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Separation Date: June 29, 2015

Fonds Title: Elisabeth Mann Borgese

Fonds #: MS-2-744

Box-Folder Number: Box 287, Folder 4

Series: United Nations

Sub-Series: UNCLoS III : correspondence

File: Correspondence with Alyn Ware

Description of item:

File contains a report by Alyn Ware (“Returning to the World Court: Notes on Possible Avenues for Follow-up Action in the International Court of Justice on Nuclear Disarmament,” October 27, 1999).

Reason for separation:

Page has been removed from digital copy due to copyright concerns.

10/1/01 Ware, Alyn
Doc 1228

THE Lawyers' Committee on Nuclear Policy INC.
 211 East 43rd Street, #1204
 New York, NY 10017
 tel: 212-818-1861; fax: 212-818-1857
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US affiliate of



International Association of Lawyers
Against Nuclear Arms

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Consultant at Large
Alyn Ware

ectors
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 ncis Boyle
 Haywood Burns(1940-1996)
 n Burroughs
 ie Marie Corominas
 av Datan
 bel Dwyer
 liam Epstein
 ard Falk
 ley Fingerhood
 n Frey-Wouters
 ya Connella Frichner
 Fagan Ginger
 than Granoff
 id Krieger
 ert van Lierop
 ard N. Meyer
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 abeth Shafer
 e Slater
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 a Yaroshofsky

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 k Askin
 ard Barret
 Bartram-Nothnagel
 n Bitensky
 Brownlie
 ueline Cabnsso
 ne J. Carroll, Jr.
 sr Clark
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 rrd Friel
 Goldberger
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 Lobel
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 Mrs. Marks (1904-1988)
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 B. Quigley
 us Raskin
 us Roche
 . Ross
 on Sahaydachny
 ikazu Sakamoto
 ie Schwenniger
 ael Tigr
 Tiger
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 n Popper(1909-1989)

Dr Elisabeth Mamm Borgese
 International Ocean Institute
 1226 LeMarket St
 Halifax, NS B3H 3P7

Fax: 902 494 2034

Dear Dr Borgese,

Attached is a copy of the draft legislation which has been introduced into the New Zealand parliament by the Greens Party.

Although the Foreign Minister and Minister of Disarmament have both spoken supportively of the idea of prohibiting nuclear weapons from navigating in the EEZ, they have received advice from the Ministry of Foreign Affairs not to adopt the legislation for both political and legal reasons. The Ministry, which was also opposed to the government adopting the original nuclear weapons free legislation in 1987, argues that such a prohibition would be in violation to UNCLOS.

Your expert opinion on this matter would be most appreciated.

I have sent by email a copy of my draft paper on the issue of navigation of nuclear weapons in the South Pacific.

I look forward to your reply.

Yours sincerely,

Alyn Ware
 Consultant at Large
 Lawyers' Committee on Nuclear Policy

PS. I will be in Pugwash, Nova Scotia from tomorrow until July 24 if you would like to discuss any aspects by phone or a meeting in Halifax. Tel: 902 243 2560

I'm afraid the fax isn't very clear - there isn't any more resolution on the monitor version.

New Zealand Nuclear Free Zone Extension Bill

Member's Bill

Explanatory note

General Policy Statement

The Nuclear Free Zone, Disarmament and Arms Control Act 1987 is severely limited in its ability to protect New Zealand from possible nuclear dangers which exist in the Pacific region.

This legislation controls only up to 12 miles from the New Zealand shore.

It is primarily concerned with controlling nuclear weapons and nuclear wastes within the New Zealand nuclear free zone, and prohibiting nuclear powered ships from entering New Zealand ports. It does not prevent the transit of nuclear powered ships or ships carrying radioactive wastes.

International shipments of high level nuclear wastes and reprocessed fuel have greatly increased in frequency and size. Reprocessed fuel can be adapted for use in nuclear weapons.

New Zealand has the right and the duty to protect the marine environment and its living resources in its exclusive economic zone, up to 200 miles from shore. Under the Law of the Sea, ships have some rights of navigation through this zone; yet if those ships carry a cargo which could contaminate marine resources for centuries, this creates a conflict with the purpose of the exclusive economic zone. This bill resolves that conflict, for New Zealand, in favour of environmental protection, and brings New Zealand into line with the practice of other concerned states and developing international law.

This bill extends the New Zealand nuclear free zone up to 200 miles and specifically prohibits the passage through it of nuclear propelled

2

New Zealand Nuclear Free Zone Extension Explanatory note

ships or ships carrying radioactive wastes, or reprocessed nuclear fuels.

Clause By Clause Analysis

Clause 4 inserts into the principal Act the following clause: "The exclusive economic zone of New Zealand and radioactive waste."

Clause 5 extends the nuclear free zone to coincide with the exclusive economic zone.

Clause 6 extends the prohibition on transport of nuclear weapons from just inland and internal waters to the full nuclear free zone.

Clause 7 extends the prohibition on nuclear powered ships from just internal waters (i.e. harbours) to the nuclear free zone.

Clause 8 prohibits the passage through the zone of ships carrying radioactive wastes or the types of highly radioactive materials which are destined for, or produced by, nuclear fuel reprocessing. Radioactive waste has been defined in terms of the International Atomic Energy Agency Code for Transboundary Movement of Radioactive Waste. The Code exempts low level wastes of the type produced by medical and scientific uses of radionuclides by providing for countries to set exemption levels. New Zealand has not yet done so, but the National Radiation Laboratory is equipped to set radiological limits and has done so for other purposes.

Clause 9 repeals the right of innocent passage for ships carrying prohibited materials but allows the Prime Minister to grant approval for a ship in distress where this will avert a potential accident.

Ian Ewen-Street

New Zealand Nuclear Free Zone Extension Bill

Member's Bill

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The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the New Zealand Nuclear Free Zone Extension Act 2000.

(2) In this Act, the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987 is called "the principal Act".

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 10

3 Purpose

The purpose of this Act is to extend the New Zealand nuclear free zone to coincide with the New Zealand exclusive economic zone and prohibit the transit of high level nuclear waste, nuclear weapons and nuclear powered ships through the zone. 15

cl 4 New Zealand Nuclear Free Zone Extension

- 4 **Interpretation**
 Section 2 of the principal Act is amended by inserting, in their appropriate alphabetical order, the following definitions:
 "exclusive economic zone has the same meaning as it has in section 9 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977" 5
 "radioactive waste has the same meaning as it has in the International Atomic Energy Agency Code of Practice on the International Transboundary Movement of Radioactive Waste, as adopted by the General Conference (GC(XXXIV)/RRES/530) of 21 September 1990". 10
- 5 **New Zealand Nuclear Free Zone**
 Section 4 of the principal Act is amended by adding the following new paragraph:
 "(e) the exclusive economic zone of New Zealand." 15
- 6 **Prohibition on stationing of nuclear explosive devices**
 Section 6 of the principal Act is amended by omitting the words "on land or waters or internal waters". } *Handwritten notes*
- 7 **New section 11 substituted**
 Section 11 of the principal Act is repealed, and the following section substituted: 20
- "11 **Visits by nuclear powered ships**
 Entry into or transit through the New Zealand Nuclear Free Zone by any ship whose propulsion is wholly or partly dependent on nuclear power is prohibited." 25
- 8 **New section 11A inserted**
 The principal Act is amended by inserting, after section 11, the following new section:
- "11A **Passage by ships carrying radioactive waste**
 Entry into or transit through the nuclear free zone of New Zealand is prohibited to any ship or aircraft carrying— 30
 "(a) radioactive waste; or
 "(b) irradiated nuclear fuel; or
 "(c) plutonium as an oxide or nitrate; or
 "(d) mixed plutonium and uranium fuel." 35

New Zealand Nuclear Free Zone Extension

cl 9

9 New section 12 substituted

Section 12 of the principal Act is repealed and the following section substituted:

12 Ships in distress

- (1) Any ship in distress prohibited by sections 6, 11, and 11A may seek approval from the Prime Minister to enter the New Zealand nuclear free zone. 5
- (2) The Prime Minister may grant approval for the entry of such a ship into the New Zealand nuclear free zone if the Prime Minister is satisfied, having regard to all relevant information and advice available, that entry is necessary to render assistance which may reduce risk to human life or the environment. 10
- (3) In granting approval under subsection (2), the Prime Minister must have regard to— 15
 - (a) the safety precautions that are in place or will be in place;
 - (b) liability in case of an accident;
 - (c) international legal obligations;
 - (d) the risk to New Zealand of an accident and the possible consequences of an accident. 20
- (4) Where a distressed ship has entered the New Zealand nuclear free zone and is a ship prohibited by sections 6, 11, and 11A, the Prime Minister must give public notice in the *Gazette* as soon as practicable. 25
- (5) The notice referred to in subsection (4) must contain the following information:
 - (a) the name of the ship and details of its cargo;
 - (b) the location of the ship;
 - (c) the nature of the distress; 30
 - (d) the measures taken to aid the ship and to avoid a nuclear accident;
 - (e) the possible risk to New Zealand and consequences of a nuclear accident;
 - (f) the arrangements for liability." 35

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "International Ocean Institute" <mcoffensmout@kilcom1.ucis.dal.ca>
Subject: Re: International Ocean Institute
Date sent: Wed, 27 Sep 2000 06:36:07 +1200

Dear Madeleine,

Thank you so much for looking for some documents for me. Unfortunately the message arrived after I had already left Halifax to speak at the University of New Brunswick. Would you be able to send the materials to me at my New York address (below)?

Also, do you have a web reference to the Corfu Channel case? I would like to read the decision to check on its implications to naval passage through territorial waters.

Sent Internet references.

Thank you
Alyn Ware

----- Alyn Ware Consultant at Large
Lawyers' Committee on Nuclear Policy 211 East 43rd Street New York, NY
10017, USA Tel: (1) 212 818 1861 Fax: (1) 212 818 1857 Email:
alynw@attglobal.net Website: www.lcnp.org

Home address
219 Ngatai Rd, Tauranga
Aotearoa-New Zealand
Phone: (64) 7 576 6750 Fax: (64) 7 576 4577

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "International Ocean Institute" <mcoffensmout@kilcom1.ucis.dal.ca>
Subject: Re: Jens Evenson
Date sent: Sun, 8 Oct 2000 01:58:55 +1300

Dear Madeleine,

Great. Thank you. I look forward to receiving the Evenson article. There is one other that I am interested in that isn't in the UN Law library (it's not a fantastic law library), and that is Boleslaw Boczek, "Peacetime Military Activities in the Exclusive Economic Zone", in Ocean Development and International Law, 1988, pp 445-468. It is referenced on page 56 of Peace in the Oceans. If you have easy access to it, a copy would be great. If not, no bother. I believe that it's not as specific to nuclear weapons as Evenson's.

Let me know if there's ever anything I can do to help you out.

Have a wonderful thanksgiving. It is also a holiday in the US, but not at the UN.

Yours
Alyn Ware

----- Alyn Ware Consultant at Large
Lawyers' Committee on Nuclear Policy 211 East 43rd Street New York, NY
10017, USA Tel: (1) 212 818 1861 Fax: (1) 212 818 1857 Email:
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219 Ngatai Rd, Tauranga
Aotearoa-New Zealand
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+ Evenson's paper



INTERNATIONAL
OCEAN INSTITUTE
CANADA

DALHOUSIE
University



FAXED

FACSIMILE TRANSMISSION

To: Alyn Ware, Consultant at Large
Lawyers' Committee on Nuclear Policy, 211 East 43rd Street, New York

Fax: 1 212 818-1857

From: Madeleine Coffen-Smout, Co-ordinator
International Ocean Institute, Dalhousie University, Halifax, Nova Scotia

Fax: 1 902 494-2034

Date: 17 October 2000

Re: Evenson

Page: 1 of 7

Dear Alyn,

Glad to see from your E-Mail received this morning that there's still time for this to be of use. Sorry the original hasn't reached you yet -- I wonder when it will finally turn up...

Hope you're pleased with the submission. Let me know if I can be of further assistance.

Regards,

Madeleine

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "International Ocean Institute" <mcoffensmout@kilcom1.ucis.dal.ca>
Subject: Re: Boczek
Date sent: Thu, 19 Oct 2000 11:30:13 +1300

Dear Madeleine,

You are wonderful... There will be a chance for us to submit additional information to the select committee, as they have just extended the time for hearings. Thus, the article will be of use. I can send you some money for copying and postage. Can you bank a check drawn in US dollars on HBSC Bank?

Yes your fax arrived. Thank you

Yours
Alyn

----- Alyn Ware Consultant at Large
Lawyers' Committee on Nuclear Policy 211 East 43rd Street New York, NY
10017, USA Tel: (1) 212 818 1861 Fax: (1) 212 818 1857 Email:
alynw@attglobal.net Website: www.lcnp.org

Home address
219 Ngatai Rd, Tauranga
Aotearoa-New Zealand
Phone: (64) 7 576 6750 Fax: (64) 7 576 4577

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "International Ocean Institute" <mcoffensmout@kilcom1.ucis.dal.ca>
Subject: Re: Boczek
Date sent: Fri, 20 Oct 2000 09:44:19 +1300

Kia ora Madeleine,

Thank you. I don't need anything else at the moment. The Evensen article arrived by post today, so the postal service does work.

I have popped a book in the mail for you about our cases against nuclear weapons in the International court of Justice... It is our publicly accessible version (ie with cartoons etc...). I'll send you a copy of the final submission later...

Ka kite (until we meet)
Alyn

----- Alyn Ware Consultant at Large
Lawyers' Committee on Nuclear Policy 211 East 43rd Street New York, NY
10017, USA Tel: (1) 212 818 1861 Fax: (1) 212 818 1857 Email:
alynw@attglobal.net Website: www.lcnp.org

Home address
219 Ngatai Rd, Tauranga
Aotearoa-New Zealand
Phone: (64) 7 576 6750 Fax: (64) 7 576 4577

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "Angie Zelter" <reforest@gn.apc.org>,
Subject: Address change
Date sent: Tue, 16 Jan 2001 22:36:35 +1300

Dear Friends,

Please note my new address and correct email address below.

Yours
Alyn Ware

----- Alyn Ware Apartment 9b 126 The
Terrace Wellington Aotearoa-New Zealand Phone: (64) 4 499 3443
Email: alynw@attglobal.net

Consultant at Large
Lawyers' Committee on Nuclear Policy
211 East 43rd Street, #1204
York, NY 10017, USA
1861 Fax: (1) 212 818 1857
Website: www.lcnp.org

New
Tel: (1) 212 818

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "Rhonda Zabinsky" <rhonda.zabinsky@royalroads.ca>,
Subject: Nobel nominations
Date sent: Wed, 17 Jan 2001 07:07:53 +1300

Dear Friends,

International Peace Bureau (IPB), as a former Nobel Peace Prize recipient, has the authority to make nominations for the prize. Nominations close Feb 1. I'm on the steering committee for IPB, so if you have anyone you would like to see nominated, please let me know and I will include your recommendation on the list we are considering. Note that IPB's nomination for 1995, Joseph Rotblat, was awarded the prize.

Yours
Alyn Ware

----- Alyn Ware 126 The Terrace #9b
Wellington Aotearoa-New Zealand Phone: (64) 4 499 3443 Email:
alynw@attglobal.net

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Tel: (1) 212 818

*forwarded to EMS.
Responded saying we
are being nominated
& could they support
it.
22-1 Jan 2001.*

From: **International Ocean Institute <mcoffensmout@Kilcom1.UCIS.Dal.Ca>**
To: **EMB**
Subject: **(Fwd) New Zealand NWFZ Bill**
Copies to: **francois**
Date sent: **Wed, 21 Mar 2001 16:34:17 AST**

----- Forwarded message follows -----

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "Dr Elizabeth Mann Borgese"
<Elisabeth.Borgese@Dal.Ca> Copies to: "Madeleine Coffen-Smout"
<mcoffensmout@Kilcom1.UCIS.Dal.Ca> Subject: New Zealand NWFZ
Bill Date sent: Wed, 21 Mar 2001 13:21:49 +1200

Dear Dr Mann Borgese,

The New Zealand Select Committee on Foreign Affairs, Defense and Trade will be hearing submissions on the Nuclear Free Zone Extension Bill in April and May. The Bill would prohibit the passage of nuclear weapons and nuclear materials through territorial waters and the Exclusive Economic Zone. The government is uncertain whether it has the authority under international law to make such a prohibition.

The International Association of Lawyers Against Nuclear Arms and the International Law Association are planning to hold a conference on the issue around that time, and to invite international experts to the conference and to appear before the select committee. The most likely dates we will be able to appear before the select committee are May 10 or 17 (although May 3 is also a possibility).

Attached is a copy of the IALANA submission plus the draft proposal for the conference.

This is not an official invitation, but more a letter of inquiry as to whether you may be available to come to New Zealand to speak at the conference and appear before the committee during the dates mentioned above.

Yours
Alyn Ware

----- Alyn Ware PO Box 23257 Cable Car Lane
Wellington, Aotearoa-New Zealand Phone: (64) 4 499 3443 Fax: (64) 4
499 5858 Email: alynw@attglobal.net

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Lawyers' Committee on Nuclear Policy
211 East 43rd Street, #1204
York, NY 10017, USA
1861 Fax: (1) 212 818 1857
Website: www.lcnp.org
New
Tel: (1) 212 818

----- End of forwarded message -----

From: **International Ocean Institute** <mcoffensmout@Kilcom1.UCIS.Dal.Ca>
To: **"Alyn Ware"** <alynw@attglobal.net>
Subject: **Re: Foot and Mouth**
Date sent: **Wed, 28 Mar 2001 17:23:43 AST**

EMB is now back from Thailand, and has just been in the office. She wrote the following for you, but said she didn't have your E-Mail address. Since it's conveniently sitting in my in-box, I can easily enough be the conduit for the message. So, here it is.

MSCS

P.S. Let me know when you put up your fireman's pole. Our three- year old spends much of his life in a bright red fireman's hat, and the challenge of hurtling down a firepole for nine storeys and then landing on a cable car might well appeal...

Dear Alyn,

Thank you very much for all this excellent material. I wish I could come for the hearing, but unfortunately this is quite impossible. I have just returned from Bangkok, and need some time at home now to catch up with quantities of work!

I think you have a very strong case and should proceed unilaterally. Looking at the broad picture, it is clear that "flag state jurisdiction" has been totally undermined by the open registration system -- and really does no longer exist. It follows, that port-state jurisdiction and coastsal-state jurisdiction will fill the vacuum. Coastal State jurisdiction in the EEZ is bound to get stronger, and actions such as the one you propose will become more and more acceptable.

So I wish you the best of luck with the hearings. Perhaps you could convince Jon van Dyke to come and testify. He is not as far away as I am -- and he is really good on this subject!

Warm regards,

Elisabeth

Dear Dr Mann Borgese,

The New Zealand Select Committee on Foreign Affairs, Defense and Trade will be hearing submissions on the Nuclear Free Zone Extension Bill in April and May. The Bill would prohibit the passage of nuclear weapons and nuclear materials through territorial waters and the Exclusive Economic Zone. The government is uncertain whether it has the authority under international law to make such a prohibition.

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Attached is a copy of the IALANA submission plus the draft proposal for the conference.

This is not an official invitation, but more a letter of inquiry as to whether you may be available to come to New Zealand to speak at the conference and appear before the committee during the dates mentioned above.

Yours
Alyn Ware

IDV/Ware

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "Dr Elizabeth Mann Borgese" <Elisabeth.Borgese@Dal.Ca>
Copies to: "Madeleine Coffen-Smout" <mcoffensmout@Kilcom1.UCIS.Dal.Ca>
Subject: Fw: New Zealand NWFZ Bill
Date sent: Sun, 1 Apr 2001 11:00:28 +1200

Dear Dr Borgese,

Thank you for your reply to my email regarding the hearings on our Nuclear Free Zone Extension Bill. I am sorry that you will not be able to come to New Zealand, but I totally understand about the need to catch up. Also, New Zealand is a long way from Halifax and the travel is quite horrendous.

Would you be willing to write something in a little more detail on your opinion regarding the ability of coastal states to protect themselves against the environmental and security risks of nuclear shipments through their territorial waters and EEZs including the right to prohibit transit that is illegal under international law (ie deployed nuclear weapons) or which pose a severe environmental risk (such as nuclear materials)? If this was written in your name, we could present it to the parliament committee as additional evidence.

Thank you and I look forward to meeting you again sometime, somewhere.

Yours
Alyn Ware

----- Alyn Ware PO Box 23257 Cable Car Lane
Wellington, Aotearoa-New Zealand Phone: (64) 4 499 3443 Fax: (64) 4
499 5858 Email: alynw@attglobal.net

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Tel: (1) 212 818

-----Original Message-----

From: Jon Van Dyke <jvandyke@hawaii.edu>
To: Alyn Ware <alynw@attglobal.net>; jvandyke@hawaii.edu
<jvandyke@hawaii.edu>; duncan@globelaw.com <duncan@globelaw.com> Date:
Tuesday, 27 March 2001 09:18 Subject: Re: New Zealand NWFZ Bill

Alyn -- Again, my apologies for the conflicts in my schedule in May. I have read through your submission, which is carefully written and instructive.

I find myself almost persuaded with regard to the territorial waters, and think you have made a strong case that the passage of nuclear-powered and nuclear-weapon-carrying vessels through the territorial sea can no longer be viewed as "innocent." You use the ICJ and the Greenock decisions in a useful and persuasive manner. Even if this view were to be accepted, however, the problem would remain regarding how one would enforce an exclusion.

Article 236 is clear that coastal states cannot interfere with warships, although it also says that the warships should comply with the requirements laid down in the Convention. A New Zealand statute prohibiting passage might be useful, even if it could not in all cases be enforced. With regard to passage through the

exclusive economic zone, I would think that the equation is somewhat different, and that totally blocking passage would probably be inappropriate. My position on the transport of nuclear cargoes has always been one of "moderation," i.e., that passage is permitted, but only subject to the conditions laid down in the Convention -- consultation, the creation of an environmental impact assessment, cooperative route planning, contingency planning for emergencies (including the identification of ports and emergency ships that would be available to assist), and the creation of a proper liability regime (based on strict liability, without financial limitations, and the establishment of a fund available to pay for damage; damages should include damage to the economies of affected nations as well as documented health damages). I feel that the environmental provisions in the Convention are just as important as the navigational freedoms, and that one cannot engage in the freedoms without accepting the environmental obligations. As an analogy, one has the freedom to drive a car, but only according to conditions established by law -- including having a driver's license, stopping at red lights, signalling for left turns, etc. I do not think, therefore, that I would be in a position to support a complete ban on the passage of nuclear-powered or nuclear-weapons-carrying warships through the exclusive economic zone. I could support an effort to insist on the conditions listed above being met, although they might have to be adjusted somewhat because of the national security considerations at stake. I would be happy if the "peaceful purposes" requirements laid down in Article 88 were to develop more teeth, but for the moment this language awaits state practice to give it meaning. New Zealand's initiative would be part of that process, but it cannot be said as of the present time that we have reached the a situation where passage of the nuclear warships through the high seas and the exclusive economic zones can be prohibited in all circumstances. I suppose my position means that I am probably not as useful to you as you might wish, and that you should probably proceed without my direct testimony, particularly in light of the awkwardness of my schedule. But I am delighted that you have carried this effort so far, and want to wish you the very best of success in gaining passage. I hope that is alright for me to send a copy of my remarks to Duncan as well, since we work closely together on these matters. Perhaps he might have some ideas that would help. Please keep me informed about your activities, and keep me in mind if I can be of help in the future. Best wishes, Jon

Alyn Ware wrote:

Dear John, Thank you so much for your interest and reply. There does seem to be an unfortunate clash with dates. The Select Committee is wanting to wrap up the submissions by May 17. However, there might be a possibility for us to persuade them to accept us on May 24, if your testimony is crucial to their decision making and we hold back the seminar until that week in order to obtain your participation. I have read your material on nuclear materials, and that would definitely be useful for the Select Committee. However, we do have Duncan Currie who is also very good on that aspect. What just as important, and more likely to be a decision swinger on this one, is your contribution on transit of nuclear armed vessels. How would you approach this question? I recall that you mentioned this is a more difficult argument to win given the history of immunity for governmental vessels. However, the 1996 International Court of Justice Advisory Opinion and subsequent cases including the Greenock decision (which I covered in our submission) indicate the potential for coastal states to prohibit transit on the grounds that it would not be innocent passage or in conformity with the

principal of peaceful purposes. I have attached another copy of
our submission. YoursAlyn Ware

----- Alyn Ware PO Box 23257 Cable
Car Lane Wellington, Aotearoa-New Zealand Phone: (64) 4 499 3443
Fax: (64) 4 499 5858 Email: alynw@attglobal.net Consultant at
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#1204 New York, NY 10017, USA Tel: (1) 212 818 1861 Fax: (1)
212 818 1857
Website: www.lcnp.org

1201 Alyn Ware

International Ocean Institute

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1226 Le Marchant Street
Halifax, N.S. B3H 3B7

Tel. 1 902 494 1737
fax: 1 902 494 2034
Canada

FACSIMILE TRANSMISSION

To: Madeleine
Fax No 494 2034
From: Elisabeth Mann Borgese
Fax No. 1 902 868 2455
Date: April 5, 2001
Subject: Alyn Ware

Hi, Madeleine,
could you please

- 1. Fax this to Alyn Ware ✓ Apr. 6/01 SB
- 2. Send it by post. ✓ Apr. 6/01 SB

Love,

Elisabeth

3. ✓ The letter to Lopes Espina
 Apr. 6/01 the little ocean
 SB
 Governance paper should be
 mailed express to Yke Gravin
 in Portugal. I don't seem
 to have his mailing address
 it must be in the file pile,
 very recent!

International Ocean Institute

FAXED
April 6/01

*Dalhousie University
1226 Le Marchant Street
Halifax, N.S. B3H 3B7*

*Tel. 1 902 494 1737
fax: 1 902 494 2034
Canada
April 3, 2001*

Select Committee on Foreign Affairs, Defence and Trade
on the New Zealand Nuclear Free Zone Extension Bill

Honourable Members,

I wish to express my full support for the submission made by the International Association of Lawyers Against Nuclear Arms, Aotearoa New Zealand Branch. In particular I would like to stress my agreement with the statement that "Customary practice and international law relating to territorial waters and Exclusive Economic Zones is not static. The recognition of sovereign rights within both has expanded even in the past half century. New actions by coastal States to enact rights will inevitably be resisted by the maritime powers, but, if reasonable and in the interests of most coastal States, are likely to become the norm over time."

I also fully agree that "Enacting the Bill would act as both clarifying the rights claimed by coastal States, and be a norm setting precedent for the enactment of such rights by other coastal States and the ultimate recognition of these by the maritime powers."

Let me now make some observations which may lend additional support to these statements.

UNCLOS attempted to establish a fair balance between the rights of flag states, coastal states and port states in the exercise of enforcement actions. During the last 30 years, however the shipping industry has been radically transformed by "globalization" and the incredible growth in the number and tonnage of ships sailing under flags of convenience. The concept of the "genuine link" has become obsolete, and with it, the concept of "flag state control." The vacuum will undoubtedly be filled by a strengthening of coastal state and port state control. This will justify actions taken under your Bill.

State practice, after all, is a recognized source of international law. The unilateral declaration of 200-NM exclusive economic zones or fishing zones by quite a number of States (including Canada), several years before this became international law is a proof, if any were needed. Undoubtedly there will be objections and protests and, given the present political atmosphere in some leading maritime States, these protests may be more than theoretical. But by enacting this Bill, New Zealand would become a world leader in a direction which most certainly will be confirmed by history and the further evolution of the Law of the Sea.

With all good wishes,

Sincerely yours,

Elisabeth Mann Borgese
Elisabeth Mann Borgese
Professor, Dalhousie University
Founder & Hon.Chair
International Ocean Institute

Sent by DHL on
Friday, April 6, 2001
SB

International Ocean Institute

*Dalhousie University
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*Tel. 1 902 494 1737
fax: 1 902 494 2034
Canada
April 3, 2001*

Mr. Gustavo Lopez Ospina
UNESCO
Paris, France

Dear Mr. Lopez Ospina,

This is to confirm that I will be very happy to send my contribution to the book which I think is a remarkable , useful and extremely beautiful initiative. The aesthetic and artistic aspects of work with the environment and for the environment are often neglected, and yet, they attract large numbers of people. Art is an extremely useful tool for consciousness-raising, while, of course it really needs no justification as it is of utmost importance by itself.

I will certainly send my contribution before the end of April.

Warm regards,

Elisabeth Mann Borgese
Elisabeth Mann Borgese

International Ocean Institute

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OCEAN GOVERNANCE

“Ocean Governance” means the way in which ocean affairs are governed, not only by governments, but also by local communities, industries and other “stake holders.” it includes national and international law, public and private law as well as custom, tradition and culture and the institutions and processes created by them. Culture, obviously, includes art and the aesthetic/emotional aspect of human activity and behaviour, as already pre-designed in the animal kingdom. Art, therefore, can make important contributions to governance, and especially, to ocean governance, since the ocean itself has given, and continues to give, so much inspiration to all forms of art, from music to painting to poetry. Governance can be successful only if it responds, not only to the socio-economic, but also to the emotional/aesthetic needs of society.

Obviously this makes for an extremely complex system. This system can be divided into three major components, with somewhat blurring boundaries between them.

The first component is the *legal framework*, whose base is given by the United Nations Convention on the Law of the Sea. When this was opened for signature in 1982, it was all comprehensive. It governed all major uses of the seas and oceans. It introduced a number of highly innovative concepts and principles, the most important of which are

- *the principle of the Common Heritage of Mankind*, as applied to the mineral resources of the international sea-bed area, which cannot be appropriated by any State, legal or natural person, must be managed for the benefit of mankind as a whole, and is reserved for exclusively peaceful purposes, with due consideration for the conservation of the Environment; Art, above all, is part of the Common Heritage of Mankind.
- *the concept that the problems of ocean space are closely interrelated and need to be considered as a whole.*

The United Nations Convention on the Law of the Sea is a *framework convention* which subsumes other international law, in particular *environmental international law* developed by UNEP and diplomatic conferences, *shipping law*, developed in particular by IMO and UNCTAD, and *fishing law*, as developed by FAO and diplomatic conferences.

International environmental law has experienced an unprecedented development since 1982, especially since the great Rio Earth Summit in 1992 which spawned a number of

Conventions, Agreements and Programmes. All of these have important ocean related components which must now be considered in their interaction with the Law of the Sea Convention. The whole legal framework thus can be considered in three major parts: (1) the United Nations Convention on the Law of the Sea, 1982; (2) other international law subsumed by the Convention; (3) the ocean-related parts of the post-1992 Conventions, Agreements and Programmes which now interact with the legal system.

The second component consists of the institutional framework. Institutions are needed to implement the laws and regulations generated during the last half century. The Law of the Sea Convention itself created four global institutions,

- The International Seabed Authority in Jamaica, to manage the Common Heritage of Mankind;
- The International Tribunal for the Law of the Sea, for the peaceful settlement of disputes arising from the implementation and interpretation of the Convention;
- The Commission on the Limits of the Continental Shelf;
- The meeting of the States Parties.

A fifth institution, mandated by the Convention but not yet implemented should consist of regional centres for the advancement of marine science and technology.

The Convention has not established any new institutions for other major uses of the seas and oceans, such as fishing, shipping, marine scientific research, etc. It relies, for their regulation and management, on "the competent international institutions," that is, in particular, the U.N. Specialized Agencies, each with its own secretariat and its own sectoral mandate. One should add to this already complicated system, the secretariats and sectoral mandates of the UNCED Convention regimes, and it becomes obvious that it has been extremely difficult to move in the direction of "integrated management" within an institutional framework as splintered and sectoralized as that generated by the UNCLOS/UNCED process. Only the General Assembly, with its universal membership and broad, intersectoral mandate, would have been able to exercise some integrating and harmonizing function, but the General Assembly simply did not have the time to do justice to this extremely demanding task. With the establishment of the "Consultative Process" (UNICPOLOS), the situation has greatly improved. An institutional order is evolving that reaches from the local community through the State government to the level of regional seas, and to the United Nations, responding to the guide lines established by the Report of the United Nations Commission on Environment and Development (1987) and further elaborated especially by Agenda 21. .

The third component consists of the *tools* needed by the institutions for the effective implementation of the laws and regulations, for not even the best legal framework, with the best institutional framework would be capable of effective implementation without such tools. The necessary tools include *technologies, funding and surveillance and enforcement capabilities*. All these are rooted in culture. They must be “socially acceptable” and “socially sustainable,” and here the arts can make their greatest contribution.

It is to be hoped that this volume, through its artistic and emotional interpretation of the ongoing environmental crisis, in which the ocean plays such a fundamental role, will be an effective tool to harness human emotion on the side of ocean governance.

Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "Elisabeth M. Borgese" <EBorgese@compuserve.com>
Copies to: "Madeleine Coffen-Smout" <mcoffensmout@Kilcom1.UCIS.Dal.Ca>
Subject: Re: Draft OP ed
Date sent: Mon, 9 Apr 2001 08:10:05 +1200

Dear Elizabeth,

Thank you for your quick response to my draft op-editorial. I have made the changes you suggested. However, with respect to the sentence about "genuine link" and the concept of "flag state control", could you explain this more? I don't quite understand what you mean by "genuine link". I think it may need further explanation in the op-ed piece.

I have attached the draft op-ed piece as a microsoft word file and as a text file. I hope this helps to read it.

Let me know any further suggestions you have.

Thank you again.
Alyn

----- Alyn Ware PO Box 23257 Cable Car
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Send reply to: "Alyn Ware" <alynw@attglobal.net>
From: "Alyn Ware" <alynw@attglobal.net>
To: "International Ocean Institute" <mcoffensmout@Kilcom1.UCIS.Dal.Ca>,
Subject: NZ Select Committee
Date sent: Sat, 7 Apr 2001 07:46:05 +1200

Dear Dr Borgese,

I thank you most kindly for the letter to the Select Committee on Foreign Affairs. I am distributing it to the committee for its consideration next week.

The issue is starting to get some attention in the media here, spurred on partly by the unfortunate death of one of my colleagues while testifying before the committee yesterday. However, we do not have very many people with expertise in the Law of the Sea in New Zealand, and none with expertise in Pacem in Maribus.

Would you be willing to write a slightly longer piece that we could give to the media to use as an op-ed piece? I would be willing to help in order to ensure its relevance for the local situation. I could also bring in an expert on the ICJ advisory opinion on the legality of the threat or use of nuclear weapons, such as Peter Weiss or Richard Falk, to make it a joint op-ed piece if you thought that would be useful.

Also, would you know of any other people from any of the operational centers of the International Ocean Institute who would have recognised expertise in the Law of the Sea and a sound knowledge of the issue of nuclear weapons and who might be able to come to New Zealand to testify to the Select Committee in May?

Thank you once again for your assistance in this initiative.

Yours sincerely,
Alyn Ware

----- Alyn Ware PO Box 23257 Cable Car
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Date sent: **Wed, 4 Apr 2001 08:56:30 -0300 (ADT)**
From: **International Oceans Institute of Canada <ioic@is.dal.ca>**
Send reply to: **ioic@dal.ca**
To: **alynw@attglobal.net**
Copies to: **Madeleine Coffen-Smout <mcoffensmout@kilcom1.ucis.dal.ca>**
Subject: **Alyn Ware (fwd)**

Mr. Ware,

I am forwarding this message as per Elisabeth's request.

Thank you
Sonya Budden
Secretary
IOIC

----- Forwarded message -----

Date: Tue, 3 Apr 2001 15:54:18 -0500
From: "Elisabeth M. Borgese" <EBorgese@compuserve.com>
To: Madeleine <ioihfx@dal.ca>
Subject: Alyn Ware

Dear Madeleine,

could you please send this to Alyn Ware. I tried to send it, but it came back!

Love,

Elisabeth

April 3, 2001

Select Committee on Foreign Affairs, Defence and Trade
on the New Zealand Nuclear Free Zone Extension Bill

Honourable Members,

I wish to express my full support for the submission made by the International Association of Lawyers Against Nuclear Arms, Aotearoa New Zealand Branch. In particular I would like to stress my agreement with the statement that "Customary practice and international law relating to territorial waters and Exclusive Economic Zones is not static. The recognition of sovereign rights within both has expanded even in the past half century. New actions by coastal States to enact rights will inevitably be resisted by the maritime powers, but, if reasonable and in the interests of most coastal States, are likely to become the norm over time."

I also fully agree that "Enacting the Bill would act as both clarifying the rights claimed by coastal States, and be a norm setting precedent for the enactment of such rights by other coastal States and the ultimate recognition of these by the maritime powers."

Let me now make some observations which may lend additional support to these statements.

UNCLOS attempted to establish a fair balance between the rights of flag states, coastal states and port states in the exercise of enforcement actions. During the last 30 years, however the shipping industry has been radically transformed by "globalization" and the incredible growth in the number and tonnage of ships sailing under flags of convenience. The concept of the "genuine link" has become

obsolete, and with it, the concept of "flag state control." The vacuum will undoubtedly be filled by a strengthening of coastal state and port state control. This will justify actions taken under your Bill.

State practice, after all, is a recognized source of international law. The unilateral declaration of 200-NM exclusive economic zones or fishing zones by quite a number of States (including Canada), several years before this became international law is a proof, if any were needed. Undoubtedly there will be objections and protests and, given the present political atmosphere in some leading maritime States, these protests may be more than theoretical. But by enacting this Bill, New Zealand would become a world leader in a direction which most certainly will be confirmed by history and the further evolution of the Law of the Sea.

With all good wishes,

Sincerely yours,

Elisabeth Mann Borgese
Professor, Dalhousie University
Founder & Hon.Chair
International Ocean Institute

1 DU/ware

Dear Alyn, *Ware*

Thanks a lot. I have corrected a few typos, and made the "genuine link" more understandable. It is a technical term, used in Article 91 of the Law of the Sea Convention as well as in a lot of other IMO and UNCTAD Conventions. So I hope this is ll right.

Yours as ever,

Elisabeth
Elisabeth

Nuclear Denizens of the Deep: Can we prohibit them?

The unfortunate death of anti-nuclear campaigner John Ulrich while giving testimony to the Select Committee on Foreign Affairs, Defence and Trade on April 6, 2001, drew attention to a little known bill, currently under consideration, to extend New Zealand's prohibition on nuclear weapons to include the 200 mile exclusive economic (EEZ), and to also prohibit transit of high level nuclear waste through the zone.

20 years ago motley groups of intrepid Kiwis were taking to the waters of major New Zealand harbours on surfboards and in kayaks, yachts and small boats to confront visiting warships armed with nuclear weapons – the most powerful and destructive weapons of annihilation ever produced. To the surprise and acclaim of the watching world, the anti-nuclear crusaders won this David and Goliath battle, New Zealand became a nuclear weapon free zone, and the nuclear navies retreated.

However, the retreat was more symbolic than actual. New Zealand is but a small ink blot in the expansive oceans that continue to be the home for nuclear armed submarines – the most frightful denizens of the deep. Despite the end of the Cold War, which had provided the original rationale for the ocean deployment of thousands of nuclear weapons, there are over [] roving the ocean depths, most on hair trigger alert and each with an explosive force 10 – 100 times that of the weapons that destroyed Hiroshima and Nagasaki.

New Zealand may have prohibited nuclear warships from its harbours, but does not prohibit their transit through territorial waters and the EEZ. Should a conflict between nuclear powers erupt, New Zealand could become a target from a nuclear state if one of their enemy's nuclear submarines is in the vicinity. The UK Crown Advocate Deputy, in a recent High Court case in Edinburgh considering the legality of Trident nuclear weapons, cited a scenario where-by New Zealand, for example, could be threatened with attack by Chinese nuclear weapons.

There is now a new threat to New Zealand's security and environment from the transit of ships carrying nuclear waste to be reprocessed, and nuclear fuel following reprocessing. The waste and fuel are highly radioactive, and the fuel – plutonium – is highly suitable for nuclear bombs and thus poses a risk of diversion to weapons purposes.

New Zealand has opposed the passage of nuclear warships and nuclear waste through its territorial waters and EEZ, but has not prohibited this on the belief that such passage must be allowed under the United Nations Convention on the Law of the Sea (UNCLOS). This international treaty, to which New Zealand and all the nuclear weapon States except the U.S. are parties, allows for *innocent passage* through territorial waters and *freedom of navigation* in EEZs.

However, with regard to the deployment of nuclear weapons, UNCLOS stipulates that the oceans “*shall be reserved for peaceful purposes*” and that the threat of force is prohibited. In 1982, when UNCLOS was opened for signature, it was not certain how this applied to the deployment of nuclear weapons. However, since then, the International Court of Justice, in its historic advisory opinion of 1996, determined that “*the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.*” The current deployment of nuclear weapons on submarines would constitute a threat as they are deployed with a readiness to use and under a policy of use. Thus such deployment is illegal.

With respect to the transit of nuclear materials, UNCLOS provides some powers to coastal states like New Zealand to regulate. More importantly there have also been advances in international environmental law since UNCLOS was adopted, particularly in the strengthening of the precautionary principle, which holds that, when activities pose a significant risk to the environment and proponents of the activities cannot demonstrate an adequate level of protection from such risks, the activities should not proceed.

There are thus legal grounds for enacting the Bill to extend our nuclear weapon free zone. New Zealand is not alone in attempting to prohibit the passage of nuclear waste or the deployment of nuclear weapons in its EEZ. Chile asserted its rights to prevent nuclear waste passage through its EEZ by sending a warship to confront the British Nuclear Fuels ship the Pacific Swan in 1998. The South East Asian Nuclear Weapon Free Zone includes a prohibition of the threat or use of nuclear weapons by any country within their EEZs.

Actions like these by coastal states to protect their interests will inevitably be resisted by the maritime powers. However, New Zealand weathered the storm over its original nuclear weapon free legislation and emerged with a strong and respected "clean green" image that has helped in trade and tourism. A strong stand against ocean deployment of nuclear weapons and nuclear waste transit would only add to that image.

In addition, by enacting this Bill, New Zealand would become a world leader in a direction which most certainly will be confirmed by history and the further evolution of the Law of the Sea. The recognition of coastal states' rights has expanded over the past half century, including their rights to an EEZ, which is a relatively new concept, and their rights within their EEZs. UNCLOS attempts to establish a fair balance between the rights of maritime powers ("flag states"), coastal states and port states.

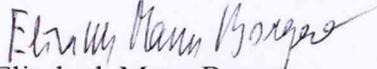
Coastal state action is becoming even more important in an international shipping order which has been radically transformed by globalisation and the incredible growth in number of ships sailing under flags of convenience. Since States offering flags of convenience have no control at all over ships flying their flag, or any other connection with them, the concept of "genuine link" has become obsolete, and with it, the concept of "flag state control." The vacuum will undoubtedly be filled by a strengthening of coastal state and port state control. This will justify actions taken by New Zealand under the Bill. Additional claims to rights, if reasonable and in the interests of most coastal states, over time will likely become the norm.

The government has expressed concern about New Zealand's inability to monitor and enforce a 200 mile nuclear free zone. However, Judge Weeramantry, former Vice-President of the International Court of Justice (ICJ) on a recent visit to New Zealand noted that the political and legal value of an action does not rely on the capacity to enforce it. He noted, for example, that 95% of ICJ decisions are respected and implemented even though the ICJ has no enforcement powers. New Zealand itself has taken cases to the ICJ against French atmospheric testing in 1974 and underground testing 1995, both of which were unenforceable, but both of which achieved the desired result of an end to the nuclear testing being challenged.

In the international arena, laws are often adopted prior to there being full enforcement capabilities, and the enforcement capabilities are developed over time. The Hague Conventions, the Geneva Conventions, the Genocide Convention and the Convention on Torture are examples. Mechanisms for enforcing these, including an International Criminal Court and the Protocol on Torture, are still being developed, many years after the initial conventions were adopted.

Nuclear weapons are now hidden from sight in missile silos and in submarines under the oceans, but they are no less dangerous. When Robert MacMamara, US Secretary of Defence [] was asked in the US Congress this year why he was so concerned about nuclear weapons now that the Cold War is over, he cited the new Roger Donaldson movie about the Cuban Missile Crisis *13 Days*, and replied "In 1962 we had 13 days to muddle through and avoid a holocaust. Today we would have 13 minutes."

New Zealand's actions to prohibit nuclear weapons and high level waste from its EEZ would throw a spotlight on this continuing danger and invigorate international action to eliminate the nuclear denizens of the deep and protect the oceans as our common global heritage.



Elisabeth Mann Borgese
Professor, Dalhousie University
Founder & Hon.Chair
International Ocean Institute

Alyn Ware
Former Executive Director
Lawyers' Committee on Nuclear Policy