

**TWO LEGAL ISSUES CONFRONTING
NATO AND THE NON-PROLIFERATION REGIME:**

US Presidential Decision Directive 60
versus
**Pledges of Non-Use of Nuclear Weapons
Made to Non-Nuclear Weapon States**

NATO Nuclear Sharing
versus
the Nuclear Non-Proliferation Treaty

John Burroughs
Lawyers' Committee on Nuclear Policy
New York www.lcnp.org
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Introduction and Summary

This paper addresses 1) the legal status of negative security assurances and exceptions to those assurances asserted by the United States in connection with Presidential Decision Directive 60 adopted in November 1997; and 2) the legal status of NATO nuclear sharing practices.

Those issues deserve serious attention at the 1999 preparatory meeting for the 2000 Nuclear Non-Proliferation Treaty (NPT) Review Conference and in the process to be initiated within NATO to "consider options for confidence and security building measures, verification, non-proliferation and arms control and disarmament".¹

The following conclusions are reached:

Negative Security Assurances:

- X Assurances of non-use against non-nuclear weapon states parties to the NPT and to regional nuclear weapon free zone treaties are legally binding, and this should be formally recognized and affirmed by the nuclear weapon states
- X The determination of whether a state is in good standing under the NPT and regional treaties and protected by the assurances is a matter for the International Atomic Energy Agency or other authoritative international body and not for the nuclear weapon states
- X The use of nuclear weapons in reprisal against a chemical or biological attack is barred by the assurances and further could not meet the legal requirements governing reprisals
- X Preemptive uses of nuclear weapons against chemical or biological weapon capabilities are similarly barred, and the United States should impose its statement that it has no policy of such uses on US armed forces which continue to plan and prepare for such a contingency

¹ Washington Summit Communique, 24 April 1999, Press Communique NAC-S(99)64, para. 52. The paragraph further states:

The [North Atlantic] Council will propose a process in December [1999] for considering such options. The responsible NATO bodies would accomplish this. We support deepening consultations with Russia in these and other areas in the Permanent Joint Council as well as with Ukraine in the NATO-Ukraine Commission and with other Partners in the EAPC [Euro-Atlantic Partnership Council].

NATO Nuclear Sharing Practices:

- X The practices are a prima facie violation of Articles I and II of the NPT because the United States is transferring to non-nuclear weapon states control over nuclear weapons
- X The US argument justifying nuclear sharing to the effect that the NPT becomes ineffective in time of war is extremely dangerous; it undermines the stability of the NPT and of international law generally
- X The United States should resolve the serious questions about the legality of nuclear sharing by withdrawing nuclear weapons from deployment in NATO states, terminating nuclear sharing arrangements, and renouncing the position that the NPT becomes ineffective in time of war

US Presidential Decision Directive 60 Versus Pledges of Non-Use of Nuclear Weapons Made to Non-Nuclear Weapon States

Background: The United States and the other declared nuclear weapon states (Russia, China, France, United Kingdom) have given assurances of non-use of nuclear weapons to non-nuclear weapon states parties to the Nuclear Non-Proliferation Treaty (NPT) and to regional nuclear weapon free zone treaties. These include the signing of protocols to the regional treaties,² adoption of memoranda on security assurances,³ and declarations. The most recent declarations were made shortly before 1995 NPT Review and Extension Conference and referred to in Security Council Resolution 984 (1995). The US declaration stated:

The United States reaffirms that it will not use nuclear weapons against non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons except in the case of an invasion or any other attack on the United States, its territories, its armed forces or other troops, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State.⁴

² Tlatelolco, Rarotonga, and Pelindaba.

³ With Ukraine, Belarus, and Kazakstan.

⁴ S/1995/263 (6 April 1995). The United States' 1978 declaration stated:

The United States will not use nuclear weapons against any non-nuclear-weapon State party to the non-proliferation Treaty or any comparably internationally binding commitment not to acquire nuclear explosive devices, except in the case of an attack on the United States, its territories or armed forces, or its allies, by such a State allied to a nuclear-weapon State or associated with a nuclear-weapon State in carrying out or sustaining the attack.

A/C.1/33/7, annex (17 November 1978). Compare the phrase “any comparably internationally binding

When signing the non-use protocol to the Pelindaba Treaty, the White House stated in a press briefing that the protocol “will not limit options available to the United States in response to an attack by an ANFZ [African Nuclear-weapon Free Zone] party using weapons of mass destruction”.⁵

Presidential Decision Directive (PDD) 60, a classified document signed in November 1997, is the latest statement of US nuclear strategy. According to Robert Bell, special assistant to the president for national security:

The PDD also reaffirmed ... our negative security assurance policy; that is, it is the policy of the United States, as restated in this PDD, not to use nuclear weapons first in a conflict unless the state attacking us or our allies or our military forces is nuclear-capable or not in good standing under the NPT or an equivalent regime, or third, is attacking us in alliance with a nuclear capability [state].⁶

Bell also stated that under the PDD:

We have no plans, no planning, no intention, no policy of using nuclear weapons preemptively to go after, take out, whatever you want to call it, WMD [weapons of mass destruction] storage or production facilities.... We have every conventional option we need to deal with our ability to target facilities that store or produce weapons of mass destruction. And that is distinct, then, from the use of such weapons by an adversary in a conflict where our negative security assurance policy stands.⁷

As described by Bell, the PDD allows for several loopholes with respect to negative security assurances. First, US nuclear first use is permissible if a state is nuclear capable or not in good standing under the NPT or an equivalent regime. Second, it is permissible if a state is attacking in alliance with a nuclear capable state. Third, it is permissible if a state has previously used chemical, biological or other weapons of mass destruction. The third loophole was alluded to in Bell’s last quoted sentence and in the US statement quoted above concerning the protocol to the Pelindaba Treaty, and was stated unambiguously in reporting about the PDD. According to the Washington Post:

commitment not to acquire nuclear explosive devices” with Robert Bell's reference to "NPT or an equivalent regime” quoted in the text.

⁵ White House, Press Briefing by Robert Bell, April 11, 1996, cited in George Bunn, "The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States." 4 The Nonproliferation Review (Spring-Summer 1997, No. 3) 1 (hereinafter “Bunn”), at 11, fn. 116.

⁶ Robert Bell, “Strategic Agreements and the CTB Treaty: Striking the Right Balance,” 28 Arms Control Today (No. 1, January/February 1998) 3, at 6.

⁷ *Id.* at 9.

Bell said Clinton's nuclear targeting directive reflects "much greater sensitivity to the threats" posed by chemical and biological attacks since the previous directive was issued. But he added that it only reiterates what senior administration officials already have said about the issue during the past year - namely, that if any nation uses weapons of mass destruction against the United States, it may "forfeit" its protection from U.S. nuclear attack under the 1995 pledge [reaffirming negative security assurances].⁸

In addition to the foregoing exceptions to negative security assurances, and despite Bell's above-quoted renunciation, the United States has given conflicting signals about preemptive use of nuclear weapons against chemical or biological weapon capabilities. The United States first raised and then denied the possibility of preemptive use against an alleged Libyan chemical weapons facility.⁹ Armed forces planning documents also refer to the possibility, implicitly or explicitly. For example, an Air Force document, dated after the PDD was adopted and after Bell's statement, states:

If US objectives are more limited, a counterforce strategy of employment might be more appropriate. This refers to the use of weapons against the enemy's immediate war-fighting capability. While there will certainly be long-term effects from the use of a nuclear device against any target, counterforce strategy focuses on the more immediate operational effect. *Nuclear weapons might be used to destroy enemy WMD before they can be used, or they may be used against enemy conventional forces if other means to stop them have proven ineffective.*¹⁰

⁸ R. Jeffrey Smith, "Clinton Directive Changes Strategy On Nuclear Arms," Washington Post, December 7, 1997. See also Edward Warner III, Assistant Secretary of Defense (Strategy and Threat Reduction), prepared statement before the Strategic Forces Subcommittee, Senate Armed Services Committee, Hearing on Nuclear Deterrence, March 31, 1998, at 9, quoted in J. Medalia, "Nuclear Weapons Production Capability Issues," Congressional Research Service Report to Congress, June 1998, at CRS-14:

If any nation were foolish enough to attack the U.S., its Allies, or friends with chemical or biological weapons, our response would be swift, devastating, and overwhelming. As Secretary Perry said in 1996, we are able to mount a devastating response without using nuclear weapons. Nevertheless, we do not rule out in advance any capability available to us.

⁹ See Stephen I. Schwartz, "Miscalculated Ambiguity: US Policy on the Use and Threat of Use of Nuclear Weapons," Disarmament Diplomacy (February 1998, No. 23) 10, at 11, available at www.acronym.org.

¹⁰ "Nuclear Operations," Air Force Doctrine Document 2-1.5 (15 July 1998), at 8-9 (emphasis supplied).

Legal analysis: Negative security assurances are legally binding. Protocols to nuclear weapon free zone treaties are treaty instruments. Memoranda of agreement have a legally binding form.¹¹ Assurances made in the form of declarations are also binding because they were made with the intent of inducing non-nuclear weapon states to agree to the indefinite extension of the NPT.¹² In its advisory opinion, the International Court of Justice concluded that "[a] threat or use of nuclear weapons should also be compatible ... with specific obligations under treaties and *other undertakings which expressly deal with nuclear weapons.*"¹³ Nonetheless, the United States has not yet accepted that its 1995 declaration is legally binding.¹⁴ The United States instead may view the declaration as "politically binding",¹⁵ recognizing the obligation but holding that only "political" consequences, for example condemnation in international forums, would follow from a violation, not "legal" consequences such as might be imposed by an international court. According to George Bunn, the distinction "could make a difference to nuclear strategists planning possible future uses of nuclear weapons or making recommendations for nuclear use to a president in time of war".¹⁶

The Principles and Objectives for Nuclear Non-Proliferation and Disarmament adopted by the 1995 NPT Review and Extension conference provide that

further steps should be considered to assure non-nuclear-weapon States not party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument.¹⁷

Whether or not other "further steps" regarding negative security assurances are taken, the United States and the other declared nuclear weapon states should formally recognize and affirm the existing declarations as legally binding. However, questions about the legal status of the declarations must not obscure that in affirming

¹¹ Bunn at 7.

¹² See *id.* at 8-11. A unilateral declaration can be binding in a negotiating context, or when other states have relied upon the declaration to their detriment. After France declared its intent to stop atmospheric testing, the International Court of Justice dismissed as moot *Nuclear Tests Case (Australia and New Zealand v. France)* 1974 ICJ Rep. 253, and in so doing, found that the declaration was an assumption of a binding obligation. The negative security assurances may also have attained the status of binding customary international law. See Bunn at 10.

¹³ *Legality of Threat or Use of Nuclear Weapons*, General List No. 95 (Advisory Opinion of 8 July 1996), para. 105(2)(D) (emphasis supplied).

¹⁴ Bunn at 11.

¹⁵ See *id.* at 8, 10-11.

¹⁶ *Id.* at 11.

¹⁷ Para. 8, NPT/CONF. 1995/32 (Part I), Decision 2.

the negative security assurances as longstanding US policy the United States has recognized their importance to the integrity and viability of the NPT. The same considerations support excluding or severely limiting asserted exceptions to the negative security assurances, as discussed below.

1) Protected states: The determination of whether a state is nuclear-capable or not in good standing under the NPT or an equivalent regime is not a matter for unilateral US determination but must be based on a determination by the International Atomic Energy Agency (IAEA) or other authoritative body. For example, the United States cannot reserve the right to use nuclear weapons against Iraq on the ground that it is not in good standing under the NPT now that the IAEA has found Iraq to be presently in compliance. Also, “equivalent regime” must be understood to refer to a regime regulating nuclear weapons such as a nuclear weapon free zone treaty, not to the regimes prohibiting chemical and biological weapons. Negative security assurances were given in connection with the NPT, not the Chemical Weapons Convention (CWC) or the Biological Weapons Convention (BWC).

2) Reprisals: The US reservation of the option of using nuclear weapons in reprisal for prior use of chemical, biological or other non-nuclear weapons of mass destruction must be rejected. With the exception of the statement made in connection with the Pelindaba Treaty, the negative security assurances included no such qualification and, as just noted, are an integral part of the NPT regime, not the CWC and BWC regimes. A reinforcing consideration is that a nuclear use would end more than 50 years of non-use and tend to legitimize the possession and use of nuclear weapons, and thereby significantly, perhaps fatally, undermine the non-proliferation regime.

Even aside from the bar posed by negative security assurances, the use of nuclear weapons in reprisal would be virtually impossible to justify legally. In the event of a chemical attack, chemical weapon use in reprisal is ruled out by the CWC, which requires that states “never under any circumstances” use such weapons. While the use of biological weapons is prohibited by the Geneva Protocol of 1925, reaffirmed by the BWC, there is no similarly clear prohibition on their use in reprisal. Nonetheless, their development and possession is prohibited by the BWC, and a prohibition of reprisals is a strong inference on that ground alone. The United States is apparently not considering executing biological reprisals to biological attacks.¹⁸ However, the United States is considering, indeed threatening, the use of nuclear weapons in reprisal to chemical or biological attacks, as well as to nuclear attacks. The doctrine of reprisal offers little support for that posture.

A reprisal has classically been defined as an otherwise illegal act, taken in response to an enemy's prior illegal act, executed with the intent of causing the enemy to cease such acts. The International Court of Justice observed that like self-defense, the right of recourse to reprisals is “governed *inter alia* by the principle of proportionality”.¹⁹ Thus, like self-defense, reprisal would warrant only measures which are

¹⁸ See Bunn at 12.

¹⁹ *Legality of Threat or Use of Nuclear Weapons*, para. 46.

proportional to the armed attack and necessary to respond to it.²⁰ The risk of escalation and effects on the environment must be taken into account in assessing proportionality, and the requirement of proportionality incorporates humanitarian law protecting combatants against unnecessary suffering and non-combatants against direct or indiscriminate harm.²¹ Humanitarian law must be obeyed in all circumstances, as the ICJ's opinion reflects. The ICJ concluded that “[a] threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of humanitarian law ...”²² The ICJ also observed that “fundamental” rules of humanitarian law are “intransgressible”.²³ Finally, the ICJ formulated the principle barring the infliction of indiscriminate harm in emphatically categorical form, paralleling the above-quoted language of the CWC in the use of the word “never”: “States must *never* make civilians the object of attack and must consequently *never* use weapons that are incapable of distinguishing between civilian and military targets”.²⁴

Thus a nuclear reprisal must meet requirements including the following: 1) it must be necessary, *i.e.* there must be no less dangerous means of causing the enemy to desist from further chemical or biological attacks; 2) it must be proportionate, *i.e.* must not be excessive in relation to the scale of the prior attack and to the objective of causing the enemy to cease such attacks, taking into account the risk of escalation and environmental consequences; 3) it must not target or indiscriminately harm civilians, or cause unnecessary suffering to combatants. It is extremely difficult to conceive of scenarios, even one where a preceding biological attack had caused casualties in the hundreds of thousands, where all of these requirements could be met. The advisory opinion of the International Court of Justice is in accord. While reaching no definitive position regarding an extreme circumstance of self-defense in which the very survival of a state is at stake, the Court concluded that threat or use of nuclear weapons is generally illegal. Even in the unlikely case where a chemical or biological attack placed the survival of a state at risk, with its conventional capabilities the United States would have no need to ignore the presumptive illegality of use of nuclear weapons.

²⁰ See *id.*, para. 41.

²¹ *Id.*, paras. 30, 42, 43.

²² *Id.*, para. 105(2)(D).

²³ *Id.*, para. 79.

²⁴ *Id.*, paras. 78 (emphasis supplied). The categorical humanitarian ban on attacks upon civilians is also found in the Statute of the International Criminal Court, adopted July 17, 1998 in Rome. It prohibits “[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” and “against civilian objects”. Art. 5(b)(I) and (ii). While the Statute does not explicitly ban reprisals against civilians, neither is any exception made for reprisals. The Statute sets forth the offenses under which individuals would be prosecuted once that court is in operation. Its substantive provisions were explicitly negotiated on the basis that they would reflect the present state of law binding on all states, and the United States participated actively in their negotiation. While the Statute is not yet in effect, as the required number of states (60) has not yet ratified the instrument, and while the United States' present position is that it will not sign or ratify the Statute, the Statute nonetheless stands as a consensus-based statement of presently binding law defining war crimes.

3) Preemptive uses: Bell's statement that the US has no policy of preemptive uses of nuclear weapons against non-nuclear WMD capabilities is to be welcomed, and should be imposed upon US armed services which continue to plan and prepare for such a contingency. A preemptive use of nuclear weapons against a non-nuclear weapon state party to the NPT or a regional nuclear weapon free zone would unquestionably breach negative security assurances and would also fail to comply with the requirements of necessity, proportionality, and discrimination.²⁵

NATO Nuclear Sharing Versus the Nuclear Non-Proliferation Treaty

Background: Six non-nuclear weapon states, Belgium, Germany, Greece, Italy, The Netherlands, and Turkey, are involved in NATO nuclear cooperation programs conducted pursuant to agreements between each of those states and the United States.²⁶ The programs include maintenance of dual capable aircraft prepared for the conduct of nuclear missions and training in nuclear weapons use. On the order of 150 nuclear bombs are reportedly deployed in the cooperating states and the United Kingdom. They cannot be armed without an order from the United States. In time of war, according to a 1969 statement of the

²⁵ Indeed, in general, *any* first use of nuclear weapons by the United States could not meet the requirements of necessity, proportionality, and discrimination. Both PDD 60 and US negative security assurances fail to recognize this reality, because they reflect the US policy of possible first use in response to conventional aggression by a nuclear-armed state or by a non-nuclear weapon state carrying out such aggression in alliance with a nuclear-armed state. PDD 60 also reaffirms the US policy of massive retaliation against nuclear attack, failing to recognize that massive retaliation by its very nature inflicts indiscriminate harm. According to Robert Bell, as reported in the previously cited Washington Post article concerning the PDD, nuclear weapons “are still needed to deter ‘aggression and coercion’ by *threatening a response that ‘would be certain and overwhelming and devastating’* [and] the directive still allows the United States to launch its weapons after receiving warning of attack - but before incoming warheads detonate - and also *to be the first to employ nuclear arms in a conflict.*” (Emphasis supplied.) Compliance with the law requires not only respect for negative security assurances as described in the text, but also a policy of unconditional no first use and rejection of the policy of massive retaliation.

²⁶ The Netherlands agreement, for example, refers to the exchange of classified information pertaining to the “[t]raining of personnel in the employment of and defense against atomic weapons...” and “[d]evelopment of delivery systems compatible with the atomic weapons which they carry.” Article II, Netherlands, Atomic Energy: Cooperation for Mutual Defence Purposes, 1959. See Martin Butcher, Nicola Butler, Oliver Meir, Otfried Nassauer, Dan Plesch, Georg Schofbanker and Stephen Young, Austrian Study Center for Peace and Conflict Research, Berlin Information-centre for Transatlantic Security, British American Security Information Council, Centre for European Security and Disarmament, *NATO Nuclear Sharing and the NPT - Questions to be Answered* (June 1997), at 14 (hereinafter “*NATO Nuclear Sharing*”). This publication is a valuable source of information and analysis.

chairman of the US Joint Chiefs of Staff, release of the weapons to the cooperating states could be authorized.²⁷ NATO's recently adopted "Strategic Concept" affirms a continuing commitment to nuclear sharing.²⁸

Article I of the Nuclear Non-Proliferation Treaty provides:

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

Article II imposes the corollary obligation on non-nuclear weapon states not to be the recipient of any such transfer or assistance.

In the US view, the NATO nuclear sharing arrangements do not violate Articles I and II because the NPT

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 not longer be controlling.²⁹

²⁷ See Testimony of General Earle G. Wheeler, "Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons," Hearing before the US Senate Armed Services Committee, 91-2, February 27-28, 1969, at 23, quoted in *NATO Nuclear Sharing* at 5.

²⁸ Press Communique NAC-S(99)65, Washington Summit Communique, April 24, 1999, "The Alliance's Strategic Concept". At paras. 63 and 64 the document states in part:

A credible Alliance nuclear posture and the demonstration of Alliance solidarity and common commitment to war prevention continue to require widespread participation by European Allies involved in collective defence planning in nuclear roles, in peacetime basing of nuclear forces on their territory and in command, control, and consultation arrangements. Nuclear forces based in Europe and committed to NATO provide an essential political and military link between the European and the North American members of the Alliance....

... NATO will maintain, at the minimum level consistent with the prevailing security environment, adequate sub-strategic forces based in Europe which will provide an essential link with strategic nuclear forces, reinforcing the transatlantic link. These will consist of dual capable aircraft and a small number of United Kingdom Trident warheads....

²⁹ "Questions on the Draft Non-Proliferation Treaty Asked by U.S. Allies Together With

This position was communicated to the Soviet Union, NATO states, and certain members of the Eighteen Nation Disarmament Committee (the predecessor to the Conference on Disarmament), prior to the opening of the NPT for signature on July 1, 1968.³⁰ It was made public in hearings before the Senate on July 9, 1968. The position was never made part of a formal international statement by the United States in connection with signature or ratification. So far as is known to the Lawyers' Committee on Nuclear Policy, no state made a formal objection to the position in connection with signature or ratification. At the 1995 NPT Review and Extension Conference, many non-NATO states indicated their lack of acceptance of the position, some holding that there is no joint interpretation of Articles I and II, others holding that the NATO nuclear sharing arrangements violate Articles I and II. At the 1998 NPT meeting preparing for the 2000 Review Conference, the Non-Aligned Movement, representing more than 100 states, presented a working paper calling pursuant to Article I for nuclear weapon states to refrain from “nuclear sharing for military purposes under any kind of security arrangements”, among themselves, with non-nuclear weapon states, and with states not party to the NPT.³¹

Legal analysis: There is a prima facie case that NATO nuclear sharing violates Articles I and II. The United States is *transferring* to non-nuclear weapon states *control* over nuclear weapons. In a non-NATO context, the United States likely would not accept the explanation that the control is partial. Further, the United States itself has acknowledged that there could be a transfer of control in the event of war, and the United States is presently *assisting* non-nuclear weapon states in *acquiring* such possible *control*. The NPT does not provide that it becomes ineffective in time of war. Nor is there any basis in international law for maintaining that it does so. The NPT does provide for withdrawal upon three months notice of extraordinary events that a state regards as having jeopardized its supreme interests, but this is not relied upon by the United States.

The US argument that the NPT becomes ineffective in time of war is extremely dangerous. As a treaty regulating weapons, it would seem that, if anything, it becomes more relevant in wartime rather than less. Moreover, the US position promotes instability. The argument could be relied upon by any nuclear weapon state to justify supplying nuclear weapons to other states, or a non-nuclear weapon state acquiring nuclear weapons. The question arises, what kind of war triggers ineffectiveness? The United States has indicated that a “general” war involving nuclear weapon states and the use of nuclear weapons would qualify, but this does not suffice to resolve the question for a wide range of possible conflicts.³² Further, the notion that a treaty becomes ineffective in time of war undermines international law. In considering, for example, human rights and

Answers Given by the United States”, NPT Hearings, US Senate, 90-2, at 262-263.

³⁰ *NATO Nuclear Sharing* at 7.

³¹ Project on European Nuclear Non-Proliferation, Press Release, “Non-Aligned Movement Demands an End to NATO Nuclear Sharing,” annex, April 28, 1998.

³² See *NATO Nuclear Sharing* at 9-10.

environmental treaties in connection with the legality of threat or use of nuclear weapons, the International Court of Justice held that those treaties continue to apply during wartime.³³

Thus the language of Articles I and II supports illegality. In response, the United States can point to the following factors: the nuclear sharing practices were in place at the time the treaty was negotiated; the negotiating history apparently indicates no positive intent to end those practices or objection to the US position; from opening for signature until entry-into-force, no objections apparently were voiced to the position; and the practices continued for a quarter century before they were challenged at the 1995 NPT Review and Extension Conference. Countervailing factors include that the position was not made publicly available prior to opening of the treaty for signature and that it was not formally communicated in connection with US signature and ratification.

Also relevant are the object and purpose of the NPT.³⁴ Its primary object is to prevent the spread of nuclear weapons beyond those states having possessed and tested them by 1968. Its purpose in preventing proliferation, as provided by the first and second preambular paragraphs, is to avoid enhancement of danger of nuclear war.³⁵ Because NATO nuclear sharing was already in place by 1968, it can be argued that it does not represent proliferation *subsequent* to the establishment of the NPT regime. But, recent NATO expansion

³³ *Legality of Threat or Use of Nuclear Weapons*, paras. 25, 30

³⁴ The US position is sometimes referred to as the “war reservation”, but it seems doubtful that it is technically a reservation. A reservation refers to a unilateral statement made by a state when signing or ratifying a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty. Art. 2(d), Vienna Convention on the Law of Treaties. Ratification is an international act whereby a state establishes on the international plane its consent to be bound by a treaty. Art. 2(b). A reservation must be formulated in writing and communicated to states entitled to be parties to a treaty. Art. 23(1). If made upon signing it must be formally confirmed upon ratification. Art. 23(2). The United States made no formal statement on the international plane concerning Articles I and II when signing or ratifying. Consistent with its conduct, the United States apparently considers its position to be an interpretation, not a reservation modifying the effect of Articles I and II. If, notwithstanding the foregoing, the US position is considered a reservation, an essential question is whether it is incompatible with the object and purpose of the treaty (Art. 19(c)), and the analysis in the text is applicable.

³⁵ The NPT begins as follows:

The States concluding this Treaty, hereinafter referred to as the “Parties to the Treaty”,

Considering 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 and to take measures to safeguard the security of peoples,

Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war, ...

raising the possibility of additional nuclear cooperation arrangements highlights the problem of accepting the prior arrangements. There are certainly strong arguments that nuclear sharing enhances the danger of nuclear war. It provides a wider range of options for NATO nuclear use, and serves as a provocation to other nuclear weapon states. It also reinforces the political value of nuclear weapons, thereby promoting proliferation. More broadly, the ongoing commitment to nuclear sharing, together with NATO's recently reaffirmed policy of reliance on nuclear weapons including possible first use, is contrary to the general illegality of threat of nuclear weapons as found by the International Court of Justice as well as the Article VI requirement of good faith negotiation of nuclear disarmament. On the other side, there are familiar arguments of "deterrence", "stability", and incremental progress towards the "ultimate" objective of elimination.

At a minimum, then, there are serious questions about the legality of nuclear sharing. The best way to resolve those questions would be to withdraw US nuclear weapons from deployment in European countries and to terminate nuclear sharing arrangements. The United States should also unequivocally renounce the view that the NPT becomes ineffective in time of war.