co-operate together in the economic, social and cultural field in the Association of Southeast Asian Nations;

Desirous of bringing about relaxation of international tension and of achieving a lasting peace in Southeast Asia;

Inspired by the worthy aims and objectives of the United Nations, in particular by the principles of respect for the sovereignty and territorial integrity of all States, abstention from the threat or use of force, peaceful settlement of international disputes, equal rights and self-determination and non-interference in the internal affairs of States;

Believing in the continuing validity of the "Declaration of World Peace and Co-operation" of the Bandung Conference of 1955 which among others enunciates the principles by which States may co-exist peacefully;

Mindful of the significant trend towards establishing nuclear-free-zones as in the "treaty for the Prohibition of Nuclear Weapons in Latin America" and the Lusaka Declaration proclaiming Africa a nuclear-free-zone, for the purpose of promoting world peace and security by reducing the areas of international conflict and of international tensions;

Recognising the right of every State, large or small, to lead its national existence free from outside interference in its internal affairs as this interference will adversely affect its freedom, independence and integrity;

Being dedicated to the maintenance of peace, freedom and independence unimpaired;

Believing at the same time, in the need to meet present challenges and new developments by co-operating with all peace and freedom-loving nations, both within and outside the region and in the furtherance of world peace, stability and harmony;

Reiterating their commitment, in the Bangkok Declaration that established ASEAN in 1967, to the principle that the countries of Southeast Asia share primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identity in accordance with the ideals and aspirations of their people;

Being agreed that the neutralisation of Southeast Asia is a desirable objective and that we should explore ways and means of bringing about its realisation;

Convinced that the time is propitious for joint action to give effective expression to deeply felt desire of the peoples of Southeast Asia to ensure the conditions of peace and stability indispensable to their independence and their economic and social well-being:

Do hereby declare:

1. That Indonesia, Malaysia, the Philippines, Singapore and Thailand are determined to exert efforts to secure the recognition of and respect for the neutrality of Southeast Asia as a Zone of Peace, Freedom and Neutrality, free from any form or manner of interference by outside Powers;

2. That the Southeast Asian countries shall by concerted efforts broaden their mutual co-operation which would contribute to their strength and solidarity as well as the closer relationship among the countries of the region.

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