

Shining a Brighter Light on Dark Places: Improving the IAEA's Use of Intelligence through Cooperation with NATO

By Michael Hertzberg^{*}

Introduction

As North Korea and Iran have recently demonstrated, the Nonproliferation Treaty (NPT), the International Atomic Energy Agency (IAEA), and the Safeguards Regime have not been completely effective in preventing the diversion of nuclear technology for military purposes by non-nuclear powers. Although the enactment of the Additional Protocol has strengthened the Safeguards Regime, there are still opportunities for would-be proliferators to clandestinely develop nuclear technology for military application in violation of the NPT.¹ One possible improvement to the IAEA's monitoring and verification regime would be enhancing the IAEA's use of intelligence by formalizing cooperation with a multilateral security organization such as the North Atlantic Treaty Organization (NATO). Working through NATO, which has established procedures and infrastructure for sharing and disseminating classified information, would avoid many problems that occur in bilateral intelligence-sharing. While collaboration with NATO may raise concerns about the impartiality of the IAEA among its non-NATO members, effective internal checks on such a relationship may help alleviate these concerns. This is preferred to having the IAEA developing its own intelligence gathering capability, which would face significant legal, political, and practical barriers.

The Additional Protocol: Giving Teeth to the Safeguards Regime

After the discovery of Iraq's extensive nuclear weapons programs following the 1991 Gulf War, it was clear the existing Safeguards Regime was insufficient to prevent the diversion of nuclear technology for military purposes. To strengthen it, in 1997 the IAEA Board of Governors (BoG) developed the Additional Protocol² "to strengthen and expand existing IAEA safeguards for verifying that non-nuclear-weapon states-parties... only use nuclear materials and facilities for peaceful purposes."³ The Additional Protocol reshaped the Safeguards regime from a quantitative system focused on material accountancy and monitoring declared activities to a qualitative system aimed at gathering a comprehensive picture of a state's nuclear and nuclear-related activities.⁴ Despite these improvements, the Additional Protocol continues to rely on voluntary disclosure by IAEA members to assess compliance and is not mandatory for non-nuclear weapons states (NNWS).

Improvements of the Additional Protocol

The Additional Protocol offered several enhancements to the Safeguards regime. Primary among these was greatly expanded inspection authority and increased disclosure by NNWS members of a variety of activities related to the nuclear fuel cycle. Although the IAEA had broad authority under Article III of the NPT to develop effective safeguards⁵, the original Safeguards Agreement reflected the IAEA's desire to limit its own jurisdiction and maintain a cooperative relationship with the states it was monitoring.

First, the Additional Protocol expanded the types of activities members must declare to the IAEA. Article Two requires states to disclose not only facilities involved in the processing, production, and utilization of nuclear materials, but also facilities engaging in activities not normally involving nuclear materials but essential for the production of nuclear weapons, such as designing components for uranium enrichment or plutonium separation plants.⁶ This gives the IAEA a broader view of the critical components and purpose of a nation's nuclear infrastructure, improving the identification of key warning signs of possible diversion or nuclear weapons activity.

In addition to greater disclosure, Articles 4-6 also give inspectors "complimentary access" to an expanded list of facilities to "assure the absence of undeclared nuclear materials and activities."⁷ This allows inspectors to access suspected facilities that may be adjacent to declared facilities.⁸ Article Five gives inspectors qualified authority to conduct location-specific environmental sampling, which is complemented by Article Nine's provisions giving inspectors the ability to conduct wide-area environmental sampling.⁹ Article Nine is particularly important, because as defined in Article Eighteen, wide-area environmental sampling can include locations "specified by the Agency for the purpose of assisting the Agency to draw conclusions about the absence of undeclared *nuclear material* or nuclear activities over a wide area."¹⁰ This broad definition gives the IAEA the authority to enter sites suspected of containing undeclared nuclear activities, access it lacked under the original Safeguards Agreement.

The Additional Protocol also fixed other weaknesses Iraq exploited by improving access to communications systems and streamlining administrative procedures. To prevent cumbersome Visa requirements from being used to deny inspectors access, Article Twelve requires inspectors be given multiple entry/exit Visas that are valid for at least one year.¹¹ In response to Iraq's monitoring of and interference with Agency communications, Article Fourteen requires members

“permit and protect free communications by the Agency for official purposes between Agency inspectorsand Agency Headquarters and/or Regional Offices.”¹² These provisions seek to prevent a recurrence of the physical intimidation and harassment that IAEA inspectors in Iraq were subject.

Weakness of the Additional Protocol

While the Additional Protocol does alleviate some weaknesses of the Safeguards Regime, it still largely relies on voluntary compliance and disclosure, and does not provide the IAEA with additional means to identify suspected facilities, even if it has the authority to inspect those facilities. With limited resources and personnel, conducting effective inspections requires some direction about where to search for undeclared facilities. Currently, this is satisfied with a combination of disclosures by national intelligence services, the media, and internal opposition groups.¹³ Due to its focus on voluntary compliance and disclosure, the IAEA has been loath to take a more active role in discovering possible Safeguards violations that would endanger its relationship with the host country.

While Iran was not a signatory to the Additional Protocol until 2004¹⁴, IAEA inspectors were unaware of undeclared nuclear activities until they were exposed by Iranian opposition groups in 2002.¹⁵ Since then, Iran has denied IAEA inspectors access to other suspected sites of undeclared nuclear activity through a combination of active denial and deception and outright refusal. While inspectors have monitored declared sites, they have been unable to find and locate additional suspected facilities. The recent disclosure of a secret enrichment facility outside of Qom highlights the need for the IAEA to improve its ability to discover these facilities before they can be used to divert nuclear material for military applications.¹⁶

Improving on the Additional Protocol: Identification of Undeclared Sites

While the IAEA has made progress in utilizing intelligence shared by national intelligence services, it has yet to take full advantage of the capabilities a multilateral intelligence-sharing relationship can offer. Working through an organization with an established intelligence dissemination mechanism would allow the IAEA to take full advantage of the sophisticated and expansive collection capabilities possessed by the U.S., UK, and Germany

without having to enlarge the size of its bureaucracy or require its inspectors to engage in more intrusive activities that might jeopardize voluntary compliance by members.

Agreements with International Organizations

While the IAEA is authorized to enter into agreements with international organizations, it has only concluded a small number of these. The majority of these have been with UN agencies such as the World Health Organization (WHO), or regional organizations focused on ensuring cooperation for the peaceful exploitation of nuclear technology, such as the European Nuclear Energy Agency.¹⁷ Under Article XVI of the IAEA statute, the BoG may, with approval of the General Conference, “enter into an agreement or agreements establishing an appropriate relationship between the Agency and the United Nations *and any other organizations* the work of which is *related to that* of the Agency.”¹⁸ Article III states one of the IAEA’s primary functions is to “establish and administer safeguards designed to ensure that special fissionable and other materials, services, equipment, facilities, and information made available by the Agency ... are not used in such a way as to further any military purpose.”¹⁹ These provisions allow the IAEA to establish an official relationship with an international security organization such as NATO. The only qualifications are that the relationship be “appropriate”, and that the work of the other organization be “related to that of the Agency.”

Although the IAEA has not concluded an agreement with an international security organization, it has worked with agencies whose missions are not directly related to nuclear energy and technology, such as WHO and the International Civil Aviation Organization, where particular capabilities of that agency may assist the IAEA in carrying out its mission.²⁰ The IAEA has also signed cooperation agreements with regional organizations dedicated to nonproliferation, such as the Agency for the Prohibition of Nuclear Weapons in South America (OPANAL), indicating the IAEA may collaborate with regional security organizations focused on nonproliferation.²¹ The variety of agencies the IAEA has negotiated agreements with indicates it has interpreted the term “related to that of the agency” broadly, and an agreement that enhances the IAEA’s nonproliferation mission would fall within the term as applied.

Any agreement must also satisfy the “appropriate relationship” qualification of Article XVI. This term appears to focus on the nature of the relationship, not the subject matter. With other international organizations, the nature of any agreement has been aimed at improving

coordination and communication between the two organizations on issues of mutual interest.²² Similar to the “related to” qualification, this term has not restricted IAEA agreements. With a security organization, such as NATO, cooperation would focus on intelligence gathering. That means the relationship must comply with other provisions of the IAEA Statute, such as those requiring the agency to respect the sovereignty of its members and not disclose proprietary commercial information.²³ Despite these concerns, the IAEA Statute considers an “information-sharing” relationship between the agency and its members an important element of its overall mission. Article VIII states that each member should “make available such information as would, in the judgment of the member, be helpful to the Agency.”²⁴ This requirement is broader than the sharing of scientific information resulting from agency activities, which is covered in the next paragraph of Article VIII.²⁵ This provision specifically authorizes a one-way transmission of information between IAEA members and the agency. The agency is not required to provide its own information in exchange, only to make that information available to other members in an “accessible form.”²⁶

Under Article VIII then, IAEA members are authorized to share information with the agency to ensure IAEA assistance is “not used in such a way as to further any military purpose,” with the bounds of that information being at the “judgment” of the member state.²⁷ As the IAEA Statute considers information-sharing between members and IAEA staff to be important to the agency’s mission, information-sharing with an international organization would be an “appropriate relationship.” The IAEA Statute authorizes the IAEA to make agreements with a variety of international organizations as long as the relationship is “appropriate” and the subject-matter is “related to” the work of the agency. An intelligence-sharing arrangement that assists the IAEA in identifying locations of suspected unreported nuclear activity falls within this authority.

Advantages of Multilateral Intelligence Coordination

Unlike past IAEA collaboration with intelligence agencies, which has been largely bilateral, multilateral intelligence coordination offers several advantages, such as access to information from a wider variety of sources and greater distribution of analytic views. A multilateral relationship would also prevent the IAEA from becoming too dependent on one intelligence service and associated with one government’s policy. Existing monitoring and

control mechanisms can also alleviate the risk of defection or inadvertent disclosure from such an exchange.

Specialization: Much as it applies to international trade, the principle of comparative advantage can apply to multilateral intelligence-sharing, allowing for specialization among members. This in turn increases the utility of the intelligence-sharing relationship. Some countries, such as the U.S. and the UK, have extensive and costly technical intelligence collection systems, such as networks of satellites and airplanes. These systems allow them to achieve global surveillance with a minimum footprint on the ground.²⁸ Other countries, such as Jordan and Turkey, focus on building human intelligence (HUMINT) operations that maximize their surplus of skilled operatives and shortage of capital. Working multilaterally allows nations to maximize their relative advantages. Specialization has proved successful in combating terrorism, as the combination of communications intercepts from the National Security Agency (NSA) and HUMINT from partners such as Jordan and Malaysia has disrupted terrorist financing networks worldwide.²⁹ A similar approach could be used to maximize the comparative advantages of each state in collecting intelligence about illicit nuclear activities.

Wider Audience: Working through a multilateral intelligence exchange would expand the available audience for classified material, which has been successful in U.S. counterterrorism efforts, as the U.S. has established intelligence-sharing relationships with non-traditional allies such as Syria and Yemen.³⁰ This effort has also facilitated cooperation between countries that would normally not share information on sensitive issues, such as Indonesia and Israel, for example.³¹ Although there are risks of unauthorized disclosure in disseminating classified information to such diverse parties, it is also advantageous to give as many different national intelligence and law enforcement organizations access to actionable intelligence about common security threats.

Manipulation of the IAEA: Receiving intelligence information multilaterally would also help prevent the manipulation of the IAEA by national intelligence services. One complaint of the IAEA in Iraq was that inspectors were working for the CIA and British SIS.³² This tainted the work of IAEA inspectors and gave non-complying nations another reason to avoid

cooperation.³³ Funneling intelligence coordination through a multilateral security organization with its own distinct preferences and interests would provide an internal check on the ability of one national government to use the IAEA as a vehicle for promoting its own interests, as the CIA did in Iraq. This framework for exchanging information would also serve as an internal check on the veracity of any information provided by a single participant, as it would be evaluated by other governments before being presented to the IAEA.

Risk of Disclosure: One significant disadvantage of multilateral intelligence-sharing is the increased risk of inadvertent or purposeful disclosure by a member. In a bilateral relationship it is easier to hold the other party accountable if there is an unintended disclosure. It is much more costly for parties to monitor other members and prevent unauthorized disclosure in a multilateral intelligence exchange.³⁴ There is also no central mechanism for enforcing cooperation and punishing defectors. While this is a common problem among international institutions, it is especially true of international organizations without a history of handling confidential information or cooperating on vital security issues. One solution is to create a hierarchical relationship where one member is dominant in deciding what information will be shared and imposing effective monitoring mechanisms. In the case of an intelligence-sharing relationship with the IAEA, NATO as an institution can serve as that dominant partner.³⁵ Because NATO members have already bargained for significant security benefits beyond intelligence-sharing, the costs of defection or inadvertent disclosure are higher, such as losing valuable military cooperation and assistance. While the fear of disclosure is a problem for intelligence-sharing partners, working through an established multilateral organization with effective monitoring mechanism can help alleviate some of those concerns.

Advantages of NATO

Since its formation in 1949, NATO has been dedicated to developing multilateral solutions to common security threats. Despite political disagreements between members, it is a cornerstone of security cooperation in post-Cold War Europe. With a formalized system for sharing classified information, it is better positioned than any other multilateral organization to prevent unauthorized disclosure. Working with the IAEA would allow NATO to become more

involved in nonproliferation efforts, a role the alliance has sought to expand since the early 1990s.³⁶

Existing Cooperation and Shared Threats: NATO's original mission was to coordinate the defense of Western Europe against a Soviet military attack. Since the fall of the Soviet Union, it has expanded to focus on improving security cooperation throughout Europe, the Mediterranean region, and the Caucasus. This expansion has been based on a common view of emerging threats, such as conventional arms proliferation, Islamic terrorism, and poor civil-military relations.³⁷ The danger posed by nuclear proliferation, which is not confined to a single nation or region, is a similar threat. While NATO has considered nonproliferation a principal goal of the alliance, it has done so only in a limited capacity.³⁸ Under the 1999 Weapons of Mass Destruction Initiative, NATO developed a special unit to respond to a WMD attack in Europe.³⁹ It also established a center in the Czech Republic for coordinating WMD response training among members.⁴⁰ Providing intelligence support to the IAEA would be a good first step towards making fuller use of its extensive capabilities.

Sophisticated Intelligence Support: Unlike other multinational organizations, NATO has an established intelligence apparatus, the NATO Intelligence Division, which is skilled in both handling collection requests and analysis.⁴¹ It is particularly well-suited for handling nonproliferation intelligence, as its personnel, who are on rotation from national military and intelligence services, are especially knowledgeable about various nuclear weapons and delivery systems. During the Cold War, NATO monitored the Soviet Strategic Rocket Forces, which handled the USSR's deployed nuclear weapons. From this, NATO analysts gained a deep understanding of nuclear weapons facilities and launch systems, and became skilled in evaluating imagery of these targets gathered by airborne and satellite collection systems.⁴² In addition, because the Soviet Union developed for its own nuclear weapons systems a sophisticated denial and deception program that it later exported to Iran, North Korea and Syria, these analysts are familiar with the techniques employed by potential proliferators to deceive both the IAEA and intelligence agencies.⁴³

Established System for Intelligence Sharing: One major concern for nations sharing information with the IAEA is the disclosure of intelligence sources and methods.⁴⁴ Sources and

methods refer to the means by which confidential information is obtained, such as a human agent in the case of HUMINT, intercepted electronic information for signals intelligence (SIGINT), or satellite images for imagery intelligence (IMINT).⁴⁵ Raw intelligence reports provide analysts with sufficient identification information of sources so they may judge the credibility of the information when presenting to policymakers. These are the “crown jewels” of any intelligence service, and because of the damage unauthorized disclosure can do to ongoing and future clandestine collection operations, most nations require the distribution of shared intelligence be highly restricted.⁴⁶ This limits its utility to policymakers, because if they cannot review such information, they cannot use it, and has hindered the utility of past multilateral intelligence-sharing efforts.⁴⁷

Because planning for combined military operations against the Warsaw Pact required significant intelligence support, NATO has an established classification system for preventing disclosure of sources and methods.⁴⁸ There are separate classifications for information coming from SIGINT, IMINT and HUMINT.⁴⁹ These allow for information developed by national governments to be properly sanitized of information identifying sources before dissemination to NATO partners. This system is established and trusted by NATO members. Allowing them to work through it would increase confidence in the protection of sources and methods, and could lead to greater classified information-sharing by NATO members with the IAEA than would occur in an ad-hoc bilateral relationship or other multinational organization.

This is especially true in the non-proliferation context, where potential proliferators are developing better techniques for hiding activities from the prying eyes of satellite imagery systems. Iran’s recently discovered uranium enrichment facility at Qom, a series of deeply buried underground facilities, was specially constructed to avoid detection from overhead surveillance.⁵⁰ Iran learned its lessons from Iraq and North Korea’s proliferation activities, and avoided building near any existing nuclear facilities already subject to surveillance.⁵¹ To counter these techniques, intelligence agencies have developed sophisticated tools for identifying where undeclared facilities are being constructed. Intelligence agencies are concerned that disclosure of information shared with the IAEA will allow proliferators to improve their countermeasures. By working through an organization that already employs proper procedures for sanitizing sources and methods, NATO can lessen these concerns.

Key Sections of an IAEA-NATO Agreement

Any intelligence-sharing agreement with NATO would have two key elements: first, the exchange of information developed by NATO members on possible locations for undeclared nuclear activities in NNWS, and second, requests by IAEA staff for collection of additional information concerning possible sites of undeclared nuclear activity. The agreement would expressly prohibit NATO from requesting information from the IAEA about the status of NNWS facilities and nuclear programs, or about internal characteristics of such facilities. This prohibition and other internal limitations on such an agreement could help assuage the concerns of non-NATO IAEA members about the extent of NATO influence on the IAEA.

One-Way Exchange of information: Under the agreement, the IAEA and NATO would conduct regular exchanges of information, with the IAEA making requests to NATO's Intelligence Division for information about suspected facilities. To answer these requests, NATO would go to its members for raw intelligence information, sanitize that information to avoid compromise of sensitive sources and methods, and provide it to the IAEA. NATO could also provide the IAEA information if it believed a declared facility in a NNWS was being used for undeclared nuclear activity. If NATO developed information from sensitive imagery sources that it did not want to disclose, it could provide the relevant information in written form rather than as an image. Importantly, there would be no reciprocity, as NATO could not request information gathered from suspected facilities during the IAEA inspection and monitoring process. Considering that much of the information collected by the IAEA is commercially-related and does not implicate security issues, being denied that information would not be a major detriment for NATO. This would allow the IAEA access to a wider variety of intelligence sources while limiting NATO's access to sensitive information the IAEA might possess.

This one-way exchange is not unusual for the IAEA, and was recommended following the expulsion of inspectors from Iraq in 1998. In evaluating the success of intelligence-sharing between national intelligence services and inspectors on monitoring and verification issues, it was noted that “[t]he substantive relationship with intelligence providers should be one-way only, even if it is recognized that dialogue with providers may be necessary for clarifications and

refinement of assessments.”⁵² This recommendation was made not only because of concerns that IAEA inspectors might be passing confidential information to their own national intelligence services, but because those same national intelligence services, specifically the CIA, were using inspectors to collect information about Saddam Hussein, not the Iraqi nuclear program.⁵³ Limiting the exchange to a one-way transmission of information would help the IAEA protect confidential information from its inspections, and prevent manipulation of IAEA personnel by national intelligence services.

Requests for Collection: The IAEA could request that NATO task its members to gather information about specific facilities it had been notified about. Although NATO has limited ability to collect information itself, it can pass these requests along to its members, who would attempt to ascertain the nature of those facilities, and pass the information through NATO back to the IAEA. NATO members would be free to deny such a request however, if they felt the request was not justified in diverting collection resources to the suspected facility.

No Information about Internal Facilities: One major concern for IAEA members has been the confidentiality of proprietary technical information. During the negotiations of the NPT, nations with advanced commercial nuclear industries, such as France, were concerned about industrial espionage carried out under the guise of IAEA inspections.⁵⁴ To prevent this, the IAEA Statute requires IAEA personnel “not disclose any industrial secret or other confidential information coming to their knowledge by reason of their official duties for the Agency.”⁵⁵ The Additional Protocol goes further, requiring the IAEA maintain “a stringent regime to ensure effective protection against disclosure of commercial, technological and industrial secrets and other confidential information,” including protocols for the handling of confidential information, conditions of staff employment relating to the protection of such information, and procedures to deal with breaches of confidentiality.⁵⁶ An agreement with NATO would need to go further to avoid inadvertent or intentional disclosure of proprietary information.

This could be done by having the nature of the information exchanged focus on the location and external attributes of suspect facilities. If the IAEA made additional collection requests from NATO, it could do so only if it did not disclose any internal characteristics of suspected nuclear facilities. This would serve as a useful check on the unauthorized disclosure of

commercially sensitive technology. While such a restriction might limit the utility of the intelligence-sharing relationship, it would only do so for marginal parts of the agreement, not the core exchange of locational information. In addition, once undeclared facilities are located, the IAEA can use its enhanced inspection powers under the Additional Protocol to check for undeclared activity or diversion of nuclear material. NATO lacks this authority, and would have little use for internal information beyond conducting military action or further intelligence collection operations, neither of which the IAEA is authorized to assist in or would benefit from.

Confidentiality Annex: The Chemical Weapons Convention (CWC), another international nonproliferation agreement, has a Confidentiality Annex aimed at the protection of commercially sensitive information that could be instructive to an IAEA-NATO agreement.⁵⁷ The Annex provides that confidential information disseminated within the Organization for the Prohibition of Chemical Weapons (OPCW) shall be strictly on a “need-to-know basis” and that OPCW staff enter into individual secrecy agreements covering their period of employment and five years afterward.⁵⁸ In the case of a breach, the Director-General of the OPCW may waive immunity protecting staff from prosecution under national law.⁵⁹ These protections exist despite the fact that the OPCW has more limited inspection powers than available under the Additional Protocol.⁶⁰ A similar annex in an IAEA-NATO agreement would be another measure designed to protect proprietary commercial information from unauthorized disclosure.

Potential Barriers to an IAEA-NATO Intelligence-Sharing Relationship

While an intelligence-sharing agreement between the IAEA and NATO would have benefits for both organizations, there would be significant concerns from non-NATO IAEA members about the impact on the impartiality of the IAEA. These concerns could be alleviated by having effective internal checks on any intelligence-sharing relationship, as well as the noting the advantages that formalizing on-going cooperation can have. NATO members might also be concerned that intelligence resources could be used better to support other alliance missions, but there are important indirect benefits to be gained by NATO.

Cooperation from non-NATO IAEA Members: One significant concern is that non-NATO IAEA members may view any association of the agency with NATO as a threat to the IAEA’s

impartiality. In particular, they may see an agreement with NATO as a first step towards greater manipulation of the agency by Western nuclear powers, and could consider withdrawing from the IAEA. This is a serious concern in the face of the recent tension at the IAEA BoG over Iran's nuclear program between the U.S. and European states on the one hand, and developing countries such as Malaysia and South Africa on the other.

One possible solution is to make sure that any intelligence-sharing relationship with NATO is subject to strict internal checks. Some of the restrictions on the type of intelligence shared, such as no information on internal characteristics of facilities, or not allowing the IAEA to share information with NATO, might help alleviate these concerns. Other potential checks could include requiring any potential subjects of an exchange to be expressly approved by the Deputy Director General of the Safeguards Department or the IAEA Director General. This would allow non-NATO members to hold high-level agency personnel accountable for any violations of this agreement. One possible external check could be that any intelligence sharing be triggered by UNSC authorization. The problem with this requirement might be that it would prevent the IAEA from using NATO intelligence to identify potential proliferators before they become a threat to international peace and security.

Additionally, working with NATO might formalize on-going intelligence sharing and bring it within a stronger procedural framework. The IAEA Statute's explicit references to non-technical information-sharing indicate that its founders believed it would need to occasional assistance from members in identifying potential proliferation concerns.⁶¹ As the IAEA already exchanges intelligence bilaterally with national intelligence services, an official agreement with NATO that is subject to strict limitations might be a better alternative by making this cooperation more transparent and official than it currently is. If non-NATO IAEA members are concerned about the impartiality of the IAEA, those concerns might be better met within a regularized procedural framework rather than ad-hoc exchanges where there is less accountability for IAEA staff and the cooperating intelligence service.

While NATO was established primarily as a political-military alliance of Western states, its expansion into other global security issues since the end of the Cold War may make it a more palpable nonproliferation partner for non-NATO members of the IAEA. Several of these states have already cooperated with NATO through UN-authorized anti-piracy operations off the Horn of Africa, as well as some of NATO's recent efforts to combat the trafficking of illicit nuclear

materials.⁶² This involvement and existing cooperation may make NATO appear a less partisan partner than its European political-military roots would indicate.

Concerns of NATO Members: An agreement to provide intelligence support to the IAEA might be resisted by NATO members who believe it would drain intelligence resources away from other critical alliance missions, such as its involvement in Afghanistan or its support to counter-piracy operations in the Red Sea, with little direct benefit to the alliance. Despite these concerns, sharing intelligence with the IAEA would make NATO a more effective partner in global nonproliferation efforts, an important alliance goal. First, while NATO has limited tools to stop potential proliferators beyond coordinating military action, the IAEA is authorized by treaty to investigate and sanction illicit nuclear activity by its members. By providing information for the IAEA, NATO can assist the IAEA in furthering their shared goal of stopping nuclear weapons proliferation.⁶³ Second, such an agreement would improve the working relationship among NATO members on nonproliferation issues, possibly leading to closer policy coordination. Finally, it would allow NATO as an institution to become an important player in global nonproliferation efforts. Despite NATO giving more than it gets on the surface of the transaction, there would be valuable indirect benefits for NATO and its members.

Unilateral Intelligence Collection by the IAEA

Another option for the IAEA would be to develop its own collection and analysis group, integrated into the Department of Safeguards. Such an effort would face significant legal, political, and practical hurdles. First, it would require amending the IAEA statute. Second, the IAEA would have to allocate some of its scarce resources for such an organization. Finally, the IAEA may have to assume a more adversarial relationship with its members, which could endanger its ability to provide technological assistance to developing countries.

Legal Hurdles: Allowing IAEA staff to actively collect intelligence on members would require amending the IAEA statute to authorize IAEA staff to engage in such action. Article III(A)(5) would need to be amended to explicitly authorize IAEA staff to overtly and clandestinely gather information about possible diversion of nuclear material for military purposes, as well as general non-proliferation concerns.⁶⁴ Article VIII would also need to be amended. Paragraph A, which outlines the exchange of information among IAEA members and

the agency, would need to be altered to allow disclosure of information at the discretion of the IAEA, not member states.⁶⁵ Section C would likely need to be altered to restrict the availability of information gathered by IAEA staff under its intelligence function to prevent disclosure to nations targeted.⁶⁶ As amending the IAEA statute requires a two-thirds majority vote, this would require convincing many developing countries already concerned about intrusions into their sovereignty by international organizations that they should allow increased access to highly-secure facilities.⁶⁷ This would be a difficult challenge for any proponent of such a plan.

Practical Hurdles: Establishing a functioning intelligence collection and analysis unit would require a major commitment of IAEA funding. This would include recruiting and training a cadre of intelligence collectors as well as instructing the Safeguards and Inspection Department in basic intelligence collection techniques. This would mean fewer resources being devoted to inspections of existing facilities and passive monitoring of fissile material, also core IAEA Safeguards missions. While the IAEA does have a unit for Information Collection and Analysis in the Safeguards Department, this unit does not have an intelligence collection capability, only a small analysis group.⁶⁸ Without a collection unit, the IAEA would still be dependent on outside agencies for raw intelligence. There would also be a significant time-lag as the IAEA stood up its own intelligence unit, during which the reduction in inspections would likely lead to an overall decrease in the IAEA's ability to monitor and detect illicit nuclear activity. Such a unit would be duplicating the functions of national intelligence services currently assisting the IAEA.⁶⁹ Noting the difficulty of sophisticated and well-funded agencies such as the CIA and British SIS in uncovering deception by suspected proliferators, it is not clear a novice and under-funded organization would succeed where they failed.

Political Hurdles: Building its own internal intelligence department would require the IAEA to actively gather information about members without their consent, something it has scrupulously avoided. One of the core principles of the IAEA, along with preventing the proliferation of nuclear weapons, has been to promote the peaceful use of nuclear energy, particularly in the developing world, through cooperation with governments.⁷⁰ If the IAEA became more adversarial, actively seeking to discover noncompliance with NPT and Safeguards Agreement obligations, developing countries may look outside the IAEA for technological

assistance. This assistance could be provided without the protection of a complete Safeguards program, increasing the risks that technology and fissile material might be diverted for military purposes. Having the IAEA collect intelligence on illicit nuclear activity may limit its ability to provide technical assistance to developing countries and maintain their cooperation in ensuring compliance with the Safeguards Agreement.

Conclusion

The NPT and the larger global nonproliferation regime are a work in progress. Because the regime is at its core a consensual agreement among sovereign nations with their own security interests, it is not designed to completely deny proliferators the ability to develop nuclear weapons. Once non-compliance is detected and efforts to ameliorate the situation within the IAEA fail, the IAEA BoG must refer such an issue to United Nations Security Council (UNSC), the primary institution for confronting threats to collective peace and security.⁷¹ Any agreement that improves the ability of the IAEA to detect potential proliferators before they force a standoff with the UNSC should be considered. An information-sharing arrangement with NATO that is properly structured to avoid disclosing intelligence sources and methods as well as sensitive information about IAEA members would be a valuable tool for improving the IAEA's ability to find hidden facilities not declared by members. It would help the IAEA ensure compliance without forcing it to assume a more adversarial positions vis-à-vis its members, while allowing NATO to increase its involvement with important global security issues. If successful, it could be a model for future cooperation for other international organizations that seek to enhance their use of intelligence in dealing with complex global issues while balancing the concerns of diverse global memberships. These could include efforts to combat narcotics trafficking, human smuggling, and intellectual property theft and misappropriation.

* BA 2004, University of Chicago; MS 2005, Joint Military Intelligence College; JD Candidate 2011, The University of Chicago Law School. The author would like to thank Aziz Huq, Michael Thompson, and Paul Staniland for their contributions and insights.

¹ Treaty on the Non-Proliferation of Nuclear Weapons (1970), 21 UST 483 (hereafter NPT). Article II commits non-nuclear weapons states "not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices."

² IAEA Doc No INFC IRC 540 (Model Additional Protocol) (hereinafter INFC IRC 540)

³ Arms Control Association, Fact Sheets, The 1997 IAEA Additional Protocol at a Glance, Jan. 2005, online at <http://www.armscontrol.org/factsheets/IAEAProtocol.asp>.

⁴ Theodore Hirsch, *The Additional Protocol and Why It Matters*, Nonproliferation Review, Fall/Winter 1994.

⁵ NPT, Art III.

⁶ Id at Art 2; see Hirsch, *Additional Protocol*.

⁷ INFC IRC 540, Art 4

⁸ At the Tuwaita Nuclear Research Center, Iraq's main nuclear site, declared facilities were located next door to undeclared facilities. See Charles D. Ferguson, *Nuclear Safeguards for a New Nuclear Age*, Bull of the Atom. Scientists (web ed. Dec. 18, 2007), online at <<http://www.thebulletin.org/node/77>> (accessed February 16, 2010).

⁹ Id at Art 5, 9

¹⁰ Id at Art 18.

¹¹ Id at Article 12.

¹² Kay, *Denial and Deception Practices* at 93; INFC IRC 540, Art14.

¹³ Wisconsin Project on Arms Control, Iran Nuclear Update 2003, online at <http://www.wisconsinproject.org/countries/iran/nuke2003.htm> (accessed March 15, 2010).

¹⁴ Iran refused to abide by the Additional Protocol in August 2006 following the IAEA Board of Governors report, although it is still complying with the original Safeguards regime in INFC IRC 153.

¹⁵ Wisconsin Project on Arms Control, Iran Nuclear Update 2003, available online at <<http://www.wisconsinproject.org/countries/iran/nuke2003.htm>> (accessed March 15, 2010).

¹⁶ Associated Press, "Pay Dirt: Digging, Clues, Revealed Qom Nuclear Site", October 23, 2009

¹⁷ See INFCIRC/11 (Texts of Agencies Agreements with the United Nations); INFCIRC/20 (Agency's Relationship Agreements with Specialized UN Agencies); INFCIRC/25 (Texts of the Agency's Agreements with Intergovernmental Regional Organizations); INFCIRC/49 (Nordic Mutual Emergency Assistance Agreement in connection with Radiation Accidents, between the Agency and Denmark, Finland, Norway and Sweden); INFCIRC/377 (African Regional Co-operative Agreement for Research, Development and Training related to Nuclear Science and Technology); INFC/IRC 613 (Co-operative Agreement for Arab States in Asia for Research, Development and Training Related to Nuclear Science and Technology).

¹⁸ Statute of the International Atomic Energy Agency (1957), 8 UST 1093, Art XVI (hereinafter IAEA Statute) (emphasis added)

¹⁹ Id at Art III, ¶(A)5.

²⁰ IAEA Doc No INFC IRC 20, Parts III and V

²¹ IAEA Doc No INFC IRC 25, Add.4

²² See note 24.

²³ IAEA Statute, Art III, ¶D ("the activities of the Agency shall be carried out with due observance of the sovereign rights of States")

²⁴ Id at Art VIII, ¶A

²⁵ Id at Art VIII, ¶B

²⁶ Id at Art VIII, ¶C

²⁷ IAEA Statute, Art VIII, ¶A; Id at Art VIII, ¶C

²⁸ James I. Walsh, *The International Politics of Intelligence Sharing* 17 (Columbia 2009).

²⁹ Derek S. Reveron, *Old Friends, New Allies: Intelligence Sharing in the War on Terror*, 6, available online at <<http://africacommand.org/Documents/su04-reveron.pdf>> (Accessed February 16, 2010).

³⁰ Id at 4.

³¹ Id at 7; Simon Chesterman, *Shares Secret: Intelligence and Collective Security*, 33 (Lowy Institute Paper No 10).

³² Kay, *Denial and Deception Practices* at 98.

³³ Id; Chesterman, *Shared Secrets* at 31.

³⁴ Walsh, *International Politics of Intelligence Sharing* at 16.

³⁵ Id at 21.

³⁶ In June 1994, NATO Foreign Ministers issued the "Alliance Policy Framework on Proliferation of Weapons of Mass Destruction," a public document stating that the principal goal of the Alliance and its Member States is to prevent proliferation from occurring or, should it occur, to reverse it through diplomatic means.

³⁷ Chesterman, *Shared Secrets* at 23.

³⁸ "WMD Proliferation the Focus of Annual NATO Conference", 11 Dec 2009, available online at <http://www.nato.int/cps/en/natolive/news_60006.htm?selectedLocale=en> (accessed 17 January 2010).

³⁹ NATO: Weapons of Mass Destruction, available online at <http://www.nato.int/cps/en/natolive/topics_50325.htm?selectedLocale=en> (accessed 17 January 2010)

⁴⁰ Id.

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- ⁴¹ NATO Intelligence Division, online at <<http://www.nato.int/docu/handbook/2001/hb1103.htm>> (accessed March 16, 2010).
- ⁴² Kenneth W. Abbot, *Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 Cornell Intl L J 1, 33 (Winter 1993)
- ⁴³ Christopher A. Ford, *The Nonproliferation Bestiary: A Typology and Analysis of Nonproliferation Regimes*, 39 NYU J Int'l Law & Pol 937, 947 (Summer 2007)
- ⁴⁴ Reveron, *Old Friends, New Allies* at 5.
- ⁴⁵ Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 Cal L Rev 1655, 1661 (2006).
- ⁴⁶ Chesterman, *Shared Secrets* at 31, 33.
- ⁴⁷ Walsh, International Politics of Intelligence Sharing at 23
- ⁴⁸ Director of National Intelligence, Authorized Classifications and Control Markings Register, 12 May 2008, online at <http://www.dni.gov/electronic_reading_room/Authorized%20Classification%20and%20Control%20Markings%20Register%20V1.2.pdf> (accessed February 6, 2010)
- ⁴⁹ DNI Authorized Classifications and Control Markings Register.
- ⁵⁰ Associated Press, "Pay Dirt: Digging, Clues, Revealed Qom Nuclear Site", October 23, 2009
- ⁵¹ *Id.*
- ⁵² UN Doc S/1999/356, Annex I, ¶57. 30 March 1999, available at <<http://documents.un.org>>; *see also* Chesterman, *Shared Secrets* at 51.
- ⁵³ *Id.*
- ⁵⁴ Barry Kellerman et al, *Disarmament and Disclosure: How Arms Control Verification Can Proceed Without Threatening Confidential Business Information*, 36 Harvard J Intl L 71, 75 (Winter 1995).
- ⁵⁵ IAEA Statute, Art VII, ¶(F)
- ⁵⁶ INFC IRC 540, Art 15; Chesterman, *Shared Secrets* at 27.
- ⁵⁷ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Annex on the Protection of Confidential Information, Jan. 13, 1993, 32 I.L.M. 800 (hereinafter CWC) ; *see also* Kellerman et al, *Disarmament and Disclosure* at 96
- ⁵⁸ CWC, Annex on the Protection of Confidential Information, ¶2(h), 9..
- ⁵⁹ *Id.* at ¶20.
- ⁶⁰ Chesterman, *Shared Secrets* at 27-28
- ⁶¹ IAEA Statute, Art VIII.
- ⁶² Russia has participated in NATO efforts to combat illicit nuclear smuggling, while NATO has cooperated with Malaysia and Saudi Arabia as part of its counter-piracy operations in the Gulf of Aden. See NATO Press Release, "Strengthening cooperation against illicit trafficking" (Sep 10 2004), online at <http://www.nato.int/science/news/2004/n040910a.htm>; see NATO Press Release, "NATO-Russian cooperation at sea" (Aug 2, 2010), online at http://www.nato.int/cps/en/SID-C7785064-645D3C94/natolive/news_65101.htm.
- ⁶³ Chesterman, *Shared Secrets* at 16.
- ⁶⁴ IAEA Statute, Art III, ¶(A)(5)
- ⁶⁵ *Id.*, Art VIII, ¶(A)
- ⁶⁶ *Id.*, Art VIII, ¶(C)
- ⁶⁷ *Id.*, Art XVIII, ¶(C)
- ⁶⁸ In the Department of Safeguards, the Section for Information Collection and Analysis (ICA) serves as an in-house analysis branch for the Department, and also handles relationships with national intelligence agencies. While ICA is able to collect information, it is mostly derived from inspections, technical knowledge, and press reports, not clandestine sources. See generally, IAEA Website, online at <<http://www.iaea.org/About/Jobs/sg.html>> (accessed February 17, 2010)
- ⁶⁹ Chesterman, *Shared Secrets* at 50
- ⁷⁰ NPT Treaty, Article IV ("All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy."); IAEA Statute, Article III, Sec(A)(1) ("The Agency is authorized... To encourage and assist research on, and development and practical application of, atomic energy for peaceful uses throughout the world")
- ⁷¹ UN Charter, Art 39