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The Debate on Binary Chemical Weapons in Belgium

The Act of 11 April 1962 Revisited

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CENTRE FOR POLEMOLOGY
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Preface

In December 1986, we published *De Giftige Lente: Het politieke debat rond de chemische wapens in België* ("The Poisoned Spring: The Political Debate on Chemical Weapons in Belgium"). It analyzed a short but fierce parliamentary debate that almost toppled the Government. Following the Government's quiet decision to approve a U.S. NATO force goal to modernize the American chemical stockpile, members of the majority parties had introduced a motion of no-confidence. A crafty compromise formula was concocted to save the Executive, although it satisfied nobody and left many questions regarding Belgium's sovereignty in NATO open. In many respects, the situation resembled that of the political debates on the deployment of Cruise missiles little more than a year earlier.

This monograph starts out with an overall description of Belgium's attitudes towards chemical weapons in general and discusses briefly the issues that were or still are politically important. The next paragraphs sketch the overall political climate following NATO's dual track decision, identify the major actors in the debate and describe the changing relationship between the Executive and the Legislative on external security issues. The conclusion of the parliamentary debate on the binary NATO force goal had important, albeit theoretical, consequences from a constitutional viewpoint and for the preservation of the principle of sovereignty in the NATO decision-making procedure in times of crisis or war. First, we analyse the constitutional consequences of the presence of foreign troops, and in particular of their armament, on Belgian territory. The discussion is closely linked to the political and juridical debate on the cruise missile deployments in March 1985.

Our analysis draws in part on documents concerning a case against the Belgian State before the Council of State (*Raad van State*), which we have received for the purpose of scientific analysis. On 7 May 1985 lawyers representing concerned individuals and representatives of the Flemish peace movements submitted requests to annul the Belgian Government's decision to proceed with the deployment of cruise missiles at Florennes.[1] The State Council consists of a section legislation and a section administration. The section legislation gives reasoned advice concerning bills introduced by the Government or by Parliament. The section administration acts as a recision judge, and - provided certain conditions are met - may nullify decisions taken by administrative authorities, in-

[1] Members of the Walloon peace movements had already submitted similar requests in March 1985.

cluding the Government. The procedure is relatively straightforward as in principle both sides can state their case and formulate counter-arguments in writing. Consequently, it may take several years before the State Council passes judgment. Although from a juridical point of view the value of these documents may lie in totally different areas, their importance for the present study follows from unambiguous governmental statements on its prerogatives. In the final phases of the court proceedings, the polemic concerned more the question what constitutional body had the authority to decide on the deployment of certain weapon systems, reflecting more of the parliamentary debates on the INF and binary munitions. However, at certain stages during the lengthy process, the State Council's Auditor will submit one or two reasoned reports accepting or rejecting certain arguments to which the requester and the defendant may reply. In the absence of a final ruling, as is the case with the governmental INF-deployment decision, these reports may be considered indicative of current legal opinion on a particular issue.

Second, this study also deals with the question of sovereign decision-making within NATO. As the Belgian Government had formally declared that it would take a sovereign decision to authorize the deployment of U.S. chemical weapons in times of crisis or war, we will try to delineate as precisely as possible under what juridical circumstances such a decision could have been taken and how an actual invasion by Warsaw Treaty forces would have affected the procedure. The closing part discusses in some detail parliamentary options for exercising influence on Belgium's foreign policy and how the debate on the binary chemical weapons has affected those options.

While I take full responsibility for the present analysis I would like to thank many experts, colleagues and friends for their critical comments during the preparations of the study and on earlier drafts. They include Lt Gen Antoon Everaert, Permanent Military Representative at NATO; Joachim Badelt of the Berghof Stiftung in Berlin; Dr. Ir. Herbert De Bisschop of the Royal Military Academy, Brussels; Prof. Dr. Paul Devroede of the Law Faculty, V.U.B; Prof. Dr. Gustaaf Geeraerts of the Centre for Polemology, V.U.B.; Prof. Dr. Johan Niezing of the Centre for Polemology, V.U.B.; Dr. Julian P. Perry Robinson of the University of Sussex; Eric Remacle, Assistant at the *Université Libre de Bruxelles*; Nicholas Sims, Lecturer at the London School of Economics and Political Science; Dr. Patrick Stouthuysen of the Centre of Political Sciences, V.U.B.; and the research staff at the *Groupe de Recherche et d'Information sur la Paix*. Finally, I would also like to thank those people who have made their time available for discussions but who prefer to remain unnamed.

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Introduction

Ypres is closely associated with chemical weapons. The first large-scale chemical attack in modern warfare occurred there, and a mustard gas variant has been named after it. Today, some twenty tons of unexploded chemical munitions are recovered annually from the former battle zones. Belgian politicians like to evoke some emotions about these fateful dates on remembrance days. Yet, in politics chemical warfare issues are rarely raised, let alone debated. The absence of former Foreign Minister Tindemans at the international Paris Conference in January 1989 symbolized Belgium's plight: his vote in Parliament was vital for the further federalization of the country. This happened when the imbroglio over the Libyan chemical factory near Rabta was coming to a head. As Belgium represents U.S. interests in Tripoli, many Arab and African leaders, amongst them Libya and Egypt, had requested an audience. Neither the press nor Parliament asked questions about Belgium's mediation efforts in the affair.

In contrast, the Belgian Government almost fell over the issue of chemical weapons in June 1986. As a consequence of the Congressional requirement for a NATO force goal and contingency plans for deploying chemical munitions in Allied countries, the U.S. binary programme became the subject of political decision-making in Europe. The Belgian Government secretly approved the U.S. chemical force proposal on 25 April 1986. Three weeks later, Prime Minister Martens had to defend his Government on the issue. A move subsequently introduced by members of the ruling Flemish Christian-democrat and Liberal parties nearly caused the coalition's collapse. Only a crafty compromise formula saved the Government. However, until today there exists no single interpretation of the wording.

The parliamentary debate had meanwhile shifted to the question whether the Executive holds the constitutional right to decide on such matters without prior consultation of Parliament. It thus became a repetition of the debate on the installation of cruise missiles thirteen months earlier. In the night of 14-15 March 1985, the Government had transmitted its written authorization to the U.S. Ambassador in Brussels. The next day, before any parliamentary debate was or could be held, American planes landed at Florennes.

Both constitutional crises arose from a blanket law adopted on 11 April 1962 which allows the entry of armed forces of NATO members on Belgian territory. Defence policies were then much less of a political controversy than in the eighties. Oral promises by parliamentary majority leaders that the Chambers would always have the final say

in nuclear policies were then accepted in good faith. However, after NATO's dual-track decision in 1979, a narrow interpretation of that law reinforced the Government's constitutional powers to decide on external security matters without consulting Parliament. Since then, the Executive has twice survived a motion of no-confidence on the issue and Parliament has failed to adopt a bill reinterpreting the 1962 law. It is our view that Parliament's repeated sanctioning of governmental behaviour during the eighties has handed the Executive the sole responsibility for security matters. Although the issue of foreign troop deployments is arguably of less concern in the post-Cold War era, the present flux in international relations and shifting NATO objectives, demand a reframing of foreign policy goals. However, the direct consequence of those debates may be that the legislative branch has largely renounced its options to control security policy. In 1988, the Flemish and Francophone Socialists and the Flemish linguistic party *Volksunie* replaced the Liberals in the coalition, but nobody displayed an interest in reconsidering the 1962 law. Prime Minister Dehaene, when outlining the policies of the new coalition of Flemish and Francophone Christian-Democrats and Socialists before the Chamber on 9 March 1992, did not even mention external security. MPs did not raise the subject during the investiture debates.[1] The linguistic tensions, the huge public debt and the economic crisis absorb all political energy ...

[1] *Parlement, Regeringsverklaring*, 9 March 1992. The coalition agreement, as published in a newspaper, contains a broadly formulated chapter on foreign policy and security issues (*Document*, 3 March 1992).

Chapter 1
Belgium and chemical weapons.

On 22 April 1915 the German Imperial Forces opened 6,000 cylinders with liquid chlorine from their trenches between Bikschote and Langemark north of Ypres. Several sources quote a figure of more than 5,000 Allied soldiers killed and another 10,000 wounded, although no documentary evidence exists to support such claims. Two years later, in the late evening of 12 July 1917, Germany launched its first ever mustard gas attack against the town of Ypres, an event preserved in the agent's name, Yperite.

Trench warfare had a profound impact on Belgian soldiers. For the Flemish, who filled the lower ranks and were linguistically discriminated against by their Francophone superiors, the experience contributed to their eventual emancipation and resulted in strong anti-war sentiments. Some pacifist movements born in the trenches still exist today. This background, combined with some emotion about Flanders' fields being the cradle of modern chemical warfare, probably explains why chemical weapons have mostly been a political issue for the Flemish parties. This implies that in Belgium's linguistically divided multi-party system it is very difficult to get the matter of chemical warfare onto the political agenda. Consequently, press and public opinion too are little concerned.

Therefore, it comes as no surprise that but sparse information on Belgium's foreign policy about chemical warfare issues is available. Governments have always strictly complied with international treaties. Belgium has signed and ratified the *Hague Declaration (IV,2) concerning asphyxiating gases* (1899); the *Hague Convention (IV) respecting the laws and customs of war on land* (1907); the *Geneva Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare* (1925); the *Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction* (1972).

Belgium became a member of the Conference on Disarmament in January 1979. During the eighties, ministers and officials now and then highlighted the Belgian delegation's active involvement in the Geneva negotiations, usually without specifying what that involvement consisted of.[1] Public opinion received such statements with some de-

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[1] cfr. *Projet de loi contenant le budget du Ministère de la Défense nationale de l'année budgétaire*

gree of scepticism or general indifference. The department responsible for chemical disarmament and related issues, such as proliferation and export controls, within the Ministry for Foreign Affairs numbers but two or three staff members. It is part of an overall problem of understaffing. Belgian proposals, if any, receive hardly any public attention. Debates fix on some topical subjects, such as the candidacy to host the International Secretariat or the dangers to the population and the environment from the old munitions stocked near Houthulst. In recent years, Belgium has introduced only one document at the Geneva Conference on Disarmament, namely a report on the National Trial Inspection.[2] Yet, during certain intervals Belgium was as one technical expert put it "*discreet, but active*".[3] During the 1987 session, the Belgian Ambassador Philippe Nieuwenhuys coordinated Clusters I and II, respectively concerned with "issues pertaining to chemical weapons stocks" (including old and abandoned munitions) and with "issues pertaining to chemical weapons production facilities".[4] Much effort was put into the particular matter of chemical munitions left behind by former occupying forces. The dispute between China and Japan, however, blocked progress at the time. Usually, Belgium coordinates its efforts within the Western Group.

In July 1987, then Foreign Minister Tindemans signalled in a speech to the CD that Belgium *"would give favourable consideration to hosting the international organization if the Conference so requested"*.[5] He confirmed the candidacy in his address to the 42nd session of the General Assembly of the United Nations on 23 September 1987. The town of Ypres strongly endorsed the idea. The Mayor repeated the offer at the occasion of the 70th anniversary of the Armistice.[6] The policy statement of the new government formed in May 1988 included a similar proposal. However, no concretization of the initiative followed. A first hint of Belgium's hesitation came in January 1989 when Foreign Minister Tindemans did not reiterate the proposal in the text he had read out in his absence at the Paris Conference on chemical disarmament. Nevertheless, Tindemans' successor, Minister Eyskens assured MPs that Belgium remained an official contender and that it was conducting bilateral talks to gain support from other CD members.[7] Only in July 1991 came the first formal indication that Belgium might not maintain its candidacy. In view of proposals by The Hague and Vienna, the Government was studying *"the opportunity to determine its intentions"* on the issue.[8] The Minister acknowledged

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1987. Rapport fait au nom de la Commission de la Défense par M. De Clercq. Sénat, 5-IX (1985-1986) - NO2, 11 June 1987, p.11.

[2] Conference on Disarmament, CD/917 (CD/CW/WP.243), 17 April 1989.

[3] M. Schmitz & E. Remacle, Winter 1987.

[4] Conference on Disarmament, CD/CW/WP.167, 27 April 1987, p.1 and CD/782, 26 August 1987, p.6. To facilitate the negotiations process, the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament had adopted a system of four clusters each focusing on a limited number of significant issues.

[5] Document CD/PV.424 (Translated from French), 23 July 1987, p. 15.

[6] Pax Christi Vlaanderen, 1989, p.6.

[7] *Parlement, Vraag nr. 110 van de heer Kuijpers*, 30 October 1990.

[8] *Parlement, Vraag nr. 348 van de heer Breyne*, 16 July 1991.

in the Autumn of 1991 that *"based on the first impressions from Geneva about Ypres' candidacy, it appears the latter would receive little support."*[9] No official reason, apart from better locations in The Hague or Vienna, is given. However, Belgium's lack of diplomatic initiative during the last couple of years explains the lack of international backing. Also, it cannot shoulder the financial burden because of the huge public debt. In February 1992, in a last effort to preserve the symbolism of Ypres in the history of CW, Minister Eyskens, then member of a caretaker government, set aside 5 million Bfr. for hosting the signing ceremony. Here, it faces France's competition, who is depositary of the 1925 Geneva Protocol.[10] On 5 March 1992, Belgium expressed its support for The Hague's candidacy.[11]

During the Paris Conference in January 1989, television pictures of decaying World War I shells at a military dump near Houthulst jolted the local population into demanding their immediate destruction. Roughly 180 tons of supposedly chemical munitions have been found since the last sea dumping in October 1980. Thereafter Belgium abided by the Oslo Treaty of 1978. Each year, an estimated twenty tons are added to the total. However, more than three years after the Paris Conference and despite many promises by ministers, construction of a chemical demilitarization installation has not yet begun. Several departments of the national as well as the regional governments are responsible, complicating policy implementation. At no time, this discussion has been placed within the broader context of the projected chemical weapons convention. Belgium faces a similar, and potentially even more dangerous situation in the North Sea. In 1920, the Allied powers dumped some 35,000 tons of World War I ammunition off the coast near Zeebrugge and Knokke. Between one-tenth and one-third is thought to be chemical. Governmental agencies nevertheless believe that, given the unstable nature of the conventional munitions, their removal would pose a greater hazard. No disposal plans have been announced. Here too, it is not clear which department, whether national or regional, would be responsible for such an undertaking.[12] There is hardly any public or political discussion on this particular subject.

In general, NATO security requirements determine Belgian positions on chemical weapons, and indeed its overall external security policy.[13] It signed the Geneva Protocol in 1925 and deposited its ratification with the French Government on 4 December 1928.[14] Analogous to most signatories at the time, the Belgian Government considers

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[9] *Parlement, Vraag nr. 357 van de heer Loones*, Submitted on 9 October 1991, p. 15072.

[10] R. Driesmans, 24 February 1992. Germany formally endorsed France's offer. (Statement by Foreign Minister Genscher to the Conference on Disarmament, CD/PV.613, 20 February 1992, p. 9.)

[11] Statement by Ambassador Servais to the Conference on Disarmament, CD/PV.615, 5 March 1992, p. 20.

[12] For a summary of estimates, dangers and political issues involved, see: J.P. Zanders, May 1991.

[13] Such a close relationship has been explicitly stated in a reply to a written parliamentary question on Belgium's non-ratification of the 1980 Convention on Inhumane Weapons. The Foreign Minister declared that Belgium signed the Convention on 10 April 1981, *"whose implications had to be analyzed within the framework of the Atlantic Alliance; this analysis has not yet been formally completed"*. (*Parlement, Vraag nr. 70 van mevrouw Maes*, Submitted on 3 February 1989, p.3662.)

[14] *Moniteur Belge - Belgisch Staatsblad*, 17 March 1929.

itself bound by the Protocol only as regards states which have signed or ratified it, or may accede to it. It also ceases to bind Belgium as soon as any enemy state or its allies fail to respect those prohibitions. The reservations reduce Belgium's commitment to a no-first-use declaration. After NATO's adoption of the flexible-response doctrine, such a position corresponded with the policy of preserving all retaliatory options against a Soviet attack. So far, Belgium has refused to rescind its reservations, although NATO officially dropped the option of chemical retaliation in 1991.[15]

The idea of chemical retaliation has been strictly theoretical for a long time. Belgium does not hold any chemical weapons, nor are its armed forces trained in using chemical weapons.[16] Small quantities of chemical agents are used for research and equipment testing purposes in the laboratories of the Technical Department of the Army at Peutie near Brussels. Most attention goes to individual protection. Two companies develop and produce NBC respirators and protective clothing. Belgium does not have any chemical tasks in NATO, nor are foreign stocks stored on its territory. In fact, its main preoccupation with chemical weapons is recovering old World War I munitions.

During the eighties, a controversy persisted over whether the Belgian Armed Forces held chemical munitions. In 1980, the Stockholm International Peace Research Institute (SIPRI) stated that "*Belgium has a hundred or so artillery shells filled with sarin*".[17] The assertion was founded on information informally exchanged with a Belgian official. At that time, three steel containers with a diameter between 10 to 15 centimetres and a height of 30 centimetres each containing roughly one artillery shell filling of the nerve agent sarin left from open-air tests conducted during the fifties awaited destruction.[18] Perry Robinson's point, however, was that even *"a hundred or so artillery shells"* did not constitute a chemical warfare capability.[19] Nevertheless, the Brussels based *Groupe de Recherche et d'Information sur la Paix* (GRIP) took up the SIPRI data and added that those shells were being stored in Jambes. Etienne De Plaen also claimed that their total number was 155 and that they were of the binary type.[20] Daniel Riche[21] repeated the

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[15] NATO: The Alliance's Strategic Concept, November 1991, § 51.

[16] *Parlement: Mondelinge vraag van de heer Kelchtermans [...]*, 25 July 1986.

[17] J.P. Perry Robinson, 1980, p. 13.

[18] Although we have been able to trace the origins of the controversy, information about the numbers involved is conflicting. According to one version, a figure of over a hundred shells was initially given, but later reduced to three. A second account mentioned two or three containers with sarin in bulk storage waiting to be destroyed. We have recently been shown a drawing of the container described in the text.

[19] Discussion with the author at an international conference in London, November 1989.

[20] E. De Plaen, 25 April 1980, p. 38 and May 1980. His source was apparently a journalist working for the Francophone Belgian television R.T.B.F. We have been unable to retrace the origins of the information on that specific figure or type of weapon. Curiously, the figure and type of shell surfaced at a moment when the Pentagon was stepping up its lobbying for the 155mm binary sarin shell.
Both Perry Robinson and the GRIP accept that Belgium does not possess chemical weapons, with the exception of old munitions.

[21] D. Riche, 1982, p. 283.

assertions and the Belgian press quoted them several times.[22] The story also resurfaced in written and oral parliamentary questions despite firm denials by consecutive defence ministers.[23] On 23 July 1987 Belgium formally declared its nonpossession of chemical weapons and disavowed any intent to acquire them at the Geneva disarmament conference.[24] If anything, this anecdote proves that by the time of the parliamentary debates on binary weapons, the trust between the Executive and Legislative on security matters had all but disappeared.

[22] cfr. Le Vif, 22 March 1984 with a reply from the Information Service of the Belgian Armed Forces in Le Vif, 31 May 1984. Also: R. Germonprez, 12 June 1986.

[23] Cfr. P. Pataer, 11 June 1986; *Parlement: Mondelinge vraag van de heer Kelchtermans [...]*, 25 July 1986.

[24] Document CD/PV.424

Chapter 2
The overall political context of the binary debate.

The polemic between the Government and Parliament arose from the rapidly evolving nature of the public security debate from the late seventies onwards. During detente, public concern in most NATO countries had shifted from security matters to the deepening economic crisis.[1] Foreign and defence policy belonged to the realm of the executive and a select number of specialists. Especially the latter group believed public control over security matters to be *"an excess of democracy"* and in any case too complex for the public at large.[2] Their position was to be seriously challenged first after the policy debacle over the enhanced radiation weapons and later after NATO's dual track decision.[3] Within the context of bleak social and economic prospects, and the resulting existential anxiety, the deployment plans for new nuclear missiles galvanized broad sections of the public in protesting a single issue as substitute for a discussion of other subjects.[4] The economic crisis and the introduction of protectionist measures too eroded the transatlantic consensus, adding to the friction within NATO. During the early eighties, Western Europe wanted to cling to the remnants of detente to preserve the recent economic ties with the East European countries, while the U.S.A. pressured their NATO allies to join them in an economic isolation of the Warsaw Pact states.[5] New social movements also created a novel political agenda during the seventies, including issues such as Third World problems, feminism, human rights, ecology, and direct democracy. Their success followed the failure of more traditional organisations to adjust to societal developments.[6] They thus created the space in which peace movements would be able

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[1] I. Faurby; H.H. Holm; N. Petersen, 1983, p.34.

[2] I. Faurby; H.H. Holm; N. Petersen, 1983, p.35. See also: S. Lunn, 1983, pp. 216-217: *"Inevitably, public concern focused on the instruments rather than the causes of such a war. [...] To those untutored in the subtleties of deterrence theory and the need to balance imbalances and close off potential gaps, the addition of 572 warheads has seemed an unnecessary proliferation at a time when both superpowers appear to enjoy a considerable margin of overkill in nuclear potential."* For a thorough analysis of the defence community, see R. Kolkowicz, Summer 1987.

[3] P.E. Stouthuysen, 1991, p.176.

[4] I. Faurby, H.H. Holm, N. Petersen, 1983, p.37.

[5] R. Coolsaet, 1983, pp.127-130.

[6] P.E. Stouthuysen, 1991, p.178-179.

to appeal to a broad section of the political spectrum. The disarmament offer in the dual track decision of December 1979 handed them an important long-term rallying point. In Europe, elections forced many Socialist and Social-democrat parties from governments or coalitions. They subsequently established or reinforced their links with peace movements, ensuring the issue remained on the political agenda. The electoral potential of security matters contributed to the challenge to the executive's prerogatives in making foreign and defence policies.

These developments worried governmental and NATO officials. Some prominent analysts interpreted public opposition as 'nuclear weapons fatigue' or as 'delegitimisation of the atom'.[7] One official report, using the term *'Delegitimation of Authority'*, expounded that governmental leadership had weakened and come into disrepute.[8] Within the context of NATO's dual track decision, the notion 'legitimacy of the government' requires further differentiation.[9] *Internal* legitimacy refers to the domestic support for authority. This was badly eroded during the eighties, because governments went ahead with deploying new nuclear systems in the face of strong popular opposition. If, on the other hand, governments had yielded to domestic pressure and modified their commitments, they would have suffered a serious loss of *external* legitimacy. Preventing damage to international standing and credibility within NATO was a major, if not the major preoccupation of some European Member States, including Belgium. External delegitimation would nevertheless be one of the inadvertent outcomes of the dual track decision.

Indeed, the need for new American intermediate-range missiles was rooted in European fears for nuclear uncoupling from Washington. The Korean War taught the Americans that a major war was still possible if the adversary was convinced that nuclear weapons would not be used. Later, General Maxwell Taylor cited the requirement of a threat to vital U.S. interests to explain the non-use of these weapons in Korea.[10] The Sputnik launch in 1957 had the Americans worrying for the first time about massive Soviet retaliation against their country. The idea of unacceptable losses raised doubts about the deterrence value of the U.S. strategic nuclear forces against the Soviet Union. Moreover, the United States questioned their role as an extension of security guarantees to the European NATO allies. Several one-sided steps reinforced European beliefs that Washington was folding the ultimate nuclear umbrella. Following doctrinal changes, the U.S.A. adopted flexible response[11] and stationed the first tactical nuclear missiles on the European continent. The Americans took up bilateral arms limitation negotiations with

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[7] G. Parmentier, 1989, p.246.

[8] I. Faurby; H.H. Holm; N. Petersen, 1983, p.40.

[9] I. Faurby; H.H. Holm; N. Petersen, 1983, pp.40-41.

[10] R. Coolsaet, 1983, p.9.

[11] The European NATO members were first informed of the changed strategy at the Spring 1962 meeting of foreign and defence ministers in Athens. The shock is reflected in points 5-7 of the final communique. Not only did the U.S.A. have to reaffirm its nuclear commitment to NATO, it also had to agree that it would concert *"with its allies on basic plans and arrangements in regard to these weapons"*. Special procedures to exchange information on the role of nuclear weapons in NATO defence would also be set up. (NATO Final Communiques 1949-1974, pp.143-144.)

the U.S.S.R. (ABM-treaty, SALT I and II) indicating their acceptance of strategic parity. Finally, U.S. governmental and non-governmental think-tanks developed limited nuclear warfare scenarios for Europe.[12] Introducing ground-launched cruise missiles and Pershing II ballistic missiles in Europe, then still in their developmental stage but capable of reaching the Soviet heartland, would safeguard U.S. nuclear commitments, so leading European politicians believed. Thus, requests for tangible proof of these renewed pledges followed their initial demands for stronger political commitments from President Carter. The rapidly developing threat of the Soviet triple-warhead SS-20 missiles did not until later become a major source of justification.[13] The overall deterioration of detente and the Soviet invasion of Afghanistan in 1979 in particular enabled authorities to present the INF decision as a reaction to an unabated Soviet threat, rather than as a means to solidify the trans-Atlantic bond.

The European origin of demands for more visible security ties between the two continents also meant that the external legitimacy of governments was at stake. Demonstrating solidarity and the ability of collective decision-making became the prime concern as governments began realizing the full extent of their commitments under the dual-track decision. In the smaller countries it slowly dawned on politicians and the public that they were going to obtain a capacity to wreak havoc in the Soviet heartland. This new, not explicitly stated element was at odds with what many believed to be their limited strategic role. The precise interrelationship between the two tracks also remained obscure.[14] The disarmament component, meant to allay public concern, was to energise national debates, leading to demands for greater transparency in security policies. Eventually, broad sections of the public interpreted the NATO decision in the sense that de-

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[12] From the mid seventies onwards and especially during President Reagan's tenure, an increasingly influential school of thought argued that deterrence depends to a considerable degree on a clearly demonstrated ability to conduct war should deterrence fail. (I. Faurby; H.H. Holm; N. Petersen, 1983, p.8; R. Coolsaet, 1983, pp.26-28) This led to vast qualitative and quantitative improvement programmes of non-nuclear war-fighting capabilities, including those for chemical warfare. The Europeans, conscious of the destructive effects of any kind of warfare on their territory, preferred to think in terms of pure deterrence rather than war-fighting scenarios, although, paradoxically, they advocated a low nuclear threshold to support that deterrence view. (CEPESS, 1980, pp.22-23. See also: R. Coolsaet, 1983, pp.2-3 & 18, who stressed the incompatibility between both wishes.)

[13] Cfr. Chancellor Schmidt's famous Alastair Buchan Memorial Lecture at the *International Institute for Strategic Studies* on 28 October 1977 did not mention the SS-20 threat, but explicitly referred to the SALT II negotiations and the deep cuts in the strategic forces President Carter was willing to accept. His main fear was that "*strategic arms limitations confined to the United States and the Soviet Union will inevitably impair the security of the West European members of the alliance vis-à-vis Soviet military superiority in Europe if we do not succeed in removing the disparities of military power in Europe parallel to the SALT negotiations. So long as this is not the case we must maintain the balance of the full range of deterrence strategy. The alliance must, therefore, be ready to make available the means to support its present strategy.*" (H. Schmidt, January/February 1978, p.4.)

Other indications are that NATO never attempted to equal the number of delivery vehicles or warheads, nor tried to match the qualitative superiority of the Soviet system (multiple warheads, range, speed).

[14] I. Faurby; H.H. Holm; N. Petersen, 1983, p.15.

ployments were contingent on the lack of results at the negotiations.[15] As both superpowers were consciously fuelling the public debate by widely announcing their negotiation offers, new uncertainties crept into NATO's decision-making process. Some governments started paying a mounting price in terms of internal legitimacy as they had limited impact on what politically had become the major issue. Five European countries had committed themselves to deploying missiles on their territory. NATO, however, had instructed the United States, sole owner of the missiles, to negotiate bilaterally with the Soviet Union. As a result, the United States were free to pursue their own national security interests. Disarmament was then *"philosophically incompatible"* with President Reagan's aim to achieve military parity in all domains with the U.S.S.R.[16] The plans included the preparation for protracted but limited nuclear-war scenarios, which went far beyond NATO's official flexible-response doctrine. President Reagan publicly endorsed them in October 1981, sending shock waves across the Atlantic.[17] Every time the European partners suggested changes to the original plans, Washington reminded them they had requested the missiles in the first place. They were thus left at pains to stress Alliance solidarity for fear of further weakening the trans-Atlantic nuclear coupling and to ensure American success at the negotiations. Criticism of the unilateral U.S. doctrinal transformations was usually couched in pleas for a return to the original Harmel-principle.

In Belgium, defence and security matters were never in the forefront of political debate. Adherence to NATO and the first deployments of nuclear weapons on Belgian territory met with little opposition. During the seventies, linguistic tensions further complicated social, economic, and other domestic problems, a fact reflected in the eight governments formed during the seventies. Yet, in 1979 the Belgian peace movement was immediately able to mobilize massively, forcing the Government to voice reservations to NATO's dual track decision. The final authorization for missile deployment was made contingent on progress at negotiations. During the next two years, opposition to the missiles increased markedly. Success depended largely on the broad alliance of new social movements with traditional mass organisations, such as labour unions, opposition political parties and religious groups. However, from the end of 1982 onwards, a radicalisation of positions occurred: even if negotiations between both superpowers failed, no missiles were to be installed on Belgian territory. The peace movement also opted for unilateral disarmament to achieve bilateral nuclear force reductions. The shift weakened the support of the christian labour union, which had strong institutional ties to the governing Christian-democrats. In 1983, the peace movement suffered some major disappointments following parliamentary debates. Several Christian-democrat politicians

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[15] In the legal case before the Belgian Council of State to nullify the governmental deployment authorization of 14 March 1985, the requester argued that the Belgian Government had not taken any new decision at the end of 1983 when the Soviets broke off negotiations, but authorised installation of the first flight of 16 cruise missiles three days after both superpowers had resumed their talks in Geneva. (*Raad van State: Verzoekschrift tot nietigverklaring*, 7 May 1985, p.2.)

[16] D.M. Alpern; J. Walcott; D.C. Martin, 5 October 1981, p.22.

[17] D.M. Alpern, et al., 4 October 1981 and 12 October 1981; R. Ranger, 1982, p.288.

who had marched in the anti-missile demonstration that same year chose to support the Government. For the rest of the decade, the antagonism between loyalty towards the Government and anti-armament sentiments was to haunt many Christian-democrats. Their voting behaviour could have had a major impact on Belgium's defence policy. However, Christian-democrat ministers placed them under much pressure. For the peace movement, they would remain a source of hope and - as time was to show - of frustration. In 1984, the peace movement's strategy focused on influencing the existing political balance of power and the policy-making process.[18] The uncompromising stance plus newly developed ideas on unilateral disarmament called for legal arguments and instruments to block deployment and to remove nuclear weapons already on Belgian soil.

As soon as the public debate over new INF gathered speed, members of both majority and opposition parties, as well as sections of the peace movement called for a profound parliamentary discussion on NATO's nuclear policy. During those early debates, the battle lines between the Executive and the Legislative were drawn and would contribute to the nature of much of the security debates in the forthcoming years. Early in June 1979, Socialist MP Louis Tobback declared at a press conference that he could not accept new nuclear weapons on Belgian territory without parliamentary consent. On 4 July, during an interpellation on the opportunity of a parliamentary debate *prior* to a governmental decision, Foreign Minister Henri Simonet (Francophone Socialist) replied that *"the foregoing debate is not constitutionally required. In our country, the government does not need the advice of Parliament for such a decision. This, however, does not exclude that such a debate can occur at any time."*[19] In an interview with the Flemish daily *De Nieuwe Gazet* published on 9 October, Minister Simonet said that the final decision will only be taken after consulting Parliament.[20] The statement probably reflected more of disagreement within the Government, and of dissent within the socialist coalition partners in particular, than a legal viewpoint.[21] Parliamentary debates were held in November and early in December. In their replies, the Ministers of Defence and Foreign Affairs limited themselves to threat evaluations and technical explanations. Probably, they could do little more. The Government apparently did not determine its position before 10 December because of the pressing economic and community questions.[22] In the afternoon of 12 December, while NATO Foreign and Defence Ministers were meeting in joint session to finalise the INF policy, Prime Minister Martens ap-

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[18] P.E. Stouthuysen, 1991, pp. 186-187.

[19] M. Heirman (Ed.), 1985, p.16.

[20] M. Heirman (Ed.), 1985, p.19.

[21] On 8 December, four days before NATO would approve the dual track decision, the *Parti Socialiste* voted to support a parliamentary move that negotiations with the Soviet Union must come first and that the final decision on missile deployment be postponed for six months, thus disavowing its own Foreign Minister Simonet.

[22] B. Tuyttens, 4 November 1985, p.3; H. De Ridder, 1986, p.152.
J. Desmarets, then Defence Minister, later acknowledged in an interview with H. De Ridder that he and Foreign Minister Simonet had to defend personal viewpoints as they had no mandate from the Government (1986, p.159).

peared before the Chamber to communicate the Belgian Government's stance.[23] Parliament had been consulted prior to, but not on the decision. Moreover, the lack of thorough preparation of the Belgian position most likely led to the Government's overlooking the automatism in NATO's modernisation decision. Even if there had been sufficient progress at the negotiations, NATO would have had to take a new decision for the deployments *not* to occur.[24] As the NATO member states had *"carefully planned and thoroughly considered"*[25] the double-track decision, individual governments should have been aware of the subsequent procedures. The denial of any automatism during later parliamentary debates and the Government's sudden discovery of the extent of its commitments in January 1985 fuelled the debates on the question of sovereignty within NATO. The same fear for automatic deployment of U.S. chemical munitions on Belgian territory led to the short but fierce parliamentary debates on the binary force goal in 1986.

[23] *Parlement, Kamer van Volksvertegenwoordigers - Handelingen, N.18*, 12 December 1979, pp. 473-480.

[24] L.E. Davis, 1983, p.68.

[25] J.J. Holst, 1983, p.59.

Chapter 3
Legal aspects about foreign troops on Belgian territory.

3.1 The Constitution and the Act of 11 April 1962.

Articles 68 and 121 of the Constitution lay down the basic principles of Belgium's external security policy, including the defence of its territory. They also provide some guidance about which legislative bodies are competent for the different aspects of that policy.[1]

> Art. 68: The King commands the Army and the Navy, declares war, concludes peace treaties, treaties of alliance and trade treaties. He notifies the Chambers thereof, as soon as the interest and the security of the State permit it, adding the appropriate statements.
> The trade treaties and the treaties which may burden the State or bind Belgians personally, have effect only after having obtained assent by the Chambers.
> No renunciation, no exchange, no addition of territory can occur but by virtue of a law. Under no circumstances can the secret articles of a treaty nullify the public articles.
>
> Art. 121: Foreign troops may not be admitted to the service of the State, occupy or move through the territory but by virtue of a law.

Article 68 in particular allows for a broad margin of interpretation. Before the Second World War, it was generally accepted on historical grounds that the King's command of the Armed Forces could in part be exercised without ministerial responsibility.[2] However, in 1940, King Leopold III capitulated and refused to follow the Belgian Government into exile. He even repudiated its legitimacy, while attempting to approach Hitler.

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[1] English translation of the Belgian Constitution in: R. Senelle, 1990. Translation of other legal texts and parliamentary documents by the present author.

[2] A. Mast & J. Dujardin, 1987, p.332.

The current view therefore holds that all royal acts must be covered by ministerial responsibility. As such, Article 64 of the Constitution now applies to all aspects of national security. It explicitly states that no act of the King can have effect, unless it is countersigned by a minister, therefore making the latter responsible for this reason alone. The Government thus develops and executes foreign and external security policies.[3]

Both Parliament and the Government have legislative powers. According to Article 68 of the Constitution, only the King may sign international accords. In five cases, and only in these five, such accords come into force only after parliamentary assent.[4] These are: (i) trade treaties; (ii) treaties that may burden the Belgian State, such as accepting the financial consequences of hosting an international organisation; (iii) treaties which may bind Belgians personally, for example, extradition treaties; (iv) treaties which involve the renunciation, exchange, or addition of territory. Article 3 of the Constitution states explicitly that changes to the borders must be made by virtue of a law; (v) treaties which alter provisions contained in already existing laws or in the Constitution.[5] For example, according to Article 121 of the Constitution the deployment of NATO troops on Belgian territory requires specific legislation. The Chambers ratify such treaties by voting an implementation bill introduced by the Government. Often it consists of no more than one article, stating that a treaty will have full effect. The Chambers thus cannot amend treaty provisions.

The finite number of cases which require parliamentary consent implies that the Government may, but need not submit other types of treaties for approval.[6] This may be the case for peace treaties and treaties of alliance in so far these do not meet one of the five conditions. For instance, the 1925 Geneva Protocol *for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare* was ratified on 4 December 1928 and published with the reservations in the *Belgisch Staatsblad - Moniteur Belge* on 17 March 1929 without an implementation law.

The Constitution does not indicate where Parliament, if at all, comes into the Government's execution of foreign and external security policies. It is a traditional belief that matters of defence and foreign policy fundamentally belong to the Executive branch. Article 68 simply states that after signing a treaty the King must inform both Chambers at the proper time. The Government, covering the King, decides the moment when the *"interest and the security of the state"* allow communication of the treaty. It does so under its proper political responsibility.[7] A 1985 parliamentary committee report on amendments to the European Treaties thus interpreted Article 68 in the sense that the King possesses in principle the widest possible competences regarding international agree-

[3] Following the recent reforms of the state, the regional governments have obtained some powers with respect to signing international treaties. Here, the King's signature is no longer required. However, security matters have remained the prerogative of the national government. Therefore, all terms used refer to the national government.

[4] A. Mast & J. Dujardin, 1987, p. 340, fn 66.

[5] A. Mast & J. Dujardin, 1987, pp. 340-341.

[6] A. Mast & J. Dujardin, 1987, p. 340, fn 66.

[7] A. Mast & J. Dujardin, 1987, p. 340.

ments, because the Executive concludes treaties and Parliament may only express its approval in certain cases.[8] Hence, apart from rejecting the implementation bill, Parliament's only way of sanctioning the Government is by introducing a motion of no-confidence after an interpellation.[9] If accepted, this topples the entire Government.[10] Some jurists therefore argue that Parliament retains full constitutional powers and can oversee the Government's external security policy.[11]

Article 121 of the Constitution imposes the only restrictions on the governmental powers invested by Article 68. No foreign troops can be hired, unless a law to that effect is adopted. The same applies to the occupation of Belgian territory by foreign troops or to their movement over Belgian soil. In 1831, the Constitutioners formulated their justification for the provision so broadly, that it must be assumed that it also bears on the weapons carried by such foreign troops.[12] The deployment of troops of NATO allies and their weapons in Belgium thus required parliamentary consent. Less clear, however, is how specific that consent should be. Article 3 of the North Atlantic Treaty stipulates that *"in order more effectively to achieve the objectives of this Treaty, the Parties, separately **and** jointly, by means of continuous and effective self-help **and** mutual aid, will maintain and develop their individual **and** collective capacity to resist armed attack* [emphasis added]. Therefore, ratification might imply that Parliament authorized the entry of troops of NATO members on Belgian territory in accordance with Article 121 of the Constitution. At the end of the fifties, however, the Christian-democrat/Liberal Government must have felt that this traditional interpretation might be challenged in Parliament,[13] more so as Article 121 of the Constitution explicitly refers to the necessity of a law.[14] Meanwhile, Liberals and Socialists had switched as coalition partners and Socialist Foreign Minister Spaak, architect of Belgium's postwar security alliances, opposed any new

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[8] *Adviescomité voor Europese aangelegenheden over de Europese Akte tot wijziging van de Europese Verdragen, Parlementaire Stukken, Kamer, 1985-1986, nr. 500-1 (Eur)/1, p. 6*, as quoted in *Raad van State, Verslag*, 18 September 1986, p. 57.

[9] Voting the Government's budget proposals is another - and perhaps the most important - means of parliamentary control. This, however, sanctions proposed policies. During the first half of the eighties, the opposition submitted amendments deleting funds for the infrastructure works at the proposed missile site of Florennes. In each case, these were rejected by the majority.

[10] This follows from the custom that all decisions are taken collegially in the Council of Ministers. The body is a political college. Its main purpose is to achieve agreements of principle between the coalition partners. According to the Constitution, linguistic parity must exist between the ministers (with the possible exception of the Prime Minister). It would be rare to have less than four political parties in a government. A coalition is usually made up of (at least) two political families and their counterparts in the other linguistic group. Even if a party achieves an overall majority in its linguistic region, one may expect the ideological counterpart of a coalition partner in the other linguistic group to be invited to join the Government.

[11] M. Bossuyt, February 1987, pp.17-18.

[12] *Raad van State, Verslag*, 18 September 1986, p. 58.

[13] At the time, there was great commotion that German units might be based in Belgium as part of NATO troop-deployment plans. (cfr. *Parlement, Senaat - Handelingen*, 1 March 1962, p. 746.)

[14] Report by Senator Moreau de Melen, *Parlement, Senaat - Handelingen*, 14 February 1962, pp. 90-91.

legislation on foreign troop deployments. Parliament nevertheless voted the bill on 11 April 1962. It comprised but a single article:[15]

> The troops of States allied with Belgium through the North Atlantic Treaty may move through or be deployed on the national territory within the limits and conditions determined for each case in implementation agreements to be concluded with the governments concerned.

Contrary to Article 121 of the Constitution, there exists no clear indication whether this act should apply to the weapons carried by those troops. Only in the final stages of the parliamentary deliberations did one Senator raise the issue of a possible imminent deployment of American atomic missiles in Belgium. The main purpose of the Act was eliminating the requirement for parliamentary approval for each agreement with a NATO Member State. The legal disputes on this article's interpretation originate in the requirement to conclude further implementation agreements. The Constitution does not clarify whether the Government must consult Parliament about this. The Act meets the prerequisite of parliamentary assent contained in Article 68 of the Constitution. It is therefore constitutionally possible for the Belgian government to implement certain new NATO military requirements without further parliamentary approbation. In reality, neither bilateral accords nor contingency plans are known to parliamentarians or the public. The Act of 11 April 1962 is therefore a blanket law as regards the presence of NATO troops on Belgian soil.

3.2 Interpreting the Constitution and the Act of 11 April 1962.

The lack of clarity allows of broad political interpretation. Fears for handing a blank cheque for deploying of nuclear weapons to the Government were already apparent during the parliamentary debates on the Act of 11 April 1962. Socialist Senator Rolin introduced a surprise amendment expressly excluding the installation of atomic munitions from the parliamentary authorization. He was particularly concerned that all further accords with NATO members would be implementation agreements, which the Government is not required to publish in the *Belgisch Staatsblad - Moniteur Belge*. He sought assurances that the Government would communicate the contents of such agreements in another way, for example, in the appropriate parliamentary committees.[16] To allay fears

[15] *Belgisch Staatsblad - Moniteur Belge*, 20 April 1962.
On 9 January 1953 Parliament had adopted another law ratifying the treaty concluded between NATO Member States in London on 19 June 1952 on the juridical status of troops deployed on each other's territory. (*Belgisch Staatsblad - Moniteur Belge*, 15 March 1953.) That law is of lesser importance for the present discussion, as it was followed by the Act of 11 April 1962.

[16] *Parlement, Senaat - Handelingen*, 1 March 1962, pp. 745-746.

of secret nuclear weapons deployments on Belgian soil, Foreign Minister Spaak declared:[17]

> "If [the fact that implementation agreements do not require consent from the legislative branch] frightens you, I give you the most formal guarantees that the implementation orders will all be shown to you, and, of course, even more so, should the Government in some sort of aberration plan to install launch sites on our territory which would not be at the disposal of Belgian troops, but of foreign troops.
> [...]
> If one day, the Government has the strange idea of having launch sites constructed on Belgian territory promised to foreign troops, we would not do this without parliamentary consent."

He reiterated the promise several times during his speech. Later in the debate, he nevertheless had to concede that his statement only bound the present Government, but added that no future Government could secretly deploy nuclear missiles. Therefore, Parliament could always exercise its control over the Executive Branch.[18] After receiving further assurances from the leader of the Christian-democrat parliamentary group, Senator Rolin withdrew his amendment.[19] The important word in Minister Spaak's assurance, however, was *"secretly"*. Close reading of his declaration suggests that he did not intend to yield part of the Executive's competence to decide on an American request to deploy nuclear missiles. Rather, Parliament would receive or obtain sufficient relevant information on the basis of which it could vote down the Government.

After NATO's dual-track decision in 1979, the consecutive governments[20] were perceived to have increasingly interpreted the Constitution in their favour. The trend seemed to have accelerated during the three centre-right alliances of Christian-democrats and Liberals between December 1981 and May 1988. Yet, the Executive only clung to its

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[17] *Parlement, Senaat - Handelingen*, 1 March 1962, p. 749.

[18] *Parlement, Senaat - Handelingen*, 1 March 1962, p. 750.

[19] The declarations made regarding Senator Rolin's amendment are most likely responsible for the fact that the term *"troepen"* (troops) utilized in Article 121 of the Constitution can be interpreted as covering weapons systems, whereas the same term used without any further qualification in a law implementing that constitutional provision should be open to discussion. The requesters in the case against the missile deployment decision before the State Council posited without any specific reference to a legal text that there exists no technical-juridical definition of the term. (*Raad van State, Memorie van wederantwoord*, 3 February 1986, pp. 44-45.) Ministers have for obvious reasons always maintained that *"troops"* covers both personnel and their equipment. The State Council's Auditor based his argumentation only implicitly on a similar connotation, despite his earlier delineation of the semantic field of the term as used in Article 121 of the Constitution. (*Raad van State, Verslag*, 18 September 1986, pp. 57-69.)

[20] From April 1979 until October 1991, there have been nine Governments. One was Christian-democrats/Socialists/Francophone Nationalists; three were Christian-democrats/Socialists; one was Christian-democrats/Socialists/Liberals; three were Christian-democrats/Liberals; and the last one in the row was Christian-democrats; Socialists and Flemish Nationalists. After its collapse, the coalition continued without the Flemish Nationalists for a brief spell. In March 1992, Christian-democrats and Socialists formed the new coalition.

traditional prerogatives in preparing and executing external security policies. Gone, however, was the national consensus of defence matters. The Socialists, who had had to approve the dual-track decision to preserve the coalition despite bad internal divisions, then sat on the opposition benches. Free of governmental responsibilities, the Flemish Socialists in particular took the lead in demanding more openness. They pressed for parliamentary approval before any deployment authorization. Many Flemish Christian-democrat MPs shared that view, so the Government could not be certain of a majority on the issue. In addition, the parliamentary calls enjoyed broad support from the peace movement and large sections of the public, thus increasing polarisation. As a result, the vocal parliamentary and extra-parliamentary opposition created a sense of greater governmental secrecy. On the other hand, the Government had to devise strategies to overcome that opposition which, in turn, reinforced the impression. Governmental behaviour in the final stages of the decision-making process clearly reflected these developments. The planes carrying the Tomahawk cruise missiles had taken off in the United States in the afternoon of 14 March 1985, before the Government informed the Chambers of the authorization. Prime Minister Martens was to explain later that in a telephone conversation informing the U.S. Ambassador of the decision he had insisted on deployment within twenty-four hours. *"Indeed,"* he said, *"I wanted to avoid that after our decision a hundred thousand people would be waiting in Florennes to prevent the aeroplanes landing. I had another argument. Had we waited with the flying over until the conclusion of the parliamentary debate, then without any doubt, many Christian-democrats would have said: we can still exert pressure so that the decision will not be carried out, so we vote against. This is my deepest conviction."*[21] The dispute between the Legislative and Executive Branches over constitutional powers therefore predictably forms the basic concern in every parliamentary debate on Belgium's external security policy.

The legal arguments against the dual-track decision involved a complex mixture of elements from national and international law. They embraced aspects of the Constitution and national penal law as well as interpretations of Belgium's commitments to NATO and responsibilities under international treaties. The reasoning can be summarized in three main points:

- The United States will start an armed conflict. This may *"even be a war of aggression or of pre-emption"*,[22] which is contrary to international law. The view rested on Washington's disregard of the condemnation by the International Court for its activities in Nicaragua[23] and the way it intercepted the plane carrying the terrorists who had attacked the ship *Achille Lauro* without informing the Italian authorities. The incident almost led to an armed encounter with Italian armed forces.[24]

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[21] H. De Ridder, 1986, p. 231. A similar, but unattributed, statement is quoted in: B. Tuyttens, 4 November 1985, pp. 30-31.

[22] *Raad van State: Memorie van wederantwoord*, 3 February 1986, p.38.

[23] *Raad van State: Memorie van wederantwoord*, 3 February 1986, p.16.

[24] *Raad van State: Memorie van wederantwoord*, 3 February 1986, p.34.

- The United States systematically refuse to declare a nuclear no-first-use policy, despite urging from the United Nations General Assembly.[25] Since they are capable of starting war, the deployment of INF gives them a *first strike capability* against the Soviet Union from Europe. AirLand Battle is the means for the United States to start and win the war against the Warsaw Pact. Nuclear weapons play a primordial role in the doctrine.[26] Therefore, the United States violate the letter and the spirit of many international treaties and provisions, including the nuclear Non-Proliferation Treaty.
- The missiles are deployed according to the single-key principle. As the Americans are the owner of both the nuclear warhead and the delivery vehicle, the Belgian Government has no means of blocking their use. It has, therefore, unconstitutionally forfeited its sovereign right to declare war and is an accomplice to crime, (mass) murder and genocide according to both internal and international law.[27]

The key elements thus were that the United States potentially had the political will to initiate a major war, that they had the military doctrine to achieve the political aims, and that Belgium, being a NATO partner, had aided the Americans in preparing that policy, but in the meantime forfeited all control over the decision-making process in Washington. Many of those arguments directly related to the nature of nuclear weapons.[28] For the present purposes, we will limit us to the legal consequences of NATO decisions and their constitutional ramifications.

(i) Consequences from the point of view of international law.

An important facet of the debate was whether Belgium had transferred part of its sovereignty to NATO when signing the North Atlantic Treaty, and whether, as a consequence, NATO decisions had immediate effects in the internal legal order. Even within the Government some confusion existed. The 1985 Department of Defence White Paper stated unequivocally:[29]

> "The entry into the Alliance actually meant the loss of some sovereign rights for all member states. A similar phenomenon occurred with the entry into the European Community or into any other international organisation."

However, the simultaneously published *Handbook of National Defence* characterized NATO as an intergovernmental rather than a supranational organisation,[30]

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[25] *Raad van State: Memorie van wederantwoord*, 3 February 1986, p.38.

[26] *Raad van State: Laatste memorie*, 5 December 1986, pp.3-6.

[27] *Raad van State: Memorie van wederantwoord*, 3 February 1986, pp.82-106.

[28] e.g., the debate whether deployment would make Belgium an accessory to genocide or whether the intended or unintended targeting of civilians constituted a violation of the Geneva Conventions.

[29] *Ministerie van Landsverdediging, Witboek van Landsverdediging*, 1985, p. 19.

[30] *Ministerie van Landsverdediging, Handboek van Landsverdediging*, 1985, p. 7.

"within which the member states retain their full sovereignty and independence."

The contradiction stemmed largely from the fact that the Handbook had actually been written two years earlier than the White Paper.[31] Moreover, Defence Minister Freddy Vreven (Flemish Liberal), reportedly committed Belgium further than mandated by the Government.[32] Such an idea of an external installation machinery beyond governmental control might have offered some political justification for ministers and MPs had elections followed the deployment decision. The excuses prove that by March 1985 members of the Government had become very concerned about (individual) political responsibility.

NATO is an intergovernmental and not a supranational organisation. Therefore, a NATO decision only binds a member state if that member state agrees with it. Conversely, if a member state disagrees it cannot be considered bound by that decision. Some constitutionalists and jurists developed legal arguments against the dual-track decision departing from the central thesis that all powers reside with the nation-state. Commitments under international law are thus only juridically binding for those aspects which the State has expressly delegated.[33] Article 25 of the Constitution lays down that all powers stem from the nation and that the Constitution determines the manner in which they are exercised. The establishment of the European Coal and Steel Community, and later of the European Economic Community, necessitated the insertion of an Article 25bis stating that *"The exercise of given powers may be conferred by a pact or law on institutions coming under international civil law"*. Therefore, only *"the exercise of given powers"* is conferred and not the powers which remain with the nation. Article 11 of the North Atlantic Treaty recognizes this central feature of sovereignty, as ratification and the provisions are carried out in accordance with the respective constitutional processes. NATO does not have community characteristics and as representatives of the participating States decide on an equal footing they possess the right of veto, expressing the sovereignty of the Member States. Moreover, NATO formulates recommendations to the Member States, which according to international law, cannot be enforced. A State cannot be held juridically responsible if it fails to meet the goals in those recommendations. One constitutionalist therefore concluded that NATO as an international organisation only possesses limited competences with respect to the Member States. No juridical commitments can follow from decisions taken by one of the NATO bodies unless Belgium concludes a specific agreement with one or more NATO Member States on a certain issue.[34]

Such a view posits the absolute primacy of the nation-state in international relations. That position is difficult to hold, especially in view of the far-reaching political, military and economic interdependence in international relations. In 1923, the Permanent Court

[31] The present author contributed to the Handbook during his military service between October 1982 and June 1983. The public debate on the deployments then still had to reach its apogee.

[32] Foreign Minister Tindemans (Flemish Christian-democrat) is reported to have made such a claim when the full extent of the Belgian commitments became clear. (H. de Ridder, 1986, p. 203.)

[33] The thesis is developed in A. Beirlaen, 1984 and 1985.

[34] A. Beirlaen, 1985, p. 11.

of International Justice ruled that the acceptance of certain restrictions when entering into international engagements is an exertion of that sovereignty:[35]

> La Cour se refuse à voir dans la conclusion d'un traité quelconque, par lequel un Etat s'engage à faire ou à ne pas faire quelque chose, un abandon de sa souveraineté. Sans doute, toute convention engendrant une obligation de ce genre, apporte une restriction à l'exercice des droits souverains de l'Etat, en ce sens qu'elle imprime à cet exercice une direction déterminée. Mais la faculté de contracter des engagements internationaux est précisément un attribut de la souveraineté de l'Etat."

Consent, whether explicit or implicit, is indeed a basic requirement before a state can be internationally obligated. In international law, there are nevertheless certain principles, such as acting in good faith or the estoppel, that cannot be simply ignored because of a sovereign right to alter an earlier decision or declaration. A state can bind itself by a unilateral action or declaration, which may be nothing more than a broad policy statement on television or an address to an international organisation. For example, in 1974, the International Court of Justice ruled that France was bound to cease atmospheric nuclear explosions in the Pacific after several French authorities had expressed such intent. Non-observance would have constituted a violation of a juridical obligation.[36] A long-standing position of a state may also be interpreted as an international commitment, and is respected as such. When explaining Denmark's, Greece's and Norway's refusal to support the United States binary chemical force goal, the U.S. Permanent Representative to NATO wrote that these countries had signed the 1925 Geneva Protocol without any reservations and had thus renounced the right to retaliate in kind. He concluded that *"their actions are consistent with long-standing national positions."*[37] The Auditor of the Council of State handling the case to revoke the Belgian missile deployment decision held the opinion that:[38]

> "National sovereignty is [...] by no means an absolute concept. In the area of external security policy in particular, there exists space for internationalisation, from which evolves a considerable relativisation of national sovereignty. Such internationalisation was for that matter a conscious choice when Belgium joined NATO."

Most international organisations work with recommendations to the member states that in themselves are not binding. Nevertheless, if they have been accepted unanimously or by a large majority of the parties, they may acquire a certain juridical value.

From this brief analysis, it would follow that decisions by high-level NATO bodies, such as the North Atlantic Council or the Defence Planning Committee are not juridically binding of themselves. The Council of State concurred when it determined that the

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[35] As reproduced in: M. Bossuyt, February 1987, p. 6.

[36] P.H. Kooijmans, 1990, p. 28.

[37] D.M. Abshire, Letter to Barry Goldwater, Chairman, Committee on Armed Services, 13 June 1986.

[38] *Raad van State, Verslag*, 18 September 1986, pp. 53-54.

request to annul the deployment decision of 14 March 1985 was admissible five years after the dual-track decision on the grounds that the NATO agreement constituted a recommendation without any administrative or legal consequences in Belgium.[39] The high-level NATO decisions nevertheless express a certain political commitment to joint efforts which, in turn, create certain expectations amongst other states parties. The essence of NATO's workings rests on *"partial pooling of sovereignty for mutual protection"* among nation states that otherwise *"retain their full freedom of action and with respect to their own policy"*.[40] The report of the Three Wise Men on political co-operation, which the North Atlantic Council approved on 13 December 1956, stressed that political consultation *"will result in collective decisions on matters of common interest affecting the Alliance"*. Full sovereignty of the Member States was to be preserved, although the consultations should lead to the development of national policies *"on the basis of a full awareness of the attitudes and the interests of all the members of NATO"*.[41] Amongst the recommendations, which today still constitute the basis for NATO's consultation procedures, were:[42]

> - in developing their national policies, members should take into consideration the interests and views of other governments, particularly those most directly concerned, as expressed in NATO consultation, even where no community of views or consensus has been reached in the Council;
> - where a consensus has been reached, it should be reflected in the formation of national policies. When for national reasons, the consensus is not followed, the government concerned should offer an explanation to the Council. It is even more important that where an agreed and formal recommendation has emerged from the Council's discussions, governments should give it full weight in any national actions or policies related to the subject of that recommendation.

The implementation of these recommendations led to the North Atlantic Council's annual appraisals at the ministerial Spring meetings and the creation of lower bodies for preparing the lines for political progress.

There is a strong underlying suggestion that NATO Member States should consider the North Atlantic Council's decisions or recommendations as binding. National sovereignty is preserved through the option of a motivated reservation. However, if a state does not express a reservation it explicitly or implicitly accepts the outcome of the con-

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[39] *Raad van State, Verslag*, 18 September 1986, pp. 29-32. It should be noted that the defenders disagreed with this view on the grounds that if the condition of success at the negotiations contained in the reservation made in 1979 was not met, the Government was no longer in a position to decide *not* to deploy any nuclear missiles precisely because of its agreeing to the dual-track decision and because of the phrasing of the reservation. (*Raad van State, Laatste Memorie van antwoord*, 23 February 1987, p. 25.) The defendants, however, did not clarify whether this condition flowed from a political commitment in 1979 or from later juridically binding agreements, such as the SHAPE calendar or the contracts for preparing the storage site at Florennes.

[40] NATO, Report of the Committee of Three [...], 1956, §§ 12 and 43.

[41] NATO, Report of the Committee of Three [...], 1956, §§ 42-43.

[42] NATO, Report of the Committee of Three [...], 1956, § 50, d and e.

sultative procedure. Consensus thus means the absence of any formal opposition. Although each Member State possesses the formal right to veto any proposition, any country exercising that right may expect intense pressure from its Alliance partners to retract its objection. A veto would therefore be rare indeed. The option of reservations allows the other Member States to proceed with the issue despite some stated opposition. States subscribing to the decision will enter bilateral or multilateral agreements amongst themselves, such as implementation accords or contingency plans, thus creating the formal juridical commitments. From a juridical point of view, formulating a reservation cannot lead to a breaking of an obligation under international law if a state later decides not to execute such a decision.[43] On the other hand, on a political level, such action would undermine a state's external legitimacy, in particular if the motivation for the refusal were to differ from the originally stated reasons.

In December 1979, Belgium approved NATO's dual-track decision, adding, however, that the Government's final authorization for the implementation was to be postponed for six months, after which it would conduct its own analysis of the international situation. Subsequently, the consecutive governments postponed the decision several times on the same grounds. One of the more controversial commitments followed from Belgium's acceptance of the SHAPE deployment timetable in 1981,[44] irrespective of the question whether it entailed any automaticity. In the statement as read out by Prime Minister Martens to the Chamber on 12 December 1979, the Government insisted that the execution of NATO's dual-track decision should be reversible at all times if the negotiations with the Soviet Union were to yield positive results and rejected any automaticity. The last paragraph, however, stated: *"Taking all these elements into account, [the Government respects] the collegial character of the Alliance decision."*[45] This reference to consensus probably explains why the Belgian Government believed for years that it had made a reservation to the dual-track decision, whereas the United States considered the declaration as a mere qualification.[46] Formally, Belgium could always have "resigned" from the timetable.[47] In the meantime, however, the authorities had engaged in bilateral accords and contracts with the United States in preparation of the INF deployments. Early in 1985, the Government announced that it would proceed with the installation. One expert in international law therefore concluded that juridically Belgium only gradually bound itself to accept the cruise missiles on its territory.[48] These agreements also had consequences from the point of view of international law and could not be cancelled unilaterally, as the leader of the opposition Flemish Socialist party had

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[43] M. Bossuyt, February 1987, p. 2.

[44] H. de Ridder, 1986, pp. 202-203.

[45] *Parlement, Kamer van Volksvertegenwoordigers, Handelingen*, 12 December 1979, pp. 473-474.

[46] H. De Ridder, 1986, pp. 195-197 on the visit by Prime Minister Martens and Foreign Minister Tindemans to the White House on 14 January 1985 where they planned to offer the concession of withdrawing their reservation in return for political negotiations on the commencing date for the deployments.

[47] Personal communication by a high-level Belgian official at NATO, November 1992.

[48] M. Bossuyt, February 1987, p. 5.

vowed to do.[49] Therefore, if a later government had wished to remove those missiles, it had to obtain the Allies' approval. Its only alternative option was leaving NATO. In the legal case against the Belgian State, the Auditor of the Council of State accepted in his report that the installation of the cruise missiles entailed a certain renunciation of sovereignty, but concluded that it was not unconstitutional.[50]

(ii) Constitutional implications.

The contention of unacceptable transfer of sovereignty was also based on the argument that implementing the dual-track decision restricted the King's options when exercising his constitutional prerogatives regarding foreign policy. The most important line of reasoning rested on two premises: (1) Belgium as a member of NATO constitutionally retained the right to remain neutral in case of war; and (2) when authorizing the deployment of cruise missiles on Belgian territory, the Government transferred the King's prerogative of declaring war to the President of the United States.

The American professor Fried developed the argument that Belgium, or any other NATO member, retained the constitutional right to remain neutral in case of war. He based his argument on Articles 5 and 11 of the North Atlantic Treaty. He read Article 5 as obligating *"the members in case of an armed attack on any of them, to take 'such action as it deems necessary, including the use of armed force ..."*. Hence, he concluded that *"each NATO State is free to take no action at all, or no military action in such case"*. Article 11 underscored the sovereign rights of each of the Member States, as the provisions are carried out in accordance with the respective constitutional processes. Fried interpreted this phrase in the sense that each State had the *"self-evident sovereign right [...] to decide whether to take any action - any non-military action - and, above all, whether to make the fatal decision to go to war [...]"*.[51] By denying the automaticity of going to war, he allowed for the possibility of a NATO member remaining neutral in a conflict between the two superpowers.[52] Beirlaen accepted the argument,[53] and the requesters in their case against the Belgian State before the Council of State advanced it as an important reason for nullifying the Government's deployment authorization.[54]

The proposition is difficult to accept, particularly in view of NATO's foundation on the definition of *collective self-defence* contained in Article 51 of the Charter of the United Nations. Moreover, although Article 5 of the North Atlantic Treaty permits each Member State to determine the nature of the help to an Ally under attack, the stipulation that *"an armed attack against one or more of them in Europe or North America shall*

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[49] Declaration by Karel Van Miert on 14 January 1985, as quoted in: M. Heirman (Ed.), 1985, p. 115.

[50] *Raad van State, Auditoraat: Verslag*, 18 September 1986, pp. 43-55.

[51] J.H.E. Fried, 1984, p. 56. [Emphases in original.]

[52] J.H.E. Fried, 1984, p. 59.

[53] A. Beirlaen, 1985, p. 13.

[54] *Raad van State, Memorie van Wederantwoord*, 3 February 1986, p. 37.

be considered an attack against them all" precludes any option of staying neutral. Even if the elements contained in Article 5 could be read separately, later declarations and documents provided clear indication of the interpretation governments have given to the provisions. For instance, in 1956, the Committee of Three put it unambiguously:[55]

> "The foundation of NATO [...] is the political obligation that its members have taken for collective defence: to consider that an attack on one is an attack on all **which will be met by the collective action of all.**"

For some European NATO members neutrality is an impossible alternative as membership of the Western European Union involves an unconditional obligation to commit the armed forces in case of aggression against another member state.

From a legal point of view, the claim that Belgium's acceptance of cruise missiles *de facto* transferred the King's prerogative of declaring war to the President of the United States is questionable. If Washington had ever decided to launch those missiles from Belgian territory without Belgian permission, it would have constituted a breach of all agreements, but could never be considered as a Belgian declaration of war, which is a juridical act and not a *de facto* situation arising from the use of violence.[56] After the Auditor in the case against the Belgian State had concluded that partial renunciation of sovereignty was not unconstitutional, the requesters, in their reply, argued that he should take the circumstances in which the nuclear missiles would be launched into consideration. Officially, NATO still adhered to flexible response, while the United States had unilaterally adopted AirLand Battle.[57] The core of the reasoning relied heavily on an article by Van Den Wijngaert published two years earlier.[58] The new motivation signalled a shift from legal to political arguments.

Van Den Wijngaert typified AirLand Battle as an aggressive doctrine not compatible with NATO's defensive aims. Flexible response envisaged nuclear escalation if NATO troops could not halt an attack by Warsaw Pact forces by conventional means. NATO thus reserved the right of nuclear *first use*. Airland Battle, by contrast, departed from the belief that a nuclear war could be won as a result of high-precision delivery vehicles, and could therefore be employed from the onset. Van Den Wijngaert argued further that the doctrine also assumed that the United States could initiate hostilities, thereby using nuclear weapons. This *first-strike* capability thus signified that *"they would start the war using atomic weapons, as atomic weapons are no longer considered a means of reprisal against a Russian attack."*[59] If Belgium thus accepted the single-key system for the new missiles, it allowed the United States to launch a nuclear attack from its territory. She also referred to the worldwide applicability of the AirLand Battle doctrine. As the United States sometimes had different strategic interests than their NATO allies and in-

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[55] NATO, Report of the Committee of Three [...], 1956, § 5. [Emphasis added.]

[56] M. Bossuyt, February 1987, p. 8.

[57] *Raad van State: Laatste Memorie*, 5 December 1986, pp. 3-6.

[58] C. Van Den Wijngaert, 17 December 1983, columns 1061-1062.

[59] C. Van Den Wijngaert, 17 December 1983, column 1061.

tervened in military conflicts outside the NATO area, the nuclear missiles on Belgian territory might be used for purposes not related to the defence of the NATO area. Therefore, she concluded, Parliament and not the Government had to make the crucial choices about Belgium's external security policy. However, international law and the domestic penal law limited the options.

When Van Den Wijngaert first raised the issue in December 1983, both the public and high-ranking members of the Armed Forces were rather confused by the nominal similarities of *AirLand Battle*, as developed in Field Manual FM 100-5 of August 1982, *AirLand Battle 2000*, a further development of more traditional U.S. Army doctrine, and *Follow-on-Forces Attack* (FOFA), an adaptation of Airland Battle 2000 for the European theatre by SACEUR, General Rogers. The debate was further compounded by the imminent deployment of the first INF in Europe. Indeed, analyses of the novel U.S. doctrines stressed the importance of emerging technologies, innovative conventional weapons which would eventually replace nuclear weapons with similar tasks, and new communication technology. While these studies did not deny the role of nuclear weapons, they hardly, if at all, mentioned Pershing II and (nuclear-tipped) cruise missiles.[60] It cannot be denied that people in high places on both sides of the Atlantic welcomed the shift of attention to non-nuclear war-fighting scenarios after the rows over official U.S. views on geographically limited and winnable nuclear wars and the INF-deployments. However, the shift fitted in another declared U.S. policy: forcing the Soviets into a high-tech arms race with the aim of bankrupting their economic system. This led to other strains in the Atlantic Alliance. Washington pressed the Europeans for an additional annual 4% increase of their defence budgets, flatly stating that they cut their social security spending. The confrontation over the Western European natural-gas contracts with the Soviets and the burden-sharing dispute also reflected the friction. The West-West differences sometimes overshadowed the threat from the East in the minds of many and generated distrust of the main Alliance partner. Every move, every proposal from across the Atlantic was greeted with criticism and suspicion. Within such an overall context, it was hardly surprising that some analysts focusing on a particular class of weapons tried to fit these in the American doctrines, and therefore often arrived at incorrect deductions.[61]

The initial mistake in Van Den Wijngaert's analysis and legal arguments based on it followed from her reliance on a misinterpretation of the *first-strike* concept in the French monthly journal *Le Monde Diplomatique*.[62] A brief survey of U.S. military documents, books and articles by AirLand Battle advocates and by members of the peace movement[63] revealed not a single reference to *first strike*. All authors agreed that AirLand

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[60] Cfr. B. Adam, Winter 1982; B. Adam & R. Coolsaet, November 1984; R. Coolsaet, 1983 and November 1984.

[61] cfr. for INF, C. Van Den Wijngaert, 17 December 1983; for chemical weapons, J.P. Zanders, December 1986, pp.27-30.

[62] K. Ege; M. Wenger, February 1983, p. 12.

[63] B. Dankbaar, October 1982; T.N. Depuy, October 1982; FM 100-5 Operations (United States Department of the Army, 20 August 1982); FM 100-5 Operations (United States Department of the Army, 5 May 1986); Grünen im Bundestag, September 1984; W.G. Hanne, October 1982; IKoVE, 1986;

Battle stressed the offensive during which military commanders must have the total range of conventional, nuclear and chemical weapons systems at their disposal.[64] IKoVE, one of the Flemish peace organisations, stopped short of suggesting a 'first strike' option when discussing offensive operations. The authors noted the "vagueness" on the issue in the manual FM 100-5 Operations (August 82 edition) and wondered whether *"the offensive orientation is valid only in case of a war in progress or already for the first battle."* They seemed to infer a distinction between being attacked first and initiating a war from the manual's discussion of 'counteroffensives' in the chapter on 'Defence'. Therefore, when the manual referred to 'offensives', *"attacks by the U.S. Armed Forces are possible."* The idea that the U.S.A might initiate hostilities followed from the juxtaposition of the statement that FM 100-5 Operations is applicable worldwide with references to the 1982 invasion of Grenada and the intervention in Nicaragua. Only later in the paragraph did the authors of the IKoVE monograph return to option of nuclear weapons, however, without linking both aspects of the discussion.[65]

The concern expressed by Van Den Wijngaert and IKoVE developed along the similar lines. It is beyond the scope of this study to comment on the correct or false use of certain terms and the impact on the argumentation. Nevertheless, Van Den Wijngaert's reliance on a misinterpretation of the first-strike concept steered the constitutional debate on to a false track. *First strike* was defined as *"the launching of an initial strategic nuclear attack before the opponent has used any strategic weapons himself"*.[66] The dictionary also referred to *pre-emptive strike* as *"a nuclear attack initiated in anticipation of an opponent's decision to resort to nuclear war"*.[67] It follows that starting a war was not a necessary condition for a first strike, the war could already be in progress. A second specialised lexicon defined *(disarming) first strike* as *"a country's ability to eliminate the retaliatory capability of an opponent through a preventive or pre-emptive attack"*. The text further explained that the superpowers' ability to launch such an attack belonged to the past, as both had developed a second strike capability.[68] The suggestion here was one of a specific aim: eliminating the opponent's strategic nuclear capability. There was no way that INF systems could have accomplished such objectives. The Pershing II had a limited range, whereas the cruise missile's four-hour flight was far too long to achieve any surprise. This, of course, does not imply that both nuclear systems played no role in AirLand Battle or FOFA. However, it does mean that the argument of the unconstitutional transfer of the authority to declare war to the President of the United States cannot be upheld on factual grounds too.

The shift to arguments concerning Belgium's role in flexible response, AirLand Battle or FOFA implicitly recognized that the INF issue essentially involved policy questions

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J.G. Siccama, 1984; TRADOC Pamphlet 525-5 (United States Department of the Army, 25 March 1981).

[64] W.G. Hanne, October 1982, p.41.

[65] IKoVE, 1986, pp.16-17.

[66] W.F. Hanrieder; L.V. Buel, 1979, p.46.

[67] W.F. Hanrieder; L.V. Buel, 1979, p.97.

[68] K.A. Nederlof, 1984, p.118.

rather legal ones. The political authorities, that is the Government and Parliament, thus had to resolve the conflict. The principal contention here revolved around the question whether the Act of 11 April 1962 covered the installation of nuclear weapons or whether such deployment required a new law. Consequently, the scope of the debate is reduced to whether the Government or Parliament has the constitutional right to determine Belgium's external security policy.

Chapter 4

The parliamentary debate on the binary force goal.

4.1 Binary chemical weapons and the force-goal procedure.

When the U.S. Congress accepted the final amendment to the 1986 Department of Defence Authorization Act on 19 December 1985, it made the release of production funds for binary chemical shells contingent on a presidential report, certifying that:[1]

1. the United States has submitted to NATO a Force Goal stating the requirement for modernization of the US proportional share of the NATO chemical deterrent with binary munitions and said Force Goal has been formally adopted by the North Atlantic Council;[2]
2. the United States has developed in coordination with the Supreme Allied Commander, Europe, a plan under which US binary chemical munitions can be deployed under appropriate contingency plans to deter chemical weapons attacks against the United States and its allies;
3. the United States has consulted with other member nations of NATO on that plan.

Considering the Force Goal procedure is a two-year cycle, the short span of time between this final amendment and the adoption of the Force Goal in May 1986 appears remarkable. This has led to some speculation there was a major subversion of Nato principles.[3] If so, this must be considered a major breach of Belgium's sovereignty both to the letter and in spirit. Indeed, Prime Minister Martens, when explaining Belgium's

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[1] Congressional Record, House of Representatives, nº 177, 19 December 1985, p. H 12850.

[2] In fact, it is the Defence Planning Committee rather than the North Atlantic Council that adopts Force Goals. On 10 April 1986, the US Permanent Representative to NATO told the Senate during a subcommittee hearing that the DPC rather than the NAC *"has jurisdiction over Force Goals"* since France withdrew from NATO's military structure (D.M. Abshire, 1986, p.7).

[3] cfr. J.P. Perry Robinson, 1986, p. 57: *"But there is, as yet, no Ministerial Guidance on CW armament; and it seems to have been a major subversion of NATO principles for a Force Goal to have been put forward, let alone adopted, in its absence."*

approval of the U.S. binary Force Goal before Parliament in May 1986, stressed Belgium's sovereignty in all aspects of the decision-making process.

NATO's force-planning procedure is complex and little information is publicly available.[4] Force Plans are reviewed every year and projections made for the next five years. As part of that procedure, new Force Goals are developed every two years. These Force Goals represent the targets NATO attempts to achieve within the next six years. The method provides the individual member states with a basis for planning their contribution. At the same time it is sufficiently flexible for modifying plans in line with the changing security situation. The first leg of the planning process is completed in May of odd years, when the *Ministerial Guidance* is adopted by the defence ministers in the Defence Planning Committee. In preparation of this document, the Military Committee[5] on the one hand will have completed its Military Appreciation of the threat for the next five years between January and March. It presents an analysis of both NATO and Warsaw Pact strategy for all military factors such as force structures, deployments, equipment and the impact of technology. The economic situation is being evaluated concurrently. Special attention is given to trends in military expenditure. These examinations are carried out for the entire NATO region and for each of the major sectors. On the other hand, the Defence Review Committee, which is part of NATO's civil structure, will examine the political, economic and technological factors which place constraints on NATO's strategy during that same period. The results will help to determine the respective priorities of the Force Goals.

After the adoption of the Ministerial Guidance, the military commanders proceed to develop the Draft Force Proposals. They thus set out what contribution they think each country should make to the overall Alliance strategy. The Force Proposals originate at the level of the Army Groups. These are next passed on to the major commands and finally to Allied Command Europe (ACE).[6] They are then communicated to the respective member states for examination. They are also further elaborated by the Military Committee and the Defence Review Committee. Especially the latter body evaluates them with reference to quality, manning levels, readiness, deployment times, equipment, reserve stocks, relative priorities, and so on.

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[4] One of the most detailed descriptions is to be found in NATO, 1984, chapter 12. See also: K.A. Nederlof, 1984, p. 49; *Ministerie van Landsverdediging: Handboek ...*, 1985 and B. George (Ed.), 1989, pp. 83-84. The overview below is also based on an interview with a former representative on the Defence Review Committee in August 1987 and on comments made on our first publication (J.P. Zanders, December 1986).

[5] The Military Committee is the highest military authority. Three times a year it meets at the level of the Chiefs of Staff of the member states. It also sits weekly at the level of the Permanent Military Representatives. All major military commands - Allied Command Europe (ACE); Allied Command Atlantic (ACLANT) and Allied Command Channel (ACCHAN) - are responsible to it. It is composed of the Chiefs-of-Staff of member states. France is only represented by a military mission as it does not participate in the integrated military structure. Iceland, which has no Armed Forces, may be represented by a civilian.

[6] For example, with reference to the Belgian Army, the Proposals would proceed through Northern Army Group (NORTHAG), Allied Forces Central Europe (AFCENT) and ACE respectively.

The second leg of the biannual cycle consists of converting the Force Proposals into *Force Goals*. They are approved during the ministerial session of the Defence Planning Committee in May of the even years. By February of that even year, the Military Committee will have sent the Force Proposals with an explicatory note on priorities and strategic risks of the new posture involved via the International Staff to the Defence Review Committee. This body as well as the International Military Staff and the Division of Defence Planning and Policy conduct a thorough review of the Force Proposals for their financial, political and economic implications. It will also satisfy itself about their compatibility with the Ministerial Guidance. By the end of February the Defence Review Committee will have sent its report to the Defence Planning Committee, stating the adjustments it believes necessary.

That same month, in light of the reports by the Military Committee and the Defence Review Committee, the Defence Planning Committee will approve a set of proposals for adoption as Force Goals. The NATO member states are to use these Draft Force Goals as the basis of their Force Plans for the five-year period under consideration. They draw up their respective Country Force and Financial Plans which are transmitted to NATO, where the NATO Military Authorities and the International Staff compare them with the Draft Force Goals. When differences occur between the Plans and the Goals, a double attempt to reconcile them is made. The first is the trilateral examination, in which the International Staff, the International Military Staff and the representatives of the major NATO Commanders participate. On the basis of their report the Defence Review Committee conducts a multilateral examination with the NATO Military Authorities and the different countries. It aims to eliminate any further differences between the Country Plans and the Draft Force Goals. By April, the Defence Review Committee will have reported the results of these reconciliation efforts to the Defence Planning Committee. At the same time, the Military Committee will have sent its assessment of the suitability of the emerging Force Plan. On the basis of both documents, the Defence Planning Committee, meeting at the ambassadorial level in May, will adopt the Force Goals and communicate them to the member states. During the ministerial meeting of that body in May of even years, the Defence Ministers will politically endorse these Force Goals, which then become the five-year Force Plans. The final part of the process consists of the annual reports by the member states and the evaluation of completion of these plans.

From this overview, it follows that no Force Goal can be adopted unless it is in full accordance with the Ministerial Guidance. Ensuing the final amendment to the 1986 Department of Defence Authorization Act, the Americans could have introduced their binary Force Proposal only at the end of December 1985 or early in January 1986. This period preceded the formal approval of the Force Proposals by the Military Committee (13 February 1986) and their referral to the Defence Review Committee for ascertaining their compatibility with the Ministerial Guidance. Especially because of the international controversy the US binary programme generated, it seems highly unlikely that the other Allies would agree to a machination at such a crucial stage of the Force Goal procedure.

It appears, however, that the May 1985 Ministerial Guidance contained - albeit vague - wording to address the Warsaw Pact chemical threat. In fact, the same Guidance

existed in 1983.[7] Circumstantial evidence also supports the inclusion of CW wording in the Ministerial Guidance. From 1980 onwards SACEUR, General Rogers repeatedly pointed to NATO's inability to retaliate in kind to a Soviet chemical attack. In June 1984 Defence Secretary Weinberger transmitted a note on improving NATO's conventional forces to Congress. He also stressed the Alliance's lag in CW. The Secretary of the Army testified before a committee that the binary modernisation was necessary for the compatibility between the US retaliatory capability and the Airland Battle/Follow on Forces Attack (FOFA) doctrine. Because of the Soviet nuclear parity in the strategic domain and increasing dominance in the European theatre, NATO started seeking for other means to bolster its deterrence policy.

During the Defence Planning Committee meeting of 4-5 December 1984 the Defence Ministers approved a set of measures for what would later be known as the Conventional Defence Improvement (CDI). This mandate became a major component in the Ministerial Guidance in preparation of the Force Goals for 1987-1992. The final communique of the 22 May 1985 meeting of the Defence Planning Committee[8] expressed concern *"that the current disparity between NATO's conventional forces and those of the Warsaw Pact risks an undue reliance on the early use of nuclear weapons"* (§2). Therefore, the Ministers already *"had an initial discussion of the work on a conceptual military framework submitted by NATO's Military Authorities"*, which *"has already helped [them] to identify those areas on which [they] will have to focus [their] efforts, and will provide military guidance for long-term planning"* (§5). However, in contrast to the final communiques of the North Atlantic Council since 1982, those of the Defence Planning Committee had so far never mentioned the chemical threat. Yet the scope of the wording seems broad enough to permit improving NATO's chemical deterrence in the way Defence Secretary Weinberger urged.

Manfred Hamm, Senior Policy Analyst at the during Reagan's tenure influential Heritage Foundation, also linked CDI with the necessity to improve the Alliance's chemical capability:[9]

> "NATO will not succeed in reducing its heavy reliance on nuclear weapons by boosting conventional defences alone. Indeed, this may be counterproductive. Increasing NATO resistance at the conventional level of hostilities might tempt Moscow to employ chemical weapons, instead of going nuclear, to break the conventional logjam and maintain the offensive momentum of its forces. In view of its inadequate assets, NATO is unable to deter Soviet chemical warfare or to fight effectively and efficiently in a chemical environment and, thus, might be forced prematurely to resort to nuclear weapons in order to halt the advance of Warsaw Pact forces. If NATO is intent on raising the nuclear threshold, it will

[7] Private communication, 3 August 1987. One of the ensuing Force Goals in 1986 called for adequate defensive and protective measures against CW agents for all NATO forces. The wording was repeated in (at least) the May 1987 Ministerial Guidance. Actually, it appears that such an instruction was first introduced in NATO's force planning with the adoption of the Flexible Response Doctrine (Document MC 14/3) in 1967.

[8] NATO Final Communiques 1981-1985, pp. 140-143.

[9] M.R. Hamm, Spring 1985, p.121.

thus have to supplement conventional force improvements with improvements of its chemical force posture."

The conceptual framework for improving conventional defences thus provided sufficient room and indeed invited a NATO chemical retaliatory capability, even if chemical weapons were not formally mentioned in publicly available documents, or factually related to CDI. A testimony by US Ambassador to NATO David Abshire to a Senate subcommittee in April 1986 - that is one month before the Defence Ministers were to endorse the Force Goals - indicated that both programmes were also linked on a more formal level within the Alliance:[10]

"The continued absence of a credible chemical weapons retaliatory capability, however, jeopardises the immense investment in conventional defence improvements made by the US. It also threatens to make the Alliance's substantial progress in this area irrelevant."

Manfred Hamm also upheld General Roger's (SACEUR) controversial call for the production of the binary chemical weapons at the end of the British *Lionheart* exercises in September 1984. Coinciding comments by senior British officers had to be denounced by the British Government. The next month, during the American exercises *Certain Fury*, General Rogers repeated his criticism of NATO's political stance on CW.[11] He was to state these views repeatedly in the following months.[12] It is, therefore, highly unlikely that SACEUR and other Military Authorities would have neglected to submit details of the chemical menace in preparation of the 1985 Ministerial Guidance. Documents MC 161 on the military threat and MC 288 on NATO strategy for the period 1985-1992, which constituted a major input for the Military Committee's 1985 Military Appreciation of the threat, must consequently have addressed the Soviet chemical posture and NATO's lack of deterrent.

More important for the present study is that at least from January 1985 onwards the Belgian military and civil authorities must have been aware of the moves to incorporate chemical weapons in the Alliance's strategy. Formally, they may have been taken by surprise when the US introduced its chemical Force Proposal at the end of that year or early in 1986. According to the Force Goal time table, around November 1985 the Force Proposals set up by the NATO Military Authorities in accordance with the Ministerial Guidance would have been sent to the member states and the Military Committee and

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[10] D.M. Abshire, 10 April 1986, p.5.

[11] It must be noted, however, that an important aspect of his concern was that the US political authorities might have released chemical weapons to him in his capacity as Commander-in-Chief of the US Forces in Europe (CINCEUR), but that his position as SACEUR required him to consult with the political authorities of the other Allies. NATO possessed no CW agents and a consultation procedure for the use of chemical weapons was therefore virtually non-existent. The stocks in the Federal Republic of Germany were under the sole authority of the USA.

[12] R. Cowton, 22 September 1984; D. Fairhall, 22 September 1984; 28 September 1984; M. Getler, 22 September 1984; P. Almond, 25 September 1984; D. Middleton, 6 October 1984; (-), 17 October 1984; R. Hutchinson, 27 April 1985, p. 719; J.P. Perry Robinson, September 1986, Chapter VIII.

Defence Review Committee for further examination. The US chemical Force Proposal could therefore not have been in the set under examination by the NATO organs at that time. Washington, on the other hand, might have amended its own list of Force Proposals to include the binary production programme. In January 1986 there was still ample time to argue for a high priority. The important conclusion here is that the Belgian authorities at the highest levels participated in the NATO decision-making process to establish a conceptual framework that allows for chemical weapons. The U.S. binary programme, by then, was just one way of filling in that framework.

4.2 The governmental decision.

On 25 April 1986, the Belgian Government decided in secret to approve the U.S. binary force goal. Defence Minister de Donnéa first disclosed its contents before the Parliamentary Defence Committee on 14 May 1986:[13]

> "I will come now to the decision by the Belgian Government on 25 April.
>
> "The governmental decision I will communicate to the Defence Planning Committee on 22 May next is the following:
>
> First, to approve the Force Goal Plan as well as the consultation procedure prepared in case of crisis [...] which means that no deployment, either in times of crisis or war, can take place without an assenting decision by the Belgian Government.
>
> Second, to state that presently Belgium does not consider it opportune to discuss deployment outside the United States, which for that matter corresponds with U.S. aims.
>
> Third, I will declare that in view of historical sensitivities regarding chemical weapons in our country, it is impossible for the Belgian Government to accept deployment of these weapons on our territory in times of peace.
>
> Fourth, the Government will stress the wish again that all members of the Alliance continue to commit themselves to an accord on a comprehensive and verifiable ban on chemical weapons and that in any case Belgium will take all steps necessary to achieve these goals.
>
> "In our declarations we, the Permanent Representative and I, will also stress in that respect all initiatives Belgium has undertaken so far and will undertake at different international fora, and the Conference on Disarmament in Geneva in particular, to achieve an agreement on a comprehensive and verifiable ban on chemical weapons as soon as possible."

For several reasons the decision was intricate. It was controversial within the Government too and it brought elements with an unclear legal status into the debate. The ministerial committee that took the decision consisted of Prime Minister Martens, Vice-Prime Ministers Verhofstadt, Gol and Nothomb, Defence Minister de Donnéa, Minister of Foreign Relations Tindemans and Minister of Social Affairs Dehaene.[14] However, some of the ministers present apparently left the meeting unaware that a final decision had been

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[13] *Parlement, Commissie voor de Landsverdediging, Kamer van Volksvertegenwoordigers*, 14 May 1986, p. 8.

[14] H. De Ridder, 15 May 1986; R. Rotthier, 16 May 1986.

reached. Midway through May, governmental sources were unable to confirm whether the text represented a formal governmental position. On 25 April, Minister de Donnéa had submitted four proposals and had argued in favour of the fourth alternative, allowing US chemical weapons on Belgian territory only in case of crisis or war and after explicit governmental authorization. That note, however, had been drafted without consulting Foreign Relations Minister Tindemans, who was in Zaire. He, among others, therefore assumed that the matter still had to be brought before the entire Council of Ministers.[15] Prime Minister Martens and Defence Minister de Donnéa, on the other hand, were convinced they had arrived at a definite governmental position.[16] In any case, the Belgian representative on the NATO Defence Review Committee required such a decision for the meeting on 28 April.

The dispute shows that, as with NATO's dual-track decision in 1979, the Belgian Government failed to prepare well in advance a common position on a sensitive security issue. Minister Tindemans was to let slip later that already in April 1985 he had written to the Defence Minister (then still F. Vreven, Flemish Liberal) warning him of the *"extremely delicate nature of the matter, and that he had to be extremely careful"*.[17] The disclosure as such might have been mere political opportunism. At the end of May, the Government was facing a serious crisis following a motion from members of the majority parties. Moreover, a conference vote of Mr Tindemans' Christian-democrats had demanded a stronger-worded governmental rejection of new chemical weapons. His letter, however, must have followed a conversation with Ronald J. Bee at the end of March or early April 1985. Bee sounded European governments and opposition politicians on the possible deployment of binary munitions in Europe in preparation of his testimony before the President's Chemical Warfare Review Commission.[18] The matter indicates that the Government had at least a year's warning time. Moreover, even within NATO, signs of European involvement in the American political process must have been abound after the first Congressional amendment on 19 June 1985 making funding of the binary programme subject to formal approval by the North Atlantic Council.[19] Whether all ministers were present on 25 April was inconsequential for the validity of the decision. The Council of Ministers decides following the consensus procedure, which allows for dissenting opinion but implies collective responsibility for decisions taken. This also binds a minister who is opposed to a particular decision. If he rejects that

[15] After the debate in the Parliamentary Committee on 14 May, Minister Tindemans' cabinet issued a statement expressing dissatisfaction with the governmental position as presented by the Defence Minister and added that there had been no need to refer to deployment conditions as the American request only concerned production. (L.P., 15 May 1986)

[16] H. Deridder, 15 May 1986.

[17] P. Geerts; R. Rotthier, 2 June 1986, p. 9.

[18] R.J. Bee, 23 April 1985, p. 5. He explicitly referred to his meeting with the Belgian Foreign Minister.

[19] Congressional Record, House of Representatives, 19 June 1985, p. H 4515. The requirement was dropped in the Conference compromise of 29 July 1985, although SACEUR still had to prove that he had developed deployment plans in collaboration with the European allies. (Congressional Record, House of Representatives, 29 July 1985, p. H 6539.)

responsibility, he has to resign.[20] As the Foreign Minister stayed on, the difference of opinion was probably not on the substance of the Governmental decision. Moreover, on 16 May 1986, the Council of Ministers formalized the decision taken in April.[21] Prime Minister Martens was to comment after that meeting that he deemed a clear governmental position necessary given the controversy in Parliament.[22] The decision confirmed in essence Minister de Donnéa's statement two days earlier.

More important for our discussion is the condition of express governmental authorization for any chemical-weapon deployment in time of crisis or war. Could a future government conceivably have had sufficient time to consent to such deployment and preserve its sovereignty? In principle, the components of the binary munitions were to be stored separately in different American states. Strategic logic would therefore require their transport to Europe at the slightest indication of enemy intent to initiate CW. At that time, Western military planners and political leaders assumed that the Soviet Union was able to mount a large-scale offensive with little warning time. Moreover, they believed that the Red Army prepared for early release of chemical weapons to prevent Allied air superiority and tactical nuclear strikes. Under such conditions, chemical deterrence could only work if in a period of sharply increased tension such munitions were present in Europe. Minister de Donnéa, however, only excluded peacetime deployment in his reply. The Council of Ministers' decision of 16 May was more precise on the circumstances:

> In case of a serious crisis or war during which there exists a clear threat of the use of chemical weapons against us, deviation from this rule [not to deploy chemical weapons on Belgian territory] is possible. The Government will sovereignly evaluate the seriousness of the crisis and the threat and will sovereignly decide about possible deployment of such weapons on our territory.

In the Belgian context, such a decision could only entail deployment in *time of war*, as legislation does not contain a juridical definition of *time of crisis*. According to Article 58 of the Act of 15 June 1899, *time of war* commences on the day the Executive issues a Royal Decree ordering the mobilisation of the armed forces. It ends on the day a Royal Decree demobilizes the armed forces. Belgium was thus in *time of war* between 26 August 1939 (general mobilisation) and 15 June 1949 (demobilisation). The example illustrates that the juridical *time of war* may exist for a much longer period than the actual war, or the *state of war*. International Law defines the latter concept as the legal situation between two states when they are in armed conflict with each other with the aim of forcing the adversary to accept certain conditions which the other side will impose after victory.[23] In 1939, the Government proclaimed the *time of war* more than

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[20] A. Mast & J. Dujardin, 1987, p. 396.

[21] The Prime Minister read out the text of the decision to the Senate on 10 June 1986. (*Parlement, Senaat - Handelingen*, 10 June 1986, p. 1284-1285.)

[22] AW., 17 May 1986.

[23] Matthijs, 1963, p. 44.

eight months before the German invasion, among other reasons, to convert the economy to a war footing. After the Second World War, the condition was maintained to facilitate the reconstruction of the country and to allow summary proceedings of collaborators by military tribunals. In each case, the activities were unrelated to the actual armed conflict. The juridical *time of war* entails the suspension of certain constitutional rights. As mobilization is ordered by Royal Decree, Parliament does not intervene in the decision.

Prime Minister Martens insisted on the governmental prerogatives when defending the governmental decision before the Senate on 10 June 1986:[24]

> "Especially with reference to the defence policy of our own armed forces, the Constitution divides competences between Parliament and the Government. [...] According to Article 66 of the Constitution, the King grants the grades in the Armed Forces. According to Article 80, by taking the oath when ascending the Throne, he accepts in particular the obligation to maintain the country's independence and to preserve the territory. To fulfil this obligation, Article 68 of the Constitution grants him the following competence: *The King commands the Army and the Navy, declares war, concludes peace treaties, treaties of alliance and trade treaties. He notifies the Chambers thereof, as soon as the interest and the security of the State ermit it, adding the appropriate statements. The trade treaties and the treaties which may burden the state or bind Belgians personally, have effect only after having obtained assent by the Chambers.* According to all constitutionalists, this article can only be interpreted as meaning that all problems relating to the country's external security are the prerogatives of the Executive. [...] I insist that all matters concerning the external security are a prerogative of the Executive, of course under parliamentary control. [...] Constitutionalists thus conclude that, barring general and specific parliamentary supervision, the Government decides about matters relating to defence it deems beneficial or necessary to fulfil its obligations. This especially includes the choice of arms required to this end and of allies with whom it wishes to co-operate.

This declaration, the decision taken on 25 April 1986, and Article 58 of the Act of 15 June 1899 taken together indicate that the Executive would have had to order general mobilization before it could allow American chemical weapons on Belgian territory. The demand by some MPs for clarification of the term *time of crisis* was pertinent as Belgium was then virtually the only NATO member without a juridical definition of the condition. Minister de Donnéa explicitly referred to consultations in times of crisis in his reply before the Chamber Committee. One author defined *crisis situation* as a *"condition of great tension as a consequence of a serious threat to the vital interests, in which far-reaching decisions must be taken"*.[25] One MP, the Christian-democrat Van Wambeke put the three correct questions to the Minister: When does a crisis start? Who determines when it is time of crisis? And if it is a crisis, under what circumstances will the political authorities meet to discuss the issue?[26] During their meeting on 22 May 1986, NATO

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[24] *Parlement, Senaat - Handelingen*, 10 June 1986, p. 1283.

[25] K.A. Nederlof, 1984, p. 47.

[26] *Parlement, Commissie voor de Landsverdediging, Kamer van Volksvertegenwoordigers*, 14 May 1986, p. 10.

Defence Ministers reportedly recognized the impossibility to define crisis in advance.[27] However, such an outlining of the term is fundamentally different from the definition required in a national legal system to allow certain preparations for a looming war without mobilizing the armed forces.

Had tensions between East and West ever become so serious that the Belgian Government would have had to order general mobilization, it would have faced one great unknown regarding CW preparations: the lapse of time between mobilisation and the outbreak of war. That period could have been very short indeed. Calculations indicated that the Americans would have had to deploy their chemical arsenal well before any aggression. The fastest way would have been by plane. In 1986, the U.S.A.F. had 66 C-5A *Galaxy* and 235 C-141B *Starlifter* cargoes for strategic airlift for missions worldwide.[28] Those dedicated to the European theatre required inflight refuelling over the Atlantic Ocean when carrying maximum payload. In case of a crisis or war they would primarily have had to fly in troops. From data released during a Congressional hearing on 7 April 1983, SIPRI published some estimates on the number of flights of C-141B *Starlifter* necessary to transport 100 tons of a particular nerve agent.[29] The author assumed that no other weapon system or troops were on board. (See table next page.)

The figures pointed to the magnitude and the time-consuming character of such an operation. Following a scenario in which 10% of the U.S. strategic transport fleet would airlift nothing but binary shells and bombs, it was calculated that transferring the total stock of binary munitions the Pentagon wished to produce, namely 1.2 million artillery shells and 44,000 Bigeye bombs, would take around 120 days. According to most NATO plans at the time, four months would have been a long crisis indeed. These considerations implied that technical factors would have forced the military to build up their chemical stocks in Europe before any military engagement had taken place. The United States then had 435 tons of nerve agent stored in the Federal Republic, an amount many considered insufficient for a credible in-kind deterrence against the 300,000 agent tons the Warsaw Pact countries were believed to hold. President Reagan's pledge to Chancellor Kohl to remove all U.S. stocks from the Federal Republic and thus from the European continent further underscored the discrepancy.

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[27] J.P. Perry Robinson, September 1986, p. 83.

[28] IISS, The Military Balance 1985-1986, p. 12.

[29] J.P. Perry Robinson, 1985, p. 167, Table 6.1 (Adapted).

Munition	Number of rounds that could be airlifted per C-141B sortie to Europe(*)	Number of C-141B sorties required to airlift rounds holding 100 tons of chemical fill(**)
155-mm howitzer shell, unitary GB and VX	504	67
155-mm howitzer shell, binary GB	608 (500)	48
8-in howitzer shell, unitary GB and VX	246	57
750-lb aircraft bomb unitary GB	66	14
160-gal aircraft spray tank, unitary VX	6	25
500-lb aircraft spray-bomb, binary VX (Bigeye)	60 (53)	21
500-lb aircraft bomb, unitary GB (MK 94)	60(‡)	31
500-lb aircraft bomb, unitary GB (Weteye)	60(‡)	10

(*) For the binary munitions, additional airlift capacity would be needed to transport the separate canisters of binary reactant. The figures given in parentheses, calculated from the original source data, allow for this.

(**) Firing tables for GB and VX munitions typically prescribe expenditures in the range of 0.8 to 40 kg of nerve gas per hectare or target area (100 ha = 1 square kilometre); a company-sized target might occupy some 25 ha.. Observe that, for the binary munitions, 100 tons of chemical fill would not yield more than about 65 tons of actual nerve gas.

(‡) Data not given in the original source, so assumed here to be the same as for Bigeye.

If other NATO-members had declared *time of crisis* without mobilization, Belgium would have come under great pressure to enter the juridical *time of war* to take preparatory measures similar to those on the eve of the Second World War. In times of great international tension mobilization may have very destabilizing effects, thus perhaps refraining the Government from taking such steps. This raises the question to what extent the United States and some other Allies would have brought pressure on the Belgian Government to authorize the deployment or the transit of chemical munitions over Belgian territory before it ordered general mobilization. Parliament would then still have exercised its full constitutional powers.

There is still a different angle to the discussion. NATO knows a condition called *General Alert* which is to be proclaimed if military aggression from outside the NATO area is clearly expected. It follows a common decision by all Allies and authorizes a collective military response. Dutch Defence Minister De Ruiter explained during an interpellation:[30]

> "General alert marks a situation towards a state of war. Before, there is - schematically speaking - no state of war, afterwards there is. Before, there is at most military aggression from the other side. This is in itself a condition for the option of military response. Hence it is so important that the Allies agree to the proclamation of general alert - the decision on a common military response. It entails a central decision, which one can take in the context of rising tension."

SACEUR would then request the President of the United States to release the required types of weapons, which may include nuclear or chemical munitions. The presidential authorization means that these weapons have come under NATO control as part of the joint military response, but can only be used by U.S. forces assigned to NATO. The Auditor of the Council of State discerned two instances of decision-making based on the statement before the Dutch Parliament:[31]

1. The NATO members must decide whether an aggression requires a collective military response. An affirmative conclusion leads to the proclamation of general alert. According to the Auditor, that condition *"is to be considered as a declaration of war"*.[32]
2. After general alert has taken effect, each member state will individually take the necessary measures it deems necessary according to Article 5 of the North Atlantic Treaty. This implies that only the United States can decide on the possible use of nuclear or chemical weapons. According to procedures, the United States would then consult with the Allies on actual use, but not on their release to NATO.

The Auditor believed that Belgium had but limited options for selecting certain military means from the array available to NATO. The options are only available when it decides on general alert.

The presence of cruise missiles on Belgian soil therefore gave the United States the authority for their launching from Belgian territory. The Belgian Government could no longer decide independently in which way it wished to assure national defence and would have had to accept that a foreign state could start a nuclear attack from its ter-

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[30] *Tweede Kamer*, 27 February 1986, p. 3741.

[31] *Raad van State, Verslag*, 3 February 1986, pp. 46-47.

[32] *Raad van State, Verslag*, 3 February 1986, p. 48. That opinion may be challenged on the ground that according to Article 68 of the Constitution the King declares war and concludes peace treaties. Minister De Ruiter did in fact not refer to a declaration of war. Finally, it should be noted that after military agression *general alert* is no longer required and that *general alert* does not mean that there *shall* be a military response. (I am grateful to Lt Gen A. Everaert, Permanent Military Representative to NATO, for the latter comment.)

ritory even if it formally advised against such action.[33] The Auditor noted the loss of a certain part of national sovereignty, which, he argued, was not unconstitutional.[34]

However, these conclusions must also be viewed in the light of the testimony to the Dutch Parliament by Mr Van Campen, former principal private secretary of NATO Secretary-General Luns.[35] He testified that countries on whose soil nuclear missiles had been deployed would not be able to veto either the proclamation of general alert nor the launching of nuclear weapons following that proclamation. He also specified that if a NATO member hosting U.S. troops rejected the proclamation of general alert, then the U.S. authorities would still retain the right to use these forces and their armament.

The main difference with the nuclear issue was that the Belgian Government had not authorized the presence of U.S. chemical weapons on its territory in peacetime. However, on the other hand, NATO had not developed formal consultation procedures for chemical-weapons employment. Even the American authorities possessed no procedures for releasing chemical weapons to NATO.

A state of war as defined in international law is a precondition for triggering general alert, which the Auditor of the Council of State accepted, would amount to a declaration of war for the Belgian State.[36] Such a condition would permit SACEUR to request the U.S. authorities to release certain categories of weapons, including chemical munitions. These would then be shipped to the battlefield and, given Belgium's role in NATO, could transit over Belgian territory or through Belgian airspace towards the American zone.[37] The American troops in possession of these munitions would have been authorized to fire chemical munitions irrespective of the advice given by the political authorities on whose territory they were to be used. Under those circumstances, the Belgian Government would have assented to the presence of chemical weapons on Belgian territory merely by agreeing on general alert. This implies that the Government's declared intention to conduct an independent analysis of the chemical threat before accepting deployment would have been but a futile exercise whose outcome would in no way have affected American plans. Moreover, it is unclear what precise relationship exists between the condition of general alert and mobilization. As all members will individually take the measures they deem necessary after the proclamation of general alert, we may assume that national mobilization requires a separate decision by the national authorities. For Belgium, only then the legal time of war would come into effect, which

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[33] *Raad van State, Verslag*, 3 February 1986, p. 49.

[34] *Raad van State, Verslag*, 3 February 1986, pp. 53-54.

[35] *Voorlopig verslag openbare hoorzitting, Tweede Kamer, 1985-1986, 9 december 1985, Wetsvoorstel 19.290, p. 53-95*, as quoted in: *Raad Van State, Memorie van Wederantwoord*, 3 February 1986, pp. 33-34.

[36] The Auditor systematically believed that agression was a precondition for triggering general alert (See also note 32, p. 41). Here, we are primarily concerned with the consequences of legal arguments supporting the Government's authority in deciding external-security policies.

[37] It should be noted that in case of war most American transports would have crossed French territory. The United States and France have concluded bilateral agreements to this effect, although it is not known whether they cover unconventional munitions.

- we have argued - is the only condition defined in Belgian law in which the Government could consider the deployment of chemical munitions. Of course, the possibility always existed that Belgium might have begun mobilizing before NATO's proclamation of general alert. This nevertheless remains far from certain. Alternatively, the technical constraints that would require the execution of chemical deployment plans in the early stages of an international crisis, raise questions concerning the moment when SACEUR could have requested the release of those munitions to NATO and the nature of the consultation procedures with the host countries. The little information on the general alert procedure presented to the Dutch Parliament strongly suggested that SACEUR could make such a request only after proclamation. The Belgian Government's decisions of 25 April and 16 May 1986 may therefore have been totally ineffective.

During Congressional hearings in March 1985, Vice-Admiral Baggett, Director of Naval Warfare of the Department of the Navy, suggested chemical munitions storage on Maritime Pre-positioned Ships just off the European coast.[38] Such squadrons are stationed in strategic areas over the world and contain sufficient weapons and supplies for 16,500 Marines. The idea does not seem to have been taken up. However, the line of thought indicated the U.S. military were developing contingency plans for rapid deployment in a period of serious tension. Moreover, as the idea was presented as a way to circumvent possible vetoes to peacetime or early deployment from European Allies, it suggests that the U.S.A. would have paid little attention to constitutional intricacies of other NATO members if circumstances so required.[39] Such a view was confirmed by a senior member of the Arms Control and Disarmament Agency to the present author in December 1989. The categorical refusal to authorize deployment in peacetime did not appear as obvious as the Government would have wished and there are some serious indications that American deployment plans would have mortgaged the sovereignty of the Belgian decision-making process which the Government had envisaged.

There are two basic questions in this debate. First, did the United States request Belgium to deploy chemical weapons under particular circumstances. Second, in such an event, under what conditions could the Belgian Government have replied affirmatively?

At first sight, it would appear logical that a request for deployment or passage through Belgium was part or a corollary of the force goal. Indeed, it was one of the preconditions contained in the amendment to the 1986 Department of Defence Authorization Act that forced the Reagan Administration to seek a chemical force goal in the first

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[38] Testimony before the House Armed Services Committee, 21 March 1985. Cfr. also the reply to a written question by Congressman Porter on whether the U.S. has formally agreed to deploy the Bigeye bomb on aircraft carriers: *"[...] there is no question of the ability and willingness of the Navy to execute United States policy with deployment aboard ammunition ships, maritime pre-positioned ships, and aircraft carriers."* (Porter, 1986.)

[39] During a hearing before the House Armed Services Committee on 21 March 1985, former Commander-in-Chief, U.S. Army Europe, General Kroesen expressed the personal view that the United States had every right to replace the unitary munitions in Europe and that he would only inform the host nation of such an operation, comparing it with exchanging tank ammunition if the U.S.A had developed a new type of such ammunition.

place. At least, there existed no doubt in the minds of the proponents of the conditions on binary production.[40] However, it was less clear whether the paragraph on the deployment plans in the amendment required *political* consultation on the highest levels. The confusion on Capitol Hill at the time stemmed in part from the mistake that the North Atlantic Council rather than Defence Planning Committee should adopt the force goal, and in part from uncertainties about the presumption that contingency plans are or should be part of such a force goal. According to one legal opinion, *"there is ample evidence from the legislative history that members of Congress felt very strongly about the chemical weapons issue [...]"*. They accordingly *"expressly required that the highest political body of NATO act formally to approve the assignment of binary chemical weapons to the Alliance [...]"*.[41] In April 1986, approximately six weeks before the DPC was to meet at ministerial level, U.S. Permanent Representative to NATO, Ambassador Abshire, testified before a Congressional subcommittee that:[42]

> "The United States Government is still developing, in coordination with SACEUR, the plan for contingency deployment of binary munitions in a crisis situation. We have already heard some Allied views on the content of the plan, and we will consult formally with the Alliance once the plan has been completed. By the time the President makes his report to Congress, on or before October 1, 1986, we will have conducted full and positive consultations with Allies on all issues relating to CW modernization programme required by Congressional Legislation."

As the ministerial sessions of the DPC and the NAC take place late in the Spring, the mentioning of October as deadline implies that contingency plans are prepared and com-

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[40] A Staff Memorandum prepared for the Committee on Foreign Affairs in February 1986 explicitly links possible forward deployment with NAC approval of a U.S. force goal on chemical munitions. (D. Barton; J. Wilzewski, February 1986, p. 3.) A similar affirmative interpretation is formulated in a letter by Senator Mark Hatfield to Lord Carrington, then Secretary-General of NATO: *"Another provision includes language expressing Congress' expectation that any new chemical weapons produced in the United States will be stored and based in Europe."* (M.O. Hatfield, 13 May 1986 - Emphasis in original.)

[41] Feldman, Waldman & Kline, Letter to Rep. S.H. Hoyer, 5 May 1986, pp. 23-24. The arguments of these Attorneys at Law centre on the question whether the U.S. Administration should seek the North Atlantic Council's approval rather than the Defence Planning Committee's. On the basis of the North Atlantic Treaty they argue that the NAC is NATO's highest body and the only one directly created by the Treaty, and that therefore the DPC is a lower body. The Administration's position that the force goal procedure only requires it to seek approval of the DPC is presented by the Attorneys as an attempt to circumvent the *"clear requirements"* of the amendment.

It is beyond the purpose of the present analysis to determine which NATO body should ultimately have been involved. Suffice it to state that *"within the specialized field of defence, the DPC has, for all practical purposes the same function and authority as the Council"* (J. Roberts; George, Bruce, 1990, p.20) and that the development of the force planning process was one prime purposes for creating that body (Final communique of the regular Spring Ministerial Session of the NATO Council, Athens, 4-6 May 1962, §10). The basic point for the present discussion is that according to one interpretation Congress required approval of the contingency plans by the highest political authorities.

[42] D.M. Abshire, 10 April 1986, p. 7.

pleted in subordinate bodies and do not require formal approval on a ministerial level. Further evidence that the United States did not formally request approval of deployment plans at the May session of the DPC is provided by the unanimous replies to parliamentary questions by the Dutch Defence Minister[43] and the British Minister of State for the Armed Forces.[44] They both affirmed that the United States had no plans to deploy binary munitions in Europe in peacetime and that the countries concerned would be consulted beforehand should such deployment be considered in future. Moreover, the British Minister's reply strongly suggested that any further discussion would be the subject of bilateral consultations rather than of further collective NATO decision-making.

The other confusion derived from the requirement that the United States develop deployment plans in coordination with SACEUR. The Supreme Allied Commander Europe, NATO's highest military commander, acts as Commander-in-Chief Europe (CINCEUR), the highest commanding officer of the United States Forces in Europe, as well. In fact, this means that Congress required the United States to co-ordinate deployment plans with their own commander.[45] Here too, it seems that the deployment plans did not require formal high-level political sanctioning. It is even likely there existed no formal necessity for co-ordination within the Military Committee and lower bodies.[46] It has also been suggested that under those plans SACEUR would have had the authority to decide when the binary munitions should be transferred to Europe.[47]

From this discussion, it would follow that the United States did not request Belgium, nor, for that matter, any other European NATO member state, to deploy chemical weapons under particular circumstances. At several occasions before and after the approval of the force goal, U.S. and European governments stressed that the United States did not have plans *"to deploy any of these weapons in any foreign country"*.[48] On the other hand, discussions on deployment were conducted in NATO's military structure. By the end of February 1986, both Secretary-General Lord Carrington and SACEUR General Rogers announced that contingency plans had been drafted, but that these were still in their very early stages.[49] According to one unnamed political NATO source, the need for a NATO plan for appropriate contingency deployment did not mean that the Allies would be asked to deploy these weapons, but that there had to be some agreement to de-

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[43] Frinking, 11 April 1986.

[44] D. Davies, 28 April 1986; A.E.P. Duffey, 28 April 1986.

[45] Cfr. the testimony by General B. Rogers, SACEUR, before a House Committee on 26 March 1987: *"[...] we have worked out a deployment plan which the Congress required be coordinated with the SACEUR. It is a EUCOM plan so as the CINCEUR, I can coordinate it with myself as the SACEUR, and surprisingly enough, we agree on that. It is a good plan."* (Copy of extract Congressional hearing in possession of the present author; no further references available.)

[46] Private communication, November 1992.

[47] J. Witherow, 16 February 1986.

[48] Reply to a written question by Congressman Porter on discussions with the West German government concerning pre-positioning of binary 155mm and Bigeye weapons in their country. (Porter, 1986.)

[49] D. Fouquet, 8 March 1986.

ploy these weapons under certain military circumstances.[50] Such a view corresponded to a less narrow interpretation of the final amendment to the 1986 Department of Defence Authorization Act (see p.30). The wording in §2 - the United States in co-ordination with SACEUR - means that the deployment plans remained American rather than becoming NATO plans. At least theoretically, it is possible to envisage that all SACEUR had to do was to consult with American officers at the SHAPE staff to meet the requirement in that paragraph. The passage also referred to a plan under which the binary munitions *can* be deployed, which is different from a plan to deploy.[51]

Nevertheless, in the weeks before the ministerial meeting of the DPC, Belgium was not amongst those countries that clearly opposed an upgrading or stationing of chemical weapons in Europe. From the present discussion it becomes clear that both Foreign Minister Tindemans and Defence Minister de Donnéa were correct in their comments on the binary force goal. In his reply to the Parliamentary Committee on 14 May 1986, de Donnéa's reference to the consultation process in a period of crisis reflected the issues debated in the NATO's military structures. He also limited the circumstances in which Belgium would be prepared to consider deploying U.S. chemical weapons. Minister Tindemans, when expressing his disappointment over the Defence Minister's declaration, stressed that Washington had not asked to approve deployment plans. He thus reflected the U.S. Administration's position, that deployment should not be discussed to avoid public outcry and parliamentary discussions. The Council of Minister's formalized decision of 16 May 1986 politically reconciled both views.

As each NATO member retains its sovereignty, all decisions are taken by consensus. Stationing or use of chemical weapons, which belong to one state only, thus required specific consultation procedures. Under Belgian law, only one or more agreements with the United States specifying the circumstances under which the binary chemical munitions could move over Belgian territory would have preserved Belgium's sovereignty. Even here, the Constitution draws the limits. Art. 68 states that under no circumstances can secret articles of a treaty nullify public articles. If such agreements constituted new treaties they would have to be ratified by Parliament. They would have actually burdened the Belgian State, for instance, as a consequence of costs for constructing adequate storage installations or securing safe transport over its territory. The basic problem arises if those agreements do not constitute a new treaty, but accords implementing an existing treaty or law. This is where the Act of 11 April 1962 entered the discussion.

4.3 Parliamentary initiatives.

The parliamentary debates on the U.S. binary force goals started on 30 April 1986 and continued until well into July. Members of the opposition had already introduced a first bill banning chemical weapons in Belgium in November 1985. Three more were

[50] M. Doornaert, 13 February 1986.

[51] Private communication, November 1992.

to follow over the next seven months. The Flemish Council, the regional parliament, also adopted a resolution on the subject. The discussions on a final bill introduced in March 1989 were closed in February 1991.

The proposals aimed at preventing all Belgian involvement in the American binary programme and at precluding deployment on Belgian territory under all circumstances. Several initiatives were co-ordinated with the Congressional opposition in Washington. During the parliamentary debates on the force goal, the interpellators' goal was without any doubt a clear Belgian position on the issue. However, for reasons explained earlier, the debates digressed on the subject of constitutional prerogatives of the legislative and executive branches. The controversy focused on the contingency plans and, as such bilateral agreements are not usually open for parliamentary debate, the bills, resolutions and motions fell into the grey area of constitutional interpretation.

The Belgian Government's position was unambiguous and other NATO member states regarded it as a refusal to deploy. However, given the wording in the Congressional amendment of 19 December 1985, Parliament was convinced that contingency plans were part of the U.S. binary force goal package. The internal debate on the interpretation of the Belgian Government's decision followed directly from an amendment that the coalition parties added to the simple motion[52] introduced after the debate in the Chamber on 14 May 1986.[53]

> The Chamber,
>
> Having heard Mr Chevalier's interpellation on chemical weapons to the Minister of Defence in the open session of the Committee for Defence;
>
> In view of the ensuing debate and the Minister's reply;
>
> Without detracting from our constitutional provisions:
>
> a) considers the historical sensitivities regarding chemical weapons in our country, as a result of which it is impossible for the Belgian Government to approve deployment on our territory;
>
> b) subscribes to the Government's position urging all Alliance members to continue efforts to achieve an agreement on a total and verifiable ban on chemical weapons;
>
> c) is of the opinion that in any case Belgium must for its part do its utmost to achieve that ultimate goal; namely ruling out both production and use of all chemical weapons;
>
> d) lays down that it is necessary to state clearly to our NATO partners that our country is under no condition prepared to store binary or other chemical weapons or to arm our troops with them;
>
> proceeds to the order of the day.

It thus stipulated that Belgium would never and under no circumstances station chemical weapons or arm its troops with them.[54] The provision, however, was explicitly

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[52] After an interpellation, members of the opposition usually introduce a motion of no-confidence adding the necessary arguments. The majority parties will react with a simple motion, urging the meeting to proceed to the order of the day, and thus expressing their confidence in the Government. The simple motion is voted first.

[53] *Parlement, Kamer van Volksvertegenwoordigers, Handelingen*, 4 June 1986, p. 1255.

[54] The recurring references to Belgian troops in the motions followed from the rumours that chemi-

subordinated to the Constitution, meaning that the ultimate competence to decide resides under all circumstances with the King. This implied that, theoretically, the Government was able to take a new decision even in peacetime. The unusual situation followed a motion introduced by two members of the majority parties, Uyttendaele (Flemish Christian-democrat) and Devolder (Flemish Liberal) after the debate on 14 May. It would have prohibited deployment of chemical weapons on Belgian territory in times of peace, of crisis, and of war. A major motivation was Minister de Donnéa's haughty behaviour before Parliament.[55] The move led to a major crisis as it could have toppled the Government. It was defused during negotiations between the leaders of the parliamentary groups and the Government. The compromise amendment to the simple motion quoted above confirmed confidence in the Government.

The text of the compromise motion allowed for a narrow and broad interpretation. According to the former, Belgium radically refused the employment of chemical weapons on its territory and to arm its forces with them. The broad interpretation recognized the Government's constitutional right to take a new decision at any time. The parliamentary debate thus no longer concerned chemical weapons. On 24 June, the Christian-democrat MP Uyttendaele forced Prime Minister Martens to recognize that the Belgian Government had transmitted the compromise motion of 4 June as a parliamentary opinion and not as a governmental decision.[56] On 10 July, Parliament adopted the simple motion introduced after Mr Uyttendaele's interpellation, thus sanctioning the Government's conduct.[57] At the same time, Parliament interpreted its own motion of 4 June in the broad sense. It recognized that the Government possessed full power of decision to allow future stationing of chemical weapons on Belgian territory and that it need not inform Parliament of such a decision in view of the Act of 11 April 1962 implementing Article 121 of the Constitution. A mere fifteen months after the missile crisis, Parliament had once more recognized that the execution of external security policies was a governmental prerogative.

Afterwards, chemical weapons disappeared from the political agenda and were replaced by questions concerning the purchase of a new fighter for the Air Force and the modernization of the short-range nuclear weapons. From a legal point of view, the binary issue was very technical and complex. In section 4.2 we analysed the governmental approach without fundamentally challenging the received wisdom that external security

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cal rounds had already been stored in Belgium. Part of the discussion concerned the purchase of 155mm artillery pieces for the Belgian Corps in Germany and the possibility of arming those troops with chemical munitions, which technically would not have constituted a violation of the prohibition of storing such munitions on Belgian territory. Some opposition members feared this presumed loophole was left to avoid *singularisierung* of the Federal Republic should circumstances require deployment in Europe.

[55] Private communication by one of the initiators, February 1988. Members of the Flemish Christian-democrats, including Foreign Minister Tindemans, declared after the party conference on 31 May 1986 that Defence Minister de Donnéa confronted them with a *fait accompli*, leading to much frustration. (P. Geerts; R. Rotthier, 2 June 1986, p. 9.)

[56] *Parlement, Commissie voor de Landsverdediging, Kamer van Volksvertegenwoordigers*, 24 June 1986, p. 8.

[57] *Parlement, Kamer van Volksvertegenwoordigers, Handelingen*, 10 July 1986.

affairs are the sole responsibility of the Executive. To judge whether the Legislative could have had a fundamental impact on the chemical weapons debate, and for that matter, on any other weapons-deployment issue, the Constitution and other legislation must at least provide the theoretical possibility for Parliament to lay out foreign policy options. With the binary chemical weapons, a double problem confronted the legislators:

1. the specific issue of unambiguous legislation concerning the presence of chemical weapons in Belgium controlled by another NATO member and the possible employment of such weapons by Belgian troops;
2. the broader issue of the competences of the Executive and Legislative branches for Belgium's security policies.

The Council of State's comments on the bill prohibiting chemical-weapons installation on Belgian territory by the Flemish Socialist MPs Chevalier and Van Miert linked both aspects. Indeed, as the authors were implicitly referring to the armament of American troops they raised the issue of access of foreign troops to the territory of the Belgian State. The Council of State summarized the problem as follows:[58]

> "The question is whether the matter belongs to the competence of the legislative branch, or whether it concerns a terrain reserved for the executive branch."

Interpreting the Constitution, and in particular Articles 68 and 121, the Council of State continued:[59]

> "Only the legislator can authorize the King to permit foreign troops to occupy the territory, to deploy there and to develop military activities with their equipment, ordnance and weapons. Strengthened by the original authorization granted by the legislator, the King then takes the necessary measures, essentially in consultation with foreign governments, which the execution of the plan implies. If necessary, He bases himself on the authorization to the treaties and agreements, by means of which the permission to occupy the Country's territory can be concretised.
>
> "From the phrasing used in the Constitution, 'by virtue of a law', it is clear that in that area Article 121 implies co-operation between the legislative authorities - with whom the original authorization must originate - and the executive authorities - who must articulate the fundamental choice in clear agreements that are appropriate for the military circumstances of the moment. *It is therefore incorrect to state that in this case the legislative branch would possess unlimited competence, or that, in reverse, the executive branch would, according to Article 68 of the Constitution, be legally invested with absolute competence.*

The Council of State held that the legislative branch can withdraw the authorization it has granted. However, in that case, Parliament must consider the consequences of the

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[58] P. Chevalier, K. Van Miert, *Stuk 489 (1985-1986), nr. 2, Advies van de Raad van State*, 10 March 1987, p. 2.

[59] P. Chevalier, K. Van Miert, *Stuk 489 (1985-1986), nr. 2, Advies van de Raad van State*, 10 March 1987, p. 4. [Emphasis added.]

Belgian State breaking international commitments. The Council of State formulated two more questions:

- Is it possible to add supplementary rules to the original authorization?
- If treaties have been concluded with one or more states, has the legislator not renounced the possibility of appealing to this right of amendment and accorded the executive branch the competency to judge under what circumstances the goals, which it has assisted to determine, are best realized?

The Council of State expressed the view that no conflict exists with the Constitution if legislators wish to preclude the employment of chemical weapons, or any other particular weapon system, by the Belgian Armed Forces. However, provisions in the bills specifically aiming at prohibiting American troops entering Belgium with chemical weapons conflict with the original authorization in the Act of 11 April 1962 and are thus incompatible with Article 121 of the Constitution. The proposed provisions concerned implementation agreements, which the legislators recognized in their bill, are not submitted to Parliament for approval. However, as the Council of State added that the legislators did not aim to abolish the Act of 11 April 1962, we may infer that the legislative branch can revoke or amend the original authorization.

The conclusions are far-reaching from two angles. First, if Parliament wishes to develop an initiative to ban a certain category of weapons from Belgian territory in possession of foreign armed forces, it must first abolish the Act of 11 April 1962 by voting another law to grant itself competence in the subject matter. Such a step would, in turn, have important repercussions for numerous other international engagements within NATO. Moreover, this interpretation of the Constitution with the Act of 11 April 1962 means that Belgium does not have a right to control the nature of the armament of foreign troops it has allowed on its territory. Only the Government, who is the sole body with knowledge of the contents of implementation agreements or contingency plans, is capable of renegotiating the bilateral or multilateral accords. Unilateral action by the Belgian authorities, especially if the United States were to refuse to disclose the nature of their troops' armament, could have led to a situation similar to New Zealand's when it was ejected from ANZUS for refusing American nuclear-armed ships entry in its harbours.

Second, the Council of State seemed to have accepted that between 1983 and 1986 an important shift had occurred concerning Parliament's right to amend an authorization it has granted the Government. In October 1983, the Green parliamentary groups introduced a bill interpreting the Act of 11 April 1962 in such a way that no short-range and intermediate-range nuclear-weapon systems could be stored in Belgium.[60] In its advice, the Council of State departed from the position that the legislator can always *"by means of an interpretative law determine the meaning and intent of the law itself"*. However, first it must be ascertained *"whether the wording of the Act of 11 April 1962 is clear or unclear, or whether the meaning of the act is obvious or obscure"*.[61] After a thorough analysis of Foreign Minister Spaak's declarations in 1962 and the promises which in-

[60] L. Dierickx, O. Deleuze, et al., *Stuk 784 (1983-1984), Nr. 1*, 17 November 1983.

[61] L. Dierickx, O. Deleuze, et al., *Stuk 784 (1983-1984), Nr. 2*, 13 July 1984, p. 2.

duced Senator Rolin to withdraw his amendment prohibiting atomic weapons in Belgium on the one hand, and governmental declarations during the parliamentary debates on NATO's dual-track decision in December 1979 and November 1983 on the other, as well as the voting results on motions after these debates, the Council of State concluded:[62]

> "According to the parliamentary preparations in 1962, the Government was not authorized to conclude execution agreements which would have made it possible to construct launching sites or deploy nuclear ammunition on national territory for use by foreign armed forces. On the other hand, when replying to interpellations on the 'installation of Euro-missiles', the Government declared it had the right to decide whether forces of other NATO member states may be armed with nuclear weapons and construct launching sites.
> "Therefore, the Act of 11 April 1962 can be interpreted one sense or the other. [...]
> "[For the sake of legal security] the legislator may use provisions which give an authentic explication of the act, or provisions which amend or supplement that act."

During the parliamentary debates on the bill, the Foreign Minister made it clear that the text concerned the way in which a decision to deploy the missiles is taken and not the installation itself; that according to Article 68 of the Constitution defence policy is the prerogative of the King; and, finally, that the Act of 11 April 1962 does not impose any restriction on the weaponry foreign troops carry with them.[63] The bill was defeated on 14 February 1985. The Council of State therefore concluded in its advice to the bill by Van Miert and Chevalier that the Act of 11 April 1962 is no longer open to dual interpretation. As a consequence, Parliament no longer has the means of an interpretative law at its disposal since the basic condition for its application is no longer present. Whether or not chemical weapons can be deployed on Belgian territory is a decision which, according to the Council of State, belongs to the exclusive competence of the executive branch.

4.4 The Aftermath.

In May 1988, the Socialists replaced the Liberals in the Government. The Government policy statement included a passage on chemical warfare in *Chapter IV: Foreign Policy and Defence; Paragraph B. Peace and Security*:[64]

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[62] L. Dierickx, O. Deleuze, et al., *Stuk 784 (1983-1984), Nr. 2*, 13 July 1984, p. 10.

[63] P. Chevalier, K. Van Miert, *Stuk 489 (1985-1986), nr. 2, Advies van de Raad van State*, 10 March 1987, p. 3.

[64] As reprinted in *De Standaard*, 3 May 1988, p. 26.

5. The Government is of the opinion that the INF Treaty must be followed as soon as possible by agreements for further nuclear, chemical, bacteriological, and, in particular, conventional arms control and disarmament;

[...]

- **chemical weapons:** the Government advocates a comprehensive and global ban on chemical weapons; it will strive for an international agreement to this effect within the framework of the current negotiations. The international agreement must include:
  - a definition of what must be considered a chemical weapon;
  - a ban on the development, production and stockpiling of chemical weapons;
  - a balanced and controlled reduction of existing stocks.

The Government will lend its full support so that such an agreement would be first accomplished and implemented in Europe. It proposes that the agency responsible for the verification measures relating to chemical weapons be established in Belgium.

Meanwhile, the Government rejects any deployment of chemical weapons on our territory.

[...]

The Government thus sought to remove the ambiguity which had arisen from the parliamentary debates on the U.S. chemical force goal. The wording, however, did not indicate that it wished to bind future governments in the same manner to this seemingly unequivocal declaration of non-deployment on Belgian territory. Nor did the paragraph explicitly exclude the possibility of a discordant governmental decision in times of crisis or war.

On 23 March 1989, the Francophone Socialist MP Eerdekens made a final legislative attempt to prohibit the production, storage, and use of chemical weapons by Belgium.[65] The bill raised no constitutional conflicts as the provisions aimed at restricting the Belgian Armed Forces or subjects, and not foreign troops on Belgian territory. The Council of State confirmed its earlier view that the legislative branch may always restrict the competence of the Executive laid down in Article 68 of the Constitution by outlawing the use of certain weapons by Belgian troops.[66] The issue of foreign troops armed with chemical weapons stationed or passing through Belgium was raised during the Committee debate. However, one MP dismissed the problem arguing that such ammunition is only useful if it is stored near the front-line and added that the projected chemical weapons convention will settle that debate.[67] The author of the bill eventually replaced it with a resolution, urging all states to abide by the provisions of the 1925 Geneva Protocol and the Belgian Government to intensify its efforts in the Committee on Disarmament. It was unanimously adopted in February 1991.[68]

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[65] C. Eerdekens, et al., 23 March 1989.

[66] C. Eerdekens, et al., *Avis du Conseil d'Etat*, 8 January 1990, p. 4.

[67] *Parlement, Notules du début de la discussion [...]*, July 1989.

[68] C. Eerdekens, et al., 6 February 1991.

Chapter 5

Concluding remarks.

Today, there still exists no single interpretation whether the Government constitutes the sole authority invested with the competence to decide which weapon systems other NATO troops may deploy on Belgian territory. However, in view of the parliamentary debates on the 1979 dual-track decision, the debates on the deployment decision itself, and the rejection of a bill interpreting the Act of 11 April 1962, Parliament has repeatedly indicated that such matters are governmental prerogatives. Government ministers have always expressed their views in unambiguous terms. They have argued that the branches of the State are not completely and equally sovereign. Regarding foreign and defence policies, the Executive holds a dominating position over the other branches, and therefore possesses exclusive judgment. Parliament's role is limited to general and specific political control. Consequently, Ministers have systematically defended the position that the execution of security policies under the Act of 11 April 1962 only requires implementation agreements between the governments concerned. Moreover, the term *troops* used in that act comprises both personnel and their equipment, including any type of weapon. Therefore, implementation agreements authorizing new weapon systems on Belgian soil cannot burden the Belgian State in the sense that they would form a new treaty requiring parliamentary assent. Parliament sanctioned governmental behaviour on the basis of such declarations and interpretations. Both the Section Legislation and the Section Administration of the Council of State have consequently formulated the opinion that the Act of 11 April 1962 is no longer ambiguous and that it is no longer necessary to examine that particular issue in future disputes.

On the other hand, in the case against the Belgian State, the Auditor of the Council of State disputed the Government's exclusive competence in defence matters. The defendants had contested the Council of State's competence on the grounds that the deployment authorization constituted an Act of Government, which involved a political choice for which the executive branch possesses the sole power. The Auditor concluded on the basis of jurisprudence that one of the most important conditions for exercising such a competence was the requirement that the act must be exclusively subject to the political control of a political organ. Only such a sovereign and infallible (sic) power of judgement could exclude any juridical control. Regarding the deployment of weapons of foreign troops on Belgian soil, the Auditor held the view that the Constitution does not invest the Government with such sovereign and infallible power of judgment or that

the Executive possesses exclusive responsibility. *"Making decisions in the sphere of foreign policy or national defence, in particular if they relate to the presence of foreign troops on Belgian territory, is invested by the Constitution in certain State Authorities, without any political authority receiving a clear mandate from the constitutioner to make a definitive and binding judgment on the subject matter."*[1]

The major reason why we posit that there still exists no single interpretation is because the Section Administration of the Council of State (which belongs to the Judiciary) has not made a final ruling in the case against the Belgian State. Therefore, neither opinion has been confirmed, nor have they been refuted. It is unlikely that the Council of State will make a final judgment now the United States have withdrawn the cruise missiles under the provisions of the 1987 INF Treaty. Indeed, the ramifications of such a ruling would be far-reaching. An arret of the Section Administration nullifying administrative acts binds all authorities and courts. More important for the present discussion, such a judgment must be interpreted in the sense that the administrative act has never existed. Its effects are therefore retroactive. The arret is also final as no other legal instruments against the Council of State are available. However, the Council of State's competence is limited to ascertaining the legality of an administrative act. The body does not rule on the opportunity of such a decision. This means that the authorities concerned can determine their position anew taking into consideration all aspects it deems relevant.[2] Consequently, as the Auditor believed the request to revoke the missile deployment decision to be permissible, the Council of State placed itself in the quandary that it may have to nullify a governmental decision[3] which was founded on firm political pledges to NATO and, in the meantime, on juridical commitments with SHAPE and the United States. In other words, the whole fabric of Belgium's external security policy as member of NATO was at issue. As the juridical debate between the requesters and the defendants shifted to the juridical consequences of essentially political arguments, there is no way that an arret by the Council of State would not stir the issue of political opportunity of the deployment decision. The legal repercussions of nullifying the decision of 14 March 1985 today remain an open question, especially since the missiles had been deployed and were later withdrawn. Nevertheless, we may wonder whether the absence of an arret is in itself not an implicit expression of the Council of State's view on the political opportunity of such a ruling.

The competence of the Section Legislation of the Council of State is purely advisory and limited to the technical-juridical aspects of a bill.[4] Therefore, the opinion that Parliament has exhausted its legal possibilities for interpreting the Act of 11 April 1962 because ambiguity no longer exists is not binding. Additionally, one legal authority maintained that a vote of confidence following a parliamentary debate on a controversial decision cannot be considered as a sanctioning of that particular decision, but only as

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[1] *Raad van State, Verslag*, 18 September 1986, p. 26.

[2] *Raad van State, Verslag*, 18 September 1986, p. 27.

[3] The defendants therefore strongly pleaded that the decision was a political Act of Government permitted under Article 68 of the Constitution and not an administrative legal act.

[4] A. Mast; J. Dujardin, 1987, p. 270.

some kind of investiture for the Government.[5] The problem is for these reasons more practical and political. Few MPs display a keen interest in the external aspects of Belgium's security policy. As the debates on the recent bill by Mr Eerdekens have revealed, the opportunity of stirring up the controversy again is not present. Other issues are considered more pressing. In any case, the requirement of strict party discipline to ensure a parliamentary majority for the coalition government, means that any initiative would have to obtain the backing of the own parliamentary group prior to any broad political debate. Even then, procedural obstacles are abound.

As for the Government, during the eighties, it has strengthened its claim to exclusive competence regarding the execution of foreign and external security policies. There is little chance of that view being challenged in the near future. However, as the issue of the binary force goal has demonstrated, the Government certainly does not possess that *infallible power of judgment* that the Auditor of the Council of State believed necessary to claim such exclusive competence. That infallibility may be an exaggeration in a secular state. Nevertheless, the government has demonstrated that it constructs (certain) foreign policy decisions on an extremely narrow base of facts. Moreover, it only has a limited capability of judging that information independently. For example, shortly after taking up office in November 1985, Defence Minister de Donnéa was briefed on the Soviet chemical threat by the Pentagon. He expressed his amazement about the Soviet CW armament efforts during an interpellation in a parliamentary committee.[6] The briefing undoubtedly influenced him when preparing the Belgian position on the U.S. binary force goal. For the Pentagon, the meeting had its importance in view of the NATO force goal timetable. The Government also refused any debate on the core of the policies regarding the cruise missiles or chemical weapons arguing that judging the political opportunity is its exclusive prerogative. Meanwhile, it produced decisions that are equivocal at the least, which, as the ministerial visit to the White House in January 1985 demonstrated, may unwittingly place it in a political straightjacket.

In our view, this is why the ambiguity surrounding Article 121 of the Constitution and the Act of 11 April 1962 should be lifted once and for all in a time when security commitments in NATO and the WEU are rapidly changing.

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[5] A. Mast, *Administratief Lexicon*, as quoted in: *Raad van State, Memorie van Wederantwoord*, 3 February 1986, p. 48.

[6] *Parlement, Commissie voor de Landsverdediging, Kamer van Volksvertegenwoordigers*, 14 May 1986, p. 8.

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