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In the Zone

An analysis of the essential legal requirements for the
creation of a *Weapons of Mass Destruction Free Zone*
in the Middle East

JURM02 Graduate Thesis
Graduate Thesis, Master of Laws programme
30 higher education credits
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Semester: Autumn 2012

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Summary

Since 1967, public international law has had many treaty additions through so-called nuclear weapon free zones, treaties that have been created through legally binding agreements to pursue *complete* nuclear disarmament within a geographically defined area. The international community has for decades discussed the establishment of such a zone in the Middle East, but without prompting any concrete action. In the light of recent instabilities and the enhanced risk of regional nuclear weapon proliferation, the zone has come up for discussion once again, this time with the ambition of an extended scope in order to establish “an effectively verifiable Middle East Zone Free of Weapons of Mass Destruction, nuclear, chemical and biological, and their delivery systems”. This initiative for a weapons of mass destruction free zone is a complete novelty, and stands to face many challenges. This thesis explores, with a legal policy perspective, the essential requirements for the establishment of a successful weapons of mass destruction free zone in the Middle East, by looking at weaknesses in existing disarmament treaties (regulating nuclear, biological and chemical weapons) as well as the previous treaties establishing nuclear weapon free zones.

The thesis sheds light on several future problems such as: the lack of a verifiable and legally binding treaty regime for delivery vehicles, *i.e.* missiles and other means of delivering the weapon to its intended target, the likelihood of normative conflicts developing if the future zone follows the precedents set by earlier nuclear weapon free zones, the delicate issue of removing the existing Israeli nuclear arsenal from the zone and its subsequent destruction, and how to compensate for weaknesses in verification of compliance regarding biological weapons.

Concluding by a set of recommendations, the thesis answers the research question by offering a list of proposed treaty provisions. These include, *inter alia*, establishing a supporting regional organisation for matters of verification and confidence building, limiting the geographical scope of marine areas to the territorial seas in order not to repeat the mistakes of earlier nuclear weapon free zones, and adding the right to and obligation of challenge inspections to enhance verification of compliance regarding all three types of weapons of mass destruction.

Sammanfattning

Med start år 1967 har folkrätten fått en rad tillskott av multilaterala överenskommelser genom uppkomsten av en ny typ av traktat. Dessa traktat har skapats för att stifta så kallade kärnvapenfria zoner och är i grunden folkrättsligt bindande överenskommelser som etablerar komplett nedrustning av kärnvapen inom ett geografiskt avgränsat område. Det internationella samfundet har under flera decennier diskuterat etableringen av en sådan zon i Mellanöstern, dock utan föranleda några konkreta åtgärder. I ljuset av den senare tidens instabilitet i regionen och risken för spridning av kärnvapen, har zonen återigen blivit föremål för diskussion, denna gång med ambitionen att utöka dess räckvidd till att omfatta inte bara kärnvapen utan alla massförstörelsevapen samt dess vapenbärare, det vill säga nukleära, biologiska och kemiska vapen samt missiler eller andra medel för levererandet av vapnet till sitt mål. Initiativet för en massförstörelsevapenfri zon utgör en ny idé och har många utmaningar framför sig. Denna uppsats använder sig av en rättspolitisk metod för att utforska de grundläggande förutsättningarna för inrättandet av en framgångsrik massförstörelsevapenfri zon i Mellanöstern. Detta mål uppfylls genom att undersöka svagheter i såväl de existerande nedrustningskonventionerna (som reglerar nukleära, biologiska och kemiska vapen), som de redan existerande traktaten som inrättar kärnvapenfria zoner.

Uppsatsen belyser flera framtida problem, bland annat bristen på en verifierbar och folkrättsligt bindande traktatregim för vapenbärare, sannolikheten för framtida normkonflikter om den blivande zonen följer prejudikaten satta av tidigare kärnvapenfria zoner, den känsliga frågan om avlägsnandet av den israeliska kärnvapenarsenalen från zonen och dess efterföljande förstörelse samt hur man kan kompensera för svagheter i verifikationsåtgärder vad gäller efterlevnad av traktatförpliktelser för biologiska vapen.

Avslutningsvis mynnar uppsatsen ut i en samling rekommendationer som besvarar frågeställningen genom en lista med föreslagna traktatbestämmelser. Dessa inkluderar bland annat inrättandet av en regional organisation för stöd i frågor som rör verifikations- och förtroendeskapande åtgärder, begränsandet av den geografiska avgränsningen i havsområden till att enbart omfatta respektive stats territorialhav samt inkluderandet av rätten att efterfråga och skyldigheten att acceptera utmaningsinspektioner (challenge inspections) för att förstärka verifikationen av traktatefterlevnad för alla typer av massförstörelsevapen.

Preface

Life is full of wonderful surprises and if you let it, it can take you places you never thought it would, allowing you to pick up new interests and have exciting adventures. When I started studying law in Lund a few years ago, I never would have imagined that I would spend a semester delving into weapons of mass destruction and become so interested in the field of international public law. Apart from probably becoming a new addition to the FBI/CIA watch-list after having spent hours and hours trying to figure out all there is to know about missile systems and biological warfare, this has been a truly fascinating subject to explore in depth.

I would like to thank the wonderful group of people working at the Department for Disarmament and Non-Proliferation with the Swedish Ministry for Foreign Affairs, for offering me a wonderful environment in which I got to deepen my understanding for the area. I would particularly like to thank the Head of Department, Dr .Christer Ahlström, for offering me this opportunity, for patiently giving me advice, and for answering my many questions.

I also thank Professor Ulf Linderfalk, with the Faculty of Law at Lund University for valuable opinions and input to this thesis.

Finally, my most sincere thanks to Dr. Randy Rydell with the United Nations Office for Disarmament Affairs, for opening my eyes to this subject in the first place, for teaching me about the intricate problems within the field, and for giving me the chance to do an internship with the United Nations, resulting in an invaluable experience that I for always will cherish.

Abbreviations

BTWC	Biological and Toxin Weapons Convention
CWC	Chemical Weapons Convention
EEZ	Exclusive Economic Zone
the Code	Hague Code of Conduct Against Ballistic Missile Proliferation
the General Assembly	United Nations General Assembly
IAEA	International Atomic Energy Agency
ICCPR	International Covenant on Civil and Political Rights
LAS	League of Arab Nations
MTCR	Missile Technology Control Regime
NATO	North Atlantic Treaty Organisation
NPT	Nuclear Non-proliferation Treaty
NSA	Negative security assurance
NWFZ	Nuclear Weapon Free Zone
NWS	Nuclear Weapon State
Non-NWS	Non-Nuclear Weapon State
OPANAL	Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Organismo para la Proscripción de las Armas Nucleares en la América Latina y el Caribe)
OPCW	Organisation for the Prohibition of Chemical Weapons
the Secretary General	United Nations Secretary General
the Security Council	United Nations Security Council
START	Strategic Arms Reduction Treaty
TCS	Treaty on Collective Security
UN	United Nations
UNCLOS	United Nations Convention on the Law Of the Sea
UNDC	United Nations Disarmament Commission
UNIDIR	United Nations Institute for Disarmament Research
UNODA	United Nations Office for Disarmament Affairs
VCLT	Vienna Convention on the Law of Treaties
WMD	Weapon of Mass Destruction

1 Introduction

1.1 Background

Weapons of mass destruction (WMDs) hold a special place in public conscience, in international debate and in public international law. But why are these particular weapons so important? What causes the widespread alarm and interest in them? The international expert panel that formed the WMD Commission analysed the global situation on these arms in their final report “Weapons of Terror” and summarised the reason for their importance quite clearly:

Nuclear, biological and chemical weapons are rightly called weapons of mass destruction [...]. Designed to terrify as well as destroy, they have the potential to kill thousands and thousands of people in a single attack, and their effects may persist in the environment and in our bodies, in some cases indefinitely.

In a region as conflict-ridden and perpetually unstable as the Middle East, the idea of another state possessing WMDs, in reality or simply the mere suspicion of it, can have a huge impact on global security. Powerful and deadly as they are, WMDs can shift power balances, or imbalances if you will, in an instant.

One of the worst kept secrets in the world is that Israel possesses nuclear weapons. Even though this notion for decades has neither been confirmed nor denied, the world has accepted the assumption that Israel is a *de facto* Nuclear Weapon State (NWS), albeit not a *de lege* one.¹ In an attempt to address this issue, the Shah of Iran introduced the idea of making the Middle East a Nuclear Weapon Free Zone (NWFZ) already in the 1970’s², an initiative publicly applauded but privately dismissed by many countries, not at least by the United States. Until recently that is. Few have failed to note the current international uproar following Iran’s suspected nuclear ambitions, and while it is uncertain if Iran is actually pursuing nuclear weapons, the thought of a potential second NWS in the region has suddenly made the idea of a Middle Eastern NWFZ very appealing indeed.

As the entire world has its eyes fixed on the Middle East in general and Iran in particular, the problem of nuclear weapons and other WMDs is imminent. Until this issue is addressed in a long-lasting way, no other

¹ Federation of American Scientists, *Israel: Nuclear Weapons*.

² Hautecouverture & Mathiot, *A Zone free of WMD and means of delivery in the Middle East: an assessment of the multilateral diplomatic process 1974–2010*, p. 1.

measures to ensure regional stability can be seriously discussed. Lasting stability can only be achieved once these weapons are out of the equation.

While the voices calling for such a NWFZ are loud indeed, being unrealistic is of no use to anybody, and it is important to be aware that this is a process that will require time. On the other range of the spectrum it is safe to say that if the issue is left unsolved it will lead to a regional arms race. The King of Saudi Arabia was quoted declaring that if Iran is successful in creating nuclear weapons, Saudi Arabia will acquire them too³. A nuclear-armed Iran would change dynamics and cause a chain reaction and an arms race that will be nearly impossible to curb.

1.2 Purpose and research question

The project of a Middle Eastern NWFZ evolved over time to comprise not only nuclear weapons, but biological and chemical weapons as well. What began as an initiative for a NWFZ has now become a project pursuing a WMD-free zone, making it the first of its kind. The mandate for the upcoming negotiations on the WMD-free zone is “the establishment of an effectively verifiable Middle East zone free of weapons of mass destruction, nuclear, chemical and biological, and their delivery systems”⁴. The extents to which we can draw inspiration from existing treaties establishing NWFZs, are therefore limited. A lot has been written and several reports serve as guidelines in the creation of NWFZs, but nothing exists covering an equivalent zone including WMDs and the means for their delivery. New problems arise and new solutions are needed. How, then, can a strong and effective treaty regime be created? The purpose of this thesis is to explore the essential requirements in making such a treaty successful in reality. The overarching research question is therefore:

What are the essential requirements for the establishment of a successful WMD-free zone in the Middle East?

This ideal outcome, a successful WMD-free zone, needs to be defined with one of the following two alternatives: either a strong treaty regime, risking a smaller group of signatories, or, a weaker and more flexible treaty regime that perhaps is not even binding, which could possibly attract a larger group of signatories. This choice of one or the other has become a general trend in later years in the arena of international disarmament. The hope of achieving treaty universality is sometimes abandoned in order to pursue negotiations

³ Shalev, *Dennis Ross: Saudi king vowed to obtain nuclear bomb after Iran.*

⁴ Davenport, *WMD-Free Middle East Proposal at a Glance.*

in a smaller circuit of so called “likeminded states”, meaning that the goal and objective is shared within the group, which makes it easier for that group to go further than in a universal forum, as in for example within the United Nations’ many different branches and sub-organisations.

So in the case of achieving a WMD-free zone, which alternative is better: an efficient treaty with a smaller group of signatories, or a looser treaty with many? In the context of a treaty zone with a clearly defined geographical delimitation, the intended target signatories must *all* join and become states parties. For without near-to-perfect adherence, there will be no regional zone to talk of, it is in fact the basic premise of a *regional* treaty that sets the limit and makes comprehensive participation a factor which cannot be conceded. It is safe to state that a weaker, more flexible treaty requires a certain level of trust, a currency that is very rare in the Middle East. Regardless of what the substantial scope will be, the states parties will need to ensure that the signatories are in compliance with their legal obligations. So for the purposes of this particular region, the only way of ensuring trust, and thereby participation to this future treaty, is to make it strong in matters of verification and compliance. The research question’s demand for a *successful* WMD-free zone shall thus define the premise of *success* as: a legally binding treaty, including efficient and strong verification and compliance mechanisms, with near-to-perfect adherence by the regional states, with a minimum of ambiguity in interpretation of the treaty provisions, and with a good outlook of gaining negative security assurances from NWSs.

1.3 Method and delimitations

This thesis aims to shed light on what tools might support and what tools might derail the process of creating a Middle Eastern Treaty that establishes a successful WMD-free zone. The nature of this task, the evaluation of *de lege ferenda*, calls for the application of a legal policy perspective. The descriptive part of this thesis is treated through a comparative method. Most importantly the different existing NWFZs are compared on the basis of contentious issues. The comparison is by no means exhaustive but highly selective, based on the most sensitive and contentious areas, as this is the most efficient and useful way of highlighting what needs to be addressed in the future treaty establishing the WMD-free zone. By drawing on lessons learned from the existing treaties establishing NWFZs, I intend to explore possible solutions for a successful zone. The treaties chosen for comparison have been so because of their inherent similarities to the proposed zone. Four additional zones are considered nuclear free, but differ too much to be

of value in this study. Mongolia has unilaterally declared its non-nuclear weapon status but is not relevant as this declaration never underwent multilateral negotiations. Furthermore, three multilateral treaties have established the Antarctic, the sea-bed, and the outer space free of nuclear weapons, but are not relevant as these zones cover areas outside of national jurisdiction.

An analysis of this nature could easily reach the size of a novel, and for this reason, I have chosen to focus on the three following areas, which will constitute the three following chapters, in order to best answer the research question: one part covering the basis for disarmament, a second looking back in time by comparing existing NWFZs, and the third exploring the specific challenges of the future WMD-free zone in the Middle East. The breakdown is specified as follows:

A. Conflicts with, and problems within, existing disarmament treaties

For each of the three different types of WMDs, a separate disarmament treaty has been created: nuclear weapons are covered in the Nuclear Non-Proliferation Treaty (NPT), biological weapons in the Biological and Toxin Weapons Convention (BTWC), and chemical weapons in the Chemical Weapons Convention (CWC). Each of these three seek, in different ways, to pursue disarmament. Some argue, as will be demonstrated further on, that adherence to each separate treaty before the creation of a WMD-free zone, is a basic and fundamental requirement. This thesis examines if there are merits in *not* acceding to them, but instead postponing this step for the moment by instead going beyond the scope of these three treaties, in the new Middle Eastern Treaty itself.

B. Complications in existing treaties establishing NWFZs

Each existing NWFZ has had its own difficulties and bears different weaknesses due to the context it originates from. These past problems are likely to have an impact on the negotiations on a WMD-free zone, and by comparing them and analysing the resulting complications in their own individual context, observations can be made for the upcoming Middle Eastern Treaty.

C. Challenges in creating the new treaty regime

The third part covers the region's specific challenges and issues of delimitations in scope, both geographic and substantial. What has been said so far about delimitations and what legal problems have been foreseen for the Middle Eastern Treaty?

1.4 Author's remarks

This thesis is structured so that each chapter ends with a section commenting and analysing the contents of that chapter. A broader analysis follows in chapter five, which is concluded with a series of suggestions of future treaty provisions. Throughout the text the terms WMD-free zone and Middle Eastern Treaty are used as synonyms. The two terms are in fact one and the same thing, as the zone will be established by the Middle Eastern Treaty. All previous NWFZs are commonly referred to with the name of the city in which they were signed. This will also be the case in this thesis, and seeing as the process for the WMD-free zone in the Middle East is in its infancy, it has no preliminary name. It is thus referred to as the Middle Eastern Treaty, plain and simple.

2 The legal basis of international disarmament

This section treats the existing framework that covers the central scope of the proposed Middle Eastern Treaty, namely WMDs. The Oxford Dictionary defines the term weapon of mass destruction as a “nuclear, biological, or chemical weapon able to cause widespread devastation and loss of life”. For many reasons, such as: military gain, pressure from civil society, international stability, and fundamentally the delicate issue of morality, the international community has sought to limit and destroy these powerful and dangerous weapons. However, in creating treaties banning them, states have been faced with the dilemma of the dual use nature of WMDs. Each of them must be allowed to exist for peaceful purposes, and the grey zone between civil and military use is often difficult to shed light on. The technology that is fundamental for nuclear weapons has the same basis as nuclear energy or nuclear power plants that fuel much of modern life. Elements that go in to making biological weapons are necessary for hospitals and laboratories, and common substances like chlorine and pesticides are some of the simplest tools for creating chemical weapons. The act of balancing the undeniable merits of banning each type of WMD with access and development of their civil and peaceful equivalent, has resulted in different outcomes and as an effect, each treaty differs in strength and scope.

2.1 The WMD-trio

2.1.1 The Nuclear Non-Proliferation Treaty

The NPT is one of the most praised, while at the same time criticised, treaties to arise from the UN system. It opened for signature in 1968, entered into force in 1970 and addresses, as exemplified by the title, non-proliferation or in other words the possible spread of nuclear weapons and weapons technology to states that do not already possess them. The NPT is largely considered to be a success and the most important existing disarmament agreement with 190 states parties, including the five NWSs.⁵ It has been criticised for effectively freezing the status quo of 1967 by only acknowledging the five nuclear powers of the time as NWSs, viz.: China,

⁵ UNODA, *Treaty on the Non-Proliferation of Nuclear Weapons*.

France, the Soviet Union/Russia, the United Kingdom, and the United States, and in so doing, creating a first class of “Have’s” and a second class of “Have Not’s”.

In substance, each NWS undertakes not to transfer nuclear weapons or weapons technology to any recipient whatsoever, thereby ensuring non-proliferation⁶. In turn, each Non-Nuclear Weapon State (Non-NWS) undertakes not to receive, nor to seek to manufacture such weapons⁷. These obligations are ensured through bilateral safeguard agreements between each state and the International Atomic Energy Agency (IAEA)⁸. The reason behind the attractiveness of the treaty to the Non-NWSs of the world at the time was due to two factors. Firstly, the NPT clearly stated that it would not affect the inalienable rights of the parties to use nuclear energy for peaceful purposes. In fact, it encouraged cooperation between the states parties, and thereby ensured that needs in terms of energy would be met.⁹ Secondly, and more importantly, article 6 (2) of the NPT created the obligation for all parties, including the actual NWSs, to “[...] pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race [...] and to nuclear disarmament [...]”. It is therefore not an exaggeration to call the NPT the backbone of nuclear disarmament.

The NPT also encourages the creation of NWFZs. Its article 7 states that “Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories”. The purpose of the NPT is to promote disarmament, and the idea of a NWFZ goes hand in hand with that purpose.

2.1.2 The Biological and Toxin Weapons Convention

Opening for signature in 1972 and entering into force in 1975, the BTWC banned the development, production and stockpiling of an entire category of WMDs, namely biological and toxin weapons¹⁰. This convention was created in order to strengthen and go beyond the 1925 Geneva Protocol, which prohibits the *use* of biological and chemical weapons in war. This norm prohibiting use is argued to have gained the status of customary international law and as such ought to be binding on all states, whether party to the Geneva Protocol or not.¹¹ Thus, the fact that *use* of biological weapons is not explicitly prohibited in the BTWC should neither be

⁶ The NPT, article 1.

⁷ The NPT, article 2.

⁸ The NPT, article 3.

⁹ The NPT, article 4 (1).

¹⁰ UNODA, *The Biological Weapons Convention*.

¹¹ Littlewood, *Strengthening the Role of the BTWC and the CWC*, p. 25.

interpreted as something that was left out as compromise, nor as a permission to use them. The reason why the wording was left out during the negotiations in 1968-1971 was due to fear that the provision might potentially undermine the Geneva Protocol and its status as customary international law.¹²

While the international taboo concerning these weapons might be strong, the convention's verification mechanisms are not. The issue of compliance verification is the largest weakness of the BTWC, much due to the inherent nature of biological weapons. As opposed to both nuclear and chemical weapons, which require large facilities and generate by-products when manufactured, most types of biological weapons can be created in nothing less than a portable laboratory, hidden in someone's basement. The BTWC consequently relies on good-faith implementation and on states parties to live up to their obligations.¹³ It dictates that the member states cooperate through consultations, bilateral as well as multilateral, regarding potential concerns about compliance and verification. Disputes regarding compliance can be referred to the UN Security Council (the Security Council) by states parties, should they suspect another member of violation. The voting rules within the Security Council for a decision to carry out an investigation of violation of the BTWC are not any different from the standard voting rules. This means that the permanent members of the council¹⁴ (China, France, Russia, the United Kingdom, and the United States) continue to possess a *de facto* veto power against any potential Security Council decision to carry out such an investigation.¹⁵

2.1.3 The Chemical Weapons Convention

Preceded by 12 years of negotiations in the UN Conference on Disarmament in Geneva, the CWC opened for signature in 1993. The convention efficiently eliminates chemical weapons by prohibiting its states parties to, *inter alia*, develop, produce, acquire, stockpile, transfer or use chemical weapons. Furthermore, each state party has undertaken to destroy whatever chemical weapons it possesses, in accordance with the convention.¹⁶

The CWC entered into force in 1997, thereby finally establishing the permanent implementing agency created through the treaty, the Organisation for the Prohibition of Chemical Weapons (OPCW)¹⁷. Based in

¹² Littlewood, *Strengthening the Role of the BTWC and the CWC*, p. 26.

¹³ Littlewood, *Strengthening the Role of the BTWC and the CWC*, p. 30.

¹⁴ Also known as the P5, the permanent five.

¹⁵ Kimball & Meier, *The Biological Weapons Convention At A Glance*.

¹⁶ The CWC, article 1.

¹⁷ UNODA, *Chemical Weapons*.

The Hague, its mandate is “[...] to achieve the object and purpose of the Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among states parties.”¹⁸

The role of the OPCW is very important and quite strong. In addition to support with implementation, the OPCW also assists in so called “challenge inspections”, a feature that entitles any state party, which suspects that another member state is failing to comply, to request the Director General of the OPCW to send an inspection team. The states parties to the CWC have committed themselves to the obligation of inspections “anytime, anywhere” with no right of refusal.¹⁹

Seven states parties have declared possession of stockpiles of chemical weapons: Albania, India, Iraq, Libya, Russia, South Korea and the United States.²⁰ As of August 2012, roughly 75% of the world's declared stockpile of 71 metric tons of chemical agents has been verifiably destroyed.²¹ The process of destruction is complicated and above all very expensive, due to environmental concerns for local populations and safety concerns for the people carrying out the actual destruction. As a result, the timeframes that were stipulated in the convention have been postponed several times. The latest deadline set to April 2012 was exceeded by the United States, Russia and Libya.²² The two former due to their very large stockpiles and practical implications, the latter due to practical problems arisen from the internal turmoil after the death of its dictator and leader Muammar Khaddafi.

2.2 Delivery vehicles

At which point does a device, a vial or a machine become a weapon? Definitions vary, but the WMD Commission in its final report defines the term as follows: “A simple device that is capable of producing mass destruction becomes a *weapon* only when its user is able to deliver such a device effectively to an intended target.”²³

The nuclear weapons dropped over Japan in 1945 were delivered by heavy long-range bombers. As these weapons modernised over time and became smaller and lighter, so did the variety of aircrafts delivering them, such as fighters, missiles and even so called drones, formally known as

¹⁸ OPCW, *About the OPCW*.

¹⁹ OPCW, *Chemical Weapons Convention*.

²⁰ Walker, *Abolishing Chemical Weapons: Progress, Challenges, and Opportunities*.

²¹ OPCW, *Demilitarisation*.

²² Kelle, *Chemical weapons destruction deadline missed*.

²³ Blix et al., *Weapons of Terror*, p. 140.

Unmanned Aerial Vehicles or UAVs. In addition to traditional aircrafts or bombers, deployment methods evolved to include nuclear landmines, depth charges and artillery shells.²⁴

Chemical weapons can be delivered by bombs but also, as repeatedly done in World War I, by simply venting clouds of toxic gas. A common trait of both biological and chemical agents is that they can be delivered through a spray can into a ventilation system or directly into a water supply. Even fleas, ticks and rodents are possible means for spreading highly infectious biological agents.²⁵

The bigger the delivery system, the easier it is to track and verify. The fact that biological and toxin weapons need so little to cause mass destruction poses, as described earlier, the biggest challenge in verification. It is therefore quite logical that much of the international effort to control WMD delivery systems has addressed ballistic and cruise missiles, which require states to undertake major financial and technological investments as well as to actually test the missiles in public. These missiles have capabilities to deliver weapons over considerable distances, with amazingly high accuracy, with little warning and without risk to pilots.²⁶

What is being done, then, to counter the arms race concerning delivery vehicles? In spite of the fact that the preamble of the NPT cites a goal of eliminating both nuclear weapons and *the means of their delivery*, there is to date no multilateral treaty requiring missile disarmament.²⁷ The most well-known treaties regulating delivery vehicles stem from the cold war and are bilateral agreements between the United States and the Soviet Union, such as the Strategic Arms Reduction Treaty I and II (START), to which the latest addition is the New START from 2010.²⁸

2.2.1 Frameworks

The international community has had little interest in missile *disarmament* and has rather focused on missile *non-proliferation*, in other words carefully selecting which states get access to this technology, putting a lot of effort in keeping it from those deemed to be unstable. This following section treats the international legal framework that covers delivery vehicles.

²⁴ Blix et al., *Weapons of Terror*, p. 140.

²⁵ Blix et al., *Weapons of Terror*, p. 140.

²⁶ Blix et al., *Weapons of Terror*, p. 140.

²⁷ Blix et al., *Weapons of Terror*, p. 143.

²⁸ Blix et al., *Weapons of Terror*, p. 142.

2.2.1.1 Missile Technology Control Regime

States possessing or producing nuclear capable missiles have created the Missile Technology Control Regime (MTCR), an informal, voluntary, non-treaty-based arrangement, in order to coordinate and control transfers and exports of missiles and missile technology.²⁹ The first discussions on the subject of an export control regime began in the early 1980's between the Western powers. Today the MTCR has 34 member states and a couple of states, though not actual members, have pledged to abide by the MTCR Guidelines.³⁰

Each member state is required to establish national export control policies for the delivery vehicles, underlying components and technologies that appear on the regime's Material and Technology Annex. The content of that annex is changed through consensus decisions. Potential exports of such items are evaluated on a case-by-case basis and members should exercise caution in approving such deals, as there are no veto rights regarding another member's exports. The evaluation of a potential export deal should take into account a number of factors, the essence of which is the concern that the intended recipient is pursuing, or has ambitions for acquiring, WMDs.³¹

Being a non-treaty association for governments that share common interests, the MTCR has no formal mechanism for compliance enforcement. Even the form of implementation varies from state to state, ranging through laws threatening sanctions (as in the case of the ardent MTCR-participant the United States) to simple policy declarations. Even though the MTCR is considered a soft and weak legal tool, it is strong because of everyday political realities. The international uproar caused in 1988 after China's sale of long-range missiles to Saudi Arabia strengthened the MTCR and no further sales of that magnitude has occurred since.³²

2.2.1.2 The Hague Code of Conduct Against Ballistic Missile Proliferation

The Hague Code of Conduct Against Ballistic Missile Proliferation (the Code) was brought into effect in November 2002 in The Hague. The Code is a non-binding political tool aimed at regulating and curbing ballistic missile proliferation across the globe, all in order to impede possible deliveries of WMDs. Intended to supplement the MTCR, the Code consists

²⁹ Blix et al., *Weapons of Terror*, p. 142.

³⁰ Nuclear Threat Initiative, *Missile Technology Control Regime*.

³¹ Davenport & Kimball, *The Missile Technology Control Regime at a Glance*.

³² Nuclear Threat Initiative, *Missile Technology Control Regime*.

of a set of recommendations for confidence building tools, such as providing pre-launch notifications for launches of ballistic missiles and space-launch vehicles, as well as for test flights. Furthermore, the subscribing states commit themselves, politically but not legally, to submitting annual declarations of their respective national policies on ballistic missiles and space-launch vehicles.³³

The Code has, thus far, 134 subscribing states, including the two most active countries in the field, Russia and the United States.³⁴ In spite of its large group of subscribing states, the effective implementations of the Code have proved to be discouraging. In 2009 only 13 % of the launches conducted by subscribing states were notified in advance and not a single launch conducted by Russia or the United States was notified.³⁵

2.2.2 The question of legality

The Vienna Convention on the Law of Treaties (VCLT) from 1969, defines a treaty as “an international agreement concluded between states in written form and *governed by international law*, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (emphasis added).³⁶ In the arena of international law the negotiating states always stand facing two courses, either to create just the clearly defined and strong treaty envisaged, or to accept the need for compromise in order to achieve a larger group of states parties to the treaty in question, generating a weaker treaty in substance but a stronger treaty in participation. These two considerations vary greatly depending on the issue at hand. In some areas, the need for large participation is so great that the agreements negotiated do not even take on the form of a legally binding agreement, and instead are shaped as politically binding instruments, as exemplified by the MTCR and the Code. These latter are considered to be examples of the term “soft law”, non-legally binding but with the possibility of over time actually gaining binding status and thus binding the states through this development into customary law. According to Dinah Shelton, professor of international law at George Washington University, the use of soft law norms tends to be more common in certain areas of law than

³³ Austrian Foreign Ministry, *Hague Code of Conduct against Ballistic Missile Proliferation*.

³⁴ Marta, *The Hague Code of Conduct against Ballistic Missile Proliferation: "Lessons Learned" for the European Draft Code of Conduct for Outer Space Activities*, p. 3.

³⁵ Marta, *The Hague Code of Conduct against Ballistic Missile Proliferation: "Lessons Learned" for the European Draft Code of Conduct for Outer Space Activities*, p. 4.

³⁶ The VCLT, article 2.1 (a).

others³⁷. For example, soft law norms are usual in the fields of environmental regulations and human rights, but very rare in the fields of trade regulations and arms control.³⁸ The MTCR and the Code thereby stand out by being tools of soft law in a domain where trust is scarce and where clearly defined obligations normally are regulated through legally binding agreements.

2.3 Comments

The Middle Eastern Treaty will be negotiated in a context where the trio of WMD-treaties make up the background. A question then arises: is it better to let the zone demand adherence to each of the existing WMD-treaties, the NPT, the CWC, the BTWC, and the frameworks for delivery vehicles, or should the Middle Eastern Treaty simply create the same obligations without mentioning these treaties? The first alternative is severely flawed. While the WMD-trio is legally binding, the same cannot be said for the frameworks for delivery vehicles, which poses a substantial problem for the Middle Eastern Treaty. For the intent and purpose of the WMD-free zone, it is essential that it is legally binding for it to be successful, and while the zone can rest on the backs of the binding disarmament treaties for each type of WMD, this option does not exist for the frameworks for delivery vehicles. With trust and security being the most important consideration, these soft law arrangements will not suffice when every element of the Middle Eastern Treaty must be legally binding in order for it to be truly successful.

This criticism does not mean that the MTCR and the Code are useless, they are, quite the opposite, excellent tools for their respective purposes. The very nature of the issue at hand, dealing with sensitive information about potential trade deals and political and security assessments of other nations, calls for loose and non-binding frameworks. However, accession to the MTCR is not only unfit for the purpose of the WMD-free zone, but would in fact undermine the very purpose of the MTCR. This regime regulates the issue of non-proliferation, trying to ensure that some states (a group to which Iran most likely belongs) cannot get access to missile technology.

For the creation of a legally binding regulation of delivery vehicles, two options seem relevant: either a more detailed Middle Eastern Treaty meticulously regulating the complete removal of delivery vehicles from the

³⁷ Shelton, *Law, Non-Law and the Problem of 'Soft Law'*, p. 3.

³⁸ Shelton, *Law, Non-Law and the Problem of 'Soft Law'*, p. 3.

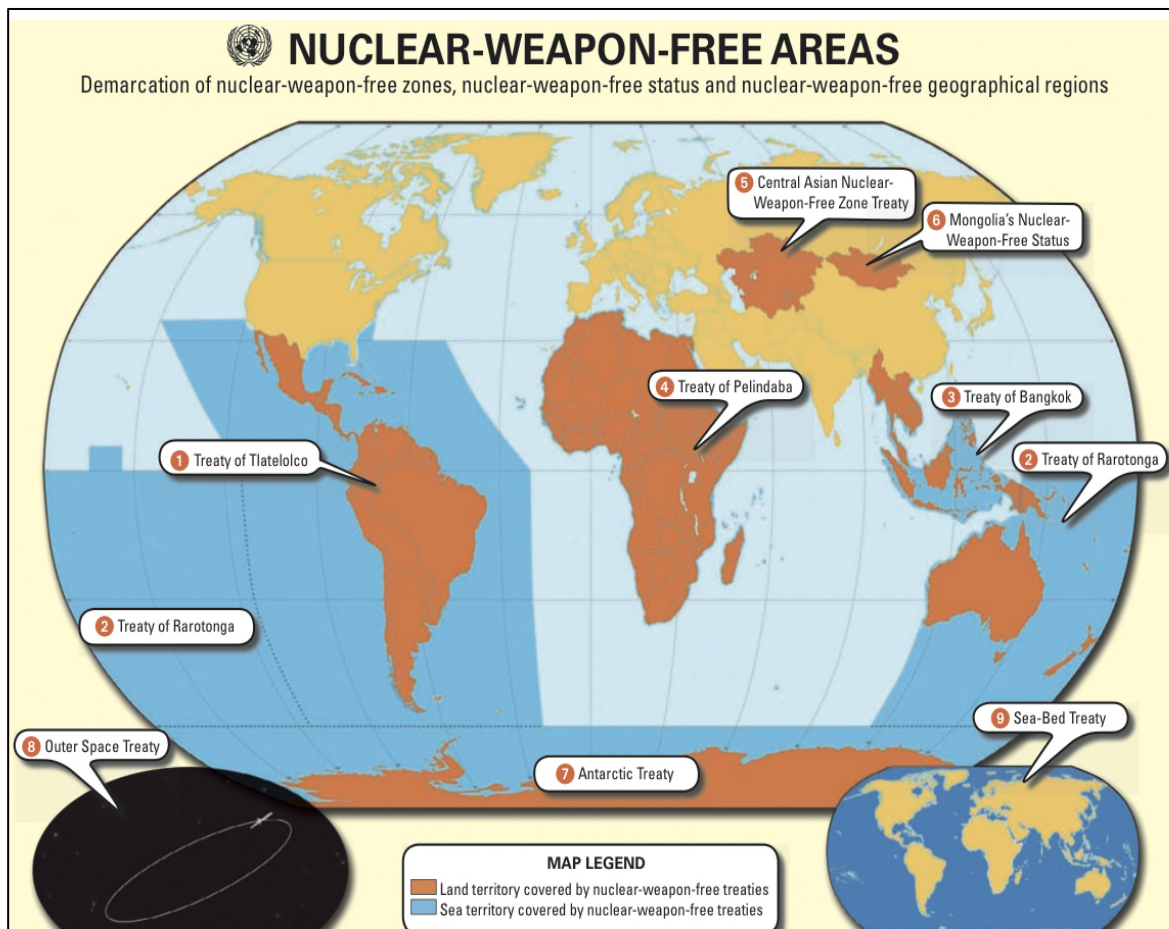
region, or, the creation of an equivalent international disarmament treaty with the goal and purpose to eliminate delivery vehicles. Seeing as the latter, being idealistic and completely unrealistic, will have no chance of reaching a greater number of states parties, or at attracting the most relevant states to sign, it does not seem to be a viable option and would actually derail the process instead of supporting it. We are thus left with one conclusion: regardless if the approach is to have the zone demand adherence to each of the existing WMD-treaties or to create all obligations independently from the WMD-trio, the Middle Eastern Treaty itself must, in detail and with full legal binding effect, regulate delivery vehicles as no such treaty or agreement exists to date.

3 The concept of NWFZs

The legal basis for NWFZs is found in article 52 of the UN Charter, which allows for the existence of regional security arrangements relating to international peace and security. Starting with the denuclearisation of Antarctica through the Antarctic Treaty, which was signed in 1959, the world has seen an ever-increasing number of states join together to declare their lands to be free of nuclear weapons. The existing NWFZs together house about 1.9 billion people, spanning over 120 states and 18 other territories, and covering more than half of the world's landmass.³⁹

3.1 The NWFZ family

The figure below shows all nuclear weapon free areas, including those excluded through the original delimitations of the thesis.⁴⁰



³⁹ Prawitz, *On the Proposed Zone Free of Weapons of Mass Destruction in the Middle East*, p. 12.

⁴⁰ See section 1.3.

Currently, six NWFZs are in force in inhabited parts of the world, and four of them cover the entire Southern Hemisphere. The regions under NWFZ agreements that will be used for comparison henceforth are: Latin America through the 1967 Treaty of Tlatelolco, the South Pacific through the 1985 Treaty of Rarotonga, Southeast Asia through the 1995 Treaty of Bangkok, Africa through the 1996 Treaty of Pelindaba, and Central Asia through the 2006 Treaty of Semipalatinsk.⁴¹

3.2 Defining the term NWFZ

In 1975, the international community through the UN General Assembly (the General Assembly) defined the concept of a NWFZ in a resolution⁴² as:

[...] any zone recognized as such by the General Assembly of the United Nations, which any group of States, in the free exercise of their sovereignty, has established by virtue of a treaty or convention whereby:

(a) The statute of *total absence of nuclear weapons* to which the zone shall be subject, including the procedure for the delimitation of the zone, is defined;

(b) An *international system of verification and control* is established to guarantee compliance with the obligations deriving from that statute. (emphasis added)

Put it differently, a NWFZ is an arrangement based on a regional treaty that obliges and binds the states parties not to allow nuclear weapons on their respective territory. Each different treaty is formed by the context in which it was negotiated and while the treaties may differ from each other, they all share three prohibitions: non-possession, non-stationing, and non-use or threat of use of nuclear weapons in the zone.⁴³

Why are these zones necessary and so very desirable? In addition to being tools of stability, transparency and legality, NWFZs allow regions to go beyond the obligations of the NPT. The existing NWFZs ban the deployment of nuclear weapons, which is not prohibited by the NPT.⁴⁴ As an example, the United States has nuclear weapons deployed in five

⁴¹ Davenport & Kimball, *Nuclear-Weapon-Free Zones (NWFZ) At a Glance*.

⁴² UN General Assembly Resolution 3472 B (1975).

⁴³ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 2.

⁴⁴ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 2-3.

European states: Germany, the Netherlands, Belgium, Italy, and Turkey⁴⁵, which are parties to the NPT as Non-NWSs. Though these types of arrangements are not specifically prohibited, there is continuous legal debate as to whether or not this is consistent with public international law. Within a NWFZ such activities are completely prohibited, illustrating yet another merit with these zones, namely their non-discriminatory character. The possession of nuclear weapons is forbidden for all.⁴⁶

Furthermore, the zones generally require more extensive compliance mechanisms and the creation of more comprehensive safeguard agreements with the IAEA. Each treaty goes further than the previous one, addressing the specific security concerns of each specific region.⁴⁷ In other words, a NWFZ is tailor-made and not a “one-size fits all” creation.

3.3 Points of weakness

Each of the separate NWFZs differs from the others in matter of strength and scope. This following section examines earlier points of contention and how these shaped the outcome of the treaties. These topics have been selected because of their status as recurring subjects for academic debate and analysis.

3.3.1 Negative security assurances

The term “positive security assurance” entails a promise to help in case of an attack. Consequently, “*negative* security assurance” (NSA), means a promise *not* to attack. Since the dawn of the nuclear era, states that decided not to acquire nuclear weapons have sought ways to receive assurances from being attacked by these weapons. After the creation of the NPT and the establishment of the terms NWS and Non-NWS, the latter have repeatedly and forcefully insisted on gaining legally binding non-use commitments from the former, in other words NSAs. This concern has not gone unnoticed, yet no such promises have been made in a legally binding way to the Non-NWSs as a whole. The use of nuclear weapons on Non-NWSs, and threat of such use, is motivation for further nuclear proliferation, and as

⁴⁵ Perkovich et al., *Looking beyond the Chicago Summit: Nuclear Weapons in Europe and the Future of NATO*, p.1.

⁴⁶ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 2-3.

⁴⁷ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 2-3.

such, the NWSs stand to gain considerably from making binding promises in certain cases.⁴⁸ As regards general, non-binding and declaratory NSAs, the American nuclear doctrine offers a good example. President Barack Obama, in his Nuclear Posture Review of 2010, reaffirmed and strengthened the United States' long standing general NSA towards Non-NWSs, with the condition that the state in question is party to the NPT and in compliance with its nuclear non-proliferation obligations.⁴⁹

To date, the only way in which NWS have made legally binding NSAs is in the context of NWFZs. All the existing NWFZs include protocols that are open for signature to the five NWSs and that create commitments of different kind based on each treaty's different conditions.⁵⁰ But even in this context the representation is not complete: not all NWSs have signed the relevant protocols to all NWFZs, and some NWSs that have signed have also made reservations to certain provisions. It is, in other words, a complicated picture and a sensitive process. However, without NSAs, the states contemplating the potential creation of a NWFZ and thereby the renunciation of nuclear weapons, will have no motivation to pursue it.

Of the five existing NWFZs, only the Treaty of Tlateloco has had its additional protocols both signed and ratified by all five NWSs, which occurred as early as 1979. The Treaty of Bangkok and the Treaty of Semipalatinsk, on the other hand, have no signatories at all to their additional protocols. The remaining two, the Treaty of Rarotonga and the Treaty of Pelindaba, are nearly complete with signatures and ratifications from all of the NWSs except the United States.⁵¹ President Obama submitted the two protocols to the Senate for ratification in May 2011 but the process, though on-going, is very slow.⁵²

What is the reason for these great variations in adherence? Why are some more attractive than others? In general, each treaty goes further than the former, adding different obligations depending on the context of each region. With more obligations added, often in regions where much is at stake, the willingness to offer this ultimate security guarantee becomes more restrictive. The individual challenges and results of the existing NWFZs will be described in the following.

⁴⁸ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 4.

⁴⁹ Nuclear Posture Review Report, p. viii.

⁵⁰ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 3.

⁵¹ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 4.

⁵² United States Senate, *Treaties Documents Received in the Senate during the Current Congress*.

3.3.2 Limiting the Seas

Drawing the lines of a NWFZ in relation to the sea has proved to be quite difficult. Coastal states have full jurisdiction over their internal seas, archipelagic waters and territorial sea.⁵³ However, any state has the right of innocent passage in such waters.⁵⁴ The regional states of a NWFZ can limit their own right to possess or deploy nuclear weapons anywhere, but cannot limit, by an agreement among themselves, the general right of extra-zonal states to navigate ships, potentially containing nuclear weapons, in waters which they have the right to use according to international law.⁵⁵

The geographical scope of the Treaty of Tlateloco contains, in addition to the territories and territorial seas of the zonal states, considerable areas in the Atlantic and Pacific Oceans, hundreds of kilometres off the coasts of Latin America, thereby encroaching on the high seas. All five NWSs have ratified the relevant protocols, which includes this extensive geographical definition, but simultaneously they all made unilateral declarations contradicting that very definition. The NWSs, though bound by their signatures to respect the denuclearisation of Latin America as “defined, delimited and set forth”⁵⁶ in the treaty, objected to this extended scope by stating that they considered this restriction on their freedom at sea to be unacceptable.⁵⁷ Contrastingly, the Treaty of Bangkok, still exceeding the territorial seas, but without including waters defined as the high seas, stipulated the denuclearisation of the exclusive economic zone (EEZ) of the states parties.⁵⁸ The NWSs have yet to sign the protocol to the Treaty of Bangkok due to their objection to this geographical inclusion. The NWSs also raised the issue that the different zones of the South China Sea are not clearly defined, making the scope of the treaty, and thereby the obligations of the protocols, ambiguous.⁵⁹

3.3.3 Military bases

The Treaty of Pelindaba still awaits American ratification, a process prolonged due to a contentious issue surrounding the presence of an

⁵³ The UNCLOS, article 2.

⁵⁴ The UNCLOS, article 17-33.

⁵⁵ Prawitz, *On the Proposed Zone Free of Weapons of Mass Destruction in the Middle East*, p. 27.

⁵⁶ Additional Protocol II to the Treaty of Tlateloco, article 1.

⁵⁷ Goldblat, *Nuclear-Weapon-Free Zone Treaties: Benefits and Deficiencies*, p. 58.

⁵⁸ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 4.

⁵⁹ Nuclear Threat Initiative, *Southeast Asian Nuclear-Weapon-Free-Zone Treaty*.

American military base on the island of Diego Garcia, located within the geographical treaty area. The island in question is part of the Chagos Archipelago, a group of islands that are the subject of a dispute of sovereignty between the United Kingdom and Mauritius⁶⁰. The African Union considers the islands to be part of Mauritius and has therefore included them in the geographical scope, as illustrated in the attached map to the treaty. It cannot be known whether nuclear weapons were ever stored on Diego Garcia in the frequent use of the base during the wars in Iraq and Afghanistan, as it is policy to never disclose present or past locations of nuclear storage.⁶¹ However, both the United Kingdom and the United States noted that they do not consider the zone to include Diego Garcia due to the pending diplomatic dispute of sovereignty. Subsequently, Russia waited until 2011 to ratify and when eventually doing so, linked a reservation declaring that its NSAs do not apply to Diego Garcia.⁶² The issue, potentially becoming a substantial problem in the future, has thus been left unsolved, setting a troubling standard for future NWFZs in not addressing the actual contentious issues.

3.3.4 Testing and dumping

All of the existing NWFZ treaties include some sort of provision prohibiting nuclear testing and obliging the zonal states to prevent such tests within the zone. However, the issue has been more important and sensitive in some zones than in others, much due to their individual historical context. The states parties to the Treaty of Rarotonga in the South Pacific have historically been severely affected by the testing of nuclear weapons. Between themselves, the NWSs conducted hundreds of atmospheric and underwater detonations. The regional states insisted upon including a prohibition on such testing within the zone and, fearing radioactive contamination of the marine environment, also prohibited the dumping of nuclear waste at sea.⁶³ France, having already conducted nuclear detonations on some of the islands in the region, was planning to continue the testing and subsequently refused to sign the relevant protocol for many years.

⁶⁰ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 5.

⁶¹ Stott, *Nuclear Non-Proliferation in the Middle East: Lessons from the Treaty of Pelindaba*, p. 4.

⁶² Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 5.

⁶³ Nuclear Threat Initiative, *South Pacific Nuclear-Free Zone*.

Neither the United States nor the United Kingdom signed the protocol until 1996 after France declared its intention to stop nuclear testing in the area.⁶⁴

The issue of nuclear testing was also sensitive in the negotiations leading up to the Treaty of Semipalatinsk, which covers Central Asia. The area surrounding the city of Semipalatinsk in Kazakhstan was the Soviet nuclear testing ground for over 40 years. The nuclear detonations, 456 in total, over the years caused widespread disease and affected the local population similarly to those of Hiroshima and Nagasaki.⁶⁵

3.3.5 Existing security arrangements

In the negotiations leading up to the Treaty of Semipalatinsk, a very large hurdle appeared in the form of a pre-existing regional security arrangement, namely the Treaty on Collective Security (TCS), also referred to as the 1992 Tashkent Treaty. Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan are, together with Russia, obligated to give each other “all assistance necessary in response to aggression”.⁶⁶ During the negotiations of the NWFZ, the question arose whether or not this provision in the TCS could possibly allow the deployment of Russian nuclear weapons on the territory of another state party to the TCS. The Russian stance is that it does allow such deployment if deemed necessary after a joint decision⁶⁷. The United States, France and the United Kingdom objected loudly to this standpoint, insisting that it would undermine the fundamental idea behind the establishment of a NWFZ.⁶⁸ These three western NWSs argued that the creation of a NWFZ would render pre-existing agreements, allowing deployment of nuclear weapons, void. As basis for this line of reasoning, they referred to the UN guidelines on NWFZs but also, and more importantly, to customary law and the rule of *lex posterior derogat legi priori*, codified in the VCLT, demanding that the most recent law takes precedence over older laws⁶⁹. In the end, this following provision was included in the final treaty text as article 12:

This Treaty does not affect the rights and obligations of the Parties under other international treaties which they may have concluded prior to the date of the entry into force of this Treaty.

⁶⁴ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 5.

⁶⁵ Kassenova, *Semipalatinsk: From Nuclear Testing Site to Test Ban Treaty Support*.

⁶⁶ The TCS, article 4.

⁶⁷ Parrish, *Prospects for a Central Asian Nuclear-Weapon-Free Zone*, p. 146.

⁶⁸ Roscini, *Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia*, p. 598.

⁶⁹ Goldblat, *Nuclear-Weapon-Free Zone Treaties: Benefits and Deficiencies*, p. 73.

The Parties shall take all necessary measures for effective implementation of the purposes and objectives of this Treaty in accordance with the main principles contained therein.

Should this article be interpreted as giving the Treaty of Semipalatinsk the meaning that this NWFZ is only nuclear free until changed by a “joint decision”, it would render the treaty worthless. The three objecting NWSs have yet to sign the protocol granting NSAs.⁷⁰

3.3.6 Nuclear military research

As the international community right now focuses on Iran, fearing its potentially growing nuclear capability, it might be useful to examine an interesting provision from the Treaty of Semipalatinsk and the Treaty of Pelindaba. Article 3 of both treaties prohibits the conduct of nuclear military research, a provision that does not appear in the other NWFZs. The states parties to these two treaties are bound to not carry out nuclear military research themselves but also not to allow such conduct within their territories by anyone, nor to receive or offer assistance in this matter to anyone.⁷¹

The Treaty of Semipalatinsk goes even further by referring to the 1997 IAEA Additional Protocol, which offers more intrusive verification measures. These broad measures stemming from this protocol gives the IAEA the authority to carry out inspections on all parts of a state’s nuclear fuel cycle, which comprises, *inter alia*, undeclared facilities, uranium mines, and any other place where nuclear material is, has been, or can be present.⁷²

3.4 Comments

One striking similarity between many of the contentious issues in past NWFZs is the fact that they are caused, infected or worsened by reservations. The right to make a reservation to a treaty provision is regulated in article 19 (a) of the VCLT and declares that “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation [...] unless the reservation is prohibited by the treaty

⁷⁰ Roscini, *Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia*, p. 599.

⁷¹ Roscini, *Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia*, p. 599-600.

⁷² Roscini, *Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia*, p. 600.

[...]”. If the right to make a reservation can be excluded, what, then, is the merit in keeping this very right? Once again, the answer is the possibility of ensuring a greater number of states parties to any given treaty. However, with the right to make reservations follows the increased risk of undermining a treaty. And in this particular type of treaty that ensures the removal of nuclear weapons, there is no meaningful reason to allow reservations. There is simply no halfway manner of joining a NWFZ, either you’re in or you’re not. The only way of ensuring a legally binding obligation free from undermining variations is by solving the underlying contentious issue that causes the reservation. The right to make reservations was denied in all of the NWFZs⁷³, but the situation is not the same in the Additional Protocols where the NWSs, in some treaties but not in all, have had the right to make reservations. For example, the Treaty of Tlateloco does not allow reservations to the obligations in the Additional Protocol II, but the Treaty of Pelindaba makes no mention of it at all⁷⁴. Furthermore, the NWSs possess a powerful trump card that can, in practical and not in legal terms, be equated with a reservation. I am of course referring to refusal to grant NSAs. Though not actual parties to any of the zones, their ratification of the Additional Protocols constitutes the crowning achievement of all NWFZs, and the very reason each zone motivated its states parties to join in the first place. I would not go so far as to say that a NWFZ is useless without NSAs, but they are the underlying goal for their creation, any zone’s *raison d’être*. Important as they are in any given region and any given NWFZ, they have never been more important than now. In the context of the Middle Eastern WMD-free zone, NSAs from all five NWSs are absolutely essential. While it is a recurring mantra that a NWFZ is a project *by* the countries in the region *for* the countries in the region, the regional states will simply not feel safe without concrete NSAs and this project then risks a quick collapse if NSAs cannot be achieved in a short period of time.

The substantial problems that have been the reason for reservations or objections in past NWFZs do not pose the same degree of risk for causing complications in the future. The problems caused by testing of nuclear weapons and dumping of nuclear waste, will most likely not impact the negotiations of a Middle Eastern Treaty noticeably. Technology has since then evolved and the need for atmospheric testing does not exist to the same extent anymore. A general ban would of course be an integral part of a WMD-free zone, as would a ban on nuclear military research and the

⁷³ Treaty of Tlateloco, article 27; Treaty of Bangkok, article 17; Treaty of Pelindaba, article 16; Treaty of Semipalatinsk, article 13; Treaty of Rarotonga, article 14.

⁷⁴ Additional Protocol II to the Treaty of Tlateloco, article 4.

demand for comprehensive safeguard agreements with the IAEA. These are essential tools for trust building and for creating a strong treaty with regards to verification of compliance, and thus also a necessity for a successful WMD-free zone.

The issue of existing security arrangements poses a problem. The sensitive issue that caused problems in the Treaty of Semipalatinsk is a case of normative conflict. This particular conflict was solved to the advantage of the zonal states and perhaps mostly to the advantage of Russia, but to the great detriment to purpose of the treaty and thereby also to the actual NWFZ. Normative conflicts will be explored in more detail in section 4.5.2.

4 Creating a new treaty

The challenge ahead for the Middle Eastern Treaty is not only that of being the first of its kind in comprising all WMDs, but also addressing the regional tensions and numerous conflicts that sometimes appear to be overwhelming and unsolvable. This section treats the context in which the WMD-free zone initiative was born, the scope of the future zone, its inherent problems and future challenges.

4.1 The evolution of an idea

That which began as a project destined to help ease and possibly solve the Arab-Israeli conflict, over time evolved to a broader regional approach on disarmament. In 1974, during the aftermath of the fourth Arab-Israeli war, Iran, possibly inspired by the Treaty of Tlateloco, suggested the creation of a NWFZ in the Middle East.⁷⁵ With the support from Egypt, the joint initiative in the UN resulted in a General Assembly resolution in December of that year⁷⁶. Each year since, the General Assembly has adopted a resolution on the creation of a NWFZ in the Middle East, and from the 1980's and onwards Israel ceased abstaining on the resolution, making it possible to adopt it without a vote.⁷⁷

In spite of the widespread theoretical support for the initiative, nothing concrete happened until the region once again was destabilised. After the end of the Iran-Iraq war⁷⁸ in 1988 the General Assembly used the momentum of the regional cool-down and requested the UN Secretary General (the Secretary General) to commence a study on the establishment of a NWFZ in the Middle East. It had become increasingly apparent towards the end of the war that Iraq had been using chemical weapons extensively, and that the country was producing the blister agent known as mustard gas, as well as the nerve agents tabun, sarin and cyclosarin. One of the largest known chemical attacks was carried out against the Kurdish town of Halabja, killing nearly 5 000 civilians.⁷⁹

⁷⁵ Hautecouverture & Mathiot, *A Zone free of WMD and means of delivery in the Middle East: an assessment of the multilateral diplomatic process 1974–2010*, p. 1.

⁷⁶ UN General Assembly Resolution 3263 (1974).

⁷⁷ Hautecouverture & Mathiot, *A Zone free of WMD and means of delivery in the Middle East: an assessment of the multilateral diplomatic process 1974–2010*, p. 1-2, 5.

⁷⁸ Also known as the First Gulf War, 1980-1988.

⁷⁹ Nuclear Threat Initiative, *Country Profiles: Iraq*.

In April 1990, Egypt's president Hosni Mubarak reacted to the use of chemical weapons and suspicions of an Iraqi nuclear programme by declaring his country's initiative to install a WMD-free zone in the Middle East, thus for the first time raising the topic of an extended scope of a NWFZ to cover biological and chemical weapons as well. In October that same year, the Secretary General published the requested "Study on Effective and Verifiable Measures which Would Facilitate the Establishment of a Nuclear Weapons Free Zone in the Middle East".⁸⁰

Later on, after the Gulf war⁸¹ and following the cease-fire agreement of 1991, Iraq admitted to having pursued a large scale WMD-programme, including, *inter alia*, complete nuclear weapon designs, 36 kilograms of weapon grade highly enriched uranium, 25 missile warheads filled with anthrax, botulinum toxin, and aflatoxin, and very large amounts of various toxic solutions.⁸² This situation led to action by the Security Council, which in 1991 passed a resolution that condemned Iraq and recognised the importance of establishing a WMD-free zone in the region.⁸³ The General Assembly followed the development and extended its annual resolution supporting the Middle Eastern NWFZ to comprise all WMDs, into a WMD-free zone resolution.⁸⁴

The next important milestone for the zone was reached in May 1995 when the zone was set as an agenda item at the NPT Review and Extension Conference. This very important step was one of the essential components that made it possible to extend the NPT indefinitely⁸⁵. Needless to say, the NPT states have continuously supported the concept of a Middle Eastern WMD-free zone – Israel not being party to the NPT. That review conference ended with a resolution (co-sponsored by Russia, the United Kingdom, and the United States) calling for "the establishment of an effectively verifiable Middle East zone free of weapons of mass destruction, nuclear, chemical and biological, and their delivery systems."⁸⁶ The resolution also called on the NWSs to "extend their cooperation and to exert their utmost efforts with a view to ensuring the early establishment by regional parties of a Middle East zone free of nuclear and all other weapons of mass destruction and their delivery systems." Even though, as mentioned earlier, the only nuclear

⁸⁰ Haute couverture & Mathiot, *A Zone free of WMD and means of delivery in the Middle East: an assessment of the multilateral diplomatic process 1974–2010*, p. 7.

⁸¹ Also known as the Iraqi invasion of Kuwait, 1990–1991, and familiar to many under the code name Operation Desert Storm.

⁸² Nuclear Threat Initiative, *Country Profiles: Iraq*.

⁸³ UN Security Council Resolution 687 (1991).

⁸⁴ UN General Assembly Resolution 4630 (1991).

⁸⁵ Cserevny, *The Role of the IAEA in Verifying Non-proliferation Commitments and in Promoting the Application of Comprehensive Safeguards in the Context of Efforts Towards a Zone Free of Nuclear and Other Weapons of Mass Destruction in the Middle East*, p. 83.

⁸⁶ Davenport, *WMD-Free Middle East Proposal at a Glance*.

weapons capable state in the region is not party to the NPT, from this point on, the idea of a WMD-free zone in the Middle East became imbedded in the NPT context and now constitutes an integral part of the well-being of the NPT process.⁸⁷

No further progress was made for ten years, and the 2005 NPT Review Conference collapsed largely due to frustration over the standstill and lack of commitment by the state sponsors. It was therefore essential that the 2010 Review Conference did not repeat the same disaster, and with this as fuel for negotiations, the states parties managed to forge consensus on several points to promote the implementation of the 1995 resolution. The Review Conference culminated by calling on the Secretary General and the three co-sponsors of the 1995 resolution to convene a conference in 2012 for the first round of negotiations on a WMD-free zone, to be attended by all states of the Middle East.⁸⁸ Towards the end of the autumn of 2012 it became clear that, due to political tensions and renewed hostilities in Gaza as well as a significant escalation in the Syrian civil war, the conference would not take place within the dedicated timeframe of 2012. It is at the present moment uncertain if the conference will be rescheduled to another date in 2013, but seeing as this conference is not only crucial for regional stability, but also an imperative for the NPT process, it seems likely that it will take place, in some form, during 2013.

4.2 Geographical scope

The Middle Eastern WMD-free zone is thought to cover a fairly broad geographical area. The exact scope of the treaty was first outlined by the IAEA in a study from 1989 and defined the zone as covering the area extending from Libya in the west to Iran in the east, and from Syria in the north to Yemen in the south⁸⁹. While this definition was appropriate for a long time, today it is somewhat limited. Far more suitable would be to include all member states of the League of Arab Nations (LAS) plus Iran and Israel in the geographical scope. States such as Djibouti, Somalia and the Comoros might lack relevance to the problem at hand, but as part of the LAS they ought to have the possibility to join, and by being minor in this context there is no need to take their potential demands in consideration. In other words, neither their participation nor the possibility of them declining

⁸⁷ Lewis & Potter, *The Long Journey Toward a WMD-Free Middle East*, p.8.

⁸⁸ Lewis & Potter, *The Long Journey Toward a WMD-Free Middle East*, p.8.

⁸⁹ IAEA General Conference, *Technical Study on Different Modalities of Application of Safeguards in the Middle East*.

involvement would have any impact on the on-going process.⁹⁰ Instead, the merits of including the LAS as a whole in an agreement of this magnitude would be a great tool for long-lasting regional stability.

As Iran borders a *de facto* NWS, Pakistan, some argue that it would be a considerable advantage to include it in the zone.⁹¹ However, this question causes disagreement in the international debate. The Arab position on the geographical scope of the WMD-free zone excludes both Turkey and Pakistan. Neither is considered to be a realistic negotiating party due to different loyalties and priorities, Turkey because of its membership in the North Atlantic Treaty Organisation (NATO) and Pakistan due to its arms race with India.⁹² I am inclined to agree with the latter and there ought not be any difficulties for Israel to accept this standpoint either, neither Turkey nor Pakistan poses a direct or immediate security threat for Israel. On the issue of NSAs however, the question is different. Although non-NPT NWSs are generally not invited to sign the relevant protocols, this might be the first time this could be necessary. The presence of a *de facto* NWS so close to the zone will cause many of the regional states and not only Israel, to demand some sort of security assurance.

4.3 Substantial scope

What are the basic conditions for a NWFZ? As more and more such zones have been created over the years, the standard definition of a NWFZ has grown and now comprises more requirements, yet at the same time is more generous in terms of flexibility and membership.

4.3.1 The Mubarak plan

The plan for a WMD-free zone⁹³ put forth by president Mubarak in 1990, emphasised three elements in particular:

- (1) All weapons of mass destruction, without exception, should be prohibited in the Middle East, i.e. nuclear chemical, biological etc.

⁹⁰ Prawitz, *On the Proposed Zone Free of Weapons of Mass Destruction in the Middle East*, p. 17.

⁹¹ Müller & Baumgart-Ochse, *A weapons of mass destruction-free zone in the Middle East: an incremental approach*, p. 3.

⁹² Aly, *Objectives and Approaches of Arab States*, p. 13.

⁹³ Letter from the Deputy Prime Minister and Minister of Foreign Affairs of Egypt addressed to the Secretary General, UN Document A/45/219, p. 3.

- (2) All States of the region, without exception, should make equal and reciprocal commitments in this regard.
- (3) Verification measures and modalities should be established to ascertain full compliance by all States of the region with the full scope of the prohibitions without exception.

4.3.2 UN Guidelines

In 1976, a group of experts appointed by the UN Disarmament Commission (UNDC) presented a study on what principles should be the basis for the creation of a NWFZ. This study somewhat extended the scope by declaring, *inter alia*, that a zonal disarmament commitment can be assumed by not only groups of states but also by individual countries as illustrated by Mongolia's nuclear weapons free status based on a unilateral declaration, that the commitment must be combined with an effective verification and compliance system also set up in the treaty, that cooperation on nuclear energy should be encouraged, and that the treaty must not be limited in time but instead remain in force indefinitely.⁹⁴

In April 1999, the UNDC submitted a report updating the 1976 guidelines. Just like the 1976 study the UNDC guidelines are non-binding recommendations, intended to support states in the process of creating a NWFZ, without being exhaustive and without dominating that process. The updates comprised changes and new ideas arisen from the Treaties of Rarotonga, Bangkok and Pelindaba.⁹⁵ All in all, these guidelines are but tools for discussion and negotiations. They all have in common that they follow the outcome after its creation, rather than shape it beforehand.

4.4 Common points of criticism

4.4.1 "First peace – then disarmament"

Israel has for a long time been supportive of the WMD-free zone initiative but maintains that the *modus operandi* ought to be "first peace, then disarmament". The purpose of the zone would therefore be the conclusion of a peace process when stability has been achieved, entering the stage when

⁹⁴ Roscini, *Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia*, p. 594.

⁹⁵ Roscini, *Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia*, p. 594-595.

all other problems have already been solved.⁹⁶ Contrastingly, all regional states except Israel prefer the establishment of the zone as early as possible, hoping that the zone can help solve other security problems.⁹⁷ Both these positions are perfectly logical. With Israel being the only NWS in the region, the surrounding states desire nothing more ardently than the immediate removal of nuclear weapons from the region. Israel, although connected to strong allies, trusts no one else on the matter of its own security and will not be the first to let go of its trump card.

However, there are examples of how volatile regions have undergone monumental changes and reached stability through disarmament. The Treaty of Tlateloco is particularly interesting because it was the first time a ban on nuclear weapons was imposed in a densely populated area, and an equally unstable area at that. The Cuban missile crisis of 1962 was the spark that moved the states of Latin America to pursue the idea of a NWFZ.⁹⁸ It took until February 1967 to negotiate the final text of the treaty and it didn't enter into force until 2002 because of a provision specifying that the full zone would not enter into force until it was ratified by all states within it. Formally, this did not occur until Cuba ratified the treaty in 2002. However, the treaty permitted individual states to waive that provision and declare themselves bound by the treaty, which many did beginning in 1968.

4.4.2 Joining the WMD-trio or leading with the zone?

Many authorities on the subject, among others the long time nuclear weapons expert and defense researcher Jan Prawitz, the most logical step in approaching a treaty creating a WMD-free zone would be by using the existing WMD-regimes, namely the NPT, the CWC and the BTWC. The regional states that are not parties to these treaties therefore ought to accede to each of them, as a starting point for the complete elimination of WMDs in the region. Easier said than done. In today's gridlock several states are holding off on signing some of the treaties until those who have not go ahead and do so. An example is Egypt and Syria, who both link their ratification of the CWC to Israel's accession to the NPT⁹⁹. The inherent problem in this situation is that a lot of pride and prestige is also inevitably

⁹⁶ Prawitz, *On the Proposed Zone Free of Weapons of Mass Destruction in the Middle East*, p. 4.

⁹⁷ Prawitz, *On the Proposed Zone Free of Weapons of Mass Destruction in the Middle East*, p. 4.

⁹⁸ Román-Morey, *The Latin American Experience in Establishing a Nuclear-Weapon-Free Zone*, p. 47.

⁹⁹ Mills, *Preventing Chemical Warfare and Terrorism: The CWC and the Middle East*.

linked to these positions, making a compromise even more difficult and unlikely.

One option worth exploring is to make the adherence to the WMD-trio secondary in the treaty process, and instead pursue the possibility of making the same commitments, that originate from the NPT, BTWC and CWC, part of the Middle Eastern Treaty. The Treaty of Tlateloco is such an example. In South America, both Argentina and Brazil possessed extensive nuclear infrastructure and were close to gaining the ability of producing nuclear weapons¹⁰⁰. Though neither ever actually developed these types of weapons, it was made public in later years that both countries were pursuing covert nuclear weapon programmes during the 1970's and 1980's.¹⁰¹ In 1992 however, Argentina and Brazil signed a bilateral agreement to place both countries' nuclear facilities under a mutual supervision authority. Additionally, the two rival states both signed comprehensive safeguard agreements with the IAEA as a trust building measure.¹⁰² They then followed to ratify the Treaty of Tlateloco in 1994, prioritising the regional NWFZ above the NPT, which was later ratified by Argentina in 1995 and Brazil in 1997¹⁰³. Naturally these measures are to be seen as two parts of the same process and demonstrate how political will can, in a short period of time, accomplish real and tangible progress in the arena of disarmament. Yet the fact that the regional treaty was prioritised stills sends a strong signal that the NPT is not the most important tool for regional stability, which in essence is exactly what everybody desires the most for the Middle East. The NPT, with its discriminatory nature is more important for those already party to it, while the regional approach is more urgent and important for those aspiring to rid the area of WMDs. I would therefore say that it is not essential and not even the most logical step, to demand adherence to the WMD-trio as the starting point for the region, but rather that avoiding these three regimes, at least initially, can be much more helpful in bypassing the stalemate caused by the linkage declared by some of the zonal states.

¹⁰⁰ Mulas, *Nuclear Weapon Free Zones and the Nuclear Powers: Lessons for a WMD/DVs Free Zone in the Middle East*, p. 3.

¹⁰¹ Global Security Institute, *Country Profiles: Argentina & Brazil*.

¹⁰² Federation of American Scientists, *Argentina: Nuclear Weapons Program*.

¹⁰³ Global Security Institute, *Country Profiles: Argentina & Brazil*.

4.5 Potential complicating factors

4.5.1 Passage at sea

As mentioned earlier, the task of setting the geographical limits of a NWFZ at sea has proved to be very difficult.¹⁰⁴ In our case of the WMD-free zone, this issue has the potential of becoming quite the hurdle. The Middle East includes several important straits and waterways, such as the Persian Gulf and the Suez Canal, that are essential for international shipping in general and the shipping of oil in particular¹⁰⁵. As marine areas have been included in the geographical scope in previous NWFZs, it is very likely and quite desirable to include them in the Middle Eastern Treaty as well, the only question is to which limit? At this point the zonal states have a choice, either to let the WMD-ban include the zonal waters to the limit of preference, which would be the consequence if nothing else is specified in the treaty, or to add a provision stating that:

Nothing in this Treaty shall prejudice the rights or the exercise of these rights by any State under the provisions of the United Nations Convention on the Law of the Sea of 1982, 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.¹⁰⁶

This provision, which is an exception to the responsibility of the states parties to the zone to ensure that nobody possesses or controls any type of WMD within their territories, does in fact undermine the goal and purpose of the WMD-free zone, but is most definitely a necessary element to include as the alternative would cause inconsistency with international law of the sea.¹⁰⁷

4.5.2 Normative conflicts

The potential Middle Eastern Treaty stands to face many challenges in its negotiation, one of the most concrete will be to steer its development in

¹⁰⁴ See section 3.3.2.

¹⁰⁵ Roscini, *The proposed WMD-free zone in the Middle East – Part One: Law of the Sea issues*.

¹⁰⁶ Article 2 (2) of the Bangkok Treaty, for similar provisions see also articles 2 (2) of the Rarotonga Treaty and of the Pelindaba Treaty.

¹⁰⁷ Roscini, *The proposed WMD-free zone in the Middle East – Part One: Law of the Sea issues*.

alignment with its goal and purpose. As with any treaty being negotiated by states holding different concerns and objectives, it faces the risk of developing normative conflicts, or in other words the situation in which multiple rules or norms are applicable, both accidentally as well as deliberately. It is not a far-fetched scenario that some states will seek to alter wordings of certain provisions to give them dual or unclear interpretations. In the field of human rights law, treaties often include provisions stating, in essence, that nothing in the current treaty shall be interpreted as going backwards. The International Covenant on Civil and Political Rights (ICCPR) is such an example. This treaty is part of the International Bill of Human Rights and obliges the states parties to ensure its citizens, *inter alia*, the right of self-determination, equal rights for men and women, the right to life etc¹⁰⁸. Article 5 (2) of the ICCPR regulates the issue of normative conflicts as follows:

There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

The way this article expresses the line of precedence in interpreting this treaty leaves no room for normative conflicts, making the ICCPR very strong in substance. This however, is only one way of solving a normative conflict in advance. The other is to do the exact opposite. Article 30 (2) of the VCLT sets out a general rule to be adhered to provided that nothing else has been agreed, stating that:

When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

This second alternative was used in the Treaty of Semipalatinsk to clarify the precedence of the TCS over the Treaty of Semipalatinsk¹⁰⁹. This choice made the treaty weak in substance, leaving not only a large loophole for potential nuclear presence in the region, but also a trace of doubt that undermined the entire Central Asian NWFZ. This example of a normative conflict is what must be avoided in the future Middle Eastern Treaty. Such a provision will undermine the WMD-free zone to the point of rendering it useless, and the Middle Eastern Treaty must, in order to be truly efficient

¹⁰⁸ The ICCPR, articles 1, 3 and 6.

¹⁰⁹ See section 3.3.5.

and fulfil its purpose, instead be the prevailing treaty in a normative conflict.

4.5.3 The nuclear elephant in the room

One of the most concrete problems the Middle Eastern WMD-free zone is facing is the issue of how to address Israel's existing nuclear weapons and its general nuclear capability. In an article published by the UN Institute for Disarmament Research (UNIDIR), author and disarmament expert Joseph Goldblat suggests looking to the Treaty of Pelindaba for inspiration on how to address the issue, a treaty he considers to set a precedent for the treaties that are concluded with a nuclear capable state as a party to it. South Africa is in fact the only state to ever have developed and later destroyed a nuclear arsenal. In the 1980's South Africa succeeded in creating six devices but stopped before finishing its seventh, and chose to abandon its nuclear weapons program in order to join the NPT¹¹⁰. The Treaty of Pelindaba is therefore the only NWFZ treaty that has had to face the challenge of including a nuclear weapons capable state.

The Treaty of Pelindaba includes an obligation of complete destruction of any nuclear device manufactured prior to the entry into force of the treaty as well as either the conversion of nuclear facilities to a facility for peaceful use (nuclear power plants), or the destruction of such facilities, all under IAEA supervision. The inclusion of this provision in the future Middle Eastern Treaty is thus essential in ridding mistrust and doubt as to if nuclear activities are going on.¹¹¹

4.6 Challenges

The previous sections have treated problems that have been more or less unique to the individual context of each zone. The following section covers three topics that are common denominators for all zones.

4.6.1 Organisation

As mentioned earlier, there is established international consensus on the fact that a NWFZ should be created *by* the states of the region *for* the states of

¹¹⁰ Nuclear Threat Initiative, *Country Profiles: South Africa*.

¹¹¹ Goldblat, *Nuclear-Weapon-Free Zone Treaties: Benefits and Deficiencies*, p. 68.

the region. The region owns the initiative of a NWFZ and needs to tailor the zone after its own needs. In the making of the Treaty of Tlateloco the negotiating states saw fit to create an inter-governmental organisation tasked with verifying that the treaty obligations are being met. The states parties to the Treaty of Tlateloco are also members of this organisation, which was named the Agency for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (OPANAL). The organisation's main responsibility is to supervise that the states parties adhere to the verification and control systems, as well as hosting general conferences and consultations on the purposes and obligations of the treaty.¹¹² Should a party not be in compliance it is up to OPANAL to, first help solve the problem, but if the failure to comply should constitute a breach of the treaty, it must notify the UN and the IAEA in accordance with the treaty.¹¹³ OPANAL is a good example of how a relatively small organisation can have a large impact on trust building and transparency in relations to a NWFZ.

In other regions the organisations are structured in different ways and often they have evolved from already existing collaborations. The Treaty of Bangkok originates from the Association of Southeast Asian Nations, a geopolitical and economic organisation commonly referred to as ASEAN.¹¹⁴ The Treaty of Pelindaba is an initiative created within the African Union.¹¹⁵ Together they all show the need for a supporting regional organisation and this trend ought not to be broken in the Middle Eastern zone. In this case there is no existing organisation fitted for the task that comprises both Arab nations as well as Israel, but just like the creation of the relatively strong OPANAL, such an organisation needs to be created to support the Middle Eastern Treaty.

4.6.2 Verification

In matters of verification, all NWFZs have gone beyond the verification requirements of the NPT. They all have in common that they place an obligation on each state party to enter an agreement with the IAEA. This agreement is a so-called safeguards agreement that is meant to verify the state's compliance with the treaty in question and that it is not illicitly developing nuclear weapons.¹¹⁶ Apart from this recurring and essential

¹¹² Nuclear Threat Initiative, *Agency for the Prohibition of Nuclear Weapons in Latin America & the Caribbean*.

¹¹³ Nuclear Threat Initiative, *Agency for the Prohibition of Nuclear Weapons in Latin America & the Caribbean*.

¹¹⁴ Nuclear Threat Initiative, *Southeast Asian Nuclear-Weapon-Free-Zone Treaty*.

¹¹⁵ Nuclear Threat Initiative, *African Nuclear-Weapon-Free-Zone*.

¹¹⁶ Davenport & Kimball, *Nuclear-Weapon-Free Zones (NWFZ) At a Glance*.

obligation, no tangible and concrete verification systems are set up through the NWFZ treaties. Relying on the efficient systems of the IAEA is, after all, the most logical way to go, not only because of the organisation's resources but also due to the fundamental issue of transparency and trust. In terms of compliance verification, political tensions and mistrust between two nations is an obvious barrier to effective monitoring, and the best way to break this barrier is to lift the question out of the bilateral arena and into the multilateral one instead¹¹⁷. With primary reliance on the IAEA and/or the OPCW for actual on-the-ground monitoring, a good option is to set up a regional verification body, tasked with supervising and managing the necessary additional verification agreements.¹¹⁸ OPANAL could serve as inspiration for this purpose, but inevitably it needs to be tailored after the specific needs of the future Middle Eastern Treaty.

This line of reasoning will only produce results for nuclear and chemical verification, processes that already have a solid infrastructure because of the strong CWC and NPT. International verification of compliance in terms of biological weapons sets a whole new range of demands and the BTWC, being weak on verification, offers no real help.¹¹⁹ The fact that the biological dimension of the WMD verification system is so underdeveloped requires large scale efforts from the zonal states, making an organisation shaped and inspired by OPANAL best suited for this significant task.

4.6.3 Trust and withdrawal

Each NWFZ has been created based on the premise that the zone in question is to remain in force indefinitely. Yet all treaties always include withdrawal clauses, as do the treaties establishing NWFZs. The Treaty of Tlateloco, being the oldest, is the only one to require as little as three months' advance notice before the withdrawal can take effect. All of the subsequent zones went further and required a notice period of 12 months before withdrawal.¹²⁰

In January 2003, North Korea, a Non-NWS member of the NPT, announced its withdrawal from the treaty. Since then, the international community has grown weary of two things: firstly the use of disarmament regimes as cover for illicit weapons programs, which proved to be the case with North Korea, and secondly the dangers of short withdrawal periods.

¹¹⁷ Aly, *Objectives and Approaches of Arab States*, p. 14.

¹¹⁸ Aly, *Objectives and Approaches of Arab States*, p. 14.

¹¹⁹ Aly, *Objectives and Approaches of Arab States*, p. 14.

¹²⁰ Davenport & Kimball, *Nuclear-Weapon-Free Zones At a Glance*.

The NPT, requiring only three months advance notice¹²¹, is weak on this point. Even with this short notice period North Korea failed to comply. However, failure to comply with the three-month-notice requirement does not make the withdrawal invalid. The requirement cannot be interpreted as a condition that needs to be met, but should rather be seen as a promise on behalf of each state party, a promise that could, according to the professor of international law Frederic Kirgis, be cause for restitution should another state party suffer damages from the withdrawal.¹²²

4.7 Comments

The WMD-free zone initiative stands a strong chance of laying the foundation for long-lasting stability in the Middle East. But in order to achieve this goal, many issues need to be properly addressed. The smart idea of including all WMDs in the scope of the zone to begin with, was an excellent move to address the security concerns of all states of the region, not only those fearing nuclear attacks. This seen in the context where linkage of ratification has paralysed the efforts to move states to ratify the BTWC, the CWC, and the NPT, gives further basis for the conclusion that the substantial goal of the WMD-free zone can be met much quicker and much more efficiently if focus is moved from these three disarmament treaties to the WMD-free zone instead. This way, pride and policy will have less of a possibility of hampering or complicating the ratification process. Naturally, these are all steps that are part of the same course, but adherence to the BTWC, the CWC, and the NPT, can follow much easier if the commitments are seen to be made more or less simultaneously and completely reciprocally, which will be the case in ratification of the WMD-free zone.

As to the concrete challenges of the Middle Eastern Treaty, one appears to be the task of setting up a supporting organisation for the treaty. While this might not seem to be a difficult undertaking at first glance, it needs to be an organisation beyond reproach in matters of trust. Part three of the Mubarak plan from 1990 stressed the importance of verification measures to ascertain full compliance by all states of the region without exception. Logical as it seems, and customary as it has become in all zones, verification is the backbone of each NWFZ. Through verification, trust can be built, which over time can lessen the burden of and demands for verification. Consequently, the demands on the measures and means of

¹²¹ The NPT, article 10 (1).

¹²² Kirgis, *North Korea's Withdrawal from the NPT*.

verification are tremendously high in the beginning. The involvement of the IAEA, a truly multilateral organisation, ought to be complemented by the new supporting organisation, hopefully a truly regional organisation. As stressed before, this is a perfect outlet for the principle that the zone is a project *by* the states of the region, *for* the states of the region. Additionally, the establishment of a supporting regional organisation adds flexibility to the treaty, not at least in the area of technological advancements. Instead of negotiating additional protocols every time something needs to be altered in matters of verification, a strong supporting organisation with clear voting rules and regular meetings can let the technological advancements influence the verification of compliance without having to risk one or several states sabotaging new negotiations.

The interesting, and to my opinion very accurate, point made by Frederic Kirgis on the issue of invalid withdrawals, is not very likely to influence the negotiations of the future Middle Eastern Treaty. The technicality of restitution and damages caused by an invalid withdrawal is not really a problem. The fear or suspicion that another state party will withdraw from the zone, however, can be a tangible problem. Once again this is a measure of trust building and if the treaty in its provisions cannot set the continuous tone that it will be in force indefinitely by not allowing short withdrawal periods, the treaty will not convey any reason for trust. In order to ensure that nothing undermines the negotiations and, in extension, the Middle Eastern Treaty, it is essential that the withdrawal period does not fall short of 12 months.

5 Conclusions

After having shed light on the many problems and challenges that face the upcoming Middle Eastern Treaty, and having explored the legal background in this domain, this following section will conclude by summarizing the determined *essential requirements for the establishment of a successful WMD-free zone*.

5.1 Normative conflicts and geographical delimitations: avoiding past mistakes

The question of the zone's geographical scope is not the most delicate one, all the major conflict areas fall within even the narrowest of delimitations. Far more complicated is the question of the zone's scope with regards to the regional waters. It is crucial that the Middle Eastern Treaty avoid past mistakes that have caused normative conflicts and refusals to grant NSAs. A generous geographical delimitation that includes areas that fall within the high seas is not desirable as this situation presents a normative conflict and thus adds ambiguity to the WMD-free zone. Clarity is of utmost importance, even if it means making the zone smaller. The Treaty of Tlateloco, with its ambitious geographical scope running into the high seas, encroached on rights deriving from UNCLOS. Despite the fact that the Treaty of Tlateloco comprised a provision prohibiting reservations from both the treaty itself as well as from the Additional Protocols, the NWSs signed the Additional Protocol and then proceeded with statements declaring themselves not bound by obligations that encroach on their rights deriving from UNCLOS. This is a classic case of a normative conflict where the Treaty of Tlateloco and UNCLOS compete for precedence in interpretation. The point could be made that UNCLOS, having by now in parts reached the status of customary international law, would take precedence over the Treaty of Tlateloco. Regardless, we are left with an element of uncertainty, and the geographical delimitation of that NWFZ is ambiguous in a situation where great gains in the arena of international nuclear disarmament could have been achieved.

Nothing indicates that the NWSs would reason any differently today if the zonal states were to use such an extensive geographical delimitation in the WMD-free zone. For the sake of ensuring actual legal binding effect and thereby a successful WMD-free zone, I would suggest that the geographical delimitations with regards to the zonal seas, be modest in comparison to the far-reaching goals of the Treaty of Tlateloco (including the high seas) and Treaty of Bangkok (including the EEZ). The Middle Eastern zone should in

its geographical delimitation therefore only include the territorial seas of its states parties.

5.2 Strengthening verification and building trust

All significant disarmament treaties include some sort of verification mechanism to ensure compliance. It has been said that the former American president Ronald Reagan was very fond of repeating the Russian proverb "Doveryai, no proveryai!" translating to "Trust, but verify!". Whether or not this anecdote is true does not matter, however, the truth in those words is of highest relevance. In order to ensure fundamental trust building in the upcoming Middle Eastern Treaty, its verification mechanisms must be truly efficient and satisfactory. As described in chapter two, the BTWC is the weakest of the WMD-treaties in matters of verification, undeniably due to the inherent features of biological and toxin weapons. There isn't much to be done about the fact that the production of biological and toxin substances is difficult to discover. But there are still things to be done in the matter of trust building. The CWC's challenge inspection provision is an excellent example of a feature that bolsters trust building. While the challenge inspections are not the most efficient verification tools in that they do not cover vast *quantities*, the power and possibility of acting out a suspicion gives tremendous strength to the verification regime in form of *quality*. This challenge inspection provision therefore needs to be implemented into the Middle Eastern Treaty, creating the possibility for challenge inspections for all three types of WMDs.

The biggest symbol of the dangers that are associated with WMDs, is the Israeli nuclear arsenal. Naturally, it will be imperative that the future treaty uses this opportunity for further trust building. The dismantlement will have to be a public affair under the supervision of the IAEA, thoroughly regulated just like in the case of the South African arsenal in the Treaty of Pelindaba. On that very note, the earlier mentioned novelty of banning nuclear military research is not only desirable, but perhaps even necessary in a region where the scientific resources in general and the nuclear "know-how" in particular, are centred to Israel and possibly also Iran. Of course, in order to even up the balance and live up to the purpose of the WMD-free zone, the ban will have to cover all WMDs.

5.3 Delivering legality

The regulation of delivery vehicles in the Middle Eastern Treaty has yet to become a significant issue for academic discussion, a fact that is surprising since it is a new feature and will require a lot of thought for it to become satisfactory regulated in the future treaty, or satisfactory regulated at all in a legally binding format. The problems associated with the regulation of delivery vehicles, notably the custom of doing so through politically binding group policies rather than through treaties, need to be addressed in the near future. Regardless if the approach is to have the zone demand adherence to each of the existing WMD-treaties or create all obligations independently from the WMD-trio, the Middle Eastern Treaty itself must, in detail and with full legal binding effect, regulate delivery vehicles in detail as no such treaty or agreement exists to date. As earlier defined, the most likely way, perhaps even the only way, the WMD-free zone will be successful is if it is shaped as a set of legally binding obligations, comprising strong verification and compliance mechanisms. This is the only way to achieve complete, or near complete, treaty adherence by the regional states.

5.4 Essential prerequisites

The road ahead to a successful WMD-free zone is very long indeed, and faced with a minefield of political barriers. The legal challenges, many as they may be, will always take a backseat to political considerations. In conclusion, this following list is a compilation of tangible suggestions, based on what has been deemed to be *essential legal requirements* in this thesis. Though not aiming to be exhaustive, it provides a basis for what we all can hope will become *a successful WMD-free zone in the Middle East*. The suggested treaty provisions originate from various NWFZs and often appear in more than one of them. The parts that have been changed or added are marked in italic.

5.4.1 Suggested inclusions to the treaty

The possibility of making reservations opens the treaty up for efforts seeking to undermine it, thus making it weaker. The provision is found in all covered NWFZs: in article 27 of the Treaty of Tlateloco, in article 17 of the Treaty of Bangkok, in article 16 of the Treaty of Pelindaba, in article 13 of the Treaty of Semipalatinsk, and in article 14 of the Treaty of Rarotonga.

RESERVATIONS

This Treaty shall not be subject to reservations.

Limiting the geographical scope to a more modest interpretation than some previous NWFZs will have the advantage of not creating a normative conflict. Neither will the treaty be weakened by the prohibition of reservations and/or the likelihood of this creating a situation in which NWSs will refuse to offer NSAs. The provision is inspired by article 1 of the Treaty of Bangkok.

GEOGRAPHICAL SCOPE

Use of terms:

For the purposes of this Treaty and its Protocols:

- (1) The "*Middle East weapons of mass destruction free zone*", hereinafter referred to as the "Zone", means the area comprising the territories of all States in the Middle East, namely, ..., *and their respective territorial seas*.

This provision covers the basic obligations of the treaty, namely the destruction of all WMDs and their delivery vehicles. Additionally, it creates the possibility for IAEA supervision and cooperation with the regional organisation that will be established through the treaty. The provision is inspired by article 6 of the Treaty of Pelindaba.

DISMANTLEMENT AND DESTRUCTION

Each Party undertakes:

- (1) To declare any capability for the manufacture of nuclear explosive devices *and devices intended for their delivery, chemical military substances and devices intended for their delivery, and biological and toxin military substances and devices intended for their delivery*;
- (2) To dismantle and destroy any nuclear explosive device *and devices intended for their delivery, chemical military substances and devices intended for their delivery, and biological and toxin military substances and devices intended for their delivery*, that it has manufactured prior to the coming into force of this Treaty;
- (3) To destroy facilities for the manufacture of nuclear explosive devices *and devices intended for their delivery, chemical military substances and devices intended for their delivery, and biological and toxin military substances and devices intended for their delivery*, or, where possible, to convert them to peaceful uses;

- (4) To permit the IAEA and the *regional organisation established by this treaty* to verify the processes of dismantling and destruction of *the above stated devices*, as well as the destruction or *conversion into peaceful uses* of the facilities for their production.

The following clause on nuclear military research originates from article 1 (c) of the Treaty of Semipalatinsk and has been modified to comprise the extended scope of the present zone.

MILITARY RESEARCH ON WMDs

Each Party undertakes [...] not to take any action to assist or encourage the conduct of research on, development, manufacture, stockpiling, acquisition or possession of

- (1) any nuclear weapon, other nuclear explosive device or *devices intended for their delivery*;
- (2) *any chemical weapon, chemical military substance or other device intended for the spread of a chemical weapon*;
- (3) *any biological weapon, biological or toxin military substance or other device intended for the spread of a biological or toxin weapon*.

The establishment of a regional organisation is inspired by OPANAL and article 7 of the Treaty of Tlateloco. Article item (4) moves the task of administratively handling and later concretely carrying out a challenge inspection, from the OPCW to the regional organisation in order to cover the scope of all WMDs and not only chemical weapons.

REGIONAL ORGANISATION

- (1) In order to ensure compliance with the obligations of this Treaty, the Contracting Parties hereby establish an international organisation to be known as the “[...]” hereinafter referred to as “the Agency.” Only the Contracting Parties shall be affected by its decisions.
- (2) The Agency shall be responsible for the holding of periodic or extraordinary consultations among Member States on matters relating to the purposes, measures and procedures set forth in this Treaty and to the supervision of compliance with the obligations arising therefrom.
- (3) The Contracting Parties agree to extend to the Agency full and prompt cooperation in accordance with the provisions of this Treaty, of any agreements they may conclude with the Agency and

of any agreements the Agency may conclude with any other international organisation or body.

- (4) *Requests for challenge inspections, can, in accordance with the Treaty, be made from any Contracting Party and shall be made to Agency.*

As a measure of strengthening the quality of the verification mechanisms, this proposed challenge inspection provision covers all types of WMDs. Inspired by the CWC's article 9 (8) and 9 (9), this will be the first time such an obligation enters a NWFZ or WMD-free zone treaty.

CHALLENGE INSPECTIONS

- (1) Each *Contracting Party* has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this *Treaty*, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General of *the Agency* [...].
- (2) Each *Contracting Party* is under the obligation to *meet* the inspection request within the scope of this Convention and to provide in the inspection request all appropriate information on the basis of which a concern has arisen regarding possible non-compliance with this *Treaty* [...]. Each State Party shall refrain from unfounded inspection requests, care being taken to avoid abuse. The challenge inspection shall be carried out for the sole purpose of determining facts relating to the possible non-compliance.

In matters of verification the Treaty of Semipalatinsk went the furthest by referring to the 1997 IAEA Additional Protocol, which offers more intrusive verification measures. The following provision is unchanged and comes from article 8 of the Treaty of Semipalatinsk.

IAEA SAFEGUARDS

Each Party undertakes:

- (1) To use for exclusively peaceful purposes the nuclear material and facilities which are within its territory, under its jurisdiction, or under its control anywhere;
- (2) To conclude with the IAEA and bring into force, if it has not already done so, an agreement for the application of safeguards in

accordance with the NPT (INFCIRC/153 (Corr.)), and an Additional Protocol (INFCIRC/540 (Corr.)) not later than 18 months after the entry into force of this Treaty;

- (3) Not to provide: (i) source or special fissionable material or (ii) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State, unless that State has concluded with the IAEA a comprehensive safeguards agreement and its Additional Protocol referred to in paragraph (2) of this article.

Building upon the ICCPR's article 5 (2), this following provision deprives any state the possibility of referring to an existing security arrangement as an excuse for dealing with any of the prohibited substances, thereby avoiding the situation in which a normative conflict is interpreted to the detriment of the WMD-free zone.

RELATION TO OTHER AGREEMENTS

There shall be no restriction upon or derogation from any of the fundamental *obligations* recognized in *this Treaty* on the pretext that *a State Party is fulfilling obligations deriving from another bilateral or multilateral agreement*.

The Treaty of Tlateloco was the only to offer the possibility to waive the provisions regulating the entry into force of the treaty, allowing the regional states to consider themselves legally bound much earlier. The inclusion of such a clause allowed for certain states to be bound as early as 1970 instead of having to wait for Cuba's ratification, which occurred 32 years later. The provision is inspired by article 28 (2) of the Treaty of Tlateloco.

ENTRY INTO FORCE

All signatory States shall have the imprescriptible right to waive, wholly or in part, the requirements laid down in the preceding *paragraph regulating the entry into force of this Treaty*. They may do so by means of a declaration which shall be annexed to their respective instrument of ratification and which may be formulated at the time of deposit of the instrument or subsequently. For those States which exercise this right, this Treaty shall enter into force upon deposit of the declaration, or as soon as those requirements have been met which have not been expressly waived.

This following provision, gathered from article 13 of the Treaty of Rarotonga, respects the development of withdrawal clauses in the treaties establishing NWFZs, and sets the withdrawal period to 12 months.

WITHDRAWAL

- (1) This Treaty is of a permanent nature and shall remain in force indefinitely, provided that in the event of a violation by any Party of a provision of this Treaty essential to the achievement of the objectives of the Treaty or of the spirit of the Treaty, every other Party shall have the right to withdraw from the Treaty.
- (2) Withdrawal shall be effected by giving notice twelve months in advance to the Director who shall circulate such notice to all other Parties.

5.4.2 Suggested exclusions from the treaty

And finally, as repeated several times, the issue of how to handle a case of normative conflict is of utmost importance for the success of this future treaty. As an alternative to entering the suggested provision under “Relation to Other Agreements”, the other, slightly weaker, alternative is to simply refrain from including the provision found in the Treaty of Semipalatinsk as article 12. In other words, the Middle Eastern Treaty must *not* include the following provision:

OTHER AGREEMENTS

This Treaty does not affect the rights and obligations of the Parties under other international treaties which they may have concluded prior to the date of the entry into force of this Treaty.

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- 1959 The Antarctic Treaty, signed in Washington D.C.
- 1966 International Covenant on Civil and Political Rights, signed in New York.
- 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean. Usually referred to as the Treaty of Tlateloco. Signed in Tlateloco.
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- 1968 Treaty on the Non-Proliferation of Nuclear Weapons, signed in New York.
- 1969 Vienna Convention on the Law of Treaties, signed in Vienna.
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- 1982 United Nations Convention on the Law of the Sea, signed in Montego Bay.
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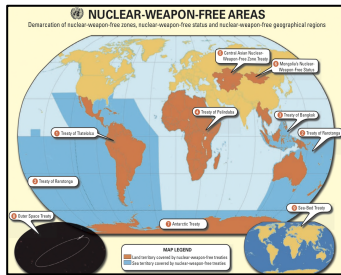
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Illustrations



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