Dalhousie Law Journal

Volume 12 | Issue 2 Article 2

10-1-1989

# Reservations and Declarations in the Additional Protocols to the Treaty of Tlatelolco

Héctor Gros Espiell
*University of Montevideo*

Héctor Gros Espiell*

# Reservations and Declarations in the Additional Protocols to the Treaty of Tlatelolco.

I.

1. It is common knowledge that the Treaty for the Prohibition of Nuclear Weapons in Latin America, the Treaty of Tlatelolco, prohibits reservations (Article 27), as does Additional Protocol 2 (Article 4). As for Protocol I, the fact that no mention is made of such a prohibition has been construed as meaning that such reservations are permissible[1].

2. Against this background, the following situations have arisen to date:

i. *Declarations of various types have been made on signing and/or ratifying the Treaty:* a. Declarations waiving the requirements laid down in Article 28, paragraph 1 (28.2), entailing automatic entry into force of the Treaty. Thus far, twenty-one states have proceeded in this way.[2] All these declarations waive the requirements set forth in Article 28 (1) and, with two exceptions, were made when depositing the instrument of ratification. The exceptions are Colombia, which ratified on August 4 1972, and waived the requirements on September 6 1972, and Trinidad and Tobago, which ratified on December 3 1970, but only submitted the

---

*Professor of International Law at the University of Montevideo, Judge at the Inter-American Court of Human Rights, formerly General Secretary of the Organisation for the Prohibition of Nuclear Weapons in Latin America (OPANAL). The bibliography on the Treaty of Tlatelolco is too extensive to be referred to here in full. The bulk can be found in the notes to earlier articles of mine, as listed in the end-notes. I would, however, like to give special mention to two excellent studies which have been published more recently: Holger Mirek: *Voranssetzungen Entwicklung und Problemer regionalier Kernwaffenfreiheit in Latinamerika;* Verlag Breitenbach Publishers, Saarbrucken, 1986 (with an exhaustive bibliography, pp. 424-500), and R. St. J. Macdonald; *Nuclear Weapon-Free Zones and Principles of International Law,* in *International Law and its Sources,* Liber Amicorum Maarten Bos, edited by Wybo P. Heere, Kluwer. On the nuclear weapon-free zone in the South Pacific, structured along similar lines to the Tlatelolco system (on the basis of a regional Treaty, the Treaty of Raratonga, of the 6th of August 1985, and two Additional Protocols), see Roderick Alley; *Nuclear Weapon-Free Zones: the South Pacific Proposal;* The Stanley Foundation, occasional paper; Grey E. Fry; *The South Pacific Nuclear-Free Zone,* SIPRI Yearbook, 1986; Joseph Goldblat and Sverre Lodgaard, *Comparison of arms control commitments in the Treaty of Raratonga and the Treaty of Tlatelolco,* SIPRI Yearbook, 1986.

1. I have already studied this question, especially in *El derecho de los Tratados y el Tratado de Tlatelolco;* OPANAL, Mexico, 1974; pp. 25-26.

2. The Bahamas, Barbados, Colombia, Costa Rica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Surinam, Trinidad and Tobago, Uruguay, and Venezuela.

declaration of waiver on June 27 1975. Two states, Brazil and Chile, despite having ratified the Treaty, have not yet made the declaration waiving the Article 28 requirements.

b) Other types of declaration: Argentina, on signing (September 27, 1967), made a declaration concerning the peaceful use of nuclear energy and nuclear explosions for peaceful purposes. Brazil, on signing (May 9, 1967), and on ratifying without waiver on January 29 1968, made a declaration concerning the interpretation of Article 18 of the Treaty. Nicaragua, on signing on February 15 1967 made a declaration on the peaceful use of nuclear energy, nuclear explosions for peaceful purposes, and the transport of nuclear material over territory. Venezuela, ratifying with a waiver on March 23 1970, made a declaration referring to Articles 25(2) and 28(1) and to its dispute with Guyana.

ii) *The following declarations have been made with regard to the second Protocol:* a) China, when signing on August 21 1973; b) The United States, when signing and ratifying on April 1st 1968 and May 12 1971 respectively; c) France, on signing on July 18 1973 and on ratifying the Treaty (March 22 1974 and April 15 1974); d) The United Kingdom of Great Britain and Northern Ireland on signing the Treaty on December 20 1967 and on ratifying it on December 11 1969; e) The Soviet Union, on signing (May 18 1978) and on ratifying (December 12 1978).

iii) *The situation as regards the first Protocol is as follows:* a) The United Kingdom made a declaration on signing the Treaty on December 20 1967, which it reiterated on ratifying (December 11, 1969); b) The Netherlands, on signing on March 15 1968 and on ratifying on July 26 1971; c) The United States, on signing on May 26 1977, made no declaration. It made a declaration in 1981 on ratification; d) France made a declaration and entered a reservation on signing on March 2 1979. France has not yet ratified the Treaty.

II.

3. I do not propose to examine the various declarations made when signing and/or ratifying the Treaty. I will only deal with the reservations and declarations concerning the two Protocols that were made when they were signed or ratified. This analysis is not only of legal interest since, as we shall see, the reservations or declarations made by the Powers on signing or ratifying the two Protocols clearly have a political significance: they reveal the aims and principles of those countries' foreign policy and, more particularly, their approach to issues directly related to international disarmament and security.

III.

4. Article 23, paragraph 2 of the Vienna Convention on the Law of Treaties states: "If formulated when signing the Treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the Treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation".

The foregoing rule explains why the United States, with regard to Protocol II, the United Kingdom, with regard to protocols I and II, France, in connection with Protocol II, and the Netherlands, on Protocol I, reiterated, confirmed or extended the declarations made on signing. While they did not formally call these declarations reservations — although they are genuine reservations in some instances, by virtue of their content, nature or purpose — they set out, by reiterating or confirming them — to preclude any possibility of them ceasing to achieve their full effect. That explains the importance they attached to them and how, although they did not call them reservations as such, in order not to clash with Article 29 of the Treaty of Tlatelolco and Article 4 of Protocol II, they dealt with them in the manner expressly prescribed by international law in the matter of reservations (the need for reiteration or confirmation). Only China did not reiterate on ratifying the declaration it had made on signing, which proves the exclusively political nature of such declarations, clearly designed to have quite a different effect from that of a declaration.

IV.

5. We can classify declarations made on signing and/or ratifying Protocol II into two groups. The first group is exemplified by the declaration made by the People's Republic of China on signing this Protocol on August 23 1973. It is a strictly political declaration which does not deal with any interpretation problem concerning either the Treaty or its Protocols. It simply restates, in a more systematic manner, China's foreign policy guidelines and viewpoints, especially with regard to the international situation of the Superpowers, relations between China and the developing countries, and disarmament. The declaration states:

> "Latin American countries proposed the establishment of a denuclearized zone in Latin America, in order to oppose the policy of nuclear threat and blackmail of the Superpowers and in order to preserve peace and security in Latin America. The Chinese Government respects and supports this rightful position, and, at the request of Mexico and other Latin American countries, has resolved to sign the second Protocol to the Treaty for the Prohibition of Nuclear Weapons in Latin America, on August 21 1973, in Mexico City.

"The Chinese Government has always stood for the complete prohibition and thorough destruction of nuclear weapons and maintains that, as the first step, all nuclear countries should first of all undertake not to use nuclear weapons, particularly not use them against non-nuclear countries and nuclear weapon-free zones. The Chinese Government has repeatedly declared that at no time and in no circumstances will China be the first to use nuclear weapons. On behalf of the Chinese Government, China's Minister for Foreign Affairs, Chi Peng-fei gave a specific undertaking in regard to the nuclear weapon-free zone in Latin America on 14 November 1972. The Chinese Government will now reiterate this undertaking: China will never use or threaten to use nuclear weapons against non-nuclear Latin American countries and the Latin American nuclear weapon-free zone; nor will China test, manufacture, produce, stockpile, install or deploy nuclear weapons in these countries or in this zone, or send her means of transportation and delivery carrying nuclear weapons to cross the territory, territorial sea or air space of Latin American countries.

"It is necessary to point out that the signing of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America by the Chinese Government does not imply any change whatsoever in China's principle stand on the disarmament and nuclear weapons issue, and, in particular, does not affect the Chinese Government's consistent stand against the treaty on non-proliferation of nuclear weapons and the partial nuclear test ban treaty. Certain countries which possess substantial nuclear stockpiles use these two treaties to establish their own nuclear monopoly, superiority and hegemony over the world. China finds itself totally compelled to develop its own nuclear weapons for the sole purpose of defending itself, in order to break the nuclear monopoly and ultimately to eradicate all nuclear weapons.

"In the opinion of the Chinese Government, it is noteworthy that at the present time the super-Powers, which have at their disposal vast stockpiles of nuclear weapons, are intensifying their nuclear arms race and competing for spheres of influence behind the smoke screen of détente — all of which is a grave threat to the peace and security of non-nuclear countries and denuclearized zones.

"The Chinese Government holds that, in order that Latin America may truly become a nuclear weapon-free zone, all nuclear countries, and particularly the super-Powers, which possess huge numbers of nuclear weapons, must first of all undertake earnestly not to use nuclear weapons against the Latin American countries and the Latin American nuclear weapon-free zone, and they must be asked to undertake to observe and implement the following: (1) dismantling of all foreign military bases in Latin America and refraining from establishing any new foreign military bases there; (2) prohibition of the passage of any means of transportation and delivery carrying nuclear weapons through Latin American territory, territorial sea or air space.

"The Chinese Government hopes that the Latin American countries will strengthen their unity and advance hand in hand in the struggle against the super-Powers' policy of nuclear threat and blackmail, and for the establishment of the denuclearized zone in Latin America. The

> Chinese Government, together with the countries of Latin America and with all peace-loving countries, is prepared to pursue its tireless efforts to attain the ultimate objective of total prohibition and complete destruction of nuclear weapons in the world".[3]

In the declaration made by the Soviet Union on ratifying this Protocol on December 12 1978, a similar, strictly political, sentence was included which compounded the earlier points made in the declaration on signing the Protocol on May 18 1978, and the supplementary statement contained in the ratification document. This declaration, of a wholly political character, to be found in paragraph 2 of the ratification declaration, reads as follows: "Moreover, the Soviet Union reaffirms its position with respect to the granting of independence to colonial countries and peoples, in accordance with the United Nations Declaration on this question (General Assembly resolution 1415 (XV) of 14 December 1960)."

This Soviet declaration is significant, since several territories situated within the zone of application of the Treaty of Tlatelolco, belonging to the United States, Great Britain, France, and the Netherlands, and to which the statute defined in Protocol applies, may be considered to be subject to a colonial régime and hence to be concerned by Resolution 1514 (XV). This is the case with the territories listed by the Decolonisation Commission, for example, Puerto Rico and several Caribbean islands in the possession of Great Britain, as well as the Falkland Islands (Malvinas). As for the French or Dutch territories, the fact that they are not mentioned in the list does not imply that the Soviet declaration has no bearing on any *de jure* or *de facto* jurisdiction to which they are subject.

As these political declarations clearly do not constitute reservations to the Treaty of Tlatelolco, their legality cannot be discussed. They obviously do not "set out to exclude or modify the legal effects of certain provisions of the treaty in their application to that particular State" (Article 2d of the Vienna Convention on the Law of Treaties). They merely state general or specific policy principles with regard to the international situation, in connection with the real or potential field of application of the Treaty.

6. In the second group of declarations we find, for example, those made by the United Kingdom, the United States, France, and the USSR (apart from that already mentioned in the previous paragraph) at the time of signing and/or ratifying Protocol II.

---

3. Héctor Gros Espiell, *La signature du Traité de Tlatelolco par la Chine et la France,* in *Annuaire du droit International,* 1973, pp. 138-140.

All these declarations have in common the fact that they state a particular interpretation of one or several of the provisions of the Treaty of Tlatelolco, with regard to the extension of the obligations assumed by them on becoming parties to Protocol II, or concerning the way in which the requirements under the Treaty of Tlatelolco are to be reconciled with international law in general. In certain instances, which I shall specify later on, these interpretative declarations are tantamount, by nature if not in name, to actual reservations. I have already pointed out, however, that reservations are not permitted under Protocol II and I have already analysed, in an earlier article, the legal problem raised whenever declarations are made which possess the character of reservations, even if they are not named as such[4].

I do not propose to re-examine the strictly legal aspect of this problem, but simply to point out that, according to the Vienna Convention on the Law of Treaties, it is not the "terms or title" which determine whether or not a "unilateral declaration" is in actual fact a reservation, but whether or not its purpose is to "exclude or modify the legal effects of certain provisions of the treaty in their application to that particular State" (Article 2.d)[5]. Since it is obvious that in some cases the declarations made at the time of signing and/or ratifying Additional Protocol II, despite their title, do exhibit this purpose or objective, I shall, by a study of the declarations made by the states party to that Protocol, advert to instances where some of them may constitute genuine reservations.

Interestingly, the Depositary Government, that is, the Government of Mexico (Article 26, paragraphs 2 and 3), has never to date raised any objection or made any observation on this matter when receiving the signature or instrument of ratification to Additional Protocol II. Nor has the issue been raised by any of the states party to the Treaty or the Protocols, with the result that no debate has ever been held on this matter by the parties themselves to these international instruments.

V.

7. The first country to sign and ratify Additional Protocol II was the United Kingdom of Great Britain and Northern Ireland, which made the following declaration on signing, on December 20 1967:

---

4. See *Las "declaraciones interpretativas" y el Tratado de Tlatelolco,* in *El Tratado de Tlatelolco: algunas consideraciones sobre aspectos especificos;* OPANAL, Mexico, 1976, pp. 41-51.

5. See the study by Ernesto J. Rey Caro: *Las reservas en la Convención de Viena de 1969 sobre el Derecho de los Tratados;* Universidad Nacional de Cordoba, 1977, pp. 6-9, written after my study quoted in note 1, which reaches the same conclusions.

> "On depositing the instruments of ratification, the Government of the United Kingdom declared it to be their understanding that: (a) The reference in Article 3 of the Treaty to "its own legislation" relates only to such legislation as is compatible with the rules of international law and as involves an exercise of sovereignty consistent with those rules, and accordingly that signature or ratification of either Additional Protocol by the Government of the United Kingdom could not be regarded as implying recognition of any legislation which did not, in their view, comply with the relevant rules of international law; (b) Article 18 of the Treaty, when read in conjunction with Articles 1 and 5 thereof, would not permit the Contracting Parties to the Treaty to carry out explosions of nuclear devices for peaceful purposes unless and until advances in technology have made possible the development of devices for such explosions which are not capable of being used for weapons purposes; (c) signature or ratification of either Additional Protocol by the Government of the United Kingdom could not be regarded as affecting in any way the legal status of any territory for the international relations of which they are responsible lying within the limits of the geographical zone established by the Treaty; and (d) the Government of the United Kingdom would, in the event of any act of aggression by a Contracting Party to the Treaty in which that party was supported by a nuclear-weapon State, be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II. I have the honour further to declare that the Government of the United Kingdom are prepared to regard their undertaking under Article 3 of Additional Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties to the Treaty as extending not only to those Parties but also to territories in respect of which the undertaking to apply the statute of denuclearisation, in accordance with Article 1 of Additional Protocol I, becomes effective".

On ratifying the two Additional Protocols, on the 11th of December 1969, the United Kingdom reiterated the declaration it had made on signing and informed the Depositary Government that, as concerns the Additional Protocol I: "(. . .) the ratification includes the Associated States of Antigua, Dominica, Grenada, St. Christopher-Nevis-Anguilla, St. Lucia and St. Vincent, and the territories of the Bahamas, British Honduras, British Virgin Islands, Cayman Islands, Falkland Islands, Montserrat, and the Turks and Caicos Islands". It further stated that:

> "The Government of the United Kingdom have always believed that the establishment of a nuclear-free zone in Latin America would be a most useful step towards non-proliferation and the building up of international confidence. While warmly welcoming the achievement of the States concerned in setting up the organs of the Treaty, Her Majesty's Government note with regret that the Treaty is not yet in force in a number of important States in the area. The Government of the United Kingdom therefore hope that the deposit of their instruments of ratification of the Additional Protocols to the Treaty will serve as an encouragement both to other nuclear-weapon States to recognize the

Treaty and to those Latin American States which have not yet done so, to bring the Treaty into force in their territory".

These declarations by the United Kingdom on signing and ratifying the two Additional Protocols to the Treaty of Tlatelolco are of particular importance: as they were the first to be made they highlighted those points on which nuclear-weapon powers or extra-continental countries with territories administered *de jure* or *de facto* by them, deemed it necessary, worthwhile or appropriate to express their viewpoints, or lay down their principles. To that extent, the British declarations are the source of many viewpoints expressed in subsequent declarations. I will come later to the similarities or discrepancies between later declarations and the United Kingdom declaration. Furthermore, as these declarations were drafted for the simultaneous signing and ratification by Great Britain of Protocols I and II, they refer to both these instruments.

8. The second country to sign Additional Protocol II was the United States, on April 1st 1968, on which occasion the Government of the United States made the following declaration:

"The United States understands that the Treaty and its Protocols have no effect upon the international status of territorial claims.

"The United States takes note of the Preparatory Commission's interpretation of the Treaty, as set forth in the Final Act, that, governed by the principles and rules of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the Treaty, to grant or deny non-Contracting Parties transit and transport privileges.

"As regards the undertaking in Article 3 of Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties, the United States would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the corresponding obligations under Article 1 of the Treaty.

"The United States wishes to point out again the fact that the technology of making nuclear explosive devices for peaceful purposes is indistinguishable from the technology of making nuclear weapons and the fact that nuclear weapons and nuclear explosive devices for peaceful purposes are both capable of releasing nuclear energy in an uncontrolled manner and have the common group of characteristics of large amounts of energy generated instantaneously from a compact source. Therefore we understand the definition contained in Article 5 of the Treaty as necessarily encompassing all nuclear explosive devices. It is our understanding that Articles 1 and 5 restrict accordingly the activities of the Contracting Parties under paragraph 1 of Article 18.

"The United States further notes that paragraph 4 of Article 18 of the Treaty permits, and that United States adherence to Protocol II will not prevent, collaboration by the United States with Contracting Parties for the purpose of carrying out explosions of nuclear devices for peaceful

purposes in a manner consistent with our policy of not contributing to the proliferation of nuclear weapons capabilities. In this connection, the United States reaffirms its willingness to make available nuclear explosion services for peaceful purposes on a non-discriminatory basis under appropriate international arrangements and to join other nuclear-weapon States in a commitment to do so.

"The United States also wishes to state that, although not required by Protocol II, it will act with respect to such territories of Protocol I adherents as are within the geographical area defined in paragraph 2 of Article 4 of the Treaty in the same way as Protocol II requires it to act with respect to the territories of Contracting Parties".

When the United States ratified this Protocol two years later, on May 12, 1971, it made the following declaration:

"The United States Government understands the reference in Article 3 of the Treaty to "its own legislation" to relate only to such legislation as is compatible with the rules of international law and as involves an exercise of sovereignty consistent with those rules, and accordingly that ratification of Additional Protocol II by the United States Government could not be regarded as implying recognition, for the purpose of this Treaty and its Protocols, or for any other purpose, of any legislation which did not, in the view of the United States, comply with the relevant rules of international law.

"The United States Government takes note of the preparatory commission's interpretation of the Treaty, as set forth in the Final Act, that, governed by the principles and rules of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the Treaty, to grant or deny non-Contracting Parties transit and transport privileges.

"As regards the undertaking in Article 3 of Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties, the United States Government would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the Contracting Party's corresponding obligations under Article 1 of the Treaty.

"The United States Government considers that the technology of making nuclear explosive devices for peaceful purposes is indistinguishable from the technology of making nuclear weapons, and that nuclear weapons and nuclear explosive devices for peaceful purposes are both capable of releasing nuclear energy in an uncontrolled manner and have the common group of characteristics of large amounts of energy generated instantaneously from a compact source. Therefore the United States Government understands the definition contained in Article 5 of the Treaty as necessarily encompassing all nuclear explosive devices. It is also understood that Articles 1 and 5 restrict accordingly the activities of the Contracting Parties under Paragraph 1 of Article 18.

"The United States Government understands that paragraph 4 of Article 18 of the Treaty permits, and the United States adherence to Protocol II will not prevent, collaboration by the United States with

Contracting Parties for the purpose of carrying out explosions of nuclear devices for peaceful purposes in a manner consistent with a policy of not contributing to the proliferation of nuclear weapons capabilities. In this connection, the United States Government notes Article 5 of the Treaty on the non-proliferation of nuclear weapons, under which it joined in an undertaking to take appropriate measures to ensure that potential benefits of peaceful applications of nuclear explosions would be made available to non-nuclear weapon States party to the Treaty, and reaffirms its willingness to extend such undertakings, on the same basis, to States precluded by the present Treaty from manufacturing or acquiring any nuclear explosive device.

"The United States Government also declares that, although not required by Protocol II, it will act with respect to such territories of Protocol I adherents as are within the geographical area defined in Paragraph 2 of Article 4 of the Treaty in the same manner as Protocol II requires it to act with respect to the territories of Contracting Parties".[6]

France was the third country to sign this Protocol. It made the following declaration on signing, on 18 July 1973:

"1. The French Government interprets the undertaking in Article 3 of the Protocol as not preventing the full exercise of the right to legitimate self-defense as contained in Article 51 of the Charter of the United Nations.

"2. The French Government takes note of the Preparatory Commission's interpretation of the Treaty, as set forth in the Final Act, that, governed by the rules and principles of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the Treaty, to grant or deny transit or transport privileges.

"3. The French Government considers the reference in Article 3 of the Treaty to "its own legislation" to relate only to such legislation as is compatible with the rules of international law.

"4. The provisions of Articles 1 and 2 of the Protocol apply to the text of the Treaty of Tlatelolco as it existed at the time of the French Government's signing of the Protocol. Consequently, the French Government would not recognize any amendment to that Treaty which entered into force, in accordance with Article 29 of the Treaty, unless it had given its express consent.

"5. In the event of this interpretative declaration by the French Government being challenged, in whole or in part, by one or several Contracting Parties to the Treaty or to Protocol II, these instruments would be deemed to be without effect in the relations between the Republic of France and the challenging State or States."

France ratified on 22 March 1974, and on that occasion reiterated the declaration it had made on signing. It made a further declaration shortly afterwards, on April 15 1974:

"The French Government is prepared to consider that the undertakings entered into under Protocol II to the Treaty on the denuclearization of

6. For an analysis of these declarations, see: Davis R. Robinson, *The Treaty of Tlatelolco and the United States,* in the American Journal of International Law, Vol. 66, No. 2, 1970.

> Latin America apply not only to Parties signatory to the Treaty, but also to the territories for which the commitment to implement the statute of denuclearization, in accordance with Article 11 of Protocol I, has entered into force".[7]

10. The fourth nuclear power to sign and ratify Additional Protocol II was the People's Republic of China. I have already referred to that declaration, which is of a political rather than a legal or interpretative character, in paragraph 5 above.

11. The fifth and final nuclear power to sign and ratify Additional Protocol II was the Soviet Union. On 18 May 1978, on signing, the Soviet Government made the following declaration:

> "As a consistent advocate of the establishment of nuclear-free zones in various parts of the world and desiring to support the efforts of the Latin American States along these lines, the Soviet Government has decided to sign Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America (the Tlatelolco Treaty).
> "In signing Additional Protocol II to the Tlatelolco Treaty, the Government of the Union of Soviet Socialist Republics deems it necessary to state the following:
> "I. The Soviet Union proceeds from the assumption that the effect of Article 1 of the Treaty extends, as specified in Article 5 of the Treaty, to any nuclear explosive device and that, accordingly, the carrying out by any Party to the Treaty of explosions of nuclear devices for peaceful purposes would be a violation of its obligations under Article 1 and would be incompatible with its non-nuclear status. For States parties to the Treaty a solution to the problem of peaceful nuclear explosions can be found in accordance with the provisions of Article 5 of the Treaty on the non-proliferation of nuclear weapons and within the framework of the international procedures of the International Atomic Energy Agency.
> "2. In signing Additional Protocol II, the Soviet Union proceeds from the assumption that at present the zone of application of the Treaty comprises the territories for which it is in force as provided in Article 4(1) of the Treaty. The signing of Additional Protocol II by the Soviet Union does not in any way signify recognition of the possibility of the force of the Treaty as provided in Article 4(2) being extended beyond the territories of the States parties to the Treaty, including air space and territorial waters as defined in accordance with international law.
> "3. With regard to the reference in Article 3 of the Treaty to "its own legislation" in connection with the territorial waters, air space and any other space over which the States parties to the Treaty exercise sovereignty, the signing of Additional Protocol II by the Soviet Union does not signify recognition of their claims to the exercise of sovereignty which are contrary to generally accepted standards of international law.
> "4. The Soviet Union takes note of the interpretation of the Treaty given in the Final Act of the Preparatory Commission for the Denuclearization

7. Héctor Gros Espiell, *La signature du traité de Tlatelolco par la Chine et la France, op cit.*, note 3, above.

of Latin America to the effect that the transport of nuclear weapons by the Parties to the Treaty is covered by the prohibitions envisaged in Article 1 of the Treaty.

"5. The Final Act of the Preparatory Commission for the Denuclearization of Latin America includes an interpretation of the Treaty to the effect that the granting of permission for the transit of nuclear weapons at the request of States not parties to the Treaty lies within the competence of each individual State party to the Treaty. In this connection the Soviet Union reaffirms its position that authorizing the transit of nuclear weapons in any form would be contrary to the objectives of the Treaty, according to which, as specially mentioned in the Preamble, Latin America must be completely free from nuclear weapons, and that it would be incompatible with the non-nuclear status of the States parties to the Treaty and with their obligations as laid down in Article 1 thereof.

"6. Any actions undertaken by a State party to, or States party to, the Tlatelolco Treaty, which are not compatible with their non-nuclear status, and also the commission by one or more States parties to the Treaty of an act of aggression with the support of a State which is in possession of nuclear weapons or together with such a State, will be regarded by the Soviet Union as incompatible with the obligations of those countries under the Treaty. In such cases the Soviet Union reserves the right to reconsider its obligations under Additional Protocol II.

"7. The Soviet Union states that the provisions of the articles of Additional Protocol II are applicable to the text of the Treaty for the Prohibition of Nuclear Weapons in Latin America in the wording of the Treaty at the time of the signing of the Protocol by the Government of the Soviet Union, due account being taken of the position of the Soviet Union as set out in the present statement. In this connection, any amendment to the Treaty entering into force in accordance with the provisions of Articles 29 and 6 of the Treaty without the clearly expressed approval of the Soviet Union shall have no force as far as the Soviet Union is concerned".[8]

The Supreme Soviet reiterated this declaration on 12 December 1978 and also added the following:

"The Soviet Union affirms that the obligations accepted by it in accordance with Protocol II of the Treaty of Tlatelolco also extend to those territories to which denuclearized zone status applies, in accordance with Additional Protocol I of the Treaty.

"Moreover, the Soviet Union reaffirms its position with respect to the granting of independence to colonial countries and peoples, in accordance

---

8. This "declaration" contains practically all the elements or viewpoints which the Soviet Union had expressed in previous years as grounds for preventing it from signing the Treaty of Tlatelolco. In this connection, see: Héctor Gros Espiell, *Comentario sobre los criterios expuestos por la Union Soviética como fundamento de su negativa a firmar el Protocolo II,* in *El Tratado de Tlatelolco: algunas consideraciones sobre aspectos específicos, op cit.* When, following lengthy negotiations, the Soviet Union's decision to sign was announced by President Brezhnev on 18 April 1978, the declaration made was aimed at safeguarding the essence of those principles which had been traditionally supported by the Soviet Union.

with the United Nations Declaration on this question (General Assembly resolution 1415 (XV) of 14 December 1960)."

I have already referred to paragraph 2 of this declaration and I have stressed its essentially political character. Paragraph 1 is comparable to similar texts to be found in the declarations of the United Kingdom, the United States, and in the French supplementary declaration of 15 April 1974. Reference is made to the situation of territories which are within the zone of application of the Treaty, but which are *de jure* or *de facto* under the jurisdiction of extra-continental powers.

VI.

12. The substance and issues contained in or raised by the foregoing declarations can be classified as follows:

[A.] Several documents issued by powers when signing and ratifying Protocol II raise the question of the zone of application of the Treaty, doubtless a subject of the utmost importance to them, since the criteria they put forward will form the basis of the spatial application of the Treaty, as they recognize it. Indeed, the Treaty not only applies to land and air space, but also to the territorial waters of the States party to it, and, upon fulfillment of the requirements of Article 28, paragraph 1, the provisions of Article 4, paragraph 2, mean that it would apply to that overall area, which is considerably greater than the sum total of the territorial area of the States party to the Treaty.

This explains why the issue is of keen interest to non-contracting States. The matter has mainly been discussed from two viewpoints; firstly, that of the concept of territory, defined as follows by Article 3 of the Treaty: "For the purposes of this Treaty, the term "territory" shall include the territorial sea, air space and any other space over which the State exercises sovereignty in accordance with its own legislation".

Great Britain, on signing protocols I and II, had this to say: "(a) The reference in Article 3 of the Treaty to "its own legislation" relates only to such legislation as is compatible with the rules of international law and involves an exercise of sovereignty consistent with those rules, and accordingly that signature or ratification of either Additional Protocol by the Government of the United Kingdom could not be regarded as implying recognition of any legislation which did not, in their view, comply with the relevant rules of international law".

On ratifying Protocol II the United States expressed similar concepts in paragraph I of its declaration: "The United States Government understands the reference in Article 3 of the Treaty to "its own legislation" to relate only to such legislation as is compatible with the rules of international law and as involves an exercise of sovereignty

consistent with those rules, and accordingly that ratification of Additional Protocol II by the United States Government could not be regarded as implying recognition, for the purpose of this Treaty and its Protocols, or for any other purpose, of any legislation which did not, in the view of the United States, comply with the relevant rules of international law".

France did likewise in paragraph 3 of its declaration on signing Protocol II: "The French Government understands the reference in Article 3 of the Treaty to "its own legislation" to relate only to such legislation as is compatible with the rules of international law."

The Soviet Union referred to the same question, in similar terms, in paragraph 3 of its declaration on signing Protocol II: "With regard to the reference in Article 3 of the Treaty to "its own legislation" in connection with the territorial waters, air space and any other space over which the States parties to the treaty exercise sovereignty, the signing of Additional Protocol II by the Soviet Union does not signify recognition of their claims to the exercise of sovereignty which are contrary to generally accepted standards of international law".

A second issue raised in the various declarations relates to the status of the zone defined in paragraph 2 of Article 4, which states:

> "Upon fulfillment of the requirements of Article 28, paragraph 1, the zone of application of this Treaty shall also be that which is situated in the western hemisphere within the following limits (except the continental part of the territory of the United States of America and its territorial waters): starting at a point located at 35° latitude, 75° longitude; from this point directly southward to a point at 30° north latitude, 75° west longitude; from there, directly eastward to a point at 30° north latitude, 50° west longitude; from there, along a loxodromic line to a point at 5° north latitude, 20° west longitude; from there, directly southward to a point at 60° south latitude, 20° west longitude; from there, directly westward to a point at 60° south latitude, 115° west longitude, from there, directly northward to a point at 0° latitude, 115° west longitude; from there, along a loxodromic line to a point at 35° north latitude, 150° west longitude; from there, directly eastward to a point at 35° north latitude, 75° west longitude."

The Soviet declaration, made on signing Protocol II, states in its paragraph 2: "In signing Additional Protocol II, the Soviet Union proceeds from the assumption that at present the zone of application of the Treaty comprises the territories for which it is in force as provided in Article 4(1) of the Treaty. The signing of Additional Protocol II by the Soviet Union does not in any way signify recognition of the possibility of the force of the Treaty as provided in Article 4(2) being extended beyond the territories of the States parties of the Treaty, including air space and territorial waters as defined in accordance with international law."

[B.] Most of the declarations made on signing and/or ratifying Protocol II refer to the question of the transit of nuclear weapons over the territory of the Contracting Parties to the Treaty. Before referring to the content of the various declarations on this matter, to put the issue in perspective, it would be useful to recall that the Treaty does not refer expressly to the question of transit as such, be it to authorise or to deny it. Although this deliberate omission has left the interpretative problem unsettled, it enables one to distinguish, on the one hand, between transit of nuclear weapons of non-Contracting Parties over the territory of Contracting Parties, and, on the other, transit over their own territory of nuclear weapons which, for whatever reason, they have in their possession. Such transport would obviously be a violation of Article 1 of the Treaty, since, if one cannot possess or acquire nuclear weapons by any means whatsoever, nor deploy them directly or indirectly, it follows that one has no right to transport them.

During the final session of the preparatory commission for the denuclearization of Latin America, shortly before the draft of the Treaty was completed, the following declaration was unanimously approved:

> "The Commission deemed it unnecessary to include the term "transport" in Article 1, concerning "Obligations", for the following reasons: 1. If the carrier is one of the Contracting Parties, transport is covered by the prohibitions expressly laid down in the remaining provisions of Article 1 and there is no need to mention it expressly, since the Article prohibits "any form of possession of any nuclear weapons, directly or indirectly, by the Parties themselves, by anyone on their behalf or in any other way".
> 2. If the carrier is a State not a Party to the treaty, transport is identical with "transit" which, in the absence of any provision in the Treaty, must be understood to be governed by the principles and rules of international law; according to these principles and rules it is for the territorial State, in the free exercise of its sovereignty, to grant or deny permission for such transit in each individual case, upon application by the State interested in effecting the transit, unless some other arrangement has been reached in a Treaty between such States". (COPREDAL/ 76, S. 8, UN doc. A/6663).

On signing protocol II on April 1st 1968, the United States declared as follows in paragraph 2 of their statement: "The United States Government takes note of the preparatory commission's interpretation of the Treaty, as set forth in the final act, that, governed by the principles and rules of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the Treaty, to grant or deny non-Contracting Parties transport and transit privileges." The United States reiterated these ideas upon ratifying the Protocol, on May 12 1971.

The Treaty concerning the Permanent Neutrality and the Operation of the Panama Canal, signed on September 7 1977 between the United

States and Panama, accepts this interpretation, since both Parties allow transit through the canal of nuclear propulsion vessels with or without nuclear weapons on board, and also that of conventionally propelled vessels carrying nuclear weapons, in accordance with the terms and within the limits defined in Article 2. In the rest of the territory of the Republic of Panama, including the so-called Canal Zone, recognised by the United States as Panamanian territory in this Treaty, by virtue of the Treaty of Tlatelolco, to which Panama is a Party, none of the activities prohibited by Article 1 of the latter Treaty can be carried out. This is by virtue of paragraph 6 of Article IV of the Agreement for the implementation of Article IV of the Treaty on the Panama Canal.[9] Transit of such weapons is not authorised on Panamanian territory, with the exception of the canal itself, since, by virtue of a previous public declaration, Panama had prohibited it. Mexico has also prohibited the transit of nuclear weapons on its territory.

When the French Government signed Protocol II on 18 July 1973, it stated in paragraph 2 of its declaration that: "The French Government takes note of the preparatory commission's interpretation of the Treaty, as set forth in the final act, that, governed by the principles and rules of international law, each of the Contracting Parties retains exclusive power and legal competence, unaffected by the terms of the Treaty, to grant or deny transit and transport privileges".

When the Soviet Union signed on 18 May 1978, it stated in paragraphs 4 and 5 of its declaration:

> "The Soviet Union takes note of the interpretation of the Treaty given in the final act of the preparatory commission for the denuclearization of Latin America to the effect that the transport of nuclear weapons by the Parties to the Treaty is covered by the prohibitions envisaged in Article 1 of the Treaty.
>
> "The final act of the preparatory commission for the denuclearization of Latin America includes an interpretation of the Treaty to the effect that the granting of permission for the transit of nuclear weapons at the request of States not Parties to the Treaty lies within the competence of each individual State Party to the Treaty. In this connection the Soviet Union reaffirms its position that authorising the transit of nuclear weapons in any form would be contrary to the objectives of the Treaty, according to which, as specially mentioned in the Preamble, Latin America must be completely free from nuclear weapons, and that it would be incompatible with the non-nuclear status of the States Parties to the Treaty and with their obligations as laid down in Article 1 thereof".

---

9. See: Héctor Gros Espiell; *Los Tratados sobre el Canal de Panamá y la Zona Libre de Armas Nucleares en la América latina,* in Cuadernos de Derecho Publico, No. 4, Universidad de los Andes, Venezuela; pp. 174 and 183.

Paragraph 4 of the Soviet declaration refers not to transit but to transport, as defined earlier in this article. As for paragraph 5, the interpretation given by the Soviet Union is diametrically opposed to the one given by the United States and France. Despite this radical difference in interpretation regarding the legal possibility or impossibility of non-Contracting Parties to transport nuclear weapons on the territory of Contracting Parties, the Depository Government, on receiving these documents with their conflicting interpretations, did not react, nor did any of the Contracting Parties when they received the text of these declarations. The interpretative discrepancy between the United States and France, on the one hand, and the USSR on the other, did not give rise to any controversy at the time. Should any formal controversy arise concerning the interpretation of the Treaty, Article 24 might be brought into play, as it states that any question or dispute relating to the interpretation of the Treaty which has not been settled may be referred to the International Court of Justice, with the prior consent of the parties to the controversy. It is noteworthy that although China made no interpretative declaration on this matter, it pointed out that it should be required that the undertaking to "prohibit the passage of all nuclear weapons carrying means over the territory, the territorial waters, and the air space of Latin America" should be respected and fulfilled.

[C.] Several of the documents also refer to the question of nuclear explosions for peaceful purposes.

The United Kingdom, in its declaration on signing the two Protocols, reiterated on ratification, stated the following: "(b) Article 18 of the Treaty, when read in conjunction with Articles 1 and 5 thereof, would not permit the Contracting Parties to the Treaty to carry out explosions of nuclear devices for peaceful purposes unless and until advances in technology have made possible the development of devices for such explosions which are not capable of being used for weapons purposes".

The argument expressed by the United States is similar, albeit fuller, as given in its declaration upon signing Additional Protocol II: "The United States Government considers that the technology of making nuclear explosive devices for peaceful purposes is indistinguishable from the technology of making nuclear weapons, and that nuclear weapons and nuclear explosive devices for peaceful purposes are both capable of releasing nuclear energy in an uncontrolled manner and have the common group of characteristics of large amounts of energy generated instantaneously from a compact source. Therefore the United States Government understands the definition contained in Article 5 of the Treaty as necessarily encompassing all nuclear explosive devices. It is also understood that Articles 1 and 5 restrict accordingly the activities of the Contracting Parties under Paragraph 1 of Article 18".

The following paragraph adds a concept which is not to be found in the U.K. declaration:

> "The United States Government understands that Paragraph 4 of Article 18 of the Treaty permits, and the United States adherence to Protocol II will not prevent, collaboration by the United States with Contracting Parties for the purpose of carrying out explosions of nuclear devices for peaceful purposes in a manner consistent with a policy of not contributing to the proliferation of nuclear weapons capabilities. In this connection, the United States Government notes Article 5 of the Treaty on the non-proliferation of nuclear weapons, under which it joined in an undertaking to take appropriate measures to ensure that potential benefits of peaceful applications of nuclear explosions would be made available to non-nuclear-weapon States Party to that Treaty, and reaffirms its willingness to extend such an undertaking, on the same basis, to States precluded by the present Treaty from manufacturing or acquiring any nuclear explosive device".

The above was reiterated, unchanged, on ratification. The basic idea expressed in the earlier paragraph was also repeated, although the latter part of it is more precisely worded.

The French declaration made on signing Protocol II makes no reference to this matter.

The Soviet Union, however, on signing, expressed in its first paragraph concepts similar to those found in the United Kingdom and United States declarations:

> "The Soviet Union proceeds from the assumption that the effect of Article 1 of the Treaty extends, as specified in Article 5 of the Treaty, to any nuclear explosive device and that, accordingly, the carrying out by any Party to the Treaty of explosions of nuclear devices for peaceful purposes would be a violation of its obligations under Article 1 and would be incompatible with its non-nuclear status. For States Party to the Treaty a solution to the problem of peaceful nuclear explosions can be found in accordance with the provisions of Article 5 of the Treaty on the Non-Proliferation of Nuclear Weapons and within the framework of the international procedures of the International Atomic Energy Agency".

[D.] With regard to the right to defend oneself against an act of aggression by a Contracting Party to the Treaty with the assistance or support of a nuclear-weapons State, several States made explicit declarations on this matter. In such an event it is taken for granted that should such aggression involve nuclear weapons, self-defense, including recourse to nuclear weapons, would be permissible and that the attacked State would be freed from its obligations under Additional Protocol II.[10]

---

10. Héctor Gros Espiell; *En torno al Tratado de Tlatelolco y la desnuclearización militar de la América Latina;* OPANAL, Mexico, pp. 14-16.

On signing, the United Kingdom stated the following on this issue: "(d) (. . .)the Government of the United Kingdom would, in the event of any act of aggression by a Contracting Party to the Treaty in which that Party was supported by a nuclear-weapon State, be free to reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II".

The United States expressed a similar notion on signing and on ratifying: "As regards the undertaking in Article 3 of Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties, the United States Government would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon State, would be incompatible with the Contracting Party's corresponding obligations under Article 1 of the Treaty".

France declared that: "The French government regards the undertaking in Article 3 of the Protocol as not preventing the full exercise of the right to self-defense, as enshrined in Article 5 of the United Nations Charter".

On signing, the Soviet Union expressed similar views: "Any actions undertaken by a State Party to, or States Parties to, the Tlatelolco Treaty which are not compatible with their non-nuclear status, and also the commission by one or more States Parties to the Treaty of an act of aggression with the support of a State which is in possession of nuclear weapons or together with such a State, will be regarded by the Soviet Union as incompatible with the obligations of those countries under the Treaty. In such cases the Soviet Union reserves the right to reconsider its obligations under Additional Protocol II. The Soviet Union further reserves the right to reconsider its attitude to Additional Protocol II in the event of any actions on the part of other States possessing nuclear weapons which are incompatible with their obligations under the said Protocol".

[E.] Several declarations refer to the possibility of future reforms of the Treaty of Tlatelolco itself and to their likely effects on Parties to the Protocols.

Paragraph 4 of the French declaration, made on signing Protocol II, states that: "The provisions of Articles 1 and 2 of the Protocol shall apply to the text of the Treaty of Tlatelolco as it was at the time of the signing of the Protocol by the French Government. Consequently, any amendment to the Treaty entering into force in accordance with the provisions of Article 29 of the Treaty without the clearly expressed approval of the French Government shall have no force as far as France is concerned".

Paragraph 7 of the Soviet declaration on signing Protocol II states: "The Soviet Government states that the provisions of the articles of Additional Protocol II are applicable to the text of the Treaty for the Prohibition of Nuclear Weapons in Latin America in the wording of the Treaty at the time of the signing of the Protocol by the Government of the Soviet Union, due account being taken of the position of the Soviet Union as set out in the present statement. In this connection, any amendment to the Treaty entering into force in accordance with the provisions of Articles 29 and 6 of the Treaty without the clearly expressed approval of the Soviet Union shall have no force as far as the Soviet Union is concerned".

No reference is made to this question in the declarations by the United States, Great Britain or China.

[F.] When the United Kingdom made a combined declaration on signing both Protocols I and II, it stated its position with regard to the territories in the American area, and although it referred to "signature or ratification of *either* Additional Protocol", its statement is clearly and specifically linked to the likely effects of its accession to Protocol I. Paragraph (c) of its declaration is worded as follows: Signature or ratification of either Additional Protocol by the Government of the United Kingdom could not be regarded as affecting in any way the legal status of any territory for the international relations of which they are responsible lying within the limits of the geographical zone established by the Treaty".

[G.] Several declarations dealt with obligations with regard to territories situated within the zone of application of the Treaty, which, although not belonging to Contracting Parties to the Treaty, are Territories administered *de jure* or *de facto* by States Party to Additional Protocol I.

By direct application of the Treaty, such territories would not be covered by the guarantees which stem from the obligations incumbent on States Party to Protocol II. Indeed, the obligations of States Party to Protocol II refer *expressis verbis* only to States Party to the Treaty itself. That is why the United States, France, Great Britain and the Soviet Union declared that the obligations entered into by themselves, as parties to Additional Protocol II, shall apply to those territories possessed by States Party to Additional Protocol I.[11] The final paragraph of the United States declaration made on signing Additional Protocol I states: "That the United States Government also declares that, although not required by

11. Héctor Gros Espiell; *La desnuclearización de la América Latina y los territorios latinoamericanos en posesión de potencias extracontinentales, in: El Tratado de Tlatelolco: algunas consideraciones sobre aspectos específicos;* OPANAL, 1976, pp. 19-31.

Protocol II, it will act with respect to such territories of Protocol I adherents as are within the geographical area defined in paragraph 2 of Article 4 of the Treaty in the same manner as Protocol II requires it to act with respect to the territories of Contracting Parties". This principle was reiterated in the declaration made on ratifying the Protocol.

Great Britain stated the following in the final paragraph of its combined declaration made on signing both Protocols: "I have the honour further to declare that the Government of the United Kingdom are prepared to regard their undertaking under Article 3 of Additional Protocol II not to use or threaten to use nuclear weapons against the Contracting Parties to the Treaty as extending not only to those Parties but also to territories in respect of which the undertaking to apply the statute of denuclearisation, in accordance with Article 1 of Additional Protocol I, becomes effective. That the United Kingdom Government also declares that, although not required by Protocol II, it will act with respect to such territories of Protocol I adherents as are within the geographical area defined in Paragraph 2 of Article 4 of the Treaty in the same manner as Protocol II requires it to act with respect to the territories of Contracting Parties".

France remained silent on this question in its declarations on signing and on ratifying Protocol II. It did make a further declaration on 15 April 1974 which refers to this matter, in terms similar to those of the United States and United Kingdom declarations. The Soviet Union made no allusion to this issue on signing Protocol II, but on ratifying it made a declaration similar to that of the United States, France, and Great Britain.

## VII.

I have already pointed out that reservations are not permitted in the case of Additional Protocol II. I do, however, find elements in some interpretative declarations made at the time of signing and/or ratifying this Protocol that arguably constitute genuine reservations.

The final paragraph of the French declaration states that: "In the event of this interpretative declaration by the French Government being challenged in whole or in part by one or several Contracting Parties to the Treaty or to Protocol II, these instruments would cease to have any effect in the relations between the Republic of France and the challenging State or States". This text, which clearly makes the French declaration into a potential reservation, was not challenged either in whole or in part by any one or several Contracting Parties to the Treaty or to Protocol II.

An analysis of this text leads me to the conclusion that "by virtue of a conflict of interpretation posed by the challenge, the legal effects of the Treaty as applied to France and to the State or States challenging the

declaration made by the former on July 18 1973 are annuled".[12] Thus the French declaration is potentially tantamount to a genuine reservation. The same applied to paragraph 2 of the Soviet declaration, in so far as it does not recognise the zone referred to in Article 4(2) as applying beyond the sum total of the territories of the Contracting Parties. The Depository Government expressed no opinion on the matter on those two occasions.

14. As regards Additional Protocol I, the declarations that have been made to date are all of a legal or interpretative nature, quite unlike the totally political type of declaration made by the People's Republic of China on signing Additional Protocol II.

The "declarations" — so named — made by the United Kingdom and the Netherlands, do not appear, either formally or in name at least, to be reservations. This does not of course preclude them from constituting actual reservations, as defined by the Vienna Convention, by virtue of their content or the purpose pursued. The document submitted by the French Government, on the other hand, when signing Protocol I on 2 March 1979, states that it contains "declarations and reservations", without specifying which paragraphs are declarations and which reservations. I will venture an opinion on that question when I come to examine that text in detail.

VIII.

15. The first country to sign and ratify Additional Protocol I was the United Kingdom, which made declarations on these occasions. The latter are reproduced in paragraph 6 of this paper, above. Following ratification of Additional Protocol I by Great Britain (11 December 1969), some of the territories in the list appended by the British Government, specifying the territories to which Protocol I would apply, gained independence. This was the case with Granada, which signed on 29 April 1975 and ratified on 20 June 1975, and the Bahamas, which signed on 29 November 1976 and ratified on 26 April 1977. They ratified with a waiver of the requirements laid down in Article 28 of the Treaty, and thereby automatically became parties to the Treaty and members of OPANAL.

In fulfillment of Article 25, paragraph 1(b) of the Treaty of Tlatelolco, the General Conference passed resolutions inviting these states to sign and ratify the Treaty, which was seen as one way of fulfilling the admission requirement referred to in the above-mentioned provision (Resolutions 46 (III) and 80 (IV) ). In the case of the Bahamas, once the

---

12. Héctor Gros Espiell; *Las "declaraciones interpretativas" y el Tratado de Tlatelolco,* op cit, pp. 19-31.

obstacle raised by its initial claim that it considered itself as already bound by the Treaty of Tlatelolco had been overcome, signature took place on 29 November 1976 and ratification (with waiver) on 26 April 1977. The Bahamas had argued its claim on the basis of the applicability of the rule of succession of states in treaty matters, but the principle was rejected.[13] When the Bahamas finally signed, the General Conference invited that state to become a Contracting Party to the Treaty of Tlatelolco (Resolution 80, c (IV) ).

16. The second country to sign and ratify Additional Protocol I was the Netherlands, which made the following declaration on signing (15 March 1968): "No provision of the Additional Protocol I shall be interpreted as prejudicing the position of the Kingdom of the Netherlands as regards its recognition or non-recognition of the rights of or claims to sovereignty of the Parties to the Treaty, or of the grounds on which such claims are made. No provision of the Protocol shall be interpreted as implying that, with respect to the carrying out of nuclear explosions for peaceful purposes on the territory of Surinam and the Netherlands Antilles, other rules apply than those operative for the Parties to the Treaty". This declaration was repeated on ratifying Protocol I on 26 July 1971.

Surinam, which had belonged to the Netherlands, became an independent state on 25 November 1975. It signed the Treaty on 13 February 1976 and ratified it with a waiver of the Article 28 requirements on 10 June 1977. The General Conference had invited Surinam to become a Party to the Treaty in its resolution 86 (IV).

17. The United States was the third country to sign Additional Protocol I. This signature was the fruit of long and complex negotiations which had been resumed under the impetus of the Government of President Carter[14]. No declaration was made at the time of signing. The Senate was requested to ratify in May 1978. The instrument of ratification was deposited on 23 November 1981, following approval by the Senate given on 13 November 1981. Ratification by the United States was made subject to the following "understandings":

---

13. Héctor Gros Espiell; *La desnuclearización militar de la América Latina y la sucesión de Estados en materia de tratados;* in: *El Tratado de Tlatelolco: algunas consideraciones sobre aspectos específicos;* OPANAL, 1976, pp. 19-31.

14. Héctor Gros Espiell: *USA e denuclearizzazione nell' America Latina* in: Rivista di Studie Politici Internazionali, Anno XLIV, No. 4, Florence, 1977. President Carter's support for the Treaty of Tlatelolco was one of the fundamental points of his foreign policy; see the message by the Government of the United States on the tenth anniversary of the Treaty of Tlatelolco, 14 February 1977, and the speech delivered by President Carter to the O.A.S., on 14 April 1977, as well as the speech by the United States observer to the General Conference of OPANAL, April 1977, and the article by President Carter: *Las relaciones interamericanas: los desafíos que enfrentamos* (Selecciones del Reader's Digest, February 1979, pp. 1-3).

"1) That the provisions of the Treaty made applicable by this Additional Protocol do not affect the exclusive power and legal competence under international law of a State adhering to this Protocol to grant or deny transit and transport privileges to its own or any other vessels or aircraft irrespective of cargo or armaments.
"2) That the provisions of the Treaty made applicable by this Additional Protocol do not affect rights under international law of a State adhering to this Protocol regarding the exercise of the freedom of the seas, or regarding passage through or over waters subject to the sovereignty of a State.
"3) That the understandings and declarations attached by the United States to its ratification of Additional Protocol II apply also to its ratification of Additional Protocol I".

As a consequence of the United States being party to Protocol I, the statute of denuclearization of the Treaty of Tlatelolco applies to Guantánamo, the Virgin Islands, and Puerto Rico.

The so-called Canal Zone, Panamanian territory which will gradually be transferred to the jurisdiction of that country, has been denuclearized, legally speaking, since the entry into force of the Panama Canal treaty of 1977 (Agreement for the implementation of Article IV of the Panama Canal Treaty, Article IV, paragraph 6), although both OPANAL and the Government of Panama had understood this to be the case earlier, on the basis of the very statute of the zone and the fact that Panama is a party to the Treaty of Tlatelolco[15].

18. France signed on March 1st 1979. This signature, which was also the fruit of difficult and protracted negotiations, was announced by President Giscard d'Estaing in his address to the special session of the General Assembly of the United Nations on disarmament, in May 1978. The signing, by Foreign Minister Jean François-Poncet, took place in Mexico during the visit there of President Giscard d'Estaing.[16]

On signing, the French Government submitted their "reservations and interpretative declarations", which stated the following:

"The French Government, because of the fact that the French territories situated within the zone of application of the Treaty for the Prohibition of Nuclear Weapons in Latin America are an integral part of the French Republic, can only sign Additional Protocol 1 to that Treaty in its capacity as power with *de jure* responsibility for those territories. It expects the Governments party to the Treaty, within the Organisation for the Prohibition of Nuclear Weapons in Latin America, to take note of the fact that it is entering into obligations under that Protocol only in that capacity.

15. Héctor Gros Espiell; *Los Tratados sobre el Canal de Panamá y la Zona Libre de Armas Nucleares en la América Latina,* in Cuadernos de Derecho Publico, No. 4, Universidad de los Andes, Mérida, 1978.
16. Héctor Gros Espiell: *Francia y los estados Unidos y el Protocolo I,* in *El Tratado de Tlatelolco, algunas consideraciones sobre aspectos específicos,* OPANAL, Mexico, 1976, pp. 14-15.

"The French Government, on signing Additional Protocol I to the Treaty for the Prohibition of Nuclear Weapons in Latin America, and subject to the fulfillment by France of the necessary constitutional requirements for its entry into force, expresses the following reservations and makes the following interpretative declarations:
"1. No provision of the said Protocol or of the Articles of the Treaty can affect the full exercise of the right to legitimate self-defence as stated in Article 51 of the Charter of the United Nations.
"2. In accordance with Article 4, paragraph 1 of the Treaty, the zone of application covered by the undertakings entered into under the Treaty is made up of the whole of the territories defined in Article 3 of the Treaty, it being understood that the legislation referred to in the said Article must comply with international law. The French Government holds that any more extensive zone, especially that which is envisaged in Article 4, paragraph 2 of the Treaty, cannot be considered to be established in accordance with international law and consequently it cannot accept that the Treaty apply to it.
"3. The French Government does not accept that the obligations under Protocol I, which refer to Articles 1 and 13 of the Treaty, apply to the transit, over the territories of the French Republic situated within the zone of the Treaty, and en route for other territories of the French Republic, of devices as defined in Article 5 of the treaty.
"4. The French Government, in subscribing, by virtue of its acceptance of Article I of Protocol I, to the obligations defined in Article 1 of the Treaty, considers that these obligations shall apply exclusively to the activities listed in that Article which are undertaken in the French territories in respect of which Protocol I was signed. It cannot accept that such obligations be interpreted as restricting in any way participation by the populations of these territories in such activities outside the zone, or their participation in the national defence effort of the French Republic.
"5. The provisions of Articles 1 and 2 of the Protocol apply to the Treaty in the wording at the time of the French Government's signing of the Protocol. Consequently, no amendment to the Treaty, entering into force in accordance with Article 28, will apply to France without the clearly expressed consent of the latter".

## IX.

The issues addressed in these declarations or reservations by States which have signed and/or ratified Additional Protocol I are the following:

A. The unalterable status of territories belonging *de jure* or *de facto* to States party to Protocol I is raised in the United Kingdom declaration made on signing, which I have already transcribed, and in the Netherlands declaration, which reads as follows: "No provisions of the Additional Protocol I shall be interpreted as prejudicing the position of the Kingdom of the Netherlands as regards its recognition or non-recognition of the rights of or claims to sovereignty of the Parties to the Treaty, or of the grounds on which such claims are made".

B. On ratifying, the United Kingdom listed those territories to which the conditions of Additional Protocol I would apply.

C. On signing Additional Protocol I, the Netherlands referred to the question of nuclear explosions for peaceful purposes: "No provision of the Protocol shall be interpreted as implying that, with respect to the carrying out of nuclear explosions for peaceful purposes on the territory of Surinam and the Netherlands Antilles, other rules apply than those operative for the Parties to the Treaty".

D. As for the *de jure* or *de facto* situation of the administered territories, the French Government stated the following on signing Protocol I: "The French Government, because of the fact that the French territories situated within the zone of application of the Treaty for the Prohibition of Nuclear Weapons in Latin America are an integral part of the French Republic, can only sign Additional Protocol I to that treaty in its capacity as power with *de jure* responsibility for those territories. It expects the Governments signatory to the Treaty, within the Organisation for the Prohibition of Nuclear Weapons in Latin America, to take note of the fact that it is entering into the obligations under the Protocol only in that capacity".

In order that the Contracting Parties to the Treaty should take special note of this point contained in the French declaration, the General Secretary reproduced this paragraph in his report to the Sixth Ordinary Part-Session of the General Conference of OPANAL (Doc. CG/182, para. 22). It should be pointed out, however, that in accordance with the conclusions of the *travaux préparatoires* for Additional Protocol I, for Latin American countries "the fact of a Party to Additional Protocol I exercising authority, *de jure* or *de facto,* over a given territory in no way prejudices the political status of that territory".[17] Although at the present time there has been no Latin American claim with regard to those territories, nor any internationally recognised appeal for the right to self-determination by the peoples inhabiting these territories, the States Party to the Treaty of Tlatelolco have not accepted, as a consequence of the French declaration, that the jurisdiction exercised by France over these territories is necessarily exercised *de jure.*

E. On the question of the right to self-defence, the French Government made a declaration expressly concerning that matter, which is similar to the one made on signing Additional Protocol I.

F. With regard to the zone of application of the Treaty, The French Government stated the following on signing Protocol I: "In accordance with Article 4, paragraph 1 of the Treaty, the zone of application of the

17. Héctor Gros Espiell, note on the *traveaux préparatoires* of Article 1, Additional Protocol I.

undertakings entered into under the said Treaty is made up of the whole of the territories defined in Article 3 of the Treaty, it being understood that the legislation referred to in the said Article must comply with the rules of international law. The signing of Protocol I by the French Republic does not in any way signify recognition of the possibility of the force of the Treaty as provided in Article 4 (2) being extended beyond the territories of the States parties to the Treaty".

The first sentence is similar to paragraph 3 of the declaration made on signing Protocol II. The second sentence, however, is new, and is comparable to paragraph 2 of the Soviet declaration on signing Additional Protocol II. For the reasons that I have already outlined, it constitutes an actual reservation.

G. On the transit question, the French declaration on signing Protocol I goes beyond that made on signing Protocol II, and states in paragraph 3: "The French Government does not accept that the obligations under Protocol I, which refer to Articles 1 and 13 of the Treaty, apply to the passage, over the territories of the French Republic situated within the zone of the Treaty, and en route for other territories of the French Republic, of devices defined in Article 5 of the Treaty". This text, not so much because it affirms the right of transit over its territories to other territories of the French republic, but rather because it excludes the application of Article 13 (concerning the safeguards agreement which must be negotiated with the IAEA), and Article 1 (which lists the prohibitions imposed by the Treaty), poses some serious problems.

In essence, it would appear to be a reservation, since, in the case of the transit under consideration, it excludes the application of two Articles of the Treaty (1 and 13) to which Protocol I expressly refers, with respect to the French territories situated within the zone of the Treaty. If transit of nuclear weapons is to be allowed in the manner indicated in Paragraph 3 of the French declaration, this is tantamount to non-acceptance of the prohibitions in Article I. The declaration also rules out the possibility of control derived from the safeguard agreement reached in accordance with Article 13. This text should therefore be considered to be a reservation which may even affect the very purpose and object of the Treaty, namely, to prohibit the activities referred to in Article 1, in the territories to which that provision applies. This reservation has, however, not yet been challenged, although arguably the Article 20 principle of the Vienna Convention on the Law of Treaties applies.

H. The French Government also made a very special declaration which, in my opinion, poses no problem with regard to the application of the Treaty, from the viewpoint of the interests of the Contracting Parties and their own objectives. Paragraph 4 states that: "The French

Government, in subscribing, by virtue of its acceptance of Article I of Protocol I, to the obligations defined in Article I of the treaty, considers that these obligations shall apply exclusively to the activities listed in that Article which are undertaken in the French territories in respect of which Protocol I was signed. It cannot accept that such obligations be interpreted as restricting in any way participation by the populations of these territories in such activities outside the zone, or their participation in the national defense effort of the French Republic".

I. Finally, as regards possible future reforms of the Treaty, the French Government made a declaration in paragraph 5 of its document, identical to that which it made in paragraph 4 of the document submitted on signing Additional Protocol II.

X.

20. This paper did not set out to give an exhaustive legal or political analysis of the problems raised by the declarations made on signing or ratifying Additional Protocols I and II to the Treaty of Tlatelolco. I have confined myself to underlining those legal problems on which I have expressed a view in earlier studies on the subject. My purpose has been to publicize texts which, generally speaking, are not very well known, texts drafted by the powers bound by the treaty of Tlatelolco as a consequence of their signing and/or ratifying Additional Protocols I and II, along with some commentaries which aim to highlight the legal and political issues raised by them.

21. These texts clearly demonstrate how, by committing themselves to the Treaty of Tlatelolco — for reasons linked to the political necessity or expediency of supporting the laudabled enterprise of regional nuclear disarmament, and, incidentally, making a politically valuable gesture towards the Latin American countries — the Parties involved tried to ensure that this did not essentially affect their strategic military balance nor the fundamental aspects of their policies with regard to the arms race. The States Party to Protocols I and II therefore wished to safeguard their own viewpoints and principles, on the basis of their own very special interests, concerning such fundmental issues as, for example, the right to self-defence in the event of nuclear attack against their extra-continental territories or those situated in Latin America, in relation to the obligations which arise from the Treaty of Tlatelolco, as well as the issue of the transport of nuclear weapons in the Latin American denuclearized zone set up by the Treaty and the possible extension of that zone, especially with regard to territorial waters and air space, to mention but a few of the problems addressed.

The differing opinions expressed by the Soviet Union and the United States on the transit of nuclear weapons in the territory of the denuclearized zone, and the convergent positions of France and the Soviet Union on the question of the nature of the territorial waters covered by Article 4(2) of the Treaty, are eloquent examples of the political and strategic approach reflected in the various declarations.

One of the viewpoints adopted — by the United States — is based on the fact that it adjoins the territory of Latin America and therefore needed to ensure possible transit of its nuclear weapons on and across the Continent. The Soviet Union's viewpoint is based on the fact that its territory is partly situated in Europe and partly in Asia, and that the USSR does not have island possessions. Other reasons are that America is a territorial mass which is separated from Europe and Asia by the Atlantic and Pacific Oceans, with the consequent need to safeguard, as far as possible, the freedom of action of its nuclear weapon-carrying vessels over these immense stretches of sea and air space, while remaining opposed to the transport of nuclear weapons on or over the territory of Latin America. Given the position of their home territories, their island possessions, and their relation to the Superpowers, it is easy to understand the stances taken by Great Britain and France, expecially as regards the territorial waters covered by the Latin American zone and, in the case of France, the transit of nuclear weapons.

The cases of the Netherlands and that of China are somewhat different. The Netherlands is the only extra-continental power with territories under its jurisdiction in America which does not possess nuclear weapons and which had no colonies or territories under its administration in the Pacific Ocean. This explains the brevity and noncommittal character of its declaration on signing Protocol I. China, with no territories in Latin America, and with the largest part of its home territory confined to one continent, had no difficulty in committing itself to Additional Protocol II, while fully respecting its own principles and the demands of the Treaty. It therefore confined itself to a political statement which summed up the main guidelines of its foreign policy.

These are examples of particular interest, revealing as they do the many conflicting opinions, as well as the occasionally concurring viewpoints, of the States Party to Protocols I and II. Underlying these differences or similarities of position are different geopolitical, political and strategic imperatives. In the documents to which I have referred, these States have attempted to properly safeguard and protect their own interests — translated into legal terms — in such a way that the obligations undertaken by them under the Treaty of Tlatelolco should not

adversely affect the balance of power, nor their overall strategy with regard to major military issues connected to nuclear disarmament, and, more particularly, regional nuclear disarmament.

Montevideo, February 1989.