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Memorandum*

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To : The Secretary
Through: S/S
From : INR - George C. Denney, Jr. *h.c.d.*

Subject: The Latin American Nuclear Free Zone: Pluses and Minuses

On February 14, fourteen Latin American states signed the Treaty of Tlatelolco creating the Latin American Nuclear Free Zone (NFZ),¹ the first such area ever established in a major inhabited area. This paper examines some of the more important features of the Treaty, and suggests some of its implications.

ABSTRACT

The Treaty is largely the result of skillful Mexican diplomacy and the adoption of a number of ingenious, if somewhat ambiguous compromises. Most Latin Americans clearly regard their action as having great psychological and practical significance, and see the Treaty as another concrete and possibly precedent-setting step -- following the Antarctic Treaty, the Limited Test Ban Treaty, and the Outer Space Treaty -- towards limiting the arms race, and fostering an attitude conducive to the achievement of general disarmament and peace. Although there is much to be said in favor of this Treaty, a cold analysis of it does not justify euphoria. The compromise decision arrived at in Mexico City on entry into force provisions is extremely complicated and provides several loopholes for states not desiring to enter the NFZ or wishing to avoid certain features of the Treaty. The resolution of the issue of peaceful use of nuclear energy, while satisfactory from the standpoint of the US and the other nuclear powers (except Communist China),

1. The Nicaraguans signed on February 16. Thus, the fifteen signatories are: Bolivia, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela.

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is still subject to differing interpretation and could possibly be challenged at some future date by the Brazilians or others. Two supplemental Protocols may also cause difficulties. Protocol I, requiring non-Latin American powers with territories within the Zone to accept the restrictions of the Treaty for those territories, raises various political, security, and constitutional issues for the US, the UK, and France. Protocol II requires a guarantee of the NFZ by the five nuclear powers; Communist China has rebuffed overtures aimed at securing its accession. A non-use commitment included in Protocol II may also prove troublesome. Brazil and Argentina, two of the more advanced Latin American states in nuclear research and development, are not enthusiastic about the NFZ, have not yet signed the Treaty, and may not allow it to come into force in their territories for quite some time, if ever.

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One of the most ingenious and complicated compromises on the NFZ arrived at in Mexico City was that on the entry into force provisions. It was required in order to bridge the gap between the Mexicans, who wanted a treaty immediately which could be perfected later, and the Brazilians -- supported by the Argentines and others -- who argued that an NFZ treaty could not be really effective until Cuba agreed to participate, all powers with territories in the hemisphere agreed to include them in the NFZ, and the five nuclear powers guaranteed to respect the Zone. In line with this reasoning, the Brazilians insisted that these points should be regarded as preconditions to the entry into force of any NFZ treaty.

In its final form, the treaty article on entry into force embodies both the Mexican and Brazilian points of view. Article 28 specifies that the NFZ will enter into force as soon as:

- 1) All Latin American Republics (including Cuba) deposit their instruments of ratification with the Mexican Government;
- 2) The continental or extra-continental powers with de facto or de jure international responsibilities for territories within the Zone (US, UK, France, the Netherlands) sign Protocol I guaranteeing to accept the prohibitions of the Treaty for those territories;
- 3) The five nuclear powers (US, UK, France, USSR, Communist China) sign Protocol II agreeing to respect the NFZ and neither to use nor threaten the use of nuclear weapons against the NFZ's contracting parties (countries for whom the Treaty is in force);
- 4) Each contracting party concludes bi-lateral or multi-lateral agreements with the International Atomic Energy Agency for application of the IAEA's safeguards to its nuclear activities. Negotiations for these agreements are to begin within 180 days after deposit of an instrument of ratification; the agreements should enter into force no later than eighteen months after the start of these negotiations.

Thus, Article 28 preserves all Brazil's "preconditions" intact. However, to satisfy the Mexicans and permit the initiation of the NFZ, each Latin American state is granted the right to waive, either wholly or in part, any of the above requirements by simply appending a declaration specifying its position to its instrument of ratification. For those countries entering unconditional waivers, the Treaty will immediately come into effect. For those states choosing to submit partial waivers the Treaty will come into effect only when all the un-waived requirements have been met. When the treaty has come into effect for eleven states, the NFZ shall be considered in effect for those countries, and the Agency set up under the Treaty to regulate and supervise the NFZ will be established.

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There are several loopholes in the above procedures for those states which are unenthusiastic about the Treaty and do not wish to have it apply in their territories. The simplest of these is the refusal to either sign, ratify, or deposit an instrument of ratification for the Treaty. Another method would be to sign and ratify conditionally with specific reference to particular requirements included in Article 28. On the basis of the information available now, both the universality requirement and the Protocols appear to raise serious difficulties which may delay the Treaty's coming into force for all intended participants for some time to come.

Cuba is the principal obstacle to the fulfillment of the first condition in Article 28 -- that all Latin American Republics accede to the Treaty. Cuba was invited to the Conference, but did not attend. In the past, the Cuban government has made its participation in the NFZ contingent upon a US commitment to abandon Guantanamo and the cessation by the US of "aggressive policies" towards Cuba. There is no evidence to date that Cuba has altered this stand, and it thus appears likely that it will not accede to the Treaty. Accordingly, there is little present prospect that the first condition of Article 28 can be met.

The Protocol signature requirements raise additional stumbling blocks. Protocol I, which requires that non-Latin American powers with territories within the Zone accept the conditions of the Treaty for those territories, raises difficulties for the UK, the US, and France. The UK may have political difficulties with this Protocol because it is involved in territorial disputes with two Latin American states -- i.e., with Guatemala over British Honduras (Belize) and Argentina over the Falkland (Malvinas) Islands -- and was not pleased by the "anti-colonial" resolutions passed at the Conference. The US, for both constitutional and security reasons, is not prepared to have either the Virgin Islands or Puerto Rico included in the NFZ. For the French, constitutional questions are paramount, for French territories are considered to be departments of metropolitan France. Only the Netherlands apparently has no major problems with Protocol I.

Protocol II, requiring a guarantee of the NFZ by the five Nuclear Powers, also presents problems. Communist China has rebuffed overtures aimed at securing its accession to the Protocol, and the Soviet Union has said it will sign providing the other Nuclear Powers do the same. Moreover, Protocol II requires the Nuclear Powers to "undertake not to use or threaten to use nuclear weapons against contracting parties of the Treaty." Here the problem is one of precedent, for the US to date has generally not favored unconditional non-use commitments. Cuba could also present a problem in this regard. If Fidel Castro should unexpectedly accede to the Treaty, the US would become bound to a non-use clause vis-a-vis Cuba by signing Protocol II.

Brazil and Argentina, the two Latin American states least enthusiastic on the NFZ, are well aware of all these difficulties, and probably feel that Article 28 insures that they need never participate in the NFZ until their

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original preconditions have been met. Thus, the result of the entry into force compromise is likely to be a functioning NFZ without Brazilian and Argentine participation.

Peaceful Uses of Atomic Energy -- An Imperfect Solution

One of the thorniest issues at the Mexico City Conference was that of the possible use of nuclear explosions for peaceful purposes. The US, supported by the UK and the Soviets, took the position that under present or foreseeable technology it is impossible to differentiate between an explosive device intended for peaceful purposes, and one which would have military applications. Several Latin American delegations, however, wished nothing written into the NFZ which would in any way hinder the uses of atomic energy for peaceful purposes. Again Brazil and Argentina, already active in nuclear research, were leaders of the group opposing a rigid definition of what constituted a "peaceful" or "military" nuclear explosive device.

The key element in the compromise worked out on this issue is to be found in Article 5 of the Treaty which defines a "nuclear weapon" as "any device which is capable of releasing nuclear energy in an uncontrolled manner and which has a group of characteristics that are appropriate for use for warlike purposes." The use, testing, manufacture, acquisition, receipt, storage, deployment, and possession of nuclear weapons, either by the contracting parties themselves or by their agents, is prohibited (Article 1). However, according to Article 18, the contracting parties "may carry out explosions of nuclear devices for peaceful purposes" either by themselves or in collaboration with third parties, providing that the limitations of Articles 1 and 5 are respected. The right to use nuclear energy for non-explosive peaceful uses is further fortified by Article 17, which states that nothing in the Treaty shall prejudice the rights of the contracting parties to employ nuclear energy for economic development and social progress, provided again that such use is consistent with Articles 1 and 5. Reactor experiments, which are a controlled use of nuclear energy will be considered exempt from the restrictive aspects of the Article 5 definition. Also, peaceful nuclear explosions conducted for the signatories by the Nuclear Powers through appropriate international arrangements would be possible, if carried out in conformity with Article 18.

In practical terms both the Nuclear Powers and the majority of the Latin Americans consider that the Article 5 definition insures that the effect of the Treaty will be non-proliferative. The US bases its position on the present and future technology of nuclear explosive devices, contending that all such devices have "a group of characteristics that are appropriate for use for warlike purposes," and that the development of such devices is prohibited by Article 1. There is not unanimity on this position, however. The Brazilian delegate at the Conference advanced the thesis that the "group of characteristics" referred to in Article 5 should be understood as "the sum total of specific attributes that identify the device as intended for use

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for purposes of war," contending further that "only military devices possess these attributes which are not common to devices used for peaceful purposes." This interpretation was immediately challenged by the Chilean delegate, and his position was sustained and supported by the Preparatory Commission Chairman (Garcia Robles of Mexico), a statement submitted to the Conference by UN Secretary General U Thant, and apparently by a majority of the other delegations present. In the face of this majority opinion, the Brazilians were unhappy, but said nothing. Although Brazil might attempt at some future time (at the ENDC negotiations in Geneva, for example) to raise again its interpretation of "Characteristics," the US considers that neither the record of the NFZ Conference nor any reasonable legal interpretation of the Treaty will support the Brazilian position. The Brazilians could choose to consider, however, that the lack of a commonly accepted definition of the "group of characteristics" constituting a "nuclear weapon" constitutes one of the Treaty's loose ends, and use this fact to leave themselves the option of acquiring explosive devices in the future.

A final aspect of this situation must be noted. As neither Brazil nor Argentina apparently intend to become contracting parties to the Treaty at this time, they will not be subject to its provisions. Thus, in effect, both the Argentines and Brazilians will remain free to develop peaceful nuclear explosive devices in the future if they decide they wish to do so. Only positive accession to the Treaty can make a nation subject to its prohibitions and obligations.

Other Gains and Losses

There are several other positive features of the Treaty which merit comment. The most obvious of these are the probable establishment of the Zone itself and the creation of a permanent organization or "Agency" based in Mexico City to administer it, once eleven states have ratified the Treaty. One of the responsibilities of the Agency is to establish a control system to ensure the Treaty's observance, and to set up procedures for ad hoc investigations of suspected violations of the Treaty. This is clearly a precedent-setting step, and could have wide implications for the future. Moreover, the Treaty specifies a commitment by the states forming the NFZ to adopt the IAEA safeguards as an effective nuclear non-proliferation technique.

Also favorably resolved, from the standpoint of the US and UK was the transport/transit issue. Argentina and Venezuela proposed that the Treaty prohibit both transport of nuclear weapons through the NFZ by the contracting parties and transit of such devices by third parties, a provision unacceptable to the US, the UK, and France. This issue also was resolved through a Mexican-sponsored compromise. Nothing appears on the question in the Treaty document itself, but a statement on transport/transit is included in the Final Act of the Preparatory Commission. The statement notes that contracting parties are already forbidden to transport nuclear weapons by the prohibitions of Article 1. However, when the prospective transporter is not a contracting

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party to the Treaty, it devolves upon each sovereign state, acting in accordance with the principles of international law, to decide whether or not it will permit the transit of weapons through or over its territory. Such permission could be granted on either a case by case basis, or could be "otherwise agreed in any treaty in force" between the transporter and the transporting third party.

Certain other provisions of the Treaty are less satisfactory from the standpoint of the US. Although the boundaries of the NFZ are compatible with the Antarctic Treaty, the definition of the "territory" of the contracting parties includes the "territorial sea, air space and any other space over which the state exercises sovereignty in accordance with its own legislation." Questions arise here with respect to various unilaterally proclaimed territorial limits which the US and other countries do not recognize as being consistent with international law. US efforts to secure recognition of the principles of international law in the Treaty failed. The US also hoped the NFZ would have closer ties with the OAS, but the Treaty obligates the NFZ Agency only to transmit to the OAS "for information" any reports "that may be of interest to it." The US also felt that specific mention of the submission of disputes arising under the Treaty to the International Court of Justice by consent of the parties concerned was superfluous, as this was already assured through the Court's statutes. Nevertheless, referral of such disputes to the ICJ was specifically enjoined by Article 24 unless "another mode of peaceful settlement" could be agreed on.

Conclusions

Viewed in purely legal terms the Treaty of Tlatelolco is a far from perfect document, for while an NFZ will probably soon be in effect for parts of Latin America, important countries -- Cuba, Brazil, and Argentina -- will apparently not be included. Nevertheless, the psychological impact of the Treaty may be considerable. The majority of the Latin Americans who participated in the discussions at Mexico City are convinced that they have produced a non-proliferative Treaty of major importance, and those states which ratify it may be expected to try earnestly to make it work. Nothing in the Treaty prevents the signatories from developing their nuclear capabilities towards peaceful pursuits; in fact, Mexico, the prime mover in the NFZ, has already announced its intention to purchase three additional nuclear reactors to be used in making Mexico "an atom-powered nation" by 1970. The crucial point to the Latin Americans is that for the first time a major part of the world has deliberately chosen to exclude itself from the nuclear arms race. This decision could strike responsive chords elsewhere in the world. The Romanians, for example, have already raised again the possibility of a Balkan NFZ in a letter to Preparatory Commission President Garcia Robles. In the long run the precedent set by the establishment of the Latin American NFZ may prove far more significant than any technical deficiencies in the Treaty document.

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