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September 30, 1966

MEMORANDUM FOR MR. BILL MOYERS

Subject: Working Group Language for the Non-Proliferation Treaty: Relationship to Existing and Possible Allied Nuclear Arrangements.

In accordance with your conversation with Mr. Meeker this afternoon, I am attaching language produced by the U.S. - Soviet working group for consideration by their Principals. As you will see, I am transmitting it in a memorandum analyzing its contents.

Adrian S. Fisher

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September 30, 1966

WORKING GROUP LANGUAGE FOR
THE NON-PROLIFERATION TREATY: RELATION-
SHIP TO EXISTING AND POSSIBLE ALLIED
NUCLEAR ARRANGEMENTS.

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September 30, 1966

Working Group Language for the
Non-Proliferation Treaty: Relationship
to Existing and Possible Allied Nuclear
Arrangements.

A.U.S. - Soviet working group has been meeting in New York in an attempt to produce compromise language for a non-proliferation treaty that both sides can live with. The group has produced for consideration by their Principals draft language for the key operative clauses of a non-proliferation treaty. They are as follows:

"ARTICLE I

"Each nuclear-weapon State Party to this Treaty undertakes not to transfer nuclear weapons or other nuclear explosives or control over such weapons or explosives to a non-nuclear-weapon State directly or indirectly; either individually or collectively with other members of a military alliance or group of States, and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosives or control over such weapons or explosives.

"ARTICLE II

"Each non-nuclear-weapon State Party to this Treaty undertakes not to receive nuclear weapons or other nuclear explosives or control over such weapons or explosives from any nuclear-weapon State directly or indirectly, either individually or collectively with other members of a military alliance or group of States; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosives or control over such weapons or explosives; and not to seek or receive any assistance in their manufacture."

Since Article II is largely the "mirror image" of Article I, this memorandum will focus its analysis on Article I. Stripped of words not relevant to the present discussion, the working group language for this Article states an undertaking "not to transfer nuclear weapons . . . or control over such weapons. . . to a non-nuclear-weapon State directly or indirectly, either individually or collectively with other members of a military alliance or group of States".

So far as the U. S. is concerned, the restrictions of this working group draft, which places the emphasis on transfer of weapons or control over them, would be very nearly coextensive with present U. S. nuclear policy embodied in the Atomic Energy Act and amendments, as these have been interpreted and applied in practice. In consequence, the restrictions that the working group treaty language would place on U. S. options are, generally speaking, similar to those under which the U. S. is now operating by virtue of domestic law.

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Existing Bilateral Deployment Arrangements

As indicated earlier, the working group language prohibits the transfer of nuclear weapons or control over them in a way that parallels the U. S. Atomic Energy Act. We have structured our bilateral arrangements with NATO countries in a way to make them consistent with this Act. For that reason bilateral arrangements consistent with the Atomic Energy Act would be unaffected by the proposed treaty language.

The general outlines of many of our existing bilateral nuclear arrangements have been made public, and the Soviets have indicated their awareness of them. They have not been the subject of any detailed discussion with the Soviet Union, although U. S. negotiators have made it quite clear that they would not agree to treaty language which would require a change in those arrangements. This, and the Soviets' dropping of language prohibiting "access" to nuclear weapons by non-nuclear countries, and language which might have inhibited existing NATO nuclear training activities, all indicate that the Soviets are now prepared to accept our existing deployment arrangements.

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Under these bilateral arrangements, U. S. nuclear weapons available for use by allied forces assigned to NATO in the event of hostilities could, of course, be transferred to those forces in that event. This would be justified under the Atomic Energy Act on the ground that, when war broke out, the President could exercise his power, as Commander-in-Chief, without regard to the ban on transfer contained in the Act. A similar interpretation would make a non-proliferation treaty inapplicable also.

The purpose of such a treaty, as the preamble could be expected to express it, would be to prevent the spread of nuclear weapons and, by this measure among others, to avoid the outbreak of nuclear war anywhere in the world. Thus the treaty has its application in time and in a situation when no nuclear conflict has broken out and when it continues to be possible to prevent such conflict. Once general hostilities involving nuclear weapons have occurred, however, the point of prevention has been passed, and the purpose of the treaty can no longer be served. In such circumstances the treaty would not apply,

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and a nuclear power would be free to transfer nuclear weapons to an ally for use in the conflict.

This line of reasoning has been discussed with the Soviets who appear to understand it. Moreover, even if one were to suppose that a non-proliferation treaty persisted as a matter of law in a situation of nuclear conflict, it would certainly be recognized that questions of international legal obligation would have little if any bearing and relevance at such a time. Indeed, possible charges of treaty violation would be without practical significance.

Allied consultations on possible use of nuclear weapons

The working group's language does not bear on the decision-making process by which governments might decide to engage in hostilities with nuclear weapons. Such deliberation -- by one government, two, or a number of governments -- does not involve any transfer of weapons or control over them to anyone. This kind of deliberation, including consultations among governments, may lead to a situation in which the treaty would cease to apply, but it does not entail transfer of nuclear weapons.

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Deliberations, including inter-governmental consultations, on whether to engage in nuclear conflict are, of course, separate from arrangements that governments may make in advance regarding possible use of nuclear weapons.

The fact that the treaty applies only if there is a transfer of nuclear weapons or of control over them makes the treaty inapplicable to consultative and planning arrangements of the type contemplated within NATO (Nuclear Defense Affairs Committee and its subsidiary Nuclear Planning Group). As stated in the September 27th communique of President Johnson and Chancellor Erhard, the purpose of the proposed "permanent nuclear planning committee" will be to "broaden and deepen the areas of nuclear consultation" and to "bring the allies more intimately into planning for nuclear defense". This does not involve anything that can be described as a transfer of nuclear weapons or control over them. Thus, consistent with the thesis, accepted by the Soviets, that what is not covered by the treaty is not prohibited, the special committee arrangements would not be prohibited.

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Assignment of Polaris Submarines to NATO

A particular case that must be considered is the assignment to NATO of U. S. Polaris submarines with U. S. nuclear weapons. If such an assignment were made in the same way that U. S. Polaris submarines are now assigned to NATO, it would clearly not violate the working group's draft prohibition on transferring nuclear weapons or control over them.

To assign Polaris submarines with U. S. nuclear weapons irrevocably to NATO would violate the Atomic Energy Act prohibition on "transfer" of U. S. nuclear weapons because they could no longer be withdrawn and used as the President directed without obtaining NATO's consent. (See memorandum of the Legal Adviser dated December 17, 1965). Probably, therefore, such an irrevocable assignment to NATO would also violate the working group language.

Given a revocable assignment, however, the working group language would not prohibit existing arrangements under which Polaris submarines are now assigned to NATO. Moreover, consultations with respect to possible use of

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these submarines in defense of NATO would be possible in the proposed Nuclear Planning Group and its parent committee. Agreement would be permissible that these weapons were to be used only with the consent of members of NATO (including the U. S.), that consent being obtained pursuant to the procedures established generally for nuclear weapons assigned to NATO. Indeed, if the proposed permanent Nuclear Planning Group and its parent committee become the regular mechanism for obtaining that consent, no reason appears why this mechanism should not be used for reaching Alliance decision on use of nuclear weapons carried by the newly-assigned submarines, provided, of course, the existing requirement of unanimity is not changed.

However, problems of compatibility with the treaty, and of possible charges by the U.S.S.R. that the treaty had been violated, would be raised if the arrangements regarding the assigned submarines appeared to vest control over nuclear weapons in an international group. For example, if a special NATO board were set up to deal with these submarines separately and were given formal

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power of decision over firing the weapons (even subject to U.S. veto), the arrangement would seem to involve a transfer in violation of the Atomic Energy Act and the treaty language.

Co-Ownership of Nuclear Weapons

Like the Atomic Energy Act, the working group language would prohibit ownership of nuclear weapons by a group in which a non-nuclear-weapon State participated. (An exception for a new, federated European state is discussed below.) The draft would thus preclude a Multilateral Force in the form previously considered.

A more difficult case would be presented if a force were to be developed in which there was collective ownership of the delivery systems with U.S.-owned warheads subject to command, control and custodial arrangements similar to those now in effect under the bilateral arrangements within NATO. Such an arrangement would not involve transfer of nuclear weapons or control over them, and the working group language would not by its terms be applicable.

On the other hand, the Soviets would probably regard the creation of a new nuclear force with collectively-owned delivery systems to which U.S. nuclear warheads were

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attached as contrary to the purposes of the treaty and a cause for withdrawal. In these circumstances, arguments by the United States that this was no different from our existing bilateral arrangements might well be not only unavailing but counterproductive in stimulating a Soviet attack on those bilateral arrangements.

The European Option

Since the time when the MLEF was under active consideration, some of the Europeans have expressed interest in a "European clause" which would envision an eventually integrated Europe having its own nuclear force, free of U. S. veto. The language for Article I developed in the working group discussions clearly preserves the "European option" in the event of the formation of a federated European state including one or more entities that had been nuclear-weapon States. The new State would have succeeded to the status of "nuclear-weapon State" formerly held by one or more of its component parts. Thus, under the non-proliferation treaty, no nuclear weapons would have been transferred to a non-nuclear-weapon State; instead, the

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federated European State would be a nuclear-weapon State by succession to one or more of its component parts.

The suggestion has been advanced that the "European option" should be held open for a supra-national European entity in the field of defense that left the individual States of Europe -- including such nuclear-weapon States as the UK and France -- still in existence. If the States of Europe were to combine all of their military establishments into a common defense force -- with a unitary agency for determining policy and the great questions of war and peace for the community -- it would seem unrealistic and a contradiction in terms to suppose that the individual components of the community could survive and continue their existence as independent national States. The creation of an all-European defense community, to the exclusion of independent national military establishments, would necessarily imply the creation of an entity that would function as a State in international affairs. By definition it would be unitary in the fields of defense and foreign policy, and the community rather than its component parts would be the State in international law and relations.

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If, on the other hand, the States of Europe were to create a partial defense community, while each retained its national military establishment, no federated European State would have come into being, and the community could not be considered to have succeeded to the status of a nuclear-weapon-State held by one or more members of the community. The community would be an additional rather than a successor entity. Transfers of nuclear weapons to the community would be prohibited by Article I of the working group draft since no succession could be said to take place. Moreover, the separate authority of such a community over nuclear weapons could increase the number of entities with ability to fire them, and thus create a clear case of proliferation.

"National" Control

The suggestion has been advanced that the qualifier "national" should be inserted before the word "control" in the non-proliferation treaty, so as to leave open the possibility of transferring nuclear weapons into the control of an international entity such as a military alliance or other international organization.

First, it should be noted that inserting the word

in Article I would not achieve this objective. The first sentence of Article I binds a nuclear-weapon State Party not to transfer nuclear weapons or control over such weapons to a non-nuclear-weapon State. To insert the adjective "national" would only specify the kind of control that a nuclear-weapon State is bound not to give up; that is the kind of control that a nuclear-weapon-State has. Insertion of the adjective here would not necessarily determine the kind of control prohibited to a transferee State.

To insert the adjective in the context of receipt of nuclear weapons in Article II would at most introduce internal inconsistency. The working group treaty language prohibits receipt of control over nuclear weapons by a non-nuclear-weapon State "either individually or collectively with other members of a military alliance or group of States". To speak of "national" control in this context would imply a confusion of ideas if the adjective had the effect intended for it.

If the language of Articles I and II were re-cast so as to make clear that only national control by a transferee is banned -- and not international control by an organization of which one or more non-nuclear-weapon States were members -- it would be necessary to delete the phrase beginning

"individually or collectively", However, this would eliminate the only language that the Soviets consider deals with one of the principal situations they want the treaty to cover -- transfer to the collectivity of an alliance or group of States. This issue has been an obstacle to a treaty from the time the negotiations began. Without language to express the idea that collective control -- shared by a non-nuclear-weapon State with other States -- is prohibited, no non-proliferation treaty would be negotiable with the USSR.

Comparison of working group language with Soviet draft treaty

The working group language for Articles I and II differs in important respects from the provisions of the Soviet draft non-proliferation treaty, which, for example, cast doubt on existing U.S. bilateral arrangements and could have interfered seriously with NATO training exercises. The working group language also avoids expressions such as ownership or transfers to an alliance or group, which in the Soviet draft gave offense to our Allies.

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A summary of Soviet adjustments to meet U. S. objections is given in Annex A.

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Soviet adjustments in working group draft to meet U.S. objections

Substantive adjustments from prior Soviet texts:

1. The working group draft contains no prohibition against granting to non-nuclear-weapon States "the right to participate in the . . . control or use of nuclear weapons." (Art. I of Soviet Draft). Neither "participate" nor "use" appears in the draft. "Control" does appear but, despite Soviet requests, is not modified by "any" or "participate". Thus, considerably more flexibility would be possible for NATO arrangements than under the Soviet draft or later Soviet suggestions.

2. The working group draft contains no prohibition against granting control over the "emplacement" of nuclear weapons to a non-nuclear-weapon State with respect to weapons deployed on its territory. (Art. I of Soviet Draft). This could have had an adverse impact on U.S. deployment of nuclear weapons abroad.

3. The working group draft contains no prohibition on transmitting "information or documentation which can be employed for the purposes of . . . use of nuclear weapons." (Art. I of Soviet Draft). This language could seriously have

interfered with NATO training exercises. Instead, the working group draft contains a simple prohibition against assistance in manufacturing nuclear weapons.

4. The working group draft contains no prohibition against giving "access" to nuclear weapons to non-nuclear-weapon States. (Soviet suggestion). Given the nature of some of our existing deployment arrangements, this word could have given us real difficulties.

5. The working group draft contains no prohibition on transfers "to any recipient whatsoever." (Working group product of September 24, 1966). This might have presented some problems with respect to transfers to the United Kingdom or to a possible future federated European state.

"Presentational" adjustments from prior Soviet texts:

1. The working group draft contains no explicit ban on the transfer of "ownership" of nuclear weapons. (Art. I of Soviet Draft). It does ban the "transfer" of such weapons, and this word must be interpreted as including the transfer of "ownership".

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2. The working group draft contains no explicit ban on transfers to "groups of states." (Art. I of Soviet Draft and later Soviet suggestion). Its prohibitions are applicable to "any non-nuclear-weapon State . . . either individually or collectively with other members of a military alliance or group of States."

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