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The Obligations of the Nuclear-Weapon States in International Waters Included in Nuclear-Weapon-Free Zones

Las obligaciones de los Estados poseedores de armas nucleares en las aguas internacionales incluidas en zonas libres de armas nucleares

Les obligations des états dotes d'armes nucleaires dans les eaux internationales incluses dans les zones exemptes d'armes nucleaires

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ABSTRACT: The effectiveness of nuclear-weapon-free zones cannot be understood without considering the law of the sea. Some nuclear-weapon-free zones include international waters in their areas of application, which provoked some nuclear-weapon States that are parties to protocols to such treaties to issue reservations on the geographical scope of such zones. This article argues that the nuclear-weapon-free zones that include exclusive economic zones and high seas in their areas of application were established in accordance with the law of the sea and, therefore, there is no reason why the nuclear-weapon States should not review their reservations in this respect.
Key words: Nuclear-weapon-free zones, nuclear weapon States, law of the sea, nuclear non-proliferation, high seas, exclusive economic zone, territorial sea, reservations.

RESUMEN: La efectividad de las zonas libres de armas nucleares no puede ser comprendida sin considerar el derecho del mar. Algunas zonas libres de armas nucleares incluyen aguas internacionales en sus áreas de aplicación, lo que provocó que algunos Estados poseedores de armas nucleares que son partes en los protocolos anexos a dichos tratados emitieran reservas sobre el ámbito geográfico de dichas zonas. Este artículo argumenta que las zonas libres de armas nucleares que incluyen zonas económicas exclusivas y alta mar en sus áreas de aplicación fueron establecidas de conformidad con el derecho del mar y, por lo tanto, no existe razón para que los Estados poseedores de armas nucleares no revisen sus reservas a este respecto.
Palabras clave: zonas libres de armas nucleares, estados poseedores de armas nucleares, derecho del mar, no proliferación nuclear, alta mar, zona económica exclusiva, reservas.

RÉSUMÉ: L'efficacité des zones exemptes d'armes nucléaires ne peut être comprise sans tenir compte du droit de la mer. Certaines zones exemptes d'armes nucléaires incluent les eaux internationales dans leurs zones d'application, ce qui a poussé certains États dotés d'armes nucléaires parties à des protocoles à ces traités à émettre des réserves sur la portée géographique de ces zones. Cet article soutient que les zones exemptes d'armes nucléaires qui incluent des zones économiques exclusives et la haute mer dans leurs zones d'application ont été établies conformément au droit de la mer et, par conséquent, il n'y a aucune raison pour que les États dotés d'armes nucléaires ne révisent pas leurs réserves dans ce domaine.
Mots-clés: zones exemptes d'armes nucléaires, états dotés d'armes nucléaires, droit de la mer, non-prolifération nucléaire, haute mer, zone économique exclusive, mer territoriale, réserves.

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I. Introduction

The Protocols annexed to the treaties establishing nuclear-weapon-free zones (NWFZs) are indispensable for maintaining a region free of nuclear weapons. They have the purpose of ensuring that the nuclear-weapon States (NWS) provide security assurances against the use or threat of use of nuclear weapons and preventing the presence of such weapons within the zones of application defined in each treaty.

The observance of the obligations included in NWFZs and their protocols requires a clear identification of the geographical space to which they apply.[1] These treaties identify such spaces as "zone[s] of application" or "zone[s]" and outline them in geographical coordinates.

The zones of application of the NWFZs in Latin America and the Caribbean (established by the Treaty of Tlatelolco),[2] South Pacific (Treaty of Rarotonga),[3] and Southeast Asia (Treaty of Bangkok)[4] are not limited to the sum of the national territories of their respective States parties. Rather, they go beyond by including areas defined in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[5] as "exclusive economic zone" (EEZ) and "high seas", both of which are not part of the national territory of States. Leaving aside the special status of Antarctica in international law, the zone of application of the Antarctic Treaty also comprises high seas.

Upon signing and/or ratifying the respective protocols to NWFZ treaties, some NWS issued reservations in which they affirm *inter alia* not to recognize the zones of application that go beyond the national territories of NWFZs parties. They argue that such zones were not demarcated in ac-

[1] OPANAL Secretariat, "Contribution of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL) to the report of the Secretary-General on oceans and the law of the sea, pursuant to United Nations General Assembly resolution 72/73 of 5 December 2017", Mexico, OPANAL, Inf.14/2018, 31 May 2018, p. 4.

[2] Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (amended), 1967, Mexico, United Nations, Treaty Series, vol. 634, no. 9068.

[3] South Pacific Nuclear Free Zone Treaty, 1985, Rarotonga, United Nations, Treaty Series, vol. 1445, no. 24592.

[4] Treaty on the Southeast Asia Nuclear Weapon-Free Zone (with annex), 1995, Bangkok, United Nations, Treaty Series, vol. 1981, no. 33873, pp. 129-152.

[5] United Nations Convention on the Law of the Sea (UNCLOS), 1982, Montego Bay, United Nations, Treaty Series, vol. 1833, no. 31363.

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cordance with international law. Additionally, the NWS present divergent interpretations on the right of parties to NWFZs to grant or deny the transit of foreign ships and aircraft carrying nuclear weapons through the zones of application; these stands can affect the effectiveness of NWFZs.

In response, States parties to NWFZs affirm that such zones of application that include EEZs or high seas are consistent with the law of the sea, and, therefore, they assert that the obligations of the NWS apply to such extended areas of the sea.

Much has been published regarding the history and relevance of NWFZs for the international regime of disarmament and non-proliferation of nuclear weapons.[6] Less has been discussed, however, on the alleged conflict of such zones with other fields of international law, including the law of the sea. This paper presents an argument supporting the claim that there is no contradiction between UNCLOS and the NWFZ treaties that include EEZs and/or high seas in their zones of application.

A legal approach will be presented in this article, offering an interpretation of UNCLOS, NWFZ treaties, the protocols to such instruments, and reservations made by some NWS. For that purpose, firstly, this document addresses the general concept and main provisions of NWFZ treaties and their protocols. A following section describes the rationale and legal nature of the zones of application of the NWFZs that include EEZs and/or high seas, namely, the Antarctic Treaty, the Treaty of Tlatelolco, the Treaty of Rarotonga, and the Treaty of Bangkok. A third section will briefly address the legal nature and breadth of the maritime areas described in UNCLOS to consider whether the zones of application demarcated in the NWFZs are in accordance with the law of the sea. A further segment will analyze three fundamental issues: (1) the position by NWS regarding the zones of application of NWFZs that go beyond the territorial sea of the States parties and the response of regional States; (2) divergent views among NWS concerning the transit of foreign ships and aircraft carrying nuclear weapons through the zones, and (3) implications for a subsequent zone free of nuclear weapons and other weapons of mass destruction in the Middle East. Finally, this document will present some conclusions and recommendations for NWFZs and NWS.

[6] Macedo Soares, Luiz Filipe (ed.), *A world free of nuclear weapons: Is it possible? Is it desirable? How could it be achieved?*, Mexico, OPANAL, 2017 and Gasparini Alves, Pericles and Cipollone, Daiana (eds.), *Nuclear-Weapon-Free Zones in the 21st Century*, Geneva, UNIDIR, 1997.

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II. Concept and Main Provisions of NWFZS

The United Nations General Assembly defines a NWFZ as a legally binding instrument that should include the "statute of total absence of nuclear weapons to which the zone shall be subject, included the procedure for the delimitation of the zone" and "an international system of verification and control" to guarantee compliance with the pertaining obligations.[7] In other words, a NWFZ represents a geographical space in which nuclear weapons are prohibited through a legally binding commitment.

The General Assembly also identifies the obligations of the NWS towards NWFZs and concerning the regional States parties. These are (1) to respect the statute of total absence of nuclear weapons defined in the respective treaty, (2) to refrain from contributing to the performance in the zone of acts involving a violation of the instrument, and (3) to refrain from using or threatening to use nuclear weapons against the parties to the zone.[8] These provisions are not political declarations, but legally binding obligations that the NWS undertake when ratifying the protocols annexed to NWFZ treaties.

Since the protocols and NWFZ treaties encompass the legal attributes of every zone, they refer to the specific geographical areas to which the pertinent obligations apply. In other words, the commitments undertaken by regional States parties and NWS parties to such protocols shall apply to the respective zone of application. The next section seeks to briefly describe the breadth and legal attributes of the zones of application of NWFZs that include EEZs and/or high seas.

III. The Extension of the Zones of Application of NWFZs

Defining the geographical limits of a NWFZ is fundamental for every region interested in establishing such a zone. All the NWFZ treaties define a

[7] United Nations General Assembly, "Comprehensive study of the question of nuclear-weapon-free zones in all its aspects", New York, UN, Resolution 3472 (XXX) B, section I (Definition of the concept of a nuclear-weapon-free zone), 11 December 1975, p. 24.

[8] *Idem*.

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geographical space with precise coordinates in which their respective obligations apply. In this regard, a brief portrayal of the legal nature of the zones of application defined in the Antarctic, Tlatelolco, Rarotonga, and Bangkok treaties will be presented.

1. *Antarctic Treaty*

The 1959 Antarctic Treaty differs from the rest of the NWFZs by not establishing a denuclearized zone in a densely populated area. It was negotiated to ensure the use of Antartica for "peaceful purposes only"[9] and thus designated the continent as a demilitarized zone which, by implication, renders the region a NWFZ.[10] For the purposes of this paper, the Antarctic Treaty is relevant considering due to the breadth of its zone of application.

Under article VI of the Antarctic Treaty, the prohibition of deployment of nuclear weapons, and any nuclear explosion,[11] apply "to the area south of 60° South Latitude, including all ice shelves". While this means that such obligations apply in the adjacent high seas, article VI also adds that "nothing in the present 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 the high seas within that area." In other words, by including high seas in its zone, the Antarctic Treaty does not distort the legal nature of that ocean space.

By recognizing that no provision affects the rights of any State concerning the high seas, the Treaty makes two points. Firstly, the parties do not claim sovereignty over the high seas within the zone of application; and secondly, the Antarctic Treaty does not prevent the States to exercise their rights related to the freedom of the seas.

No State party has ever issued any reservation raising any kind of controversy between the Antarctic Treaty and the law of the sea. Therefore, it can be inferred that the States parties to the Treaty, including the five NWS,

[9] Article 1osibueno, mcuhas. of the Antarctic Treaty, 1959, Washington D.C., United Nations, Treaty Series vol. 402, no. 5778.

[10] Philip Jr., P. Robert, "The South Pacific Nuclear-Weapon-Free-Zone, the law of the sea and the ANZUS alliance: an exploration of conflicts, a step toward world peace", *California Western International Law Journal*, San Diego, vol. 16, num. 1, 1986, pp. 138-177.

[11] Articles I and V of the Antarctic Treaty.

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consider that the zone of application of the Antarctic Treaty is consistent with the customary international norm regarding the freedom of the high seas and, thus, is compatible with UNCLOS.

2. *Treaty of Tlatelolco*

Being the first NWFZ established in a densely populated region, the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) distinguishes the concepts of "territory" and "zone of application". Article 3 establishes that "territory" shall include "the territorial sea, air space and any other space over which the State exercises sovereignty in accordance with its own legislation". In contrast, article 4 provides that the zone of application of the Treaty "is the whole of the territories" for which is in force and that, upon the fulfillment of the requirements of article 29 (1),[12] the zone shall also include high seas adjacent to the territories of the region. This was made through precise geographical coordinates defining a zone of application much greater than the sum of the territories of the parties. It was in 2002, when Cuba ratified the Treaty, that this extended zone of application became effective.[13] The zone of application is regionally contiguous with the zone established by the Antarctic Treaty,[14] and with the South Pacific NWFZ; additionally, its eastern limit reaches vast spaces of the Atlantic Ocean.

Article 1 of the Treaty of Tlatelolco obliges the States parties to prohibit and prevent "in their respective territories" the testing, use, manufacture, production, and acquisition of nuclear weapons. In other words, the parties shall comply with such obligations in their national territories, including "the territorial sea, air space and any other space" over which they exercise

[12] (1) The ratification of the Treaty of Tlatelolco by all regional States; (2) ratification of Protocol I by all extra-regional States having *de jure* or *de facto* international responsibility for territories situated in the zone of application; (3) ratification of Protocol II by the NWS; and (4) conclusion of nuclear safeguards agreements with the International Atomic Energy Agency by all States parties to the Treaty.

[13] OPANAL Secretariat, "Status of the Treaty of Tlatelolco", Mexico, OPANAL, 2022, available at: *http://www.opanal.org/en/status-of-the-treaty-of-tlatelolco/*.

[14] United Nations General Assembly, "Study on the naval arms race. Report of the Secretary-General", New York, UN, A/40/535, para. 240 (b), 17 September 1985, p. 66.

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sovereignty as defined in article 3. The parties also undertake to refrain from participating, outside the zone, in any activity prohibited by the Treaty.[15]

For its part, the territories of extra-regional States "which lie within the limits of the geographical zone established in that Treaty" are the subject matter of Additional Protocol I to the Treaty of Tlatelolco. The parties to Protocol I undertake to enforce the prohibitions defined in article 1 of the Treaty in the territories within the zone of application for which they are *de jure* or *de facto* internationally responsible. In this case, the zone of application serves to delimitate which such territories are.[16] Regarding Additional Protocol II, the NWS undertake to respect the statute of denuclearization "as defined, delimited and set forth in the Treaty" in all its express aims and provisions. Moreover, article 2 of Protocol II contains the obligation of the NWS not to contribute to the violation of article 1 of the Treaty; this provision applies in the entire zone of application defined in article 4 (2). This means that the five NWS, all of them parties to Protocol II, are obliged not to test, use, storage, install, or deploy nuclear weapons in neither the national territories of regional States parties nor the EEZs and high seas included in the zone of application of the Treaty of Tlatelolco.

The Caribbean and Latin American States outlined the zone of application of the Treaty with full knowledge that it extends beyond the area under their sovereignty or jurisdiction. However, the breadth of the zone of application was not established in such a way by the ambition of the regional states.[17] In other words, it does not constitute a declaration or claim of sovereignty or jurisdiction over the high seas areas which lie within said zone.[18] In this regard, it is important to consider some reasons why the Treaty of Tlatelolco distinguishes "territory" from "zone of application", a feature that was also adopted in subsequent NWFZ treaties.

[15] Article 1 (2) of the Treaty of Tlatelolco.

[16] These are the territories for which France, the Netherlands, United Kingdom, and the United States are international responsible for within the limits of the zone. The four countries have ratified Additional Protocol I to the Tlatelolco Treaty. See: OPANAL Secretariat, "Additional Protocols", Mexico, OPANAL, 2022, available at: *https://www.opanal.org/en/additional-protocols/*.

[17] OPANAL Secretariat, "Contribution of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean – OPANAL to the second part of the report of the United Nations Secretary-General on oceans and the law of the sea, pursuant to General Assembly resolution 71/257", Mexico, OPANAL, Inf.11/2017, 7 June 2017, p. 2.

[18] *Ibidem,* p. 3.

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When the Treaty of Tlatelolco was negotiated (1964-1967), a consensus on the breadth of the territorial sea of the coastal States was far from being reached by the international community. There was not either a unified position between the regional States about the matter. For instance, Chile, Ecuador, and Peru had claimed a territorial sea of 200 nautical miles;[19] other States in contrast, including Mexico, had claimed a less ambitious range for their territorial sea.[20] Consequently, the Treaty of Tlatelolco could not have limited itself to apply only to the sum of the national territories of the regional States since there was no international norm or agreement regarding the territorial sea limits. In other words, there was no legal basis to define the geographical boundaries of the "territory" of each of the parties. If the Treaty had established a zone of application limited to the sum of each "territory" of the States parties, including territorial seas, that would have constituted a legal proclamation on the breadth of an ocean space for which there was no international norm. For that reason, the States decided to expand the zone of application and include high seas.

Furthermore, the regional States had the interest to protect the seas adjacent to their territories from the presence of nuclear weapons. For instance, during the negotiation of the Treaty of Tlatelolco, all participating States were already concerned about the nuclear tests in the South Pacific that could "endanger the health of the Latin American peoples or damage their maritime riches and other natural resources".[21] In the amidst of the negotiation of the Treaty of Tlatelolco (1966), the regional States made public this alarm through a joint declaration that was reiterated during subsequent decades.[22]

Other legal precedents also explain why the negotiators of the Treaty of Tlatelolco defined such a zone of application. Among them is the 1947 In-

[19] Castañeda y Álvarez de la Rosa, Jorge, "El concepto del mar patrimonial en el derecho internacional", *Obras completas*, Mexico, SRE-Colmex, 1995, vol. II: Derecho del mar, p. 39.

[20] López-Bassols, Hermilo, *Derecho internacional público y jurisprudencia internacional,* Mexico, Porrúa, 2014, p. 434.

[21] Comisión Preparatoria para la Desnuclearización de la América Latina (COPREDAL), "Resolución 17. Llamado a las potencias nucleares", Mexico City, OPANAL, COPREDAL/Res.17, 4 May 1966.

[22] OPANAL General Conference, "Urgente necesidad de cesar todos los ensayos de armas nucleares", Mexico, OPANAL, CG/RES.39, 10 September 10 1971.

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ter-American Treaty of Reciprocal Assistance (TIAR),[23] which defines in its article 4 a maritime security area that includes high seas. Even though TIAR constitutes a military alliance, and, in contrast, Tlatelolco is rather a collective effort to prevent the arms race in Latin American and the Caribbean,[24] the zones of application in both treaties are similar by including high seas.

The legal nature of the zone of application defined in TIAR does not mean, in any way, a claim of sovereignty over the EEZ or high seas included in it.[25] This is also the case of the Treaty of Tlatelolco; its delimitation is not in contradiction with the law of the sea since does not affect the right of innocent passage over the territorial sea or the freedom of the high seas.[26] That is why the Treaty of Tlatelolco does not prohibit the transit of nuclear weapons.[27]

3. *Treaty of Rarotonga*

The 1985 Treaty of Rarotonga defines the "South Pacific Nuclear Free Zone" as the area described in its Annex 1, which is a zone of application

[23] OPANAL Secretariat, "Contribution of the Agency… [Inf.14/2018]", *cit.*, p. 4.

[24] United Nations General Assembly, "Study on the naval arms race…", *cit.*, p. 66.

[25] OPANAL Secretariat, "Contribution of the Agency… [Inf.14/2018]", *cit.*, p. 4.

[26] *Ibidem,* p. 5.

[27] In the Final Act of the IV Session of the Preparatory Commission for the Denuclearization of Latin America (COPREDAL), the negotiating body of the Treaty of Tlatelolco, the question on the transit of nuclear weapons through the zone of application of the instrument was explained as follows: "The Commission deemed it unnecessary to include the term 'transport' in article 1, concerning "Obligations", for the following reasons: 1. If the carrier is one of the Contracting Parties, transport is covered by the prohibitions expressly laid down in the remaining provisions of article 1 and there is no need to mention it expressly, since the article prohibits 'any form of possession of any nuclear weapon, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way'. 2. If the carrier is a State not a Party to the Treaty, transport is identical with "transit" which, in the absence of any provision in the Treaty, must be understood to be governed by the principles and rules of international law; according to these principles and rules it is for the territorial State, in the free exercise of its sovereignty, to grant or deny permission for such transit in each individual case, upon application by the State interested in effecting the transit, unless some other arrangements has been reached in a Treaty between such States". See Final Act in: United Nations General Assembly, "Letter dated 20 February 1967 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General", New York, UN, A/6663, 23 February 1967, available at: *https://undocs.org/A/6663*.

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that includes high seas. Additionally, it defines "territory" as "internal waters, territorial sea and archipelagic waters, the seabed and subsoil beneath, the land territory and the airspace above them", meaning the sovereign territory of the regional States.

The zone of application of Rarotonga stretches in the west from the west coast of Australia to the boundary of Tlatelolco's zone of application in the east.[28] It thus extends approximately 130 degrees of longitude, from 115°E to 115°W. It stretches from the Equator (with small bumps into the northern hemisphere to incorporate the EEZs of Papua New Guinea, Kiribati, and Nauru), to 60° south, the boundary of the zone of application of the Antarctic Treaty.[29] Therefore, the zone encompasses national territories of the parties, their corresponding EEZs, and high seas. This makes it the largest NWFZ on the planet, covering populated regions as well as extraterritorial ocean space.[30]

Article 2 provides that "[e]xcept where otherwise specified, this Treaty and its Protocols shall apply to territory within the South Pacific Nuclear Free Zone". This can be interpreted in the sense that the obligations of States parties to the Treaty and to its protocols only apply to the "territory" defined in article 1 (internal waters, territorial sea, and archipelagic waters, the seabed and subsoil beneath, the land territory and the airspace above them). That interpretation might explain why no NWS issued any reservation regarding the breadth of the zone of application defined in the Treaty of Rarotonga. On the other hand, the words "[e]xcept where otherwise specified" suggests that there are some provisions of the Treaty that apply in the entire zone.

The obligations of the regional States that apply beyond their territories are the renunciation of nuclear explosive devices[31] and the prevention of dumping of radioactive wastes.[32] Besides, the obligations on peaceful nuclear activities,[33] prevention of testing of nuclear explosive devices[34] –in so

[28] Philip Jr., P. Robert, *op. cit.*, p. 141.

[29] Fyfe, Nigel and Beeby, Christopher, "The South Pacific Nuclear Free Zone Treaty", *Victoria University of Wellington Law Review*, Wellington, num. 5, 1987, p. 33-51.

[30] Philip Jr., P. Robert, *op. cit.*, p. 157.

[31] Article 3 of the Treaty of Rarotonga.

[32] *Ibidem*, Article 7.

[33] *Ibidem*, Article 4.

[34] *Ibidem*, Article 6.

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far as it relates to the non-facilitation of testing– are globally applicable as they are not specified to pertain to parties only within the zone or the territory. For its part, Protocol 3 establishes that the NWS parties undertake not to test any nuclear explosive device "anywhere within the South Pacific Nuclear Free Zone",[35] including the high seas.

Moreover, article 2 of the Treaty provides that nothing in the 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." Unlike the Treaty of Tlatelolco, which implicitly refers to such rights, the Rarotonga Treaty mentions this norm codified in article 87 of UNCLOS. This will be also the case with subsequent NWFZs.

4. *Treaty of Bangkok*

Article 1 of the 1995 Treaty of Bangkok defines "Southeast Asia Nuclear Weapon-Free Zone" as the area comprising the territories of all States in Southeast Asia, "and their respective continental shelves and Exclusive Economic Zones (EEZ)". The same article defines "territory" as "the land territory, internal waters, territorial sea, archipelagic waters, the sea-bed and the subsoil thereof and the airspace above them". As previously affirmed, the distinction between the zone of application of a NWFZ and the territory of the States is essential to demarcate the respective commitments and rights of both the parties to the treaties and the parties to the protocols.

Article 2 establishes that the Treaty shall apply to "the territories, continental shelves, and EEZ of the States Parties within the Zone in which this Treaty is in force". In other words, apart from the sovereign territories of regional States, the Treaty of Bangkok applies beyond the territorial sea of the parties. Article 2 (2) establishes that nothing shall prejudice the rights by any State under UNCLOS, "in particular with regard to freedom of the high seas, rights of innocent passage, archipelagic sea lanes passage or transit passage of ships and aircraft, and consistent with the Charter of the United Nations". The Bangkok Treaty is the only NWFZ that expressly mentions UNCLOS, which was adopted 13 years before the Treaty.

[35] *Ibidem*, Article 1.

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Under article 3, each State party undertakes not to, anywhere inside or outside the Zone, to "develop, manufacture or otherwise acquire, possess or have control over nuclear weapons". Additionally, the parties are obliged not to "station or transport nuclear weapons by any means; or test or use nuclear weapons". Each State party also undertakes not to allow, in its territory, any other State to carry out such banned activities. Moreover, dumping at sea anywhere within the zone any radioactive material or wastes is prohibited by the Treaty.

Article 7 provides that each State party "on being notified, may 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 through its territorial sea or archipelagic waters and overflight of foreign aircraft above those waters in a manner not governed by the rights of innocent passage, archipelagic sea lanes passage or transit passage". This provision confirms that the transport of nuclear weapons through the territory of the parties and EEZs is not prohibited by the Treaty. Certainly, as in the case with the rest of NWFZs, acknowledging the freedom of the seas codified in UNCLOS does not mean that the Southeast Asian States are willing to grant such transit of nuclear weapons.

Among other things, the Bangkok Treaty differs from the rest of NWFZs by containing only one protocol, which is open for signature and ratification by the five NWS. Under article 1 of this Protocol, each party undertakes to respect the Treaty and not to contribute to any violation of the instrument or its Protocol. Article 2 contains the commitment to grant security assurances against the use or threat of use of nuclear weapons, which shall extend to the entire zone. This means that, by becoming parties to the Protocol, the NWS would be obliged to provide such security assurances to the territories of the Southeast Asian states and their EEZs adjacent to territorial seas. This is the main reason why no NWS has signed the Protocol. In addition to this, the strategic context of Southeast Asia also remains an obstacle for NWS to adhere to the Protocol. Unfortunately, that subject will not be covered in this paper.

To assess the compatibility of the zones of application of the NWFZs established in the Antarctic, Caribbean and Latin America, South Pacific, and Southeast Asia with the law of the sea, the next section seeks to briefly describe the legal regime of the oceans and the sea.

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IV. The Law of the Sea and the non-Proliferation of Nuclear Weapons

The Antarctic and Tlatelolco treaties were negotiated and adopted several years before UNCLOS was concluded in 1982. This is important to consider since both NWFZs include in their respective zones of application areas considered in the Convention as EEZs and high seas, which are not subject to appropriation by coastal States. For its part, even though the Treaty of Rarotonga was opened for signature in 1985, three years after the adoption of UNCLOS, its zone of application also includes EEZs and high seas. Additionally, the zone defined in the Treaty of Bangkok expressly incorporates the EEZ adjacent to each of the regional States. This fact raises the following question: do States parties to NWFZs have the right to ban nuclear weapons in areas of the seas which are not under their sovereignty or jurisdiction? This question is relevant to respond since, to be effective, a treaty can neither contravene peremptory norms of international law, nor conflict with other international legal obligations of the parties, in this case related to the law of the sea.[36] To answer the said question, it is necessary to briefly present key provisions contained in the so-called "Constitution for the oceans".

1. *United Nations Convention on the Law of the Sea*

UNCLOS lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources.[37] It presents an important feature, namely, a "zonal approach"; this means that the law of the sea is examined maritime zone by maritime zone, and they should respond to two main questions: 1) what the

[36] Philip Jr., P. Robert, *op. cit.*, p. 142.

[37] United Nations Division for Ocean Affairs and the Law of the Sea, "United Nations Convention on the Law of the Sea of 10 December 1982. Overview and full text", New York, UN, 2022, available at: *https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm*.

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limits of each area are? and 2) what legal regime applies to every maritime area?[38]

The Convention defines six maritime zones, namely, internal waters, territorial sea, contiguous zone, exclusive economic zone (EEZ), continental shelf, and high seas. The first five are spaces appertaining to the coastal State, whereas the high seas are *res communis*.[39] The zonal approach is mainly concerned with what that breadth should be from the coastal State's perspective and how its coastal zones impinge on the rights of other States in the EEZ and high seas.[40] A brief explanation of UNCLOS's zonal approach is worth considering.

2. *Territorial Sea*

Under article 3 of UNCLOS, every State has the right "to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles". The coastal State exercises sovereignty in the territorial sea and has, therefore, faculties to guarantee the safety of navigation and regulate fiscal, customs, and sanitary matters, as well as the right to establish surveillance over vessels, which includes the rights of visit, capture, arrest, and seizure of prohibited items.[41]

By stating that "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law", UNCLOS provides an exemption to the sovereignty of the coastal State over the territorial sea, which is the right of innocent passage described in articles 17

[38] Treves, Tullio, "Introduction. The Law of the Sea on the Thirtieth Anniversary of the United Nations Law of the Sea Convention, Part II", New York, United Nations Audiovisual Library of International Law, 10 April 2012, available at: *https://legal.un.org/avl/ls/Treves_LS_video_2_2.html*.

[39] *Res communis* means the "[a]reas beyond, and not subject to incorporation into, state territory; thus available for unilateral use and exploitation by all states; examples include the high seas". See: Currie, John, "Res communis", *Public International Law*, Toronto, Irwin Law, 2008, available at: *https://irwinlaw.com/cold/res-communis/*.

[40] Sillwatwinyoo, Nut, *Zonal versus functional approach in the new law of the sea*, Lund, Lund University, 2012, p. 9, available at: *https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=2701690&fileOId=2701696*.

[41] López-Bassols, Hermilo, *op. cit.*, p. 436.

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to 32 of the Convention. This is where the regime of the territorial sea is different from that of the internal waters.

The coastal State shall not impede the innocent passage of foreign ships and shall guarantee the safety of said passage, as established in article 24. However, the passage is innocent "so long as it is not prejudicial to the peace, good order or security of the coastal State". Article 19 (2) enumerates some activities that constitute a violation of innocent passage, including "any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State", "any exercise or practice with weapons of any kind", and "the launching, landing or taking on board of any military device".

This means that a warship armed with nuclear weapons has no right of innocent passage through the territorial sea if it is developing "exercise or practice" with nuclear weapons.[42] In other words, a military exercise, or a nuclear weapons test in the territorial sea of a coastal State without its permission would be a violation of the right of innocent passage. Consequently, such activities are prohibited unless the nuclear-weapons possessor and the coastal State adopt an agreement allowing those activities to be carried out. On the other hand, the mere passage or transport of nuclear weapons through the territorial sea of a NWFZ State party is a matter of concern for coastal countries since there is no clarity on whether such an act could be considered as "innocent passage". However, this issue will be discussed later.

Under article 20 of UNCLOS, submarines and other underwater vehicles are required to navigate on the surface and to show their flag. The coastal State may require foreign ships exercising the right of innocent passage through its territorial sea to use sea lanes and traffic separation schemes for the regulation of the passage of ships. In particular, "tankers nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes".[43]

So, even though the coastal State shall not impede the "innocent passage" of foreign ships it may extend both its prescriptive and enforcement powers thereto, including the adoption of norms regarding the safety, protection

[42] Philip Jr., P. Robert, *op. cit.*, p. 158.

[43] Article 22 (2) of UNCLOS.

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and preservation of the maritime space.[44] UNCLOS also provides that "the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent".[45] The establishment of a NWFZ is a necessary step to prevent non-innocent passage of a foreign nuclear-armed vessel through territorial waters.[46]

On the other hand, even though a coastal State, including a party to a NWFZ, has the right to grant or deny such an innocent passage, including the transport of nuclear weapons, it is hard to imagine that a NWS would openly request or even notify such passage.[47] In practice, NWS do not reveal where their nuclear weapons are transiting. Apart from that, despite the right of the coastal State to request innocent passage through traffic separation schemes, article 32 of the Convention provides that military vessels and official non-merchant ships enjoy complete immunity from local jurisdiction by the coastal State. In other words, the transit of nuclear weapons through the territorial sea, even if it is not identified as an innocent passage, is not prohibited by the Convention. This is also the case in NWFZ treaties.[48]

3. *Exclusive Economic Zone*

The EEZ is a relatively new concept in the law of the sea; it was the creation of UNCLOS.[49] Article 55 of the Convention defines it as "an area beyond and adjacent to the territorial sea… under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention". The EEZ is 188 nautical miles in width starting at the outer limit of the territorial sea

[44] Hakapää, K. and Molenaar, E.J., "Innocent passage. Past and present", *Marine Policy*, Australia, vol. 23, no. 2, 1999, pp. 131-145.

[45] Article 25 of UNCLOS.

[46] Philip Jr., P. Robert, *op. cit.*, p. 160.

[47] To address a debate related to the passage rights of warships see: Hakapää, K. and Molenaar, E.J., *op. cit.*, pp. 138-143.

[48] See note 28 *ut supra*.

[49] Sillwatwinyoo, Nut, *op. cit.*, p. 20.

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and ending at its outer limit which is 200 nautical miles measured from the baselines.

Although three of the six freedoms of the high seas apply within the EEZ (freedom of navigation, overflight, and laying of submarine cables and pipelines), neither the EEZ is an extension of the territorial sea nor a part of the high seas. Thus, the EEZ is commonly described as a regime *sui generis*.[50]

There are two fundamental legal attributes of the EEZ regime: the notion of sovereign rights and jurisdiction applicable in that zone. Article 56 provides that in the EEZ the coastal State has sovereign rights for exploring and exploiting, conserving, and managing the natural resources of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and concerning other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds. The concept of "sovereign rights" in the EEZ context should not be construed in an ordinary sense. Sovereign rights pertain only to exploration, exploitation, conservation, and management of natural resources.[51] Additionally, the two most important matters over which the coastal State has jurisdiction in the EEZ are marine scientific research and the protection and preservation of the marine environment; in other words, the prevention of marine pollution from all sources.[52]

All States enjoy in the EEZ the same freedoms of navigation and overflight that they do in the high seas. However, the freedom of navigation through the EEZ is not without limitations. A first limit derives from article 58 (3) of UNCLOS: "In exercising their rights… in the exclusive economic zone, 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 this Convention and other rules of international law…". The Convention does not limit the movement of foreign ships and planes, even those carrying nuclear weapons through the EEZ, but only the activities that they can carry out. On the means in transit, there are certain obligations such as those to notify the passage and to consult with the coastal authorities when navigation presents high or serious

[50] *Ibidem*, p. 22.

[51] *Idem*.

[52] *Ibidem*, p. 23.

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risks of pollution.[53] The need for preventive consultation and notification derives from the principle of good faith and exists whenever a State carries out activities that could harm the interests of another State.

The coastal State is therefore legitimized to ensure that its sovereign rights (for conserving and exploiting the natural resources) and jurisdiction (to protect and preserve the marine environment) over the EEZ adjacent is not compromised by the activities of other countries, including the use, testing, and deployment of nuclear weapons. Consequently, the enforcement of the obligations outlined in NWFZ treaties is compatible with UNCLOS provisions regarding the EEZ. This means that a coastal State, including a party to a NWFZ, has the legitimate right to denuclearize its EEZ.

4. *High Seas*

Some authors have argued that the NWFZs must extend beyond the territorial seas of the regional States parties to have any effect at all.[54] This can be explained because the passage of ships carrying nuclear weapons is mainly conducted beyond the territorial waters, in the ocean space known as the "high seas".[55]

The definition of the high seas in article 86 of UNCLOS follows an exclusion criterion. The high seas correspond "to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State". In this regard, no State "may validly purport to subject any part of the high seas to its sovereignty".[56]

Article 87 of UNCLOS enshrines the rights that prevail on the high seas, namely, freedom of navigation, overflight, to lay submarine cables and pipelines, to construct artificial islands and other installations permitted under international law, and scientific research. It is worth noting that these rights shall be exercised by all States with due regard for the interests of other

[53] Roscini, Marco, "La zone dénucléarisée du Sud-est Asiatique: problèmes de droit de la mer", *Revue Générale de Droit International Public,* Paris, vol. 105, 2001, pp. 617-645.

[54] See: note 144 in Philip Jr., P. Robert, *op. cit.*, p. 169.

[55] *Idem*.

[56] Article 89 of UNCLOS.

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countries in their exercise of the freedom of the high seas. In this respect, the activities to be carried out in the high seas or the seabed shall be reserved for "peaceful purposes", as established in article 88 of UNCLOS, and their use will be for the benefit of humankind, since, according to the Convention, the seabed constitutes a "Common Heritage of Mankind".[57]

Even though UNCLOS does not define "peaceful purposes", affirms that, in exercising their rights and performing their obligations under the Convention, "States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations".[58] Thus, actions that are consistent with the UN Charter, in particular with articles 2 (4) (prohibition of the threat or use of force) and 51 (immanent right of self-defense), are not prohibited by the Convention.[59] However, it is clear that "peaceful purposes" means non-warlike and non-military activities, including those that involve nuclear weapons deployment, test or use; this interpretation is consistent with the traditional construction of the term "peaceful purposes" enshrined in the Antarctic Treaty, the Outer Space Treaty, and the Sea-bed Treaty.[60] This argument lead us to conclude that the use of nuclear weapons in the high seas is contrary to article 88 of UNCLOS.[61]

On the other hand, article 95 of UNCLOS establishes that warships on the high seas "have complete immunity from jurisdiction of any State other than the flag State". This means that the transit of nuclear-armed vessels through the high seas is not prohibited. As mentioned before, this is also the case in the NWFZs that include high seas in their zones of application.

All States parties to UNCLOS are committed not to pollute the high seas.[62] In this regard, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice affirmed that "[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of

57 López-Bassols, Hermilo, *op. cit.*, p. 450.

58 Article 301 of UNCLOS.

59 United Nations General Assembly, "Study on the naval arms race…", *cit.*, pp. 54 y 55.

60 Philip Jr., P. Robert, *op. cit.*, p. 172.

61 *Idem*.

62 Article 194 of UNCLOS.

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other States or of areas beyond national control is now part of the *corpus* of international law relating to the environment".[63] This principle was codified in article 194 (2) of UNCLOS.[64]

To conclude this section, in the context of NWFZs, enforcing provisions to guarantee the absence of nuclear weapons in the adjacent high seas is consistent with the obligation contained in UNCLOS to protect and preserve the marine environment. In this respect, that does not mean any claim of sovereignty over such maritime areas by NWFZ parties or the violation of the rights of all States over the high seas, including the freedom of navigation. Even though not all States parties to NWFZs have ratified UNCLOS, none of them has issued any reservation or contestation regarding the freedom of the high seas.

V. Concerns of NWS Regarding the EEZ and High Seas Included in NWFZs

The establishment and respect of NWFZs is in the obvious interest of regional States parties, but it is also relevant for NWS. This has been recognized in numerous resolutions adopted by the United Nations General Assembly and in final documents of the Review Conferences of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[65] However, some challenges to such acknowledgments remain.

[63] International Court of Justice, "Legality of the threat or use of nuclear weapons in armed conflict - Advisory opinion of 8 July 1996", Advisory opinions (1996) ICJ 2, ICJ Reports 1996, párrafo 29, pp. 19 y 20.

[64] Article 194 (2) of UNCLOS provides that "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

[65] In its final document (NPT/CONF.2010/50 (Vol. I)), the 2010 NPT Review Conference recognized "the conviction that the establishment of the internationally recognized nuclear-weapon-free zones on the basis of arrangements freely arrived at among the States of the region concerned enhances global and regional peace and security, strengthens the nuclear non-proliferation regime and contributes towards realizing the objectives of nuclear disarmament".

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Upon signing and/or ratifying protocols to NWFZs, some NWS issued interpretative declarations which in some cases constitute reservations that limit the effectiveness of such protocols and, thus, the zones. These unilateral statements differ in their legal consequences; some of their paragraphs fall under the category of political statements rather than interpretative declarations of the obligations under the protocols. In contrast, other paragraphs contain reservations, which, under international law, purport "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".[66]

France and Russia (Successor State of the Soviet Union) issued reservations on the inclusion of high seas in the zone of application of the Treaty of Tlatelolco. China, the United Kingdom, and the United States presented no reservations to Tlatelolco's zone defined in article 4 (2). For its part, no NWS presented reservations regarding the inclusion of high seas or EEZs in the Antarctic and the Rarotonga treaties. In contrast, the NWS have a reluctance to sign and ratify the Protocol to the Treaty of Bangkok due to the breadth of its zone of application, which contains EEZs adjacent to regional States.

An additional concern in this respect is that the NWS have divergent views on whether the transit of nuclear weapons across the zones of application of NWFZs is compatible with such instruments. In some cases, the views presented by some NWS oppose each other. This situation puts the States parties to NWFZs amid a potential legal confrontation that must be prevented by all actors involved.

This section will present some considerations on three main issues. Firstly, the reservations made by France and Russia regarding the inclusion of EEZs and high seas in the Tlatelolco's zone of application. Secondly, the reluctance by NWS to adhere to the Treaty of Bangkok and, thirdly, the divergent interpretations by some NWS concerning the "transit" of nuclear weapons through the zones of application of NWFZs. In the latter section, a brief comment on lessons for the establishment of a free zone of nuclear weapons and other weapons of mass destruction in the Middle East will be included.

[66] Article 1 (d) of the Vienna Convention of the Law of the Treaties, 1969, Vienna, United Nations, Treaty Series, vol. 1115, num. 18232.

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1. *Reservations by France and Russia Regarding the Zone of Application of the Treaty of Tlatelolco*

Moscow and Paris affirmed that the zone of application defined in article 4 (2) of the Treaty of Tlatelolco cannot be considered in accordance with international law and, consequently, both countries reject that the Treaty and its Protocol II apply to such geographical space, which includes EEZs and high seas. Upon signing Protocol, I in March 1979, France presented a declaration as follows:

> For the French Government, any zone which is more extensive, specifically the one referredto in article 4, paragraph 2, of the Treaty, *cannot be considered as being established in conformity with international law, andconsequently the French Government could not agree to the application of the Treaty therein*.[67] (Emphasis added).

France does not explain in which way the zone of the Treaty of Tlatelolco "cannot be considered as being established in conformity with international law". Forty years after issuing that statement, France sent a letter to the States parties to Tlatelolco in response to their démarches in Paris to resolve this longstanding concern. In the said letter, the *Quai d'Orsay* clarified this issue as follows:

> France admits a zone of territorial application of the Treaty of Tlatelolco restricted to the territorial sea, airspace and any other place over which the State exercises its sovereignty in accordance with its legislation, pursuant to Article 3 of the Treaty of Tlatelolco. France thus refers to the territorial scope of a treaty as is commonly recognized in international law.
>
> This interpretative declaration also aims to recall that, in accordance with Article 2 of the Convention on the High Seas, this is not subject to appropriation and is characterized by the principle of freedom of navigation. These provisions have been confirmed by the Convention of the United Nations on the Law of the Sea in its articles 87.1 and 90.

[67] United Nations Office for Disarmament Affairs, "France: Ratification of Additional Protocol I to the Treaty of Tlatelolco", New York, UN, 2021, available at: *http://disarmament.un.org/treaties/a/tlateloco_p1/france/rat/mexico+city*.

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> The analysis done by France is, therefore, than *an adaptation of its interpretative declaration concerning Article 4 of the Treaty of Tlatelolco would have the effect of restricting the principle of free navigation and overflight on the High Seas, in contradiction with the norms of international law*.[68] (Emphasis added).

Apart from rejecting "an adaptation of its interpretative declaration regarding Article 4 of the Treaty of Tlatelolco", France seems to inaccurately interpret that the reinterpretation of such reservation proposed by the Latin American and Caribbean States[69] "would have the effect of restricting the principle of free navigation and overflight on the high seas". As the regional States clarified in a memorandum addressed to France, the fact that the zone of application of Tlatelolco includes high seas in no way constitutes a "declaration of sovereignty or jurisdiction over high seas spaces included in that zone".[70] Establishing a NWFZ is a preventive self-defence and transcends the traditional concept of sovereignty as territorial control by a single State.[71] Therefore, this does not either mean a restriction of the right of free navigation and overflight on the high seas included in the zone. As stated previously, the Treaty of Tlatelolco does not prohibit transit by third States across the zone. The parties to Tlatelolco have communicated to France that the zone of application "has the sole purpose of indicating the space where the placement [as well as the test and use] of nuclear weapons is prohibited".[72] They also argued that the zone of application "implies no distortion, violation or incompatibility with the 'freedom of the high seas' established in article 87" of UNCLOS.[73] Consequently, the zone was established in conformity with international law, in contrast to what has been affirmed by France.

For its part, the Soviet Union (succeeded by the Russian Federation) signed Protocol II to the Treaty of Tlatelolco in May 1978. At that time, Moscow considered it necessary to state the following:

[68] OPANAL General Conference, "Interpretative declarations made by States Party to Additional Protocols I and II to the Treaty of Tlatelolco. Report of the Secretary-General", Mexico City, OPANAL, CG/08/2019, 7 November 2019, párr. 19, pp. 4-5.

[69] *Idem*.

[70] *Ibidem*, párrafo 21, p. 5.

[71] Philip Jr., P. Robert, *op. cit.*, p. 173.

[72] OPANAL General Conference, "Interpretative declarations made…", *cit.*, para. 21, p. 5.

[73] *Ibidem*, párrafo 21, p. 5.

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> *The signature by the Soviet Union of Additional Protocol II in no way signifies recognition of the possibility of application of the Treaty, as prescribed in article 4, paragraph 2, beyond the territories of States parties*, including the air space and the territorial sea established in accordance with international law.[74] (Emphasis added)

Russia interprets that the Treaty's zone of application should be limited to the sum of the territories of the parties and rejects that article 4 (2) is applicable. It does not either clarify the rationale of its interpretation. However, in 2018, in response to the démarches by the parties to the Treaty of Tlatelolco aimed at proposing Moscow an adjustment of said reservation, the Russian Ministry of Foreign Affairs expressed in a note what follows:

> The Ministry has the honor to underline that restrictions, made during the signing of the aforementioned document [Additional Protocol II], do not contravene the spirit and letter of the Treaty and correspond to the recognized rules of international law.[75]

Considering that Protocol II to the Treaty does not allow reservations,[76] the Russian declaration purports to limit its obligations towards the parties to the NWFZ. If Moscow does not recognize the geographical space that delimitates the zone, its declaration certainly seeks to contravene the spirit and letter of the Treaty, contrary to its affirmation.

It is worth recalling that the negotiation of UNCLOS took place from 1973 to 1982. Understandably, France and the then Soviet Union had a keen sensitivity to the law of the sea at the time they signed the Protocols to the Treaty of Tlatelolco. At that time, indeed, some Latin American countries had ambitious positions regarding the extension of their territorial seas; for that reason, these countries among others were known as "territorialists". However, this was resolved with the adoption of UNCLOS in 1982. For its part, the other three NWS parties to Protocol II (China, the United States,

[74] United Nations Office for Disarmament Affairs, "Russian Federation: Ratification of Additional Protocol II to the Treaty of Tlatelolco", New York, UN, 2021, available at: *http://disarmament.un.org/treaties/a/tlateloco_p2/russianfederation/rat/mexico+city*.

[75] OPANAL General Conference, "Interpretative declarations made…", *cit.*, para. 16, p. 4.

[76] Article 4 of the Additional Protocol II to the Treaty of Tlatelolco.

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and the United Kingdom) did not issue any reservation on the breadth of the zone of application established in the Treaty of Tlatelolco.

Furthermore, in conformity with the Partial Test Ban Treaty (PTBT),[77] the Comprehensive Nuclear-Test-Ban Treaty (CTBT),[78] and the Seabed Treaty[79] the deployment, use, and testing of nuclear weapons in the ocean and sea-bed floor of the high seas is also prohibited. If France and Russia have contested the inclusion of high seas in the zone of application of the Treaty of Tlatelolco, such reservations would also apply to the aforementioned instruments. On the contrary, even though the PTBT and the Seabed Treaty also include high seas in their areas of application, most NWS are parties to such treaties and none of them has raised any objection or reservation in this respect. There is no legal obstacle, therefore, not to try to achieve a common understanding of the legal nature of the zone of application of the Treaty of Tlatelolco as defined in its article 4 (2). In accordance with resolutions of the United Nations General Assembly[80] and the final document of the 2010 NPT Review Conference,[81] all of them adopted without vote (including with the support of the NWS), the Caribbean and Latin American States presented in Paris and Moscow concrete and relevant proposals for adjustment of the reservations made by the said countries to resolve this longstanding concern; however, none of those NWS has accepted to discuss this issue yet.[82]

77 Article 1 of the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water, 1963, Moscow, United Nations, Treaty Series, vol. 480, no. 6964.

78 Article 1 of the Comprehensive Nuclear-Test-Ban Treaty, 1996, New York, United Nations, Treaty Series, vol. 2, chap. XXVI.

79 Article 1 (1) of the Treaty on the prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof, 1971, Washington, Moscow and London, United Nations, Treaty Series, vol. 955, num. 13678.

80 United Nations General Assembly, "Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco)", New York, UN, Resolution A/RES/74/27, 18 December 2019, paragraph. 3.

81 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), "Final Document" (NPT/CONF.2010/50 (Vol. I)), New York, UN, 18 June 2010, part I, action 9, p. 22.

82 OPANAL General Conference, "Interpretative declarations made by States Party to Additional Protocols I and II to the Treaty of Tlatelolco. Report of the Secretary-General", Mexico City, OPANAL, CG/08/2021, 30 September 2021.

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2. *The reluctance by NWS to adhere to the Protocol to the Treaty of Bangkok*

No NWS has yet signed or ratified the Protocol to the Treaty of Bangkok. Most of them oppose adhering to it due to the breadth of the zone of application of the Treaty, which includes the EEZs adjacent to regional States parties.

China noted that it has "resolved all pending issues with ASEAN countries regarding the Protocol".[83] It adds that if the regional States "decide to sign the Protocol with five nuclear weapon states separately, China will actively consider to be the first to sign. Meanwhile, China is ready to assist the ASEAN to resolve disputes on reservation issue with the other four nuclear weapon states on the basis of not affecting previous consensus which have already been reached."[84] This statement affirms, in other words, that China is ready to adhere to the Protocol but once the rest of the NWS are ready to do the same.

For its part, the other four NWS have not signed the Protocol to the Treaty of Bangkok since they object to: (1) the inclusion of continental shelves and EEZs in the zone of application; (2) the restriction not to use nuclear weapons within the zone, or from within the zone against targets outside the zone, and (3) the restriction on the passage of nuclear-powered ships through the zone *vis-à-vis* the issue of the high seas as embodied in UNCLOS.[85] They also have raised the concern that the continental shelves and EEZs are not clearly defined in the South China Sea, which creates uncertainty over the scope of the NWFZ, as well as the Treaty's protocol obligations. Washington also expressed concerns with the nature of the legally binding security assurances against the use and threat of use of nuclear weapons to be expected, and the alleged ambiguity of the Treaty's language

[83] Statement by Chinese Delegation at the Second Session of the Preparatory Committee for the 2020 NPT Review Conference on Nuclear-Weapon-Free Zones and Nuclear Issues in the Middle East, New York, Reaching Critical Will, 30 April 2018, *https://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom18/statements/30April_China.pdf.*

[84] *Idem.*

[85] *Idem.*

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concerning the permissibility of port calls by ships, which may carry nuclear weapons.[86]

Since the Treaty of Bangkok provides that the establishment of the 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, it can be said that the zone of application of the Treaty is not intended to affect the law of the sea regime of navigation. As well as the rest of NWFZs, Bangkok contains provisions to safeguard the navigational rights of extra-regional States in the waters described in UNCLOS. There seems to be, therefore, no reason why the NWS should take a different view of the Treaty of Bangkok.[87]

The Treaty of Bangkok also acknowledges the right of the parties to decide whether to allow visits to their ports and airfields, the transit of their airspace, navigation through their territorial sea or archipelagic waters, and overflight above those waters by foreign ships and aircraft in a manner not governed by the rights of innocent passage, archipelagic sea lanes passage or transit passage. In this respect, the Treaty seems to be not problematic for the NWS. However, the term "on being notified" in the first sentence of this article seems to imply that non-regional States must inform the regional countries if their warships are going to navigate the territorial or archipelagic waters of the NWFZ parties.[88] Although the rest of NWFZs also recognize the right of the parties to grant or deny such transit in accordance with international law, they do not explicitly refer to receiving such notification as a requirement. However, the Southeast Asian States maintain that it is not inconsistent with international law to require other countries to notify such transit.[89] For its part, some NWS affirm that under the law of the sea, coastal States could not seek such requirement of notification or prior approval.[90] The interpretation of the right of the innocent passage will

[86] United Nations, "Protocols to the Nuclear-Weapon-Free-Zone Treaties", New York, UN, 2021, available at: *https://www.un.org/nwfz/fr/content/protocols-nuclear-weapon-free-zone-treaties.*

[87] Subedi, Surya P., "Problems and prospects for the Treaty on the creation of a Nuclear-Weapon-Free Zone in Southeast Asia", The International Journal of Peace Studies, Fairfax, vol. 4, num. 1, January 1999.

[88] *Idem.*

[89] *Idem.*

[90] *Idem.*

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determine the future status of the freedom of navigation in the geographical areas enclosed in the Southeast Asian NWFZ,[91] and therefore, the eventual signature and ratification of its Protocol by the NWS.

Some voices suggest that the Southeast Asian States should accept the issuance of reservations by the NWS to facilitate the universalization of the Protocol. However, this option could represent a negative precedent for other NWFZs, including those that could be created in the future; additionally, that would be a contradiction with final decisions of the NPT Review Conference, including the 2010 action plan in which it was agreed that "concerned States are encouraged to review any related reservations"[92] regarding protocols annexed to NWFZs. In other words, the respect for a NWFZ by NWS should not be hostage to any reservation.

The Southeast Asian States have the right to establish and maintain a region free of nuclear weapons for the benefit of regional security and the international regime of nuclear disarmament and non-proliferation. Since no provision of the Treaty seems to place any direct restrictions on the rights of other States recognized under international law in the waters and airspace of the zone, there is no reason why NWS and regional States could not reach a common understanding in this regard. This does not mean that Southeast Asian States should accept any reservation to accelerate the ratification of the protocol by the NWS.

3. *Divergent Views on the Transit of Nuclear Weapons and Implications for a Zone in the Middle East*

As previously mentioned, no NWFZ treaty contains any prohibition of the transit of foreign ships or aircraft through their respective zones of application; they recognize the principle of freedom of the seas. This is not a legal gap, but a provision in light of the law of the sea.

It is reasonable that some NWS are sensitive about potential barriers to transit of nuclear weapons through particular regions;[93] for that reason,

[91] *Idem*.

[92] 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), "Final Document…", *cit.*, action 9, p. 22.

[93] Mendenhall, Elizabeth, "Nuclear-weapon-free zones and contemporary arms control", *Strategic Studies Quarterly*, vol. 14, num. 4, Winter 2020, pp. 122-151.

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as stated by the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL), both the parties to the NWFZ treaties and the parties to the protocols must reach a common understanding about the question of transit. The Agency adds that some interpretative declarations and reservations in this respect cannot be considered as a shared understanding.[94]

Upon signing Protocol II to the Treaty of Tlatelolco in August 1973, China declared that for the region to truly become a NWFZ, all NWS must be asked to undertake to observe and implement the following commitment: the "…prohibition of the passage of any means of transportation and delivery carrying nuclear weapons through Latin American territory, territorial sea or air space".[95] This statement is not a reservation, but a political statement addressed to the rest of the NWS.

For its part, when signing Protocol II to the Treaty of Tlatelolco, France declared that "the Treaty does not apply to transit, authorization or denial of which is within the exclusive competence of each State Party, in conformity with the relevant rules and principles of international law".[96] Additionally, upon signing Protocol I to Tlatelolco, France affirmed not to agree "that the obligations arising out of Protocol I, which relates to articles 1 [prohibitions] and 13 [nuclear safeguards of the International Atomic Energy Agency] of the Treaty, may be applied to the transit, through the territories of the French Republic situated in the zone of the Treaty, of devices referred to in article 5 [nuclear weapons] of the Treaty which are destined for other territories of the French Republic". In this case, France limited itself to refer to the transit of nuclear weapons through its territories located within the zone. In addition, France also stated in its declaration made upon signing Protocol I to the Treaty of Pelindaba (African NWFZ) that "the Treaty

[94] OPANAL Secretariat, "Contribution of the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL) to the report of the United Nations Secretary-General on the law of the sea, pursuant to General Assembly resolution A/RES/69/245", Mexico City, OPANAL, Inf.003/2015, 30 January 2015.

[95] Text attached to letter No. S-16783 by the Secretary-General of OPANAL to Mr. Li-Zhaoxing, Minister of Foreign Affairs of the People's Republic of China, dated 16 July 2003, annexed to OPANAL General Conference, "Interpretative Declarations made by the States Party to the Additional Protocols I and II to the Treaty of Tlatelolco", Mexico City, OPANAL, CG/05/2015, 26 November 2015.

[96] United Nations Office for Disarmament Affairs, "France: Ratification…", *op. cit.*

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shall in no wat modify the legal regime governing the Suez Canal prior to the Treaty's entry into force" and considered that the instrument "shall in no way impair the principle of free passage through the Canal, both in time of war and in peacetime". Concerning the South Pacific NWFZ, France did not issue any declaration or reservation regarding the transit through the zone. Similarly, upon ratifying Protocol I to the Treaty of Tlatelolco in November 1981, the United States declared:

> That the provisions of the Treaty made applicable by the protocol do not affect the *rights of the contracting parties to grant or deny transport and transit privileges* to their own or other vessels or aircraft regardless of cargo or armaments;
>
> That the provisions of the Treaty made applicable by the protocol *do not affect the rights of the contracting parties regarding the exercise of freedom of the seas or passage* through or over waters subject to the sovereignty of a State.[97] (Emphasis added).

Washington issued no declaration when signing the three protocols to the South Pacific NWFZ. The declarations by the United Kingdom when signing or ratifying the Protocols to Tlatelolco and Rarotonga do not refer to the transit of foreign ships. Is concerning Protocol I to Pelindaba that London issued a declaration in this regard, stating that "nothing in the Treaty affects rights under international law with regard to transit of the African nuclear weapon free zone or visits to ports and airfields within that zone by ships and aircraft".[98]

In contrast, when the Soviet Union signed Protocol II to Tlatelolco it affirmed that "to grant permission for the transit of nuclear weapons in any form would violate the spirit of the Treaty" and, therefore, transit "would be incompatible with the non-nuclear status of States parties to the Treaty and with their obligations".[99] This is a very concerning declaration since no

[97] United Nations Office for Disarmament Affairs, "United States of America: Ratification of Additional Protocol II to the Treaty of Tlatelolco", New York, UN, 2021, available at: *http://disarmament.un.org/treaties/a/tlateloco_p2/unitedstatesofamerica/rat/mexico+city.*

[98] United Nations Office for Disarmament Affairs, "United Kingdom of Great Britain and Northern Ireland: Ratification of Protocol I to the Pelindaba Treaty", New York, UN, 2021, available at: *http://disarmament.un.org/treaties/a/pelindaba_1/unitedkingdomofgreatbritainandnorthernireland/rat/cairo.*

[99] United Nations Office for Disarmament Affairs, "Russian Federation: Ratification of Additional Protocol II…", *op. cit.*

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other NWS contested the right of NWFZ parties to grant transit of foreign ships. Moscow also presented a similar declaration when signing the pertinent protocols to the Treaty of Rarotonga.[100]

No less concerning is that Moscow also declared, concerning the protocols to both Tlatelolco[101] and Rarotonga,[102] that in case any action taken by one or more States parties to the respective NWFZ that is incompatible with its nuclear-weapon-free status and obligations, it reserves the right to review or reconsider its obligations under the protocols. Since Russia considers that granting the transit of nuclear weapons through the zones of application of Tlatelolco and Rarotonga is "incompatible" with the status of the parties, that action might be a reason for Moscow to withdraw from the respective protocols.

In response to Moscow's reservations, it is worth mentioning that even though the NWFZs recognize the right of the States parties to grant the transit of extra-regional ships, this in no way implies that the parties to NWFZs pretend to accept such transit. The NWFZ treaties do not compel the parties to allow such action. As can be deduced from what is prohibited, there is no attempt to control the transit of nuclear weapons on ships outside the 12-mile territorial limits of the coastal States or to control weapons on aircraft flying in international airspace.[103] Both activities are beyond the legal jurisdiction of NWFZ parties and are, in any case, activities that are protected by the law of the sea.[104]

Furthermore, independently of the right of regional States to grant or deny such transit, for a NWFZ to be effective, it is fundamental that all NWS refrain from transiting their nuclear weapons through the zones of application of the treaties. Even if the NWS are not obliged to observe that action, they could commit themselves not to transit with nuclear weapons

[100] United Nations Office for Disarmament Affairs, "Russian Federation: Ratification of Protocol 2 to the South Pacific Nuclear Free Zone Treaty", New York, UN, 2021, *http://disarmament.un.org/treaties/a/rarotonga_p2/russianfederation/rat/pifs.*

[101] United Nations Office for Disarmament Affairs, "Russian Federation: Ratification of Additional Protocol II…", *cit.*

[102] United Nations Office for Disarmament Affairs, "Russian Federation: Ratification of Protocol 2…", *cit.*

[103] Fry, Greg, "The South Pacific nuclear-free zone: Significance and implications", *Bulletin of Concerned Asian Scholars,* USA, vol. 18, num. 2, 1986, pp. 61-72.

[104] *Idem.*

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through the zones of application of NWFZs, an action that would strengthen the international regime of nuclear disarmament and non-proliferation.

States parties to the NWFZs could make a call to resolve the issue of transit of nuclear weapons in a joint position issued, for instance, at the next Conference of States parties and signatories to treaties establishing nuclear-weapon-free zones, at the NPT Review Conferences and/or during the United Nations General Assembly, among other relevant international fora. If the NWS have divergent views on the transit of nuclear weapons, they should engage in a discussion aimed at reaching a common understanding of this problem; of course, this must be made also in consultations with NWFZ parties.

The issue of transit of nuclear weapons will also be urgent to discuss during an eventual negotiation of a free zone of nuclear weapons and other weapons of mass destruction in the Middle East. The United Nations Secretary-General mentioned that prospective zonal areas have coasts in the Red Sea, the Persian Gulf, the Mediterranean, the Atlantic and the northwestern Indian Ocean. The Secretary-General also pointed out that the zonal area would include some international straits subject to the regime of transit-passage, such as Gibraltar, Bab al Mandab.[105]

In this respect, the Secretary-General asserts that the possibility of including international waters within the zone of application of a zone in the Middle East raises the question of the attitude of the NWS, since the warships of some of them, believed to carry nuclear weapons, frequent these waters.[106] Consequently, discussions in this regard between regional States and NWS should not be absent during preparatory and negotiation meetings of a potential zone in the Middle East.

On 22 December 2018, the United Nations General Assembly decided to

> entrust the Secretary General the convening… of a conference on the establishment of a Middle East zone free of nuclear weapons and other weapons of mass destruction, to which all States of the Middle East, the three co-sponsors [Russia, United Kingdom, and the United States] of the resolution on the Middle East adopted by the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, in the light of their responsibility

105 *Idem*.

106 *Idem*.

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for the implementation of that resolution, the other two nuclear-weapon States and the relevant international organizations shall be invited.[107]

The General Assembly adds in its decision that the conference shall aim at "elaborating a legally binding treaty establishing a Middle East zone".[108] Two sessions of this conference have taken place in 2019 and 2021, and a third one will be held in November 2022.[109] The provisions related to the rights and obligations of regional States and parties to protocols in the ocean space covering the potential zone of application in the Middle East should be included in the agenda to facilitate further negotiations in this respect.

VI. Conclusions

The inclusion of EEZs and high seas in the zones of application of treaties establishing NWFZs does not mean any claim of sovereignty by regional States over such maritime areas and it does not distort the rights of extra-regional States concerning the law of the sea. Therefore, the geographical provisions of these treaties are consistent with UNCLOS.

The zones of application of NWFZs have the sole purpose of indicating the geographical space that should be free from nuclear weapons. Consequently, it is a legitimate interest of the coastal States that the EEZs and high seas adjacent to their territorial seas remain free from the presence of nuclear weapons. There is no legal reason for the NWS to remain closed to reconsidering or reviewing their reservations issued regarding the zones of application of the treaties establishing NWFZs. In particular, the Caribbean and Latin American countries presented communications to Moscow and

[107] United Nations General Assembly, "Convening a conference on the establishment of a Middle East zone free of nuclear weapons and other weapons of mass destruction", New York, UN, Decision 73/546, 22 December 2018, para. (a).

[108] *Ibidem,* párrafo (a)(ii).

[109] United Nations Office for Disarmament Affairs, "Conference on the Establishment of a Middle East Zone Free of Nuclear Weapons and Other Weapons of Mass Destruction", New York, UN, 2022, available at: *https://www.un.org/disarmament/topics/conference-on-a-mezf-of-nwandowomd/#:~:text=The%20Conference%20on%20the%20Establishment,Ambassador%20Sima%20Bahous%20of%20Jordan.*

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Paris that explain their concerns, including the nature of their geographical zone in relation to the law of the sea, and have also invited them to initiate an open discussion on the matter. However, both countries have refused to accept that exchange. Despite this challenge, it is advisable that the States parties to the Treaty of Tlatelolco continue supporting that démarches; these efforts could bring important lessons for other NWFZs as well.

The divergent views among NWS on the transit of nuclear weapons across the NWFZs represent a potential confrontation that must be prevented. States parties to the NWFZs should express this concern as a joint position in relevant international fora on nuclear disarmament and non-proliferation. For its part, the NWS should engage in a discussion among them and with NWFZ parties aimed at reaching a common understanding on this problem.

The NWFZs are tools that offer a legal basis to prevent not only the proliferation of nuclear weapons leading towards general and complete disarmament, but also contribute to avert the militarization of the oceans and the sea. For that reason, it is urgent that States parties to NWFZs and NWS reach a common ground on the relation between the non-proliferation norms contained in the said treaties and the law of the sea. As was noted in this paper, the effectiveness of the NWFZs depends on fulfilling the commitments undertaken by both the States parties to such treaties and the NWS that are parties to the protocols. The commitments of the latter are not a concession to the former, but a way to comply with international law. The respect of the zones is in the interest of all, it is not only relevant for the parties to NWFZs.

The population growth and the search for energy resources in yet unexploited geographic spaces make it very likely that high seas will become an area subject to military and economic expansion by some countries,[110] including the NWS. Ocean space comprises some 70% of the Earth's surface, which means that most of the planet could be subject to conflict[111] provoked by the presence of nuclear weapons. This concern can be expanded in further research to address the potential impact of a nuclear arms race in the

[110] Barry Jr., James, "The Seabed arms control issue: 1967-1972: a superpowers symbiosis?, *Naval War College Review*, Newport, vol. 25, num. 2, November - December 1972, pp. 87-101.

[111] *Idem.*

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high seas. Additionally, what has been presented in this paper could also be relevant for States that participate in the annual sessions of the conference on the establishment of a zone free of nuclear weapons and other weapons of mass destruction in the Middle East, among other proposed zones.

As late Mexican Ambassador Miguel Marin Bosch used to say, the NWFZs share the common goal of restoring the Earth to its natural condition of a global nuclear-weapons-free zone, as it was before the beginning of the "nuclear age". The role of NWFZs can be enhanced if the States parties articulate and maintain a common stand on issues that are relevant to all zones. The recognition of the breadth of the zones of application, as well as the need to reach a shared understanding on the transit of foreign ships and aircraft through the zones, are two of the most important matters to discuss by both States parties to treaties establishing NWFZs and NWS.

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