

March 18, 1968

**Note for the Directorate of Political Affairs,
Disarmament, 'Non-proliferation treaty: Draft
resolution on non-nuclear countries guarantees'**

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Summary:

The finalization of a completed draft nuclear nonproliferation treaty, which the ENDC transmitted to by the United Nations without endorsement on March 18, 1968, launched a French review of the NPT's implications for international law. The draft NPT was accompanied by a proposed United Nations Security Council Resolution (UNSC), whose soft guarantees against nuclear-weapon use or threats had been a compromise worked out between Washington and Moscow. An initial study by Foreign Ministry lawyers identified numerous "juridical reasons... to fight against a project that, in its letter if not its spirit, constitutes a revision of the [UN] Charter." The report elaborated on how the hierarchization of "forms of aggression" would "downgrade" non-nuclear (i.e. conventional) violence. Non-nuclear-weapon states treaty signatories would receive non-binding security guarantees. The "Anglo-Saxons and Soviets" would maintain "freedom of action as far as what measures they choose to adopt." Although the French government's foremost legal experts opted not to advise vetoing the UNSC resolution, they warned the NPT package could serve as a warrant for nuclear-armed permanent members of the UN Security Council to wage "preventive war" in the name of worldwide nonproliferation.

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NOTE
FOR THE DIRECTORATE OF POLITICAL AFFAIRS
Disarmament

Annex: Non-proliferation treaty
Draft resolution on non-nuclear
Countries guarantees.

After studying the draft resolution that the USA, Great-Britain and the USSR decided to submit to the Security Council to meet the requests for security guarantees made by some non-nuclear States called on to adhere to a future non-proliferation treaty, the Legal Department is inclined to confirm the observations written down in the note n° 1206 of November 14, 1967, and to supplement them on the following points.

I.

The paragraph 1 of the operative provisions creates in fact a new intervention case of the Council not intended by the

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Charter: the threat of aggression. Even though no reference was made to the specific provisions of the Charter, both the fact that the Council "should act" and the wording of paragraph 3 of the preamble, it follows that the authors envisage the adoption of this text within the framework of the provisions of chapter VII. But the Article 39, which restrictively establishes the theoretical rationales in which the Council may act, only provides three of them: the threat to the peace, the breach of the peace and an act of aggression.[*] This provision could thus be considered as an amendment to the Charter requiring the implementation of the procedures set out in Article 109.

II

It may be dangerous to equate the "threat of aggression" with "aggression" for purposes of instigate an appeal for action from nuclear powers.

We thus run a risk of justifying the launch of a preventive war.

We could think that that it is for this motive that the authors of the UN Charter eliminated this concept.

III

Even by imagining that the threat of aggression may, safely, be equated with the threat to peace, it is highly doubtful that the Council has the capability of working out in advance, *in abstracto*, whether such a threat exists.

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The same Article 39 starts like this:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression..."

This body is therefore tasked with deciding on a case-by-case basis on the existence of one of these three situations envisaged according to the factual data. It is therefore unclear how, without violating the Charter, it could bound itself in advance as to the conditions of its action in a hypothetical case.

IV

Paragraph 1 of the operative provisions establishes between the permanent members of the Council and the other members an illegitimate distinction because it is not provided for by the Charter.

In addition, it creates a new category of members: those permanent members in possession of nuclear weapons. In this regard, it should be noted that only nationalist China [Taiwan], permanent member who does not possess nuclear weapons, does not fall into this category.

V

Paragraph 2 of the operative provisions is, in all likelihood, useless or dangerous. Indeed, it is impossible that, "in accordance with ... the United Nations Charter", some

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States may, without waiting for the Council's decision, intervene in a conflict or support a preventive military action. If there is no decision from the Council, their action could only be performed within the framework of the article 51, which provides for collective self-defense. The content of this article is the subject of reaffirmation in paragraph 3.

VI

By reserving the use of an especially rapid procedure for the event of aggression accompanied by the use of nuclear weapons, the resolution carries out a sort of "downgrading" of non-nuclear conflicts. Moreover, such an approach, legally unfounded, does not seem reasonable when we consider that, since 1945, world peace has been threatened far less by the prospect of nuclear war than by the very conflicts using so-called conventional weapons.

VII

Paragraph 2 establishes contrary to the Charter discrimination among non-nuclear States based on whether they are signatories of the Non-Proliferation Treaty.

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VIII

Paragraph 3 of the operative provisions is open to criticism insofar as it would imply that perfectly clear stipulations of the Charter need to be confirmed and that the Security Council is authorized to make such a confirmation.

If a reminder or a reference to Article 51 were deemed necessary, it should be listed in the preamble and not in the operative section.

IX

Despite its debatable legal nature, the resolution would, in practice, bring no new security guarantee to the non-nuclear States.

Indeed, it is clear that this text, except for the incitation it contains to treat any potential conflict relating to nuclear powers with particular swiftness, still leaves the Security Council and more specifically its permanent members full freedom to act when it comes to which measures to adopt.

X

Such a resolution would bind, if it were adopted, the members of the Organization pursuant to the Articles 25^[+] and 48, paragraph 2.^[+]

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This would be the case for France in particular if it were to abstain from voting in the ballot since it admits that its abstention would not prevent the Security Council's decisions from being adopted pursuant to Article 27, paragraph 3 of the [UN] Charter.

[§]

[*] United Nations Charter, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

[+] "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." United Nations Charter, Chapter V: The Security Council, Article 25.

[+] "Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members." United Nations Charter, Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," Article 48, paragraph 2.

[§] "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting." United Nations Charter, Chapter V: The Security Council, Article 27, paragraph 3.