

The Nuclear Non-Proliferation Treaty's Gordian Knot: The Intractable Problem of the Legality of Nuclear Sharing

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Anna Hood

INTRODUCTION

At the heart of the Nuclear Non-Proliferation Treaty (NPT or Treaty)¹ is the idea that only the five nuclear-weapon States—China, France, Russia, the United Kingdom (UK) and the United States (US)—can possess nuclear weapons.² These States are not entitled to transfer their weapons, or control over them, to any other entities and all other States Parties (the non-nuclear-weapon States) must forgo receiving, manufacturing or acquiring them. These propositions are embedded in the first two Articles of the Treaty.³ Article I provides:

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.⁴

Article II states:

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.⁵

While the basic premise of who can and cannot possess nuclear weapons appears clear cut, one of the most divisive issues in the nuclear realm is whether two sets of nuclear sharing practices—the nuclear sharing between the US and its North Atlantic Treaty Organization (NATO) allies, and the nuclear sharing between Russia and Belarus—contravene Articles I and II NPT. Nuclear sharing by a nuclear-weapon State can involve a range of practices, including: stationing its nuclear weapons in a non-nuclear-weapon State; providing a non-nuclear-weapon State with access to nuclear weapons; allowing a non-nuclear-weapon State to participate in decision-making, policy-making and strategising around nuclear weapons; training military personnel in a non-nuclear-weapon State in how to deploy and use nuclear weapons; and allowing non-nuclear-weapon State military personnel to deploy and use nuclear weapons.

¹ Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT).

² It is important to note that the right of the nuclear-weapon States to possess nuclear weapons is only temporary. Pursuant to NPT *ibid* art VI, they must ‘pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control’. For discussion of art VI, see Section 3.

³ NPT (n 1) art IX(3) states that ‘for the purposes of this Treaty, a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967’.

⁴ NPT (n 1).

⁵ *ibid*.

The US has engaged in forms of nuclear sharing with its NATO allies since 1954.⁶ At present, it stations nuclear weapons in Belgium, Germany, Italy, the Netherlands and Turkey.⁷ During peacetime, these weapons remain under the custody and control of the US, but NATO policy provides that, during times of conflict, military personnel from the non-nuclear-weapon States can be authorised to deploy and use the nuclear weapons.⁸ To ensure this policy can be actioned effectively, non-nuclear-weapon States' military personnel are trained in how to handle and use nuclear weapons.⁹ A further component of NATO's nuclear sharing arrangements is that NATO's nuclear policies are developed and implemented by the Nuclear Planning Group,¹⁰ a body made up of members from all NATO States bar France.¹¹

Russia's nuclear sharing arrangements with Belarus are much more recent than those between the US and its NATO allies.¹² The possibility of Russia entering into nuclear sharing arrangements with Belarus was first raised in early 2022 and, on 27 February of that year, Belarusians voted in favour of adopting a new constitution which paved the way for nuclear sharing by removing a ban on nuclear weapons in Belarusian territory¹³ Then, on 25 March 2023, Russian President Putin announced that he would deploy tactical nuclear weapons to Belarus¹⁴ and, the following month, Russian military personnel began training their Belarusian counterparts in nuclear matters.¹⁵ On 16 June 2023, Putin declared that 'the first nuclear warheads have been delivered to Belarus, but only the first batch. There will be more. By the end of the summer, by the end of this

⁶ North Atlantic Treaty Organization (NATO), 'NATO's Nuclear Sharing Arrangements' (Factsheet, 4 February 2022) https://www.nato.int/nato_static_fl2014/assets/pdf/2022/2/pdf/220204-factsheet-nuclear-sharing-arrange.pdf.

⁷ J Masters and W Merrow, 'Nuclear Weapons in Europe: Mapping U.S. and Russian Deployments' *Council on Foreign Relations* (30 March 2023) <https://www.cfr.org/in-brief/nuclear-weapons-europe-mapping-usand-russian-deployments>.

⁸ 'NATO's Nuclear Sharing Arrangements' (n 6) 1–2; NATO, 'NATO's Nuclear Deterrence Policy and Forces' (30 November 2023) https://www.nato.int/cps/en/natohq/topics_50068.htm.

⁹ This training includes an annual NATO military exercise known as 'Exercise Steadfast Noon': 'NATO Holds Long-Planned Annual Nuclear Exercise' *NATO News* (13 October 2023) <https://www.aviano.af.mil/News/Press-Releases/Display/Article/3556394/nato-holds-long-planned-annual-exercise/>; 'NATO Holds Annual Nuclear Exercise: Steadfast Noon' *NATO News* (14 October 2024) <https://www.nato.int/en/news-and-events/articles/news/2024/10/11/nato-holds-annual-nuclear-exercise-steadfast-noon>

¹⁰ 'NATO's Nuclear Sharing Arrangements' (n 6).

¹¹ The NATO website notes that France decided not to be part of the Nuclear Planning Group: NATO, 'Nuclear Planning Group' (9 May 2022) https://www.nato.int/cps/em/natohq/topics_50069.htm.

¹² Although note that during the Cold War, when Belarus was a Republic of the USSR, nuclear weapons were stationed on its territory: 'Belarus Overview' *Nuclear Threat Initiative* (1 November 2020) <https://www.nti.org/analysis/articles/belarus-overview/>.

¹³ HM Kristensen et al, 'Nuclear Weapons Sharing, 2023' (2023) 79 *BullAtSci* 393.

¹⁴ D Sabbagh, 'Russia to Station Nuclear Weapons in Belarus' *The Guardian* (25 March 2023) <https://www.theguardian.com/world/2023/mar/25/russia-to-station-tactical-nuclear-weapons-in-belarus>.

¹⁵ Kristensen et al (n 13).

year, we will complete this work.'¹⁶ The President of Belarus, President Lukashenko, confirmed in late December 2023 that the transfers of nuclear weapons from Russia had been completed.¹⁷

Many States Parties to the NPT object to all forms of nuclear sharing. They contend that the stationing of nuclear weapons in the territory of a non-nuclear-weapon State and allowing non-nuclear-weapon State military personnel to undertake nuclear training amounts to a 'transfer' of nuclear weapons under Articles I and II NPT and that allowing non-nuclear-weapon States to participate in decision-making involves them exercising control over the weapons, as does allowing military personnel to deploy and use nuclear weapons in times of war.¹⁸ In response, the NATO States assert that a 'transfer' of nuclear weapons only occurs when the weapons are physically in another State *and* control over the weapons has been transferred.¹⁹ Consequently, the stationing of nuclear weapons in other States during peacetime—without the transfer of control over the weapons—does not violate the NPT. This position raises questions about the legality of nuclear-weapon States transferring control over nuclear weapons to non-nuclear-weapon States' military personnel during times of conflict. However, the US has sought to circumvent this issue by contending that the NPT does not apply in times of war.²⁰ As for the involvement of nuclear training and decision-making, it holds that the Treaty does not address these matters and, consequently, there is nothing preventing NATO States from collaborating on them.²¹ Russia and Belarus have not released lengthy defences of their nuclear sharing arrangements; rather, they have relied on the fact that the US and NATO engage in comparable practices. For example, in 2023, when justifying the new nuclear sharing practices with Belarus, President Putin stated:

the United States have been doing this for decades. They have long ago deployed their tactical nuclear weapons on the territory of their allied countries, NATO countries ... the Americans do this with their allies, deploy on their territory, teach, by the way, their

¹⁶ President of Russia, 'Plenary Session of the St Petersburg International Economic Forum' (16 June 2023) <http://en.kremlin.ru/events/president/news/71445>.

¹⁷ 'Belarus Leader Says Russian Nuclear Weapons Shipments Are Completed, Raising Concern in the Region' *Associated Press* (26 December 2023) <https://apnews.com/article/russia-belarus-nuclear-weaponsshipments-lukashenko-poland-a035933e0c4baa0015e2ef2c1f5d9b1a>.

¹⁸ These views are captured in [Sections 2.2](#) and [2.3](#).

¹⁹ NATO asserts that its peacetime approach to nuclear sharing is permissible under the NPT because its B-61 nuclear weapons that are stationed in Europe 'remain under US custody and control in full compliance with the Treaty on the Non-Proliferation of Nuclear Weapons': 'NATO's Nuclear Sharing Arrangements' (n 6) 1.

²⁰ This position was articulated as early as 1967: N deB Katzenbach, 'Tab A: Questions on the Draft Non-Proliferation Treaty Asked by U.S. Allies Together with Answers Given by the United States' (28 April 1967) appended to N de B Katzenbach, 'Letter from the Under-Secretary of State (Katzenbach) to Secretary of Defense Clifford' (Washington, 10 April 1968) <https://history.state.gov/historicaldocuments/frus196468v11/d232>.

²¹ *ibid.*

crews, their pilots to use this type of weapons if necessary. We agreed that we will do the same—without violating our obligations.²²

Discerning which interpretation of Articles I and II is correct is not straightforward. As explored in Section 2, the ordinary meaning of the words in Articles I and II can be interpreted in different ways; there are copious—and at times conflicting—historical records to sort through to try to determine what the parties believed the terms to mean when the NPT was being drafted; and there is a significant amount of subsequent practice to consider.

Over the years, a number of non-lawyers have put forward thoughts as to what Articles I and II mean by drawing on parts of the *travaux préparatoires* and other historical records. For example, Martin Butcher, Otfried Nassauer, Tanya Padberg and Dan Plesch have conducted extensive research into the history of the relationship between the NPT and NATO’s nuclear sharing programme;²³ Daniel Khalessi has provided detailed analysis of conversations that took place about the drafting of the NPT within the US Government, amongst NATO allies and amongst delegates to the NPT negotiations,²⁴ and William Alberque has delved into the bilateral negotiations concerning the drafting of Articles I and II NPT that took place between the US and the Union of Soviet Socialist Republics (USSR, as Russia then was) in the 1960s.²⁵ While their research contains important information about different understandings of Articles I and II during the drafting of the NPT, the authors have (understandably) not applied the rules of treaty interpretation to their factual findings. Consequently, their research does not identify which facts are legally significant or draw any legal conclusions. In addition, there are some parts of the historical record—in particular, aspects of the NPT negotiations which took place in the Eighteen Nation Committee on Disarmament (ENDC)²⁶—that were not considered in these accounts.

Surprisingly few international lawyers have grappled with whether nuclear sharing is permitted under Articles I and II NPT and the two most significant studies have some limitations. Mohamed Shaker penned an extraordinary three-part treatise in 1980—*The Nuclear Non-Proliferation Treaty: Origins and Implementation 1959–1979*—which provides detailed information about the development of the NPT and its first few years

²² G Faulconbridge and F Kerry, ‘What Did Putin Say on Tactical and Nuclear Weapons?’ Reuters (26 March 2023) <https://www.reuters.com/world/europe/what-did-putin-say-tactical-nuclear-weapons-belarus-2023-03-25/>.

²³ M Butcher et al, ‘Questions of Command and Control: NATO, Nuclear Sharing and the NPT’ (Project on European Nuclear Non-Proliferation, Research Report No 2000.1, 2000) <https://www.bits.de/public/pdf/00-1command.pdf>.

²⁴ D Khalessi, ‘Strategic Ambiguity: Nuclear Sharing and the Secret Strategy for Drafting Articles I and II of the Nonproliferation Treaty’ (2015) 22 *NPR* 421.

²⁵ W Alberque, ‘The NPT and the Origins of NATO’s Nuclear Sharing Arrangements’ (Institut Français des Relations Internationales, Proliferation Paper No 57, 2017).

²⁶ As will be discussed, the ENDC was the main body that negotiated the NPT text. The ENDC was set up in 1961 to consider a range of disarmament initiatives for the United Nations (UN). It was one of the predecessors of the Conference on Disarmament that continues to this day.

of operation.²⁷ While the treatise sets out significant information about the formation of Articles I and II,²⁸ it does not evaluate that information in light of the principles of treaty interpretation. Its age is also a limitation, given that there have been four decades of activity since Shaker's analysis which potentially give rise to subsequent practice for treaty interpretation purposes. In 2021, Mika Hayashi published an article that examined the legality of NATO's nuclear sharing practices.²⁹ While the article applied some of the rules of treaty interpretation to NATO's nuclear sharing arrangements, it did not look at the ordinary meaning of the Treaty's terms. Further, and very significantly, it did not engage with any of the primary *travaux préparatoires* documents, relying instead on secondary accounts of the negotiations. The secondary accounts focused on deliberations between the US and USSR, leaving out important perspectives and nuances put forward by the other negotiating States Parties. Additionally, Hayashi looked only at subsequent practice since 1995, rather than from the Treaty's first Review Conference in 1975. All of this means that Hayashi's main conclusion—that the NPT permits nuclear sharing—is questionable.³⁰

In order to provide greater insight into the legality of nuclear sharing under Articles I and II NPT, in Section 2 this article engages with the extensive historical records surrounding the two Articles, the secondary literature and the principles of treaty interpretation set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).³¹ The key issues explored are whether the prohibition on a nuclear-weapon State transferring, and a non-nuclear-weapon State receiving, nuclear weapons—directly or indirectly—and the prohibition on a nuclear-weapon State transferring control over nuclear weapons—directly or indirectly—permit or prohibit the following nuclear sharing activities:

- i. a nuclear-weapon State stationing its nuclear weapons in a non-nuclear-weapon State;
- ii. a nuclear-weapon State training military personnel from a non-nuclear-weapon State in how to deploy and use nuclear weapons;
- iii. nuclear- and non-nuclear-weapon States jointly making decisions and devising strategies around nuclear weapons; and

²⁷ M Shaker, *The Nuclear Non-Proliferation Treaty: Origins and Implementation 1959–1979* (Oceana Publications 1980).

²⁸ *ibid* 183–249.

²⁹ M Hayashi, 'NATO's Nuclear Sharing Arrangements Revisited in Light of the NPT and the TPNW' (2021) 26 *JC&SL* 471.

³⁰ This point will be elaborated upon in Section 2.

³¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT). Although the VCLT did not enter into force until 1980, a decade after the NPT entered into force, it is widely acknowledged that arts 31 and 32 reflected customary international law in 1970 and so should be employed to interpret the NPT's provisions: R Gardiner, *Treaty Interpretation* (OUP 2008) 12–13.

- iv. nuclear-weapon States transferring control over nuclear weapons to military personnel in non-nuclear-weapon States in times of conflict.

Section 2.1 begins by examining the ordinary meaning of the words in Articles I and II in light of their context and the Treaty's object and purpose. Section 2.2 explores what can be discerned about the scope of Articles I and II in the context of nuclear sharing from the Treaty's *travaux préparatoires*. Section 2.3 considers whether there have been any subsequent agreements or subsequent practice that have affected the meaning of Articles I and II since the Treaty was concluded. It is argued that, of the four aspects of nuclear sharing under investigation, only one can be conclusively settled by the principles of treaty interpretation. The ordinary meaning of the NPT's terms reveals that the Treaty does not cease to exist in times of war, and it is therefore not permissible for nuclear-weapon States to transfer nuclear weapons and/or control over them to non-nuclear-weapon States in times of conflict. This understanding is supported by the *travaux préparatoires* and subsequent practice. In contrast, it is not possible to determine whether the Treaty forbids or permits the other nuclear sharing practices: the text of the Treaty permits competing interpretations of Articles I and II on these points; the preparatory materials expose the fact that there were differing views about the meaning of the terms at the time the Treaty was concluded; and there has been no subsequent agreement or practice in the last 57 years that has settled these matters. This results in a Gordian knot:³² ambiguity is so deeply embedded in Articles I and II that deciphering whether they permit nuclear sharing or not is impossible.

Unfortunately, unlike in the Greek legend, there is no way to slice through the NPT's Gordian knot.³³ However, Section 3 of this article considers a different solution, analysing whether the nuclear disarmament obligation in Article VI NPT can provide an alternative way to resolve the question of whether nuclear sharing is permitted under the NPT. It argues that while Article VI did not prohibit nuclear sharing when the Treaty was adopted in 1968, there are compelling reasons to believe that today it does. It is thus concluded that those States that wish to see an end to nuclear sharing would be best placed to focus their argument on the fact that the practice is a violation of Article VI and therefore must be brought to an end to ensure compliance with the Treaty. Section 4 concludes the article with some brief overarching reflections.

IS NUCLEAR SHARING PERMITTED UNDER ARTICLES I AND II NPT?

Under their ordinary meaning

The starting place for interpreting Articles I and II NPT are the rules of treaty interpretation, as reflected in Article 31(1) VCLT: '[a] treaty shall be interpreted in

³² A Gordian knot derives from an Ancient Greek legend about an elaborate, multifaceted knot in the city of Gordium that seemed impossible to untangle.

³³ In Greek legend, the problem posed by the Gordian knot was solved by Alexander the Great slicing through it with his sword.

good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.³⁴ Thus it must be determined whether the ordinary meaning of the terms in Articles I and II NPT, in their context and in light of the Treaty's object and purpose, prohibit nuclear sharing. More specifically, it must be determined, first, whether, if the principles reflected in Article 31(1) VCLT are applied, the prohibition on 'transfer[ing]' nuclear weapons in the NPT includes a prohibition on stationing nuclear weapons in non-nuclear-weapon States or allowing individuals from non-nuclear-weapon States to access nuclear weapons during training exercises. Second, it is necessary to ascertain whether the prohibition on transferring 'control' over nuclear weapons prevents non-nuclear-weapon States from being involved in the decision-making about nuclear weapons. Third, it must be ascertained whether the text of the NPT provides guidance as to whether the treaty applies in times of conflict or not. This section considers these questions and argues that the application of the principles reflected in Article 31(1) VCLT to the third question reveals that the NPT was intended to apply in times of conflict, but that it provides no clear answer in relation to the other two questions.

Stationing of weapons and training of military personnel

Article I NPT prohibits nuclear-weapon States from 'transfer[ing]' nuclear weapons to any recipient directly or indirectly and Article II prohibits non-nuclear-weapon States from 'receiv[ing]' the transfer of nuclear weapons. The question here is whether stationing nuclear weapons in a non-nuclear-weapon State—that is, the physical placement of nuclear weapons on the territory of a non-nuclear-weapon State without the ownership of or control over the weapons being transferred—amounts to a 'transfer' and whether the non-nuclear-weapon State's military personnel accessing nuclear weapons during training exercises constitutes a 'transfer'. The *Merriam Webster Dictionary* offers multiple definitions of the term 'transfer', each of which leads to a different conclusion on this point.

One of the definitions provided is 'to convey from one person, place or situation to another'.³⁵ Following the idea that transfer means conveying from one place to another, stationing would fall foul of the NPT as it involves conveying nuclear weapons from the territory of a nuclear-weapon State to the territory of a non-nuclear-weapon State. Further, applying the idea that transfer means conveying from one person to another, allowing a non-nuclear-weapon State's military personnel access to nuclear weapons during training might fall within this definition. However, a further definition states that transfer means 'to make over the possession or control of' something.³⁶ Under this understanding of the term, the stationing of nuclear weapons in non-nuclear-weapon States would not be prohibited because the arrangement does not allow the non-nuclear-

³⁴ VCLT (n 31).

³⁵ Definition: 'Transfer', *Merriam Webster Dictionary* (online) <https://www.merriam-webster.com/dictionary/transfer>.

³⁶ *ibid.*

weapon State to possess or control the nuclear weapons. It is possible that training exercises might be prohibited under this definition, although this would turn on whether the military personnel are allowed to ‘possess’ nuclear weapons and how much control they are granted over the weapons during training.

One piece of information that could potentially sway the interpretation of the word ‘transfer’ in favour of the restrictive position is the fact that one object and purpose of the NPT is to prevent the proliferation of nuclear weapons.³⁷ It makes little sense to take a permissive approach to the word ‘transfer’ if the Treaty’s goal is to prevent nuclear weapons from spreading. However, States that engage in nuclear sharing would insist that proliferation only occurs when control or ownership is transferred and, thus, that a permissive interpretation of ‘transfer’ is not contrary to the goal of the Treaty.³⁸

Another possible argument in favour of the restrictive approach is the fact that Article I refers to the concepts of ‘transfer’ and ‘control’ separately. This could suggest that the term ‘transfer’ is meant to have a definition that does not include the concept of ‘control’. The difficulty here, however, is that an understanding of the term ‘transfer’ that contains the word ‘control’ does not make a separate reference to ‘control’ superfluous. It is possible that there was a desire to emphasise that there was an intention to prohibit physical transfers of nuclear weapons where control was also transferred as well as situations where control alone (without physical transfer) was handed over. It is thus difficult to conclude from the ordinary meaning of the word ‘transfer’ in the Articles whether nuclear stationing and training are permitted.

Participating in nuclear policy decision-making

Articles I and II NPT prohibit nuclear-weapon States from transferring control over nuclear weapons and non-nuclear-weapon States receiving control over nuclear weapons. What must be determined at this point is whether non-nuclear-weapon States contributing to decision-making about nuclear weapons amounts to exercising ‘control’ over nuclear weapons. The *Merriam Webster Dictionary* defines control as ‘to exercise restraining or directing influence over’³⁹ or ‘to have power over’.⁴⁰

Similarly to the definitions of ‘transfer’, these definitions can be interpreted and applied in different ways. It is possible to argue that a non-nuclear-weapon State that is involved in nuclear decision-making may have a restraining influence over what happens to nuclear weapons because they can advocate for or against particular nuclear policies being implemented. Equally, however, it could be argued that because non-nuclear-weapon States do not have complete influence over what happens to nuclear weapons, they cannot be said to have a ‘directing influence’; their voice is only one among many

³⁷ D Joyner, *Interpreting the Treaty on the Non-Proliferation of Nuclear Weapons* (OUP 2011) 29–32.

³⁸ This is implicit in NATO’s current nuclear policy: see ‘NATO’s Nuclear Sharing Arrangements’ (n 6).

³⁹ Definition: ‘Control’, *Merriam Webster Dictionary* (online) <https://www.merriam-webster.com/dictionary/control>.

⁴⁰ *ibid.*

and will not necessarily determine any particular policy or strategy discussion. There is also uncertainty with the second definition—‘to have power over’—as it is not clear-cut whether this requires complete power over something or whether some shared level of power would be sufficient.

Once again, turning to the object and purpose of the Treaty provides limited assistance as it depends on how one understands the scope of the term ‘proliferation’: does it occur when some level of control over nuclear weapons is transferred or only in the event that complete control is vested in another entity?

Application in times of war

The final issue to consider is whether the NPT applies during times of war: if it does, then NATO’s argument that it would be permissible for non-nuclear-weapon States to assume control of nuclear weapons during times of conflict would fail. On its face, there is nothing in the NPT to suggest that it does not apply in wartime. The only mention of war is in the preamble and the reference there does not suggest that the Treaty would cease in the event of conflict breaking out.⁴¹ There is no mention of war in the body of the Treaty, let alone any suggestion that war would result in the Treaty no longer applying.

There is, however, a provision which does not mention war but helps to answer this question. Article X(1), which sets out when individual States can withdraw from the Treaty and the process they must follow, states:

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.⁴²

The fact that the Treaty envisages individual States withdrawing when ‘extraordinary events’ occur reinforces the idea that is implicit in the rest of the Treaty: that it does not automatically cease to apply in times of conflict. Instead, it is for each State Party to determine if it wants to stop being bound by the Treaty in a time of war.

The conclusion that the NPT does not automatically cease during times of war is supported by the International Law Commission’s (ILC) 2011 Draft Articles on the Effects of Armed Conflicts on Treaties (Draft Articles).⁴³ Article 3 provides that ‘[t]he existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties’, and Article 5 states that the ‘rules of international law on treaty interpretation

⁴¹ NPT (n 1) preamble para 2 states: ‘[c]onsidering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war’; NPT preamble para 3 states: ‘[b]elieving that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war’.

⁴² *ibid*.

⁴³ ILC, ‘Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries’ (2011) UN Doc A/66/10.

shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict'.⁴⁴ While the Draft Articles are not a binding source of law, the ILC is a highly respected body, and it is therefore noteworthy that the application of these principles confirms the idea that the NPT would not automatically cease to apply in times of war.

Conclusion on the ordinary meaning of the text

From the above discussion it is possible to conclude that the claim by NATO States that the NPT does not operate in times of conflict is not supported by the ordinary meaning of the Treaty's text. It is less clear, however, whether the Treaty supports or prohibits the stationing of nuclear weapons, the training of non-nuclear-weapon State military personnel in nuclear weapon matters or the involvement of non-nuclear-weapon States in nuclear decision-making. When it is not possible to discern the meaning of a treaty term from the methods of interpretation in Article 31 VCLT, regard may be had to the treaty's *travaux préparatoires*, as reflected in Article 32 VCLT.⁴⁵ The following section considers the NPT's preparatory materials to see what light they shed on the matter.

Under the *travaux préparatoires*

As mentioned in Section 1, the NPT negotiations in the 1960s produced a large number of documents. Over the years, academics, civil society leaders and diplomats have dipped into these documents and selected excerpts to support one side or the other in the nuclear sharing debate. There has not, however, been a comprehensive attempt to consider all the material in the negotiating documents in light of the rules concerning what constitutes *travaux préparatoires*. This section begins by outlining what can be considered under Article 32 VCLT before turning to examine the NPT's preparatory material in this light. It argues that the materials reveal that there was no agreed upon position amongst the negotiating parties as to whether stationing nuclear weapons in non-nuclear-weapon States, training military personnel from non-nuclear-weapon States and non-nuclear-weapon States' participation in nuclear decision-making and strategising were permitted or excluded under Articles I and II.⁴⁶

*Defining *travaux préparatoires**

There is no precise definition of what constitutes *travaux préparatoires*⁴⁷ but it is well established that only material from the negotiating process 'during the preparation of

⁴⁴ *ibid.*

⁴⁵ VCLT (n 31) art 32(a) provides that, where the meaning of a treaty term is 'ambiguous or obscure', regard may be had to 'the preparatory work of the treaty [*travaux préparatoires*] and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31'.

⁴⁶ Note that because applying the ordinary meaning of the Treaty terms to the question of whether the NPT operates in times of war heralded a clear answer, it is not necessary to examine what light the *travaux préparatoires* shed on this matter. Consequently, this section does not consider this in detail although it is noted that the *travaux préparatoires* in fact support the ordinary meaning of the Treaty on this point.

⁴⁷ Gardiner (n 31) 24.

the treaty up to its conclusion' that is 'apt to illuminate a common understanding of the negotiating parties to treaty provisions' can be used.⁴⁸ This means that material prepared by just one or two negotiating parties can be used only if it was made available to all negotiators and elicited a common understanding between all negotiators.⁴⁹ Documents that represent the 'unilateral hopes, inclinations or opinions' of just one negotiating party are not considered *travaux préparatoires*.⁵⁰

Meaning of Articles I and II in the travaux préparatoires

In light of the legal test above, it is necessary to determine whether there are materials from the NPT's *travaux préparatoires* that clarify what the negotiating parties to the NPT understood as being permitted by Articles I and II in relation to the stationing of nuclear weapons in a non-nuclear-weapon State; the training of non-nuclear-weapon States' military personnel in nuclear weapons matters; and the involvement of non-nuclear-weapon States in nuclear decision-making.

The materials that are relevant to these issues come from three different stages of the NPT negotiations:

- i. Early discussions (between 1965 and early 1967) in the ENDC—the main international forum where the NPT was negotiated.⁵¹
- ii. Bilateral discussions between the US and USSR over the Articles, which took place in 1966 and 1967, and which resulted in the text of the Articles being agreed.
- iii. Discussions in the ENDC after the conclusion of the bilateral negotiations between the US and USSR and materials that emerged around the time the NPT was signed and ratified by States Parties, which shed light on how States understood the scope of the provisions to which the US and USSR had agreed.

Divergent views in early discussions in the ENDC

In the early stages of the NPT negotiations, it was apparent that there were very different conceptions of what Articles I and II should contain among the States in the ENDC. The approaches can be grouped broadly into three categories: the permissive approach; the restrictive approach; and the highly restrictive approach.

The permissive approach was adopted by the NATO States who advocated for very few limits to be embedded in Articles I and II. They wanted to ensure that these Articles

⁴⁸ O Dörr, 'Article 32: Supplementary Means of Interpretation' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 617, 621.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ The fact that the ENDC was the main forum for negotiating the NPT is discussed in Khalessi (n 24) 430. Once the ENDC had agreed on the text of the NPT, it submitted it to the UN General Assembly which then opened the NPT for signature: 'Treaty on the Non-Proliferation of Nuclear Weapons: Introductory Note' Audiovisual Library of International Law <https://legal.un.org/avl/ha/tnpt/tnpt.html>.

were formulated in a way that allowed them to maintain their existing nuclear sharing practices and preserved the right for them to develop an arrangement—termed a multilateral force (MLF)—that would enable all NATO Member States to participate in the joint control, manning and command of nuclear weapons.⁵² To this end, they advocated for language in Articles I and II that would have prohibited non-nuclear-weapon States from gaining *independent* control to fire nuclear weapons but would have permitted them to have nuclear weapons stationed on their territory and to participate with other NATO States in the control, command and use of those weapons. This approach was expressed by the UK’s delegate in the following way:

[t]he western delegations have explained what proliferation means in their view – and it is a straightforward, common-sense definition; proliferation occurs when a non-nuclear weapon state or group of states acquires its own independent capability to fire nuclear weapons, without the explicit and concurrent decision of a nuclear weapon state.⁵³

The restrictive approach was advanced by the USSR and some of its allies. The Soviets were vehemently opposed to the idea that the NPT would permit non-nuclear-weapon States to jointly own or control nuclear weapons via some form of multilateral body such as the MLF.⁵⁴ They objected to the language put forward by the US on the basis that it would afford non-nuclear-weapon States ‘the possibility of participating in the control of nuclear weapons and in taking decisions concerning these weapons’⁵⁵ and they made it clear that they did not support ‘the right [of non-nuclear-weapon States] to participate in the ownership, disposal and use of nuclear weapons’.⁵⁶ The USSR also opposed the idea that military personnel from non-nuclear-weapon States could have any form of access to nuclear weapons.⁵⁷ While the USSR’s views were much more restrictive than those of NATO, it did not insist on a complete ban on moving nuclear weapons to non-nuclear-weapon States. Instead, it put forward proposals that allowed for the possibility of nuclear weapons being stationed in the territory of non-nuclear-

⁵² Khalessi (n 24) 424; Hayashi (n 29) 475.

⁵³ ENDC, ‘Final Verbatim Record of the Two Hundred and Forty-Fourth Meeting of the ENDC’ (1 March 1966) UN Doc ENDC/PV.244, 10. See also Shaker (n 27) 214–66.

⁵⁴ See, e.g. the statement from the USSR in ENDC, ‘Final Verbatim Record of the Two Hundred and Fifty-Second Meeting’ (29 March 1966) UN Doc ENDC/PV.252, 4; and the statement from Czechoslovakia in ENDC, ‘Final Verbatim Record of the Two Hundred and Forty-Second Meeting’ (22 February 1966) UN Doc ENDC/PV.242, 36. See also the USSR’s proposed language for art I on 24 September 1965, cited in Shaker (n 27) 227: ‘Parties to the treaty possessing nuclear weapons undertake not to transfer such weapons in any form – directly or indirectly, through third states or groups of states – to the ownership or control of states or groups of states not possessing nuclear weapons and not to accord to such states or groups of states the right to participate in the ownership, control or use of nuclear weapons.’

⁵⁵ ENDC, ‘Final Verbatim Record of the Two Hundred and Fifty-Second Meeting’ (n 54) 11 (here, the USSR was quoting a statement previously made by the Czechoslovakian delegate).

⁵⁶ ENDC, ‘Final Verbatim Record of the Two Hundred and Forty-Fifth Meeting’ (3 March 1966) UN Doc ENDC/PV.245, 38.

⁵⁷ Shaker (n 27) 223–25, 227–28.

weapon States, provided that the weapons remained under the command and control of a nuclear-weapon State.⁵⁸

The highly restrictive approach was adopted by States from the Non-Aligned Movement⁵⁹ and some of the USSR's Eastern Bloc allies. These States were opposed to nuclear weapons being moved to non-nuclear-weapon States under any circumstances (including in the form of stationing) and non-nuclear-weapon States having any involvement in nuclear weapon policy or decision-making. For example, Burma argued for 'watertight non-proliferation', asking 'should not the text be favoured that tried to close all possible avenues, to prevent proliferation in the very sense of the word?'.⁶⁰ India similarly insisted on a comprehensive ban on the spread of nuclear weapons, asserting that:

the treaty must prohibit all aspects of proliferation ... in any form or shape. As a non-aligned nation we are unable to understand why members of military alliances should receive a special dispensation in the context of non-proliferation. There cannot be three categories of nations: nuclear nations, non-nuclear nations in alliance with nuclear nations, and non-nuclear nations.⁶¹

Similar sentiments were expressed by the Latin American States, which advocated for Article I NPT to say:

the Contracting Parties undertake 'to use exclusively for peaceful purposes the nuclear material and facilities which are under their jurisdiction, and to prohibit and prevent in their respective territories' both 'the testing, use manufacture, production or acquisition by any means whatsoever of any nuclear weapons' and 'the receipt, storage, installation, deployment and 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'.⁶²

Mexico declared this formulation to be 'undoubtedly one of the most comprehensive ever to have been drafted at world or regional level and [it] certainly does not appear to contain any loophole'.⁶³ Further, Poland argued that all forms of disseminating nuclear

⁵⁸ This is captured by the Mexican delegate's statement that 'the stationing by a nuclear Power of its own weapons on foreign territory does not appear to be forbidden in either the United States or the Soviet draft so long as that Power keeps these weapons under its "control"; and the whole of the discussion turns on this term, but not on the fact itself of the stationing': ENDC, 'Final Verbatim Record of the Two Hundred and Seventy-Fourth Meeting' (19 July 1966) UN Doc ENDC/PV.274, 10–11. See also Shaker (n 27) 227–28.

⁵⁹ The Non-Aligned Movement was a forum set up in 1961, at the height of the Cold War. It consisted of States that were not formally aligned with either the Western or Soviet power bloc and was designed to advance the interests of developing States.

⁶⁰ ENDC, 'Final Verbatim Record of the Two Hundred and Fiftieth Meeting' (22 March 1966) UN Doc ENDC/PV.250, 30.

⁶¹ ENDC, 'Final Verbatim Record of the Two Hundred and Fortieth Meeting' (15 February 1966) UN Doc ENDC/PV.240, 16.

⁶² ENDC, 'Final Verbatim Record of the Two Hundred and Eighty-Seventh Meeting' (21 February 1967) UN Doc ENDC/PV.287, 24. Mexico put forward this comment on behalf of Latin American States as a collective.

⁶³ *ibid.*

weapons, including ‘physical’ transfer without necessarily transferring ‘ownership, possession or control’ over them, should be banned to ensure the Treaty’s effectiveness.⁶⁴ Finally, throughout the ENDC negotiations, numerous States referred to the fact that the United Nations General Assembly (UNGA) Resolution imbuing the ENDC with the power to negotiate the NPT noted that one of the main principles which should be respected was that ‘the treaty should be void of any loop-holes which might permit nuclear or non-nuclear Powers to proliferate, directly or indirectly, nuclear weapons in any form’.⁶⁵

The approach which should be taken to Articles I and II proved one of the most contentious issues in the early years of the NPT negotiations and consumed extraordinary amounts of time. By April 1966, it was apparent that there was little hope of agreement being reached in the full committee of the ENDC and it was thus agreed that the US and the USSR should enter bilateral discussions in a bid to reach agreement on the matter.

US/USSR bilateral discussions

The US and the USSR conducted a series of bilateral negotiations about the scope of Articles I and II across the second half of 1966 and into 1967.⁶⁶ There are significant questions concerning what was agreed between the two States and whether the understanding they appeared to come to was then communicated to the other negotiating States Parties. To appreciate the points of contention it is helpful to provide an overview of the negotiations and the communications that unfolded.

When the two States entered the bilateral talks, the key sticking points were the interest of the US in developing an MLF and its determination to protect all of its existing NATO nuclear sharing arrangements. Across the course of the negotiations, the US agreed to give up its hopes for an MLF⁶⁷ but it remained steadfast in its commitment to preserve NATO’s nuclear sharing arrangements. Conscious that the Soviets were not prepared to adopt provisions that explicitly allowed for all of its nuclear sharing practices to persist, the US worked on drafting ambiguously worded versions of Articles I and II in the hopes that the right phrasing might placate Soviet concerns while also allowing for NATO’s arrangements to be accommodated.⁶⁸ The text that they settled on and that was incorporated into the final version of the NPT appeared to do precisely

⁶⁴ ENDC, ‘Final Verbatim Record of the Two Hundred and Fifty-Fourth Meeting’ (4 April 1966) UN Doc ENDC/PV.254, 4.

⁶⁵ UNGA Res 2028 (XX) (19 November 1965). Examples of States referring to the ‘no loop-holes’ aspect of UNGA Res 2028 (XX) include: the United Arab Republic in ENDC (n 56) 7; and Bulgaria in ENDC, ‘Final Verbatim Record of the Two Hundred and Fifty-Fifth Meeting’ (5 April 1966) UN Doc ENDC/PV.255, 7. ⁶⁶ Khalessi (n 24) 430–35; Alberque (n 25) 32–41.

⁶⁷ Khalessi (n 24) 430–35; Alberque (n 25) 32–41

⁶⁸ Alberque (n 25) 32–41.

⁶⁹ As Khalessi argues, the Johnson administration ‘formulated a strategy of preserving NATO nuclear sharing through deliberate ambiguity: the administration sought to intentionally make the language of the NPT, particularly arts I and II, more ambiguous to preserve the arrangements’: Khalessi (n 24) 425.

this. In particular, as discussed in Section 2.1, the words ‘transfer’ and ‘control’ have multiple meanings that can be used both to support and oppose nuclear sharing practices.

The Americans made it clear in a document sent to the USSR on 28 April 1967 that they believed the agreed-upon drafting of Articles I and II protected their nuclear sharing arrangements. It detailed the understanding that the US was permitted to station nuclear weapons in NATO States and that the treaty would cease to operate in times of war in the following way:

[The Treaty] does not deal with arrangements for deployment of nuclear weapons within allied territory as these do not involve any transfer of nuclear weapons or control over them unless and until a decision were made to go to war, at which time the treaty would no longer be controlling.⁶⁹

It also made it clear that the US did not consider the Articles to prevent NATO States from engaging in nuclear discussions and policy-making, stating that ‘[the Treaty] does not deal with allied consultations and planning on nuclear defense so long as no transfer of nuclear weapons or control over them results’.⁷⁰

While the US interpretation of Articles I and II was clearly set out to the Soviets, it is evident from US Government documents that the USSR never explicitly agreed to these understandings. Indeed, when briefing the US Secretary of Defense about the state of Articles I and II NPT on 10 April 1968, the Under Secretary of State, Nicholas Katzenbach, explained that the US ‘nuclear defense deployment arrangements … are not explicitly sanctioned by Articles I and II, since the USSR was not prepared to provide such an endorsement of NATO arrangements’.⁷¹ However, Katzenbach went on to say that ‘the Soviets were informed that if they took an official position in opposition to these interpretations, a very serious problem would arise’.⁷²

All of this suggests that the USSR can perhaps be said to have acquiesced to the US interpretation of Articles I and II. In international law, a State acquiesces to a position (and is thus bound by it) when it remains silent in circumstances where ‘expressing disagreement or objection in relation to the conduct of another State would be called for’.⁷³ Arguably, if the Soviets did not want the NPT to permit NATO’s nuclear sharing arrangements and they were aware the US took the position that it did, it was incumbent upon them to make their objection known. Interestingly, however, even the US was sceptical at the time that the Soviets were bound by their own interpretation, with Katzenbach writing in his letter to the US Secretary of Defense in 1968 that ‘the USSR could not be expected to be bound by unilateral interpretations’ and ‘[w]e have not

⁶⁹ ‘Questions on the Draft Non-Proliferation Treaty Asked by US Allies’ (n 20).

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ NSM Antunes, ‘Acquiescence’ in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2006) para 2.

heard from the Soviets any indication that they will contradict the US interpretations when they are made public ... This does not mean that they will necessarily agree with them.⁷⁴ There is thus some ambiguity as to whether the Soviets can be said to have acquiesced to the US interpretation of Articles I and II.

Even if it is determined that the Soviets acquiesced to the US understanding of Articles I and II and the negotiations between the US and USSR 'illuminate a common understanding' between them as to the scope of the provisions, it is not possible to conclude that all other negotiating States were aware of this understanding, let alone supportive of it, as will become apparent in the next section.

The ENDC and signing the Treaty

The US and USSR introduced the text of Articles I and II that they had agreed upon to the rest of the ENDC on 24 August 1967. It is clear from archival records that in addition to informing the Soviets of their understanding of Articles I and II, the Americans did share their understanding of the provisions with their NATO allies.

Indeed, Katzenbach wrote in his 1968 letter that '[w]e worked out interpretations on ... Articles I and II with our allies (and in particular the FRG).⁷⁵ There is, however, no evidence that all the non-NATO States in the ENDC were aware of how the US understood the Articles, though Shaker states that the US interpretation of Articles I and II was shared with 'key delegations' in the ENDC.⁷⁶ However, as set out above, the rules on *travaux préparatoires* are clear that it is not sufficient for 'key' delegations to be aware of a particular textual interpretation; there is a need for all negotiating States to be involved. There is no evidence in the ENDC's NPT negotiation records that the Americans' understanding of the provisions was discussed by the full ENDC at any stage.⁷⁷

Furthermore, there are a number of pieces of evidence that suggest that at least some of the ENDC States were not aware of the US interpretation. For example, when expressing support for the content of Articles I and II in August 1967, the Czechoslovak delegate stated that '[t]hey leave no loop-holes allowing for a spread of nuclear weapons in any way',⁷⁸ a position that they would have struggled to adopt if they were aware of the American understanding of the provisions. In 1999, a Swedish diplomat

⁷⁴ 'Questions on the Draft Non-Proliferation Treaty Asked by US Allies' (n 20).

⁷⁵ *ibid.* The abbreviation 'FRG' refers to the Federal Republic of Germany.

⁷⁶ Shaker (n 27) 234. This is supported by a NATO paper from 2009, which states that the nature of its nuclear sharing arrangements was 'made clear to key delegations' during the drafting of the NPT: NATO, 'NATO's Positions regarding Nuclear Non-Proliferation, Arms Control and Disarmament Related Issues' (Position Paper, 22 October 2009) https://www.nato.int/nato_static/assets/pdf/pdf_topics/20091022_NATO_Position_on_nuclear_nonproliferation-eng.pdf.

⁷⁷ The author is grateful to research assistant, Arianna Bacic, for her help in working through the ENDC records from the NPT negotiations. Neither she nor I found any reference to the belief of the US that arts I and II accommodated NATO's nuclear sharing arrangements. This is confirmed by Butcher et al (n 23) 23.

⁷⁸ ENDC, 'Final Verbatim Record from the Three Hundred and Twenty-Seventh Meeting' (31 August 1967) UN Doc ENDC.PV/327, 14.

confirmed that Sweden signed the NPT in 1968 without being aware of the US position.⁷⁹ He stated that the idea that non-nuclear-weapon States would have access to and be able to use nuclear weapons during times of war went against Sweden's reasons for signing the NPT.⁸⁰

Finally, US Government records reveal that the US deliberately decided not to release their interpretation of Articles I and II prior to the NPT being opened for signature on 1 July 1968.⁸¹ It was only eight days after the Treaty opened for signature (and 56 States had already signed it) that the US publicly released its understanding of Articles I and II during the US Senate's debate as to whether to ratify the treaty.⁸² The literature on *travaux préparatoires* makes it clear that understandings of a treaty term that are set out in the domestic legislative documents of an individual State can only be considered when they 'illuminate a common understanding of the agreement'⁸³ amongst the negotiating parties. This is a very difficult test to pass.⁸⁴ A rare example is found in the *Oil Platforms* case when the International Court of Justice (ICJ) found that, for interpretation purposes, regard could be had to documents conveyed to the US Senate during a treaty ratification process.⁸⁵ However, the documents related to a bilateral treaty and both States Parties to that treaty introduced and relied on the material before the ICJ, suggesting that their contents did indeed represent a common understanding of the relevant treaty provision.⁸⁶ This scenario is thus very different to the Senate debate over the NPT where the provisions in issue were embedded in a multilateral treaty and there was no indication that the American understanding of the terms amounted to a 'common understanding' amongst all negotiating States.

In light of the fact that some States in the ENDC were not informed of the US interpretation during the negotiating process and that the US Senate records cannot be read as elucidating a common understanding of the States that negotiated the NPT, it is not possible to conclude that the US understanding of Articles I and II represents the meaning of the terms in 1968.

It must then be asked what the common understanding of Articles I and II amongst the ENDC States was at the time that the NPT was concluded. This question is difficult to answer as the ENDC records do not clearly explain the scope of the two Articles. It is apparent from the records of the ENDC debate following the release of the joint US–USSR agreed text in August 1967 that there was no discussion of whether nuclear-

⁷⁹ Butcher et al (n 23) 17.

⁸⁰ *ibid.*

⁸¹ In his April 1968 letter, Katzenbach wrote, 'We do not believe it would be in our interest or that of our allies to have a public discussion of the US interpretations prior to the time when the NPT is submitted to the Senate for advice and consent': 'Questions on the Draft Non-Proliferation Treaty Asked by US Allies' (n 20).

⁸² Butcher et al (n 23) 22.

⁸³ Gardiner (n 31) 119. See also Dörr (n 48) 622.

⁸⁴ Gardiner (n 31) 119; Dörr (n 48) 622.

⁸⁵ *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objections)* [1996] ICJ Rep 803, 814, para 29.

⁸⁶ Gardiner (n 31) 120.

weapon States could transfer nuclear weapons to their non-nuclear allies in times of war, and certainly no agreement on the matter amongst all negotiating States. It seems likely that the non-NATO States in the ENDC assumed that the prohibition on non-nuclear-weapon States controlling nuclear weapons precluded non-nuclear-weapon States from participating in nuclear decision-making or policy development. This is because they had objected vociferously to the idea that any non-nuclear-weapon State could be involved in decisions over nuclear weapons in the early stages of the NPT negotiations,⁸⁷ and if they suspected this was permitted by the final version of Articles I and II, there is little doubt they would have spoken out in protest. It appears, however, that no mention was made of this issue following the introduction of the US–USSR agreed text of the provisions to the ENDC.

What is less clear is whether the non-NATO States believed that the Articles permitted the stationing of nuclear weapons and the training of military personnel from non-nuclear-weapon States. The fact that, as noted above, Czechoslovakia stated that Articles I and II ‘leave no loop-holes allowing for a spread of nuclear weapons in any way’⁸⁸ suggests that it believed the Articles captured the highly restrictive position that many Non-Aligned Members had supported. However, other ENDC States believed (much to their consternation) that the Articles in their final form were not capable of banning stationing or training. For example, when commenting on the final text of the Articles, India stated that ‘[n]o attempt appears to have been made, however, to deal with the question of the transfer of nuclear weapons to and their stationing in the territories of other countries, or with ... the training of the armed personnel of non-nuclear nations in the use of nuclear weapons’.⁸⁹ Similarly, in 1968, soon after the Treaty had been opened for signature, Mauritius noted that ‘[t]he Non-Proliferation Treaty had other weaknesses. It did not prohibit the storing or transporting of nuclear weapons within the territories of the parties’.⁹⁰

In light of the discrepancies in State responses to the Treaty, it is difficult to reach a definitive conclusion as to what the common understanding was. Instead, it is clear that different understandings of key provisions of the Treaty were present from the outset. The NATO States believed that their existing nuclear sharing practices were permissible and that the Treaty would cease to operate if a war were to break out. Some non-NATO States believed that nuclear stationing and training were permitted by the NPT, but not

⁸⁷ See the discussion in Section 2.2.2.1.

⁸⁸ ENDC (n 78) 14.

⁸⁹ ENDC, ‘Final Verbatim Record of the Three Hundred and Thirty-Fourth Meeting’ (28 September 1967) UN Doc ENDC/PV.334, 11. India reiterated this concern in May 1968, saying that ‘[t]here is another feature of the draft treaty which causes us concern even within the limited scope of non-dissemination of nuclear weapons. It does not prohibit the deployment of nuclear weapons on the territories of non-nuclear-weapon States, nor does it prevent the training in the use of nuclear weapons of the armed personnel belonging to non-nuclear-weapon States’: UNGA, ‘Agenda Item 28: Non-Proliferation of Nuclear Weapons’ (14 May 1968) UN Doc A/C.1/PV.1567 (prov) 13.

⁹⁰ UN Conference of Non-Nuclear Weapon States, ‘Summary Records of the First to the Twentieth Meetings’ (13 September 1968) UN Doc A/CONF.35/SR.15, 202.

other forms of nuclear sharing, and some States believed that all forms of nuclear stationing were forbidden under Articles I and II. The seeds of division and disagreement were thus planted at the Treaty's inception.

Subsequent agreements and subsequent practice

The meaning of a treaty's terms at the time of its conclusion is not the end of the story. Instead, pursuant to the principle reflected in Article 31(1)(3) VCLT, the meanings of terms can evolve over time through subsequent agreements and subsequent practice. This section begins by setting out the rules on subsequent agreements and subsequent practice before considering whether any agreements or practice have arisen over the last five decades that have clarified or altered the understanding of Articles I and II in relation to nuclear sharing practices. It argues that there is a subsequent agreement that has confirmed the understanding that the NPT continues to operate in times of war but that there has been no subsequent agreement or practice that elucidates an understanding amongst all States Parties as to whether other nuclear sharing practices are permitted under Articles I and II. Instead, the divisions that emerged during the NPT negotiations have persisted.

VCLT definition

Article 31(3) VCLT provides that the interpretation of a treaty shall take into account 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'⁹¹ and 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.⁹² Subsequent agreements encompass any 'firm agreement' amongst the States Parties as to the meaning of provisions in a treaty.⁹³ Such agreements can be formal treaties but do not have to be; the key requirement is that the States Parties have reached agreement as to the meaning of a term.⁹⁴

Subsequent practice for the purposes of Article 31(3)(b) VCLT comprises conduct of the States Parties in the fulfilment of a treaty's obligations that reveals a common understanding about the meaning of its terms.⁹⁵ The conduct needs to be 'concordant, common and consistent' over time so that a discernible pattern is established.⁹⁶ Isolated acts are not sufficient to amount to subsequent practice⁹⁷ but it is possible that

⁹¹ VCLT (n 31) art 31(3)(a).

⁹² ibid art 31(3)(b).

⁹³ Gardiner (n 31) 217.

⁹⁴ ibid.

⁹⁵ ibid 227.

⁹⁶ Appellate Body Report, Japan–Taxes on Alcoholic Beverages, WT/DS8/AB/R, adopted 4 October 1996, 13. See also Gardiner (n 31) 227.

⁹⁷ Gardiner (n 31) 228.

subsequent practice exhibiting agreement amongst States Parties can be identified when some States Parties to a treaty remain silent or inactive.⁹⁸

Finally, the ILC has determined that a decision adopted by a Conference of States Parties to a treaty may amount to either a subsequent agreement or subsequent practice for the purposes of Article 31(3) VCLT ‘in so far as it expressed agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted’.⁹⁹

Relevant subsequent agreements and subsequent practice

Under Article VIII(3) NPT, the States Parties to the Treaty are required to hold a Review Conference every five years to examine the operation of the Treaty. The records of these Review Conferences are helpful in determining whether there have been any subsequent agreements or subsequent practice that affects the interpretation of the Treaty’s terms. Some Review Conferences have resulted in a Final Document being agreed by consensus. Where this has occurred, it can be relevant to have regard to the content of the Final Document to see whether there is language that demonstrates a firm agreement amongst the parties as to the meaning of particular terms in the Treaty. Regardless of whether a Final Document has been agreed, the debates from each Review Conference are useful in examining whether any ‘concordant, common and consistent’ interpretations of terms appear over time that could constitute subsequent practice.

A review of the records of the ten NPT Review Conferences that have taken place to date reveals that the issue of nuclear sharing has not been an issue that has attracted a large amount of time. It has, however, persistently been raised by a handful of States across the Review Conferences and the records reveal that, with the exception of an agreement in 1985 which affects whether the Treaty applies in times of war, there has been no agreement as to whether nuclear sharing practices fall within the scope of Articles I and II. To understand this state of affairs, it is helpful to provide an overview of what occurred at each Review Conference.

The very first NPT Review Conference, in 1975, resulted in a Final Document which stated that ‘obligations undertaken under Articles I and II of the Treaty have been faithfully observed by all Parties’.¹⁰⁰ This statement, combined with the fact that the US and USSR were openly stationing nuclear weapons in non-nuclear-weapon States at the time, suggests that States Parties to the NPT did not believe that stationing was a violation of Articles I and II. However, there is a need for caution in assuming that all States were of this view. Yugoslavia, for example, stated that the ‘Conference had failed

⁹⁸ A Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 AJIL 200.

⁹⁹ ILC, ‘Draft Conclusions on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties’ (2018) UN Doc A/73/10, conclusion 11(3).

¹⁰⁰ NPT Review Conference, ‘Final Document of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons’ (30 May 1975) UN Doc NPT/CONF/35/I, annex I, 2.

to reach consensus on any substantive issues’ and that this ‘reflected the existence of profound divergencies on fundamental issues’.¹⁰¹ It went on to say that ‘the draft Final Document did not faithfully reflect the deliberations of or the positions adopted at the Conference, nor did it contain all the pertinent elements of the proposal made’ and that it would have voted against the Final Document if a vote had been held, but it had decided that it would ‘not stand in the way of consensus provided that its statement was fully recorded’.¹⁰²

In 1980, there was no consensus on a final text and the divergent views as to whether Articles I and II permitted any form of nuclear sharing came to the fore more explicitly in the debates. While some declared that the NPT States Parties were in compliance with Articles I and II (again suggesting that nuclear sharing practices were not contrary to the provisions embedded in those Articles),¹⁰³ others raised doubts and questions. Morocco, for example, said that ‘[i]t was difficult not to consider the transfer of nuclear technology and equipment and the deployment of nuclear weapons on the territory of third States or in international waters as contrary to article I’.¹⁰⁴ Other States expressed qualms at the existence of nuclear sharing without directly stating that they violated Articles I and II. For example, the People’s Republic of the Congo noted that the safeguarding of the security of non-nuclear-weapon States ‘should lead to the dismantling by [the nuclear-weapon States] … of their military bases on foreign territory’.¹⁰⁵ It added that this ‘was felt by most States to be a legitimate demand’.¹⁰⁶

Unlike in 1980, the 1985 Review Conference did reach a consensus agreement. With respect to Articles I and II, the Final Declaration provided that:

The Conference acknowledged the declarations by nuclear-weapon States Party to the Treaty that they had fulfilled their obligations under Article I. The Conference further acknowledged the declarations that the non-nuclear weapons States Party to the Treaty had fulfilled their obligations under Article II. The Conference was of the view therefore that one of the primary objectives of the Treaty had been achieved in the period under Review.¹⁰⁷

At first glance, these clauses appear to endorse the idea that nuclear sharing practices at the time were not in violation of Articles I and II. However, the language is somewhat

¹⁰¹ NPT Review Conference, ‘Summary of the Fourteenth Meeting’ (30 May 1975) UN Doc NPT/CONF/SR.14, 140.

¹⁰² *ibid* 141. Note that the draft Final Document being discussed was the version that was adopted by consensus that same day.

¹⁰³ For example, Norway proposed that the Final Document should state that ‘[t]he Conference confirms that the obligations undertaken under Articles I and II have been observed by all Parties’: Norway, ‘Working Paper on the Review of Articles I and II’ (27 August 1980) UN Doc NPT/CONF.II/C.1/8.

¹⁰⁴ NPT Review Conference, ‘Summary Record of the Nineteenth Meeting’ (7 September 1980) UN Doc NPT/CONF.II/SR.19, 153.

¹⁰⁵ *ibid* 194.

¹⁰⁶ *ibid*.

¹⁰⁷ NPT Review Conference, ‘Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Declaration, Part I’ (21 September 1985) UN Doc NPT/CONF.III/64/I, annex I, 2.

equivocal. It only ‘acknowledged’ the States Parties’ declarations that they had complied with their obligations. It did not accept those declarations. Further, the phrase ‘of the view’ is not particularly strong, definitive language.

Looking behind the Final Declaration at the debates that preceded it, it becomes apparent that the pre-existing divisions over whether nuclear sharing is consistent with Articles I and II persisted. As with previous Review Conferences, numerous States believed that the Articles permitted nuclear sharing.¹⁰⁸ However, Peru stated that it was unclear whether Article I had been implemented by the nuclear-weapon States and highlighted the fact that nuclear-weapon States ‘had stationed nuclear weapons in the territory of other States parties, with a possibility, and in some cases the declared intention, of transferring control over those weapons to the receiving States in the event of an armed conflict’.¹⁰⁹ Further, Sri Lanka determined that it ‘was concerned at the stationing of nuclear weapons on the soil of non-nuclear-weapon States in pursuance of military alliance obligations, for the act of transfer itself was precluded by article I and receipt of the transfer was a breach of article II’.¹¹⁰ It stated that it ‘would also like to see its understanding that article I precluded transfers between nuclear-weapon States embodied in a final document of the Conference’.¹¹¹

Yugoslavia also spoke out against nuclear sharing. It said that ‘the horizontal proliferation of [nuclear] weapons through their deployment in the territories, waters or airspace of some non-nuclear weapon States as well as in international waters … could only harm the credibility of the Treaty’.¹¹² Additionally, it submitted a Working Paper designed to ‘reaffirm the main obligations of the States parties in respect of articles I, II and VI of the Treaty and to propose measures for fulfilling those obligations’.¹¹³ A key part of that Working Paper was a request for nuclear-weapon States to conclude a treaty to halt the future deployment of nuclear weapons in the territories of non-nuclear-weapon States and secure the withdrawal of nuclear weapons that were currently in such territories.¹¹⁴

One further point of note from the 1985 Final Declaration is that it stated:

The Conference agreed that the strict observance of the terms of Articles I and II remains central to achieving the shared objectives of preventing under any

¹⁰⁸ For example, the idea that nuclear weapons can be stationed in non-nuclear-weapon States under the NPT is implicit in the statements of the USSR (NPT Review Conference, ‘Summary Record of the Second Meeting’ (28 August 1985) UN Doc NPT/CONF.III/SR.2, 34); and Finland (NPT Review Conference, ‘Summary Record of the Twelfth Meeting’ (4 September 1985) UN Doc NPT/CONF.III/SR.12, 150).

¹⁰⁹ NPT Review Conference, ‘Summary Record of the Twelfth Meeting’ (n 108) 158.

¹¹⁰ NPT Review Conference, ‘Summary Record of the Tenth Meeting’ (3 September 1985) UN Doc NPT/CONF.III/SR.10, 125.

¹¹¹ *ibid.*

¹¹² NPT Review Conference, ‘Summary Record of the Fifth Meeting’ (11 September 1985) UN Doc NPT/CONF.III/C.I/SR.5, 237.

¹¹³ *ibid* 238.

¹¹⁴ *ibid.*

circumstances the further proliferation of nuclear weapons and preserving the Treaty's vital contribution to peace and security, including to the peace and security of non-Parties.¹¹⁵

The use of the words 'under any circumstances' suggests that the States Parties were affirming that the obligations in Articles I and II apply at all times, including in times of war. This underscores the idea that was agreed during the drafting of the Treaty that, contrary to NATO's nuclear doctrine, it would be impermissible for the US to transfer command and control of nuclear weapons to non-nuclear-weapon States in the event that war broke out.

The Review Conference that took place at the end of the Cold War, in 1990, failed to achieve a final agreement. As with previous debates, there was a divergence of opinion as to whether nuclear sharing was permitted under the Treaty. Venezuela, for example, stated that 'articles I and II of the Treaty, read in conjunction with each other, did not explicitly prohibit a nuclear weapon State from establishing in the territory of a non-nuclear weapon state nuclear weapons which remained under its jurisdiction and control',¹¹⁶ while the Democratic Republic of Korea believed that the objectives of the Treaty required States to give up nuclear sharing arrangements. It urged States to make the most of the period of 'détente and co-operation' to adopt 'decisive measures to attain the Treaty's fundamental objectives'.¹¹⁷ At the top of the list of measures it asserted were required for proper fulfilment of the Treaty was that 'the nuclear-weapon States parties to the NPT must be prohibited from deploying their weapons outside their territory'.¹¹⁸

Once again, there was no agreement on a final text in 1995 and tensions between competing viewpoints on Articles I and II continued to simmer. The NATO States insisted that the nuclear sharing they engaged in was permitted under the NPT. In the words of Germany, '[t]here had never been any transfer whatsoever of nuclear material or know how for military purposes'¹¹⁹ to it as the US had always maintained command and control of the weapons on German territory. A number of non-nuclear-weapon States, however, questioned this position. The Philippines challenged the Netherlands as to whether it was a nuclear- or non-nuclear-weapon State, emphasising that '[f]or its part, the Philippines was a non-nuclear weapon State which complied with the provisions of article II'.¹²⁰ Egypt and Tanzania both stated that Article I was unclear,¹²¹ with Tanzania arguing that 'the deployment of nuclear warheads in the territory of non-

¹¹⁵ NPT Review Conference, 'Final Declaration, Part I' (1985) (n 107) 2.

¹¹⁶ NPT Review Conference, 'Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Part III' (1992) UN Doc NPT/CONF.IV/45/III, 327.

¹¹⁷ *ibid* 101.

¹¹⁸ *ibid*.

¹¹⁹ NPT Review Conference, '1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Part III Summary and Verbatim Records' (1996) UN Doc NPT/CONF.1995/32, 244.

¹²⁰ *ibid* 248.

¹²¹ *ibid* 243–44.

nuclear weapon States would represent a violation of article I if it were interpreted as a transfer of nuclear weapons'.¹²² The confusion surrounding the issue prompted Mexico to state that it 'would like to clarify some matters relating to articles I and II of the Treaty, in particular the question of the transfer of nuclear weapons or other nuclear explosive devices'.¹²³

The division over nuclear sharing's compatibility with Articles I and II persisted into the twenty-first century. The two Final Documents that were approved by consensus after the turn of the century, in 2000 and 2010, did not directly address the issue one way or another but instead simply noted that the parties reaffirmed their commitments to the principles within the Articles.¹²⁴ However, the debates that took place in the Review Conferences from 2000 onwards reveal the ongoing split in opinion. The NATO States maintained that the non-proliferation provisions permitted nuclear sharing while various other States opposed the idea.¹²⁵ For example, in 2005, Libya argued that the Review Conference 'should highlight the importance of the full observance of articles I and VI of the Treaty. Nuclear-weapon States should be called upon not to share or export nuclear technology or know-how except for peaceful purposes'.¹²⁶ Further, the Non-Aligned Movement stated that '[n]uclear-weapon States must refrain from nuclear sharing for military purposes under any kind of security arrangements'.¹²⁷ This was echoed by China, which said that 'States should withdraw and repatriate all nuclear weapons deployed outside their own territories, abandon "nuclear umbrella" and "nuclear sharing" policies and practices'.¹²⁸

In 2010, Iran said that '[t]he nuclear-weapon States should comply with their obligations under article I by refraining from nuclear-sharing, under any pretext, including security arrangements or military alliance'.¹²⁹ It reiterated its concerns in

¹²² *ibid* 244.

¹²³ *ibid* 243.

¹²⁴ NPT Review Conference, '2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Parts I and II' (2000) UN Doc NPT/CONF.2000/28, paras 3–4; NPT Review Conference, '2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Parts I and II' (2010) NPT/CONF.2010/50 (Vol I) paras 3–4.

¹²⁵ Note that the UN has not published the debates of the 2000 NPT Review Conference, so it is not possible to determine the different views that may have been expressed there. Reaching Critical Will has published a few of the statements from the Review Conference but none of them touched on the topic of nuclear sharing: see Reaching Critical Will, 'Statements to the 2000 NPT Review Conference' <https://www.reachingcriticalwill.org/disarmament-fora/npt/2000/statements#MCII>.

¹²⁶ NPT Review Conference, 'Summary Record of the Eighth Meeting' (14 June 2005) UN Doc NPT/CONF.2005/57, pt 3, 76.

¹²⁷ NPT Review Conference, 'Summary Record of the Second Meeting' (6 June 2005) UN Doc NPT/CONF.2005/57, pt 3, 20.

¹²⁸ NPT Review Conference, 'Main Committee I, Summary Record of the First Meeting' (24 July 2006) UN Doc NPT/CONF.2005/57, pt 3, 153.

¹²⁹ Islamic Republic of Iran, 'Working Paper No 49 on Nuclear Disarmament' (3 May 2010) UN Doc NPT/CONF.2010/WP.49, 5–6.

2015, arguing that ‘[n]uclear-weapon-sharing … was a clear violation of the concerned States parties’ explicit obligations under articles I and II of the Treaty’.¹³⁰

In 2015, Russia also expressed its view that nuclear sharing contravened the NPT. The Russian delegate argued that his Government considered ‘the nuclear-sharing missions of the North Atlantic Treaty Organization (NATO) … a blatant violation of articles I and II of the Treaty’.¹³¹

Opposition to nuclear sharing being compatible with Articles I and II continued at the 2022 Review Conference. There, the Non-Aligned Movement stated:

In the view of the Group, any horizontal proliferation of nuclear weapons and nuclear weapon-sharing by States Parties constitutes a clear violation of non-proliferation obligations undertaken by those Nuclear Weapon States (NWS) under Article I and by those Non Nuclear Weapon States (NNWS) under Article II of the Treaty. The Group therefore urges these States parties to put an end to nuclear weapon-sharing with other States under any circumstances and any kind of security arrangements, including in the framework of military alliances.¹³²

Russia stated that ‘[t]here are U.S. nuclear weapons on the territory of non-nuclear bloc allies. Its practical use is being exercised with the involvement of non-nuclear members of the bloc. Such actions … are contrary to Articles I and II of the NPT’.¹³³

While not explicitly claiming that nuclear sharing was contrary to Articles I and II, China spoke out strongly against it, declaring that nuclear sharing ‘has never been universally and clearly recognized by all the parties’ and that ‘it runs counter to the purposes and principles of the Treaty, and is itself nuclear proliferation’.¹³⁴

It is apparent from the above exposition that there has been very little agreement or ‘concordant, common and consistent’ practice over time from the States Parties to the NPT as to whether nuclear sharing practices are permissible under Articles I and II. The one element of agreement displayed is found in the 1985 Final Declaration, which suggests that States are agreed that the Articles continue to operate in times of war.

Conclusion on nuclear sharing practices

¹³⁰ NPT Review Conference, ‘Main Committee II: Summary Record of Second Meeting’ (22 June 2015) UN Doc NPT/CONF.2015/MC.II/SR.2, 11.

¹³¹ *ibid* 4.

¹³² Reaching Critical Will, ‘Statement by the Delegation of the Republic of Indonesia on behalf of the Group of the Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons at the Tenth Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons: Main Committee II’ (8 August 2022) <https://reachingcriticalwill.org/disarmament-fora/npt/2022/statements#mc2>.

¹³³ Reaching Critical Will, ‘Statement by the Deputy Head of the Delegation of the Russian Federation at the Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Mr. Igor Vishnevetskii: Main Committee II’ (8 August 2022) <https://reachingcriticalwill.org/disarmamentfora/npt/2022/statements#mc2>.

¹³⁴ Reaching Critical Will, ‘Statement by the Chinese Delegation on Nuclear Non-Proliferation at the Tenth Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons Main Committee II’ (8 August 2022) <https://reachingcriticalwill.org/disarmament-fora/npt/2022/statements#mc2>.

The application of the principles of treaty interpretation reflected in the VCLT to Articles I and II NPT reveals a deep ambiguity in their scope and uncertainty as to the extent to which they support or prohibit the various types of nuclear sharing practices. Having regard to the ordinary meaning of Articles I and II in their context and in light of the NPT's object and purpose does not provide a clear answer in relation to the stationing of nuclear weapons in non-nuclear-weapon States, the training of military personnel from non-nuclear-weapon States or the participation of non-nuclear States in nuclear decision-making, strategising and planning exercises. Furthermore, neither the travaux préparatoires nor the records of debates or Final Documents from NPT Review Conferences provide any greater clarity. Instead, they reveal the deep divisions between States Parties as to whether different nuclear sharing practices are permissible under the Articles.

The only area where the application of the principles reflected in Articles 31 and 32 VCLT to the NPT does provide some clarity is with respect to the war issue. The ordinary meaning of the Treaty's terms, the travaux préparatoires and the subsequent agreement from the 1985 NPT Review Conference all demonstrate that NATO's assertions that the Treaty ceases to operate in times of conflict, and that the US can transfer command and control over nuclear weapons to non-nuclear-weapon States in the alliance, cannot be supported.

The disarmament obligation in Article VI NPT

While most of the legal discussions surrounding nuclear sharing have focused on Articles I and II, there are other provisions that are relevant when considering the legality of these practices. Most significantly, the nuclear disarmament obligation in Article VI should be considered. This section begins by setting out the scope of Article VI and how it has been interpreted before considering its implications for nuclear sharing practices.

Scope of Article VI NPT

Article VI provides that '[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to ... nuclear disarmament'.¹³⁵ Precisely what this obligation entails has been the subject of considerable debate,¹³⁶ and its vague terms have enabled the nuclear-weapon States to justify a lack of progress towards nuclear disarmament.¹³⁷ However, despite efforts by the nuclear-weapon States to undermine Article VI, there is strong support from the ICJ and international law

¹³⁵ Art VI also contains obligations concerning ending the nuclear arms race and concluding a treaty on general and complete disarmament, but these are not directly relevant to the discussion here.

¹³⁶ For an overview of the debate, see M Cormier and A Hood, 'Australia's Reliance on Extended Nuclear Deterrence and International Law' (2017) 13 JILIR 26.

¹³⁷ A Hood, 'Questioning International Nuclear Weapons Law as a Field of Resistance' in JL Black-Branch and D Fleck (eds), *Nuclear Non-Proliferation in International Law* (TMC Asser Press 2020) vol V, 17.

literature for the proposition that it entails concrete obligations to achieve nuclear disarmament.

The ICJ determined in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that ‘[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control’.¹³⁸ In other words, Article VI contains both an obligation of conduct (to take part in negotiations) and an obligation of result (to achieve nuclear disarmament).¹³⁹

Some scholars have questioned whether the ICJ went too far in reading an obligation of result into Article VI,¹⁴⁰ and have suggested instead that a plain meaning interpretation of the provision simply requires States Parties to focus on engaging in good faith negotiations.¹⁴¹ The concept of good faith negotiations is well known in international law and was explored by the ICJ in the *North Sea Continental Shelf* cases of 1969. The Court held that good faith negotiations mean that:

The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation ... they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.¹⁴²

Good faith negotiations have further been held to require States to ‘move forward simultaneously’¹⁴³ and to ‘make every effort ... to reach a mutually satisfactory compromise, even going so far as to abandon previously inflexibly held positions’.¹⁴⁴

Interestingly, in many respects there is very little difference in what these two interpretations of Article VI achieve over time. While the ICJ’s approach explicitly requires States to achieve nuclear disarmament at some point, if States are properly engaging in good faith negotiations under the second approach and focusing on reaching agreement, ensuring negotiations are meaningful, compromising with one another and moving forwards, they will also eventually reach a point where nuclear disarmament is achieved. It is thus clear that both interpretations of Article VI require

¹³⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 268.

¹³⁹ *ibid* 263.

¹⁴⁰ See, e.g. Joyner (n 37) 97; VP Nanda and D Krieger, *Nuclear Weapons and the World Court* (Transnational Publishers 1998) 113.

¹⁴¹ Joyner (n 37) 95–108; D Rietiker, ‘The Meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Analysis under the Rules of Treaty Interpretation’ in JL Black-Branche and D Fleck (eds), *Nuclear Non-Proliferation in International Law* (TMC Asser Press 2014) vol I, 52–54.

¹⁴² *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Rep 3, para 85.

¹⁴³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 18 (Separate Opinion of Judge Higgins).

¹⁴⁴ G Guyomar, ‘Arbitration Panel/Tribunal of the Agreement on German External Debt AFDI’ (1973) XIX RIAA 27.

States Parties to be making meaningful progress towards nuclear disarmament until it is achieved.

Applying Article VI NPT to nuclear sharing practices

The requirement under Article VI for States Parties to the NPT to be making progress towards nuclear disarmament has significant implications for all of the States Parties engaged in nuclear sharing practices. In relation to the NATO States engaged in the practice, it does not mean they were under an immediate obligation upon joining the NPT to give up these practices. However, it does mean that they must be able to show that from the point they joined the Treaty they have been progressively taking steps towards nuclear disarmament. Arguably, if this obligation was being met, the NATO States would have long ago reached the point where they needed to start giving up their nuclear sharing practices to demonstrate their good faith movement towards the goal.¹⁴⁵ Indeed, a number of States have made this point over the years in Review Conferences. For example, as early as 1975, Yugoslavia said ‘[t]o initiate the process of gradual nuclear disarmament, nuclear weapon States [must] remove tactical nuclear weapons from foreign territory as soon as possible’. More recently, in 2010, China argued that States should ‘abandon the policy and practice “nuclear umbrella” and “nuclear sharing”’ so that they could ‘promote nuclear disarmament’.¹⁴⁶ And, in 2022, prior to re-engaging in the practice itself, Russia stated that NATO’s nuclear sharing arrangements ‘generally hamper nuclear disarmament efforts’.¹⁴⁷

Article VI also raises difficulties for the nuclear sharing arrangements between Russia and Belarus. Introducing nuclear sharing practices in 2023 was a step away from nuclear disarmament, as it involved spreading the reach and influence of the weapons rather than diminishing them. Given that Article VI requires States to work progressively towards nuclear disarmament, Russia and Belarus’s actions can be seen as a violation of the provision.

Conclusion

The argument that I have put forward in this article about the interaction between Articles I and II NPT and nuclear sharing was not the one that I had expected to make. I had always read Articles I and II as prohibiting the practice. On reflection, however, I should not have been surprised that the wording of the Articles is in fact ambiguous and that the history of the Treaty—from the earliest days of the ENDC negotiations through to the most recent Review Conference—reveals deep contrasts in how the words are understood. This is a result of the fact that the NPT was drafted to accommodate the

¹⁴⁵ It is, of course, possible that there are steps other than giving up nuclear sharing that they could take to further nuclear disarmament but if they keep engaging progressively with it (as they must under art VI), at some point, there will be no option left but to dismantle their engagement with nuclear sharing in order to fulfil their obligation.

¹⁴⁶ NPT Conference Review, ‘Nuclear Disarmament and Reduction of the Danger of Nuclear War: Working Paper Submitted by China’ (6 May 2010) UN Doc NPT/CONF.2010/WP.63, 2–3.

¹⁴⁷ Reaching Critical Will (n 133).

nuclearism of the nuclear-weapon States (and their allies) while paying lip service to the anti-nuclear ideals of other States.¹⁴⁸ The ambiguity that is woven into the fabric of the Treaty makes it exceedingly difficult for those States and civil society organisations that want to see progress made towards a nuclear-free world to undo the Gordian knot of the Treaty and gain traction on their agendas. Instead, they are pulled into endless arguments about the meaning of the Treaty's terms.

In light of the uncertainty that underlies Articles I and II, there is perhaps little to be gained by seeking to resolve the nuclear sharing debate through continuing to litigate the meaning of these provisions. Instead, those States that are opposed to the practice would be advised to challenge it under Article VI NPT. As noted in Section 3, all States Parties are required by Article VI to work progressively towards nuclear disarmament. If the NATO States Parties to the Treaty had been fulfilling this obligation across the decades and continuously taking steps towards this goal, they ought to have at least made a start in dismantling their nuclear sharing practices, if not given them up completely. Furthermore, if Russia and Belarus were complying with their Article VI obligations, they would not have entered into their 2023 nuclear sharing arrangements at all.

In closing, it is important to note that the issues explored in this article are likely to become increasingly significant in the coming years. There is growing pressure for the establishment of new nuclear sharing initiatives. In particular, both Japan and the Republic of Korea have expressed a strong interest in entering nuclear sharing arrangements with the US to protect against threats from North Korea, Russia and China.¹⁴⁹ If Japan and the Republic of Korea (and for that matter any other non-nuclear-weapon States Parties to the NPT) want to maintain their good standing within the NPT, and not contravene their clear obligations under Article VI, then ideas of nuclear sharing need to be abandoned and alternative means of achieving security pursued.

¹⁴⁸ Indeed, the NPT is often referred to as a 'grand bargain' that accommodates the interests of both nuclear- and non-nuclear-weapon States.

¹⁴⁹ S Kuramitsu, 'Japan's New Leader Stirs Debate on Nuclear Sharing' (*Arms Control Today*, November 2024) <https://www.armscontrol.org/act/2024-11/news/japans-new-leader-stirs-debate-nuclearsharing>; BW Bennett, 'South Korean Nuclear Nonproliferation Pivot Points' (*Rand*, 12 August 2024) <https://www.rand.org/pubs/commentary/2024/08/south-korean-nuclear-nonproliferation-pivot-points.html>.

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