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NEGATIVE SECURITY ASSURANCES IN THE PROTOCOLS ADDITIONAL TO THE TREATIES ESTABLISHING NUCLEAR WEAPON- FREE ZONES

Marco Roscini¹

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1. Introduction

Negative security assurances are those guarantees by the nuclear weapon states not to use or threaten to use nuclear weapons against the states that have renounced them. During the negotiations of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), the non-nuclear weapon states sought for security assurances from the five nuclear weapon states in return for their renunciation to the military uses of nuclear energy. The nuclear weapon states did however not accept the inclusion of negative security assurances in the final text of the NPT for fear that their nuclear doctrines and alliances could be undermined and limited themselves to subsequently make unilateral statements in 1978 and 1995.² The five treaties establishing nuclear weapon-free zones (NWFZs) in inhabited regions, on the contrary, include, inter alia, protocols by which the nuclear powers provide legally binding negative security assurances to the zonal states.³ Indeed, Paragraph II of Resolution 3472 (XXX) B of 11 December 1975, in which the General Assembly adopted its definition of NWFZ, declares that 'all nuclear-weapon States shall undertake or reaffirm, in a solemn international instrument having full legally binding force, such as a treaty, a convention or a protocol, the following obligations: (a) To respect in all its parts the statute of total absence of nuclear weapons defined in the treaty or convention which serves as the constitutive instrument of the zone; (b) To refrain from contributing in any way to the performance in the territories forming part of the zone of acts which involve a violation of the aforesaid treaty or convention; (c) To refrain from using or threatening to use nuclear weapons against the States included in the zone'. Paragraph

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² In these statements, China was the only nuclear weapon state to offer unconditional assurances. In Res. 984 (1995), the UN Security Council took note 'with appreciation' of the 1995 statements, which superseded those given in 1978. See Roscini, 2003, 301-310.

³ Five treaties establishing NWFZs have been concluded so far: the 1967 Treaty of Tlatelolco with regard to Latin America and the Caribbean, the 1985 Treaty of Rarotonga on the South Pacific Ocean, the 1995 Bangkok Treaty with respect to South-East Asia, the 1996 Pelindaba Treaty in relation to Africa and the 2006 Semipalatinsk Treaty on Central Asia. All five treaties have now entered into force.

62 of the Final Document of the 1978 Tenth Special Session of the UN General Assembly, the first special session on disarmament, also states that, with respect to NWFZs, ‘the nuclear-weapon States [...] are called upon to give undertakings, the modalities of which are to be negotiated with the competent authority of each zone, in particular: a) To respect strictly the status of the nuclear-weapon-free zone; b) To refrain from the use or threat of use of nuclear weapons against the States of the zone’.

In the negotiations that would lead to the establishment of the first NWFZ, it was discussed how to formalise these assurances. The *Comisión Preparatoria para la Denuclearización de América Latina* (COPREDAL) supported the adoption of a General Assembly resolution endorsing the creation of the zone and binding on all states that had voted in favour. The United States, however, doubted that General Assembly resolutions could ever acquire binding character and supported the adoption of a protocol to be attached to the main treaty, where the obligations of the nuclear weapon states would be spelt out (Fischer, 1967, 88). The latter option eventually prevailed and was followed by the drafters of the subsequent treaties as well. Negative security assurances are thus provided in Protocol II of the Treaty of Tlatelolco, Protocol 2 of the Treaty of Rarotonga, Protocol I of the Pelindaba Treaty and in the Protocols attached to the Treaties of Bangkok and Semipalatinsk. The importance and legally binding character of these assurances have been recognised by the International Court of Justice (ICJ) in its 1996 Advisory Opinion on the *legality of the threat and use of nuclear weapons*, where it held that a threat or use of nuclear weapons should be compatible ‘with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons’ (*ICJ Reports*, 1996, 266): ‘specific obligations under treaties’ can be interpreted as a reference to the protocols attached to the NWFZ treaties, while ‘other undertakings’ refers to the 1995 unilateral statements.

In the following section, the assurances contained in the NWFZ protocols will be discussed, highlighting, where appropriate, the differences among them.⁴ The statements that the nuclear weapon states have formulated on signing and/or ratifying the protocols will then be analysed in Section 3 and their nature examined in Section 4, in order to verify the extent to which they condition the commitments by the

⁴ In Protocol 3 of the Treaty of Rarotonga and Protocol II of the Pelindaba Treaty, the nuclear weapon states have also committed not to test nuclear explosive devices within the NWFZs. These no-test assurances are however outside the scope of the present study.

nuclear weapon states under the protocols. Finally, some considerations on the lights and shadows of negative security assurances in the context of NWFZs will be made.

2. The Security Assurances Contained in the NWFZ Protocols

Unlike the negative security assurances unilaterally given by the nuclear weapon states at the global level to the non-nuclear weapon states parties to the NPT (with the exception of that of China), the protocols additional to the NWFZ treaties provide not only for a commitment not to use nuclear weapons or nuclear explosive devices,⁵ but also not to threaten their use (Article 3 of Protocol II of the Treaty of Tlatelolco, Article 1 of Protocol 2 of the Treaty of Rarotonga, Article 1 of Protocol I of the Pelindaba Treaty, Article 2 of the Bangkok Protocol and Article 1 of the Semipalatinsk Protocol). In the protocols attached to the Treaties of Rarotonga, Pelindaba, Bangkok and Semipalatinsk, this two-pronged commitment is undertaken by the five nuclear weapon states under the NPT, i.e. China, France, Russian Federation, United Kingdom and United States. Protocol II of the Treaty of Tlatelolco, on the contrary, does not expressly refer to them, which would allow de facto nuclear powers like India and Pakistan to accede the protocol (Gros Espiell, 1973, 324).

The beneficiaries of the negative security assurances are those states that, by ratifying the relevant regional treaty, have become part of a NWFZ. The protocols attached to the Treaties of Rarotonga and Pelindaba expressly extend the assurances to the territories situated within the zone but for which an external state is internationally responsible. Such extension does not appear in the protocols attached to the Treaties of Bangkok and Semipalatinsk, as no territory within these zones is controlled by external states. In the case of Latin America and the Caribbean, where United States, United Kingdom, France and the Netherlands still control territories, the lacuna has been filled by the statements issued by the nuclear powers on signing and/or ratifying Protocol II of the Treaty of Tlatelolco, by which they have accepted to extend the assurances to the dependent territories situated within the zone.⁶ These amount to unilateral commitments by which the author ‘purports to undertake obligations going beyond those imposed on it by the treaty’.⁷ If the requirements

⁵ The broader notion of ‘nuclear explosive device’ is used in the Rarotonga, Pelindaba and Semipalatinsk Protocols. On its meaning, see Roscini, 2003, 37-42.

⁶ Read the statements at <<http://unhq-appspub-01.un.org/UNODA/TreatyStatus.nsf>>.

⁷ International Law Commission (ILC) guideline 1.4.1. In Res. 48/31 of 9 December 1993, the UN General Assembly requested the ILC to study the topic of reservations to treaties. The purpose is not to draft a treaty, but rather to prepare guidelines with commentaries and model clauses that states and international organisations can use whenever they intend to append a reservation. The text of the

indicated by the ICJ in its 1974 judgment on the *Nuclear Tests* case are met,⁸ they become binding on those who make them.

The Bangkok Protocol is peculiar in that it prohibits the threat and use of nuclear weapons by the nuclear weapon states not only against the states parties to the treaty, but also ‘within the Southeast Asia Nuclear Weapon-Free Zone’. This entails a commitment by the nuclear weapon states not to launch missiles with a nuclear warhead from ships, submarines or aircraft located within the zone even if the target is situated outside, and also not to use nuclear weapons against means of transport (even if they belong to another nuclear weapon state) situated in the internal waters, territorial sea and, most importantly, exclusive economic zone of the states parties to the Bangkok Treaty.⁹ A regional state could also benefit from the negative security assurances if its territory is included in the geographical scope of application of the Bangkok Treaty, regardless of whether or not it has ratified or withdrawn from it (Biad, 1997, 232). For these reasons, the United States has so far refused to sign the protocol (Yakemtchouk, 1997, 55). A similar position has been taken by France (Bourgois, 1997, 126).

It is not clear whether the negative security assurances provided in the protocols also apply to those denuclearised states that possess other weapons of mass destruction, i.e. chemical and biological weapons: the fact that the undertakings do not apply ‘under any circumstances’, as for instance in Article I (1) of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, appears to support a negative answer. With regard to Protocol I of the Pelindaba Treaty, the Special Assistant for Arms Control to the US President expressly declared that ‘Protocol I will not limit options available to the United States in response to an attack by an African Nuclear Weapons-Free Zone party using weapons of mass destruction’ (quoted in Rosen, 1997-1998, 51-52). United Kingdom, United States and France all oppose a no-first use policy and admit the use of nuclear weapons in belligerent reprisal against those

guidelines provisionally adopted by the Commission can be read in Report of the International Law Commission on the work of its sixty-first session (4 May – 5 June and 6 July – 7 August 2009), UN Doc. A/64/10, Supplement No. 10, 191 et seq.

⁸ According to the ICJ, ‘[i]t is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. [...] When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations is binding’ (*ICJ Reports*, 1974, 267).

⁹ According to Art. 1 of the Bangkok Treaty, the South-East Asia NWFZ also includes the continental shelves and exclusive economic zones of the states parties.

states using chemical or biological weapons (Yost, 2006, 702).¹⁰ The French nuclear deterrence doctrine announced by former President Chirac in 2006, for instance, threatens nuclear retaliation against those ‘who would envisage using, in one way or another, weapons of mass destruction’ (quoted in Yost, 2006, 702). The 2010 US Nuclear Posture Review, as to it, on the one hand declares that states benefiting from US revised negative security assurances and using chemical or biological weapons against the United States and its allies and partners would face a ‘devastating *conventional* military response’, but on the other it emphasises that ‘the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapon threat and the U.S. capacities to counter that threat’ (US Nuclear Posture Review, 2010, 16; emphasis added).

Consistently with the above mentioned General Assembly Resolution 3472, the NWFZ protocols contain not only non-use commitments, but also other types of assurances. By ratifying the Bangkok Protocol, the nuclear weapon states undertake ‘not to contribute to any act which constitutes a violation of the Treaty or its Protocol by States Parties to them’ (Article 1). The Rarotonga and Semipalatinsk Protocols use similar language (Article 2), while the Pelindaba and Tlatelolco Protocols do not specify that the violations must be committed by the other states parties (Article 2). However, this does not seem to have practical consequences, as it is only the parties to the relevant instrument that could ‘violate’ it according to the principle *pacta tertiis nec nocent nec prosunt* codified in Article 34 of the 1969 Vienna Convention on the Law of Treaties. To be on the safe side, though, on signing and ratifying the Pelindaba Protocols, the United Kingdom made clear that the commitment is to be interpreted as meaning that ‘each party undertakes not to contribute to any act of a party to the Treaty which constitutes a violation of the Treaty, or to any act of another party to a Protocol which constitute a violation of that Protocol’.¹¹

Finally, the protocols attached to the Treaties of Tlatelolco and Bangkok also contain ‘status assurances’ (Rosas, 1982, 199), i.e. a commitment to respect the denuclearisation of the concerned region (Article 1 in both protocols). This amounts to an obligation not to introduce nuclear weapons in the NWFZ. According to China and the Soviet Union, though, this undertaking also entails the prohibition of transit and overflight for ships and aircraft with nuclear weapons on board.¹²

¹⁰ In his Dissenting Opinion on the *legality of the threat and use of nuclear weapons*, Judge Schwebel recalled that ‘[a]s long as [...] “rogue states” menace the world (whether they are or are not parties to the NPT), it would be imprudent to set policy on the basis that the threat or use of nuclear weapons is unlawful “in any circumstance”. Indeed, it may not only be the rogue States but criminals or fanatics whose threats or acts of terrorism conceivably may require a nuclear deterrent or response’ (*ICJ Reports*, 1996, 329).

¹¹ See <<http://unhq-appspub-01.un.org/UNODA/TreatyStatus.nsf>>.

¹² See below, Section 4.

3. The Statements Formulated by the Nuclear Weapon States on Signing and/or Ratifying the NWFZ Protocols

To protect their security interests, on signing and/or ratifying the protocols additional to the Treaties of Tlatelolco, Ratocongga and Pelindaba the nuclear weapon states have formulated certain statements the nature of which is unclear. Some parts of these statements concern the negative security assurances.¹³ On signing Protocol II of the Treaty of Tlatelolco, the United States declared that, with regard to its commitment not to use or threaten to use nuclear weapons against the zonal states, it ‘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’.¹⁴ ‘Assistance’ is however not defined, so one can wonder whether it covers only direct participation in the armed attack or also, say, logistical or financial support. Furthermore, in the absence of any specification, it is irrelevant whether the nuclear weapon state assisting the state party to the Treaty of Tlatelolco in carrying out the armed attack actually uses nuclear weapons or not: the point can however be made that the (military) assistance of a nuclear weapon state always implies the threat and the potential use of nuclear weapons. The statement issued by the United Kingdom on signing Protocol II to the Treaty of Tlatelolco and confirmed at the moment of ratification is very similar to that of the United States. The only significant difference is the reference not to ‘armed attack’ but to ‘act of aggression’, which is a broader concept: the UK assurance is thus narrower than the American one. It is not clear whether a case of ‘indirect’ aggression carried out by a state party to the Treaty of Tlatelolco with the support of a nuclear weapon state would also allow the United Kingdom to reconsider its undertaking.¹⁵ The Soviet Union, as to it, formulated a declaration on signing Protocol II invoking

¹³ The statements can be read in the on line treaty database of the UN Office for Disarmament Affairs, <<http://unhq-appspub-01.un.org/UNODA/TreatyStatus.nsf>>. See also *SIPRI Yearbook*, 2010, 495-497, 499, 500-501. This study will only examine those parts of the statements related to the negative security assurances.

¹⁴ The statement was confirmed on ratifying the protocol. According to a commentator, ‘the purpose of the US declaration is to encompass those hypothetical contingencies in which nuclear weapons are neither acquired by Contracting Parties nor introduced into their territories but in which a nuclear-weapon State assisted a Contracting Party in an armed attack by providing a “nuclear umbrella” or conventional armed support’ (Shaker, 1980, Vol. II, 512). The reasons that persuaded the United States to give negative security assurances to the Latin American states are highlighted by Bunn, 1997, 5.

¹⁵ ‘Indirect’ aggression has been defined in the well-known UN General Assembly’s Definition of Aggression as ‘[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein’ (GA Res. 3314 (XXIX), 14 December 1974, Art. 3 (g)).

the right to review its obligations towards the zonal states in case of: 1) '[a]ny action taken by one or more States parties to the Treaty of Tlatelolco that is incompatible with its non-nuclear status'; 2) 'the commission by one or more States parties to the Treaty of an act of aggression in support of a nuclear-weapon State or jointly with that State'; and 3) 'any action on the part of other nuclear-weapon States' incompatible with their obligations under Protocol II.¹⁶ With regard to (1), the Soviet statement explains that the granting by a denuclearised state of the permission for the transit of nuclear weapons 'in any form' through the zone would be an action incompatible with its denuclearisation obligations under Article 1 of the Treaty of Tlatelolco: this action would thus entitle the Soviet Union (now Russia)¹⁷ to reconsider its commitments.¹⁸ France formulated a declaration at the signature of Protocol II of the Treaty of Tlatelolco stating that the negative security assurances under Article 3 of the Protocol do not prejudice the full exercise of the right of self-defence as provided in Article 51 of the Charter of the United Nations.¹⁹ The French statement should be read as a reaffirmation of the right to use nuclear weapons in self-defence: if interpreted as referring only to conventional weapons, the statement's reference to Article 3 of Protocol II would not make sense. The invocation of the 'full' exercise of the right of self-defence also supports this interpretation. Finally, the Chinese statement issued on signing Protocol II limits itself to reaffirm China's position on nuclear disarmament, its opposition to the NPT and to the Partial Test Ban Treaty (PTBT) and its commitment to 'never use or threaten to use nuclear weapons against non-nuclear Latin American countries and the Latin American nuclear weapon-free zone': China was then the only nuclear weapon state to give an unconditional assurance.

In relation to Protocol 2 of the Treaty of Rarotonga, the United Kingdom declared that the negative security assurances would not apply in the case of 'an invasion or any other attack on the United Kingdom, its dependent territories, its armed forces or other troops, its allies or a State towards which it has a security commitment, carried out or sustained by a party to the Treaty in association or alliance with a nuclear weapon State' or 'if a party to the Treaty is in material breach of its own non-proliferation obligations under the Treaty'.²⁰ 'Invasion' and 'security

¹⁶ The statement was reiterated at the moment of ratification.

¹⁷ As from 24 December 1991, the Russian Federation continues to exercise the rights and honour the commitments arising from treaties concluded by the Soviet Union.

¹⁸ On this point, see below, Section 4.

¹⁹ The statement was reiterated at the moment of ratification.

²⁰ The declaration is modelled on that given to NPT non-nuclear weapon states on 6 April 1995. According to Art. 60 (3) of the 1969 Vienna Convention on the Law of Treaties, a 'material breach' is '(a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty'. The statement does not stipulate who is entitled to determine whether the denuclearised state is in material breach of its obligations.

commitment' are not legal terms of art and have therefore no definition in international law. Furthermore, the difference between 'association' and 'alliance' is unclear. The latter seems to refer to the case where there is a treaty of alliance in force between the denuclearised and the nuclear weapon states, while in the former 'there's no piece of paper' (Bunn, 1997, 15). From a literal interpretation of the statement, however, it seems that the mere existence of a treaty of alliance would not allow the United Kingdom to reconsider its non-use commitment if the other nuclear weapon state did not participate in it. At the moment of the signature of Protocol 2 of the Treaty of Rarotonga, the Soviet Union issued a statement similar to that related to Protocol II of the Treaty of Tlatelolco but with a few differences: the reference to violations of the protocol by the parties to the protocol disappears and a distinction is made between two groups of situations: in case of any action undertaken by a state party to the Treaty of Rarotonga which is not compatible with its 'main' commitments under the treaty and in case of an act of aggression with the support of or jointly with a state in possession of nuclear weapons with the use by such a state of the territory, airspace, territorial sea or archipelagic waters of the treaty parties for calls by nuclear armed ships or aircraft or for transit of nuclear weapons, the Soviet Union would consider itself free from its obligations under Protocol 2, while in case of any other actions by the states parties to the Treaty of Rarotonga incompatible with their non-nuclear status the Soviet Union reserves the right to reconsider its commitments.²¹ The Chinese declaration on signing Protocol 2 of the Treaty of Rarotonga is much more restrictive than that formulated in relation to Protocol II of the Treaty of Tlatelolco, as it states that China reserves the right to reconsider its obligations towards the zonal states if other nuclear weapon states or the contracting parties take any action in gross violation of the treaty or its protocols that changes the nuclear-free status of the zone and endangers China's security. This statement was however not confirmed at the moment of ratification. On signing Protocol 2 of the Treaty of Rarotonga, France made the usual reference to the full exercise of the right of self-defence under Article 51 of the UN Charter and declared that the commitments towards the zonal states were the same as those unilaterally given in 1995 to the NPT non-nuclear weapon states and of which Security Council Resolution 984 (1995) took note. The US government signed Protocol 2 without reservations (Goldblat, 1997, 24).

The statements formulated by United States, United Kingdom, Russian Federation and France on signing Protocol I of the Pelindaba Treaty are modelled on the negative security assurances given at the global level to the NPT non-nuclear

²¹ The statement was not reiterated at the moment of ratification. Among the actions incompatible with the non-nuclear status of the zonal states, the Soviet statement includes the granting of permission for the transit of nuclear explosive devices in any form through the zone and for calls at the ports and airfields within the zone of ships and aircraft with nuclear weapons on board.

weapon states in 1995 and provide that the non-use commitments will not apply in case of an invasion or any other attack against the nuclear weapon states, their territories, armed forces or other troops, their allies, or on a state towards which they have a security commitment, carried out or sustained by a party to the NWFZ treaty in association or alliance with another nuclear weapon state. Consistently with the statement made in relation to Protocol 2 of the Treaty of Rarotonga, however, the United Kingdom added a further case in which it would reconsider its commitments, i.e. when a state party to the treaty is in material breach of its own non-proliferation obligations under the treaty: to benefit from the assurance, then, the zonal states need not only to adhere to the treaty, but also to comply with it. The United Kingdom also pointed out that it does not accept the inclusion of the British Indian Ocean Territory within the African NWFZ without its consent and that therefore it does not accept any legal obligations in respect to that territory arising from its adherence to Protocols I and II. This claim was opposed in the Russian statement, according to which, as certain states declared to consider themselves free from obligations arising from the protocols with respect to the above mentioned territory, Russia would also not be bound by its undertakings under Article 1 of Protocol I in respect to it.

No nuclear weapon state has so far either signed or ratified the protocols attached to the Bangkok and Semipalatinsk Treaties. In particular, China has objected to the Bangkok Treaty because of the inclusion in the zone of certain parts of the South China Sea the sovereignty of which is contested (Goldblat, 1997, 28). The US government, as to it, is concerned that restrictions on air and maritime transit rights might arise from the inclusion in the zone of the exclusive economic zones of the states parties and that regional security arrangements might be disturbed (Yakemtchouk, 1997, 55). The United States has also not supported the Central Asian NWFZ for fear that Iran might join and use its membership to hide its clandestine nuclear programme and because Article 12 of the Semipalatinsk Treaty preserves the rights and obligations of the states parties under pre-existing treaties, which might allow Russia to redeploy its nuclear weapons in the region (*SIPRI Yearbook*, 2010, 399-400).²²

4. The Legal Nature of the Statements Formulated by the Nuclear Weapon States: Reservations or Interpretative Declarations?

²² The draft clause envisaging potential extension of membership was however deleted. I have also argued elsewhere that the importance of Art. 12 should not be overestimated (Roscini, 2008, 598-599).

If the protocols attached to the Treaties of Rarotonga and Pelindaba are silent on reservations, with the consequence that only those incompatible with the object and purpose of the treaty are prohibited (Article 19 (c) of the 1969 Vienna Convention on the Law of Treaties), Article 4 of Protocol II additional to the Treaty of Tlatelolco prohibits all reservations.²³ During the fourth session of COPREDAL, the Mexican delegate Castañeda clarified that '[a] juicio de su Delegación, la prohibición de hacer reservas no incluía la posibilidad de hacer declaraciones interpretativas que no tuvieran jurídicamente el carácter de reservas' (COPREDAL/AR/41, 1967, 15). The problem is, thus, whether the statements related to Protocol II of the Treaty of Tlatelolco analysed in the previous section amount to reservations or to mere interpretative declarations: in the former case, they would be impermissible and they might prejudice the participation of the reserving state to the Latin American denuclearisation regime.²⁴

The 1969 Vienna Convention on the Law of Treaties does not deal with interpretative declarations. In Article 13 (l) of his draft articles on the law of treaties, the Special Rapporteur Fitzmaurice suggested that reservations do not include 'mere statements as to how the State concerned proposed to implement the treaty, or declarations of understanding or interpretation, unless these imply a variation on the substantive terms or effect of the treaty' (*Yearbook of the International Law Commission*, 1956, Vol. II, 110). In his First Report (1962), Fitzmaurice's successor, Sir Humphrey Waldock, limited himself to incorporate a provision in the draft articles (Article 1 (l)) according to which '[a]n explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in the legal effect of the treaty, does not constitute a reservation' (*Yearbook of the International Law Commission*, 1962, Vol. II, 31-32). These provisions were eventually not included in the final text of the Vienna Convention, which only contains the definition of 'reservation' ('unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State').²⁵

An interpretative declaration is however defined in the ILC draft guidelines on reservations to treaties as a 'unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a

²³ According to Art. 4, the prohibition of reservations contained in the Treaty of Tlatelolco applies to the protocol as well.

²⁴ A reservation prohibited by the treaty prevents the accession of the reserving state to the treaty unless the reservation is withdrawn or is unanimously accepted by the other contracting states (Horn, 1988, 119-120).

²⁵ Article 2 (1) (d).

treaty or to certain of its provisions' (draft guideline 1.2). Unlike reservations, then, interpretative declarations have the limited purpose of clarifying the scope and meaning of a treaty, and not of excluding or modifying its legal effects: the declarant state merely gives its interpretation of an ambiguous provision after the treaty has been adopted, with no derogatory effect (Bowett, 1976-1977, 88-89).²⁶ In order to determine whether it is a reservation or an interpretative declaration, one has to interpret the statement in good faith taking into account the ordinary meaning of the terms in the light of the treaty to which it refers and of the intention of the declarant at the time it formulated the statement (draft guideline 1.3.1).

There are several differences in the rules and procedures applicable to reservations and interpretative declarations. Unlike reservations, interpretative declarations can be formulated at any time unless the treaty provides otherwise (draft guideline 2.4.3). When formulated on signing a treaty, they do not need subsequent confirmation when the state expresses its consent to be bound (draft guideline 2.4.4), unless they are 'conditional' interpretative declarations (draft guideline 2.4.5). If a state objects to a reservation, it must do so within 'twelve months after it was notified of the reservation or by the date in which it expressed its consent to be bound by the treaty, whichever is later' (Article 20 (5) of the Vienna Convention) otherwise the reservation will be considered as accepted, while, according to draft guideline 2.9.9, '[a]n approval of an interpretative declaration shall not be inferred from the mere silence of a State or international organization'. The declarant state will therefore have to demonstrate that the silence of the other party is relevant to determine whether that party has approved the interpretative declaration.²⁷ The effects of an objection are also different depending on whether it refers to a reservation or to an interpretative declaration. In the latter case, the objection (*rectius*: opposition) only entails the insurgence of an interpretative dispute between parties without effects on the application of the treaty between them, while in the former the objection prevents the application of the provision to which the reservation relates between the reserving and the objecting states (Article 21 (3) of the 1969 Vienna Convention).

In light of the above, are the statements formulated by the nuclear weapon states on signing and/or ratifying Protocol II of the Treaty of Tlatelolco reservations or interpretative declarations? The wording of the French statement seems to suggest that it is an interpretative declaration and not a reservation ('The French Government interprets', 'this interpretative declaration by the French Government'). The

²⁶ According to another commentator, an interpretative declaration 'has the function to assert the existence and contents of a norm where the text of the treaty leaves us in doubt. It is not intended to have a derogatory effect, which is the case with reservations' (Horn, 1988, 237-238).

²⁷ As explained by Lysén, '[t]he state invoking a reservation only has to show inaction by other states (i.e. tacit acceptance). For an interpretative declaration, on the other hand, it is a matter of showing acquiescence in the declaration by the confronted states' (Lysén, 1990, 168).

terminology employed does not however have a decisive importance, as the declarant state might use misleading language in order to circumvent the express prohibition of reservations contained in a treaty.²⁸ One has rather to look at the effects on the concerned provision, i.e. whether the statement aims to modify its legal effects or merely to clarify certain ambiguous aspects of it. It does not seem that the French statement entails any modification of the legal effects of Article 3 of Protocol II of the Treaty of Tlatelolco: indeed, even though the protocol does not expressly refer to it, the inherent right of self-defence would have been preserved anyway and, according to the ICJ, such right could be exercised through the use of nuclear weapons, though only in 'extreme circumstances' where the state's survival is at stake (*ICJ Reports*, 1996, 263).²⁹ The French statement is then not a reservation, but a 'conditional' interpretative declaration, as the declarant 'subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof' (ILC draft guideline 1.2.1).³⁰ A conditional interpretative declaration is, at the same time, an interpretation of the provision and a potential reservation: when a different interpretation becomes authoritative, the declaration becomes a real reservation and objections will have to be issued within twelve months from the date when the authoritative interpretation has been affirmed (Horn, 1988, 242).

It has been seen that the statements formulated by United States, United Kingdom and Soviet Union in relation to Protocol II of the Treaty of Tlatelolco reaffirm the right to reconsider the negative security assurances in case the denuclearised states carry out an armed attack or an act of aggression with the support or assistance of or jointly with a nuclear weapon state and, in the Soviet Union's statement, also if a denuclearised state adopts measures incompatible with its status or if another party to the protocol adopts measures incompatible with its obligations under the protocol. These too are interpretative declarations and not reservations, as they limit themselves to reaffirm the customary principle *inadimplenti non est adimplendum*, as codified in Article 60 (2) (c) of the Vienna Convention on the Law of Treaties. This conclusion is however valid only if the above statements are interpreted narrowly, i.e. as suspending the negative security assurances solely when a

²⁸ According to ILC draft guideline 1.3.2, the phrasing and name of the statement is only an indication of its nature.

²⁹ This is confirmed by the *Comprehensive Study of the Question of Nuclear-Weapon-Free Zones in All Its Aspects (Special Report of the Conference of the Committee on Disarmament)*, UN Doc. A/10027/Add. 1, New York, 1976, Annex II, para. 155 ('a nuclear-weapon-free zone treaty cannot impair the inherent right, under Article 51 of the Charter, of individual or collective self-defence if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security').

³⁰ The French declaration states that '[i]f the interpretative declaration thus made by the French Government is contested in whole or in part by one or more Contracting Parties to the Treaty or to Protocol II, the said instruments shall be without effect in relations between the French Republic and the contesting State or States'.

nuclear weapon state directly and militarily supports a denuclearised state in the armed attack or aggression (not just provides financial or logistic assistance) and as envisaging the threat or use of nuclear weapons only when it is proportionate to the armed attack or aggression carried out by the denuclearised state with the support of a nuclear weapon state.

The Soviet statement, however, raises serious problems where it claims that granting permission for the transit of nuclear weapons through the zone ‘in any form’ would be incompatible with the denuclearised states’ obligations under Article 1 of the Treaty of Tlatelolco and would thus entitle the Soviet Union to reconsider its commitments under Protocol II. The treaty is silent on transit, but COPREDAL took the position that, in the absence of express provisions in the treaty, the principles and rules of international law apply, which entail the right of the territorial state to decide in each case whether to authorise the transit or not (García Robles, 1967, 247-248). The Soviet Union and its continuator, the Russian Federation, have always considered themselves parties to the Tlatelolco Protocol and as such they have been treated by the treaty parties and by the depositary government, that did not object to the statement: it seems that, at least for them, the statement did not amount to an impermissible reservation. This conclusion is supported by a study prepared by the US Department of State Legal Adviser’s Office, according to which the Soviet declaration is nothing else than a ‘political statement of opposition to such transit’ and, as such, it ‘has no validity or effect’ (quoted in Horn, 1988, 447). It appears, then, that the other parties and the depositary government have acquiesced to the Soviet statement, which has allowed the Soviet Union’s participation in the denuclearisation of Latin America.³¹

As to the Chinese declaration, it amounts to what the ILC calls ‘general statements of policy’, that are neither reservations nor interpretative declarations and that can be formulated at any time (draft guideline 1.4.4).³² Indeed, China limited itself to reaffirm its no-first use policy and its opposition to the NPT and PTBT. The declaration does not have a specific link to the protocol and does not aim to modify its effects or to interpret its provisions. It is not surprising, then, that China was the only nuclear power not to reiterate its declaration at the moment of the ratification of Protocol II.

³¹ One could also recall the ILC draft guideline 1.3.3 providing that ‘[w]hen a treaty prohibits reservations to all or certain of its provisions, a unilateral statement formulated in respect thereof by a State or an international organization shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author’.

³² Draft guideline 1.4.4 reads as follows: ‘A unilateral statement formulated by a State or by an international organization whereby that State or that organization expresses its views on a treaty or on the subject matter covered by the treaty, without purporting to produce a legal effect on the treaty, constitutes a general statement of policy which is outside the scope of the present Guide to Practice’.

The problem of the nature of the statements formulated by the nuclear weapon states in relation to the Rarotonga and Pelindaba Protocols is not of paramount importance, as the prohibition of reservations that applies to the main treaties is not extended to the protocols as in the Tlatelolco regime. No particular problems arise, then, from the Soviet statement issued on 15 December 1986 on signing Protocols 2 and 3 of the Treaty of Rarotonga, according to which the permission of transit of nuclear explosive devices in any form through the zone and the calls at the ports and airfields within the zone of ships and aircraft with nuclear weapons on board is 'in conflict with the aims of the Treaty and incompatible with the nuclear-free status of the zone' and would thus allow the Soviet Union to reconsider its commitments under Protocol 2. If – as seen above - in the context of the Treaty of Tlatelolco and its protocols the nature of such statement is dubious, in the Rarotonga regime it certainly amounts to a reservation, as the treaty contains a provision expressly reaffirming the right of each party to decide for itself whether to authorise or not the passage of nuclear ships and aircraft (Article 5 (2)), the legal effects of which the Soviet statement aims to exclude. The statement was however not confirmed at the moment of ratification, which means that the Russian Federation is now bound without reservations.

5. Negative Security Assurances and NWFZs: An Evaluation

The main advantage of the negative security assurances contained in the protocols additional to the NWFZ treaties is that, unlike those provided unilaterally at the global level to the NPT non-nuclear weapon states parties, they are legally binding, even though the nuclear weapon states have attached exceptions and conditions to them. The problem is that several nuclear powers still have to sign or ratify the protocols: the United States has to ratify the Rarotonga and Pelindaba Protocols, Russia has signed but not ratified Protocol I of the Pelindaba Treaty and no nuclear weapon state has so far signed or ratified the Bangkok and Semipalatinsk Protocols.³³ At the NPT Review Conference of May 2010, though, the US Secretary of State Hillary Clinton announced that the US government will seek Senate advice and consent to ratification of the Rarotonga and Pelindaba Protocols.³⁴ This is because 'the [US] Administration

³³ The Final Document of the 2010 NPT Review Conference stressed 'the importance of the signature and ratification by the nuclear-weapon States that have not yet done so of the relevant protocols to the treaties that establish nuclear-weapon-free zones', called the concerned states on ratifying the protocols and encouraged them 'to review any related reservations' (NPT/CONF.2010/50 (Vol. I), 18 June 2010, 16, 22).

³⁴ 'Secretary Clinton's Remarks at NPT Review Conference', 3 May 2010, <www.america.gov/st/texttrans-english/2010/May/20100504083001bpuh7.084292e-02.html>.

is satisfied that the African and South Pacific treaties are consistent with U.S. and international criteria for such zones' and that 'the Treaties of Pelindaba and Rarotonga and their Protocols will not disturb existing security arrangements or U.S. military operations, installations, or activities'. The treaties and protocols will also 'promote regional cooperation, security and stability and provide a vehicle for the extension of legally-binding negative security assurances, consistent with the strengthened negative security assurance announced in the recent U.S. Nuclear Posture Review'.³⁵ As to the Bangkok and Semipalatinsk Protocols, Clinton declared that the US government is willing to continue consultations with the zonal states in order to eventually ratify the instruments. The Russian President Medvedev has also recently sent the Pelindaba Protocols to the Duma to consider ratification.³⁶

It should however not be forgotten that, with the exception of Protocol II of the Treaty of Tlatelolco, the NWFZ protocols are not open for signature to de facto nuclear weapon states not parties to the NPT and that only India has unilaterally declared that 'it fully respects the status of the NWFZ in South-East Asia', is 'ready to convert this commitment into a legal obligation' and 'remains responsive to the expressed need for such commitments from other nuclear-weapon-free zones also' (Prawitz, 2000, 33). Furthermore, even if all nuclear weapon states ratified the protocols, the negative security assurances would still be reversible: the protocols are of a permanent nature, but the parties can withdraw whenever 'extraordinary events' related to the subject-matter of the protocols jeopardise their 'supreme interests'.³⁷ No mechanism to review the party's decision to withdraw is provided: the withdrawing

³⁵ U.S. Department of State, Press Release 2010/557, 3 May 2010, <<http://usun.state.gov/briefing/statements/2010/141415.htm>>. In the 2010 US Nuclear Posture Review, the US government committed not to use or threaten to use nuclear weapons against non-nuclear weapons states parties to the NPT in compliance with their non-proliferation obligations (US Nuclear Posture Review, 2010, 15). As to countries possessing nuclear weapons or not in compliance with their non-proliferation obligations, 'there remain a narrow range of contingencies in which U.S. nuclear weapons may still play a role in deterring a conventional or CBW [chemical or biological weapon] attack against the United States or its allies and partners', i.e. 'in extreme circumstances to defend the vital interests of the United States or its allies and partners' (ibid., 16). The Final Document of the 2010 NPT Review Conference welcomed the 'statements by some nuclear-weapon States regarding measures related to strengthening negative security assurances' (NPT/CONF.2010/50 (Vol. I), 18 June 2010, 14). The Group of Experts on a New Strategic Concept for NATO also recommended that 'NATO should endorse a policy of not using or threatening to use nuclear weapons against non-nuclear states that are party to the Nuclear Non-Proliferation Treaty and in compliance with their nuclear non-proliferation obligations' (*NATO 2020: Assured Security; Dynamic Engagement, Analysis and Recommendations* of the Group of Experts on a New Strategic Concept for NATO, 17 May 2010, at 43 (<www.nato.int/nato_static/assets/pdf/pdf_2010_05/20100517_100517_expertsreport.pdf>)).

³⁶ See 'Russia to Weigh African Nuke-Free Protocols', *Global Security Newswire*, 25 August 2010, <http://gsn.nti.org/gsn/nw_20100825_1465.php>.

³⁷ Art. 4 of Protocol II of the Treaty of Tlatelolco, Art. 6 of Protocol 2 of the Treaty of Rarotonga, Art. 6 of Protocol I of the Pelindaba Treaty, Art. 5 of the Protocol attached to the Bangkok Treaty, Art. 6 of the Protocol of the Semipalatinsk Treaty. Art. 4 of Protocol II of the Treaty of Tlatelolco, which invokes Art. 31 of the treaty, refers to 'circumstances' instead of 'extraordinary events' and adds the 'peace and security' of the contracting parties to their 'supreme interests'.

party is only required to notify the 'extraordinary events' jeopardizing its supreme interests. Even though the other parties could question the existence of such extraordinary events, the lack of any definition and the vagueness of the notions hardly make this notification obligation an effective deterrent against the frivolous exercise of the right of withdrawal.

Finally, no NWFZ protocol provides for an effective enforcement mechanism to react to violations by the nuclear weapon states of their undertakings under the protocols. The Bangkok Treaty limits itself to provide that, in case of a breach of the protocol by a state party to it, the Executive Committee set up by the treaty 'shall convene a special meeting of the Commission [for the Southeast Asia NWFZ] to decide on appropriate measures to be taken' (Article 14 (4) of the Bangkok Treaty). Potential remedies will then have to be found in the framework of competent international organisations and of general international law. As to the former, non-military sanctions could be adopted and the UN Security Council could also step in if the situation amounts to a threat to the peace, breach of peace or act of aggression (Article 39 of the UN Charter). With regard to the latter, the states parties might adopt countermeasures against the wrongdoing state according to the law of state responsibility.³⁸

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³⁸ See Roscini, 2003, 361-381.

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