



NWFZS and Extended Nuclear Deterrence: Squaring the Circle?

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By Jayantha Dhanapala

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This report was originally presented at the [East Asia Nuclear Security workshop](#) held on November 11, 2011 in Tokyo, Japan. All of the papers and presentations given at the workshop are available [here](#), along with the full agenda, participant list and a workshop photo gallery.

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I. Introduction

Jayantha Dhanapala states that a Nuclear Weapons Free Zone (NWFZ) in Northeast Asia could prove to be a reasonable solution to the complex issues in the region, but that the exceptions and

ambiguities that have been allowed during past negotiations of NWFZs must be avoided. Dhanapala argues that compromising on fundamental NWFZ principles—namely that all parties must verifiably dismantle any nuclear weapons and rescind extended nuclear deterrence agreements with Nuclear Weapons States (NWS)—will only exacerbate security concerns.

Jayantha Dhanapala is a former Ambassador of Sri Lanka and a former UN Under Secretary-General for Disarmament Affairs.

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II. Report by Jayantha Dhanapala

-“NWFZS and Extended Nuclear Deterrence: Squaring the Circle?”

by Jayantha Dhanapala

Five nuclear weapon free zones (NWFZ) [\[i\]](#), one single-state nuclear weapon free zone (Mongolia) and one unpopulated nuclear weapon free continent (Antarctica) - apart from the denuclearization of the extremities of the sea-bed and ocean floor and outer space - have been legally established and exist in the world today. While they do not conform to a replicable model, the UN Disarmament Commission has established guidelines [\[ii\]](#) which future proposals for NWFZ may wish to follow. As Jozef Goldblat has written:

“Nuclear-weapon-free zones have thus gradually become part and parcel of the nuclear non-proliferation regime. Not only do the treaties that have established the zones unconditionally prohibit the possession of nuclear weapons by non-nuclear-weapon states, but they also, in certain respects, go much further than the Non- proliferation Treaty, for instance, in the field of environmental security.” [\[iii\]](#)

At the moment a weapons of mass destruction free zone is being discussed for the Middle East with a conference planned for 2012 and NWFZs are proposed for North-East Asia and the Arctic. The proposal for a North-East Asian Nuclear Weapon Free Zone has intrinsic merits. However it has acquired a fresh relevance both as a solution to the nuclear weapon programme of the Democratic People’s Republic of Korea (DPRK) and as a safeguard against a possible nuclear weapon option being exercised by Japan and the Republic of Korea (ROK). It could also assuage fears of a Chinese nuclear threat in East Asia with China accepting the protocols to a future NWFZ. The proposal is being seriously discussed among academics and legislators - perhaps a prelude to a negotiation at the policy making level.

While entry into force provisions vary from treaty to treaty, a NWFZ, has always in the past and should in the future, come into existence after all its member states who are signatories are verifiably nuclear weapon free. [\[iv\]](#) The 1969 Vienna Convention on the Law of Treaties states unambiguously in Article 18 an:

“Obligation not to defeat the object and purpose of a treaty prior to its entry into force”

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to

ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”[\[v\]](#)

There can be no transitional grey period in which the DPRK remains nuclear armed justifying continued US nuclear deterrence or where some NWS (e.g. the US) retains extended deterrence for Japan and ROK if China does not ratify the Protocols and poses a threat to these allies of the US. Therefore attempts to tailor the NWFZ proposed to particular interests of states and some nuclear weapon states (NWS) would be counter-productive. Morton Halperin’s arguments for a “flexible NWFZ”[\[vi\]](#) supports assurances of non-use of nuclear weapons from NWS to members of a future NWFZ in North-east Asia but also sees no contradiction in the US continuing its commitment to extending nuclear deterrence to Japan and ROK making it clear “that the nature of the response in either case would be tailored to the circumstances of the attack and would not necessarily involve the use of nuclear weapons.”[\[vii\]](#) This casuistry and the obvious ambiguity of “would not necessarily” is patently in collision with basic features of a NWFZ and will place the DPRK in a disadvantaged position if it enters a NWFZ after dismantling its nuclear weapon arsenal. China especially is unlikely to accept such a condition. Hence all aspects deserve the fullest exploration.

Conceptually NWFZs represent ‘affirmative action’ on the part of non-nuclear weapon states (NNWS) within the Treaty for the Non-proliferation of Nuclear Weapons (NPT) in accordance with its Article VII. The choice of that term, borrowed from the political discourse of many countries to describe policies or programmes providing advantages for peoples who are perceived as weaker groups, is deliberate. It points to a strong opposition to nuclear weapons among NNWS, actually predating the NPT, and the creation of NWFZs as building blocks for a nuclear weapon free world which the Obama-Medvedev Joint Declaration of April 2009[\[viii\]](#), on behalf of the two states who hold 95% of the nuclear weapons in the world, declared as their objective. Indeed NWFZs in their preambles refer to global nuclear disarmament in unambiguous terms. As quarantine zones protecting countries and regions from the contagion of nuclear weapons, NWFZs are not all consistent in the set of prohibitions they have adopted. The Treaty of Rarotonga for the South Pacific NWFZ and the Treaty of Semipalatinsk for the Central Asian Nuclear Weapon Free Zone (CANWFZ), for example, include countries that have defence agreements with NWS and therefore enjoy extended nuclear deterrence.

In the case of Rarotonga the treaty permits the passage of nuclear armed vessels through the NWFZ and the harbours of its member states. These compromises on the principles of the prohibitions enshrined in the NWFZ treaties through adroit drafting were not seen to be in such fundamental conflict with the prohibitions as to vitiate the central thrust of the treaty. The 1999 UN Disarmament Commission guidelines for establishing NWFZs states, inter alia, that:

States parties to a nuclear-weapon-free zone exercising their sovereign rights and without prejudice to the purposes and objectives of such a zone remain free to decide for themselves whether to allow visits by foreign ships and aircraft to their ports and airfields, transit of their airspace by foreign aircraft and navigation by foreign ships in or over their territorial sea, archipelagic waters or straits that are used for international navigation, while fully honouring the rights of innocent passage, archipelagic sea lane passage or transit passage in straits that are used for international navigation.[\[ix\]](#)

All NWFZ treaties allow, at the sovereign discretion of each member state, for overflight and transit of nuclear armed vessels through international waters. The provisions of the Treaty of Bangkok also cover the Exclusive Economic Zones (EEZ) and continental shelves. However, it is disputed whether

this is in accordance to the UN Law of the Sea Convention. Jozef Goldblat has noted in respect of the CANWFZ that :

"This means that transit of nuclear weapons may be allowed or refused, but the decisions "should not be prejudicial" to the purposes and objectives of the treaty. Since neither the frequency nor the duration of transit is limited by the treaty, it is not clear to what extent transit differs from stationing. With the proviso mentioned above, total absence of nuclear weapons in the CANWFZ, as envisaged in Article VII of the NPT (dealing with the right of states to conclude regional denuclearization treaties), cannot be guaranteed.

Introduction of nuclear weapons into the zone, even for a short time, would defeat the sought goal of regional denuclearization. Moreover, transit of nuclear weapons allowed by one zonal state might affect the security of another."[\[x\]](#)

Australia and New Zealand's[\[xi\]](#) membership of ANZUS may require further clarification because of the USA's announced intention to play a greater role in the Pacific to counter the ascendancy of China. Geoffrey Barker, *a visiting fellow at the Strategic and Defence Studies Centre at the Australian National University* has written that doubts have long existed over the obligations of the US under the treaty adding that, "There would be questions about extended US nuclear deterrence, but that would be doubtful anyway under ANZUS if China's nuclear capabilities became competitive with US capabilities. No American president would risk sacrificing an American city to protect an Australian city from nuclear attack."[\[xii\]](#)

The CANWFZ has Kazakhstan Kyrgyzstan, Tajikistan, and Uzbekistan which are parties to the Tashkent Treaty – the treaty implied in Article 12 of the Semipalatinsk Treaty. Goldblat, who was associated with the actual drafting process (together with this writer) has explained a possible resolution of this issue in the following terms.

"In a joint statement, issued in the form of a binding international agreement, some high-level officials (preferably foreign ministers) of the Central Asian states would adopt a common understanding of the contentious provision. They would pledge that in settling disputes related to this provision they would base themselves on, and act in conformity with, Article 30 of the 1969 Vienna Convention on the Law of Treaties. According to this article of the Vienna Convention, when a treaty specifies that it is not to be considered incompatible with an earlier treaty dealing with the same subject matter, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Reference to this generally accepted rule of international law (*lex posterior derogat legi priori*) could allay the apprehension that Article 12 degrades the value of the entire treaty. In a similar but more explicit statement, the five parties would agree that any treaty, which they had concluded earlier, and which dealt with the same subject matter as the Semipalatinsk Treaty, would apply only to the extent that its provisions were compatible with the Semipalatinsk Treaty."[\[xiii\]](#)

Article 12 of the CANWFZ has no problems for the states parties themselves and for China and Russia. However the objections of UK, USA and France to signing the protocols may be lifted by the adoption of the recommendations of Goldblat.

Commenting on the CANWFZ Marco Roscini states:

"During the drafting of the 1976 (UN [\[xiv\]](#)) Comprehensive Study, several experts argued that "such alliances should not be regarded as being in all cases competitive with nuclear-weapon-free zones". The answer would thus depend on the circumstances of each case: if "a treaty or alliance [...] does not envisage nuclear retaliation in support of an ally, nor include the stationing of nuclear weapons

on the territory of that ally", then it would be "no bar to the creation of a nuclear-weapon-free zone" and in such a case "a non-nuclear weapon State allied to a nuclear-weapon State can [...] also be a party to a nuclear-weapon-free zone treaty". In order to avoid assuming conflicting obligations, the denuclearized State should however verify that the nuclear weapon-free zone treaty is not in contrast with other agreements to which it is a party."[\[xv\]](#)

With regard to another aspect of a NWFZ treaty, more recently the proposed Australian decision to export uranium to India despite the latter not being within the NPT is widely seen as a violation of the Treaty of Rarotonga.[\[xvi\]](#) Thus accepted NWFZ guidelines have been shown to be flexible.

In the case of all NWFZs however the provisions of the NPT apply since they are all states parties of this treaty. Thus the application of extended deterrence or sheltering under the nuclear umbrella offered by any one of the NWS must be seen as a violation of Article 1 – one of the core articles of the NPT. Firstly the transfer of nuclear weapons or control of such weapons "directly or indirectly" is prohibited. This has been violated by the geographical location of US nuclear weapons in five NATO countries in Europe but has been justified by the US because the weapons are under US control – a justification frequently rejected by NNWS at NPT Review Conferences and other forums[\[xvii\]](#). No NWFZ would make the actual stationing of nuclear weapons whether under the control of a NWS or not legal. Secondly, the prohibition "not in any way to assist, encourage, or induce"[\[xviii\]](#) any NNWS to acquire or control nuclear weapons stands obviously violated when the protection of a nuclear weapon defence is agreed upon by a bilateral treaty with a NWS as in the case of Australia, Japan or ROK.

The Treaty of Tlatelolco is the only NWFZ whose Negative Security Assurance (NSA) protocol is signed and ratified by all five NWS. The United States is hesitant in granting NSAs to NWFZ members although the ratification to the protocols of Pelindaba and Rarotonga are pending before the US Senate. The U.S. government has also published its own criteria for the establishment of a NWFZ in 1995, highlighting the right of states parties to grant or deny the passage of nuclear-capable ships and aircraft of non-party nations, and the validity of rights recognized under international law such as the freedom of navigation and overflight, the right of innocent passage, and the right of archipelagic sea lanes passage[\[xix\]](#). However the UN principles for establishment of NWFZs are generally accepted by France, Russia, and the United Kingdom who make their decisions to support individual NWFZs on a case-by-case basis. China being the only NWS that has explicitly rejected the first use of nuclear weapons has pledged not to use nuclear weapons against any NNWS and/or member of a NWFZ. [\[xx\]](#)

The International Court of Justice in its Advisory Opinion of 8 July, 1996 ruled unambiguously on nuclear deterrence and extended nuclear deterrence both of which contain a threat of the use of nuclear weapons. The court decided to comply with the request for an advisory opinion;

The court replied that "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons";

The court replied that "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such";

The court replied that "A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful";[\[xxi\]](#)

The court replied that "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the

principles and rules of humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons".^[xxii]

In the context of today's realpolitik the use or threat of use of nuclear weapons and the need for extended deterrence to be available to members of NWFZs is even more dubious than before. China has always pledged never to use nuclear weapons first and certainly never to use them against NNWS. The four other NWS have given assurances in the form of a Security Council pledge which falls short of the Treaty bound assurance that Non-aligned Movement countries have wanted.

In the April 2010 Nuclear Posture Review (NPR), the United States declared that it would not use nuclear weapons against non-nuclear-weapon states that are members in good standing of the NPT.

Previously, successive US administrations had maintained a policy of "strategic ambiguity" by refusing to rule out the use of nuclear weapons in response to biological or chemical weapons attacks, even from NPT member states. Thus the need for extended deterrence embedded in bilateral security treaties to be carried over to NWFZs is questionable especially if it leads to an imbalance in the zone such as in the proposed Northeast Asian Nuclear Weapon Free Zone (NEANWFZ). Moreover at the 2010 NPT Review Conference US Secretary of State Hillary Clinton stated that protocols for the NWFZs in Africa and the South Pacific were being sent to the US Senate for ratification and that discussions would be held regarding the Central Asian (Treaty of Semipalatinsk) and Southeast Asian (Treaty of Bangkok) NWFZs. This has been followed by concrete action through diplomatic consultations and a submission of the Treaties of Rarotonga and Pelindaba, in May 2011 to the US senate for ratification.

Thus a NWFZ in North-east Asia has many reasons to commend itself as a solution to the complex issues in the region that threaten its security but compromising on fundamental NWFZ principles will only exacerbate matters. Exceptions and ambiguities have been introduced in the negotiation of past NWFZs but they cannot, and should not, be cited as precedents for future NWFZs. Extended deterrence and a NWFZ are mutually exclusive. The Obama speech in Prague in April 2009 and all that has transpired with regard to the objective of a nuclear weapon free world has altered global circumstances. Cold War warriors Schultz, Kissinger, Nunn and Perry said in their famous Wall Street Journal of 2007 that, "The end of the Cold War made the doctrine of mutual Soviet-American deterrence obsolete. Deterrence continues to be a relevant consideration for many states with regard to threats from other states. But reliance on nuclear weapons for this purpose is becoming increasingly hazardous and decreasingly effective."^[xxiii] The time to bury nuclear deterrence and extended nuclear deterrence is now.

III. Notes

[i] The five regions with NWFZ agreements are: Latin America (the 1967 Treaty of Tlatelolco), the South Pacific (the 1985 Treaty of Rarotonga), Southeast Asia (the 1995 Treaty of Bangkok) Africa (the 1996 Treaty of Pelindaba) and Central Asia (the 2006 Treaty of Semipalatinsk).

[ii] United Nations General Assembly, Fifty-fourth session, Report of the Disarmament Commission, New York, 1999, Supplement No. 42 (A/54/42) Official Records, pg 8,9. http://www.un.org/ga/search/view_doc.asp?symbol=A/54/42%28SUPP%29 (accessed on Feb 7th , 2012)

[iii] Jozef Goldblat, "Denuclearization of Central Asia", Disarmament Forum, Pg 26(2007), (accessed on Feb 7th , 2012). <http://www.unidir.org/pdf/articles/pdf-art2685.pdf>

- [iv] Under article 28 of the Treaty of Tlatelolco, the Treaty comes fully into force when all eligible states have signed and ratified the Treaty, relevant Protocols and concluded comprehensive safeguards agreements with the IAEA. However, under the same article, States can individually waive these requirements and declare the Treaty in force for their respective territories thus creating a nuclear weapon free zone gradually. See: US Department of State, Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco) , <http://www.state.gov/p/wha/rls/70658.htm>
- [v] United Nations, Vienna Convention on the Law of Treaties 1969, United Nations, *Treaty Series*, vol. 1155, p. 331 , 2005 http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed on 2nd April, 2012)
- [vi] Halperin Morton H, “[A Proposal for a Nuclear Weapons Free-Zone on the Korean Peninsula](#)”, (Paper presented at the East Asia Nuclear Security Workshop organized by the Nautilus Institute for Security and Sustainability in Tokyo, Japan November 11, 2011). (accessed on Feb 7th , 2012).
- [vii] *ibid*
- [viii] The White House, Joint Statement by Dmitriy A. Medvedev, President of the Russian Federation, and Barack Obama, President of the United States of America, Regarding Negotiations on Further Reductions in Strategic Offensive Arm, April 1, 2009, http://www.whitehouse.gov/the_press_office/Joint-Statement-by-Dmitriy-A-Medvedev-and-Barack-Obama (accessed on Feb 7th , 2012)
- [ix] United Nations General Assembly, Fifty-fourth session, Report of the Disarmament Commission, New York, 1999, Supplement No. 42 (A/54/42) Official Records, pg 8,9. http://www.un.org/ga/search/view_doc.asp?symbol=A/54/42%28SUPP%29 (accessed on Feb 7th , 2012)
- [x] Jozef Goldblat, “Denuclearization of Central Asia”, Disarmament Forum, Pg 28(2007), (accessed on Feb 7th , 2012). <http://www.unidir.org/pdf/articles/pdf-art2685.pdf>
- [xi] In August 1986 the United States suspended its ANZUS security obligations to New Zealand pending the restoration of port access. after the Government of New Zealand refused access to its ports by nuclear-weapons-capable and nuclear-powered ships of the U.S. Navy.
- [xii] Barker Geoffrey, Has ANZUS passed its use-by date?, Inside Story, 13 June 2011, <http://inside.org.au/has-anzus-passed-its-use-by-date/>(accessed on Feb 7th , 2012)
- [xiii] Jozef Goldblat, “Denuclearization of Central Asia”, Disarmament Forum, Pg 31(2007), (accessed on Feb 7th , 2012). <http://www.unidir.org/pdf/articles/pdf-art2685.pdf>
- [xiv] For an advance issue of this document see: COMPREHENSIVE STUDY OF THE QUESTION OF NUCLEAR-WEAPON-FREE ZONES IN ALL ITS ASPECTS, Special report of the Conference of the Committee on Disarmement , UN Doc. A/10027/Add. 1, New York, 1975 <http://www.un.org/disarmament/HomePage/ODAPublications/DisarmamentStudySeries/PDF/A-10027-Add1.pdf>
- [xv] Marco [Roscini](#), Something “Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia”, Oxford Journals - [Chinese Journal of International Law](#), Oxford

University Press [Volume 7, Issue 3](#), 2008 Pp. 593-624. (Accessed on Feb 8th 2012) <http://chinesejil.oxfordjournals.org/content/7/3/593.full#fn-17>

[xvi] Daryl Kimball and William Potter, "Stand on uranium sales needed", The Press, 23/12/2011, (Accessed on Feb 8th 2012) <http://www.stuff.co.nz/the-press/opinion/perspective/6182310/Stand-on-uranium-sales-needed>

[xvii] For example at the 1995 NPT Review and Extension Conference, a clarification was sought by the Mexican delegation followed by the Non-Aligned Movement on whether nuclear sharing breached Articles I and II of the NPT. See : [Berhanykun Andemicael, Merle Opelz, and Jan Priest](#) "Measure for measure: The NPT and the road ahead", IAEA (Accessed on March 20th 2012) <http://www.iaea.org/Publications/Magazines/Bulletin/Bull373/priest.html> and see also Working Paper Presented By The Group Of Non-Aligned States Parties To The 2010 Review Conference Of The Treaty On The Non-Proliferation Of Nuclear Weapons (NPT), (Accessed on March 20th 2012) http://isisonline.org/uploads/conferences/documents/NAM_Working_Paper_for_2010_NPT_RevCon_3April2010.pdf

[xviii] The Treaty On The Non-Proliferation Of Nuclear Weapons (NPT) , Signed in Washington, London, and Moscow on 1st July 1968, United Nations, <http://www.un.org/en/conf/npt/2005/npttreaty.html>. (Accessed on Feb 8th 2012)

[xix] McArdle Kelleher, Catherine Kelleher, Judith Reppy Getting to Zero: The Path to Nuclear Disarmament, Stanford University Press, Mar 2, 2011, pg 175

[xx] "Nuclear-Weapon-Free-Zone (NWFZ) Clearinghouse," James Martin Centre for Nonproliferation studies (Accessed on Feb 8th 2012) http://cns.miis.edu/nwfz_clearinghouse/

[xxi] That is, "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" (Article 2, paragraph 4); and "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." (Article 51): Charter of the United Nations, at: <http://www.un.org/en/documents/charter/>

[xxii] [C. G Weeramantry](#), *Nuclear weapons and scientific responsibility*, (Ratmalana ; Sri Lanka ; Vishva Lekha publishers, 1999)pg 292

[xxiii] George P. Shultz, William J. Perry, Henry A. Kissinger and Sam Nunn. "A World Free of Nuclear Weapons", The Wall Street Journal, January 4, 2007; Page A15

IV. Nautilus invites your responses

The Nautilus Peace and Security Network invites your responses to this report. Please send responses to: napsnet@nautilus.org. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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Nautilus Institute

608 San Miguel Ave., Berkeley, CA 94707-1535 | Phone: (510) 423-0372 | Email:

nautilus@nautilus.org