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## Legal Implications of Indian Nuclear Development

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# STUDENT COMMENTS

## LEGAL IMPLICATIONS OF INDIAN NUCLEAR DEVELOPMENT

On May 18, 1974, India detonated a nuclear explosive device in the desert area of Rajasthan, about forty miles from the Indo-Pakistani border. This development has caused grave concern not only among India's neighbors, but also among many other nations of the world.<sup>1</sup> It is the purpose of this comment to assess the legality of India's actions under present standards of international law. In so doing it shall be necessary to examine: 1) the status of nuclear non-proliferation as an international legal norm, 2) other principles of international law that are applicable to India's nuclear explosion, 3) the Indian position on the legality of the development of nuclear explosive devices by non-nuclear weapon states, and 4) conclusions regarding the legality of India's actions and their impact upon the international legal system.

### I. NUCLEAR NON-PROLIFERATION AS AN INTERNATIONAL LEGAL NORM

The Nuclear Non-Proliferation Treaty<sup>2</sup> entered into force on March 5, 1970.<sup>3</sup> The treaty represents the most advanced and comprehensive attempt yet made to control the spread of nuclear weapons.

The obligations of the treaty are divided between two categories of states: nuclear weapon states and non-nuclear weapon states.<sup>4</sup> Nuclear weapon states are prohibited from transferring "to any recipient whatsoever nuclear weapons or other nuclear explosive devices."<sup>5</sup> They are also bound not to assist or encourage any non-nuclear weapon state from manufacturing or otherwise acquiring such de-

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1. See 27 PAKISTAN AFFAIRS No. 11, June 1, 1974, at 3; *Id.* No. 12, June 16, 1974, at 2; *Id.* No. 13, July 1, 1974, at 2; *Id.* No. 14, July 16, 1974, at 3.

2. Treaty on the Non-Proliferation of Nuclear Weapons, done July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839 [hereinafter cited as NPT].

3. The treaty entered into force with 97 signatures and 47 ratifications. Smith, *NATO Nuclear Information Sharing Arrangements and the Non-Proliferation Treaty: Collective Defense Confronts Arms Control*, 13 ATOMIC ENERGY L.J. 331, 341 (1972). As of January 1, 1974, ratifications, accessions, or notifications of successions had been deposited by 82 states. TREATIES IN FORCE, Jan. 1, 1974, at 366.

4. Under the treaty, "a nuclear weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967." NPT, art. IX, para. 3.

5. *Id.* art. I.

vices.<sup>6</sup> In addition to these two specific prohibitions, nuclear weapon states are generally obligated to facilitate the development of nuclear energy throughout the third world<sup>7</sup> and to make available to the non-nuclear weapon states "the potential benefits from any peaceful applications of nuclear explosions."<sup>8</sup> Finally, nuclear weapon states are obligated to negotiate in good faith on measures designed to end the nuclear arms race with the eventual goal of complete disarmament.<sup>9</sup>

In contrast, the non-nuclear weapon states are bound not only to refrain from acquiring or manufacturing nuclear explosive devices,<sup>10</sup> but also to accept international safeguards and controls on their peaceful nuclear programs.<sup>11</sup> The requirement is designed to prevent the diversion of source or special fissionable material to the manufacturing of a nuclear explosive device. Under the treaty the safeguards are to be administered by the International Atomic Energy Agency (IAEA).<sup>12</sup>

Thus, India's actions as a non-nuclear weapon state were clearly violative of the two most critical provisions of the treaty: 1) the prohibition against the fabrication of a nuclear explosive device, and 2) the application of international controls to peaceful nuclear programs.<sup>13</sup>

6. *Id.* The Non-Proliferation Treaty makes no distinction between nuclear weapons and "peaceful" nuclear explosives. From a technological point of view there is no meaningful difference between a bomb and a "plowshare" device. In order for the Non-Proliferation Treaty to be effective, therefore, controls must be applied to all nuclear explosive devices. M. WILLRICH, *NON-PROLIFERATION TREATY: FRAMEWORK FOR NUCLEAR ARMS CONTROL* 69-70 (1969); Firmage, *The Treaty on the Non-Proliferation of Nuclear Weapons*, 63 AM. J. INT'L L. 711, 722 (1969); Bunn, *Nuclear Non-Proliferation Treaty*, 1968 WIS. L. REV. 766, 772; 27 PAKISTAN AFFAIRS, *supra* note 1, at 3. See generally, Gorove, *Distinguishing "Peaceful" from "Military" Uses of Atomic Energy, Some Facts and Considerations*, 30 O.S.L.J. 495 (1969).

7. NPT, art. IV, para. 2. The obligation to aid the nuclear development of the third world also applies to advanced non-nuclear weapon states such as Canada.

8. *Id.* art. V.

9. *Id.* art. VI.

10. *Id.* art. II.

11. *Id.* art. III.

12. *Id.* See generally Questor, *Nuclear Non-Proliferation Treaty and the International Atomic Energy Agency*, 24 INT'L ORG. 163 (1970). The treaty does not set forth specific safeguard requirements. It merely requires that non-nuclear weapon states conclude safeguard agreements with the IAEA. The agreements must be designed so as to provide effective monitoring of the use and production of source (natural uranium) or special fissionable material (enriched uranium).

13. India has consistently resisted international controls over the peaceful nuclear programs of the non-nuclear weapon states. In the Indian view:

Institution of international controls on peaceful reactors and power stations is like an attempt to maintain law and order in a society by placing all its law-abiding citizens in custody while leaving its law-breaking elements free to roam the streets.

Since India has never signed or ratified the Non-Proliferation Treaty, the legality of India's nuclear explosion hinges on whether the Non-Proliferation Treaty represents customary international law to such an extent that its provisions are binding even upon states that are not a party to the treaty.

Treaties, especially multilateral treaties, are commonly cited by writers, judges, and lawyers as evidence of customary international law.<sup>14</sup> A treaty may be either declaratory of customary international law as it already exists, or it may, in itself, be the formulation (*fons et origo*) of a new legal norm.<sup>15</sup> The validity of a declaratory treaty as evidence of customary international law can be tested by examining the practice of states prior to the formulation of the treaty. Conversely, a treaty which attempts to create a new legal norm must achieve a high level of adherence before that norm can be considered a part of customary international law. The Non-Proliferation Treaty deals with an uncertain area of international law and thus contains elements of both types of treaties. It is necessary, therefore, to examine both state practice prior to the formulation of the Non-Proliferation Treaty and the degree of adherence to the treaty.

Also, the subject matter of a treaty has a significant effect upon how quickly that treaty becomes a part of customary international law. Accordingly, the purposes of the Non-Proliferation Treaty and the motives of its chief proponents, the U.S. and the U.S.S.R. must be considered.

#### A. *State Practice*

State practice as evidence of customary international law in the area of nuclear non-proliferation must be weighed carefully. The decision to go nuclear has been in the past and, for the foreseeable future, will be a decision that is based upon economic, military, and political factors rather than upon legal analysis. The practice of the large majority of nations which have no nuclear capability whatsoever must be discounted accordingly. Nevertheless, state practice before and after the Non-Proliferation Treaty came into force indicates that there may be an emerging norm of international law against the development of nuclear weapons by non-nuclear weapon states. The practice has generally taken the form of 1) unilateral declarations, 2)

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Statement by the Representative of India to the Eighteen Nation Disarmament Conference, Aug. 12, 1965, ENDC/PV. 223, at 5-21; quoted in M. WILLRICH, *supra* note 6, at 124.

14. On multilateral treaties as sources of international law, see W. COPLIN, *THE FUNCTIONS OF INTERNATIONAL LAW* 8-10 (1966); Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 *BRIT. Y.B. INT'L L.* 275 (1965-66).

15. Baxter, *supra* note 14, at 277.

the de-nuclearization of certain geographic areas, and 3) limitations upon the testing of nuclear weapons.<sup>16</sup>

#### 1. *Unilateral Declarations*

The most significant renunciations of the right to manufacture nuclear weapons have been made by West Germany and India. The West German pledge was made in connection with that country's entry into the North Atlantic Treaty Organization in 1954.<sup>17</sup> The pledge, however, prohibits only the manufacturing of nuclear weapons. It does not prevent their acquisition by other methods. Also, the continued legal validity of the pledge has been open to question in recent years.<sup>18</sup>

The Indian renunciation of nuclear weapons has taken the form of general pronouncements by various government leaders.<sup>19</sup> The primary thrust of these statements is that India will develop nuclear energy for exclusively peaceful purposes. It is true, however, that such promises cannot be taken as irrevocable commitments that are legally binding upon future Indian governments.<sup>20</sup> Also, India makes a distinction between peaceful nuclear explosives and nuclear weapons, a distinction not generally made by the great majority of nations.<sup>21</sup> Nevertheless, India's declarations had created expectations among the nations of the world and to ignore these expectations is a serious breach of trust, if not of international law, by India.<sup>22</sup>

#### 2. *Nuclear Free Zones*

Another important development in the area of nuclear non-proliferation has been the emergence of "nuclear free zones." The zones have been created by multilateral treaties which have received widespread support. The first such area was created by the Antarctic

16. See generally M. WILLRICH, *supra* note 6, at 53-66; G. DELCOIGNE & G. RUBINSTEIN, *NON-PROLIFERATION DES ARMES NUCLEAIRES ET SYSTEMES DE CONTROLE* 57-80 (1970).

17. M. WILLRICH, *supra* note 6, at 53.

18. *Id.* See also Willrich, *West Germany's Pledge Not to Manufacture Nuclear Weapons*, 7 VA. J. INT'L L. 91 (1966).

19. See India News, June 14, 1974, at 3, col. 1 for comments on the development of nuclear weapons by Prime Minister Nehru (1957), President Prasad (1958), Prime Minister Shastri (1964), and Prime Minister Gandhi (1968). See also STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, *THE NEAR-NUCLEAR COUNTRIES AND THE NPT* 22-23 (1972); S. WILLIAMS, *THE U.S., INDIA AND THE BOMB* 39 (1969).

20. Kapur, *Nuclear Weapons and Indian Foreign Policy: A Perspective*, 27 WORLD TODAY 379, 380-81 (1971).

21. India insists that its development of a nuclear explosive device is for peaceful purposes and therefore cannot be considered a weapon. India News, June 14, 1974, at 3, col. 3. Most countries contend that given the state of nuclear technology no such distinction can reasonably be made. See note 6 *supra*.

22. Wall Street Journal, May 31, 1974, at 10, col. 2.

Treaty of 1959 which prohibited all nuclear explosions in that region.<sup>23</sup> A second nuclear free zone was established by the Treaty Governing the Use and Exploration of Outer Space, which entered into force in 1967. The treaty prohibits the placement of nuclear weapons in orbit around the earth, on celestial bodies, or on space stations.<sup>24</sup> The third nuclear free zone was created by the Treaty Prohibiting the Placement of Nuclear Weapons or Other Weapons of Mass Destruction on the Seabed.<sup>25</sup> The treaty entered into force in 1972 and differs from the other two treaties in that it was specifically designed as an arms control agreement.

Each of the three multilateral treaties deals with areas generally considered to be international in character. They represent the joint efforts of the two countries who have the technology and resources to carry out nuclear activities, the United States and the Soviet Union. The almost universal acceptance of the three treaties by nuclear and non-nuclear weapon states alike has probably already elevated the treaties to the status of customary international law.

There have also been significant attempts to create nuclear free zones in Latin America and Africa. The Latin American effort can be traced to a working resolution concerning the de-nuclearization of Latin America that was introduced in the United Nations General Assembly by Chile, Bolivia, Brazil, and Ecuador in 1962.<sup>26</sup> Following a General Assembly resolution endorsing the de-nuclearization of Latin America,<sup>27</sup> negotiations among the Latin American states produced the Treaty of Tlatelolco which was opened for signature on February 14, 1967.<sup>28</sup> The provisions of this treaty are stricter than those of the Non-Proliferation Treaty in that the parties to the Treaty of Tlatelolco may not permit the deployment of nuclear weapons by other states on their territory. Also, parties to the Treaty of Tlatelolco may not aid any other state (nuclear weapon state or non-nuclear

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23. The Antarctic Treaty, art. V, para. 1 [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71 (1961). See also G. DELCOIGNE, *supra* note 16, at 61-63.

24. Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, *done* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347. See also, G. DELCOIGNE, *supra* note 16, at 63-64; M. WILLRICH, *supra* note 6, at 57.

25. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor, *done* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337. See also G. DELCOIGNE, *supra* note 16, at 64-65.

26. G. DELCOIGNE, *supra* note 16, at 58.

27. G.A. Res. 1911, 18 U.N. GAOR Supp. 15, at 14, U.N. Doc. A/5515 (1963).

28. G. DELCOIGNE, *supra* note 16, at 59. As of 1970, the treaty had been signed by 22 states and ratified by 15. *Id.* at 183-84. The text of the Treaty of Tlatelolco may be found in 22 U.S.T. 762, T.I.A.S. No. 7137.

weapon state) in the manufacturing of nuclear weapons.<sup>29</sup> The Non-Proliferation Treaty permits the deployment of nuclear weapons on the territory of non-nuclear weapon states and allows a non-nuclear weapon state to aid a nuclear weapon state in the manufacturing of nuclear weapons.<sup>30</sup>

The provisions under which the Treaty of Tlatelolco will come into force, however, are almost impossible to fulfill.<sup>31</sup> The treaty cannot enter into force for the entire zone until it is ratified by all states of the region.<sup>32</sup> Similarly, the treaty cannot enter into force until all nuclear weapon states ratify Protocol II, whereby these states pledge not to use nuclear weapons against parties to the treaty nor to encourage or participate in any violation of the treaty.<sup>33</sup>

The Treaty of Tlatelolco, however, recognizes that signatory states "have the imprescriptable right to waive, wholly or in part," the conditions under which the treaty comes into force.<sup>34</sup> Fourteen states of Latin America have exercised this right and for these states the treaty is now in force.<sup>35</sup>

Efforts have also been made to create a nuclear free zone in Africa. At first, these efforts centered around African concern over French nuclear testing in the Sahara desert.<sup>36</sup> With the passing of French Algeria, the focus moved toward a general de-nuclearization of Africa. As a result, two resolutions were passed by the United Nations General Assembly which called upon all states to respect Africa as a nuclear free zone.<sup>37</sup> Despite these efforts, no further prog-

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29. Treaty of Tlatelolco, *supra* note 28, art. I.

30. M. WILLRICH, *supra* note 6, at 57; G. FISCHER, THE NON-PROLIFERATION OF NUCLEAR WEAPONS 60 (1971).

31. M. WILLRICH, *supra* note 6, at 56. The conditions under which the Treaty of Tlatelolco takes effect are set forth in Article 28 of the treaty.

32. Treaty of Tlatelolco, *supra* note 28, art. XXVIII, para. 1a. The requirement that ratifications of the treaty be unanimous implicitly acknowledges that the treaty cannot be imposed as customary international law upon non-consenting states.

33. Treaty of Tlatelolco, *supra* note 28, art. XXVIII. The treaty defines a nuclear weapon as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes." *Id.* art. V. Under this definition India's device is a nuclear weapon. India, therefore, must sign Protocol II before the treaty can come into force.

34. *Id.* art. XXVIII, para. 2.

35. G. DELCOIGNE, *supra* note 16, at 183-84.

36. *Id.* at 59.

37. *Id.* at 59-60, 161-162. The resolutions are G.A. Res. 1652, 16 U.N. GAOR Supp. 17, at 4, U.N. Doc. A/5100 (1961) and G.A. Res. 2033, 20 U.N. GAOR Supp. 14, at 9, U.N. Doc. A/6014 (1965). The former resolution passed by a vote of 55-0 with 44 abstentions. The latter resolution also passed without opposition, 105-0, with 3 abstentions. The change in the voting pattern reflects the change in attitude of the United States and the Soviet Union with respect to nuclear non-proliferation. G. DELCOIGNE, *supra* note 16, at 60-61.

ress has been made toward the de-nuclearization of Africa. The failure probably reflects African concern over the policies of the Union of South Africa in regard to nuclear non-proliferation.<sup>38</sup>

### 3. *Limited Test Ban Treaty*

A final element of state practice in regard to nuclear non-proliferation is the Limited Test Ban Treaty.<sup>39</sup> Although the treaty is primarily an arms control measure with environmental overtones, it has served to restrain the proliferation of nuclear weapons by making their development much more costly.<sup>40</sup> The treaty is also significant because, unlike the outer space and seabed treaties, it is applicable to several states who have the capability and motivation to conduct the proscribed activities. The inability of the international legal system to prevent French defiance of the treaty indicates the necessity of complete adherence to such treaties. In this respect, Indian disregard of the Non-Proliferation Treaty is analogous to French violations of the Limited Test Ban Treaty.

#### B. *Adherence to the Non-Proliferation Treaty*

The Non-Proliferation Treaty can be traced to a United Nations General Assembly resolution on the "Prevention of the Wider Dissemination of Nuclear Weapons" which was unanimously adopted on December 4, 1961.<sup>41</sup> After several years of U.S.—U.S.S.R. negotiations under the auspices of the Eighteen Nation Disarmament Conference,<sup>42</sup> the final draft of the treaty was presented to the General Assembly for consideration. The Assembly approved the treaty on June 12, 1968 by a vote of 95 to 4, with 21 abstentions.<sup>43</sup> The treaty was opened for signature on July 1, 1968 and entered into force on March 5, 1970 with 97 signatures and 47 ratifications.<sup>44</sup> At the present time 82 states have acceded to or ratified the treaty.<sup>45</sup> To date, only India has violated the treaty's ban on the manufacturing of nuclear explosives by a non-nuclear weapon state. The widespread acceptance of the treaty must be considered persuasive evidence that the

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38. The Union of South Africa has not ratified or acceded to the Non-Proliferation Treaty. *TREATIES IN FORCE*, Jan. 1, 1974, at 366.

39. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *done* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

40. M. WILLRICH, *supra* note 6, at 55.

41. *Id.* at 61.

42. For a legislative history of the treaty see M. WILLRICH, *supra* note 6, at 61-66; *PREVENTING THE SPREAD OF NUCLEAR WEAPONS* 52-62 (C.F. BARNABY ed. 1969).

43. G.A. Res. 2373, 22 U.N. GAOR Supp. 16A, at 5-7, U.N. Doc. A/6716 (1968).

44. See note 3, *supra*.

45. *TREATIES IN FORCE*, Jan. 1, 1974, at 366.



treaty has attained at least some measure of independent juridical status as customary international law.

Many of the non-adherents to the Non-Proliferation Treaty, however, are those nations which have the technology and resources to go nuclear in a relatively short period of time. Countries such as Brazil, India, Japan, South Africa, Pakistan, West Germany, Egypt, and Israel have refused to give up their nuclear option by ratifying the Non-Proliferation Treaty.<sup>46</sup> The People's Republic of China and France have not become parties to the treaty, although both have indicated that they will abide by its general terms.<sup>47</sup> Since the success of the Non-Proliferation Treaty is dependent upon near unanimous adherence to its provisions, the practice of these states is crucial. The decision of India to exercise its nuclear option will put political pressure on other states, particularly Pakistan, to go nuclear. At the same time, India's actions have made it easier for other states to argue in favor of the legality of the development of nuclear explosives by non-nuclear weapon states. India's nuclear blast is therefore a serious blow to the formation of nuclear non-proliferation as a norm of customary international law.

### C. *Purposes of the Treaty*

Humanitarian treaties, because of their universal nature, become norms of customary international law more quickly than do those treaties which are based upon political or economic bartering.<sup>48</sup> Although the non-proliferation of nuclear weapons is certainly beneficial to all mankind, it would appear that the driving force behind the Non-Proliferation Treaty was primarily political and not humanitarian. The main proponents of the treaty, the United States and the Soviet Union, see the treaty as a means of freezing the nuclear status quo.<sup>49</sup> The failure of the United States and the Soviet Union to reach meaningful agreement on disarmament measures brings into question their motives in proposing the Non-Proliferation Treaty. It is unlikely, therefore, that the near-nuclear states that are not parties to the Non-Proliferation Treaty will feel bound by its provisions as long as the expansion of nuclear arsenals by the nuclear weapon states continues.

## II. OTHER PRINCIPLES OF INTERNATIONAL LAW

In addition to arguments based upon a general legal norm

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46. *Id.*

47. Smith, *supra* note 3, at 341-42 n. 40.

48. Baxter, *supra* note 14, at 286.

49. G. FISCHER, *supra* note 30, at 67; Ehrlich, *The Non-Proliferation Treaty and Peaceful Uses of Nuclear Explosives*, 56 VA. L. REV. 587, 588-89 (1970).

against nuclear proliferation, India's nuclear explosion has been attacked on several other grounds. It has been suggested that India: 1) violated bilateral agreements with Canada concerning nuclear aid, 2) violated the Limited Test Ban Treaty by allowing radioactive fallout to enter Pakistan, and 3) disregarded universal humanitarian principles by expending large amounts of money on nuclear explosives while a great number of Indians live in poverty.

#### A. *Canadian Agreements*

Canada has been the most important contributor of foreign aid toward the development of Indian nuclear technology. The agreements under which this aid was made available to India were concluded several years prior to the Non-Proliferation Treaty. They do not provide for strict controls over Canadian supplied materials. India has merely agreed that the materials shall be used for exclusively peaceful purposes.<sup>50</sup>

India asserts that it has not violated the aid agreements for two reasons: 1) the materials used for the nuclear explosive device were completely indigenous,<sup>51</sup> and 2) the explosion was conducted for peaceful purposes. While it is technically correct that the materials for the device were totally indigenous, the plutonium used in the blast was produced by CIRUS, a 40 megawatt research reactor jointly built by Canada and India.<sup>52</sup> Also, it is indisputable that India was aware of Canada's position that there is no difference between a nuclear explosive device and a nuclear weapon.<sup>53</sup> Canada's position was made clear in a letter from Prime Minister Trudeau to Prime Minister Gandhi:

The use of Canadian supplied material, equipment and facilities in India that is at CIRUS, RAPP I and RAPP II or missile material from these factories, for the development of a nuclear explosive device would inevitably call on our part for a reassessment of our nuclear co-operation arrangement with India, a position we would take with any other non-

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50. Sullivan, *Indian Attitudes on International Atomic Energy Controls*, 43 *PACIFIC AFFAIRS* 353, 358 (1970); See generally, Gorove, *Control over Atoms-for-Peace under Canadian Bilateral Agreements with other Nations*, 42 *DENVER L. CEN. J.* 41 (1965).

51. Press Release No. 5/74, Information Service of India, May 21, 1974, at 3; Press Release No. 7/74, Information Service of India, May 31, 1974, at 1; Press Release No. 8/74, Information Service of India, June 17, 1974, at 2 (text of Ambassador Kaul's address to the National Press Club); *Id.* at 5 (text of the question and answer session following Ambassador Kaul's speech).

52. *NEWSWEEK*, June 10, 1974, at 45.

53. See the remarks of Canadian Foreign Minister Mitchell Sharp reprinted in *FOREIGN AFFAIRS PAKISTAN* at 38-40 (unpublished material available from the Embassy of Pakistan).

nuclear weapons State with which we have co-operation arrangements in the nuclear field.

There is, of course, the possibility (contemplated in the Non-Proliferation Treaty) that arrangements acceptable to the international community will be developed for the provision of peaceful nuclear explosive devices. In such an event we would of course have no cause for concern if such service (without the transfer of technology relating to the nuclear explosive device itself) were made available to India by existing nuclear weapons States using their own nuclear material or plutonium provided by India for this purpose.<sup>54</sup>

Prime Minister Gandhi's reply evaded the issue of nuclear explosive devices by stating:

The obligations undertaken by our two Governments are mutual and they cannot be unilaterally varied. In these circumstances it should not be necessary now in our view to interpret these agreements in a particular way based on the development of a hypothetical contingency.<sup>55</sup>

Nevertheless, the beginnings of this "hypothetical contingency" occurred less than a year later when, in the summer of 1972, Mrs. Gandhi ordered scientists to begin work on India's first nuclear explosive device.<sup>56</sup> It must be concluded, therefore, that India has at least violated the spirit, if not the letter of the agreements with Canada. This evaluation is borne out by Canada's swift suspension of nuclear aid to India following the detonation of India's nuclear device.<sup>57</sup>

#### B. *Limited Test Ban Treaty*

The Limited Test Ban Treaty, to which India is a party, prohibits underground nuclear tests that would cause "radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."<sup>58</sup> India claims that the test was "clean" and that no radioactivity was detected by a helicopter flying 100 feet above ground zero thirty minutes after the blast.<sup>59</sup> The assertion has been challenged by Pakistan and United States intelligence sources.<sup>60</sup> Thus, the facts are in dispute. However, even if it could be conclusively shown that India had violated the Limited Test Ban Treaty in this instance, such a result would not bar India from detonating other nuclear explosive devices. Only if India

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54. *Id.* at 41-42.

55. *Id.*

56. NEWSWEEK, *supra* note 52, at 42.

57. FOREIGN AFFAIRS PAKISTAN, *supra* note 53, at 38; New York Times, May 21, 1974, at 1, col. 2; *Id.* May 23, 1974, at 1, col. 4.

58. Limited Test Ban Treaty, *supra* note 39, art. I, para. 1.

59. NEWSWEEK, *supra* note 52, at 45; Press Release No. 7/74, *supra* note 46, at 1-3.

60. FOREIGN AFFAIRS PAKISTAN, *supra* note 53, at 56; 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 4; NEWSWEEK, *supra* note 52, at 45.

were unable to provide adequate safeguards against radiation leakage would the Limited Test Ban Treaty be a significant legal deterrent to India's development of nuclear explosive devices.

### C. *Humanitarian Principles*

The humanitarian argument against the Indian nuclear blast is based upon the incongruity of developing nuclear explosives in a nation that has so many economic and social problems.<sup>61</sup> Translated into legal terms, the argument would require that a nation expend its resources to fulfill the basic human needs of its populace before any of those resources could be allocated to other areas. Although humanitarian principles of international law have made great progress in the past few years, a norm governing the expenditure of internal resources has not yet emerged. The concept is too far-reaching in that it would prevent a nation from allocating its resources to those projects which that nation, through its own decision making process, concludes must be undertaken. The level of military expenditures in the world is ample proof that such a norm of customary international law does not exist.

The argument is particularly weak when it is applied to India's nuclear program. India spends only about one percent of its national budget on nuclear research. The cost of developing the nuclear explosive was less than \$400,000.<sup>62</sup> In addition, as early as 1968 opinion polls showed that over 75 percent of the Indian public was in favor of making the decision to go nuclear.<sup>63</sup> In view of these facts, the expenditure of \$400,000 must be regarded as a conscious national decision to pursue the possible benefits of nuclear explosive devices. However the logic of the decision may be criticized, the legality of the act in regard to humanitarian principles of international law cannot be questioned.

### III. THE INDIAN POSITION

India's defense of its nuclear explosion is based on three arguments: 1) the Non-Proliferation Treaty is discriminatory and therefore has no legal effect on states not a party to that treaty, 2) the

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61. For a good sampling of this attitude in the American press, see *AMERICAN MEDIA AND INDIA'S BOMB*, a series of six pamphlets published by the Embassy of Pakistan.

62. Press Release No. 8/74, *supra* note 51, at 7-8. The figure of \$400,000 reflects only the cost of building the explosive device. The research and development was a "free spin-off" of the Indian nuclear power program. The hole for the nuclear device was dug by hand. Malloy, *Critical for the Masses*, *The National Observer*, August 24, 1974, at 16, col. 2.

63. Kapur, *supra* note 20, at 381.

Indian nuclear program is for peaceful purposes only, and 3) India, as a matter of self-defense, has a right to retain a military option in conjunction with its nuclear program.<sup>64</sup> Each of these points will be discussed in turn.

A. *Discriminatory Nature of the Non-Proliferation Treaty*

It has been a long-standing position of the Indian government that any nuclear non-proliferation treaty must embody an acceptable balance of mutual obligations between the nuclear and non-nuclear powers, be a step toward the achievement of general and complete disarmament, and be void of any loopholes which might permit nuclear or non-nuclear powers to proliferate nuclear weapons in any form.<sup>65</sup> In the Indian view, the Non-Proliferation Treaty is discriminatory because it fails to meet any of the three requirements.

Concerning the mutuality of obligations, India's greatest objections are to the international controls over the peaceful nuclear programs of the non-nuclear weapon states.<sup>66</sup> The objection is merely one in a long line of Indian objections to any system of international nuclear controls that does not encompass all countries, including nuclear weapon states.<sup>67</sup> India opposed the formation of the International Atomic Energy Agency and has consistently attempted to make its own nuclear program as independent as possible from foreign assistance and safeguard measures.<sup>68</sup> This attitude is reflected in India's preference for loose bilateral agreements concerning nuclear foreign aid.<sup>69</sup>

Also, the vast amount of inspection experience is in the West.<sup>70</sup> The emerging nations of the third world are distrustful of such agencies as the International Atomic Energy Agency which might easily be dominated by inspectors from the developed countries.<sup>71</sup> In addition, keeping the proper records and maintaining nuclear facilities in such a manner that inspections can be thorough and effective are very costly to the host nation.<sup>72</sup> The cost of the safeguard program is not dealt with directly in the Non-Proliferation Treaty and therefore pro-

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64. See S. WILLIAMS, *supra* note 19, at 45.

65. These provisions are part of G.A. Res. 2028, 20 U.N. GAOR Supp. 14, at 7-8, U.N. Doc. A/6014 (1965). Prime Minister Gandhi has stated that the Non-Proliferation Treaty is unacceptable to India because it does not conform to the mandate of Resolution 2028. S. WILLIAMS, *supra* note 19, at 44.

66. Sullivan, *supra* note 50, at 355-56.

67. *Id.*

68. *Id.* at 356-58.

69. *Id.*; S. WILLIAMS, *supra* note 19, at 61.

70. Questor, *supra* note 12, at 167.

71. *Id.* at 165.

72. *Id.* at 164-65.

vides a legitimate cause for concern among nations such as India that are trying to develop their nuclear industries as quickly as possible.

A second aspect of the mutuality of obligations problem is that the Non-Proliferation Treaty imposes a policy of non-armament on the non-nuclear weapon states while allowing nuclear weapon states to continue the arms race.<sup>73</sup> From the Indian viewpoint, the provisions of the Non-Proliferation Treaty concerning disarmament by the nuclear weapon states are too vague to be considered a *quid pro quo* for India's relinquishment of its nuclear option.<sup>74</sup> It is the Indian position that for a disarmament provision to be effective it must have a specific time limit within which all nuclear weapon proliferation will be halted. The wording of the provision must be sufficiently clear to create a definite juridical obligation for the nuclear weapon states.<sup>75</sup> In this respect, the Indian position inextricably links nuclear non-proliferation with disarmament on the part of the nuclear weapon states.<sup>76</sup>

#### B. *Peaceful Nuclear Explosive Devices*

The second major Indian objection to the Non-Proliferation Treaty is the treaty's failure to distinguish between peaceful nuclear explosive devices and nuclear weapons.<sup>77</sup> India views the failure as an attempt by the nuclear weapon states to extend their monopoly on nuclear weaponry to the peaceful uses of nuclear energy.<sup>78</sup> At the present time, peaceful nuclear explosives are still experimental.<sup>79</sup> Article V of the Non-Proliferation Treaty which guarantees that nuclear explosive devices for peaceful purposes will be made available to non-nuclear weapon states could be thwarted simply by the foot-dragging of the nuclear weapon states in the area of nuclear explosives research. In effect, the non-nuclear weapon states' access to the possible benefits of peaceful nuclear explosives would be dependent upon the willingness of the nuclear weapon states to allocate funds for nuclear explosives research.<sup>80</sup> This type of technological subservience

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73. Sullivan, *supra* note 50, at 366; S. WILLIAMS, *supra* note 19, at 50.

74. S. WILLIAMS, *supra* note 19, at 46-48.

75. *Id.* at 47-48.

76. *Id.* at 46. India's disarmament proposal includes 1) a comprehensive test ban treaty that provides for the international control of peaceful nuclear explosives, 2) a freeze on the production of nuclear weapons and their delivery systems, and 3) a reduction in existing stockpiles of nuclear weapons. *Id.*; Press Release No. 8/74, *supra* note 51, at 6-7.

77. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 21; S. WILLIAMS, *supra* note 19, at 57-60. See also note 6, *supra*.

78. S. WILLIAMS, *supra* note 19, at 59.

79. Brooks & Myers, *Plowshare Evaluation*, in *NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL* 87, 101 (B. Boskey & M. Willrich ed. 1970).

80. G. FISCHER, *supra* note 30, at 117-18.

is particularly distasteful to nations such as India, which have already developed an advanced nuclear industry.<sup>81</sup>

The Indian position on the distinction between peaceful nuclear explosives and nuclear weapons has been joined by several other non-nuclear weapon states.<sup>82</sup> In their view, the use of nuclear energy for economic development is an inalienable right.<sup>83</sup> Any derogation of this right, therefore, must be non-discriminatory in order to have the force of customary international law.

### C. Nuclear Military Option

The third Indian objection to the Non-Proliferation Treaty is that there are inadequate security guarantees for the non-nuclear weapon states.<sup>84</sup> Because of India's insistence that its nuclear program is for exclusively peaceful purposes, the objection is rarely raised in connection with India's refusal to sign the Non-Proliferation Treaty. Nevertheless, national security considerations have played an increasingly greater role in decisions concerning India's nuclear development.<sup>85</sup>

The problem of security guarantees for the non-nuclear weapon states was recognized at an early stage in the negotiations on the Non-Proliferation Treaty.<sup>86</sup> The United States successfully resisted incorporation of security guarantees into the treaty itself.<sup>87</sup> To remedy the deficiency, the Security Council passed the following resolution on June 19, 1968:

*The Security Council,*

*Noting with appreciation the desire of a large number of States to*

81. Sullivan, *supra* note 50, at 355. In assessing this attitude it must be remembered that India views nuclear energy as the key to its economic development. See India News, June 7, 1974, at 1, col. 1; Malloy, *supra* note 62, at 16, col. 1. The energy crisis has hit India particularly hard. See Malloy *supra* note 62, at 1, col. 2; *Crippling Shortage*, TIME, April 29, 1974, at 88; Press Release No. 8/74, *supra* note 51, at 7.

82. Comment, *Non-Proliferation Treaty and Peaceful Applications of Nuclear Explosives*, 20 STAN. L. REV. 1030, 1031 (1968).

83. See the Final Document of the Conference of Non-Nuclear Weapon States, Resolution J in U.N. Doc. A/Conf. 35/10, at 16-17. The Treaty of Tlatelolco also makes a distinction between nuclear weapons and nuclear explosive devices as long as these devices are under strict international control. Treaty of Tlatelolco, *supra* note 28, art. XVIII.

84. See generally, Kapur, *supra* note 20; Kapur, *Peace and Power in India's Nuclear Policy*, 10 ASIAN SURVEY 779 (1970); S. WILLIAMS, *supra* note 19, at 50-56; Coffey, *Nuclear Guarantees and Non-Proliferation*, 25 INT'L ORG. 836 (1971); Coffey, *Threat, Reassurance, and Nuclear Proliferation* in NUCLEAR PROLIFERATION: PROSPECTS FOR CONTROL, *supra* note 79, at 119.

85. Sullivan, *supra* note 50, at 369; Kapur, *supra* note 20, at 381; Kapur, *supra* note 84, at 783-784; NEWSWEEK, *supra* note 52, at 42.

86. M. WILLRICH, *supra* note 6, at 166-67.

87. *Id.* at 167.

subscribe to the Treaty on the Non-Proliferation of Nuclear Weapons, and thereby to undertake not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices,

*Taking into consideration* the concern of certain of these States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, appropriate measures be undertaken to safeguard their security,

*Bearing in mind* that any aggression accompanied by the use of nuclear weapons would endanger the peace and security of all States,

1. *Recognizes* that aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State would create a situation in which the Security Council, and above all its nuclear-weapon State permanent members, would have to act immediately in accordance with their obligations under the United Nations Charter;

2. *Welcomes* the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act or an object of a threat of aggression in which nuclear weapons are used;

3. *Reaffirms* in particular the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.<sup>88</sup>

India immediately rejected the resolution as being nothing more than a restatement of the nuclear weapon states' obligations under the U.N. Charter.<sup>89</sup> As such, it does not constitute a reasonable *quid pro quo* for a non-nuclear weapon state's renunciation of nuclear weapons.<sup>90</sup> Also, the resolution is so ambiguous that it is almost useless as an effective legal obligation. It does not, for instance, define aggression or the threat of aggression.<sup>91</sup> It does not assure immediate action, since the guarantees are to be enforced through the mechanism of the Security Council.<sup>92</sup>

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88. S/Res./255, 23 U.N. SCOR 1430th meeting in U.N. Doc. S/PV 1430 (1968).

89. S. WILLIAMS, *supra* note 19, at 44; Coffey, *Nuclear Guarantees and Non-Proliferation*, *supra* note 84, at 837.

90. S. WILLIAMS, *supra* note 19, at 44.

91. Lenefsky, *U.N. Security Council Resolution on Security Assurances for Non-Nuclear Weapon States*, 3 N.Y.U. J. INT'L L. & POL'ICS 56, 61 (1970). The recent U.N. paragraph defining aggression may remedy the deficiency.

92. *Id.* at 62-63. The point is particularly relevant since China became a permanent member of the Security Council. China could prevent the Security Council from taking any action in a dispute between itself and India through the use of its veto power.



The inadequacies of the resolution, coupled with the inability of India to obtain effective unilateral guarantees,<sup>93</sup> has placed India in a precarious military situation. India is flanked by two hostile neighbors, Pakistan and the People's Republic of China. Indian military planners regard Pakistan as a significant but short term threat.<sup>94</sup> From the Indian point of view, the most disturbing aspect of the Pakistani threat is that nation's membership in SEATO.<sup>95</sup> The Indian concern was shown to be justified by the United States support of Pakistan during the 1971 Indo-Pakistani war.

The long term threat to Indian security is posed by China.<sup>96</sup> China has the ideology and the military capability to seriously threaten the independence of India. The war between India and China in 1962, Chinese nuclear development since 1964, and Chinese support of Pakistan have caused India to re-evaluate its position with respect to a nuclear weapons program.<sup>97</sup> Fear of Chinese nuclear blackmail and the probability that within a short time India will have fallen far behind China in the development of nuclear explosives have gradually increased pressure upon the Indian government to make the decision to go nuclear.<sup>98</sup> Indeed, an opinion poll conducted after the Indian nuclear blast indicates that almost two-thirds of the educated Indian populace want to use India's nuclear technology to manufacture nuclear weapons.<sup>99</sup> It is also interesting to note that India has been developing a modest space program in recent years.<sup>100</sup> The technology from the space program could be used as a basis for developing a nuclear weapons delivery system.<sup>101</sup> In view of the fact that the feasible use of peaceful nuclear explosives is probably many years away,<sup>102</sup> it must be concluded that Indian technological development has been designed to give India an effective nuclear military option that can be utilized in a relatively short period of time. India's neighbors are justified in regarding India's nuclear blast with suspicion, despite the pronouncements of Prime Minister Gandhi.<sup>103</sup>

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93. Noorani, *India's Quest for a Nuclear Guarantee*, 7 *ASIAN SURVEY* 490 (1967).

94. Kapur, *supra* note 84, at 784.

95. W. Wentz, *NUCLEAR PROLIFERATION* 97-98 (1968).

96. Kapur, *supra* note 84, at 784; Kapur, *supra* note 20, at 382; W. Wentz, *supra* note 95, at 97.

97. Kapur, *supra* note 20, at 381.

98. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 21; Kapur, *supra* note 20, at 380-381.

99. Rocky Mountain News, Aug. 3, 1974, at 38, col. 4.

100. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 19; India News, July 5, 1974, at 5; Malloy, *supra* note 62, at 16, col. 6.

101. Malloy, *supra* note 62, at 16, col. 6.

102. Brooks & Myers, *supra* note 79, at 101.

103. Pakistan regards the verbal assurances of the Indian government as

## IV. CONCLUSIONS

A. *Legality of Indian Development of Nuclear Explosive Devices*

There is substantial evidence of a slowly developing norm against nuclear proliferation. Prior to the enactment of the Non-Proliferation Treaty, significant steps had been taken toward the creation of nuclear free zones and against the indiscriminate testing of nuclear explosive devices. The Non-Proliferation Treaty itself has received a wide measure of support, both through formal ratifications and state practice. The provisions of the Non-Proliferation Treaty must be presumptively considered as part of customary international law.<sup>104</sup> The legality of India's actions, therefore, rests on the validity of its objections to the Non-Proliferation Treaty.

The objection to the discriminatory nature of the treaty is well founded. The Non-Proliferation Treaty places no burden whatsoever upon the nuclear weapon states. The United States and the Soviet Union never had any intention of transferring nuclear weaponry to other nations.<sup>105</sup> Also, the ineffectiveness of the treaty's provisions on disarmament have been demonstrated by the failure of the nuclear weapon states to achieve meaningful progress in the area of arms control. There is no adequate compensation given to the non-nuclear weapon states by the treaty for the obligations which they are required to undertake.<sup>106</sup> As a result, the control provisions of the Non-Proliferation Treaty cannot be considered a part of customary international law. The requirements are violative of a basic, peremptory norm of international law that all nations are equal in the international legal system.<sup>107</sup> A conclusion to the contrary would institutionalize in juridical form the inherent inequality between the nuclear weapon states and the non-nuclear weapon states.

The objection to the Non-Proliferation Treaty's failure to distin-

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unpersuasive of that country's peaceful intentions. See 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 1. In the Pakistani view, "it is a question not only of intentions but of capabilities." Press Release, Embassy of Pakistan, text of the reply of the Prime Minister of Pakistan to the letter of the Prime Minister of India, June 5, 1974, at 1.

104. Baxter, *supra* note 14, at 290, 299. The Non-Proliferation Treaty is both declaratory of existing customary international law and legislative in that it adds to the law of nuclear non-proliferation. The writer has chosen to treat the Non-Proliferation Treaty as presumptively representative of customary international law (i.e., as a declaratory treaty) because it is for the most part a continuation and extension of previous efforts in the area of nuclear non-proliferation.

105. G. FISCHER, *supra* note 30, at 67.

106. Sullivan, *supra* note 50, at 369.

107. The concept that any non-proliferation treaty must respect the sovereign equality of the non-nuclear weapon states was articulated in Resolution A of the Conference of Non-Nuclear Weapon States, *supra* note 83, at 5-6.

guish between peaceful nuclear explosives and nuclear weapons is not convincing. It is a simple technological fact that there is no difference between such a device and a bomb.<sup>108</sup> Nuclear capability is just as destabilizing as actual possession of nuclear weapons.<sup>109</sup> It must be concluded that a non-discriminatory non-proliferation treaty which placed all nuclear explosive devices under international control would be binding upon states not a party to that treaty.

However, it must also be concluded that India's objection to the nuclear weapon states' monopoly on nuclear explosives is valid. Given the right of states to use nuclear energy for economic development, any restriction on the use of nuclear explosives must be universal in order to have binding legal effect.<sup>110</sup>

The most important objection to the Non-Proliferation Treaty is the one based on national security grounds. The basis of the objection lies in the Indian desire to retain a military nuclear option. The argument, therefore, does not challenge the narrow discriminatory provisions of the Non-Proliferation Treaty but rather confronts the assertion that there exists a general international legal norm against the development of nuclear weapons. It does not apply to the recent Indian nuclear explosion, which was for allegedly peaceful purposes. Instead, it is limited to the possibility that India may some day make the decision to develop nuclear weaponry.<sup>111</sup>

It is a peremptory norm of international law that all nations have the right of self-defense.<sup>112</sup> No multi-lateral treaty, therefore, which leaves a state not a party to that treaty bereft of reasonable security guarantees can be legally binding upon that state. The security guarantees accompanying the Non-Proliferation Treaty are inadequate with respect to such states as India.<sup>113</sup> Also, after a reasonable attempt, India found that it could not obtain satisfactory unilateral guarantees without sacrificing its non-aligned status.<sup>114</sup> There can be no doubt that China represents a legitimate nuclear threat to India.<sup>115</sup> Given the military situation in which India finds itself today, India

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108. See note 6, *supra*.

109. See note 97, *supra*. The maxim that the threat is often more powerful than its execution is quite applicable to this situation.

110. See note 83, *supra*.

111. In concluding that states not a party to the Non-Proliferation Treaty have the right, as of the present time, to develop peaceful nuclear explosives as their economic needs warrant, the writer has limited the argument to nuclear weapons only.

112. U.N. Charter art. LI.

113. Pakistan also considers the security guarantees embodied in the Security Council resolution inadequate. 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 4.

114. See Noorani, *supra* note 93.

115. S. WILLIAMS, *supra* note 19, at 29; W. Wentz, *supra* note 95, at 97.

would be justified under present standards of international law in building a nuclear weapons force designed to counter the Chinese threat.<sup>116</sup>

B. *Legal Impact Upon Pakistan*

It is the saddest and most dangerous aspect of nuclear proliferation that the acquisition of nuclear capability by one state, even for legitimate reasons, leads inevitably to the need of another nation to acquire that same capability. Just as India was pressured to go nuclear by the Chinese nuclear development, so too is Pakistan now being pressured to explore a nuclear option.

Pakistan, however, has a much less developed nuclear industry than India.<sup>117</sup> As a consequence, Pakistan has taken a positive attitude toward the Non-Proliferation Treaty<sup>118</sup> (although it is not a party to the treaty) and has actively sought security assurances from the United States and China.<sup>119</sup> Given Pakistan's membership in CENTO and SEATO, and its cordial relationship with the United States and China, the security assurances of these two countries against Indian nuclear aggression should be adequate at the present time. Nevertheless, by applying the same rationale to Pakistan as was applied to India in the above arguments, it is difficult to see how Pakistan can be legally restrained from developing a nuclear explosive device. In view of India's hostile attitude toward Pakistan in the past thirty years, Pakistan would be legally justified in maintaining nuclear parity with India.

C. *Future of the Non-Proliferation Treaty*

The Non-Proliferation Treaty does not represent customary international law to such an extent that its provisions are binding upon states not a party to that treaty. The reason for this unhappy result probably lies in the fact that the concept of non-proliferation cuts across the conflicting political and economic goals of the nations of the world. Translated into legal terms, the Non-Proliferation Treaty as it is now constituted is basically incompatible with two peremptory norms of international law: the equality of states in the international legal system and the inherent right of self-defense. If the Non-Proliferation Treaty were made to work it would in effect create a two tiered international system in which there would be no movement between the two levels.<sup>120</sup> The handful of nuclear weapon states would

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116. See Coffey, *Nuclear Guarantees and Non-Proliferation*, *supra* note 84, at 844.

117. STOCKHOLM PEACE INSTITUTE, *supra* note 19, at 25-26.

118. *Id.* at 26.

119. *Id.* at 25. See also 27 PAKISTAN AFFAIRS No. 12, *supra* note 1, at 4; *Id.*, No. 13, at 3.

120. Sullivan, *supra* note 45, at 366.

dominate the entire system. In view of Secretary of State Kissinger's recent successes in Moscow and Peking, such a possibility is not so far-fetched in the eyes of the third world. In this scenario the Non-Proliferation Treaty would work because the basic international legal concept of the equality of states would be discarded in favor of a legal system that reflected and legitimized the political, economic, and military inequality of states in the late 1960's.

A second alternative would be complete and total disarmament in regard to nuclear weapons. In this way a new legal norm of nuclear non-proliferation could be formulated. The norm would be binding upon all states in that it would be universal in application and would eliminate the need for security assurances. In contrast with the first alternative, military reality would be changed so as to allow the Non-Proliferation Treaty to function within the peremptory norms of state equality and national self-defense.

A final alternative would be the development of multilateral regional nuclear forces throughout the world.<sup>121</sup> The need for general disarmament by the nuclear powers would be eliminated and at the same time credible security assurances would be available to all the non-nuclear weapon states. International stability would be enhanced in that the number of nuclear actors would remain low and relatively constant.

Since none of the above alternatives are likely to come about in the near future, it must be concluded that nuclear non-proliferation is a problem that will be handled within the political arena.<sup>122</sup> International law and the system of nuclear weapons control put forth in the Non-Proliferation Treaty are basically incompatible. The prevention of nuclear proliferation will, for the foreseeable future, depend upon the ability of our political leaders to find a just and equitable solution to this problem.

*James R. Walczak*

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121. Kahn & Dibble, *Criteria for Long Range Nuclear Control Policies*, 55 CAL. L. REV. 473, 479-81 (1967).

122. For other predictions of the Non-Proliferation Treaty's fate see Kaplan, *Nuclear Non-Proliferation Treaty: Its Rationale, Prospects, and Possible Impact on International Law*, 18 J. PUB. L. 1, 10 (1969); Kahn, *supra* note 121, at 479.