OBLIGATIONS ON NON-PARTIES UNDER MULTILATERAL NUCLEAR CONTROL TREATIES

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RAVINDRA PRATAP

CENTRE FOR STUDIES IN DIPLOMACY
INTERNATIONAL LAW AND ECONOMICS
SCHOOL OF INTERNATIONAL STUDIES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI - 110067
INDIA

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Jawaharlal Nehru Univeristy
School of International Studies
New Delhi--110067

Tel. 6107676 Ext.2338
Fax: 91-11-6165886, 6198234

Centre for Studies in Diplomacy,
International Law and Economics

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CERTIFICATE

This is to certify that the M. Phil. dissertation entitled "**OBLIGATIONS ON NON-PARTIES UNDER MULTILATERAL NUCLEAR CONTROL TREATIES**", submitted by Ravindra Pratap in partial fulfilment of the requirement for the award of the degree of **MASTER OF PHILOSOPHY** from Jawaharlal Nehru University is an original work. This has not been published or submitted to any other university for any other purpose.

Professor Pushpesh Pant
Chairperson

Y. K. Tyagi
Professor Yogesh K. Tyagi
Supervisor

To my mother

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Chapter 1

INTRODUCTION

The development of international law has been affected by the notion of state sovereignty. The former in turn has influenced not only the latter but also meandered the course of history. Waning euphoria of autarky among nation-states as discrete units of pre-Westphalian system sowed the seeds of interdependence and later tempered the Hegelian brand of monism. Aberrations apart, this growing conviction of sovereign states worked until the middle of the twentieth century. However, over the years, and for a variety of reasons, this has increasingly been exposed to the new rules of the game. Centripetal forces soon engulfed states making them conscious of their "sovereignty"--a virtue easy to define but difficult to discern. Goals were pursued by assertion where possible, coercion when necessary. Distrust began to decay the roots of coexistence unfolding into one of the most subtle paradoxes of our times--a disjuncture between unadmitted obsession of states for hegemonic autonomy (desired euphemistically in terms of "security") and admitted compulsion of deepening dependence (manifests in existential realities--a fall out of what John Kenneth Galbraith calls, "culture of contentment").

What does this beckon to, if at all? Does this mean that the logic of coexistence has transcended beyond a point of sustenance except at the detriment of state--the principal actor of international system? Or does it indicate contrary to what David Mitrany says that sovereignty is functional? Are there any limits to the logic of obligation inherent in a system of law as imperfect and imprecise as law of nations under every situation, or is it merely contextual? Or is it a false

perception of the temporal reality with little scope for a meaningful debate under international law which, despite limitations and imperfections, can hardly be anything other than "rational order of things"?

Major issues that emerge therefore are: what are the limits of unilateralism in the community of sovereign states; what should be the basis of obligation in this new international reality? what should be the new rules of identifying norms of international law? and; what role should be assigned to international law and "Her infinite variety", to maintain what McDougal and Feliciano call" "a minimum world public order" in the third millennium.

The issues raised here do neither necessarily presage that the norms of international law are applied always in accordance with the principle of "uniformity and impartiality" nor form essentially the nuclei of this study. Their relevance, however, lie in building a necessary setting to pursue the focus of this study in a perceived perspective.

The concept of obligation is central to the idea of law, and the nature of law conditions the nature of obligation of its subjects. Rules of nature jus naturale formed the basis of state intercourse at the time of the Greek and Roman Empires, and later, in the Middle Ages. Positivism maintained that the sources of international law are international obligations explicitly undertaken by sovereign states. Grotians, made a pragmatic compromise between naturalists and positivists following differentiation between what was believed to be "necessary" law, and merely "voluntary" law. International law as it emerged out of these rather vague and jumbled concepts first formed the basis of the

jurisdiction of the Permanent Court of International Justice and later were incorporated into the Statute of the International Court of Justice which provides in its Article 38 paragraph (1):

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The fact that drafters of the Statute chose not to establish any hierarchy in Article 38(1), attitudes of states have not always been in conformity with such a belief. And quite a few significant instances of inferring precedence to one or the other sources may be discerned, if not more. The conflict is perpetual between the paragraphs (a) and (b) of Article 38(1). Interestingly, both these provisions have common philosophical leanings--positivism.

A treaty generally bears consequence for the parties. For third states which are not parties the treaty is, as a matter of principle *res inter alios acta*. Therefore, agreements neither impose obligations nor confer rights upon thirds *pacta tertiis nec nocent nec prosunt*. At the same time, however, international practice shows many deviations from this principle expressing themselves in international agreements by a formula in favour of a third party (*pactum in favorem tertii*), and by designating a negative relationship to a third state or

states (*Pactum in Odium tertii*). Multilateral nuclear control treaties (MNCTs) have been controversial. They raise questions of international law as to obligations on non-parties. The problem gets accentuated in view of the following:

Some of the resolutions of the General Assembly, the Security Council, and the Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted at the 1995 Review and Extension Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons 1968 (NPT), equate disarmament efforts of the United Nations with matters of international peace and security. These resolutions and declarations urge states non-parties to the NPT, to accede to it at the earliest possible date recognizing the importance of the universality of the Treaty.

The Comprehensive Test Ban Treaty 1996 (the CTBT), negotiated and adopted under the auspices of the United Nations and signed by an overwhelming membership of the Organization--including all the permanent members of the Security Council (the P5). Its entry into force requires ratification by the designated number of states listed in Annex 2 of the Treaty. Failing entry into force three year after the date of the anniversary of its opening for signature, Article XIV (2) of the CTBT provides that "measures consistent with international law" may be undertaken to accelerate the ratification process in order to facilitate the entry into force of this Treaty.

The Advisory Opinion of 8 July 1996, rendered by the International Court of Justice. pronouncing unanimously on the existence of an "obligation to pursue in good faith and to bring [to] a conclusion negotiations leading to nuclear

disarmament in all its aspects under strict and effective international control" (dispositif 2F). This is an obvious reference to Article VI of the NPT with no distinction to be found in the Advisory Opinion between parties and non-parties to the Treaty

Proliferation of nuclear-weapon-free zone (NWFZ) treaties placing a large part of the Southern hemisphere off limits to nuclear weapons. This gives a fresh lease of life to the resolutions of the General Assembly and the Security Council calling for the creation of a South Asia nuclear free zone.

There are *odium tertii* stipulations in some of the NWFZ treaties. For instance, the Tlatelolco Treaty of 1967 provides that the operation of this Treaty will be suspended if another state anywhere in the world acquires nuclear weapons and it will remain suspended until that state ratifies Protocol II. Further, Protocols I, II and III of the Pelindaba Treaty of 1995 speak of the obligation of all states to take all steps in achieving the ultimate goal of a world entirely free of nuclear weapons.

The Guidelines of the control regimes of weapons and weapon delivery system, such as the Missile Technology Control Regime (the MTCR), the Nuclear supplier Group (the NSG) and their impact on non-members.

Legal regime of inspections and safeguards is likely to attract new norms when the ongoing discussions conclude at Geneva on a Fissile Material Production Cutoff Treaty (FMCT). So far, non-parties to the NPT have bilateral safeguards agreements with the International Atomic Energy Agency (IAEA). Once the obligations hitherto imposed on parties to the NPT and the CTBT are

held to apply on non-parties *pari passu*, the non-parties would then come under the purview of all those IAEA regulations applicable thus far only to the parties to these treaties.

The international response following recent nuclear tests by India and Pakistan (non-parties to the NPT), in particular that of the permanent members of the Security Council (P5) tends to blur the distinction between unilateral sanctions based on domestic law and obligations on non-parties under international law. "Our laws have very stringent provisions signed in the law by me in 1994 in response to nuclear test by non-member states and I intend to implement them fully", said President Clinton. And, "according to international law, a nuclear weapons state by definition must have detonated a nuclear device before 1968...", remarked James Rubin, the State Department spokesman on recent tests by India. The linkage between disarmament and development now being used by the developed countries for denying developmental aid and transfer of technologies to developing countries non-parties to the NPT and the CTBT and coercing them (particularly India) to sign the latter "now and without conditions".

These developments, reflective of an unprecedented albeit long brewing international reality, may be concretized into a query: Do MNCTs especially the NPT and the CTBT envisage obligations for non-parties?

The problem is attempted in this study by way of an enquiry into the following: what conditions does the Vienna Convention of 1969 presage for an obligation to exist on a non-party to a treaty? Whether the Convention

adequately and fully deals with this new branch of international law, since MNCTs deal with the basic security aspects of states and ultimately with the very existence of the state? What obligations does the Charter of the United Nations as a treaty impose on non-parties to MNCTs, since their adoption have increasingly been equated by the Organization with matters of international peace and security. Whether the United Nations' disarmament efforts over the years could be enough to form a norm obligatory on non-parties to MNCTs particularly in view of the United Nations Conference on Disarmament (the CD) statement that India's decision (five tests conducted on 11 and 13 May) broke the international norm against test explosions established by the 1996 CTBT negotiated at the Conference? Whether MNCTs reflect or create conditions which obligate non-parties to a treaty especially in view of a resolution adopted unanimously by the Security Council on 6 June 1998 demanding that the two countries (India and Pakistan) refrain from further nuclear tests, and urging them to become parties to the NPT and the CTBT without delay and without conditions?

Whether obligations *erga omnes*, if any, flowing from treaties creating an internationally recognized status or regime, such as the Antarctic Treaty of 1959, recognize exceptions in favour of non-parties to MNCTs and whether they complement/enlarge upon *erga omnes* obligations flowing from *jus cogens*?

This study does not discuss national policies on the issues of nuclear non-proliferation and disarmament. It is confined to the legal aspects of the problem although cognizant of the mutual non-exclusivity of law and politics, both domestic and international.

The study is divided into four chapters. Chapter one provides an introduction to the problem in the perceived international scenario. Chapter two is designed to discern rules governing obligations on non-parties to a treaty. Rules obtained from chatper two will be utilized to devise a formulation under Chapter three to be applied on MNCTs to discern obligations on non-parties. Chapter four will first recapitulate the preceding chapters and then bring out conclusions of the study.

CHAPTER 2

RULES GOVERNING OBLIGATIONS ON NON-PARTIES TO A TREATY

The scope of this chapter extends to an analysis of internaitonal law applicable to non-parties to a treaty. This will be discussed under the following headings: the law of the UN Charter; the law of the Vienna Convention of 1969; customary law; judicial decisions; and juristic opinion.

A. The Law of the UN Charter

Article 2 paragraph (6) provides

> The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

This is one of the key provisions of the Charter establishing relationship between the United Nations and non-members.[1] This "corresponds to the last unnumbered paragraph of Chapter II of the Dumbarton Oaks Proposals",[2] and is a "consequence of the fact that the purpose of the United Nations ... is not only to maintain peace within the Organization but within the whole international

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1. Other provisions are: Article 4 (admission of membership); Article 11 paragraph (2) (the right to bring questions before the General Assembly); Article 32 (participation in discussions of the Security Council); Article 35 paragraph (2) (submissions by non-members); Article 50 (the right of non-members affected by Security Council measures to consult the SC); Article 93 paragraph (2) (the right to become a party to the Statute of the International Court of Justice); Article 102 (registration of treaties).

2. Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (1946), p.70.

community, that is to say: to maintain world peace".[3] In the present context, a question arises whether Article 2 paragraph (6) is capable of having any legal effects at all on states which are not members of the United Nations. The question embraces two opposite views. One accords the provision a legal status reflective of the comprehensive authority laid down in the Charter which takes "precedence over the principle of non-interference in the domestic affairs of other states ..., if the maintenance of international peace and security is in jeopardy".[4] According to Hans Kelsen, "the Charter establishes a true legal obligation of Members to behave in a certain way only if it attaches to the contrary behaviour a sanction. If the Charter attaches a sanction to a certain behaviour of non-Members, it establishes a true obligation of non-Members to observe the contrary behaviour".[5]

The other opinion holds that Article 2 paragraph (6) is no more capable of imposing obligations on third states without their consent than any other international agreement. Goodrich and Hambro share this view. According to them, "the Charter does not of course create any legal obligations for states not Members of the Organization. They are therefore not obligated in a legal sense to act according to the Principles of the Charter for any purpose whatsoever."[6] However, the United Nations is "certainly authorised to ensure that non-member

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3. Hans Kelsen, *The Law of the United Nations* (1950), p. 106.

4. Bruno Simma (ed.), *Charter of the United Nations -- A - Commentary* (1994), p.132.

5. Supra note 3, p.107.

6. Supra note 2, p.71.

states shall act in conformity with the principles laid down in Article 2, paragraphs 3, 4 and 5"; and "violation of these principles may lead to the application of the enforcement measures provided in Chapter VII if the Security Council considers such violations as a threat to or breach of the peace."[7] For non-Members, "the Charter system therefore provides for the imposition, by force if necessary, of the prescribed conduct without any legal basis in contractual agreement".[8]

The Report of Rapporteur of Subcommittee I/1/A to Committee I/1 of the San Francisco Conference did not interpret Article 2 paragraph (6) implying obligations on non-Members. The Report stated:

> The vote was taken on the understanding that the association of the United Nations, representing the major expression of the international legal community, is entitled to act in a manner which will ensure the effective co-operation of non-member states with it, so far as that is necessary for the maintenance of international peace and security.[9]

During the discussion on this provision at the twelfth meeting of the Committee, the representative of Uruguay asked "how a non-Member could be brought within the sphere of the Organisation and how the Organisation could impose duties upon non-Members." [10] The Rapporteur replied that "the paragraph was intended to provide a justification for extending the power of the

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7. Supra note 3, p.109.

8. Supra note 2, p.71.

9. U.N.C.I.O. Doc. 739, I/1/A/19(a), p. 6.

10. U.N.C.I.O. Doc. 810, I/1/30, p.7.

organisation to apply to the actions of non-Members..."[11] The representative of Belgium considered this "a most important provision"[12] and "felt that the Organisation could ignore the claim made by non-Members because it would be the authorised expression of the international legal community."[13] The leader of the Australian delegation agreed that this was "a difficult provision to enforce but that it was an essential one ..."[14]

One reason contributing to varied interpretations is linguistic nuances of the provision. The French version[15] of Article 2 paragraph (6) can more easily be interpreted in a narrow way than the English version.[16]

Universal membership of the Organization has rendered Article 2 paragraph (6) as one of receding relevance. However, in the past practice of the United Nations, the provision was referred to on quite a few occasions. For instance, Poland referring to Article 2 paragraph (6), proposed to take enforcement measures under Articles 39 and 41 against Spain, a non-member because "the existence and activities of the Franco regime in Spain have led to

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11. Ibid.

12. Ibid.

13. Ibid.

14. Ibid.

15. "fait en sorte que", i.e. the organs of the UN should pay particular attention to the observance of the Principles by members and non-members alike. See, *supra* note 4, p.134.

16. "shall ensure that", indicates that non-members are drawn into a purposeful task with the aim of achieving certain results. Ibid.

international friction and endangered international peace and security."[17] Quoting the provision the representative of Poland, "the fascist regime in Spain does not act in accordance with the principles of the United Nations, nor has it ever given any evidence that it intends to do so. It endangers the maintenance of international peace and security. It is, therefore, the duty of our Organization to ensure that any nation, whether a Member or not, does not endanger international peace and security."[18]

Article 2 paragraph (6) was referred to in the Security Council Resolution[19] on Southern Rhodesia[20] and the aspect of securing universality of sanctions by including non-Members was also strongly emphasized.[21] The General Assembly has adopted a number of resolutions[22] involving the principles of the Charter addressed variously to "all states", "all nations", "every state", and "all members and all other states. The Security Council did, however, distinguish different levels in so far as it referred to the obligations of Member states to implement the operative parts of resolutions, whereas non-members were simply appealed to or urged to act in accordance with those

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17. G.A. Res. 32(I), 9 February 1946.

18. Ibid.

19. SC Res. 409 (1977), para.4.

20. *Yearbook of the United Nations*, (1977), p.201.

21. SCOR (21), 1340 mtg., 16 December 1966, para. 38.

22. See, in particular, G.A. Res. 2734 (XXV), 16 December 1970, Declaration on the Strengthening of International Security.

resolutions.[23]

The Charter displays in Article 2, paragraph (6) "the tendency to be the law not only of the whole international community, that is to say, to be general, not only particular, international law."[24] Thus, "both the Covenant and the Charter must therefore be regarded as having set a limit determined by the general interest of the international community",[25] to the rule embodied in Roman law maxim *pacta tertiis nec nocent nec prosunt*, (agreements neither confer rights nor impose obligations on non-parties) and no organ "established under the Charter would be at liberty to hold that action taken in pursuance of Article 2 is contrary to international law."[26]

B. The Law of the Vienna Convention of 1969

Article 34, as the general rule regarding third States, provides:

> A treaty does not create obligations or rights for a third State without its consent.[27]

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23. See, SC Res. 232 (1966), 253 (1968), 314(1) (1972), 388 (1976), 409 (1977), and 591 (1986). Article 17 of the Covenant of the League of Nations provided that in the event of a dispute involving a state not a Member of the League the state should be invited "to accept the obligations of membership", "for the purposes of such dispute" upon conditions deemed just by the Council.

24. Supra note 3, p. 109.

25. R.Y. Jennings and Arthur Watts, *Oppenheim's International Law*, Vol.1 (1992), Part 2-4, p.1326.

26. Ibid.

27. *International Legal Materials*, vol.8 (1969), pp. 679-96 at p. 685 (hereinafter the "Vienna Convention").

This general rule exemplifying *pacta tertíis nec nocent nec prosunt*. The International Law Commission considered that "there appears to be almost universal agreement"[28] upon such a rule. It follows, therefore, from the general rule that treaties may create obligations for non-parties with their consent.[29] Article 35 of the Vienna Convention thus provides:

> An obligations arises for a third state from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.[30]

J.G. Starke points out that "it is questionable whether this is a real exception; an arguable point is that the treaty itself in conjunction with the written acceptance of the obligation may constitute a composite tripartite arrangement, and such an interpretation seems to be supported by Article 37 paragraph (1)"[31],

> When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed.[32]

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28. Commentary (Treaties), Article 30, para. (1): *Yearbook of International Law Commission* (1966), vol.2, p.226.

29. See, India-Pakistan agreement of 1973, containing stipulations requiring action by Bangladesh and in which the government of Bangladesh concurred. *International Legal Materials*, vol.12 (1973), p.1080.

30. Supra note 27, p. 685.

31. *Introduction to International Law* (1989), p.446.

32. Supra note 27. p.686.

It would be pertinent here to distinguish between modification of the treaty provision as such and modification of the obligation for third state to which that provision has given rise. While the former is a matter solely for the parties to the treaty, the latter requires the consent of the non-parties.[33]

Treaties may affect obligations of non-parties even though not creating them *stricto sensu*: e.g., where a tready between states X and Y grants more widespread comercial rights than state X has earlier granted to state Z under an MFN clause of a treaty.[34] Such third states cannot generally invoke the principle of non-discrimination as a basis for being assimilated to the position of the specially favoured state: on the basis of principle of non-discrimination or rules of customary international law, no general right of whatever scale of treatment is granted by a state to the most favoured other state.[35] Similarly, obligations of non-parties affect where a treaty requires a party to it to divest itself of its obligations under a treaty with other states,[36] or where a treaty determines an individual's nationality with consequent effects for third states.

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33. Supra note 28, p.230.

34. See, Article 1 of the General Agreement on Tariffs and Trade, which subject to certain exceptions, provides for general unconditional most favoured nation treatment between all parties to the GATT. Another important multilateral MFN provision is Article 18 of the Montevideo Treaty of 18 February 1960 establishing a Free Trade Area and instituting the Latin American Free Trade Association.

35. Supra note 25, p.1326.

36. See Article 234 of the Treaty of Rome 1957 establishing the EEC and Article 292 of the Treaty of Versailles 1919.

Two exceptions to the *pacta tertiis* principle regarding obligations exist. First, obligation in relation which arises for an aggressor state "in consequence of measures taken in conformity with the Charter of the United Nations with reference to the aggression";[37] and second, a rule becoming binding on non-parties if it becomes a part of international custom.[38] The second exception is the subject of our inquiry in the following section.

C. Customary Law

Article 38 of the Vienna Convention provides:

> Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.[39]

The notion of generation developed in the work of the International Law Commission. The Fifth Report of Gerald Fitzmaurice states:

> 1. Law-making or norm-enunciating treaties, in the nature of general multilateral conventions, codifying branches of existing customary international law, or establishing new rules by way of the progressive development of international law, and in so far as they evidence declare or embody legal rules or legal régimes which are, or eventually become, recognized as being of universal validity and application, constitute vehicles whereby such rules or régimes are or become generally mediated so as also to bind States not actually parties to the treaty as such.

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37. Article 75 of the Vienna Contention.

38. Article 38 of the Vienna Convention.

39. Supra note 27, p.687.

2. In any such case however, it is the rule of customary international law thus evidenced, declared or embodied that binds the third State, not the treaty as such.[40]

No distinction was made between the formation of customary law by way of generation and its embodiment in a treaty, *via* codification.[41] Humphrey Waldock's Third Report was confined to generation. However, the ILC Draft transcended the bar and covered all declaratory rules:

> Nothing in articles 58 to 60 precludes rules set forth in a treaty from *being binding* upon States not parties to that treaty if they have become customary rules of international law.[42]

Following the 1966 ILC debate, the provision reverted to generation (of custom by way of treaty) only contained in the present Article 38 of the Vienna Convention. The *travaux préparatoires* confirm that Article 38 cannot per se enjoy a binding force *qua* contractual obligation; but the material rule to which it refers, will apply *qua* customary law *erga omnes*, to parties and non-parties *pari passu*.

The existence of a written text (a conventional rule) is a precondition for generation of customary law, though it has only a stimulating function. It is State practice and *opinio juris* which lead to the emergence of customary law. To the question whether certain Articles of the 1907 Hague Convention (IV) were binding on several belligerents non-parties to the Convention, the Nuremberg Tribunal held:

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40. *Yearbook of International Law Commission* (1960), Part II, pp. 80-85.

41. Commentary (Treaties), Article 16, para. 59. Ibid., p.95.

42. *Yearbook of International Law Commission* (1964), Part II, pp.184 (emphasis added).

> the rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But, the Convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war ...[43]

In the *North-Sea Continental Shelf* cases, Denmark and the Netherland contended *inter alia*, that Article 6 paragraph(2) of the Geneva Convention on Continental Shelf 1958 containing the equidistance principle for the delimitation of continental shelves, had generated new customary law and was, as such, binding on the Federal Republic of Germany, a non-party.[44] The Court said:

> there is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.[45]

And, the Court said before such a rule becomes binding on third States, it must be:

> a norm-creating provision which has constituted the foundation of, or has generated a rule which, while conventional or contractual in its origin, has since passed into the general corpus of international law, and is now acepted as such by the *opinio juris*, so as to have become binding even for countries which

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43. *Judgment of the International Military Tribunal at Nuremberg of 1946*. Reproduced in American Journal of International Law, *vol.41 (1947), p.248.*

44. *ICJ Reports (1969)*, p.37.

45. Ibid., p.41.

> have never, and do not, become parties to the convention.[46]

The Court therefore concluded:

> ... such a rule has come into being since the Convention partly because of its own impact, partly on the basis of subsequent State practice -- and that this rule, being now a rule of customary international law binding on all states...[47]

Earlier, in the *Norwegian Fisheries* case the conclusion of the Court that there has been "the general toleration of foreign states"[48] was based on the conduct of the United Kingdom, the state whose interests were particularly affected, and on that of France. To a request to consider "new accepted trends" of UNCLOS III, the Court, in *Libya/Malta Continental Shelf* case said:

> the Court ... could not ignore any provision of the (LoS) draft convention if it came to the conclusion that the content of such provision is binding upon all members of the international community because it embodies or crystallizes a pre-existing or emergent rule of customary law.[49]

The interplay between a treaty and customary law was recognized by the Court in the *Nicaragua* case:

> The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the *North Sea Continental Shelf*

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46. Ibid.

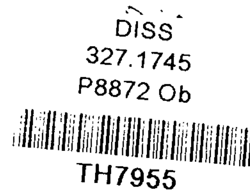
47. Ibid.

48. *ICJ Reports (1951)*, p.139.

49. *ICJ Reports (1982)*, p.38. in the *UK-France* Continental shelf Arbitration, the Court stated that that "the rules of customary law" -- namely a delimitation based on equitable principles -- "lead to much the same result as the provisions of Article 6." *International Law Reports*, vol. 54 (1977-78), p.8.

> cases ... there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter "supervenes" the former, so that the customary international law has no further existence of its own.[50]

The process consummating a conventional rule into a norm of customary law "is the closest approximation to true legislation offered by international law",[51] and to this extent the United Nations, where most of the multilateral conventions are adopted, may be mentioned as a *forum* signifying "transition from traditional custom-making to international legislation by treaty".[52] And "the fiction that the Court resolve controversies according to law whereas the Assembly and the Council settle political disputes, and therefore, that the resolutions of these organs cannot be sources of law, simply has no validity any longer ... Even if there is no real creation of norms, there is often legal recognition and confirmation that certain practices or principles are, in the judgement of an organ largely representative of the international community, either customary rules or general principles of international law."[53]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50. *ICJ Reports (1986)*, p.94.

51. Mark E. Villiger, *Customary International Law and Treaties* (1985), p.197.

52. Dissenting Opinion of Judge Tanaka in the *South-West Africa* cases *(Phase 2), ICJ Reports (1966)*, p.294.

53. Jorge Castaneda, *Legal Effects of United Nations Resolutions* (1969), pp.4-5.

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(i) State practice: resolutions of the political organs of the United Nations

As early as 1962, the World Court held:

> --- the functions and powers conferred by the Charter on the General Assembly are not confined to discuss, consideration, the initiation of studies and the making of recommendation: they are not merely hortatory.[54]

The United Nations represents "the general legal order of unorganized international society, a decentralized and scarcely institutionalized system, lacking organs specifically entrusted with the creation of law."[55] And "diversity of forms for expressing the members' consent"[56] and "the successive, complementary and integrative character of the different phases of this creative process"[57] makes it "difficult to determine at what precise moment the new rule came into being."[58]

In *The International Society as a Legal Community*, Judge Mosler has summarized his view of General Assembly resolutions:

> After quite a long and fierce dispute it now seems that extreme views, on the one hand that resolutions have no binding effect at all and on the other hand that they have a legislative effect, have been abandoned

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54. *Advisory Opinion on the Certain Expenses of the United Nations*, ICJ Reports (1962), p.163.

55. Supra note 53, p.105.

56. Ibid., p.107.

57. Ibid.

58. Ibid.

> and that a generally accepted view is emerging. There can be no single answer to the questions -- resolutions must be distinguished according to various factors, such as the intention of the General Assembly, the content of the principles proclaimed and the majority of their adoption.[59]

Resolutions, forming material evidence of state practice, may either be adopted by consensus or by a division of votes, will now be discussed seriatim as part of customary law inquiry.

(a) Consensus

Consensus is a method for reaching a decision without voting in the absence of formal objection. From the point of view of substance, a consensus is normally a compromise in which opposing views are reconciled.[60] In the consensus process the majority forgoes its right to impose a text on the minority, but in turn expects good faith acceptance of the consensus text.[61]

The view that consensus may be regarded as a source of international law has been supported and denied by numerous authors. In 1966 Richard Falk wrote

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59. (1980), pp.8-9.

60. Blaine Sloan, "General Assembly Resolutions Revisted (Forty Years Later)," *British Yearbook of International Law*, vol. 58 (1987), p.91.

61. Mohammad Bedjaoui, *Towards a New International Economic Order* (1977), p.186. It will be useful to see the consensus on hijacking adopted by the United Nations Security Council on 20 June 1972, whereby it called for cooperation by states against hijacking and hijackers and the consensus adopted in June 1976 by the Special Committee of Twenty Four of the United Nations on Decolonization denouncing South Africa's continued administration of Namibia (South-West Africa). In the course of the sessions, 1973-82, of the Third United Nations Conference on the Law of the Sea the provisions of the draft text of the Convention opened for signature on 10 December 1982, were adopted by consensus.

that consensus is replacing consent as a basis of international legal obligation.[62] Anthony D'Amato goes even further in saying that consensus is not a source of international law -- it *is* international law.[63] There is thus considerable legal fiction in the idea of consent, and for the majority the element of consent is not an essential element in the formation of customary law.[64] However, the issue is whether a consensus expressed through resolutions of the General Assembly is a sufficient manifestation of the position of states to be a basis for the authority or force of those resolutions. The answer may depend on the circumstances of the case and the intent.[65] If the consensus is reached on what is clearly intended as a non-binding recommendation, then the effects depend on hortatory and good faith considerations. If the consensus is based on the existence of a rule of customary international law or a general principle of law or if it is an

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62. "On the Quasi-Legislative Competence of the General Assembly", *American Journal of International Law*, vol. 60 (1966), p.783.

63. "On Consensus," Canadian Yearbook of International Law, vol.1C8 (1980)-III, p.121. Others who support this view in varying degree include:
Oliver Lissitzyn, *International Law Today and Tomorrow* (1965), pp.35-6; Jiménez de Aréchaga, "General Course in Public International Law," *Recueil des cours*, vol.159 (1978-I), p.31; Christopher C. Joyner, "UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation," *California Western International Law Journal*, vol.11 (1981), p. 464; D.W. Bowett, *The Law of International Institutions* (1975), pp.41-2; Edvard McWhinney, *The World Court and the Contemporary International Law Making Process* (1979), p.16; Rahmatullah Khan, "The Legal Status of the Resolutions of the United Nations General Assembly," *Indian Journal of International Law*, vol. 19 (1979), pp.554.

64. C.H.M. Waldock, "General Course on Public International Law," *Recueil des cours*, vol. 106 (1962-II), pp.49-53; H.L.A. Hart, *The Concept of Law* (1961), p.220-1; H. Meÿers, "How is International Law made? -- The Stages of Growth of International Law and the Use of its Customary Rules," *Netherlands Yearbook of International Law*, vol. 9 (1978), pp.18-9.

65. Supra note 60, p.92. See also: Obed Asamoah, "The Legal Effect of Resolutions of the General Assembly," *Columbia Journal of Transnational Law*, vol.3 (1964-5), pp.48-9, 51; C.W. Jenks, *A New World of Law?* (1969), pp.205-11.

interpretation of the Charter, its authority enjoys the colour of a traditional source.[66]

b. Vote

The number of votes and the voting patterns are also considered a most important factors in measuring the weight of resolutions[67] in the formation of rules of customary international law. The element of voting is not relevant regarding the legal effect of resolutions of binding nature. However, the degree of support is relevant to a number of legal effects.[68] Resolutions which are adopted unanimously, or nearly unanimously, or by consensus[69] reflect the will of the international community greater if fructified with the votes of those states whose support may be necessary for effective implementation and states from all

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66. Supra note 60, p.92.

67. Aréchaga, supra note 63, pp.31-2; Maurice Mendelson, "The Legal Character of General Assembly Resolutions: Some Considerations of Principle," in Kamal Hossain (ed.), *Legal Aspects of the New International Economic Order* (1980), p.95; H.G. Schermers, *International Institutional Law* (1980), p.615, Quincy Wright, "Custom as a Basis for International Law in the Post-War World," *Indian Journal of International Law*, vol.7 (1967), p.9; Inis Claude, "Collective Legitimization as a Political Function of the United Nations", *International Organization*, vol. 20 (1966), p.375.

68. Rosalyn Higgins, "The United Nations and Lawmaking: The Political Organs," *Proceedings of the American Society of International Law*, 64th Annual Meeting (1970), pp.41-2; Egon Schwelb, "The Nuclear Test Ban Treaty and International Law," *American Journal of International Law*, Vol.58 (1964), pp.645-6; Stephen M. Schwebel, *Digest of United States Practice in International Law* (1975), p.85.

69. Unaccompanied by reservations.

economic and legal systems.[70] If support comes from only certain groups of states, with other groups voting against, this is of course a negative factor[71] in developing a prescriptive norm of customary international law.

There is no agreement among publicists as to the effect of abstentions at the time of adoption of resolutions. A large number of abstentions in comparison to affirmative votes would certainly evidence a lack of enthusiasm for the resolution, however the better view to treat abstentions, as a general rule, as acquiescence.[72]

A recommendation is not translated into a legal obligation simply by being re-affirmed or re-cited[73] no matter how many times. Thus "a vote for a resolution cannot express any conviction of legal obligation, a statement on the General Assembly or elsewhere can do -- and often does -- just that".[74]

Thus, resolutions of the political organs reflecting state practice at the highest level may become the starting point for the consolidation of a principle of international law towards fully accepted customary law. While the potential

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70. Mosler, supra note 59, p.258; Higgins, supra note 68, p.29; Claude, supra note 67, p.375.

71. Schwelb, supra note 68, pp.645-6.

72. Michael B. Akehurst, "Custom as a Source of International Law", British Yearbook of International Law, vol. 47 (1974-75), pp.6-7; Lissitzyn, Supra note 63, p.36; D'Amato does not favour this view but would apply consideration of estoppel. Supra note 63, pp.113-5.

73. S.A. Bleicher, "The Legal Significance of Recitation of General Assembly Resolutions", *American Journal of International Law*, vol. 63 (1969), p.444.

74. Iain MacGibbon, "Means for the Identification of International Law. General Assembly Resolution: Custom Practice and Mistaken Identity," in Bin Cheng (ed.) *International Law Teaching and Practice* (1982), p.24.

legal effects of these resolutions should not be overestimated, "in the case of unanimously adopted resolutions on principles of law, a contributory effect towards the creation of a new rule of customary international law cannot be ruled out".[75]

(ii) *Opinio juris*

This is the acknowledgement by states non-parties to a treaty generative of a putative norm of customary law that their conduct or the abstention therefrom is a matter either of right or of obligation. The material practice[76] of such a state vis-a-vis that treaty may take either of the two forms: acquiescence or persistent objection. The former gestures a germination, the latter depicts a denial of obligation crystallized professedly via customary process. This subjective element may be deduced from various sources, including the conclusion of bilateral or multilateral treaties, attitudes to resolutions of the General Assembly and other international meetings, and statements by state representatives.

According to MacGibbon "generalizations concerning the process by which rules of customary international law are formed do not always

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75. Supra note 53, p.135. "It is necessary to distinguish between the vote of a state and its actual practice in the matter: it is not unknown for a state to vote in one sense, but in fact to behave in a contrary sense." See, *Oppenheim's International Law*, supra note 25, part 1, p.49. In *Nicaragua* case, the Court found that the existence of the necessary *opinio juris* could "with all due caution" be deduced from the attitude of states to the relevant resolutions. *ICJ Reports (1986)*, pp.99-100.

76. Supra note 25, part 1, p.28.

acknowledge that a rule may be expressed in terms either of a right or of an obligation and that it may involve both the protection of the right in question and the acknowledgement of the corrlative duty. Consideration which apply to a rule expressed as a right or as a liberty may well be inappropriate to a rule expressed as a duty or as a prohibition."[77] The fact that "claims may conflict to a greater or less degree lends complication to the process of determining what part, if any, of differing claims and practices in respect of a particular matter have crystallized into customary practices with legal sanction. It is probable that only by reference to protest and acquiescence can this question be resolved".[78]

(a) Acquiescence

MacGibbon defines acquiescence as a "form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection".[79] To Hudson, the elements necessary to establish the existence of a customary rule are "the concordant and recurring action of numerous states in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other states to challenge that conception

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77. "Customary International Law and Treaties", *British Yearbook of International Law*, vol.34 (1957), p.116.

78. Ibid., pp.118-9.

79. "The Scope of Acquiescence in International Law", *British Yearbook of International Law*, vol.31 (1954), p.143.

at the time."[80] Failure to protest against the conviction that the practice is enjoined by law is not equivalent to acquiescence in the practice itself.[81] However, "acquiescence in refusals to submit to a given practice, or acquiescence in a contrary practice on the part of other states, affords cogent evidence that the practive is not followed on the basis of a claim of right and that submission to its exercise is not regarded as obligatory -- in short, that it is not an international custom".[82] To a question whether silence may conclusively be interpreted as amounting to acquiescence would depend primarily on the circumstances in which the silence is observed. According to Anzilotti, "silence maintained by a state after a situation had been notified or had become generally known could fairly be interpreted as acquiescence and as the abandonment of claims to the contrary, if, by virtue of either special agreements or general practice, the occasion was one on which the state could, or ought to, have protested.[83] Similarly, Verykios said that long silence maintained without reason is equivalent to consent.[84]

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80. *Permanent Court of International Justice, 1920-1942* (1943), p.609.

81. Supra note 79, p. 151.

82. Supra note 77, p.118.

83. Quoted from MacGibbon, supra note 79, p.170.

84. Ibid.

(b) Persistent objection

A state which objects to an *evolving* rule of general customary international law can be exempted from its obligations. Hence, a state is required to have actively and persistently[85] maintained an objection to the evolving rule of law. One writer feels that a state which "opposes the rule in the early days of the rule's existence (or formation) and maintains its opposition consistently thereafter" may prevent a rule of customary international law from becoming binding on it".[86] In the *Anglo-Norwegian Fisheries case*, the International Court of Justice made an alternative finding that a coastline delimitation rule put forward by the United Kingdom "would appear to be inapplicable as agianst Norway, in as much as she has always opposed any attempt to apply it to the Norwegian coast".[87] Increased attention to the persistent objector rule may also reflect the emphasis on state sovereignty that the newly emerging states have encouraged.[88]

The persistent objector rule is difficult to reconcile with the view that consent is not required before a rule of customary law can bind the state.

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85. There exists a difference of opinion as to whether the objection must be persistent, some authorities refer to the rule as the "persistent objector rule", and others refer to it as the "objector rule" or "dissenting State rule".

86. Akehurst, supra note 72, p.24. See also I.C. MacGibbon, "Some Observations on the Part of Protest in International Law", *British Yearbook of International Law*, vol. 30 (1953), pp.318-9.

87. J.I. Charney, "The Persistent Objector Rule And the Development of Customary International Law," *British Yearbook of International Law*, vol.56 (1985), pp.4-5.

88. *ICJ Reports* (1951), p.131.

Brierly, however, both accepted the persistent objector rule and rejected consent as a necessary element of customary law formation.[89] Brownlie argued for the rule by reference to a dependence of custom on consent.[90]

D'Amato does not accept the persistent objector rule. To him, the rule is "incompatible with the theory that public international law is not founded upon the specific consent of states to rules of law".[91] He states that the authorities cited in support of the persistent objector rule either "do not support the rule in fact or are limited to situation in which a special, rather than general, rule of customary international law is relevant".[92] He has, therefore, based his analysis on the distinction between general and special (regional)[93] customs. Relying on the *Asylum* case he concluded that a persistent objector, "although bound by general customary law, is not bound by regional custom". Thus, it appears that the persistent objector rule "is, at best, only of temporary or strategic value in

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89. J.L. Brierly, *The Law of Nations* (1963), p.52.

90. Ian Brownlie, *Principles of Public International Law* (1979), pp.10-11.

91. Anthony D'Amato, *The Concept of Custom in International Law* (1971), p.261.

92. Ibid., at pp.233-4.

93. See, *Asylum case, ICJ Reports* (1950). The ICJ held that: "The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is an accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial State", (p.276). And, "the Court cannot therefore find that the Colombian Government has proved the existence of such a [regional or local] custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it...," pp.277-8.

the evolution of rules of international law".[94] Customary international law "is not static. It changes as the patterns of State behaviour change and opinio juris evolves to reflect current realities of obligation. Extant rules of law are subjected to change. Nations forge new law by breaking existing law, thereby leading the way for other nations to follow. Ultimately new patterns of behaviour and obligation develop".[95]

D. Judicial Decisions and Arbitral Awards

The general rule that a treaty does not create either obligations[96] or rights for a third state without its consent: (*parta tertiis nec nocent nec prosunt*), is so well established that there is "no need to cite extensive authority for it."[97] However, "as subsidiary means for the determination of rules of law"[98], mention may be made of the decisions of judicial and arbitral tribunals in cases concerning treaties containing *odium tertii* stipulations.

In the Arbitration on the *Cession of Vessels and Tugs for Navigation on the Danube* between four of the former Allied Powers and four of the former

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94. Supra note 87, p.24.

95. Gerald Fitzmaurice, "The General Principles of International Law considered from the Standpoint of the Rule of Law," *Recueil des Cours*, vol. 92 (1957-II), p.113.

96. Subject to exceptions discussed earlier. See, in particular Article 38 of the Vienna Convention.

97. Supra note 25, part 2-4, p.1261.

98. Article 38(1)(d) of the Statute of the International Court of Justice.

Central Powers, the Arbitrator accepted the Romanian submission that it was not bound by the Armistice of 3 November 1918 between the Allied and Associated Powers and Austria-Hungry, for, at that time, Romania was not one of the Allied and Associated Powers.[99] In the Arbitration on the *Frontiers between Colombia and Venezuela*, one of the issues was the effect of the lack of any protest by Venezuela against the Treaty of 1907 between Brazil and Colombia. In this treaty, Colombia had purported to cede to Brazil a territory which was in dispute between Colombia and Venezuela. The Swiss Federal Council, as Arbitrator, held that Venezuela's silence could not be interpreted agianst her, because vis-a-vis Venezuela, the Treaty was "*res inter alios acta.*"[100]

The Permanent Court of International Justice in its Advisory Opinion on the *Nationality Decrees in Tunis and Morocco* held that treaties concluded between a protecting Power and a protected state *Opposable* to third states only within the limits of the consent expressed, or recognition granted, by such third States.[101] In the *Eastern Carelia* case, the Court held that non-member states "not bound by the Covenant. The submission, therefore, of a dispute between them to the methods provided for in the Covenant could take place only by virtue of their consent. Such consent, however, has never been by Russia. On the contrary, Russia has, on several occasions, clearly declared that it accepts no

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99. *Report of International Arbitral Awards* (RIAA), vol.1 (1921), p.112.

100. (1922), 1 RIAA, p.262.

101. *(1923), PCIJ, Series B, No.4*, p. 92.

intervention by the League of Nations in the dispute with Finland."[102]

The Arbitrator Kaeckenbeeck found, in the *Acquisition of Polish Nationality* between Germany and Poland, that for the purpose of determining the meaning of terms in treaties binding on Germany and Poland, treaties concluded between Poland and other states were irrelevant, as Germany was not a party to the treaties. Conversely, the authoritative determination of these issues by the Arbitrator between Germany and Poland could not affect the interpretation of other treaties, for the scope of *res judicata* was equally strictly limited to the parties to the Arbitration.[103] Judge Huber, in *Report III* (1924) on the Spanish Zone of Morocco claims of Great Britain, as *Rapporteur*, stated that the right of diplomatic protection of third states could not be in any way impaired "in consequence of bilateral agreements between the protected state and the protecting power".[104] It was held in the *Ottoman Debt* Arbitration that, as Bulgaria was not a party to the Peace Treaty of Lausanne of 1923, she could not be bound by any of its articles. Bulgaria's obligation regarding Ottoman Debt had to be determined exclusively by reference to the Peace Treaty of Neuilly of 1919 between the Allied and Associated Powers and Bulgaria.[105]

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102. *(1923), PCIJ, Series B, No.5*, pp. 27-8. The Court refused to countenance any interpretation of Article 17 of the Covenant which required non-members States to submit any dispute to the jurisdiction of the League or the Court. And, as the question put to the Court related to the main issue in the actual dispute between Finland and the Soviet Union, the Court considered itself precluded from rendering even an advisory opinion on the question submitted to it by the League Council.

103. (1924), 1 RIAA, pp. 412-3.

104. (1924), 2 RIAA, p.648.

105. Ibid., p. 551.

Again, in the *Island of Palmas* case, Judge Huber reiterated the *non-opposable* nature of a treaty concluded between Spain and the United States implying Spanish sovereignty over the island at the time of cession of the Philippine archipelago to the US.[106] In the *Clipperton Island* case the question was whether Article 35 of the General Act of Berlin of 1885, which imposed the duty of notification on the new territorial acquisitions in Africa, was relevant as between France and Mexico. The Arbitrator held that not only was the island in question situated outside Africa, but also the Act bound "only the signatory power of whom Mexico was not one."[107] And, in the *Interpretation of Article 181 of the Peace Treaty of Neuilly (Merits)*, the Arbitrator found that Greece could rely on the Treaty of Constantinopole of 1913 between Bulgaria and the Ottoman Empire only because of the incorporation of this treaty by express reference into the Peace Treaty of Neuilly of 1919.[108]

New realities in inter-state relations found reflection in the jurisprudence of the Court as well. Whilst in principle the *pacta tertiis* rule remains good, an organization may possess capacity to bring international claims against both members and non-members:

> The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs

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106. Ibid., pp. 842-3, 850 and 866.

107. Ibid., p. 1110

108. (1933), 3 RIAA, pp. 1416-8. See also, the Arbitration on *German Reparations under Article 260 of the Peace treaty of Versailles* (1924), 1 RIAA, p.440; and *Sopron-Koszeg Railway* (1929), 2 RIAA, pp. 967-9.

> of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of states has already given rise to instances of action upon the international plane by certain entities which are not States... Fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and *not merely personality recognized by them alone*, together with capacity to bring international claims.[109]

Judge Alvarez in his Dissenting Opinion on the *Reservations to the Genocide Convention* case (1951) observed:

> These conventions signed by a great majority of states ought to be binding upon the others, even though they have not expressly accepted them.[110]

In the *Namibia (South West Africa)* case, the Court said:

> ...South Africa's continued presence in Namibia having been declared illegal, it is for non-member States to act in accordance with these decisions.[111]

The jurisprudence of the Court "has tended to recognise a type of treaty which although contractual in origin and character, possesses an existence independent of and transcending the parties to the treaty".[112] The Court held in the case concerning the *Status of*

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109. *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports (1949)*, p.178, 184 (emphasis added); See also the Dissenting Opinion of Judge Krylov at pp.218-9.

110. *ICJ Reports (1951)*, P.52.

111. *ICJ Reports (1971)*, p.56.

112. Supra note 25, part 1-2, p. 1205.

South West Africa:

> The international rules regulating the mandate constituted an *international status*for the Territory recognised by all the Members of the League of Nations, including the Union of South Africa.[113]

And the Court continued:

> ... the termination of the Mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law.[114]

The key pronouncement on the subject was made in the judgement in the *Barcelona Traction Co.* case:

> ...an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*... Some of the corresponding rights of protection have entered into the body of general international law...; Others are conferred by international instruments of a *universal or quasi-universal* character.[115]

Unilateral declarations of the non-party to a convention expressed *erga omnes* may evidence an intention to be legally bound, although such a posture

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113. *ICJ Reports (1950)*, p. 133 (emphasis added).

114. Supra note 111, p. 56.

115. ICJ Reports (1970), p.32 (emphasis added). The sources of these obligations enumerated by the Court include: outlawing of acts of aggfression, and of genocide, principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. See also, *Nicaragua* case,*ICJ Reports (1986)*, p.134.

constitutive of obligations should "not lightly to be presumed, and that a "a very consistent course of conduct"[116] is required in such a situation. In the *Nuclear Test* case[117] the criteria of obligation were: the intention of the state making the declaration that it should be bound according to its terms; and that the undertaking be given publicly. This criterion found application in the *Nicaragua* case[118] and also in the *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)*.[119] The obligation thus created may take the form of estoppel, resting on principles of good faith and consistency.[120]

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116. Supra note 44, p.25.

117. (Australia v. France), *ICJ Reports (1974)*, pp. 267-71.

118. Supra note 115, p. 132.

119. *ICJ Reports (1986)*, 573-4. For comments see, Alfred Rubin, "The international legal effects of unilateral declarations", *American Journal of International Law*, vol. 70 (1977), pp.1-30.

120. Bowett enlists three essentials of estoppel: the meaning of the statement must be clear and unambiguous; the statement or representation must be voluntary, unconditional and authorised; reliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation), "Estoppel Before International Tribunals And Its Relations to Acquiescence", *British Yearbook of International Law*, vol. XXXIII (1957), p.184. Other cases where the principle was found to be applicable in some form include: *Tinoco Arbitration Case* (1923) in *American Journal of International Law*, vol. 18 (1924), p.147; *Diversion of Water from the Meuse (Netherlands v. Belgium; PCIJ (1937), Series A/B, No.70*, pp.18-25; *Chorzow Factory Indemnity* case, *PCIJ, Series A, No.9, p.31; German Interests in Polish Upper Silesia, PCIJ, Series A, No.7*, pp.21-4; *Nottebohm* case (*second phase*), *ICJ Reports (1955)*, p. 17; *Nicaragua case (Jurisdiction)*, ICJ Reports (1984), p. 411-3; and, *Border and Transborder Armed Actions (Nicaragua v. Honduras), ICJ Reports (1988)*, p.105. See also Hersch Lauterpocht, *Private Law Sources and Analogies of International Law* (1927), p.204; Georg Schwargenberger, "The Fundamental Principles of International Law", *Recucil des cours*, vol. 87 (1955)-I, pp 290-326; and I.C. MacGibbon, "Estoppel in International Law," *International and comparative law Quarterly*, vol. 7 (1958), p. 468; and Oscar Schachter, "Non-Conventional concerted Acts," in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), p.265.

State pleadings illustrate two aspects of estoppel. First, that a state is barred from pleading its own default as a justification for avoiding its international obligations; and second, the rule that prior recognition of, or acquiescence in, a situation, or a previous admission by a state bars it from subsequently challenging what it has recogniged or admitted. This found manifestation in the *Temple of Preah Vihear*[121] case where Thailand sought to avoid a frontier agreement on the ground of error. The Court held that Thailand was precluded by its conduct from asserting that it did not accept the treaty. In the *Arbitral Award by the King of Spain*[122], the Court held the award valid and stated that it was no longer open to Nicaragua, who, by express declaration and by conduct, had recognized the award as valid, to challenge its validity.

The principle of good faith set forth in Article 2, paragraph (2) of the Charter, was reflected in the Declaration of Friendly Relations between States[123], in the Final Act of the Helsinki Conference (1975) and embodied in Vienna Convention, has also received increasing judicial attestation in recent times:

> Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation...[124]

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121. *ICJ Reports (1962)*, p. 32.

122. *ICJ Reports (1960)*, p. 213.

123. Res. 2625 (XXV) of 24 October 1970.

124. Supra note 117, p. 268.

But, in the *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)*, the Court said:

> The Principle of good faith is one of the basic principles of governing the creation and performance of legal obligations... it is not in itself a source of obligation where none would otherwise exist.[125]

Yet, in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court held unanimously:

> There exists an obligation to pursue in good faith and to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.[126]

The emphasis on good faith *stricto sensu* and no trace of Article VI of the NPT in the dispositif amounts, in effect, to good faith *lato sensu* -- envisaging obligations on parties and non-parties *pari passu*. The Court's observation in the *North Sea Continental Shelf* cases is relevant here:

> ... it is a characteristic of purely conventional rules and obligations that... general or customary law rules and obligations ... have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour ... when rules or obligations of this order are embodied, or are intended to be reflected in certain provisions of a Convention a right of unilateral reservation is not conferred, or is excluded.[127]

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125. *ICJ Reports (1988)*, p. 105.

126. *ICJ Reports (1996)*, p. 36.

127. Supra note 44, pp. 38-9.

Does this refer to those rules from which no derogation is permissible? And if it does, then there is "some apparent confusion between the generality of a rule of law and its classification as *jus cogens...*"[128] How, then, do we identify peremptory norms of international law? "There is no simple criterion",[129] admitted the International Law Commission in its 1966 Report. But, the word "emerges" in Article 64 of the Vienna Convention, which contemplates new rules of *jus cogens*, shows that it could be one of the norms of customary international law. In 1974, the Court characterized the principle of good faith as one of:

> Trust and confidence ... *inherent* in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.[130]

Whether this inference of good faith in a treaty of universal character has sublimized into peremtoriness, and whether treaties creating *erga omnes* obligations complement or enlarge upon *erga omnes* obligations flowing from *jus cogens*, "remain to be worked out in the practice of states and in the jurisprudence of international tribunals."[131] The onus, again, lies more on the

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128. Hugh Thirlway, "The Law And Practice Of The International Court Of Justice", *British Yearbook of International Law*, vol. LX (1989), p.102.

129. p. 76.

130. Supra note 117, p. 268 (emphasis added).

131. Supra note 25, part 1, p. 8.

Court in as much as Article 66 of the Vienna Convention provides for the judicial settlement of disputes concerning the application and interpretation of Articles 53 and 64.

E. Juristic Opinion

It is perhaps needless to insist on the important role played by jurists in the development of international law,[132] but with the growth of international judicial activity and of the practice of states evidenced by widely accessible records and reports, it is natural that reliance on the authority of writers as evidence of international law should tend to diminish.[133] It is obvious that subjective factors[134] "enter into any assessment of the teachings of the most highly qualified publicists of the various nations,"[135] the latter remain, however, among the "subsidiary means for the determination of rules of law."[136]

Juristic opinion may serve to evidence not merely of established[137] customary rules, but of "customary rules which are bound in course of time to become established".

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132. J.G. Starke, *Introduction to International Law* (1989), p. 50.

133. Supra note 25, part 1, p. 43.

134. Ian Brownlie, *Principles of Public International Law* (1990), p.24.

135. Supra note 98.

136. Ibid.

137. Supra note 132, p. 51.

D.J. Harris regards the *pacta tertiis* rule as one which "undoubtedly reflects customary international law."[138] And James Crawford doubts any relationship of this rule with that of *jus cogens*:

> States simply do not have, in the absence of consent, the competence to deprive other States of their legal rights by way of treaty. A treaty attempting to impose duties on third States is not void -- as is a treaty in violation of a *jus cogens* norm. It merely provides a possible set of rules which are, in the absence of the consent of the State or States affected, non-opposable.[139]

But as Paul Guggenheim says "it is not particularly in international law, to make an inventry of the effective individual and superior general norms, in view of the often disputed claim of validity and efficacy of the norms. That is true above all for the rules of law not directly created by the states. These are the norms of customary law created not through conscious purpose and in a decentralized way."[140]

To a question that how can a near universal treaty be taken as powerful or even conclusive proof of customary international law binding even on a non-party and perhaps even overriding other evidence of the state of customary international law, R.R. Baxter enlists a series of arguments:

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138. *Cases and Materials on International Law* (1991), p. 781.

139. *The Creation of State in International Law* (1979), p.80.

140. "What Is Positive International Law?" in George A Lipsky. *Law and Politics in the World Community* (1953), p.28.

> In the *first* place, the treaty is clear evidence of the will of states, free of the ambiguities and inconsistencies characteristic of the patchwork of evidence of state practice that is normally employed in proving the state of international law. *Secondly*, the convention which was hypothesized constitutes one common statement of the law by virtually all states, which does not require the process of harmonization and reconciliation that normally goes into the extraction of a rule of law from the hodge-podge of evidence presented to a tribunal or other form of decision maker. *Thirdly*, the hypothetical treaty is fully contemporary in that, so long as states are parties to it, it speaks as of the present moment and does not... reflect a view of the obligations of international law securely anchored in the past. *Finally*, if one requires a sense of legal obligation, *opinio juris sive necessitatis* that sense is unambiguously present in a treaty, to which states become parties with full realization that they thereby assume legal obligations and may claim legal rights."[141]

The role of intention embedded in the treaty text has been emphasized by D'Amato:

> If the structure of a treaty is such that it manifests an intent to have certain provisions generalizable into rules of customary international law while reserving other provisions solely to the treaty, then that intent should be given weight in assessing whether a particular provision can be cited as having generated a rule of customary law.[142]

But, in the words of Baxter, the process of transition from a treaty rule into customary international law is:

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141. "Treaties and Custom", *Recueil des cours*, vol. 129 (1970), part I, pp. 36-8. "If there be other inconsistent evidence of state practice, surely that evidence must yield to the more contemporary, the more uniform, and the more pervasive view reflected in the treaty itself". Ibid.

142. Supra note 91, p.110.

> ...different from the way in which evidence of customary international law is derived from codification treaty. This requires a three fold test: First, proof of the rule of customary international law; Second, evidence that the treaty contains the same rule; Third, demonstration that the treaty is evidence of the state of customary international law.[143]

There are rules of international law of universal application, if contained in a treaty, opposable to non-parties without their consent. Judge Alvarez in his Dissenting Opinion on *Reservations to the Genocide Convention* (1951), said:

> These conventions signed by a great majority of States ought to be binding upon the others, even though they have not expressly accepted them.[144]

Falk, writing in 1966, defined the core of obligation as "a generalized preference among nations for orders, reinforced ... by the association between ideas of *fairness*, and *respect for law...*"[145] Proliferation of states and of judicial activity as a result of increased inter-state relations have given rise to certain general principles, such as estoppel the requirement of which, in Hersch Lanterpacht formulation:

> may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct the basis of which is the general principle of good faith recognized in many systems of law.[146]

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143. "Multilateral Treaties as Evidence of Customary International Law", *British Yearbook of International Law*, vol. XXXXI (1965-66), pp. 295-6.

144. *ICJ Reports (1951)*, p. 52.

145. "Respect For International Law And Confidence in Disarmament", in Richard A. Falk and Saul H. Mendlovitz (eds.), *The Strategy of World Order: Disarmament and Economic Development (1966), p. 367-8 (emphasis added).*

146. *Private Law Sources and Analogies of International Law* (1927), p. 204.

Rosalyn Higgins argues that "international law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct -- that is to say, conduct which is recognized by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price."[147] Since the 19th century especially by treaties among European States claiming to be valid *erga omnes*, have added a new dimension to the prima facie rule of *pacta tertiis*:

> The emergence of obligation *erga omnes* and growing recognition of *jus cogens* show than an individualistic view of public international law relating only to the legal position of individual states is giving way to a new perception of international, pays more attention to the communitarian aspect of the world order."[148]

"International Law", says Georg Schwarzenberger, "on the level of unorganized international society does not know of any *jus cogens*",[149] But Shabtai Rosenne argues that "the concept of *jus cogens* had existed in international law for a long time, even if in inchoate form."[150] Alfred Verdross has classified three types of *jus cogens*: those existing in the common interest of

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147. "International Law And The Avoidance, Containment and Resolution of Disputes," *Recueil des cours*, vol. 231 (1991), Part V, p. 25.

148. Supra note 4, pp. 137-8. See also, Eric Suy, *The Concept of jus cogens in International Law* (1967), Egon Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission", American Journal of International Law, vol. 61 (1967), pp. 946-75; B.S. Murty, "Jus Cogens in the Law of Treaties", *Proceedings of Indian Society of International Law*, 5th Annual Conference (1968), pp.10-24; R.P. Dhokalia, "Problems Relating to Jus Cogens in the Law of Treaties," in S.K. Agarwala, *Essays on the Law of Treaties* (1972), pp. 149-77.

149. *Current Legal Problems*, vol. 18 (1965), pp. 191-214; and *International Law and Order* (1971), pp. 27-56.

150. *Yearbook of International Law Commission* (1963), vol. I, 685 mtg., para 4.

the whole international community; those created for humanitarian purpose; and those introduced by the Charter of the UN against the treaties or use of force in international relations.[151] But the fact remains as pointed out by Ian Sinclair, that *jus cogens* is:

> a concept so widely supported in doctrine and in writings of jurists has found so little application in state practice.[152]

Thus, the *pacta tertiis* rule is subject to the following principal considerations: the principle that states which are not members of the United Nations act in accordance with the Principles[153] necessary to maintain international peace and security and the rule that in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail;[154] *Odium tertii* stipulations in a treaty;[155] a rule set forth in a treaty becoming binding upon a state non-party to such a treaty as a customary rule of international law;[156] the rule that a state is not bound by an evolving rule of general customary international law if that state has actively

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151. "*Jus Cogens* and Jus Dispositivism, *American Journal of International Law*, vol. 60 (1966), p. 59.

152. *The Vienna Convention on Law of Treaties* (1984), p.21.

153. Sovereign equality, performance of obligations in good faith, peaceful settlement of disputes in conformity with the principles of justice and international law, and prohibition of the threat or use of force. For a historical account of these principles see, V.S. Mani, *Bssic Principles of Modern International Law* (1993).

154. Article 103 of the Charter

155. Articles 35 and 37 paragraph (1) of the Vienna Convention.

156, Article 38 of the Vienna Convention.

and persistently maintained an objection to such a rule;[157] Obligations *erga omnes*, though there is no fixed enumeration of these but which would definitely include obligations deriving from the outlawing of acts of aggression, genocide, and principles and rules concerning the basic rights of the human person[158] and which may even be created by the actions of a limited number of states,[159] e.g., treaties creating objective regimes,[160] such as NWFZs (Nuclear Weapon Free-Zone Treaties) and may also include obligations to protect the environment;[161] norms of *jus cogens*[162] distinguished by their relative indelibility,[163] though not always of consensual recognition[164] and yet find application and interpretation in the judicial settlement of disputes;[165] the rule that prior recognition of, or acquiescence[166] in a situation, or a previous admission by a state bars it from subsequently challenging what it has recognized or admitted; unanimously adopted resolution of the General Assembly though certainly exert a strong persuasive influence but it would be too wide a construction to construe that a recommendation becomes binding by way of

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157. See, Supra note 88.

158. Supra note 115, p. 32; *Yearbook of International Law Commission* (1976), part 2, p.99.

159. Supra notes 109 and 114.

160. Supra note 114.

161. Supra note 25, p. 415.

162. Article 53 of the Vienna Convention.

163. Supra note 34, p.513.

164. Article 64 of the Vienna Convention; supra note 148.

165. Article 66 of the Vienna Convention.

166. Supra note 80.

estoppel;[167] unilateral declarations must be mirrored in the considerations of good faith, *lato sensu*[168] and *stricto sensu.*[169]

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167. Supra notes 65 and 75. "It may become binding by consent, and by consenting to it, a state may then be estopped from challenging it. Where consent is given subject to the overriding consideration that recommendations are not binding no estoppel can be created". See, I.C. MacGibbon, "Estoppel in International Law", *International and Comparative Law Quarterly*, vol. 7 (1958), p. 45.

168. Supra note 117, p. 268.

169. Supra note 125, p. 105.

CHAPTER 3

APPLICATION OF THE RULES GOVERNING OBLIGATIONS ON NON-PARTIES TO MULTILATERAL NUCLEAR CONTROL TREATIES

A. UN Charter Obligations

There has been a discernible pattern in the attitudes of the political organs of the United Nations to equate MNCTs in particular treaties comprising the so-called non-proliferation regime[1], with matters relating to peace and security.[2] The Charter of the United Nations confers on the Security Council primary responsibility for the maintenance of international peace and security,[3] but this responsibility is not exclusive.[4] The reasons for giving primacy to the Security Council are understandable: that it is a continuously functioning body and that it is a smaller executive body with permanent membership of major powers. In a reasolution adopted on 5 June 1998 in the wake of nuclear tests by India and Pakistan, the Security Council:

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1. Treaty on the Non-Proliferation of Nuclear Weapons, 1968. *Status of Multilateral Arms Regulation and Disarmament Agreements*, vol.1(1992), pp. 110-593. The Comprehensive Test Ban Treaty, 1996, *International Legal Materials*, vol. XXXV (1966), pp. 1439-78.

2. G.A. Res. 49/75 H, adopted on 15 December 1994, "*attaches great importance* to the contribution which the treaty on the Non-Proliferation of Nuclear Weapons has made to the peace and security of the world since its entry into force in 1970; and *urges* States not parties to the Treaty on the Non-Proliferation of Nuclear Weapons to accede to it at the earliest possible date recognizing the importance of the universality of the Treaty". *Yearbook of the United Nations*, vol. 48(1994), p. 146. Among the key non-parties Pakistan voted in favour, India and Israel abstained.

3. Article 24 paragraph (1), which says: "*In order to ensure prompt and effective action by the United Nations*, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security..." (emphasis added).

4. "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of my organs provided for in the present charter ..." See Article 10 of the Charter.

> *reiterates* that the proliferation of all weapons of mass destruction constitutes a threat to international peace and security...
>
> And, ... recognises that the tests constitute a serious threat to global efforts towards nuclear non-proliferation and disarmament, *urges* India and Pakistan, and all other States that have not yet done so, to become Parties to the treaty on the Non-Proliferation of Nuclear Weapons and to the Comprehensive Nuclear Test Ban Treaty without delay and without conditions.[5]

The fact that SC resolutions are considered recommendatory since the issue was taken up under Chapter VI of the Charter, does not exonerate the Security Council of its obligations under the Charter.[6] As the Indian Government made it clear that the "attempts to coerce Member States to accede to international treaties is contrary to the norms of international law..."[7] Even a party "exercising its national sovereignty has the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of this Treaty, have jeopardized the supreme interests of its country..."[8] the point has been eloquently stated in the *S.S. Wimbledon* case:

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5. SC Res. S/1172/1998, pp. 1-3.

6. "... the Security Council *shall* act in accordance with the Purposes and Principles of the United Nations". See Article 24(2). The Purposes and Principles inter alia enjoin it to observe the principles of "justice and international law", "sovereign equality of all its members" and "good faith" to "fulfil obligations assumed in accordance with the present charter. (emphasis added).

7. The text of the response by the Indian Government to the Security Counicl's resolution of 5 June 1998. *The Hindu* (New Delhi), 7 June 1998, p. 10.

8. Article X(1) of the NPT.

> ... any convention creating an obligation ... places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But, *the right of entering into international engagements is an attribute of state sovereignty.*[9]

And, state territorial sovereignty was described by Max Huber, Arbitrator in the *Island of Palmas Arbitration*, in these terms:

> Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the *exclusion* of any other State, the functions of State.[10]

According to Judge Gros, "to assert that a matter may have a distant repurcussion on the maintenance of peace is not enough to turn the Security Council into a world government."[11] India has raised several questions on the Security Council's resolution:

> Can the Security Council continue to ignore the overwhelming demand for elimination of nuclear weapons, which has been repeatedly endorsed by the General Assembly; will the Council henceforth engage itself in matters relating to nuclear disarmament? if indeed the Charter of the United Nations envisaged any role for the Security Council on non-proliferation issues, which is doubtful, why has it not acted on the proliferation of tens of thousands of nuclear weapons since the United Nations was established? is the Security Council's concern on matters of proliferation limited to horizontal proliferation alone? is the continued retention of nuclear weapons by the nuclear-weapons

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9. *PCIJ, Series A, No.1(1923)*, p. 25. (emphasis added).

10. *American Journal of International Law*, vol. 22(1928), p. 875.

11. Dissenting Opinion in the *South West Africa (Namibia) case, ICJ Reports (1971), p. 331.*

> States not considered a proliferation risk that threatens international peace and security; if nuclear tests are a threat to "non-proliferation and disarmament", or if the imputation is that tests raise tension, why did the Council not take cognizance of the over 2,000 tests carried out over the last 50 years, including as recently as 1996? can the Council call on a country not to assemble or develop nuclear devices, when this process continues in other countries, without the Council taking any notice? can the Council call on a country not to develop ballistic missiles, when it has made no such call to others, including to those who have several thousands of these weapons in their arsenals and continue to produce and develop them? on what basis is the Council limiting its concern on nuclear weapons to an arbitrarily defined geographical sub-region, when nuclear weapons by definition have a global reach and impact, and when the security concern of at least one of the countries it addresses extends well beyond that sub-region? on what basis can the Secretary-General report to the Council on the steps taken by the countries addressed by this resolution, when most of its provisions are *ultra vires* or at variance with international law and infringe on the sovereign prerogative of member States.[12]

Pakistan was also dissatisfied with the Council's approach, but for different reasons. Ahmad Kamal, its Permanent Representative the U.N. said

> ... It is evident that by adopting this approach the Council is, in fact, acknowledging its failure to address the critical elements of the situation.[13]

While India described the resolution as "coercive", Pakistan wailed the "failure" of the Council. But, the question is: "Are there any limits to the Council's power of appreciation ... If there are any limits, what are these limits and what body, if

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12. Letter to the Security Council President by India's Permanent Representative at the U.N. *The Hindu*, 7 June 1998, p. 1. (emphasis added).

13. Ibid.

other than Security Council, is competent to say what those limits are".[14] In the *Expenses* case the Court observed:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations ... As anticipated in 1945, therefore each organ must, in the first place at least, determine its own jurisdiction.[15]

Earlier, the South African and French Governments characterised *ultra vires* the resolutions of the General Assembly which terminated the Mandate for South West Africa (Namibia). On a request by the Security Council to the Court for an advisory opinion, the Court clarified:

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.[16]

However, some judges expressed the opinion that the Court could take note of any relevant issue of law and countenanced the thesis that the jural contents of the resolutions could be of relevance to the legal repurcussions of South African rejection of the resolutions.[17] At the same time:

> The political character of an organ cannot release it from the observance of the treaty provision

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14. Dissenting Opinion of Judge Shahabuddeen in *Lockerbie* case *ICJ Reports (1992)*, p. 32.

15. *ICJ Reports (1962)*, p. 168.

16. Supra note 11, p. 45. See also, the Separate Opinions of Judges Ammoun, de Castro and Padilla Nervo, at pp. 71, 180-2 and 105 respectively.

17. Ibid., the Seperate Opinions of Judges Petren, Onyeama and Dillard at pp. 130-1, 141-5 and 151-2. See also, the Dissenting Opinions of Judges Fitzmaurice and Gros at pp. 301-4 and 331-2.

> established by the Charter when they constitute limitations on its powers or criteria for its judgement.[18]

And, on this specific point, the World Court ruled in the *Nicaragua* case:

> In international law there are no rules; other than such rules as may be *accepted* by the state concerned, by treaty or *otherwise*, whereby the level of armaments of a sovereign state can be limited.[19]

The UN Charter is a treaty, albeit *primus inter pares* one; yet "the members of the UN are not "obliged" to carry out all decisions of the Security Council. The meaning of Article 25 is that the members are obeyed to carryout those decisions which the Security Council has taken in accordance with the Charter".[20] As to rules which have been accepted "otherwise", the study now turns to.[21]

B. The Vienna Convention

(i) *Odium tertii* stipulations in MNCTs

The undertaking by nuclear-weapon states (NWS) not to assist non-nuclear weapon states (MNWS) under Article I is universal and applies with

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18. The *Admissions* case, *ICJ Reports (1948)*, p. 64.

19. *ICJ Reports (1986)*, p. 135 (emphasis added)

20. Hans Kelsen, *The Law of the United Nations* (1950, p. 3.

21. Articles 35 and 37 paragraph (1) of the Vienna Convention. The Provisions provide respectively: "An obligations arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing"; and, "when an obligation has arisen for a third state in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third state, unless it is established that they had otherwise agreed".

equal force to all states, whether or not they are parties to the NPT.[22] And, by virtue of Article IX paragraph (3) of the NPT, a NWS is one which has manufactured and exploded a nuclear devices prior to 1 January 1967.[23] On 11 May 1995, the Treaty received its indefinite and unconditional extension.[24]

The Comprehensive Test Ban Treaty (the CTBT)[25] was opened for signature on 24 September 1996. It will enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex-2 to the Treaty...[26] And, if this has not entered into force three years after the date of the anniversary of its opening for signature, Depository shall convene a Conference of the States that have already deposited their instruments of

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22. Mason Willrich, *Non-Proliferation Treaty: Framework for Nuclear Arms Control* (1969), p. 95. Article I of the NPT says: "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices." *Status of Multilateral Arms Regulation and Disarmament Agreements*, vol. 1 (1992), p. 111-2.

23. *Hearings on the Treaty on the Non-Proliferation of Nuclear Weapons Before the Senate Committee on Foreign Relations*, 90th Cong., 2nd Sess. (1968), p. 359. Adrian Fisher, the Deputy Director of the US Arms Control and Disarmament Agency (ACDA) confirmed that the definition would exclude any nation which acquires a nuclear capacity after the fixed date.

24. The decision was made pursuant to Article X paragraph (2) of the NPT. A Conference was convened by the depositary governments in New York on 17 April 1995 to decide whether it should be extended for an additional fixed period or periods. On that day the Conference took such a decision by consensus which was supported by the majority of the Parties to the Treaty. See *International Legal Materials*, vol. XXXIV (1995), pp. 961-74.

25. *International Legal Materials*, vol. XXXV (1996), p. 1427.

26. Significant among those include India, Israel and Pakistan, the so-called threshold states.

ratification upon the request of a majority of those States. That Conference shall examine the extent to which the requirement set out in paragraph (1) of Article XIV has been met and shall consider and decide by consensus what measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the early entry into force of the treaty.[27]

In 1959 the original parties[28] to the Antarctic Treaty guaranteed that "it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes[29], and ... the continuance of international harmony in Antarctica will further the purposes and principles embodied in the charter of the United Nations".[30] The Treaty provided that any future international agreements relating to the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste, to which they all become parties, would also apply in Antarctica.[31]

Article I of the Outer Space Treaty of 1967[32] seeks to establish that the exploration and the use of outer space shall be "carried out for the benefit and

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27. Article XIV of the Treaty. The vote on the General Assembly Resolution that adopted the CTBT was 158 in favour, 3 against (Bhutan, India and Libya) and 5 abstentions (Cuba, Lebanon, Mauritius, Syria and the United Republic of Tanzania). UN DOC. A/Res./50/245, 17 September 1996.

28. Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, USSR, the UK and the USA.

29. Preamble of the Treaty, Supra note 22, p. 22.

30. Ibid.

31. Article V paragraph (2).

32. Supra, note 22, pp. 51-71.

interest of all mankind". It therefore prohibits any nuclear activity in outer space.[33] Similarly, the Seabed Treaty of 1971 prohibits emplacement of nuclear weapons and other weapons of mass destruction on the seabed and ocean floor and in the subsoil thereof.[34]

Essentially a nuclear weapon-free zone (NWFZ)[35] treaty, the Treaty of Tlatelolco, 1967[36] provides to come into force *inter alia*: when all states outside Latin America which have de facto or de jure responsibility for territories within the "zone of application of the Treaty" undertake to apply the Treaty to those territories;[37] when all states possessing nuclear weapons sign and ratify Protocol II, thereby undertaking to respect the "status of denuclearization" and not to use or threaten to use nuclear weapons against any contracting state. Once these conditions have been satisfied, and the treaty has entered into force for all the states in the zone, its operation may still be

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33. Article IV of the Treaty.

34. Supra note 22, pp. 160-99.

35. Article VII of the NPT recognizes the right of states to conclude regional treaties in order to ensure the absence of nuclear weapons from their territories. An ad hoc group was set up under the auspices of the Conference of the Committee on Disarmament (CCD) which recommended that obligations relating to the establishment of a nuclear weapon-free zone might be assumed not only by groups of states constituting entire continents but also by smaller groups of states and even individual states. Some members of this group extending beyond the conventionally defined geographical limits of the states comprising NWFZs. But the experts admitted that such safety zones would have to be negotiated and agreed by third states if they were not to violate international law. See *Yearbook of the United Nations*, vol. 29 (1975), p. 90. See also, David Freestone and Scott Davidson, "Nuclear Weapon-free zones", in Istvan Pogany, *Nuclear Weapons and International Law* (1987), p. 178.

36. Supra note 22, pp. 72-109.

37. This understanding is made by ratification of Protocol I. Supra note 22, pp. 89-90.

suspended if another state anywhere in the world acquires nuclear weapons. It will remain suspended until that state ratifies Protocol II.[38]

The 1967 Treaty of Rarotonga[39] seeks to prohibit a very wide spectrum of nuclear activity in the South-Pacific including the disposal of nuclear waste, the supply of materials for the nuclear weapons industry as well as the testing, possession, control and presence of nuclear weapons. And, unlike the Tlatelolco Treaty, it does not permit explosions for "peaceful purposes".[40]

The parties to the 1995 Pelindaba Treaty[41] have determined to take "all steps in achieving the ultimate goal of a world entirely free of nuclear weapons, as well as of the obligations of all states to contribute to this end.[42]

Rise of transnational coalitions--the so-called regimes exhibiting a new form of coordination and organization, emerged out of realism questioning the

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38. Article 28 paragraphs (1)(c) and (4). See also H. Gros Espiell, "The Non-Proliferation of Nuclear Weapons in Latin America," *International Atomic Energy Agency Bulletin*, vol. 22, no. 3/4 (1980) pp. 81-6; J.R. Martinez Cobo, "The Nuclear Weapon-Free Zone in Latin America, *International Atomic Energy Agency Bulletin*, vol. 24, no. 2 (1982), pp. 56-8; G. Descoigne, "An Overview of Nuclear-Weapon-Free Zones," *International Atomic Energy Agency Bulletin*, vol. 24, no. 2 (1984), pp. 50-5.

39. Supra note 22, pp. 267-86.

40. W.M. Sutherland, "The South Pacific Nuclear Free Zone Treaty", *International Journal of Estuarine and Coastal Law*, vol. 1 (1986), pp. 218-23; G. Fry, "Towards a South Pacific Nuclear Free Zone", *Bulletin of the Atomic Scientists*, June-July (1985), pp. 16-20.

41. African Nuclear-Weapon-Free Zone Treaty, *International Legal Materials*, vol. XXXV (1996), pp. 635-50. See also Sola Ogunbanwo, "History of the Efforts to Estabilish an African Nuclear-Weapon-Free Zone", *Disarmament*, vol. XIX, No.1 (1996), pp. 13-20.

42. Preamble of the Treaty. Ibid., p. 635.

"importance of international law as a constraint on state behaviour",[43] has given a new turn to the issue of nuclear non-proliferation. The 12 - member Missile Technology Control Regime of 1987 is a voluntary arrangement in which countries interested in restricting the proliferation of specific goods and technologies exchange information and coordinate their national activities.[44] It does not act as a decision-making authority; each member is responsible for implementing group decisions through national laws and regulations.[45] But, within the regime the members have developed common approaches to the issue of transfers of a specific list of controlled items. Two issues of the relationships between MTCR members and non-members are significant: first, the relationship with countries which have considerable ballistic missile-production capacities but are not members of the MTCR;[46] and second, MTCR members' relations with countries which are developing or buying ballistic missiles with focus on the Persian Gulf and South Asia.

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43. Stephen Haggard and Beth A. Simmons, "Theories of international regimes", *International Organization*, vol. 41, No. 3 (1987), p. 491. For an excellent exposition on the subject, see Stephen Krasner (ed.), *International Regimes* (1983).

44. The MTCR restricts the proliferation of missiles, unmanned air vehicles and related technology for those systems capable of carrying a 500-kg payload a distance of at least 300 km. But the Arms Control and Disarmament Agency (ACDA) of the US uses a wider formulation. In addition to the above, it restricts "systems intended for the delivery of weapons of mass destruction (WMD)". Besides missiles, this covers all systems designed and developed specifically for delivering nuclear, chemical or biological weapons. See *The Missile Technology Control Regime* (US Arms Control and Disarmament Agency: Washington, 1996).

45. *SIPRI Yearbook 1997*, p. 354.

46. China and North Korea are prominent in this group. See W. Frieman, "New Members of the Club: Chinese participation in arms control regimes, 1980-95," *Non-proliferation Review*, vol. 3, no. 3 (1996), p. 20; Y. Sharov, "Ukraine and the MTCR", *The Monitor*, vol. 1, no.2 (1995), p. 12.

Set up in 1975, one of the key features of the Nuclear Suppliers Group (NSG)[47] Guidelines[48] is the requirement for an agreement between the International Atomic Energy Agency (IAEA) and the recipient state requiring the application of full-scope safeguards.[49] This goes even beyond the purview of the NPT in as much as these cover transfers to all NNWS. These have been further tightened by the Warsaw Guidelines issued in 1991.[50] The idea is to "strengthen

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47. is a forum for discussing and coordinating export control policies with a view to preventing the acquisition of nuclear weapons by non-nuclear weapons states. The members exchange information on nuclear programmes of potential concern from a proliferation perspective and issue Guidelines following consultations among themselves. See, supra, note 45, p. 349.

48. *for the Export of Nuclear Material, Equipment or Technology* (the so-called London Guidelines for Nuclear Transfers), INFCIRC/254/Rev.1/Part 1/Mod.3, November 1994. The three basic principles of these Guidelines are: that transfer of items on the trigger list should be authorized only after formal assurances from the governments of the recipients which explicitly excludes uses which would result in a nuclear explosive device; materials and facilities appearing on the trigger list should be "placed under effective physical protection to prevent unauthorised use and handling"; and trigger list items should only be transferred when covered by appropriate IAEA safeguards. See, paras, 2, 3 and 4.

49. Safeguards on all fissionable materials in its current and peaceful activities. See also R. Chidambaram and V. Ashok, "Embargo Regimes and Impact," in Deepa Ollapally and S. Rajagopal (eds.), *Nuclear Cooperation: Challenges and Prospects* (1997), pp. 57-64.

50. *Guidelines for Transfers of Nuclear Related Dual-Use Equipment - Material and Related Technology* (the Warsaw Guidelines), IAEA Document INFCIRC/254/Rev.1/Part 2, July 1992. Now there are several other factors taken into account before effecting such transfers, such as first whether the state is a party to the NPT, Tlatelolco Treaty or similar nuclear non-proliferation agreement with an agreement on IAEA safeguards on all peaceful nuclear activities; second, if not a party to any such international agreement, whether facilities associated with nuclear fuel cycle activity are not or will not be subject to safeguards; third, whether items are appropriate for the end-use and whether this stated use is considered appropriate for the end user; fourth, whether the item is to be used in a reprocessing or enrichment facility; and finally, demonstrated support for nuclear non-proliferation by the receipient and compliance with existing obligations in this area.

the principles of [the MTCR and NSG] that can command universal adherence".[51]

(ii) Scope of obligations

The hypothetical loophole[52] in the NPT became a reality on 11 May 1998 when India, hitherto a non-party NNWS, initiated a series of nuclear tests completed two days later. In a statement to the Parliament on 27 May 1998, the Indian Prime Minister Atal Bihari Vajpayee declared:

> India is now a nuclear weapon state. This is a reality that cannot be denied. It is not a conferment that we seek, nor is it a status for others to grant. It is an endowment to the nation by our scientists and engineers. It is India's due, the right of one-sixth of human kind.[53]

Pakistan followed suit on 29 May 1998. Speaking "authoritatively" on behalf of the Government of Pakistan, the Foreign Secretary announced on 30 May 1998:

> The devices [Nuclear] tested correspond to weapon configuration compatible with delivery systems.[54]

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51. President William Jefferson Clinton, "Confronting the challenges of a broader world," *US Department of State Dispatch*, vol.4, no. 39, 27 September 1993.

52. A strict interpretation of Article IX paragraph (3) would exclude the new nuclear state from the difinition of NWS under the NPT. Supra note 22, p. 115.

53. *The Hindu*, 28 May 1998, p. 9.

54. *The Hindu*, 31 May 1998, p. 1

Later, the Foreign Minister confirmed that the Ghauri missile "will be armed with nuclear warheads".[55]

The Joint Communique On Indian and Pakistani Nuclear Tests By Five Permanent Members of Security Council, released on 5 June 1998, said:

> ... the international non-proliferation regime must remain strong and effective despite the recent nuclear tests in South Asia... Notwithstanding their recent nuclear tests, India and Pakistan do not have the status of nuclear weapons States in accordance with the NPT ... strongly believe that India and Pakistan should adhere to the Comprehensive Nuclear Test Ban Treaty immediately and unconditionally...[56]

The US response was even more explicit:

> According to international law, a nuclear weapon state by definition must have detonated a nuclear device before 1968...[57]

And the US continued:

> in this case India would be considered as a non-nuclear weapon state based on its status under the nuclear Non-Proliferation Treaty...[58]

"International law does not define a nuclear weapons state..." Obviously "a state which has nuclear weapons is a nuclear weapon state.

To determine the status of a nuclear weapon state, one does not need to await a recognition as such by the Parties to the NPT, or by the

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55. Ibid.

56. *Press Release SC/6527*, 5 June 1998, pp. 1-2.

57. *The Hindu*, 17 May 1998, p. 1.

58. Ibid., 12 may 1998, p. 1.

P-5 of the UN Security Council".[59] Whether non-proliferation has become a norm of international law, as feared by some,[60] will be tested later in this study, the cumulative effect of the international response[61] has been to place India under the obligation of Article II[62] as there is no third category of states in the NPT. However, being a non-party it is not bound by it.[63]

Another significant implication is that a nuclear state which is not an NWS under the NPT would be precluded from qualifying, under the US Atomic Energy Act, for assistance in the design, development and fabrication of atomic weapons.[64]

In addition, there are other significant stipulations envisaging obligations on non-parties. There is link, albeit a tenuous one, between the NPT and the

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59. V.S. Mani, "India's tests: the legal issues", *The Hindu*, 5 June 1998, p. 10.

60. Muchkund Dubey, "World Nuclear Order and India", *The Hindu*, 27 May 1998, p. 10; see also Achin Vanaik, "Sign the CTBT", Ibid., 29 June 1998, p. 10.

61. "... I, for one, cannot and will not agree to any treaty which would legitimize de facto India's possession of these weapons ...," said Senator Jesse Helms, the Chairman of the US Senate Foreign Relations Committee. See *The Hindu*, 15 May 1998, p. 12.

62. "... not to manufacture nuclear weapons or other nuclearexplosive devices..." See Supra note 22, p. 112.

63. Article 35 of the Vienna Convention.

64. "When India demands a recognition of its status as a nuclear weapons power, it is not seeking a de jure membership of the NPT System. It wants a de facto acknowledgement by a lifting of the long standing civilian technology blockade imposed by the great powers against it over the last quarter of a century in the name of non-proliferation" C. Raja Mohan, "Rethinking the CTBT," *The Hindu*, 26 May 1998, p. 12.

CTBT and "Article VI and the preamble of the PTBT refer to this."[65] And interestingly, both India and Pakistan are parties to the PTBT but that is not sufficient for Article XIV[66] of the CTBT to survive the test of Article 52 of the Vienna Convention.[67]

Obligations *erga omnes* flowing from treaties creating internationally recognized status, such as the Treaty of Tlatelolco, require states--in this case those who have emerged as nuclear-weapon states--to observe the sanctity of those regimes. The operation of oligopolistic weapon material and delivery system certainly affect the interests of non-members, in particular of target states,[68] but international law does not obligate non-members to observe the guidelines of

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65. T.T. Poulose, *The CTBT and the Rise of Nucelar Nationalism in India -- Linkage between Nuclear Arms Race, Arms Control and Disarmament* (1996), p. 180. Preamble of the PTBT principally aims to "put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons," and seeks "to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end", and desire "to put an end to the contamination of man's environment by radioactive substances." See supra note 22, p. 33. Article VI of the NPT provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control". Ibid., p. 114.

66. Supra note 27 and the accompanying test.

67. "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations". See also supra note 6; A.G. Noorani, "EIF in CTBT-II Violation of Vienna Convention", *The Statesman* (New Delhi), 8 August 1996; V.S. Mani, "CTBT: the EIF provisions", *The Hindu*, 15 August 1996, p. 10; M.K. Nawaz, "Prospects for the Entry into Force of the CTBT," *Indian Journal of International Law*, vol. 37, no. 1 (1997), pp. 239-61; Arundhati Ghose, "Negotiating the CTBT: India's Security Concern and Nuclear Disarmament", *Journal of International Affairs*, Vol.51, no.1 (1997), pp.239-613; John D. Holum, "The CTBT and Nuclear Disarmament--The U.S. View", ibid., pp. 263-81.

68. See Statement by R.L. Bhatia, Indian Minister of State for External Affairs, in the First Committee of the 49th UN General Assembly at New York on 24 October 1994. *Statements by India on CTBT (1993-1996)*, p. 30.

the MTCR and the NSG.

C. Cu:stomary Law Enquiry

The main question is whether the recent nuclear tests by India broke the international *norm*[69] against nuclear test established by the CTBT. Whether twenty-four-year long de facto moratorium reflects India's acquiescence in the existing regime of non-proliferation or whether its refusal to sign the NPT as well as the CTBT confirm that India has been an objector? Where does the *opinio juris* lie? Though it is not always easy to discern evidence of its existence, more so in relation to MNCTs, such as the NPT and the CTBT, a dissective perusal may shed some light on these issues. To this end, the Indian[70] practice

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69. The conference on Disarmament (CD) on 14 May said that Indian nuclear tests "broke the international *norm* against test explosion established by the 1996 CTBT negotiated at the Conference". *UN Newsletter*, vol. 53, No. 21, 23 May 1998; "Such testing was contrary to the de facto moratorium on the test of nuclear weapons..." See *Press Release* SC/6517, 14 May 1998, p. 1; "Even though the CTBT is yet to enter into force, they [the P-5] regard it as having established an international norm against testing." Supra note 60, p. 10.

70. The Joint Communique On Indian And Pakistani Nuclear Tests By Five Permanent Members of Security Council issued on 5 June 1998 makes a distinction between the Indian practice vis-a-vis the practice of other non-parties and, in particular, the practice of Pakistan which until 4 July 1998 remained essentially Indo-centric and unlike India, not opposed to the NPT per se. The Communique brings home this point very clearly: "...the grave situation created by the nuclear tests carried out in May by India and *then* by Pakistan." Supra note 56, p. 1. Israel's refusal to sign the NPT predicated on the consideration "that until there was conclusive evidence that the Arab states had reconciled themselves to Israel's existence" ... it must continue "deterrence through uncertainty"..."from its ambiguous nuclear posture". Shai Feldman, "Israel", in Mitchell Reiss and Robert S. Litwak (eds.), *Nuclear Proliferation after the Cold War* (1994), p.70. IN addition, it was India which initiated testing not only this time but also in 1974. See also, K. Subramanyam (ed.), *Nuclear Proliferation and International Security* (1985), Zia Mian, *Pakistan's Atomic Bomb and Search For Security* (1995), pp. 12-5.

is considered at three levels [71]: Indian practice prior to the conclusion of NPT, from NPT to Pokharan-I[72] and from Pokharan-I to Pokharan-II.[73]

(i) Indian Practice Prior to the NPT

In a statement in the Lok Sabha (Lower House of Parliament) on 2 April 1954, Prime Minister Jawaharlal Nehru declared:

> We have maintained that nuclear (including thermoneuclear), chemical and biological (bacterial) knowledge and power should not be used to forge these weapons of mass destruction. We have advocated the prohibition of such weapons, by common consent and immediately by agreement amongst those concerned ... The Government would consider, among the steps to be taken now and forthwith, the following: 1. Some sort of what may be called "standstill agreement"... A. Immediate (and continuing) private meetings of the sub-committees of the Disarmament Commission to consider the "standstill" proposal ...

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71. The treaty "rule must be sufficiently significant to be of a fundamentally norm creating character, the rule must be of a potentially norm creating character with respect to precision as to its meaning and scope, state practice constituting the subject matter of the rule should be extensive and virtually uniform, the passage of a considerable period of time is not necessary provided there is widspread and representative participation in the observance of the rule particularly among States having a direct interest in the issue, the States that adopt the practice constituting the rule must do so because they feel legally compelled to comply, the states that observe the rule because they feel legally compelled to do so, must believe themselves to be bound by a custom as representing law, not merely by treating obligation, and the treaty embodying the rule in question must have been, since its inception, declaratory of a then existing rule of customary international law..." See the*North-Sea Continental Shelf cases, ICJ Reports (1969)*, pp. 41-5.

72. First nuclear device exploded by India on 18 May 1974 at Pokharan (Rajasthan).

73. Nuclear tests of 11 May 1998.

> The Government of India will use its best efforts in pursuit of these objectives.[74]

V.K. Krishna Menon said:

> The bomb has no value; it has not even a deterrent value ... our efforts should not be in building another bomb but in trying to rid the world of the bomb. What power would we have to say that nuclear weapons should be banned if we are building one ourselves?... I refuse to believe that complete disarmament is utopian.[75]

In 1965 India put forward the idea of an international non-proliferation treaty which would obligate NWS to abandon their nuclear stockpile should other countries refrained from developing or acquiring these weapons. But,

> This balance of rights and obligations was not accepted ... As a result we made it clear that we would not be able to sign the NPT.[76]

(ii) From the NPT to Pokharan-I

On 5 April 1968 the then Indian Prime Minister Indira Gandhi declared in the Lok Sabha:

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74. *Jawaharlal Nehru Speeches (1953-1957)*, pp. 248-50.

75. Michael Brecher, *India and World Affairs: Krishna Menon's View of the World* (1968), pp. 228-32.

76. Supra note 53, ibid.

> we shall be guided entirely by our self-enlightenment and the considerations of national security.[77]

The NPT which was opened for signature on 1 July 1968 came into force on 5 March 1970. For the next four years India neither acceded to the Treaty nor did anything prohibited in the Treaty. Does this indicate a concurrence in the emerging norm of non-proliferation despite the fact that India refused to sign the treaty even as an NNWS and that peaceful nuclear programme was permitted in accordance with a safeguard agreement to be concluded with the International Atomic Energy Agency (IAEA)?[78] Or does this amout to an objection since India's refusal to sign the Treaty showed that, though it restrained from performing a test, it did not abandon the prospective intention of doing so? Further, the fact that peaceful nuclear activity was permitted for NNWS parties carried India's intention further that the impending explosion might be for other than peaceful purposes only.[79]

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77. Ibid.

78. Articles III and IV of the NPT. The first provides: (1) "Each non-nuclear weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency ..." (3) "The safeguards required by this Article shall be implemented in a manner designed to comply with Article IV of this Treaty ..." Article IV says: "Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty." Articles I and II respectively refer to non-transfer by the NWS and non-receipt by the NNWS of any nuclear weapon or other nuclear explosive devices. Supra note 22, pp. 112-4.

79. Krishna Menon said: "There can be no green bombs inasmuch as there can be no vegetarian tigers." quoted from Mani, Supra note 59, ibid.

On 18 May 1974 India successfully carried out an underground nuclear explosion. The Atomic Energy Commission of India described it as "a peaceful nuclear explosion experiment using an implosion device. As part of the programme of study of peaceful uses of nuclear explosions, the Government of India has undertaken a programme to keep itself abreast of developments in this technology, particularly with reference to its use in the field of mining and earth moving operations".[80] Prime Minister Indira Gandhi said:

> we do not intend to use this knowledge of this power for any other than peaceful purposes and our neighbour need have no fear.[81]

And the Foreign Minister clarified:

> We have no intention of developing nuclear weapons.[82]

(iii) From Pokharan-I to Pokharan-II

During the span of twenty-four year which elapsed since India exploded its first nuclear device on 18 May 1974, profound changes have taken place in the international scenario significant among those include: indefinite extension of the NPT in 1995; Advisory Opinion of the International Court of Justice on the

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80. *SIPRI Yearbook 1975*, p. 16.

81. Ibid.

82. Ibid.

legality of the threat or use of nuclear weapons in 1996; and the conclusion of a CTBT in 1996.

Two questions may be raised here: first, whether twenty-four years of self-imposed moratorium on nuclear testing evidences an *opinio juris* in favour of nuclear non-proliferation and testban. In other words, has India acquiesced in the existing regime of nuclear non-proliferation and test ban[83]. Second, whether refusal to accede to the NPT and sign the CTBT testify against the existence of such an *opinio juris*. In other words, can Indian policy during the interregnum be termed as one of persistent objection against both the existence of a norm of nuclear non-proliferation as well as of test ban.

Let us now briefly look at how does this practice translate in terms of international law precepts governing obligations.

The then Indian Prime Minister Rajiv Gandhi said at the UN Special Session on Disarmament on 9 June 1988:

> Deterrence needs an enemy, even if one has to be invented. Nuclear deterrence is the ultimate expression of the philosophy of terrorism holding humanity hostage to the presumed security needs of the few.[84]

The Indian Memorial submitted to the World Court in 1995 stated:

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83. I.K. Gujaral is reported to have said: "It [India] has scrupulously observed the provisions of the NPT even while remaining out of it". *World Focus*, vol. 18, no. 3 (1997), p. 23.

84. Rajiv Gandhi Institute of Contemporary Studies Project, No.4, Global Security Programme, Final Report of the Global Security Project, p. 45. See also, Siba Moshaver, *Nuclear Weapons Proliferation in the Indian Subcontinent* (1991), p. 10-4.

> Nuclear deterrence had been considered to be abhorrent to human sentiment since it implies that a state if required to defend its own existence will act with pitiless disregard for the consequances to its own and adversary's people ... A better and saner way to secure everlasting peace would be to ensure that not only are such weapons never used but also not made ... if peace is the ultimate objective there can be no doubt that disarmament must be given priority and has to take precedence over deterrence ... if *the use of such weapons itself is illegal under international law then their production and manufacture cannot under any circumstances* be considered as permitted... Violation of international law like any law would only highlight the importance of complying with such law and do not make legal what is otherwise illegal.[85]

Indian Prime Minister Atal Bihari Vajpayee said following Pokharan-II:

> ...The series of tests recently undertaken by India have led to the removal of doubts. The action involved was balance in that it was the minimum necessary to maintain what is an irreducible component of our national security calculus...[86]

And the Indian Foreign Secretary stated in the plenary of the Conference on Disarmament at Geneva on21March 1996:

> ... India's objectives are different. We do not believe that the acquisition of nuclear weapons is essential for national security, and we have followed a conscious decision in this regard...[87]

The inconsistencies in the statements of Indian leaders and officials seem to elude an infallible evidence of concretization of an *opinio juris* necessary to

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85. *Indian Journal of International Law*, vol. 37, No. 1 (1977), p. 147-8.

86. *The Hindu*, 28 May 1998, p. 9.

87. Supra note 68, p. 98.

crystallize the Indian practice either as one of conclusive acquiescence in or of persistent objection to the putative norm of nuclear non-proliferation and test-ban. However, in so far as the policy of deterrence is concerned, the ICJ held in its Advisory Opinion of 8 July 1996:

> ... the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence in accordance with Article 51 of the Charter when its survival is at stake.
> Nor can it ignore the practice referred to as "policy of deterrence," to which an appreciable section of the international community adhered for many years...[88]

Instances of inconsistent Indian practice attended with unilateral declarations certainly mollify the rigour of its objection to the putative norm of nuclear non-proliferation and test-ban, the Court found the number of ratifications "though respectable, hardly sufficient"[89] for the NPT as creative of such a norm binding non-parties.

As regards the CTBT:

> the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law... an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been *both extensive and virtually uniform*...[90]

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88. *International Legal Materials*, vol. XXXV, no.4 (1996), p. 830. It is a coincidence of some significance that the Court's pronouncement of the Advisory Opinion preceded the adoption of the CTBT by the General Assembly on 10 September 1996. Moreover, the request for an Advisory Opinion was made by the General Assembly resolution of 15 December and the NPT was indefinitely extended on 17 April 1995. See also declaration of Judge Shi, ibid., p. 832.

89. Supra note 71, p. 43.

90. Ibid.

But the inconsistencies in Indian practice are not wholly without some legal consequence.

D. Estoppel and Good Faith

The doctrine of estoppel[91] based on the general principal of good faith[92] requires, in essence, "that a state ought to be consistent in its attitude to a given factual or legal situation".[93] The principle of good faith now warrants India to adhere to its statements whether it be true or not and it is the principle of good

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91. See *Arbitral Award by the King of Spain, ICJ Reports (1960)*, p. 213; *Temple of Preah Vihear, ICJ Reports* (1962), p. 32.

92. See Article 2 paragraph (2) of the Charter. The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, *inter alia*, provides that: "Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law". See *International Legal Materials*, vol. IX (1970), p. 1292. The ICJ has emphasized that the principle of good faith is one of the basic principles governing the creation and performance of legal obligations but not in itself a source of obligation where none would otherwise exist. See *Border and Transborder Armed Actions* case, ICJ Reports (1988), p. 105. See also, Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," *British Yearbook of International Law*, vol. XXX (1953), pp. 53-4; Ibid. (1959), pp. 207-16; Georg Schwarzenberger, "The Fundamental Principles of International Law", *Recueil des cours*, vol. 87 (1955)-I, pp. 290-326; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), 105-60; Shabtai Rosenne, *Developments in the Law of Treaties 1945-1988* (1989), pp. 135-79; V.S. Mani, *Basic Principles of Modern International Law* (1993), pp. 195-214.

93. I.C. MacGibbon, "Estoppel in International Law", *International and Comparative Law Quarterly*, vol.7 (1958), p. 468.

faith which debars it by way of an equitable estoppel:[94]

> A policy of deterrence borders on a policy of threat of use of force. A threat of use of force is forbidden under the modern international law--50 years of Indian foreign policy have contributed to this perspective of international law in no small measure. It is ironic that all the above legal postulates were sharply articulated by India in its Written pleadings before the ICJ in 1995. India is now estopped from making a volta-face.[95]

But equity[96] is the genus of which estoppel is an species. It is a legal concept being "a direct emanation of the idea of justice".[97] It follows, therefore, that "a rule of law, if not actually embodying equitable principles, may require their application".[98] Manly O. Hudson observed:

> This long and continuous association of equity with the law which is applicable by international tribunals would seem to warrant a conclusion that equity is an element of international law itself[99]

Thus, equity forms part of international law.[100] The characterization as threshold states of three principal non-parties to the NPT by definition meant

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94. "... but equity in this connexion denotes, not a departure from established rules of international law, but the basis of good faith upon which so many of those substantive rules exist." See D.W. Bowett, "Estoppel Before International Tribunals And Its Relations to Acquiescence," *British Yearbook of International Law*, vol. XXXIII (1957), p. 176.

95. Mani, supra note 59, ibid.

96. Wilfred Jenks, *Proper Law of International Organisations* (1962), pp. 102-14.

97. Tunisia - Libya Continental Shelf *case ICJ Reports (1982), p. 60.*

98. R.Y. Jennings & Arthur Watts, *Oppenheim's International Law*, vol. I, Part 1 (1992), p. 44.

99. *Permanent Court* (1943), p. ;617.

100. *Rann of Kutch Arbitration*, vol. 50 (1968), p. 2.

acknowledgement of their *de facto* nuclear status. Hence, it fell on parties to the Treaty to formalize their status as part of their obligation under Article VI which would in turn obligate them under the same provision.[101] Omission to do this indicates the breach of good faith under Article VI, and indefinite extention of the NPT confirms its perpetuation and cannot be redeemed except by way of an *ultra vires*, by a mandate[102] of the Security Council -- an organ itself mandated to act in accordance with "justice and international law."[103]

E. Juristic Opinion

The writings of publicists seem to revive, in some measure, the inherent tension between positive and natural law as to the basis of obligation. Some say that the inherent rationality of law "cannot tolerate an interpretation which negates its very essence."[104] Those who subscribe to the widely accepted notion that international law "is indeed a binding system of a rule of law"[105] argue that

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101. See dispositif 2F, supra note 88, p. 831.

102. Supra note 56, ibid.

103. Articles 24 paragraph (2.) and 1 paragraph (1). See also, C. Raja Mohan, "The art of the nuclear deal," *The Hindu*, 9 July 1998, p. 10; "The nature of the Security Council does not confer upon its recommendatory acts legal effects of *res judicata*", see Dissenting Opinion of Judge Ranjeva in the *Lockerbie* case, ICJ Reports (1992), p. 73.

104. B.S. Chimni, cited from dissenting Opinion of Judge Weeramantary in supra note 88, p. 912. "There is an important body of rules which regulate state behaviour in international relations and which do not fall within the category of legal rules." See Michael Bothe, Legal and non-legal norms - a meaningful distinction in international relations?" *Netherlands Yearbook of International Law*, vol. 11 (1980), p. 93.

105. Mani, "On international law", *Seminar*, vol. 433, October (1995), p. 4.

"not being a party to the NPT or the CTBT India is not legally forbidden from developing nuclear weapons".[106] There are others who think that disarmament treaties "represent a category of treaties which are of particular importance to the State since they deal with the basic security aspects of States; ultimately with the very existence of the State",[107] and therefore, "the law of treaties must be as precise as possible in order to ensure as high a degree of predicatability and certainty of interpretation and applicable as can be achieved."[108] The view lends credence to the "extreme difficulty"[109], as the study shows, to discern evidence of an *opinio juris* as contemplated by Article 38 of the Vienna Convention. The number of ratifications[110] may in one way evidence its inadequacy to address situations such as besets the present one, though the contrary is not always untrue.[111]

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106. Mani, supra note 59, ibid..

107. Goran Lysen, "The Adequacy of the Law of Treaties to Arms Control Agreements," in Julie Dahlitz (ed.), *Avoidance and Settlement of Arms Control Disputes, Arms control and Disarmament Law*, vol. II (1994), p. 123. See also the dispositif 2E of the Advisory Opinion, supra note 88, p. 831.

108. Ibid.

109. Dissenting Opinion of Judge Tanaka, note 71, p. 176.

110. Only two permanent members (the UK and Russia) of the Security Council are parties to it. China, France, the USA, Germany and Italy are non-parties.

111. "There is something inherently wrong with sanctioning a democracy legally acting in its perceived national interest while rewarding a single party communist state which threatens regional security in violation of international law." Senator Connie Mack questioning the Clinton administration's policies towards China and India. *The Hindu*, 18 June 1998, p. 8.

Decentralized structure of international law reflects "the chasm between the ideal and real."[112] It does not always have "a clear and specific legal rule readily applicable to every international situation"[113] but its development "has always been a process of applying ... established legal principles to circumstances not previously encountered".[114] As to the basis of binding nature of international law, the debate is more pronounced among positivists[115] *inter se*, and seems more apparent than real:

> International Law is not rules. It is a normative system. All organized groups and structures require a system of normative conduct -- that is to say, conduct which is recognized by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price.[116]

Oscar Schachter argues "The rules against aggression and on self defence are not just another set of international rules. They have a higher "normativity", a recognized claim to compliance that is different from the body of international

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112.Mani, supra note 104, ibid.

113. Supra note 98, pp. 12-13.

114. *Oil Fields of Texas Inc.* v. *Iran, International Law Reports*, vol. 69 (1982), p. 594.

115. Roberto Ago, "Positive Law and International Law", *American Journal of International Law,* vol. 51 (1957), P. 698; J.L. Brierly, *The Basis of Obligation in International Law* (1958), pp. 250-64; H.L.A. Hart, *The Concept of Law* (1961), Chapter 10;
P.E. Corbett, *Morals, Law and Power in International Relations* (1956), p. 10-2; W. Friedman, *The Changing Structure of International Law* (1964), p. 9; Wilfred Jenks, A New World of Law? (1969), pp. 219-66; Richard A Falk, *Legal Order in a Violent World* (1970), p. 39-42.

116. Rosalyn Higgins, "International Law And The Avoidance, Containment and Resolution of Disputes," *Recueil des cours*, vol. 231 (1991)-V, p. 25.

law rules".[117] The consequences of this reasoning are not difficult to fatham. "There is a clear tendency in the jurisprudence of the ICJ as well as in the practice of the political organs of the United Nations to consider certain treaties as producing effects also for those which hitherto have not ratified them".[118] Judge Lachs in his Dissenting Opinion in the *North Sea Continental Shelf* cases admitted that not only could provisional international instruments, like unratified treaties, give rise to general rules of international law but that:

> treaties binding many States are, a *fortiori* capable of producing this effect, a phenomenon not unknown in international relations.[119]

It appears therefore that "treaties can be made opposable to a third party, by specific acceptance of their contents ... unilateral acts may be the source of an obligation undertaken but not of the norm which thereby becomes

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117. "Entangled Treaty and Custom," in Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabati Rosenne* (1989), p. 734. The Court too has said: "There is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law." *Nicaragua v. U.S. (Merits), ICJ Reports* (1986), p. 94.

118. Christian Tomuschat, "Obligations Arising for States without or Against Their Will", *Recueil des cours*, vol. 241 (1993)-IV, pp. 268-73. See also, D'Amato, "Trashing Customary International Law," *American Journal of International Law*, vol. 81 (1987), p. 102; Thomas M. Frank, "Some Observations on the ICJ's Procedural and Substantive Innovations", ibid., pp. 118-9; Frederick L. Kirgis, "Custom on a Sliding Scale", ibid., p. 146;
Gennady M. Danilenko, *Law-Making in the International Community* (1993), pp. 67-8; Martti Koskenniemi, "The Politics of International Law", vol. 1 (1990), p. 27; Thirlway, International Customary Law and Codification (1972), p. 81; and General Assembly Resolution 2625 (XXV) of 22 October 1970.

119. Supra note 71, p. 225. Tomuschat lists in this category treaties with "generalizable" provisions, treaties protecting basis interests of the international community, treaty mechanism focussed on non-party States, and action by the Security Council. Supra note 120, p. 273.

opposable."[120] There remains "a wide range of views on the basis of obligation - natural law, consent, principles anterior to the legal system itself, consensus reciprocity -- it is interesting that they all exclude imposed obligation by the enforcement of sanctions".[121]

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120. Tomuschat, supra note 120, p. 73.

121. Higgins, supra note 118, p. 41; See also in this context, Articles 2 paragraphs (1) and (7) of the UN Charter. At the conclusion of the first meeting of the Security Council held at the level of Heads of State and Government on 31 January 1992 a statement was issued that seems outright to challenge the notion of sovereign freedom with regard to national defence: "The members of the Security Council underlie the need for *all Member States* to fulfil their obligations in relation to arms control and disarmament; to prevent the proliferation in all its aspects of all weapons of mass destruction; to avoid excessive and destabilizing accumulations and transfers of arms; and to resolve peacefully in accordance with the Charter any problems concerning these matters threatening or disrupting the maintenance of regional and global stability". UN Doc. S/23500, 31 January 1992, p. 4.

CHAPTER 4

CONCLUDING OBSERVATIONS

The mere idea of the word "obligation" with reference to non-parties to a treaty sounds a jural oxymoron; and the choice of a preposition which would eventually define that relationship is no more immune from pitfalls. The assumption underlying arms control is the existence of arms, and nuclear arms control would obviously presage nuclear weapons. Such a construction, with political and strategic overtones, if favoured, would be prejudical to the non-parties to MNCTs and would also have compromised the objectivity as well as the essentially juridical character of the enquiry--into the obligations, not the existence of nuclear weapons, of non-parties to MNCTs. Hence the reference--"nuclear control treaties". Though not treaties *stricto sensu*, certain arrangements have been suitably discussed in the study for their impact on non-members. The operational guidelines of these arrangements exert a wider influence on non-members than do many treaties and, to that extent, constitute *odium tertii*. The NPT and the NSG sufficiently explain this phenomenon. The latter was largely a response to Pokharan-I to control activities which fell beyond the regulatory regime of the NPT vis-a-vis India, a non-party. *Pro hac vice*, the juridical distinction, as it obtains under international law, between treaties *stricto sensu* and such arrangements has not been countenanced in the study.

The study, beset with these difficulties, was conceived in a broader theoretical framework than essentially required subsequently and was eventually pursued. The reason is singular-- the recent nuclear tests in the Indian sub-continent. These have not only imparted a context but have also shaped the contours of this study.

The study reaffirms that the Charter of the United Nations invests the Organization with a very wide latitude of powers necessary to maintain international peace and security. The Charter entrusts these powers primarily with the Security Council which is mandated to act in accordance with the Purposes and Principles which include, *inter alia*, the principles of justice and international law. But, unlike the legal systems of the states, there is no procedure in the scheme of the United Nations for determining the validity of acts of its organs. Similarly, there is no body external to the Security Council to determine the *vires* of a situation constituting a threat to international peace and security. And realism dictates that a determination to this effect for non-adherence to a treaty, even if under Chapter VI of the Charter, does not warrant complacence when repeated refusals to honour the urges of the Organization may potentially be employed by the P-5 as a conduit to Chapter VII to effect an eventual determination for enforcement action. But unilateral sanctions imposed by some of the members of the Security Council cannot legitimize acts otherwise impermissible and rob states of their sovereign prerogative to enter into treaty-relations. The linkage between disarmament and development, now being coercively perpetuated by the developed countries parties to MNCTs to tighten conditionalities for developmental aid and transfer of technologies to the developing countries non-parties to these treaties, can in no case obligate non-parties as a matter of law--as forming a king of *tertium quid*.

The 1969 Vienna Convention instances the consensual basis of binding nature of international law. Consent, the Convention shows, is generally express, albeit a few provisions contemplate its implied variant. Attempts to deduce obligations out of the latter have been controversial and the jurisprudence of the International Court of Justice admits the extreme difficulty that surrounds its infallible determination. This becomes the subject of even more acrimonious debate when attempts are being made to impose obligations on non-parties on the basis of treaties, such as the NPT and the CTBT as have set forth the norms of nuclear non-proliferation and test-ban. Even when the parties are free to repudiate binding obligations in cases of threat to their supreme national interests it becomes difficult to comprehend how the same logic can obligate non-parties who have not only never consented but have always questioned the purported *raison d^etre* of those treaties. A treaty so opposed can never generate a binding norm of customary law and attempts to assert the contrary exemplify rather than execrate the existence of such a rule.

"The image of law is tarnished less by conduct than by callous style of justification",[1] and, the insatiable quest for security has been the perennial refuge for such a recourse. The membership of international society evidences the recognition of limited sovereignty by states and the existence of law predicates the continuing need for a modicum of stability and a semblance of predictability in the attitudes of states externalized by their conduct in the space

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1. Richard A. Falk, "Respect for International Law in Disarmament', in Richard A. Falk and Saul H. Mendlovitz (eds.) *The Strategy world order, Disarmanent and Economic Development* (1966), p.361.

they hold in common with others. Woven with moral fibre, equity in a more strictly legal sense would preclude a non-party from averring the truth in a prior *suo motu* assertion, and when forming a necessary part of the principle of good faith embodied in a treaty obligation, such as Article VI of the NPT, would desist the parties from perpetuating, despite protests, an *odium tertii*. Far from creating obligations *qua* treaty, acts such as these militate with the spirit of peremptoriness underlying the norms of *jus cogens*.

An enquiry such as this often slips into a doctrinal debate that underlies the basis of obligation. Though essentially a debate amongst positivists *inter se*, who concede albeit grudingly, the difficulty inherent in the application of their theory--especially one that insists on "tacit" consent in situations where the "express" variant is impossible to locate with ease; the revival of the theory of natural law in the twentieth century and its seminal role in the development of humanitarian law has led the jurists to argue on the basis of inherent rationality of law, has made the debate pronounced and multipolar. We have, in consequence, a plurality of juristic opinion ranging from those who admit no obligations on non-parties to a treaty because there is no consent to be so bound, to those who assert that there are treaties of generalizable provisions, such as the NPT and the CTBT which presage higher norms of compliance and states can be forced even against their will. In between, some point out that certain rules in international society which regulate the behaviour of states are not even "legal rules". There are others who argue that inherent rationality of law predicates

survival and nuclear weapons eliminate such a hope. No right thus can be legally protected in respect of these weapons but every obligation must be legally enforced for their total elimination, and for this reason the distinction between parties and non-parties to MNCTs becomes superfluous. And, finally, there are those who doubt the adequacy of the Vienna Convention since the issue impinges on the survival of state and hence no question of obligation.

In all, the *pacta tertiis* rule explains the esoteric legality but fails to address the emergent reality. Rights of subjects in a legal community with no effective remedy in case of violation, suggests elementary jurisprudence, are but imperfect rights and applies *pari passu* to states in the international community, and to this extent eclipse the notional rigour of *pacta tertiis*. Realities inexplicable in jural semantics cannot predicate obligations so to say, but they do often incur for their subjects something of the same measure, if not more, consequences of which elude definite juridical nomenclature. Sovereign states must learn to confront the reality of a world so small and too fragile, and embrace the limitations of law to be the sentinel in every case.

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