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NATO nuclear burden sharing and NPT obligations

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Introduction

NATO's summit released its Declaration of Alliance Security on 3rd April, announcing a major review of its Strategic Concept. The review will cover all aspects of NATO's strategic policy, including its nuclear posture. Perhaps most obviously those nuclear weapons explicitly assigned exclusively to NATO operations – the US tactical nuclear weapons in Europe – will be a part of the discussions. Their continued deployment remains an open issue, and the new Strategic Concept presents an opportunity to close legal loopholes that threaten the cohesion of the NPT.

The deployment of American warheads in European non nuclear states has repercussions in international law, regardless of whether they are stationed at US or NATO military bases. The key international frameworks that regulate the stationing of US nuclear weapons in NATO member states, in addition to the terms of the NPT, are outlined in the Alliance's legally enforceable "Agreements for cooperation on the use of atomic energy for mutual defense purposes". This paper examines the effects of these agreements and their compatibility with the terms of the Non Proliferation Treaty (NPT).

The obligation to disarm, as defined in the preamble to the Non Proliferation Treaty (NPT) and highlighted in the International Court of Justice's Advisory Opinion on the threat or use of nuclear weapons[i], is general in its scope and susceptible to broad interpretation. Unfortunately, this undermines its legal effectiveness. Nevertheless, the principle of good faith in the interpretation of international treaties is mandated by the Vienna Convention on the Law of Treaties. The review of the Strategic Concept presents an opportunity to consider NATO's nuclear weapons policy, and ensure that its deployment of nuclear weapons, and its posture, is consistent with both the letter of the Treaty and with the intentions of NATO members to strengthen the provisions of NPT in future. As parties to the NPT, all NATO members have a responsibility to observe and uphold its objectives, including the obligation to proceed toward global nuclear disarmament.

The 1999 Strategic Concept largely retained NATO's traditional Cold War nuclear posture, with the use of nuclear weapons being largely determined by immediate military objectives as opposed to longer term political or diplomatic considerations. The current and future options for NATO have been recently explored in *"Towards a Grand Strategy for an uncertain world".* The report, written by five former NATO member Chiefs of Defence Staff, proposes a new security strategy aimed at reinvigorating transatlantic partnerships through a range of instruments of both soft and hard power. The article proposes measures to strengthen these relationships by enforcing proactive deterrence, prevention and interactive escalation.[ii] The 2007 *Grand Strategy* expands upon what is already an open option by proposing the threat of preventative nuclear strikes. Such a development would further stretch the legal basis of what is already a controversial doctrine within NATO. Rather than seeking new roles for its nuclear posture, NATO members need to consider the role they play in strengthening non-proliferation.

Nuclear sharing regulations

Approximately 200 U.S. tactical nuclear weapons are thought to be currently deployed in Europe at six NATO bases in five non-nuclear weapon states.[iii] Through various NATO nuclear sharing agreements, the vast majority are assigned for delivery by the air forces of four non-nuclear NATO member states (Belgium, Germany, Italy and the Netherlands) and are stored within vaults using the WS3 Weapons Storage and Security System under the control of the USAF. The codes required for detonating them are all under U.S. control, with the intention of the transfer of the warheads to the host state and codes at a time of conflict.

The legal regulations for US nuclear weapons deployment in Europe in addition to the multilateral legal commitments under the NPT) are of three levels:

- Agreements governing the use of the territorial state military bases (between US or NATO and a host or user country);
- Agreements for cooperation on the use of atomic energy for mutual defense purposes (between the US and a user country);
- Technical agreements implementing the previous.

Level I: Agreements governing the use of the territorial state military bases

These accords are often referred to as 'umbrella agreements' and are both general in nature and scope. The legal basis for constructing a US base within another NATO member state stems from the so called bilateralization agreement defined in Art. 3 of the NATO Treaty, according to which:

> "… the Parties, separately and jointly, by means of continuous and effective self-help and mutual aid, will maintain and develop their individual and collective capacity to resist armed attack".

The construction of an American military base on another NATO member's soil nevertheless requires the conclusion of an independent bilateral agreement between the U.S. (or NATO) and the territorial state itself. According to the jurisprudence of the International Court of Justice there is no general right enabling a state to use or establish military facilities in another state.[iv] It must be undertaken with the express consent of the host country and within the bounds of any restrictions imposed by the host.

Level II: Agreements for cooperation on the use of atomic energy for mutual defense purposes

These are unclassified bilateral agreements which determine the rules by which U.S. nuclear weapons are deployed in NATO countries. The agreements outline the conditions regarding the exchange of information and the transfer of non-nuclear parts of weapons, including the delivery, transport and storage systems that are required to ensure deployment.

Level III: Technical agreements (implementing level I and level II agreements)

These are bilateral, classified agreements between the US and each user country, covering issues such as:

- Atomic Stockpile Agreements, regulating the introduction and location of the stocks, their custody, transportation, security, safety and release of weapons and cost sharing;
- The Atomic Cooperation Agreements, providing for the exchange of information for mutual defense purposes;
- The Service-Level Agreements, providing details for nuclear deployment and use;
- Third Party Stockpile Agreements, trilateral government-to-government agreements regulating stockpiling of nuclear weapons within the territory of a third-nation for the use by NATO forces.[v]

NPT Articles 1 and 2

Level II Agreements were signed in the years 1954-1962,[vi] prior to the entry in to force of the NPT. There may, therefore, be some question as to whether the NPT provisions apply to them. The Vienna Convention on the Law of Treaties (VCLT), concluded in 1969 and entered into force in 1980, governs the relationship between successive treaties, and would clearly imply that NATO agreements for cooperation concluded prior to the entry into force of the NPT would nevertheless be bound by its requirements[vii].

The particular problems of compatibility focus upon NPT Articles 1, 2 and 6. Article 1 prohibits nuclear weapon states sharing their weapons with non-nuclear states:

> "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices."

Article 2 provides for a corresponding obligation on the part of non-nuclear states parties not to receive nuclear weapons:

> "Each non-nuclear weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."

If the United States explicitly transferred nuclear warheads to its NATO allies it would unambiguously break Article 1, and their allies would be breaking Article 2. The tactical warheads based in these host states are intended for delivery by those host states. How does this not break the two articles?

The United States government points to two particular reasons, or loopholes. Firstly, the transfer of the warheads only happens at a point when hostilities break out and secondly, the transfer of related technologies and hardware is not covered by the NPT.

The claim that the NPT is not applicable during wartime, and that member states can prepare now to break off their NPT commitments in advance, is highly controversial. The traditional view maintains that the declaration of war renders most treaties null and void. Contemporary legal doctrine denies that war has extinctive effect on *multilateral* treaties, unless, in the light of the clause *rebus sic stantibus*, there has been a radical change in the circumstances rendering the treaty obsolete. The US view specifically in this instance has been that the purpose of the NPT is to prevent proliferation, and that if nuclear war were to break out it would have failed and would therefore no longer apply.

Whether it is legal or not, the preparation by NPT members to break with the terms of the Treaty certainly and undeniably undermines its efficacy, the commitment of the Alliance to the Treaty, and the willingness of members outside the Alliance to stick to its provisions.

Article 6

The US claim that the NPT does not deal with nuclear capable *delivery* systems (the aircraft) is not as clear-cut legally as the Americans might hope.[viii] This interpretation is based on the "Questions on the Draft Non-Proliferation Treaty asked by US allies together with answers given by the United States."[ix] A relevant consideration is whether such a qualification by the U.S. constitutes a reservation to the Treaty in question. A Treaty reservation occurs when a state party submits an interpretative qualification to a treaty exempting or conditioning its compliance to a certain interpretation. While it was presented to the Soviet Union and selected members of the Eighteen Nation Disarmament Committee (ENDC), it was not submitted at the time of the signature, ratification or accession to the Treaty. Other states may not have been aware of its existence until long after they signed the NPT and were not in a position to object to it.

A state's capacity to submit such reservations is limited by the Vienna Convention's Article 19. According to this provision, states have the authority to submit reservations except when they are expressly or implicitly forbidden by the treaty or, if the treaty is silent, when they contravene its 'object and purpose'.[x] The NPT Preamble expresses the desire of all members to "further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery", and "to end the nuclear arms race at the earliest possible date". Article 6 of the Treaty commits all signatories to pursue negotiations in good faith on effective measures relating to ending the nuclear arms race at an early date, to nuclear disarmament, and to a *treaty on general and complete disarmament*. These provisions, as they were intended, make clear the purpose of all parties—to move toward the ultimate goal of both nuclear and general disarmament.

Making clear that the ultimate goal of disarmament is not some indefinite future achievement, the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, unanimously stated that the obligations under article 6 of the NPT require members to "bring to a conclusion negotiations leading to nuclear disarmament *in all its aspects"*[xi]. The Final Document of the 2000 NPT Review Conference, including the notorious 13 practical steps, required "an unequivocal undertaking to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all states parties are committed under article 6 ".

In contrast to Articles 1 and 2, which are limited in scope, Article 6 provides a general obligation for the State Parties. Stemming from the history of the NPT's negotiation and subsequent development, it is indeed understood

as denoting a package of measures and a series of practical and irreversible steps leading to nuclear disarmament in all its aspects.

On the face of it, both procedurally and substantially, the US 'interpretative reservation' seeking to exclude delivery systems from the scope of the NPT is not valid. It was not submitted as a formal reservation and, in addition, stands in contradiction to the NPT's object and purpose as set forth in Art. 6. As a result, the Agreements for cooperation on the use of nuclear energy for mutual defence purposes results in a contradiction. They contravene the obligations that NATO member states have undertaken as signatories of the NPT.

Conclusion

The continuing presence of American tactical nuclear weapons in Europe has a questionable legal basis, and is increasingly challenged in NPT circles by non-European non-nuclear weapon states. While during the Cold War the arrangements may have been largely overlooked, today the discrepancy with the NPT could become a significant bone of contention, undermining the treaty, so that a major political effort to correct the situation is now justified. The review of the Strategic Concept is an opportunity to do this prior to the crucial Review Conference in May 2010.[xii]

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[i] International Court of Justice, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996. Available on the web at http://www.icj-cij.org/docket/files/95/7495.pdf

[ii] This includes the use of "[0]all instruments of soft and hard power, ranging from the diplomatic protest to nuclear weapons". *Idem*.

[iii] Hans Kristensen, Federation of American Scientists, blog dated June 26, 2008, available at: http://www.fas.org/blog/ssp/2008/06/us-nuclear-weapons-withdrawn-from-the-united-kingdom.php#more-259

[iv] Permanent Court of International Justice, *The Case of S. S. "Lotus"*, 7 September 1927. Emphasis added.

[v] *Idem*.

[vi] Belgium 1962, Italy 1960, Germany 1959, Turkey 1959, the Netherlands 1959.

[vii] According to Article 4, its rules apply to agreements concluded before its entry into force when deemed to constitute "customary acts of international law". There is little doubt that Article 30 of the VCLT satisfies this requirement- so that NATO agreements for cooperation should be fully compatible with the NPT. On Art 30 of VCLT as International Customary Law see See J. B. Mus, *Conflict between Treaties in International Law*, 45 Netherlands International Law Journal, 1998, p.213. On NATO Cooperation Agreement and NPT see BASIC, the Acronym Institute for Disarmament Diplomacy and Peacerights, *Mutual Defence Agreement-Legal Opinion*, available at http://www.basicint.org/nuclear/MDAlegal.htm. [0]

[viii] M. Wilrich, *The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics*, 77 Yale Law Journal 1968 , p. 1447, 1464.

[ix] Questions on the draft Non-proliferation Treaty asked by US allies together with answers given by the United States, in NPT Hearing, US Senate, 90-2, p. 262, note 35 in the PENN Research Report 2000.1, also available at http://www.opanal.org/Articles/cancun/can-Donnelly.htm

[x] Art. 19 is considered declaratory of *jus cogens*. See Benedetto Conforti, *Diritto Internazionale*, Editoriale Scientifica, Napoli, 1997, p. 95-97

[xi] Emphasis added.

[xii] Progressive reduction and final elimination of delivery systems in the efforts is often listed in official documents as a practical means to general disarmament. See for example: Christopher A. Ford*, United States Special Representative for Nuclear Nonproliferation,* delivered at the *Conference on "Preparing for 2010: Getting the Process Right", Annecy, France, March 17, 2007. Available at* http://www.state.gov/t/isn/rls/other/81946.htm*. "*Eliminating Delivery Systems: In parallel with reductions in warhead numbers, the United States has been reducing its nuclear delivery systems. Since the Cold War's end, the United States has canceled the modern, highly sophisticated MGM-134 "Midgetman" missile, and halted production of other major weapons systems such as the B-2 "Stealth" bomber. Under President George H.W. Bush, the United States took out of nuclear weapons service four Ohio-class nuclear-powered ballistic missile submarines (SSBNs)

carrying the Trident C-4 submarine-launched ballistic missile (SLBM), and modified these vessels for other uses. It also removed the B-1 "Lancer" bomber from strategic service. To date, in fact, the United States has eliminated more than 1,000 strategic missiles and bombers, and 450 silos for ICBMs. The final MX "Peacekeeper" missile -- the last of 50 -- was de-activated in September 2005, and the United States recently announced that it will eliminate about 400 Advanced Cruise Missiles currently deployed with the B-52 bomber fleet".