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NATO's Nuclear Sharing Arrangements Revisited in Light of the NPT and the TPNW

Mika Hayashi

Abstract

The nuclear sharing arrangements of the North Atlantic Treaty Organization (NATO) are arrangements that pre-date the Nuclear Non-Proliferation Treaty (NPT). This article revisits the nuclear sharing arrangements in light of the NPT, then examines the issues in light of a new treaty, the Treaty on the Prohibition of Nuclear Weapons (TPNW). The question of the compatibility between these arrangements and the NPT was initially solved by an understanding that the stationing of the US nuclear weapons in host States did not involve transfer of ownership or transfer of control of these weapons to host States. Compared to the initial acceptance of this interpretation, the contemporary acceptance is less solid. The nuclear sharing arrangements are questioned or criticized in the NPT Review process, both by non-nuclear-weapon States and nuclear-weapon States. In contrast, with regard to the TPNW, there seems to be no controversy; the TPNW explicitly provides that the States Parties must not allow stationing of nuclear weapons. The nuclear sharing arrangements would be incompatible with this prohibition. The article also briefly deals with a separate question, whether a client State of extended nuclear deterrence that does not allow stationing of nuclear weapons in its territory would also contravene the prohibitions in the TPNW. Given the scope and the nature of provisions of the TPNW, the article concludes that it would, if such a client State joins the treaty without a change in its policy regarding extended deterrence.

Keywords

Nuclear deterrence, nuclear sharing arrangements, North Atlantic Treaty Organization (NATO), Nuclear Non-Proliferation Treaty (NPT), Treaty on the Prohibition of Nuclear Weapons (TPNW).

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I Introduction

The arrangements of the North Atlantic Treaty Organization (NATO)¹ for basing U.S. nuclear bombs in States that otherwise do not possess nuclear weapons are called ‘nuclear sharing arrangements.’² The existence of nuclear sharing arrangements is not confidential, and it is confirmed in factsheets drawn up by NATO for the media.³ Under these arrangements, Germany, for example, provides dual-capable aircraft for the nuclear mission of NATO.⁴ A few other European States also dedicate their dual-capable aircraft to deliver the nuclear bombs under these arrangements.⁵ It is understood that currently, the nuclear sharing arrangements of

¹ Its founding instrument is the North Atlantic Treaty, 34 U.N.T.S. 243.

² NATO, ‘NATO’s Positions regarding Nuclear Non-Proliferation, Arms Control and Disarmament and Related Issues’ (2009),

<www.nato.int/nato_static/assets/pdf/pdf_topics/20091022_NATO_Position_on_nuclear_nproliferation-eng.pdf> accessed 2 September 2020

³ NATO, ‘NATO Nuclear Deterrence’, Factsheet (February 2020),

<www.nato.int/nato_static_fl2014/assets/pdf/2020/2/pdf/200224-factsheet-nuclear-en.pdf> accessed 2 September 2020; NATO, ‘NATO and the Non-Proliferation Treaty’ (March 2017) [hereinafter ‘NATO Factsheet on the NPT’],

<www.nato.int/nato_static_fl2014/assets/pdf/pdf_2017_03/20170323_170323-npt-factsheet.pdf> accessed 3 September 2020.

⁴ E.g., Jens Stoltenberg ‘Germany’s support for nuclear sharing is vital to protect peace and freedom’ (op-ed article by NATO Secretary General, 11 May 2020),

<www.nato.int/cps/en/natohq/opinions_175663.htm> accessed 25 August 2020.

⁵ NATO, Factsheet on Deterrence (n 3).

NATO place US nuclear weapons in Germany, the Netherlands, Italy, Belgium and Turkey,⁶ which are non-nuclear weapons States in the Nuclear Non-Proliferation Treaty (NPT).⁷ Today, these nuclear sharing arrangements, or the wider policy of extended deterrence, are critically reviewed by some,⁸ while NATO continues to reiterate their importance.⁹ The compatibility of these arrangements with other international instruments has received fresh attention in recent

⁶ Hans M. Kristensen, 'US Nuclear Forces', in *SIPRI Yearbook 2020: Armaments, Disarmament and International Security* (2020), 334. Older secondary sources frequently cited are Hans M. Kristensen and Robert S. Norris, 'Worldwide deployments of nuclear weapons, 2017' (2017) 73 *Bulletin of the Atomic Scientists* 289; Robert S. Norris and Hans M. Kristensen, 'US Tactical Nuclear Weapons in Europe, 2011' (2011) 67:1 *Bulletin of the Atomic Scientists* 64.

⁷ Treaty on the Non-proliferation of Nuclear Weapons (NPT), 729 U.N.T.S. 161. Today, all NATO members are States Parties to the NPT.

⁸ Natalino Ronzitti, 'US Military Bases in Italy: In Keeping with International Law? Still Needed?' (2008) 43:2 *International Spectator* 79-94; Karl-Heinz Kamp and Robertus C.N. Remkes, 'Options for NATO Nuclear Sharing Arrangements', in Steve Andreasen and Isabelle Williams (eds.), *Reducing Nuclear Risks in Europe: A Framework for Action* (NTI, 2011), 76-95; Otfried Nassauer, 'Nukleare Teilhabe – Überholtes Konzept ohne Funktion?' (18 April 2020), *Streitkräfte und Strategien, NDR Info*. Text available at <<http://www.bits.de/frames/publibd.htm>> accessed 11 September 2020. See also a list of authors mentioned in Todd S. Sechser, 'Sharing the Bomb: How Foreign Nuclear Deployments Shape Nonproliferation and Deterrence' (2016) 23 *The Nonproliferation Review* 444, fn 9.

⁹ NATO, Positions (n 2); NATO, Factsheet on Deterrence (n 3).

years. Within the NPT, there are contestations.¹⁰ Outside the NPT, there are questions asked in relation to the Treaty on the Prohibition of Nuclear Weapons (TPNW).¹¹ It is in this contemporary context that the nuclear sharing arrangements are revisited in this article.

The obvious difficulty of the task is that the main object of the examination is classified. Beyond the sketchy public information, details of these nuclear sharing arrangements are not known. While described as ‘a multilateral arrangement,’¹² they may consist of classified bilateral agreements. For the purpose of the article, a speculation which is plausible enough, if not provable, has to be used. Consequently, it is assumed that the dual-key system, a term used by multiple sources in discussing the nuclear sharing arrangements,¹³ is indeed the way these arrangements operate. This means that while the US nuclear weapons are physically located in a host State, the nuclear weapons remain under the control and ownership of the United

¹⁰ See Section II(2).

¹¹ Treaty on the Prohibition of Nuclear Weapons (TPNW). As of August 2021, the UNTS volume number has not yet been made available. The text is available at <<https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56487/Part/I-56487-08000002804c2398.pdf>> accessed 24 August 2021. On the questions asked, see Section III(1).

¹² Stoltenberg (n 4).

¹³ Natalino Ronzitti, 'Lo stato del disarmo nucleare' (2017) 77 Osservatorio di Politica Internazionale 3; Marco Roscini, 'International Law, Nuclear Weapon-Free Zones and the Proposed Zone Free of Weapons of Mass Destruction in the Middle East' in Annie Golden Bersagel, Gro Nystuen and Stuart Casey-Maslen (eds), *Nuclear Weapons under International Law* (CUP 2014) 330; Sechser (n 8) 447. The ‘two-key’ system, instead of a ‘dual-key’ system, is used in Mohamed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, Vol I (Oceana 1980), 242-43.

States.¹⁴ From a host State's perspective, '[the host State] does not have any direct control of the US nuclear warheads.'¹⁵ Figuratively speaking, the first key is always retained by the United States, and the host State is given a second key. The meaning of the second key in the dual-key system is not control of nuclear weapons. It is that even if the United States decides to use the nuclear weapons stationed in a host State, that host State can still veto that decision, and refuse the launching of nuclear weapons from its own territory.¹⁶ The present article examines how accepted this version of the nuclear sharing arrangements is within the NPT (Section II), then proceeds to examine the discussions that the nuclear sharing arrangements of NATO produce in light of the TPNW, including a spin-off question regarding client States under extended nuclear deterrence in general (Section III).

II NATO's Nuclear Sharing Arrangements in light of the NPT

The main obligation of non-nuclear-weapon States in the NPT is 'not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of

¹⁴ NATO, Positions (n 2); Steven Hill, *NATO and the Treaty on the Prohibition of Nuclear Weapons*, Research Paper of the International Security Programme of Chatham House (January 2021) 8.

¹⁵ Ronzitti (n 8) 89.

¹⁶ Kamp and Remkes (n 8) 93, fn 16; Mirko Sossai, 'Il rapporto tra il Trattato sul divieto di armi nucleari e gli altri accordi in materia di non-proliferazione e disarmo' (2018) 101 *Rivista di diritto internazionale* 185, 199; Natalino Ronzitti, 'Aspetti generali del disarmo' in Sergio Marchisio (ed), *La crisi del disarmo nel diritto internazionale* (Editoriale Scientifica 2009) 111; Shaker (n 13) 242-43.

control over such weapons or explosive devices directly, or indirectly (Art. II).’ Do the host States of nuclear sharing arrangements that allow the the US nuclear weapons to be maintained in their territory comply with this obligation? There is also a question which is the other side of the same coin. The main obligation of nuclear-weapon States in the NPT, the United States in the present case, is ‘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 (Art. I).’ Does the United States comply with this obligation when the US nuclear weapons are stationed in non-nuclear-weapon States in accordance with the nuclear sharing arrangements?

Stated this way, the questions for the nuclear sharing arrangements within the NPT are technical questions of treaty interpretation regarding certain terms used in Articles I and II. In particular, the meanings initially given to ‘transfer’ and ‘control’ of nuclear weapons must be verified (II(1)). At the same time, there is also a wider question of the contemporary acceptance of the nuclear sharing arrangements in the contemporary NPT regime (II(2)). Finally, quite apart from the historical and contemporary acceptance of the dual-key explanation of the nuclear sharing arrangements as compatible with the NPT, a scenario where this explanation does not, at first glance, apply needs to be examined (II(3)).

II. (1) Drafters’ intentions and initial acceptance

The key terms in question, ‘transfer’ and ‘control’ in Articles I and II, had been kept simple in the text of the NPT. They are not accompanied by any adjective, and they are not given any definitions. Nevertheless, the drafters’ intentions become abundantly clear when the well-documented and well-researched drafting history of the NPT is examined. Mohamed Shaker in

his classical work¹⁷ as well as works by subsequent writers all confirm that the 1966-1968 negotiations between the USSR and the United States produced a compromise about the place of the nuclear sharing agreements of NATO within the new regime of non-proliferation.¹⁸

The place of the nuclear sharing arrangements of NATO was a central problem in the NPT negotiation of its Articles I and II. At that time, the USSR was not going to accept any treaty that would allow West Germany to control nuclear weapons.¹⁹ The USSR was not going to accept an establishment of multilateral nuclear forces (MLF) of NATO, either.²⁰ The MLF as it was explored in the NATO 'would have allowed for a joint ownership and control of strategic nuclear system,'²¹ which, in the eyes of the Soviet Union, was proliferation. The United States was arguing that such collective ownership was not proliferation as long as the nuclear-weapon

¹⁷ Shaker (n 13).

¹⁸ As far as the text is concerned, by August 1967, Articles I and II were formulated in the identical way in the identical treaty drafts of the United States and the Soviet Union. They remained unchanged and were adopted as Articles I and II. Shaker (n 13) 232.

¹⁹ See the Soviet foreign minister's letter to the president of the General Assembly, A/6398 (26 September 1966). This Soviet attitude is also confirmed by many studies, e.g., Shaker (n 13) 217-18; William Alberque, *The NPT and the Origins of NATO's Nuclear Sharing Arrangements* 57 IFRI Proliferation Papers (February 2017) 27; Bertrand Goldschmidt, 'The Negotiation of the Non-Proliferation Treaty (NPT)' (1980) 22 (3/4) IAEA Bulletin 73.

²⁰ Shaker (n 13) 217-18, 232; Alberque (n 19) 27; Goldschmidt (n 19) 73-75; Wilfrid L. Kohl, 'Nuclear Sharing in NATO and the Multilateral Force' (1965) 80 Political Science Quarterly 88.

²¹ Shaker (n 13) 187.

State, the United States, did not give up the right and the ability to use nuclear weapons.²² Against this background, the text of the NPT was negotiated and agreed upon;²³ the USSR stopped opposing the nuclear sharing arrangements when the MLF project was abandoned by NATO,²⁴ and upon the assurance that West Germany was not going to obtain control of nuclear weapons.²⁵

²² Shaker (n 13) 232.

²³ Writers agree that the turning point in the negotiation was the visit of Washington, D.C., by the Russian Foreign Minister in October 1966, preceded by a few more bilateral talks between him and the U.S. Secretary of State. Shaker (n 13) 232-33; Goldschmidt (n 19) 75. See Memorandum of Conversation (10 October 1966), in Evans Gerakas, David S. Patterson and Carolyn B. Yee (eds) *Foreign Relations of the United States, 1964–1968*, Volume XI, *Arms Control and Disarmament* (Government Printing Office, 2010) Document 158 <history.state.gov/historicaldocuments/frus1964-68v11/d158> accessed September 2020, also cited by Alberque (n 19) 39-40.

²⁴ By 1966, NATO abandoned both the MLF project and the other project it had been discussing, the Atlantic Nuclear Force (ANF). Instead of these forms of nuclear sharing, NATO turned to the option of the Nuclear Planning Group (NPG). For details of NATO discussions of these nuclear options in this period, see Shaker (n 13) 131-189; Alberque (n 19) 20-25; Daniel Khalessi, 'Strategic Ambiguity: Nuclear Sharing and the Secret Strategy for Drafting Articles I and II of the Nonproliferation Treaty' (2015) 22 *The Nonproliferation Review* 421, 424.

²⁵ Shaker (n 13) 233. Alberque (n 19) 39-41; Goldschmidt (n 19) 75; Georges Fischer, *La non-prolifération des armes nucléaires* (LGDJ 1968) 73-80.

Based on this well-researched drafting history, researchers appear to be unanimous in confirming the drafters' intentions regarding the interpretation of Articles I and II with regard to the nuclear sharing arrangements: these articles were not intended to regulate the nuclear sharing arrangements. There was even a confirmation by the United States, drawn up as a response to a question by the NATO member States regarding the draft treaty text.²⁶ One of their questions was 'Does the draft treaty prohibit arrangements for the deployment of nuclear weapons owned and controlled by the United States within the territory of non-nuclear NATO members?'²⁷ The answer was that 'It [the draft 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.'²⁸

Nevertheless, there are a few authors that raise some doubts about the initial acceptance of this interpretation by the rest of the States negotiating or signing the NPT. Their observations are that there may have been some States among the 56 original signatories that did not read or see, prior to their signatures, the particular interpretation of Articles I and II held by the United

²⁶ 'Questions on the Draft Non-Proliferation Treaty Asked by US Allies together with Answers Given by the United States' attached to the letter of submittal of the NPT from the Secretary of State to the President, reproduced in Shaker (n 13), 234-35, and in Alberque (n 19) 54, Annex 2.

²⁷ 'Questions on the Draft Non-Proliferation Treaty Asked by US Allies' (n 26).

²⁸ 'Questions on the Draft Non-Proliferation Treaty Asked by US Allies' (n 26). See also Sechser (n 8) 447. For the remaining part of this answer, see Section II(3).

States,²⁹ and that some States might have opposed this particular interpretation of ‘control’ and ‘transfer’ in Articles I and II had they known more during the negotiation.³⁰ There is certain legitimacy in what must have motivated these concerns. The NPT being a multilateral treaty, if any special meaning was given to the terms used in it - in the present case, ‘transfer’ and ‘control’ - it should be ‘established that *the parties* so intended,’³¹ and not just two parties, or just a particular group of States, out of all the parties to the treaty.

In this regard, the drafting history indicates that the compromise regarding the nuclear sharing arrangements, reached by the United States and the Soviet Union, was indeed known, and was quietly accepted by the Non-Aligned members of the Eighteen-Nation Disarmament Committee (ENDC). During the ‘heated controversy centred around the “control” issue’³² in the ENDC between the United States and the Soviet Union regarding the US nuclear weapons located in non-nuclear NATO member States, ‘there was a tendency to leave to the major Powers themselves the task of solving their alliance problems.’³³ Reactions of the States participating in the negotiation was much the same when the discussion was moved to the UN General Assembly, that is, ‘their colleagues in the UN General Assembly rarely took sides with

²⁹ Martin Butcher and others, ‘NATO Nuclear Sharing and the NPT - Questions to be Answered’ (June 1997) <www.bits.de/public/researchnote/rn97-3.htm> accessed 19 May 2021.

³⁰ Khalessi (n 24) 434.

³¹ Emphasis added. Art. 31(4), Vienna Convention on the Law of Treaties (VCLT) 1155 U.N.T.S. 331.

³² Shaker (n 13) 223.

³³ Shaker (n 13) 227.

regard to the question of nuclear-sharing arrangements within alliances.’³⁴ Thus, it appears that while these States did not actively intervene in the debate between the Superpowers, there was no lack of knowledge or awareness about the nature of nuclear sharing arrangements of NATO. Similarly, these States could not have been unaware of the controversy between the Superpowers.

According to the United States, the interpretation in question was of course shared with the NATO allies as early as April 1967,³⁵ and raised no objections; it was shown to the USSR and raised no objections;³⁶ and it was equally shown to the key delegations of the ENDC in the negotiation process, and they also raised no objections.³⁷ In February 1969, the US Senate Foreign Relations Committee was told that these Questions and Answers ‘have now been made available to all members of the UN, and an indication that this is the way the United States proposed to proceed. There has been no indication of objections.’³⁸ NATO follows the same line of explanation, stating that ‘Their [nuclear sharing arrangements]’ nature was made clear to key delegations and subsequently made public.’³⁹ In other words, ‘The negotiating record of the NPT shows that these arrangements were well known and were, from the very start, part of the *acquis* of the Treaty [the NPT].’⁴⁰

³⁴ Shaker (n 13) 230.

³⁵ Butcher and others (n 29).

³⁵ NATO, Positions (n 2).

³⁶ Shaker (n 13) 202-03; Alberque (n 19) 54.

³⁷ Shaker (n 13) 234.

³⁸ Emphasis removed, Butcher and others (n 29).

³⁹ NATO, Positions (n 2).

⁴⁰ NATO, Factsheet on the NPT (n 3).

From the information above, the following conclusion may be drawn. A possibility that some signatories had totally been unaware of the nature of the nuclear sharing agreements on 1 July 1968 is slim. In addition, if there had indeed been such signatories, it would have been of no consequence; the law of treaties gives such States a choice of not ratifying a treaty upon finding out more, or even possibly a recourse to an error after a ratification (Art. 48). Such steps, however, were never taken.

It is also in this light that the insistence of certain points in the description of the dual-key system can be appreciated. Seen from a host State in the nuclear sharing arrangement, '[the host State] does not have any direct control of the US nuclear warheads and their presence [in the host State] is therefore not incompatible with the NPT.'⁴¹ The nuclear sharing arrangements are compatible with the NPT, despite the presence of nuclear weapons in the host States, because 'The U.S. nuclear weapons based in Europe are in the sole possession and under constant and complete custody and control of the United States.'⁴² The second key in the dual-key system, understood as the veto power of the host State to refuse the use of the nuclear weapons located in its territory, does not signify collective or joint control of these weapons; rather, it is a manifestation of territorial sovereignty.⁴³

To sum up, in light of this drafting history, most of the commentators agree that there was an initial acceptance, within the NPT, of the nuclear sharing arrangements by NATO described as a dual-key system. There was an acceptance, sufficiently shared, of the meaning given to terms 'control' and 'transfer' in the resulting texts of the negotiation to accommodate the nuclear sharing arrangements. The conclusion that most commentators draw is that the NPT does not

⁴¹ Ronzitti (n 8) 89.

⁴² NATO, Positions (n 2). Hill (n 14) 8.

⁴³ Shaker (n 13) 242-43.

regulate, or prohibit, the stationing of the US nuclear weapons in the territory of non-nuclear-weapon States as arranged by NATO's nuclear sharing arrangements.⁴⁴

II (2) Challenges to contemporary acceptance

However, a demonstration of historical or initial acceptance in 1968 is not sufficient to ensure that the nuclear sharing arrangements are still accepted by states parties of the NPT today. The total number of the States Parties has grown to over 190. If the acceptance is the base on which the compatibility of the nuclear sharing arrangements of NATO and Articles I and II of the NPT is based, then it seems this acceptance should be a contemporary one, general among the current states parties.

In this regard, NATO contends that 'In several decades following the NPT's entry-into-force, state parties [of the NPT] did not question NATO's nuclear sharing arrangements in the context of the Treaty Review process.'⁴⁵ However, strictly speaking, this is not accurate. Contrary to this categorical description on the NATO website, views disfavouring or questioning the

⁴⁴ Shaker (n 13) 235ff; Fischer (n 25) 61; Marie-Françoise Furet, *Le désarmement nucléaire* (Pedone 1973), 133; Kate Deere, 'The Obligations of Nuclear-Weapon States Not to Transfer Nuclear Weapons and Devices (Article I NPT)' in Jonathan L. Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law*, vol I (T.M.C. Asser Press; Springer 2014) 27. A contemporary commentator of the TPNW also adopts this interpretation as given: 'for the purposes of these instruments [the NPT and the TPNW] the transfer of a nuclear weapon ... occurs when *title* over the weapon or device passes from the state party to a recipient.' Emphasis in the original text. Stuart Casey-Maslen, *The Treaty on the Prohibition of Nuclear Weapons: A Commentary* (OUP 2019) 146.

⁴⁵ NATO, Factsheet on the NPT (n 3).

nuclear sharing arrangements, as well as more straightforward challenges to their compatibility with Articles I and II of the NPT, have been pronounced in the NPT Review process,⁴⁶ and it seems, increasingly.⁴⁷

Mexico raised the question of the nuclear sharing arrangements of NATO as early as in the 1995 Review Conference⁴⁸ in a session dealing with Articles I and II. Mexico was of course aware of the nuclear sharing arrangements of NATO. Mexico was also aware of the dual-key explanation, that ‘The weapons were in the charge of USAFE [U.S. Air Force Europe], which maintained them in order to comply with the rule in the Treaty regarding the transfer of nuclear weapons or devices.’⁴⁹ Nevertheless, Mexico asked for more clarifications about these arrangements ‘to have a clearer idea of the meaning and scope of the Treaty.’⁵⁰ Mexico named the host States of the nuclear sharing arrangements in its statement, so some of them made

⁴⁶ The NPT Review process in this article refers to both the review conferences (Art. X(3), NPT) and its preparatory meetings.

⁴⁷ Khalessi (n 24) 422, regarding the period between 1975 and 2010. E.g., Working Paper submitted by the Non-Aligned members, NPT/CONF.2010/WP.46 (28 April 2010), Recommendations 6, 8 and 9. This Working Paper is mentioned in Sechser (n 8) 444, fn 10.

⁴⁸ According to Germany speaking in the same session, the issue had never been raised before in the form of complaint about the incompatibility of the nuclear sharing arrangements with the NPT. NPT/CONF.1995/MCI/SR3 (21 April 1995), para. 20, in NPT/CONF.1995/32 (Part III), 244.

⁴⁹ Summary records of the 3rd meeting of Main Committee I (n 48) para. 15.

⁵⁰ Summary records of the 3rd meeting of Main Committee I (n 48) para. 15.

responses in the same session. Germany,⁵¹ Greece,⁵² Belgium,⁵³ and the Netherlands⁵⁴ repeated the understanding of the dual-key system described previously: there was no transfer, and host States did not control nuclear weapons; there was no issue, therefore, under Article II.

In the NPT Review process leading to the 2010 Review Conference, noticeably ‘more states and NGOs than at previous Review Conferences raised concerns’ about the nuclear weapons stationed in Europe under the nuclear sharing arrangements of NATO.⁵⁵ Non-aligned States did.⁵⁶ Even the nuclear-weapon States started to raise questions for the nuclear sharing arrangements.⁵⁷ China, without naming NATO and without mentioning Articles I and II, mildly suggested ‘abandoning “nuclear umbrella” and “nuclear sharing” policies and practices’ as one of the measures that should be taken by nuclear-weapon States in view of nuclear disarmament and reduction of the danger of nuclear war.⁵⁸ In the Review process for the postponed 2020 Review Conference, China repeated its view that ‘[nuclear-weapon States] should put an end to the policy and practice of nuclear umbrella and nuclear sharing, and

⁵¹ Summary records of the 3rd meeting of Main Committee I (n 48) para. 20.

⁵² Summary records of the 3rd meeting of Main Committee I (n 48) para. 21.

⁵³ Summary records of the 3rd meeting of Main Committee I (n 48) para. 22.

⁵⁴ Summary records of the 3rd meeting of Main Committee I (n 48) para. 30.

⁵⁵ Rebecca Johnson 'The NPT in 2010-2012: A Control Regime Trapped in Time' in Rebecca Johnson and others (eds.), *Nuclear Disarmament and Security beyond the NPT Review Process* (Acronym Institute for Disarmament Diplomacy 2012) 7-8.

⁵⁶ Johnson (n 55) 18.

⁵⁷ Johnson (n 55) 18, for Russia.

⁵⁸ NPT/CONF.2010/PC.I/WP.46 (7 May 2007), para. 12.

withdraw all nuclear weapons that are deployed in other countries.’⁵⁹ It continues to do so as a matter of Article VI and nuclear disarmament.

There have also been instances of more direct challenges against the nuclear sharing arrangements in light of Articles I and II of the NPT. As it was shown previously, Russia, or the USSR at the time of the negotiation of the text of the NPT, had discontinued its opposition to the nuclear sharing arrangements of NATO. However, during the general debate in the 2015 Review Conference, Russia stated:

‘Both articles [Articles I and II] are violated during so called ‘nuclear sharing’ when servicemen from NATO non-nuclear-weapon States are trained to apply nuclear weapons and participate in the nuclear planning process. We call on the US and those NATO Member States concerned to ensure due compliance with the NPT obligations.’⁶⁰

In 2019 during the work of the Preparatory Committee, Russia repeated its 2015 position, reiterating that ‘One of the most serious challenges to the nuclear regime are the so-called “nuclear sharing arrangements” of the North Atlantic Treaty Organization (NATO), which combine nuclear planning with nuclear weapon deployment exercises involving the use of carrier aircraft, flight crews, airfields and land-based support units belonging to NATO

⁵⁹ NPT/CONF.2020/PC.III/WP40 (26 April 2019), para. 3.

⁶⁰ Statement by Russia, NPT Review Conference (27 April 2015), available at <<https://www.un.org/en/conf/npt/2015/statements.shtml>> accessed 17 May 2021. A shorter extract of this statement is found in Alberque (n 19) 11. The Russian complaint is also highlighted in Sossai (n 16) 198.

members that are non-nuclear-weapon States.’⁶¹ Referring to the obligations under Articles I and II, Russia repeated its view that ‘this practice directly contradicts the spirit and letter of the Non-Proliferation Treaty.’⁶²

As a matter of treaty interpretation, a line of defense for the nuclear sharing arrangements would be to say that the proposed interpretation is a new interpretation, different from what was initially accepted in 1968, and that it does not seem to be established. The challenges in the NPT Review process that the nuclear sharing arrangements constitute ‘transfer’ and transfer of ‘control’ under Articles I and II seem to remain challenges. NATO allies in the NPT oppose such an interpretation. There seems to be no formal follow-up debate in the NPT Review process. In light of this, in the language of the VCLT, one could argue that these challenges amount to neither ‘subsequent agreements’ nor ‘subsequent practice’ of the States Parties under Article 31 of the VCLT. These challenges alone, therefore, cannot establish a new treaty interpretation.

However, setting the question as that of the treaty interpretation may be a poor choice. In answering this question from that particular angle, one can, as it was mentioned previously, defend the compatibility of the nuclear sharing arrangements with the NPT. However, the criticisms of the nuclear sharing arrangements within the NPT underline the fragile foundation of the compatibility of these arrangements with the NPT regime, and not the opposite as the question of the treaty interpretation and its answer above might seem to suggest. In a broader perspective, clearly, the change in the Russian position is not an isolated affair about a treaty interpretation. The nuclear sharing arrangements had been acceptable arrangements for the USSR during the Cold War, and for Russia till recently. However, the environment in which

⁶¹ NPT/CONF.2020/PC.III/WP6 (15 March 2019), para. 15.

⁶² Working Paper by Russia (n 61).

they were deemed acceptable changed. Russia and the United States started to have many disagreements over security and weapons during the last decade including, but not limited to, the terminated INF Treaty.⁶³

Other third parties to the nuclear sharing arrangements, in particular non-aligned States which had largely been silent on the issue during the initial NPT negotiations, might also express more systematic concerns for nuclear sharing arrangements, either as a matter of nuclear disarmament under Article VI of the NPT, or squarely as an issue of transfer under Articles I and II. In both cases, the real question of importance is the acceptance, in a broad sense, of the nuclear sharing arrangements and nuclear deterrence. At the same time, even as a matter of treaty interpretation, dissatisfactions and allegations repeatedly voiced about the nuclear sharing arrangements can constitute subsequent practice as a supplementary means of interpretation under Article 32, VCLT.⁶⁴ These are reasons why the contemporary acceptance continue to be important in the assessment of the nuclear sharing arrangements in light of the NPT.

⁶³ Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), 1657 U.N.T.S. 2. The disagreements on security issues are, of course, also disagreements between NATO and Russia. Steven Hill, 'The North Atlantic Treaty Organization', in Robin Geiß and Nils Melzer (eds) *The Oxford Handbook of the International Law of Global Security* (OUP 2021) 1048.

⁶⁴ International Law Commission, Draft Conclusions on Subsequent Agreements and Practice in Relation to the Interpretation of Treaties (2018), Conclusion 4(3). The Draft Conclusions are reproduced in A/RES/73/202 (2019).

II. (3) 'No-longer-controlling' scenario

Besides the two issues above - first, of the initial acceptance of the nuclear sharing arrangements in the NPT, and second, of their contemporary acceptance as observed in the Review process - , there is another, independent scenario that needs to be mentioned. This need arises because the following scenario is arguably not covered by the dual-key description of the nuclear sharing arrangements. In the NPT Review process when Mexico raised the issue of these arrangements in 1995, it specifically asked for a clarification regarding the following scenario. Under the nuclear sharing arrangements as Mexico understood them, 'when the time came to use them [nuclear weapons], United States nuclear weapons would be loaded onto NATO aircraft flown by allied pilots, so that, when the aircraft took off, the control of those weapons would be transferred to the other State [the host State].'⁶⁵ Does this hypothetical scenario not violate Articles I and II, both for the United States and for the host State? Certainly, the speculative scenario used by Mexico may be an over-simplification; the control of transfer is complete and the United States no longer holds any control of their weapons.⁶⁶ It is perhaps more realistic to speculate that under a circumstance where the launch of nuclear weapons is approved by both the United States and the host State, the undertaking becomes that of joint forces under joint control in some form, rather than an exclusive undertaking by a host State with a complete transfer of control from the United States to this host State. At any rate, in both speculative cases, it is legitimate to ask whether the scenario violates Articles I and II. When the host State's dual-capable aircraft with nuclear weapons takes off, arguably these weapons

⁶⁵ NPT/CONF.1995/MCI/SR3 (21 April 1995), para. 15, in NPT/CONF.1995/32 (Part III), 241.

⁶⁶ See Alberque (n 19) 35.

are no longer under the ‘sole’ control of the United States. They unmistakably come under the control of the host State, either jointly with the United States as the previous speculation illustrated, or exclusively as Mexico depicted in its statement. In both cases, to describe the scenario as a continued instance of the sole control of the United States is impossible without doing an atrocious injustice to the ordinary meaning of the word ‘control.’ In these speculative cases, there is indeed transfer of control, and the dual-key system no longer ensures a compatibility of the nuclear sharing arrangements and the NPT. A conclusion one could draw appears to be relatively straightforward: ‘the release of nuclear weapons or control over them to the allies of the nuclear-weapon State in case "a decision were made to go to war" would be a violation of Article I of the NPT’⁶⁷ for the United States, and would be a violation of Article II for the host States.

This particular scenario suggested by Mexico in 1995 does not appear to have received any follow-up comments in the 1995 Review Conference; as described above, the host States named by Mexico preferred to repeat the dual-key understanding of the peacetime scenario, without referring to the imminent scenario described by Mexico. There was, however, a clear answer to this question, prepared by the United States long before the 1995 Review Conference. In the context of confirming the compatibility between the nuclear sharing arrangements and the first two articles of the NPT, the interpretation by the United States was shared both internally and externally, as discussed previously.⁶⁸ In this interpretation, the United States gave the following explanation about the particular scenario raised by Mexico.

⁶⁷ Mohamed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, Vol II (Oceana 1980) 865.

⁶⁸ ‘Questions on the Draft Non-Proliferation Treaty Asked by US Allies’ (n 26).

Q. Does the draft treaty prohibit arrangements for the deployment of nuclear weapons owned and controlled by the United States within the territory of non-nuclear NATO members?

A. It 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.

The first half of the answer is in fact the presentation of the dual-key system of the arrangements previously examined; Arrangements for the deployment of nuclear weapons within a host State do not involve any ‘transfer’ of nuclear weapons or transfer of ‘control’ over them, and therefore, the nuclear sharing arrangements are compatible with the NPT.

The second half of the answer is that if there ever was a decision to go to war,⁶⁹ ‘the treaty would no longer be controlling.’ Taken out of context, this could mean that a decision to go to a nuclear war would be a scenario of complete chaos and that there would be no practical room to consider treaty obligations in one way or another. Nevertheless, the legal context in which the question was asked is apparent, and this part of the answer should be read as a legal answer: this treaty would cease to be binding as a result of a decision to go to war.

It must be said at the outset that there is no general, automatic assumption of treaty termination or suspension as a result of war. The VCLT itself explicitly refrains from dealing with this

⁶⁹ Wars referred to were general wars involving nuclear-weapon States, and not local armed conflicts without the involvement of nuclear-weapon States. Shaker (n 67) 865, fns 28-30.

question.⁷⁰ Outside the VCLT, the absence of a general rule is confirmed by the Draft Articles on Effects of Armed Conflicts on Treaties⁷¹ by the International Law Commission (ILC): ‘the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.’⁷² At the same time, the trend in the treatment of the question has changed over time.⁷³ Broadly speaking, the older tendency was to underline that the treaties were often abrogated as a result of war, while admitting there could be exceptions. Today, it is more common to stress that treaties are not automatically abrogated, while equally admitting some treaties could be. The categories of treaties that do survive the outbreak of hostilities are identified and highlighted,⁷⁴ and not those that stop operating or existing.

Against this trend, however, treaties of disarmament and arms control are an object of markedly different emphasis. The emphasis is still on the possibility of a treaty suspension or termination

⁷⁰ The provisions of the VCLT ‘shall not prejudice any question that may arise in regard to a treaty [...] from the outbreak of hostilities between States’ (Art. 73).

⁷¹ International Law Commission, Draft Articles on Effects of Armed Conflicts on Treaties, Art. 3. Yearbook of the International Law Commission, 2011, Vol 2, Pt II.

⁷² René Provost, ‘Article 73 (1969)’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol II (OUP 2011) 1657.

⁷³ Provost (n 72) 1655-58; Robert Kolb, *The Law of Treaties: An Introduction* (Edward Elgar 2016) 242-44. Over time, the terminology also changed, from effects of ‘war’ on treaties to effects of ‘the outbreak of hostilities’ (Art. 73, VCLT) or effects of ‘armed conflicts’ (ILC (n 71)) on treaties.

⁷⁴ ILC (n 71) Art. 7 and annex; Kolb (n 73) 242-44.

as a result of war.⁷⁵ The NPT is treated as a treaty in this category when the effects of war is discussed.⁷⁶ In this context, the withdrawal clause of the NPT is highlighted. It entitles the States Parties to withdraw from the NPT if ‘extraordinary events ... have jeopardized the [their] supreme interests (Art. X).’ A war can obviously constitute such an event,⁷⁷ and therefore, a termination or suspension of treaties in the presence of war is considered unproblematic.⁷⁸

In addition, there are a few specific scenarios of war in which a similar result can be reached, that the NPT is legally ‘no longer controlling.’ For example, NATO being an alliance for collective defence (Art. 5 of the North Atlantic Treaty), one could assume that a war NATO allies might wage is likely to be a war of self-defence. According to Article 14 of the ILC Draft Articles on Effects of Armed Conflicts on Treaties, a State exercising its right to self-defence ‘is entitled to suspend in whole or part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right.’⁷⁹ Within these narrower

⁷⁵ Serge Sur ‘Droit de la paix et de la sécurité internationales’ in Jean Combacau et Serge Sur (eds) *Droit international public* (7e ed., Montchrestien 2006) 685; McNair, *The Law of Treaties* (2nd ed., OUP 1961) 703; Anthony Aust, *Modern Treaty Law and Practice* (2nd ed., CUP 2007) 308, citing McNair; Harry Almond, ‘Arms Control and the Law of War: Control over Weapons and their Use’ (1997) 36 *Revue de droit militaire et de droit de la guerre* 13, 30.

⁷⁶ Ronzitti (n 16) 110.

⁷⁷ Ronzitti (n 16) 110.

⁷⁸ Ronzitti (n 16) 110; Shaker (n 67) 866. Whether such a termination requires a notification and whether it only comes into effect after three months, as in the case of the procedure under Article X, the NPT, is not discussed.

⁷⁹ ILC (n 71) Art. 14.

circumstances, if, in a hypothetical situation, the NPT is incompatible with a war NATO allies wage as the exercise of their right to self-defence, the NPT could be suspended.⁸⁰ A conclusion drawn from the quick survey of the law of treaties, and beyond, is that at least when there is a general war involving nuclear powers, it is indeed possible to produce a legal situation where the NPT is ‘no longer controlling.’

II(4) Brief summary

For the sake of clarity, this article divided the examination of the compatibility between the nuclear sharing arrangements of NATO and the NPT into three issues: initial acceptance, contemporary acceptance and an independent examination of the ‘no-longer-controlling’ scenario. The last examination of the separate scenario when and if a decision were made to go to war was necessary, since the scenario would take the nuclear sharing arrangements beyond the dual-key system.

Under the dual-key system of the nuclear sharing arrangements, the compatibility between the NPT and the nuclear sharing arrangements could be defended as a matter of treaty interpretation in light of the drafting history; it indicated the initial acceptance of the place of these arrangements within Articles I and II of the NPT. In comparison to the initial acceptance, the contemporary acceptance of the compatibility of the nuclear sharing arrangements in the NPT is less solid. They are increasingly criticized in the NPT Review process, both by the non-nuclear-weapon States and nuclear-weapon States.

⁸⁰ The precarious nature of treaties including the NPT in light of the right to self-defense is also noted in Sur (n 75) 685.

III Issues discussed in light of the TPNW

Unlike the discussion of the incompatibility of these arrangements with the NPT, the discussion of their incompatibility with the TPNW is only hypothetical as the NATO member States are not party to the TPNW. Nevertheless, the examination is undertaken as it can shed more light on the nuclear sharing arrangements, NATO member States' attitude towards the TPNW, as well as on the TPNW itself.

Unlike the previous debate with regard to the NPT, the nuclear sharing arrangements' incompatibility with the TPNW appears to be undisputed. This is because States Parties to the TPNW, *inter alia*, 'undertake[s] never under any circumstances to allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive devices in its territory or at any place under its jurisdiction or control (Article 1(1)(g))' (III (1)). The incompatibility of the nuclear sharing arrangements with this provision, for host States, is clear. This is indeed a conclusion drawn by the NATO member States and commentators alike (III (2)).

A more complex question that the TPNW raises is a question for the US allies under extended nuclear deterrence in general, without nuclear sharing arrangements. This question for the States that are often called client States of extended deterrence does not have any direct relation with the examination of the nuclear sharing arrangements where the nuclear presence is the central issue. Nevertheless, because commentators that examine the nuclear sharing arrangements in light of the TPNW tend to discuss this issue, too, some thoughts will be given to this question (III (3)).

III(1) Obligation not to allow stationing, installation or deployment of any nuclear weapons

The States Parties to the TPNW 'undertake[s] never under any circumstances to allow any stationing, installation or deployment of any nuclear weapons or other nuclear explosive

devices in its territory or at any place under its jurisdiction or control (Article 1(1)(g)).’ Unlike the debated terms such as ‘transfer’ and ‘control’ in the NPT, which were given wider meaning than the physical sense of the words, ‘stationing, installation or deployment’ in the TPNW all refer to physical acts. Stationing, installation or deployment of nuclear weapons occur with or without a change in the ownership of the weapons, and with or without a change in who controls the weapons. Nothing in the drafting history appears to indicate that any special meaning beyond the physical sense of the words was given to any of these terms. Given the ordinary meaning of these terms in the context of this treaty, it is simply impossible to argue that stationing, installation or deployment does not occur under the nuclear sharing arrangements, without somehow changing the ordinary meaning of these terms.

Admittedly, not all terms are clear beyond any ambiguity in the TPNW. The TPNW establishes two terms, stationing and deployment, as independent terms. The difference sought between the two terms in the TPNW is, according to a commentary, the expected time length of undertaking. Stationing is explained as a medium- to long-term undertaking, whereas deployment is explained as a short-term undertaking: it involves the act of bringing the nuclear weapons ‘that may soon be employed in a military operation.’⁸¹ Meanwhile, the distinction is not vigorously used in the literature. For example, the presence of the US nuclear weapons in Europe under the nuclear sharing arrangements is very frequently called ‘deployment,’⁸² even though there is no short-term plan to employ the weapons in any military operation soon. There

⁸¹ Casey-Maslen (n 44) 172; John Borrie and others, *A Prohibition on Nuclear Weapons: A Guide to the Issues* (International Law and Policy Institute; UNIDIR 2016), 33.

⁸² For examples of the use of ‘forward deployment’ in this sense, see Kamp and Remkes (n 8) 84, 89; Khalessi (n 24) 435; Borrie and others (n 81) 33.

are also treaties that use these terms differently from the TPNW, for example, to use ‘stationing’ as meaning ‘implantation, emplacement, stockpiling, storage, installation *and deployment*.’⁸³

In any case, the inconsistency of the usage of these terms and a certain amount of ambiguity it could produce, have no consequence for the evaluation of the nuclear sharing arrangements in light of the TPNW. For this particular purpose, the scope of Article 1(1)(g) and its terms are clear. Whichever definition one uses, there is no good reason to view the presence of the US nuclear weapons in the territory of the host States as not constituting stationing or deployment. Whichever definition one uses, it is either deployment or stationing, or installation in any case. Article 1(1)(g) and the nuclear sharing arrangements are not compatible.

Moreover, Article 1(1)(g) of the TPNW specifically prohibits the act of ‘allowing’ the stationing, installation or deployment, and the nuclear sharing arrangements are precisely made for such ‘allowing.’ Those who examined the drafting history even observe that the main target of Article 1(1)(g) is NATO’s nuclear sharing arrangements.⁸⁴

⁸³ E.g., Art. 1(c), Treaty on a Nuclear-Weapon-Free Zone in Central Asia, 91 U.N.T.S. 2970.

Emphasis added by the present author.

⁸⁴ Tiphaine de Champchesnel, « Que faire du traité sur l’interdiction des armes nucléaires ? » *Revue Défense Nationale* 809 (avril 2018), 113, 115. Dan Joyner, ‘The Treaty on the Prohibition of Nuclear Weapons’ (July 26, 2017), *EJIL: Talk!* <www.ejiltalk.org/the-treaty-on-the-prohibition-of-nuclear-weapons/> accessed 11 September 2020, also observes that ‘This paragraph [Article 1(1)(g)] was very intentionally added to the TPNW in order to close a controversial loophole in Article II of the NPT, that NATO has long argued allows for such nuclear sharing agreements.’

III. (2) Incompatibility confirmed by the NATO member States

Host States of the nuclear sharing arrangements of NATO agree with the conclusion drawn above, that the TPNW is not compatible with their arrangements. Germany and the Netherlands are more or less explicit.⁸⁵

Citing the substance of Article 1(1)(g) of the TPNW, Germany acknowledges in its Disarmament Report that the TPNW is not compatible with Germany's obligations as a NATO ally and especially with the nuclear sharing of NATO.⁸⁶ Germany accordingly did not participate in the TPNW negotiation at all, and did not join the treaty, either.

⁸⁵ According to a secondary source, Italy also takes a very similar position. Ronzitti (n 13) 3. Belgium appears to be silent, possibly because of its silence for the domestic audience on the matter. See the reaction of the Belgian government when the media spotted that Belgium was one of the host States, Dominique Simonet, 'Il n'y a toujours pas d'armes nucléaires en Belgique... Officiellement...' (19 July 2019), *La Libre*, <www.lalibre.be/belgique/politique-belge/il-n-y-a-toujours-pas-d-armes-nucleaires-en-belgique-officiellement-5d30c133d8ad585935b87132> accessed 8 September 2020.

⁸⁶ 'Der Kernwaffenverbotsvertrag ist nicht mit Deutschlands bündnispolitischen Verpflichtungen und insbesondere nicht mit der nuklearen Teilhabe der NATO vereinbar.' *Bericht der Bundesregierung zum Stand der Bemühungen um Rüstungskontrolle, Abrüstung und Nichtverbreitung sowie über die Entwicklung der Streitkräftepotenziale (Jahresabüestungsbericht 2019)* (2019). Alena Kunstreich, 'Prohibition or Non-Proliferation? : Germany's Point of View concerning the Treaty on the Prohibition of Nuclear Weapons and

Unlike Germany and the rest of NATO member States, the Netherlands did participate in the negotiation of the TPNW. It nevertheless voted against the treaty adoption, and stated that ‘The obligations in Article 1 are incompatible with our commitments as a NATO state.’⁸⁷ In the same explanation of its own negative vote, the Netherlands also revealed that the Dutch delegation to the TPNW negotiation had attempted to strike a compromise between these commitments as a NATO member state and the treaty, ‘but most delegations here could not reconcile that with their views on a nuclear weapons ban.’⁸⁸ In fact, a driving force of the TPNW negotiation was the ‘need to completely eliminate such weapons’ as the ‘only way to guarantee that nuclear weapons are never used again under any circumstances.’⁸⁹ A compromise on that very point was an impossible proposition to accept; ‘Allowing states to join a prohibition against nuclear weapons but not requiring that they keep their territory nuclear-weapon-free would be perceived by many as hypocrisy.’⁹⁰

Effective Nuclear Arms Control and Disarmament' (2017) 60 German Yearbook of International Law 773, 780-81.

⁸⁷ ‘Explanation of Vote of the Netherlands on Text of Nuclear Ban Treaty’ (7 July 2017), <www.permanentrepresentations.nl/latest/news/2017/07/07/explanation-of-vote-of-ambassador-lise-gregoire-on-the-draft-text-of-the-nuclear-ban-treaty> accessed 8 September 2020.

⁸⁸ ‘Explanation of Vote of the Netherlands’ (n 87).

⁸⁹ Preamble, TPNW.

⁹⁰ Borrie and others (n 81) 33.

To sum up, the host States' positions are clear regarding the compatibility between their nuclear sharing arrangements and the TPNW: they are not compatible.⁹¹ The evaluation is shared by lawyers.⁹² The evaluation is also shared by advocacy groups of the civil society. The website of the *Nuclear Weapons Ban Monitor* containing national profiles show that five host States of nuclear sharing arrangements are 'not compliant' with Article 1(1)(g) of the TPNW,⁹³ that is, if they ever join the treaty.

At the time of the TPNW negotiation, the US mission to NATO reportedly expressed the view that the eventual treaty would 'destroy the basis for US nuclear extended deterrence,'⁹⁴ and urged NATO members not to participate in the negotiation.⁹⁵ The US view regarding the TPNW at large is that its initiative 'disregards the realities of the international security environment,' as shown in the joint press statement of three nuclear-weapon States, the United

⁹¹ Joyner (n 84), regarding the question whether Article 1(1)(g) can be reconciled with the nuclear sharing arrangements, writes: 'Most NATO countries, clearly including the Netherlands, appear to think that it cannot be'; Sossai (n 16) 199; For Italy, see Ronzitti (n 13) 3.

⁹² Hill (n 14) 18. Stationing of US nuclear weapons in the nuclear sharing arrangements is used as an example of prohibited stationing under Article 1(1)(g), too, in Casey-Maslen (n 44) 171.

⁹³ 'State Profiles', *Nuclear Weapons Ban Monitor* <banmonitor.org/profiles> accessed 11 September 2020.

⁹⁴ Shannon N. Kile, 'Treaty on the Prohibition of Nuclear Weapons' in SIPRI (ed), *SIPRI Yearbook 2018: Armaments, Disarmament and International Security* (OUP 2018), 316.

⁹⁵ Kile (n 94) 311.

States, France and the United Kingdom.⁹⁶ The same statement affirms that ‘Accession to the ban treaty [TPNW] is incompatible with the policy of nuclear deterrence, which has been essential to keeping the peace in Europe and North Asia for over 70 years.’⁹⁷ While the nuclear sharing arrangements are not mentioned in the statement, these are arrangements that effectively implement the nuclear deterrence for the alliance, and therefore are surely regarded as incompatible with the TPNW. The views expressed by NATO are similarly a general and complete dismissal of the TPNW, without mentioning its nuclear sharing arrangements.⁹⁸

III (3) Extended nuclear deterrence

⁹⁶ ‘Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption’ (7 July 2017), available at usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-united-nations-of-the-united-states-united-kingdom-and-france-following-the-adoption/ accessed 10 September 2020, also available at onu.delegfrance.org/Adoption-of-a-treaty-banning-nuclear-weapons accessed 10 September 2020.

⁹⁷ ‘Joint Press Statement’ (n 96).

⁹⁸ ‘North Atlantic Council Statement as the Treaty on the Prohibition of Nuclear Weapons Enters Into Force’ (15 December 2020), https://www.nato.int/cps/en/natohq/news_180087.htm accessed 14 June 2021; ‘North Atlantic Council Statement on the Treaty on the Prohibition of Nuclear Weapons’ (20 September 2017), www.nato.int/cps/ua/natohq/news_146954.htm accessed 10 September 2020.

As it was shown, the nuclear sharing arrangements of NATO, under which the host States allow stationing of US nuclear weapons, are so clearly incompatible with Article 1(1)(g) of the TPNW that there was no further discussion. In contrast, considerably more debate has developed regarding the compatibility of extended deterrence in general and the TPNW. There are two groups of States concerned: (1) non-nuclear NATO member States without the presence of nuclear weapons; and (2) non-NATO US allies under extended deterrence without the presence of nuclear weapons in their territories. Australia, Japan, and a few pacific island-nations among others are the States in the second group. The characteristic the States in the second group share is that they rely on extended nuclear deterrence provided by the US nuclear weapons, even though their arrangements with the United States, unlike the nuclear sharing arrangements of NATO, do not include stationing of the US nuclear weapons. The States under extended deterrence are often called client States, or nuclear umbrella States. At the time of the writing, none of the States in these two groups, either individually or collectively, warm up to the idea of joining the TPNW. There are two prohibitions in Article 1 of the TPNW that concern client States in particular: States Parties undertake never under any circumstances to ‘Use or threaten to use nuclear weapons or other nuclear explosive devices’ (Art. 1(1)(d)); they also undertake never under any circumstance to ‘Assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Treaty’ (Art. 1(1)(e)).

Does a client State under extended deterrence threaten to use nuclear weapons against potential aggressors? If one were to promote the adherence of client States to the TPNW, one could, for example, try to support the following line of interpretation: ‘To threaten to use nuclear weapons one must possess them (or have sufficient control over them to be able to use them)’,⁹⁹ and therefore a violation of Article 1(1)(d) ‘does not transpire by the mere fact of adherence to a

⁹⁹ Casey-Maslen (n 44) 155.

nuclear alliance.’¹⁰⁰ This line of interpretation, that being a client State under extended deterrence would not violate Article 1(1)(d), finds some concurring views.¹⁰¹

It is harder to reconcile extended nuclear deterrence and Article 1(1)(e) for the client States. The provision prohibits, *inter alia*, encouraging prohibited activities under the TPNW. As previously mentioned, the Netherlands explained its negative vote on the treaty text by declaring that ‘The obligations in Article 1 are incompatible with our commitments as a NATO state.’¹⁰² While a few authors were of the view that this statement reflected the position of the Netherlands as a host State under the nuclear sharing arrangements in particular,¹⁰³ the statement could also reflect its position more generally as a NATO member State.¹⁰⁴ As discussed by a number of authors, to encourage means to promote,¹⁰⁵ or to seek to persuade someone to do or to continue to do something.¹⁰⁶ In this light, ‘extended nuclear deterrence

¹⁰⁰ Casey-Maslen (n 44) 156. The same author reaffirms this evaluation in Stuart Casey-Maslen, 'The Status of Nuclear Deterrence Under International Law in Light of the Treaty on Prohibition of Nuclear Weapons' (2018) 21 Yearbook of International Humanitarian Law 23, 41-42.

¹⁰¹ Hill (n 14) 18.

¹⁰² ‘Explanation of Vote of the Netherlands’ (n 87).

¹⁰³ Joyner (n 84).

¹⁰⁴ Sossai (n 16) 199, fn 60; Masahiko Asada, ‘Nuclear Non-proliferation and Disarmament under International Law’ in Robin Geiß and Nils Melzer (eds) *The Oxford Handbook of the International Law of Global Security* (OUP 2021) 340.

¹⁰⁵ Anna Hood and Monique Cormier, ‘Can Australia Join the Nuclear Ban Treaty without Undermining ANZUS?’ (2020) 44 Melbourne University Law Review 143.

¹⁰⁶ Casey-Maslen (n 100) 46.

arguably promotes, at the very least, the continuance of nuclear weapons possession and stockpiling which is prohibited by art 1(1)(a) [of the TPNW].'¹⁰⁷ Similarly, in the particular context of NATO, 'NATO's 2010 Strategic Concept explicitly envisages the possession and potential use by certain members of a "nuclear alliance",' and 'it is hard not to view this as an overt and official form of encouragement to continued possession and stockpiling by other members.'¹⁰⁸

One could arguably draw a similar conclusion for some client States,¹⁰⁹ such as Japan, under bilateral arrangements with the United States. The endorsement of extended nuclear deterrence by Japan is express and unconditional: 'Japan will strengthen the deterrence of the Japan-U.S. Alliance by closely consulting on the extended deterrence, including nuclear deterrence,

¹⁰⁷ Hood and Cormier (n 105) 143.

¹⁰⁸ Casey-Maslen (n 100) 47. The view is unchanged in Casey-Maslen (n 44) 165. The emphasis by Casey-Maslen is that, however, the Strategic Concept is a political declaration and should not be seen as an unsurmountable bar to the participation to the TPNW. On this discussion, see Hill (n 14) 19-20.

¹⁰⁹ As to Australia, its official position is that legally, 'Joining the Treaty [TPNW] would also be inconsistent with our US alliance obligations', Department of Foreign Affairs and Trade, 'Nuclear Issues' <<https://www.dfat.gov.au/international-relations/security/non-proliferation-disarmament-arms-control/nuclear-issues/treaties#tpnw>> accessed 21 June 2021. Hood and Cormier (n 105), 144-48, considers the case as falling under 'assistance' prohibited by Article 1(1) (e).

through the Japan-U.S. Extended Deterrence Dialogue and other consultations.’¹¹⁰ If strengthening nuclear deterrence, extended to the client State, is not encouraging a prohibited possession and potential use of nuclear weapons, the prohibition of encouragement in the TPNW risks being literally empty.

A conclusion that may be drawn from a short examination above is that as long as a client State upholds extended nuclear deterrence and chooses to be a protégé, it is difficult to reconcile that policy with the prohibitions enumerated in the TPNW. It is also reminded that the three nuclear-weapon States appear to refute the general compatibility between the nuclear deterrence and the TPNW: ‘Accession to the ban treaty [TPNW] is incompatible with the policy of nuclear deterrence.’¹¹¹ Being a client State of nuclear deterrence is being a part of the practice and policy of nuclear deterrence. Some authors also refute the place of nuclear deterrence itself in the TPNW.¹¹²

¹¹⁰ ‘Statement by Foreign Minister on the Release of the U.S. Nuclear Posture Review (NPR)’ (3 February 2018) <https://www.mofa.go.jp/press/release/press4e_001893.html> accessed 21 June 2021.

¹¹¹ ‘Joint Press Statement’ (n 97).

¹¹² ‘These four provisions [(d) to (g) of Article 1(1), TPNW] represent a clear rejection of extended nuclear deterrence under the TPNW’, Monique Cormier, ‘Running Out of (Legal) Excuses: Extended Nuclear Deterrence in the Era of the Prohibition Treaty’, in Jonathan L. Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law*, vol V (T.M.C. Asser Press; Springer 2020) 274. See also Ramesh Thakur, ‘Nuclear Turbulence in the Age of Trump’ (2018) 29 *Diplomacy & Statecraft* 105, 117-118.

IV. Conclusion

The nuclear sharing arrangements of NATO are long-standing arrangements. This article revisited them in light of the NPT, then examined the issues of interest in light of the new treaty, the TPNW. The question of compatibility between the nuclear sharing arrangements and the NPT was a central issue in the negotiation of the treaty text. It was solved initially by an understanding that the stationing of the US nuclear weapons in host States did not involve transfer of ownership or transfer of control of these weapons to host States. This particular interpretation forwarded by the United States seems to have been accepted, *albeit* quietly, by those States that signed the NPT in 1968. Whether there is contemporary and general acceptance of the understanding within the NPT, which now has over 190 States Parties, is less certain. Given the questions and criticisms raised about the nuclear sharing arrangements in the NPT Review process, the acceptance is certainly not as solid as NATO member States would like it to be.

The examination of the same question with regard to the TPNW, whether such arrangements would be compatible with the TPNW, was much shorter, as there is no dispute about the answer to the question. The TPNW explicitly provides that the States Parties must not allow stationing of nuclear weapons. Arrangements that allow that stationing such as the nuclear sharing arrangements of NATO are clearly incompatible with the TPNW. For the NATO member States, it is a reason, among multiple reasons, for not embracing the TPNW.

There was a spin-off question in light of the TPNW, which was about client States that benefit from extended deterrence without the presence of foreign nuclear weapons on their territories. The prohibitions enumerated by the TPNW are comprehensive, and one of them is a prohibition to encourage any prohibited activities. Client States will find it difficult to comply with this

obligation in the TPNW, unless they are ready to change their policies towards extended deterrence.