

# THE LEGALITY OF NUCLEAR- WEAPONS SHARING ARRANGEMENTS UNDER INTERNATIONAL LAW: UNITED STATES-NATO AND RUSSIA-BELARUS

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*This Essay argues that certain nuclear sharing agreements between nuclear and non-nuclear powers are legal under the Nuclear Non-Proliferation Treaty. This topic is highly important as Russia has announced its stationing of nuclear weapons in Belarus and Belarus has signaled its intent to use them.*

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## I. INTRODUCTION

The United States presently has in place certain “nuclear sharing arrangements” with its North Atlantic Treaty Organization (“NATO”) allies whereby the United States stations nuclear weapons in allied territory.<sup>1</sup> It would be too much to smuggle in all the details of these arrangements here; suffice it to say that this

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<sup>1</sup> NATO’s *Nuclear Sharing Arrangements*, NATO (Feb. 2022), <https://perma.cc/3PVA-WDS6>.

Essay sets out to evaluate the legality of these arrangements in light of the United States' obligations under the 1968 Nuclear Non-Proliferation Treaty ("NPT").<sup>2</sup> The treaty—to which the United States and its NATO allies are party<sup>3</sup>—prohibits in Article I, “the *transfer* to any recipient whatsoever [of] nuclear weapons or other nuclear explosive devices or *control* over such weapons,”<sup>4</sup> and, in Article II, “receiv[ing] the *transfer* from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of *control* over such weapons.”<sup>5</sup>

The crucial question thus becomes: do these nuclear sharing arrangements run afoul of the NPT? This question has taken on powerful importance given Russia's recent announcements that it is similarly stationing nuclear weapons in Belarus.<sup>6</sup> In the law, and international law in particular, “what is sauce for the goose is normally sauce for the gander.”<sup>7</sup> Has the United States set the precedent for a way to circumvent the NPT in modern warfare?

Although some commentary helpfully addresses nuclear sharing arrangements,<sup>8</sup> no scholars have performed a deep dive into treaty interpretation that the topic calls out for. Treaties are complicated legal creatures with a multitude of rules governing their interpretation. Unlike, say, “textualism” in U.S. law, where decisionmakers look only to the plain language of the text of a legal instrument,<sup>9</sup> treaty interpretation under international law requires investigation into text,<sup>10</sup> context,<sup>11</sup> object and purpose,<sup>12</sup> preparatory materials,<sup>13</sup> negotiation,<sup>14</sup> interpretive declarations<sup>15</sup> and understandings,<sup>16</sup> subsequent practice,<sup>17</sup> agreements,<sup>18</sup> and special meanings<sup>19</sup> to name but a few inquiries.

<sup>2</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

<sup>3</sup> *Arms Control, Disarmament and Non-Proliferation in NATO*, NATO (Feb. 27, 2023), <https://perma.cc/B4WJ-ZUMJ>.

<sup>4</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 2, art. I (emphasis added).

<sup>5</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 2, art. II.

<sup>6</sup> Hans M. Kristensen et al., *Russian Nuclear Weapons*, 80 BULL. ATOMIC SCIENTISTS 118, 123-24 (2024) (“[In June 2023] Putin announced that the first batch of nuclear weapons was delivered to Belarus and that there would be more to follow.”); *Belarus Leader Says Russian Nuclear Weapons Shipments Are Completed, Raising Concern in the Region*, ASSOCIATED PRESS (Dec. 25, 2023), <https://perma.cc/3YHY-E65F>; Nikolai N. Sokov, *Russia Is Deploying Nuclear Weapons in Belarus. NATO Shouldn't Take the Bait*, BULL. ATOMIC SCIENTISTS (Apr. 24, 2023), <https://perma.cc/U3EE-K3RR>.

<sup>7</sup> *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 349 (2016) (citing *Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016)).

<sup>8</sup> See, e.g., Mika Hayashi, *NATO's Nuclear Sharing Arrangements Revisited in Light of the NPT and the TPNW*, 26 J. CONFLICT & SEC. L. 471 (2021).

<sup>9</sup> The Black's Law Dictionary defines textualism as “The doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means.” *Textualism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>10</sup> RICHARD K. GARDINER, *TREATY INTERPRETATION* VIII (2d ed. 2015).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at xi.

<sup>14</sup> *Id.* at ix.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at xi.

The first half of this Essay provides an in-depth description of the sharing arrangements as well as the United States' arguments that such arrangements are legal under the NPT (or perhaps more accurately, that the NPT simply does not apply to the arrangements). The second half runs the arrangements through what is often referred to as the "crucible" of the Vienna Convention on the Law of Treaties' rules for interpreting treaties.<sup>20</sup> This Essay then concludes that the arrangements are legal under the NPT, and that parity would render Russia's recent actions legal as well.

## II. UNITED STATES-NATO NUCLEAR SHARING ARRANGEMENTS

The United States-NATO nuclear sharing arrangements predate the NPT.<sup>21</sup> According to NATO, these arrangements "ensure that the benefits, responsibilities and risks of nuclear deterrence are shared across the Alliance."<sup>22</sup> Indeed, they "are at the heart of the Alliance's deterrence and defence posture."<sup>23</sup> According to these arrangements, the United States has stationed a number of B61-12 nuclear weapons in allied territory—specifically in Germany, the Netherlands, Italy, Belgium, and Turkey.<sup>24</sup> Should NATO conduct a mission under the sharing arrangements, U.S. B61 warheads would be carried by what are called dual-capable aircraft or DCA.<sup>25</sup>

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<sup>20</sup> *Id.* at 32 n. 91.

<sup>21</sup> The first "Strategic Concept for the Defense of the North Atlantic Area" approved by NATO in December of 1949 included a U.S. commitment to "ensure the ability to carry out strategic bombing including the prompt delivery of the atomic bomb." SECRETARY TO THE NORTH ATLANTIC DEFENSE COMMITTEE, D.C. 6, THE STRATEGIC CONCEPT FOR THE DEFENCE OF THE NORTH ATLANTIC AREA, reprinted in NATO STRATEGY DOCUMENTS 1949-1969 49, 54 (Gregory W. Pedlow ed., 1997). Nearly a decade later, United States Secretary of State John Foster Dulles testified before Congress in 1958 on the proposed amendments to the Atomic Energy Act of 1954. He stated the necessity for the "United States to maintain in Europe nuclear warheads deployed under United States custody." John Foster Dulles, U.S. Sec'y of State, *Sharing Nuclear Knowledge with Our NATO Allies*, 38 DEP'T STATE BULL. 713, 740-42 (1958).

<sup>22</sup> *NATO's Nuclear Sharing Arrangements*, *supra* note 1.

<sup>23</sup> *Id.*

<sup>24</sup> As of 2024, 100 U.S. nuclear weapons are estimated to be deployed in allied countries. Five countries host them across six bases: Kleine Brogel Air Base in Belgium, Volkel Air Base in the Netherlands, Büchel Air Base in Germany, Ghedi and Aviano Air Bases in Italy, and Incirlik Air Base in Turkey. Each of these bases host around 20 United States B61 bombs. Hans M. Kristensen, et al., *Nuclear Weapons Sharing*, 79 BULL. ATOMIC SCIENTISTS 393, 395-99 (2023); see also *U.S. Non-Strategic Nuclear Weapons*, CTR. FOR ARMS CONTROL & NON-PROLIF. (Nov. 2023), <https://perma.cc/JXQ4-QWR6>.

<sup>25</sup> The B61 gravity bomb was first developed in 1963. Throughout its sixty-year history it has had twelve different variants. The development of the B61-12 variant started under the Obama Administration and is considered, "the most expensive nuclear bomb program in US history." Hans M. Kristensen & Robert S. Norris, *The B61 Family of Nuclear Bombs*, 70 BULL. ATOMIC SCIENTISTS 79, 80-83 (2014). On November 1, 2022, the Air Force authorized the transport of B61-12 weapons to Europe signaling a that the new weapons would start preparations to deploy to Europe. See U.S. DEP'T OF THE AIR FORCE, AIR FORCE INSTRUCTION 91-115, SAFETY RULES FOR NUCLEAR AIRLIFT OPERATIONS (Nov. 1, 2022), <https://perma.cc/RRW4-BQKR>; see also U.S. DEP'T OF DEF., 2022 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 14. In October 2022, Politico first reported that the United States was accelerating deployment of the B61-12 bombs to NATO allies in Europe. The new version is operational on both strategic bombers, such as the B-2 and B-21, and fighter aircraft, such as F-15, F-16, F-35, and Tornado fighter jets. Erin Banco, Bryan Bender & Paul McLeary, *U.S. Speeds Up Plans to Store Upgraded Nukes in Europe*, POLITICO (Oct. 26, 2022), <https://perma.cc/8UDD-D38T>. In October 2023, the Department of Defense announced that a new variant, the B61-13, was being developed, some of which will be deployed to Europe. See Press Release, U.S. Dep't of Def., Department of Defense Announces Pursuit of B61 Gravity Bomb Variant (Oct. 27, 2023), <https://perma.cc/W7L8-HNGD>.

Mika Hayashi helpfully lays out precisely how the sharing arrangements work in practice; in particular, the “dual key” operation necessary to launch the weapons. She explains:

[I]t is assumed that the dual-key system, a term used by multiple sources in discussing the nuclear sharing arrangements, 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 USA. From a host State’s perspective, ‘[the host State] does not have any direct control of the US nuclear warheads.’ Figuratively speaking, the first key is always retained by the USA, 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 USA 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.<sup>26</sup>

As might be gleaned from this explanation, it is the Alliance’s stance that the stationing of the nuclear weapons does not constitute “transfer” or “control” of the weapons. Because the weapons always remain in the ultimate control of the United States, they are never technically transferred to the control of allied states.<sup>27</sup> This argument has some weaknesses. It may appear to work as an explanation of the first key; but it is hard to see how giving the allied state a veto power over the launch would not constitute some degree of control. The proffered counterargument here is that the veto is a function of the host state’s sovereignty over its territory.<sup>28</sup> This is a rather anemic argument because states can contract away, through treaty, entitlements like control over territorial sovereignty in certain circumstances.<sup>29</sup> Moreover, it is not clear who would actually be piloting the aircraft. Would it not be a “transfer” of “control” to the allied pilot who ultimately deploys the weapon? If so, does not this individual exercise control—indeed ultimate control—over the use of the weapon?

Against these lines of attack, the United States asserts that these arrangements do not constitute “transfer” or “control” because they were not meant to be covered by the NPT when it was drafted.<sup>30</sup> Specifically, it points out that during

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<sup>26</sup> Hayashi, *supra* note 8, at 473.

<sup>27</sup> *NATO’s Nuclear Sharing Arrangements*, *supra* note 1; Questions on the Draft Non-Proliferation Treaty Asked by U.S. Allies Together with Answers Given by the United States, OFFICE OF THE HISTORIAN (Apr. 28, 1967), <https://perma.cc/HSG3-8VG9> [hereinafter Questions on the Draft Non-Proliferation Treaty].

<sup>28</sup> See, e.g., Hayashi, *supra* note 8, at 477.

<sup>29</sup> Cession is an accepted method of acquiring territory under international law. According to one definition, “Acquisition of territory by cession occurs when one sovereign state agrees to cede territory to another state. It is a consequence of the exercise of sovereignty by both the ceding state and the receiving state. It is a form of acquisition of territory that depends on the consent of one state that possesses sovereignty over a territory to transfer that sovereignty to another state.” CURTIS F.J. DOEBBLER, *DICTIONARY OF PUBLIC INTERNATIONAL LAW* 39 (2018).

<sup>30</sup> Rose Gottemoeller, NATO Deputy Sec’y Gen., Speech at the University of Oslo: NATO Nuclear Policy in a Post-INF World (Sept. 10, 2019), <https://perma.cc/K9M5-N3DC>. See 2020 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Summary Record*

the negotiation process, other state parties, and in particular, Russia, were aware of the arrangements and viewed them as falling outside the scope of the NPT.<sup>31</sup> Not only that, but Russia had the opportunity to object to the United States' interpretation of "transfer" and "control," but declined to do so.<sup>32</sup> As such, Russia acquiesced to this definition prior to the NPT's finalization and enactment.<sup>33</sup> According to the NATO factsheet:

NATO's nuclear sharing arrangements were, and remain, in full compliance with the NPT. When the deliberations of the NPT began in the 1960s, NATO's nuclear sharing arrangements already existed and were known to the Soviet Union. During their bilateral discussions on the draft NPT, both the US and the USSR carefully negotiated text to ensure that no provisions prohibited NATO's nuclear sharing arrangements, which were viewed by both actors as necessary to prevent further nuclear weapons developments by European nations. The drafting of the NPT was concluded in 1968 and it entered into force in 1970.<sup>34</sup>

A rather more detailed explanation can be found in the questions on the draft NPT asked by the allied powers with answers given by the United States in April 1967. In particular, *inter alia*,

Q: What may and what may not be transferred under the draft treaty?

A: The treaty deals only with what is prohibited, not with what is permitted. It prohibits transfer to any recipient whatsoever of "nuclear weapons" or control over them, meaning bombs and warheads. It also prohibits the transfer of other nuclear explosive devices because a nuclear explosive device intended for peaceful purposes can be used as a weapon or can be easily adapted for such use. It does not deal with, and therefore does not prohibit, transfer of delivery vehicles or delivery systems, or control over them to any recipient, so long as such transfer does not involve bombs and warheads.

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

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*of the Second Part of the 3rd Meeting*, ¶¶ 20-27, 30, 32, U.N. Doc. NPT/CONF.2020/MC.II/SR.3/Add.1 (Aug. 10, 2022).

<sup>31</sup> See Letter from Nicholas deBelleville Katzenbach, U.S. Under Sec'y of State, to Clark Clifford, U.S. Sec'y of Def. (Apr. 10, 1968) (on file with the Office of the Historian) [hereinafter 1968 Letter from Nicholas deBelleville Katzenbach].

<sup>32</sup> See Memorandum of Conversation on Non-Proliferation Between the U.S. and USSR 7 (Oct. 10, 1966) (on file with the Department of State) [hereinafter Conversation on Non-Proliferation].

<sup>33</sup> See TOM COPPEN, *THE LAW OF ARMS CONTROL AND THE INTERNATIONAL NON-PROLIFERATION REGIME* 96 (2016) ("subsequent agreement and practice can even manifest themselves as informed acquiescence") [hereinafter COPPEN, ARMS CONTROL]; see also *id.* ("[I]naction can under circumstances constitute subsequent practice; silence, moreover, may constitute acceptance of a practice . . ."); Danae Azaria, *State Silence as Acceptance: A Presumption and an Exception*, 2024 BRIT. Y.B. INT'L L. 12.

<sup>34</sup> NATO's *Nuclear Sharing Arrangements*, *supra* note 1.

- 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.<sup>35</sup>

Whether these arrangements constitute a violation of the NPT is fundamentally a question of treaty interpretation. And the principal mechanism for evaluating whether conduct complies with a treaty is the Vienna Convention on the Law of Treaties (“Vienna Convention,” “VCLT,” or “Convention”).<sup>36</sup> Although the United States is not a party to the Convention itself, all agree—including the United States—that the treaty has passed into what is called customary international law binding on all states.<sup>37</sup> Custom arises out of a consistent practice of states accompanied by what is called “*opinio juris*” or the intent that the practice gives rise to a legal obligation or right.<sup>38</sup>

### III. THE VIENNA CONVENTION ON THE LAW OF TREATIES

The Vienna Convention entered into force in 1980 (despite what the NATO factsheet says), after the sharing arrangements were already in place.<sup>39</sup> It sets out a series of rules that are not to be interpreted in a linear fashion but rather through a recursive analysis of a treaty’s application,<sup>40</sup> or what some have called an “art.”<sup>41</sup> Thus the treaty characterizes the bundle of rules under the heading of Article 31, “General rule of interpretation.”<sup>42</sup> Article 32 then sets out “Supplementary means of interpretation.”<sup>43</sup> Though some notions are categorized as “supplementary” rather than “general rules,” in practice their importance is not diminished and should be

<sup>35</sup> Questions on the Draft Non-Proliferation Treaty, *supra* note 27.

<sup>36</sup> See Santiago Torres Bernardez, *Interpretation of Treaties by the International Court of Justice Following the Adoption of the 1969 Vienna Convention on the Law of Treaties*, in LIBER AMICORUM PROFESSOR IGNAZ SEIDL-HOHENVELDERN IN HONOUR OF HIS 80TH BIRTHDAY 724-25 (Gerhard Hafner et al. eds., 1998).

<sup>37</sup> GARDINER, *supra* note 10, at 162; COPPEN, ARMS CONTROL, *supra* note 33, at 84.

<sup>38</sup> *Draft Conclusions on Identification of Customary International Law, with Commentaries*, U.N. Doc. A/73/10 (2018), reprinted in [2018] 2 Y.B. INT’L L. COMM’N 70, U.N. Doc. A/CN.4/SER.A/2018/Add.1(Part 2).

<sup>39</sup> *Definitions*, UNITED NATIONS: TREATY COLLECTION, <https://perma.cc/RA8X-7XYX> (last visited Jul. 15, 2024).

<sup>40</sup> United Nations Conference on the Law of Treaties, *Draft Articles on the Law of the Treaties with Commentaries, Adopted by the International Law Commission at its Eighteenth Session*, 39 ¶ 8 U.N. Doc. A/CONF.39/11/Add.2 (1966) [hereinafter U.N. Conference on the Law of Treaties, *Draft Articles*]. The [International Law] Commission, by heading the article ‘General rule of interpretation’ in the singular and by underlining the connection between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, indented to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, Article 27 is entitled *General rule of interpretation* in the singular, not *General rules* in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. DANIEL H. JOYNER, *INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY* 23-24 (1st ed. 2011).

<sup>41</sup> GARDINER, *supra* note 10, at 5.

<sup>42</sup> Vienna Convention on the Law of Treaties art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>43</sup> *Id.* art. 32.

equally considered and weighed.<sup>44</sup> These “rules” are actually better viewed as guidelines, and are not exclusive.<sup>45</sup> Rather, they encompass many topics and considerations that should be reviewed when attempting to parse out the meaning of a treaty. Accordingly, given the meticulous analysis this Essay sets out to perform, it is rather obligatory to spell out these Articles at the outset:

### Article 31

#### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

### Article 32

#### *Supplementary means of interpretation*

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<sup>44</sup> See GARDINER, *supra* note 10, at 25.

<sup>45</sup> See GARDINER, *supra* note 10, at 40. Treaty interpretation should not be a mechanical operation. It is a task that calls for investigation and an application of a number of factors that vary from case to case. *Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, [1964] 2 Y.B. INT'L L. COMM'N 53, ¶ 1, U.N. Doc. A/CN.4/167 and Add.1-3 (citing Harvard Law School, *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. SUPP. 653, 946 (1935)); see also Donald H. Regan, *Understanding What the Vienna Convention Says About Identifying and Using “Sources for Treaty Interpretation,”* in THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1047, 1058 (S. Besson & J. D'Aspremont eds., 2017).

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

As noted, exegesis of treaties is unlike familiar techniques in domestic law. For example, treaty interpretation goes well beyond where a textualist interpretation may stop. Rather, according to the International Court of Justice—the principal judicial organ of the United Nations—“a treaty provision must be interpreted ‘in accordance with the intentions of its authors as reflected by the text of the treaty *and other relevant factors in terms of interpretation.*’”<sup>46</sup> Nonetheless, text is a natural starting point;<sup>47</sup> it’s just not the end of the inquiry.<sup>48</sup> Treaty interpretation also takes into account subsequent practice and agreements of the parties, preparatory work, the object and purpose of the treaty, and—of salient significance to this Essay—special meanings to be given its terms.<sup>49</sup> Richard K. Gardiner explains the interactions of these elements as follows:

True, the Vienna rules start with the idea of approaching the terms of a treaty in good faith and giving them their ordinary meaning. This allows scope for viewing a reasonable first impression as a starting point; but that is swiftly dispelled by the immediate link which the rules make with context and with the requirement of consideration of the object and purpose of the treaty, even before the further elements of the general rule (such as practice and general international law) are taken into account. Inclusion of context and these further elements of the general rule in the treaty interpretation process take it way beyond attempting merely to recapture the meaning of words at the time of inclusion of the treaty.<sup>50</sup>

Before even getting to the text itself, the Convention requires “good faith.”<sup>51</sup> This obligation may be thought of as equivalent to parties to a contract interpreting the instrument in good faith to achieve its object and purpose.<sup>52</sup> It also encompasses

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<sup>46</sup> Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, ¶48 (July 13) (emphasis added).

<sup>47</sup> U.N. Conference on the Law of Treaties, *Draft Articles*, *supra* note 40, at 40 ¶11 (According to the International Law Commission (ILC) commentary on the Vienna Convention, “[T]he text must be presumed to be the authentic expression of the intention of the parties; . . . in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties.”).

<sup>48</sup> *Id.* at 139 ¶5 (“[I]t was wiser and more equitable to assume that the text represented the common intentions of the original authors and that the primary goal of interpretation was to elucidate the meaning of that text in the light of certain defined and relevant factors.”).

<sup>49</sup> See GARDINER, *supra* note 10, at viii–ix.

<sup>50</sup> *Id.* at 27.

<sup>51</sup> See *id.* at 167–68.

<sup>52</sup> Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT’L L. 48, 56 (1949).



the Convention's instruction to read and interpret the treaty as a whole, rather than as specific words and instances on their own.<sup>53</sup> There is nothing in the history of the arrangements indicating that parties to the NPT were acting in bad faith, so we can put this criterion aside fairly quickly.

Next is the text. Of course, the chief terms at issue in the NPT are "transfer" and "control." One obvious starting place is dictionary definitions.<sup>54</sup> Unsurprisingly, these terms have a multitude of meanings. For example, "transfer" according to Merriam-Webster can mean "to convey from one person, place, or situation to another," "to make over the possession or control of,"<sup>55</sup> and "to print or otherwise copy from one surface to another by contact."<sup>56</sup> Importantly, one of these definitions clearly indicates a change in ownership, while the others do not. Such confusion over this simple term is telling within the NPT context as well. Does the prohibition on transfer limit parties' ability to physically convey items, or just restrict a change in ownership? The NPT drafters were incredibly concerned with non-nuclear states developing their own weapons, so from some perspectives, including that of the United States, restrictions on transfer were enacted to curb ownership changes and restrict non-nuclear states from possessing nuclear weapons—thereby adding more actors to the increasing arms race.<sup>57</sup> The contrary position reads transfer to signify the restriction of weapons physically entering a non-nuclear state, even if that state never gains "control" over the weapon.<sup>58</sup> Accordingly, similar issues and concerns are invoked over the meaning of "control," which might be the ability "to exercise restraining or directing influence over," "to have power over," and/or "to reduce the incidence or severity of especially to innocuous levels."<sup>59</sup> To be sure, "dictionaries give many words more than one meaning: 'Ambiguous' itself bears seven meanings of which the one indicated as most common offers multiple choice of somewhat different senses."<sup>60</sup> For instance, ambiguous in some contexts may mean "doubtful or uncertain especially from obscurity or indistinctness."<sup>61</sup>

In light of these ambiguities, the text must be evaluated according to the treaty's context.<sup>62</sup> Here the context is directly informed by the treaty's preamble,<sup>63</sup> which demonstrates a collective desire to halt the proliferation of nuclear weapons.<sup>64</sup>

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<sup>53</sup> GARDINER, *supra* note 10, at 168.

<sup>54</sup> *See id.* at 184.

<sup>55</sup> *Transfer*, MERRIAM WEBSTER, <https://perma.cc/BS8Q-28NQ> (last visited Jul. 15, 2024).

<sup>56</sup> *Id.*

<sup>57</sup> The United States' Amendments of March 21, 1966 redrafted Article I to maintain the view that the NPT banned not only direct transfer of nuclear weapons, but also indirect transfer. MOHAMED I. SHAKER, *THE NUCLEAR NON-PROLIFERATION TREATY: ORIGINS AND IMPLEMENTATION, 1959-1979*, at 221-27 (1980).

<sup>58</sup> The meaning of "control" and the Soviet concept of access were a major barrier between the United States and Soviet Union from 1962 to 1965. *See* Mason Willrich, *The Treaty on Non-Proliferation of Nuclear Weapons: Nuclear Technology Confronts World Politics*, 77 YALE L.J. 1447, 1463-70 (1968).

<sup>59</sup> *Control*, MERRIAM WEBSTER, <https://perma.cc/7EDD-HJL4> (last visited Jul. 15, 2024).

<sup>60</sup> *See* GARDINER, *supra* note 10, at 377 (quoting *Ambiguous (adj.)*, OXFORD ENGLISH DICTIONARY (2020 ed.)).

<sup>61</sup> *Ambiguous*, MERRIAM WEBSTER, <https://perma.cc/M5TF-22CV> (last visited Jul. 15, 2024).

<sup>62</sup> *See* Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. Rep. 4, 8 (Mar. 3).

<sup>63</sup> JOYNER, *supra* note 40, at 27.

<sup>64</sup> *See, e.g.*, Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 2 ("Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war . . .").

It may be tempting to jump to the conclusion that the sharing of nuclear weapons runs directly contrary to this context, but that would misread the intent behind the arrangements. For the arrangements were designed to cut back on non-nuclear states' own nuclear programs.<sup>65</sup> That is to say, if a non-nuclear state fell within the protective umbrella of a nuclear state, like the United States, it would have less incentive to develop its own nuclear arsenal, thus decreasing the spread of nuclear weapons in the aggregate. To be sure, "[a]greements on nuclear arms control have . . . as a result of the strategic and deterrent value of their subject, traditionally focused primarily on security-related objects and purposes."<sup>66</sup> Thus, "the object and purpose of the NPT should primarily be seen in a security related context."<sup>67</sup>

Perhaps the strongest argument that can be made appears in Article 31(4), which allows that a "special meaning shall be given to a term if it is established that the parties so intended."<sup>68</sup> Here recourse may be had to what is generally called the "preparatory work of the treaty,"<sup>69</sup> which includes the negotiations leading up to the

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<sup>65</sup> Support comes from a submission the United States promulgated for the proposed treaty in 1966, in which it agreed not to transfer control over nuclear weapons to NNWSs. Rep. on the Conference of the Eighteen-Nation Committee on Disarmament, *Disarmament Commission Official Records Supplement for 1966*, 11 U.N. Doc. A/6390-DC/228 (Aug. 30, 1966). This proposition included language that highlights that the real thrust of the prohibition on the transfer of control was to prohibit NNWSs from developing their own weapons. *Id.* The combination of these statements supports the assertion that the United States and NATO states did not want to prevent themselves from placing nuclear weapons in non-nuclear territories, but rather prevent NNWSs from creating new weapons. *See id.* Such an understanding is in alignment with the modern-day rationalization of why the United States places nuclear weapons in its allied NATO states, namely, to deter and prevent states from constantly engaging in arms races. *See NATO's Nuclear Sharing Arrangements*, *supra* note 1. Another statement that suggests other nations were aware of and acquiesced to NATO's nuclear sharing arrangements prior to adopting the NPT is found in the United States' response to questions posed by its allies regarding the legality of the NPT and NATO sharing arrangements. *Questions on the Draft Non-Proliferation Treaty*, *supra* note 27. The United States specifically noted that the treaty encompasses what is prohibited rather than what is permitted, and the sharing arrangements under NATO were not prohibited. *Id.* The United States further explained its understanding of the proposed language in a letter between the Secretary of State of the USSR and the Secretary of Defense of the United States. The letter details that the NPT does "not mention alliance consultations or deployment arrangements not involving a transfer of nuclear weapons." 1968 Letter from Nicholas deBelleville Katzenbach, *supra* note 31. Essentially the United States states that the nuclear sharing arrangements do not transfer control to another nation and are protected under the language and understanding of the NPT. *See id.* The letter uniquely dictates that, "We have not heard from the Soviets any indication that they will contradict the US interpretations when they are made public in the process of consideration of the treaty either by the US or by our allies." *Id.* Essentially, this forced the USSR to raise objections to those interpretations or acquiesce to them, and the record afterwards does not contain any further publicly raised concerns by the USSR. *See William Alberque, The NPT and The Origins of NATO's Nuclear Sharing Arrangements*, 57 PROLIFERATION PAPERS 11, 44 (2017).

<sup>66</sup> COPPEN, ARMS CONTROL, *supra* note 33, at 81-82.

<sup>67</sup> *Id.* at 82; *see also id.* at 9 (explaining "the requirement of a certain amount of flexibility under arms control instruments to be able to adapt to changing circumstances").

<sup>68</sup> Vienna Convention on the Law of Treaties, *supra* note 42, art. 31(4).

<sup>69</sup> Stephen M. Schwebel, *May Preparatory Work Be Used to Correct Rather than Confirm the 'Clear' Meaning of a Treaty Provision?*, 10 SVJT 797, 804 (1997) ("That practice and that precedent demonstrate that preparatory work is often brought to bear in the interpretation of treaties, by the parties to those treaties and by their interpreters, and this whether [preparatory work] confirm(s) or correct(s) an interpretation otherwise arrived at."); *see also* GARDINER, *supra* note 10, at 382-83, 394, 400. ("Using supplementary means for confirming of a meaning may involve no more than recounting of the stages of development of a provision.") ("Although the text of a convention must be accorded primacy in matters of interpretation, it is well settled that the [preparatory material of an international convention may be used as supplementary means of interpretation.]") ("Resort may be made to the preparatory work to identify the object and purpose of a treaty.") ("[T]he very nature of a convention as an act of will made it essential to take into account all the work which had led to the formation of that will—all material which the parties had had before them when drafting the final text.").

ratification of the treaty.<sup>70</sup> Because both the United States and Russia were the principal negotiators, their views carry the most weight.<sup>71</sup> Negotiating parties are those that “took part in the drawing up and adoption of the text of the treaty,” and their representatives were endowed by their states with “full powers” that enabled them to negotiate, adopt, and/or authenticate the text of the treaty.<sup>72</sup> As noted, the evidence of their views is considered preparatory work, which is often recognized under the Convention as “offer[ing] the clearest explanation” of what the treaty means.<sup>73</sup> In an attempt to memorialize and solidify treaty interpretations, negotiating parties often document their understanding of the treaty in “interpretative declarations” during or after negotiations.<sup>74</sup> Though these documents are traditionally only considered “preparatory work” if created before negotiations for the treaty conclude,<sup>75</sup> other states’ responses to interpretative declarations may also evidence approval for the written understanding, and often a state’s silence as a response signifies an acquiescence to the interpretive declaration.<sup>76</sup>

As to the sharing arrangements, the preparatory work makes clear that the United States communicated to Russia and distributed its documented understandings, an interpretive declaration of sorts, regarding its position related to “transfer” and “control” within the NATO sharing agreements’ context.<sup>77</sup> The United States explained that the NPT did 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.”<sup>78</sup> Russia acquiesced to this interpretation after meeting with the United States to discuss its concerns, admitting that Russia was not “enthusiastic about some of [the United States’] interpretations of the treaty but they had agreed that those things which were not prohibited were permitted” and “nothing [in the treaty] deals with exchanges of new weapons for old within existing arrangements.”<sup>79</sup> Additionally, Russia subsequently failed to controvert these interpretations publicly during the NPT’s continued negotiations and ratification.<sup>80</sup> As such, it acquiesced to the United States’ stance that “transfer” and “control” did not prohibit its nuclear sharing arrangements under NATO. Thus, a strong argument can be made that the terms have a “special meaning” pursuant to Article 31(4).<sup>81</sup> For it is clear from the negotiating history that Russia agreed to the United States’ interpretation that the NPT does not cover the arrangements because the arrangements do not constitute the “transfer” and “control” of nuclear weapons.<sup>82</sup>

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<sup>70</sup> GARDINER, *supra* note 10, at 23.

<sup>71</sup> CTR. FOR SEC. STUD., NEGOTIATING THE NUCLEAR NON-PROLIFERATION TREATY 22 (Roland Popp et al. eds., 1st ed. 2017) [hereinafter CENTER FOR SECURITY STUDIES].

<sup>72</sup> GARDINER, *supra* note 10, at 83-84.

<sup>73</sup> *Id.* at 38.

<sup>74</sup> *Id.* at 91.

<sup>75</sup> *Id.* at 94.

<sup>76</sup> *But see id.* at 110.

<sup>77</sup> Conversation on Non-Proliferation, *supra* note 32, at 7; Alberque, *supra* note 65, at 45.

<sup>78</sup> Questions on the Draft Non-Proliferation Treaty, *supra* note 27.

<sup>79</sup> U.S. Dep’t of State, Telegram 121338 on Non-Proliferation Treaty (Jan. 18, 1967) (on file with the Department of State).

<sup>80</sup> Alberque, *supra* note 65, at 45.

<sup>81</sup> Vienna Convention on the Law of Treaties, *supra* note 42, art. 31(4).

<sup>82</sup> See 1968 Letter from Nicholas deBelleville Katzenbach, *supra* note 31.

As the Third Report of the Special Rapporteur to the Convention explains, a term may have a special meaning “if it is established conclusively that the parties employed the term in the treaty with that special meaning.”<sup>83</sup>

Next, the interpreter is instructed to consult subsequent practice and agreements.<sup>84</sup> I want to bracket this inquiry for reasons that will become clear and move on to the treaty’s negotiations. The negotiations between the United States and Russia make clear that transfer and control do not cover the nuclear sharing arrangements.<sup>85</sup> To be sure, these negotiations may be part of the treaty’s “preparatory work” which the Vienna Convention instructs interpreters to consider.<sup>86</sup> And as alluded to, the United States and Russia were the principal negotiators of the NPT making their views carry significant weight.<sup>87</sup>

While all of these arguments point to the legality of the sharing arrangements under the NPT, treaties may be subject to change if subsequent understandings and practice alter their meanings.<sup>88</sup> Here acquiescence affirms the original meanings, but protest may indicate a changed understanding of terms.<sup>89</sup> This is what the Vienna Convention refers to as “subsequent practice.”<sup>90</sup> At this point, a bit of history is in order. For the first three decades, Russia seemed content with the interaction (or perhaps more accurately, non-interaction) between the NPT and the sharing arrangements.<sup>91</sup> But more recently, some states have begun to question the arrangements’ legality.

By 1995, international debate over NATO’s nuclear sharing policy and its impact on the non-proliferation regime under the NPT started to grow steadily.<sup>92</sup> At

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<sup>83</sup> GARDINER, *supra* note 10, at 335 (quoting *Law of Treaties*, [1964] 2 Y.B. INT’L COMM’N 52 U.N. Doc. A/CN.4/SER.A/1964/ADD.1); *see also Summary Records of the Eighteenth Session*, [1966] 1 Y.B. INT’L L. COMM’N 192 ¶ 90, U.N. Doc. A/CN.4/SER.A/196.

<sup>84</sup> *See, e.g., Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.)*, Judgment, 1999 I.C.J. 1045, ¶ 85 (Dec. 13) (After considering the object and purposes of the treaty and its preparatory materials, “the Court examined at length the subsequent practice of the parties to the Treaty. The Court found that that practice did not result in any agreement between them regarding the interpretation of the Treaty or the application of its provisions”).

<sup>85</sup> 1968 Letter from Nicholas deBelleville Katzenbach, *supra* note 31.

<sup>86</sup> *See supra* note 69.

<sup>87</sup> CENTER FOR SECURITY STUDIES, *supra* note 71, at 22.

<sup>88</sup> GARDINER, *supra* note 10, at 253 (quoting *Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.)*, Judgment, 1999 I.C.J. 1045, ¶ 49 (Dec. 13)); COPPEN, ARMS CONTROL, *supra* note 33, at 83 (“Since both international law and its specific context are subject to continuous evolution, the rules to interpret the law must retain a certain form of flexibility; treaty interpretation is a political act with a legislative dimension.”).

<sup>89</sup> COPPEN, ARMS CONTROL, *supra* note 33, at 96 (“subsequent agreement and practice can even manifest themselves as informed acquiescence”); *id.* ([I]naction can under circumstances constitute subsequent practice; silence, moreover, may constitute acceptance of a practice . . .”).

<sup>90</sup> GARDINER, *supra* note 10, at 254-56, 262-63, 265, 271; Appellate Body Report, *Japan—Texas on Alcoholic Beverages*, 12-13, WTO Doc. WT/DS8/AB/R (adopted Oct. 4, 1996) (“Generally in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a ‘concordant, common and consistent’ sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties of the parties regarding its interpretation.”).

<sup>91</sup> *See* Acting Head of the Delegation of the Russian Federation, Statement at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (Apr. 27, 2015), <https://perma.cc/SAX8-VRDS>, [hereinafter 2015 Russian NPT Statement].

<sup>92</sup> Despite the rising criticisms from the international community, the United States steadily reduced the number of nuclear weapons stationed abroad. By 1993 less than 1,000 United States nuclear warheads remained abroad and by 2011 there were less than 200. *See* Todd S. Sechser, *Sharing the Bomb: How Foreign Nuclear Deployments Shape Nonproliferation and Deterrence*, 23 NONPROLIFERATION

the 1995 NPT Review and Extension Conference, several nations raised “serious concerns as to whether NATO nuclear sharing arrangements comply with Articles I and II of the Treaty.”<sup>93</sup> Mexico raised concerns over the nuclear cooperation between the United States and United Kingdom stating these arrangements did not “comply with the spirit and objectives of the treaty.”<sup>94</sup> While Mexico noted that NATO had significantly reduced the amount of nuclear weapons stationed in Europe since the end of the Cold War, it wanted clarification on how the United States was still in compliance with the Treaty under the NATO sharing arrangements.<sup>95</sup> The 2000 debate on nuclear sharing was short, but the NATO sharing arrangements and expansion prompted further debate from the international community.<sup>96</sup> Belarus, China, and Russia objected to NATO expansion in Eastern Europe and Belarus called for a nuclear-weapon-free zone in Central and Eastern Europe.<sup>97</sup> South Africa was even more critical, expressing concerns

about the non-proliferation implications of the plans for the expansion of NATO . . . The planned expansion of NATO would entail an increase in the number of non-nuclear weapon States which participate in nuclear training, planning decision making and which have an element of nuclear deterrence in their defense policies.<sup>98</sup>

At the 1998 Preparatory Committee meeting the first proposals to end nuclear sharing were presented after the Project on European Nuclear Non-Proliferation (“PENN”) publication, *NATO Nuclear Sharing and the NPT – Questions to be Answered*,<sup>99</sup> was published showing how NATO nuclear sharing arrangements were possibly illegal under the NPT.

Indeed, the most powerful objection came from Russia, despite the USSR’s role in the original negotiation process. Russia voiced this concern at the 2015 United Nations Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons:

Accusing others of noncomplying with the NPT obligations, the US forgets that its own compliance record is far from being perfect. It would be appropriate to remind that Article I of the Treaty stipulates that nuclear-weapon States undertook not to transfer to any recipient whatsoever nuclear

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REV. 443, 445-46 (2016). Today the United States stations around 100 weapons in Europe. Hans M. Kristensen et al., *supra* note 24, at 393, 395-96.

<sup>93</sup> Martin Butcher et al., *Questions of Command and Control: NATO, Nuclear Sharing and the NPT*, 2000.1 PROJECT ON EUR. NON-PROLIFERATION RSCH. REP. 4, 12 (2000).

<sup>94</sup> 1995 NPT Review and Extension Conference, *Summary Record of the 3rd Meeting of the Main Committee*, ¶ 14, NPT/CONF.1995/32 (Part III) (Apr. 21, 1995).

<sup>95</sup> *Id.* ¶ 15.

<sup>96</sup> Butcher et al., *supra* note 93, at 13.

<sup>97</sup> 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Report of the Preparatory Committee on its first session*, ¶ 12, NPT/CONF.2000/PC.I/19 (Apr. 18, 1997).

<sup>98</sup> Permanent Rep. of South Africa to the U.N., Statement to the First Preparatory Committee Meeting for the Year 2000 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons 8 (Apr. 8, 1997).

<sup>99</sup> *See generally* Butcher et al., *supra* note 93.

weapons or control over such weapons directly, or indirectly. Non-nuclear weapon States in their turn under Article II of the NPT undertook not to receive the transfer from any transferor whatsoever of nuclear weapons or of control over such weapons directly, or indirectly. Both articles 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. If they cease to violate the Treaty, they will make their best contribution to strengthen the nuclear non-proliferation regime.<sup>100</sup>

Moreover, at the 2020 NPT Review Conference, the Russian delegation submitted a working paper calling NATO’s nuclear sharing arrangements “one of the most serious challenges to the nuclear regime.”<sup>101</sup> Russia asserted that NATO’s sharing practice “directly contradicts the spirit and letter of the Non-Proliferation Treaty.”<sup>102</sup>

One can think of Russia’s stance as a pendulum starting with acceptance of the arrangements and swinging to non-acceptance over time.<sup>103</sup> Yet now, that pendulum appears to be on a return swing toward acceptance with Russia’s stationing of nuclear weapons in Belarus, a topic addressed immediately below.

#### IV. BELARUS

As of early 2024, the world learned that Russia had stationed nuclear weapons in Belarus—a non-nuclear weapon state.<sup>104</sup> If (1) the move resembles the United States–NATO sharing arrangements, and (2) Russia claims that it is in compliance with the NPT, then the deployment directly contradicts Russia’s statements regarding the illegality of sharing arrangements in 2015. Both are true. And indeed, in defending placement of weapons in Belarus, Russia relied directly on the United States–NATO model and language.<sup>105</sup>

A brief timeline is in order. After the invasion of Ukraine in February 2022, Belarus held a referendum to amend its constitution and renounce the country’s status

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<sup>100</sup> 2015 Russian NPT Statement, *supra* note 91, at 10–11.

<sup>101</sup> Preparatory Comm. for the 2020 Rev. Conf. of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Working Paper Submitted by the Russian Federation, ¶ 15, U.N. Doc. NPT/CONF.2020/PC.III/WP.6 (Mar. 15, 2019).

<sup>102</sup> *Id.*

<sup>103</sup> See Letter from Nicholas deBelleville Katzenbach, U.S. Under Sec’y of State, to Clark Clifford, U.S. Sec’y of Def. (Apr. 10, 1966) (on file with the Department of State); 2015 Russian NPT Statement, *supra* note 91, at 10–11.

<sup>104</sup> Jack Detsch & Robbie Gramer, *Russia’s Nuclear Weapons Are Now in Belarus*, FOREIGN POL’Y (Mar. 14, 2024), <https://perma.cc/T86F-Y5E>.

<sup>105</sup> Russia’s actions in moving weapons into Belarus were formalized by Vladimir Putin who asserted that Russia’s acts mirrored what the United States has and continues to do with its NATO allies. Leila Sackur, *NATO Criticizes Putin for ‘Dangerous’ Rhetoric over Belarus Nuclear Weapon Deployment*, ABC NEWS (Mar. 26, 2023), <https://perma.cc/C2ES-EHUG>. That is, Russia has adopted the same stance the United States takes regarding the placement of weapons in non-nuclear states—Russia asserts that it still maintains control over the weapons according to NATO’s understanding of the word in the NPT context. *Id.*

as a non-nuclear state.<sup>106</sup> Within four months, plans to deploy Russian nuclear infrastructure to Belarus started to take shape.<sup>107</sup> On June 25, 2022, Russian president Vladimir Putin and the president of Belarus Alexander Lukashenko, discussed the deployment of Russian nuclear weapons in Belarus.<sup>108</sup> Putin expressed concern to Lukashenko that Russia did not have any foreign deployment of nuclear weapons like the United States did with NATO.<sup>109</sup> Thus, he proposed the deployment of Russian nuclear weapons to Belarus.<sup>110</sup>

First, Putin proposed that Belarusian Su-25 attack aircraft be converted to carry nuclear weapons.<sup>111</sup> Nikolai Sokov commented at the time that,

[T]he conversion of Belarusian Su-25 aircraft to a dual-capable role would mirror NATO's nuclear sharing arrangements: In peacetime, weapons would be controlled by Russian personnel but, in wartime, they would be used by Belarusian pilots using Belarusian aircraft. Given this significant nuclear policy development, we may hear soon Moscow saying that NATO should not worry as Russia has only copied NATO's policy.<sup>112</sup>

Notably, at this time there were no public plans for Russia to deploy nuclear warheads to Belarusian territory. Russia would only outfit Belarus with the planes to carry nuclear warheads and train their pilots accordingly, though one could presume that warheads themselves would follow.<sup>113</sup> Thus, on its face, Russia's initial proposal seemed to comply with the United States' interpretation that the NPT did not prohibit the sharing of equipment designed to *handle* nuclear weapons.<sup>114</sup> Yet less than a year later, Putin announced that Russia would deploy its tactical nuclear weapons in Belarus, "just as the United States has been doing on the territories of its allies."<sup>115</sup>

Putin declared, "The United States has been doing this for decades . . . and we agreed that we will do the same. Without violating . . . our international obligations on the nonproliferation of nuclear weapons."<sup>116</sup> Putin emphasized that

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<sup>106</sup> *Belarus Referendum Approves Proposal to Renounce Non-Nuclear Status – Agencies*, REUTERS (Feb. 27, 2022), <https://perma.cc/2KAG-JF62>. In 2022, Belarus held a referendum to alter Sec. 1 Art. 18 of its constitution. The 1996 version stated, "The Republic of Belarus pledges itself to make its territory a neutral, nuclear-free State." In 2022 this was changed to "The Republic of Belarus excludes military aggression from its territory against other states." See Daniel McCarthy, *Atom-Bombs in Belarus: Russia's New Approach to Nuclear-Sharing and the NPT*, VÖLKERRECHTLICHE (Mar. 5, 2023), <https://perma.cc/B6TE-35SR>.

<sup>107</sup> *See Putin Promises Belarus Nuclear-Capable Missiles to Counter 'Aggressive' West*, REUTERS (Jun. 25, 2022), <https://perma.cc/5XGC-AYDX>.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*; *What Did Putin Say on Tactical Nuclear Weapons and Belarus?*, REUTERS (Mar. 25, 2023), <https://perma.cc/X38E-WC7W>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Nikolai N. Sokov, *Russia-Belarus Nuclear Sharing Would Mirror NATO's—and Worsen Europe's Security*, BULL. ATOMIC SCIENTISTS (July 1, 2022), <https://perma.cc/2YHF-FMXF>.

<sup>113</sup> *Id.*

<sup>114</sup> Elena Chernenko & Anastasia Dombitskaya, *The Russian Foreign Ministry Has Provided Details on Russian-Belarusian Cooperation in the Nuclear Sphere*, KOMMERSANT (Dec. 21, 2022), <https://perma.cc/VP6D-RXG7>.

<sup>115</sup> *Russia to Deploy Its Tactical Nuclear Weapons in Belarus at Request of Minsk, Says Putin*, TASS (Mar. 25, 2023), <https://perma.cc/YA4J-WHTC>.

<sup>116</sup> *Id.*

Russia would not *transfer* such weapons to Belarus, just as the United States claimed not to be transferring, stating, “We are actually doing everything they have been doing for decades.”<sup>117</sup> By April 2023, Belarusian pilots and missile crews reportedly began their training to handle nuclear weapon systems.<sup>118</sup> In June, Putin confirmed Russian nuclear weapons were on Belarusian soil, stating, “The first nuclear warheads have been delivered to Belarus, but only the first batch. There will be more. By the end of the summer, by the end of this year, we will complete this work.”<sup>119</sup> Russian officials continued to justify the deployment as “fully within the framework of international law.”<sup>120</sup>

On October 5, 2023, members of the international community at the U.N. General Assembly decried Russia’s nuclear activities, calling them violations of the NPT.<sup>121</sup> Belarus defended the deployments saying it was in line with international law and the NPT, stating, “This cooperation is nothing new, as it has long been practised by the North Atlantic Treaty Organization (NATO), both in the form of joint nuclear missions and the deployment of United States’ nuclear weapons to five non-nuclear NATO member countries.”<sup>122</sup> The United States defended its nuclear sharing arrangements, stating they were in line with the NPT because the United States maintained custody and control over the weapons.<sup>123</sup> The United States noted that Russia did not raise this as an NPT issue until 2015.<sup>124</sup> The United States also raised concerns over statements by President Lukashenko that he has control of nuclear weapons.<sup>125</sup> Finally, Russia stated, “Washington, D.C., thinks what they do is good and correct, but that what other countries, such as the Russian Federation and Belarus, do is wrong and violates the NPT. There is no reason that the United States must deploy nuclear weapons in Europe. . . . Nuclear weapons in Belarus are fully under the control of the Russian Federation.”<sup>126</sup>

In sum, Russia’s stance on the legality of nuclear sharing arrangements has been a sort of pendulum swinging back and forth from legality to illegality and back to legality. And Russia’s most recent position and actions support the legality of the United States-NATO sharing arrangements.

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<sup>117</sup> *Id.* Belarus insisted that these arrangements to update aircraft, train pilots, and “the deployment of nuclear warheads on the territory of Belarus without transferring control over them” did not violate Article I and II of the NPT. See Press Release, Ministry of Foreign Affairs of the Republic of Belarus, The Response of the Press Service of the Ministry of Foreign Affairs of Belarus to the Question of the TASS Agency About the Deployment of Tactical Nuclear Weapons of Russia on the Territory of Belarus (Mar. 28, 2023), <https://perma.cc/F7PW-FL6S>.

<sup>118</sup> Hans M. Kristensen et al., *supra* note 24, at 393, 400. This two-week certification for handling nuclear weapons is unusually short compared to NATO certification which can take months.

<sup>119</sup> Vladimir Putin, *Remarks at the Plenary Session of the St Petersburg International Economic Forum* (June 16, 2023) (transcript available at <https://perma.cc/PUW4-MX3N>).

<sup>120</sup> Russia claimed its arrangement with Belarus was legal under the NPT because unlike NATO, the two countries are within the “framework of the Union State, which has a single territory and a common military doctrine.” Press Release, Ministry of Foreign Affs. of the Russ. Fed’n, Commentary by the Official Representative of the Russian MFA M.V. Zakharova in Connection with the US Activities in the Field of Nuclear Weapons (June 13, 2023), <https://perma.cc/YSV6-3Y3J>.

<sup>121</sup> Press Release, General Assembly, Deployment of Nuclear Weapons to Belarus Debated in First Committee, as Delegates Rethink Global Security, U.N. Press Release GA/DIS/3712 (Oct. 5, 2023).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*



## V. CONCLUSION

The question presented by this Essay is whether United States-NATO nuclear sharing arrangements are legal; in particular, whether such arrangements comply with the NPT. The answer is yes. As has been stated before, treaty law is a crucible, a recursive process by which many factors are considered to arrive at an ultimate meaning. This Essay ran the arrangements through that crucible, analyzing text, context, object and purpose, preparatory materials, negotiating history, subsequent practice, and special meaning. What emerged was a fairly-solid precedent based on Russia's—the other major negotiating state's—*ab initio* and almost unbroken agreement and acquiescence in the legality of the arrangements. This answer holds not only academic worth but also real-world ramifications for current events, namely, Russia stationing nuclear weapons in Belarus. For if the United States-NATO arrangements are legal, so too are the Russia-Belarus agreements. However, what also emerges is that transferring control to Belarus without Russia maintaining ultimate authority over the weapons violates the NPT, a move Belarus has announced.<sup>127</sup>

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<sup>127</sup> Belarus's President Lukashenko claimed he has a personal "veto" over Russia's use of nuclear weapons, stating, "These are our weapons and we will use them." Kristensen et al., *supra* note 24, at 393, 402.