

# NUCLEAR ARMS CONTROL BY A PEN AND A PHONE: EFFECTUATING THE COMPREHENSIVE TEST BAN TREATY WITHOUT RATIFICATION

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## ABSTRACT

*This Article examines three crucial national security problems concerning the testing and proliferation of nuclear weapons, and offers three novel solutions. The three urgent problems are: (1) the fact that the Comprehensive Nuclear Test Ban Treaty (CTBT), the most important multilateral nuclear arms control agreement of the past forty years, may never enter into force; (2) the fact that without CTBT, the global non-proliferation regime is in trouble, too, as the fragile consensus underpinning the world's efforts to restrict the spread of nuclear weapons threatens to unravel; and (3) the fact that the United States is peculiarly disabled, due to persistent internal political discord, from exercising the leadership necessary to address these difficulties.*

*In that dissonant environment, President Barack Obama has heralded his willingness to proceed with his progressive agenda “with a pen and a phone”—if Congress is irreconcilably deadlocked, he will use his pen to sign executive orders and other agency actions and his telephone to convene meetings of concerned stakeholders. The president has already proceeded with those tactics in numerous areas of domestic policy. Thus, this Article proposes cognate strategies in the international realm to rescue the CTBT and the global non-proliferation order.*

*The three innovative options presented here are: (1) the adoption of a legally binding resolution by the United Nations Security Council to declare nuclear weapons testing a “threat to the peace”; (2) the creation of a new norm of “customary international law” prohibiting such testing; and (3) the adoption by relevant states of legally binding “unilateral undertakings” to refrain from testing.*

*Each of these options would promote U.S. national security and global stability by legally entrenching the current voluntary moratoria against nuclear*

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*testing. Each has precedents in international arms control practice, although none has ever been exercised regarding issues of this consequence. Each is, admittedly, inferior to prompt effectuation of the CTBT via a Senate vote of advice and consent, and would institute only a portion of what would be accomplished via formal entry into force of that treaty. But each option can be effectuated by the executive branch unilaterally, not being hostage to legislative branch stasis; if current political circumstances preclude, for the foreseeable future, the favored ratification option, the United States and other key players should seriously consider these alternative mechanisms to pursue preservation of the CTBT and the non-proliferation regime.*

I.	INTRODUCTION . . . . .	476
II.	THE COMPREHENSIVE TEST BAN TREATY . . . . .	480
	A. <i>Structure of the CTBT</i> . . . . .	480
	B. <i>Importance of the CTBT</i> . . . . .	482
	C. <i>Evolution of the CTBT</i> . . . . .	484
	D. <i>Current Status of the CTBT</i> . . . . .	486
	E. <i>Interim Measures</i> . . . . .	487
	F. <i>Political Prospects for the CTBT</i> . . . . .	489
	G. <i>Bottom Line</i> . . . . .	491
III.	NUCLEAR NON-PROLIFERATION . . . . .	491
	A. <i>The NPT</i> . . . . .	491
	B. <i>CTBT and NPT</i> . . . . .	493
IV.	U.S. POLITICAL GRIDLOCK . . . . .	495
V.	U.N. SECURITY COUNCIL RESOLUTION . . . . .	500
	A. <i>What This Mechanism Would (and Would Not)</i> <i>Accomplish</i> . . . . .	502
	B. <i>Bottom Line</i> . . . . .	505
VI.	CUSTOMARY INTERNATIONAL LAW . . . . .	506
	A. <i>Legal Effect</i> . . . . .	510
	B. <i>Bottom Line</i> . . . . .	510
VII.	UNILATERAL UNDERTAKINGS . . . . .	511
	A. <i>French Nuclear Tests Case</i> . . . . .	512
	B. <i>Legal Effect</i> . . . . .	515
VIII.	CONCLUSION . . . . .	515

I. INTRODUCTION

This Article addresses three serious interlocking national security problems connected to the testing and proliferation of nuclear weapons and investigates three novel possible solutions that lie within the exclusive province of the U.S. executive branch. The three clamorous problems are:

(1) The fact that the Comprehensive Test Ban Treaty (CTBT),<sup>1</sup> indisputably the most important multilateral nuclear arms control agreement of the past forty years, may never enter into force. This ambitious instrument—a crucial legal impediment against the nuclear arms race and the further proliferation of nuclear weapons capabilities—was signed with great international ceremony on September 24, 1996, and has now been ratified by 163 countries, notably not including the United States.<sup>2</sup> But because of its peculiarly stringent ratification requirements, it has not entered into force for anyone, and there is no prospect that it can be formally executed in the foreseeable future.

(2) The fact that without CTBT, the global non-proliferation regime is faltering. Timely implementation of the CTBT has long been appreciated as the critical litmus test for preserving and extending the vital global consensus underlying the 1968 Nuclear Non-Proliferation Treaty (NPT).<sup>3</sup> Lacking this paramount validation, the “basic bargain” of the NPT threatens to unravel, with disastrous consequences for international stability and security.

(3) The fact that sustained political turmoil in the United States—specifically, the disabling blockage of the U.S. Senate—has foreclosed the obvious, traditional routes for addressing problems one and two. Rabid partisanship has occluded reasoned legislative consideration of the merits of the CTBT and threatens to undermine U.S. leadership in promoting these most essential elements of international arms control order.

Creative thinking is therefore urgently required, to identify alternative routes for timely pursuit of these indispensable national security goals. The three ideas explored here are:

(1) The possibility that the United Nations Security Council, acting pursuant to Chapter VII of the U.N. Charter,<sup>4</sup> could adopt a legally-binding resolution authoritatively finding that nuclear weapons testing by any state would constitute a “threat to the peace,” and ordering that it shall not be done.

(2) The possibility that the United States and the other leading international actors could cooperate in the development and promul-

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1. Comprehensive Nuclear-Test-Ban Treaty, *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439, S. Treaty Doc. No. 105-28 (not yet in force) [hereinafter CTBT].

2. *Status of Signature and Ratification*, CTBTO.ORG, <http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/> (last visited Nov. 20, 2014).

3. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 168 (entered into force Mar. 5, 1970) [hereinafter NPT].

4. U.N. Charter art. 39.

gation of a new norm of “customary international law,” paralleling the testing prohibitions of the CTBT and binding all states, even in the absence of an operational treaty.

(3) The possibility that the current “moratoria” against testing, declared individually by the most critical states, could be converted into legally binding, albeit unilateral, obligations, as the International Court of Justice (I.C.J.) determined had occurred forty years ago with a similar partial declaration by France.<sup>5</sup>

Notably, the executive branch could pursue each of these three alternative pathways without the concurrence of the U.S. Senate. In January 2014, President Barack Obama famously declared that if Congressional intransigence threatens to paralyze imperative national initiatives, he will promote his progressive agenda “with a pen and a phone.”<sup>6</sup> He explained that he would use his pen to sign executive orders and other enabling instruments and that he would wield the telephone to convene productive meetings and persuade others to join the enterprise.<sup>7</sup> Already, the White House “bully pulpit” has been employed to promote important, but otherwise-mired causes in domestic policy, including a federal minimum wage, environmental protection, and immigration reform.<sup>8</sup> This Article contemplates an international correlate of that strategy, promoting meaningful nuclear arms control in pursuit of a CTBT with a pen and a phone.

Of course, the traditional avenues for accomplishment of nuclear arms control—obtaining the advice and consent of two-thirds of the Senate to the ratification of the CTBT—would be preferable. The wisdom of the constitutional scheme is readily apparent, and the proposed alternatives would be unable to incorporate all the important features that formal entry into force of the treaty would provide. But if an artificial political impediment has constipated the usual legislative processes, then possible fallback routes for circumvention must be considered, especially when, as here, the provocation concerns the existential dangers of nuclear weaponry.

This Article addresses each of these points in turn. After this introduction, Part II discusses the CTBT in more detail, elaborating what the treaty would accomplish; why it is so important to the public order of

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5. *See* Nuclear Tests Case (Aus. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

6. *Remarks by the President Before Cabinet Meeting*, THE WHITE HOUSE (Jan. 14, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/14/remarks-president-cabinet-meeting>.

7. *Id.*

8. *See infra* text accompanying notes 93-100.

the world community; what its current status is; and why the entry into force of the accord has become so bogged down in international and domestic U.S. politics. Part III turns to nuclear non-proliferation, explaining why this policy objective remains preeminent, and why there has always existed an indelible linkage between CTBT and the NPT, such that failure to effectuate the test ban treaty threatens the core of the global commitment against the spread of nuclear weapons.

Part IV is devoted to parsing the sad story of contemporary U.S. political incompetence, whereby the federal executive and legislative branches have arrived at such persistent loggerheads that even the most vital aspects of national security policy have run unaddressed. President Obama's "pen and phone" approach to circumventing the congressional dead zone has proven at least partially successful in selected areas of domestic policy, despite dogged Republican resistance, and it deserves consideration for international application, too.

Part V presents the first of the three surrogate pathways. The U.N. Security Council possesses an extraordinary capability to create binding international law. Exercising its Chapter VII powers, it could "decide" that no further nuclear weapons testing shall be done, and all U.N. members would be legally obligated to comply. Such a legislative resolution would immediately insinuate the heart of the CTBT into international law—but would likely not incorporate all aspects of the treaty regime.

Part VI considers a second alternative: the transformation of state practice into binding customary international law. Most of the leading players have declared longstanding moratoria on nuclear testing—the United States, for example, last conducted a nuclear explosion on September 23, 1992. That pattern of self-restraint could be converted into legal obligation simply by altering the states' public characterizations of their actions, without signing on any new dotted lines. Part VII then pursues a similar train of analysis, grounded in a famous 1974 I.C.J. decision that France's earlier declaration of an intention to halt *atmospheric* testing of nuclear weapons above the South Pacific had hardened into a unilateral legal obligation;<sup>9</sup> perhaps a similar sleight-of-hand can now be worked regarding *all* testing.

Finally, Part VIII offers some concluding thoughts, beginning with the concession that the United States and the world would be better off pursuing the traditional avenues for creation of international legal

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9. See Nuclear Tests Case (Aus. v. Fr.), 1974 I.C.J. 253 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20).

obligations, rather than these half-baked alternatives. Both from the standpoint of democratic theory and in terms of the content of the resulting legal obligations, formal treaty ratification is the most satisfactory mechanism for instituting reliable, detailed commitments. But if the front door to crucial international law is blocked, consideration must be given to circumventing the political anomie via back door mechanisms for advancement of the CTBT and preservation of the NPT.

## II. THE COMPREHENSIVE TEST BAN TREATY

The CTBT has long been the “holy grail” of disarmament—an objective of surpassing importance, pursued with ceaseless vigor by legions of zealots around the world for more than half a century despite overwhelming obstacles, and remaining forever tantalizingly out of reach.<sup>10</sup> This Part begins by describing the basic structure of the treaty and its importance as a measure of arms control and non-proliferation. It then addresses the evolution and current status of the treaty, as well as the partial interim test moratorium and verification measures that are already in place, and the grim political prospects for the CTBT’s timely entry into force.

### A. *Structure of the CTBT*

The basic obligations of the treaty are stated with deceptive simplicity: “Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control.”<sup>11</sup>

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10. President Bill Clinton called the CTBT “the longest-sought, hardest-fought prize in the history of arms control.” Remarks by President Bill Clinton to the 52nd Session of the United Nations General Assembly, WHITE HOUSE (Sept. 22, 1997, 10:50 AM), <http://clinton4.nara.gov/WH/New/html/19970922-20823.html>; see also U.S. Dep’t of State, *History of the CTBT*, STATE.GOV (July 24, 2013), <http://www.state.gov/t/avc/rls/212186.htm>; TOM Z. COLLINA WITH DARYL KIMBALL, NOW MORE THAN EVER: THE CASE FOR THE COMPREHENSIVE NUCLEAR TEST BAN TREATY, (2010); JONATHAN MEDALIA, CONG. RESEARCH SERV., RL33548, COMPREHENSIVE NUCLEAR-TEST-BAN TREATY: BACKGROUND AND CURRENT DEVELOPMENTS (2014).

11. CTBT, *supra* note 1, art. I(1). In addition, each party undertakes “to refrain from causing, encouraging, or in any way participating in the carrying out” of any nuclear explosion. *Id.* art. I(2). The reference to “other” nuclear explosions, beyond “test” explosions, is designed to bring within the ambit of the CTBT so-called “nuclear explosions for peaceful purposes,” such as those that might be conducted for civil engineering operations to re-route a river or to deepen a shipping channel. See *infra* text accompanying note 41 (regarding PNET).

In support of that terse basic ban, the vast bulk of the treaty consists of two kinds of operational structures: those connected to verification of compliance and those specifying the mechanics of the new international organization that will implement the treaty. Regarding verification, the CTBT represents the state of the art in arms control,<sup>12</sup> incorporating elaborate provisions for both an international monitoring system (IMS)<sup>13</sup> and on-site inspection (OSI).<sup>14</sup> The IMS comprises four technologies to be installed on 337 diverse facilities dispersed around the world:<sup>15</sup> 170 seismic stations;<sup>16</sup> 60 infrasound depots;<sup>17</sup> 11 hydroacoustic installations;<sup>18</sup> and 96 radionuclide monitors and laboratories.<sup>19</sup> These installations are designed to provide swift, authoritative detection, identification, location and characterization of any clandestine nuclear explosion, enabling the treaty parties to respond in an appropriately vigorous, clear-eyed fashion.<sup>20</sup>

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12. NATIONAL ACADEMY OF SCIENCES, *THE COMPREHENSIVE NUCLEAR TEST BAN TREATY: TECHNICAL ISSUES FOR THE UNITED STATES* 35-7635-76 (2012); COLLINA, *supra* note 10, at 14-19.

13. CTBT, *supra* note 1, art. IV(B), Protocol Part I; NATIONAL ACADEMY OF SCIENCES, *supra* note 12, at 39-43; *Verification Regime*, CTBTO.ORG, <http://www.ctbto.org/verification-regime/> (last visited Nov. 22, 2014); *CTBT: International Monitoring System*, STATE.GOV (July 24, 2013), <http://www.state.gov/t/avc/rls/212176.htm>.

14. CTBT, *supra* note 1, art. IV(D), Protocol Part II; *The Final Verification Measure*, CTBTO.ORG, <http://www.ctbto.org/verification-regime/on-site-inspection/the-final-verification-measure/> (last visited Nov. 22, 2014).

15. CTBT, *supra* note 1, Annex 1 to the Protocol (listing locations of the stations).

16. The seismic network monitors various types of energy waves transmitted through the earth; it consists of fifty “primary” stations that provide data continuously on-line, and 120 “auxiliary” stations that contribute data on request. *Seismic Monitoring*, CTBTO.ORG, <http://www.ctbto.org/verification-regime/monitoring-technologies-how-they-work/seismic-monitoring/> (last visited Nov. 22, 2014).

17. Infrasound monitors detect minute changes in atmospheric pressures, which could indicate an atmospheric nuclear explosion. The network consists of sixty stations located in thirty-five countries, relaying data twenty-four hours a day, seven days a week. *Infrasound Monitoring*, CTBTO.ORG, <http://www.ctbto.org/verification-regime/monitoring-technologies-how-they-work/infrasound-monitoring/> (last visited Nov. 22, 2014).

18. The eleven hydroacoustic stations monitor energy waves propagated through the oceans, particularly valuable for detecting underwater nuclear explosions. *Hydroacoustic Monitoring*, CTBTO.ORG, <http://www.ctbto.org/verification-regime/monitoring-technologies-how-they-work/hydroacoustic-monitoring/> (last visited Nov. 22, 2014).

19. Radionuclide monitors detect radioactive particles and noble gases in the atmosphere; there are eighty monitoring stations and sixteen laboratories in twenty-seven countries. *Radionuclide Monitoring*, CTBTO.ORG, <http://www.ctbto.org/verification-regime/monitoring-technologies-how-they-work/radionuclide-monitoring/> (last visited Nov. 22, 2014).

20. *See, e.g.*, the organization’s success in detecting evidence about North Korea’s 2013 nuclear weapon test. *CTBTO Detects Radioactivity Consistent with 12 February Announced North Korean Nuclear Test*, CTBTO.ORG (Apr. 23, 2013), <http://www.ctbto.org/press-centre/press-releases/>

The OSI provisions enable parties to trigger an intrusive, extended inspection by the organization of any site where a nuclear explosion may have been carried out in violation of the treaty.<sup>21</sup> The inspectors, laden with the best available detection, observation and analytic equipment, will be empowered to scour and sample the relevant land, water, air, flora, and fauna to gather evidence and to report their findings objectively and in detail to the world community.<sup>22</sup>

The second important category of the treaty's implementation measures concerns the creation and empowerment of the Comprehensive Nuclear Test-Ban Treaty Organization (CTBTO), which will pursue the object and purpose of the treaty and provide a forum for consultation, cooperation, and dispute resolution among the parties.<sup>23</sup> The CTBTO will be the vehicle through which parties make and respond to inquiries about possibly ambiguous activities related to the treaty obligations and operate the IMS and OSI functions.<sup>24</sup> Like other cognate institutions, the CTBTO will consist of three organs: an inclusive Conference of the States Parties, a smaller Executive Council, and a permanent staff of the Technical Secretariat.<sup>25</sup>

### B. *Importance of the CTBT*

Many arms control experts consider CTBT to be the most important nuclear treaty. Although the SALT and START accords and others in the alphabet soup of arms control can contribute direct limitations upon the numbers of strategic and other nuclear weapons,<sup>26</sup> only CTBT focuses on the "qualitative" aspects and directly impedes countries' abilities to engineer ever-better, more sophisticated types of new nuclear devices.<sup>27</sup> It is thus uniquely suited to the tasks of interdicting

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2013/ctbto-detects-radioactivity-consistent-with-12-february-announced-north-korean-nuclear-test/.

21. CTBT, *supra* note 1, art. IV(D).

22. *Id.* Protocol Part II(E).

23. *Id.* art. II(A)(1).

24. *Id.* arts. V-VI.

25. *Id.* art. II.

26. ARMS CONTROL ASS'N, *U.S.-Russian Nuclear Arms Control Agreements at a Glance* (Apr. 2014), <http://www.armscontrol.org/factsheets/USRussiaNuclearAgreementsMarch2010> (summarizing progression of bilateral U.S.-Soviet/Russian agreements to limit and reduce their nuclear warheads and delivery systems over four decades).

27. CTBTO PREPARATORY COMM'N, *Who We Are, Why is the CTBT important?*, <http://www.ctbto.org/specials/who-we-are/> (last visited Nov. 22, 2014); David A. Koplow & Philip G. Schrag, *Phasing Out Nuclear Weapons Tests: The Belmont Conference on Nuclear Test Ban Policy*, 26 STAN. J. INT'L L. 205, 217 (1989) (reporting that a test ban at the appropriate times would have prevented or



both “horizontal” proliferation (i.e., the spread of nuclear weapons capabilities to additional countries) and “vertical” proliferation (i.e., the elaboration and enhancement of the nuclear arsenals of the countries that already field the weapons).<sup>28</sup>

It is important not to overstate here the claims about the treaty’s effectiveness. In truth, a determined, well-resourced and technologically sophisticated “threshold” country could probably develop a functional nuclear weapon (especially if content with a relatively simple and perhaps cumbersome “first generation” device) even without conducting a single nuclear explosion.<sup>29</sup> Likewise, a country that has already conducted many tests and that already possesses a substantial nuclear weapons cache could probably refine or enhance those weapons in various ways without undertaking additional testing.<sup>30</sup> But those are risky strategies; conservative military and political tacticians favor extensive developmental and proof testing before committing to fund, develop, manufacture, and deploy new weapons—and certainly before brandishing and relying upon those instruments in international confrontations or combat. History is replete with illustrations of weapons that did not function as initially anticipated, and that required exten-

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greatly inhibited the turns in the superpower nuclear arms race that produced hydrogen bombs, ICBM warheads, and multiple warheads for missiles); Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty, *Final Declaration and Measures to Promote the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty*, CTBTO.ORG (Sept. 27, 2013), [http://www.ctbto.org/fileadmin/user\\_upload/Art\\_14\\_2013/Statements/Final\\_Declaration.pdf](http://www.ctbto.org/fileadmin/user_upload/Art_14_2013/Statements/Final_Declaration.pdf) (asserting that the test ban, “by constraining the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and non-proliferation in all its aspects”); MEDALIA, *supra* note 10.

28. See ARMS CONTROL ASS’N, *CTBT at 15: Status and Prospects* (Oct. 2012), available at [http://www.armscontrol.org/files/ACA\\_CTBT\\_Report\\_Vienna\\_2012.pdf](http://www.armscontrol.org/files/ACA_CTBT_Report_Vienna_2012.pdf) [hereinafter *CTBT at 15*] (discussing the CTBT’s role in curbing both horizontal and vertical proliferation); see generally P. Terrence Hopmann, *The Verification Debate and Its Effects on the Negotiation Process*, in *BANNING THE BANG OR THE BOMB? NEGOTIATING THE NUCLEAR TEST BAN REGIME* 32 (Mordechai Melamud et al., eds., 2014); Christopher F. Chyba, *Time for a Systematic Analysis: U.S. Nuclear Weapons and Nuclear Proliferation*, *ARMS CONTROL TODAY* (Dec. 2008); Darryl Howlett & John Simpson, *The NPT and the CTBT: An Inextricable Relationship?*, 1 PROGRAMME FOR PROMOTING NUCLEAR NON-PROLIFERATION (1992).

29. See Koplow & Schrag, *supra* note 27, at 223 (Israel and South Africa each developed nuclear weapons without apparently conducting a nuclear test); ARMS CONTROL ASS’N, *Arms Control and Proliferation Profile: Israel* (July 2013), <http://www.armscontrol.org/factsheets/israelprofile>; ARMS CONTROL ASS’N, *Nuclear Weapons: Who Has What at a Glance* (June 23, 2014), <http://www.armscontrol.org/factsheets/Nuclearweaponswhohaswhat>.

30. See Koplow & Schrag, *supra* note 27, at 218-19; MOHAMED I. SHAKER, *THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979 619-20* (1980).

sive testing and tweaking before attaining operational status.<sup>31</sup> A timely and effective test ban, therefore, could succeed in pinching off the next twist in an arms race or the next dissemination of a weapons capability to additional possessors.

C. *Evolution of the CTBT*

Countries have conducted some 2,053 explosive nuclear tests since 1945 at sites from Lop Nor in China to the South Pacific to Nevada to Australia.<sup>32</sup> The CTBT, too, has been under consideration, development and iterative negotiation since the dawn of the nuclear era. Indeed, as early as 1954, Indian Prime Minister Jawaharlal Nehru proposed a “standstill agreement” on nuclear testing.<sup>33</sup> From 1958 to 1961, the United States and the Soviet Union observed unilateral, parallel moratoria on nuclear testing, but were unable to reach agreement on a complete, legally binding accord.<sup>34</sup> They came close again in 1978-80, but those negotiations foundered, too, over verification and related issues.<sup>35</sup>

The CTBT is emphasized as a “comprehensive” treaty because it follows a series of partial or incomplete instruments in the same vein.

31. See, e.g., Robert Gard & Philip Coyle, *America’s Massive Missile-Defense Mistake*, THE NATIONAL INTEREST (June 30, 2014), <http://nationalinterest.org/feature/americas-massive-missile-defense-mistake-10768> (arguing that repeated test failures should lead to delay in deployment of additional missile defense assets); Andrea Shalal, *Pentagon Plans Work on New Missile Defense Interceptor*, REUTERS (Feb. 25, 2014), <http://www.reuters.com/article/2014/02/26/us-usa-budget-missile-idUSBREA1P03F20140226> (reporting that Under Secretary of Defense for Acquisition Frank Kendall attributed problems in missile defense program to prior decisions to rush deployment of technologies that had not been thoroughly tested).

32. ARMS CONTROL ASS’N, *The Nuclear Testing Tally* (Feb. 2013), <http://www.armscontrol.org/factsheets/nucleartesttally> (listing tests conducted by each of the eight countries, including 1,030 by the United States, 715 by the Soviet Union/Russia, 210 by France, 45 by the United Kingdom, 45 by China, 3 by India, 3 by North Korea, and 2 by Pakistan).

33. CTBTO PREPARATORY COMM’N *1945-54: Early Efforts to Restrain Nuclear Testing* (Nov. 21, 2014), <http://www.ctbto.org/the-treaty/history-1945-1993/1945-54-early-efforts-to-restrain-nuclear-testing>; Pierce S. Corden, *Historical Context and Steps to Implement the CTBT*, in *BANNING THE BANG OR THE BOMB?: NEGOTIATING THE NUCLEAR TEST BAN REGIME* 17 (I. William Zartman, Mordechai Melamud & Paul Meerts eds., 2014).

34. CTBTO PREPARATORY COMM’N, *1945-1993: From Peace Movement to Missile Crisis* (Nov. 21, 2014), <http://www.ctbto.org/the-treaty/history-1945-1993/1955-62-from-peace-movement-to-missile-crisis/>.

35. CTBTO PREPARATORY COMM’N, *1977-94: Renewed Test Ban Commitments, More Attempts at a Comprehensive Test Ban* (Nov. 21, 2014), <http://www.ctbto.org/the-treaty/history-1945-1993/1977-94-renewed-test-ban-commitments/>.

The 1963 Limited Test Ban Treaty (LTBT),<sup>36</sup> for example, prohibited explosive testing in the atmosphere, in outer space, or under water—thereby confining the explosions to deep underground chambers, from which the hazardous radioactive materials would not leak into the biosphere.<sup>37</sup> It has been joined by 126 countries.<sup>38</sup>

The 1974 Threshold Test Ban Treaty (TTBT) and its 1990 Protocol<sup>39</sup> were bilateral agreements under which the United States and the Soviet Union agreed to restrict the size of their underground nuclear tests to no more than 150 kilotons yield.<sup>40</sup> The 1976 Peaceful Nuclear Explosions Treaty (PNET), again accompanied by a 1990 Protocol,<sup>41</sup> extended the same size limitation to nuclear explosions conducted for peaceful, rather than weapons, applications.<sup>42</sup>

36. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313 [hereinafter LTBT].

37. See ARMS CONTROL ASS'N, *Limited Test Ban Treaty (LTBT)* (Nov. 21, 2014), <http://www.armscontrol.org/documents/LTBT> (characterizing the LTBT as both an arms control instrument and a measure of environmental protection; note that the preamble and art. I.1.b of the LTBT cite the parties' intention to achieve a CTBT).

38. U.N. OFFICE FOR DISARMAMENT AFFAIRS, *Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Underwater*, [http://disarmament.un.org/treaties/t/test\\_ban](http://disarmament.un.org/treaties/t/test_ban) (last visited Jan. 3, 2015); see also The Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 5778 (prohibiting nuclear testing on that continent); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty] (prohibiting nuclear testing on the moon); Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, Feb. 11 1971, 955 U.N.T.S. 115 (prohibiting nuclear testing on the sea-bed).

39. Treaty on the Limitation of Underground Nuclear Weapon Tests, U.S.-U.S.S.R., July 3, 1974, 1714 U.N.T.S. 217 (entered into force Dec. 11, 1990) [hereinafter TTBT] (the TTBT preamble and art. I.3 cite the parties' continuing intention to pursue negotiation of a CTBT); U.S. DEPARTMENT OF STATE, *Treaty Between the United States of American and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests (and Protocol Thereto)*, <http://www.state.gov/t/isn/5204.htm#narrative> (last visited Jan. 3, 2015) (providing additional verification measures beyond those specified in the original treaty).

40. ENCYCLOPEDIA BRITANNICA, *Thermonuclear Bomb* (Dec. 12, 2013), <http://www.britannica.com/EBchecked/topic/591670/thermonuclear-bomb?anchor=ref258692> (last updated Dec. 21, 2014) (nuclear explosions are so powerful that their yield is conventionally measured in "kilotons"; one kiloton is the equivalent of 1000 tons of TNT. The weapons that destroyed Japanese cities at the end of World War II were approximately 20 kilotons yield).

41. Treaty on Underground Nuclear Explosions for Peaceful Purposes, U.S.-U.S.S.R., May 28, 1976, 1714 U.N.T.S. 432 [hereinafter PNET].

42. See CTBTO PREPARATORY COMM'N, *Peaceful Nuclear Explosions*, <http://www.ctbto.org/nuclear-testing/history-of-nuclear-testing/peaceful-nuclear-explosions> (last visited Nov. 24, 2014). A "peaceful nuclear explosion" (PNE) is an effort to employ nuclear explosive power for civil

D. *Current Status of the CTBT*

The extant CTBT was negotiated over a two and one-half year period between early 1994 and the signing summit on September 24, 1996, at which President Bill Clinton was the first to affix a signature.<sup>43</sup> To date, 183 states have signed (including all the permanent members of the U.N. Security Council and all the members of NATO) and 163 signatories have ratified.<sup>44</sup>

However, the CTBT includes an unusual and highly problematic specification regarding entry into force. Article XIV, paragraph 1 stipulates that the treaty will become effective 180 days after the deposit of instruments of ratification by all forty-four states identified by name in Annex 2.<sup>45</sup> This roster includes most of the leading states of the world—all those possessing nuclear weapons and those with substantial civilian nuclear programs—whose participation in the treaty would, of course, be highly desirable.<sup>46</sup> But the structure of this provision effectively affords each of the forty-four a “veto” over the entry into force of the treaty for anyone. To date, forty-one of the designated countries have signed, and thirty-six have ratified.<sup>47</sup> The eight Annex 2 holdouts are China, Egypt, India, Iran, Israel, North Korea, Pakistan, and the United States.

engineering purposes, such as digging a canal, enlarging a harbor, or creating an underground storage chamber. During the 1950s and 1960s, enthusiasts contemplated that PNEs would be inexpensive and useful, and numerous nuclear tests in the United States and the Soviet Union were devoted to improving the techniques. Ultimately, environmental and other considerations reduced the appeal of PNEs, and test ban treaties had to treat them identically with weapons development tests, because there was no reliable way to differentiate between peaceful and weapons technologies. *Id.*

43. CTBTO PREPARATORY COMM’N, 1996: *CTBT: A Long-Sought Success*, <http://www.ctbto.org/the-treaty/1993-1996-treaty-negotiations/1996-ctbt-a-long-sought-success/> (last visited Nov. 24, 2014).

44. *Status of Signature and Ratification*, *supra* note 2; see David S. Jonas, *The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion*, 39 N.Y.U. J. INT’L L. & POL. 1007 (2007).

45. CTBT, *supra* note 1, art. XIV(1), Annex 2.

46. The roster of Annex 2 states includes all those who were members of the Conference on Disarmament in 1996 and who appeared on lists prepared by the International Atomic Energy Agency of countries with nuclear power or research reactors. *Id.* Annex 2; CTBTO PREPARATORY COMM’N, 1994-96: *Entry into Force Formula*, <http://www.ctbto.org/the-treaty/1993-1996-treaty-negotiations/1994-96-entry-into-force-formula> (last visited Nov. 24, 2014).

47. Three Annex 2 states have not signed the CTBT: India, North Korea, and Pakistan. Those three, plus China, Egypt, Iran, Israel, and the United States have not ratified. *Status of Signature and Ratification*, *supra* note 2.

Perhaps some of the fence-sitters are merely awaiting U.S. ratification before they finally commit themselves, too. Some experts opine that China and Israel, for example, might join as soon as the United States does, and perhaps a way forward can be found for India and Pakistan, too, in the context of some sort of settlement or amelioration of persistent regional tensions.<sup>48</sup> But North Korea presents special, seemingly intractable problems in this regard.

The CTBT includes a provision under article XIV, paragraph 2 for conferences of the signatories to consider measures that might be undertaken to accelerate the ratification process, but six of these conclaves have proven unavailing to date.<sup>49</sup>

#### E. *Interim Measures*

Pending the treaty's entry into force, several features of the contemplated treaty regime are already provisionally in place—more or less. Most importantly, countries have refrained from conducting nuclear test explosions: with the exception of North Korea, unilateral self-restraint has prevailed for more than fifteen years.<sup>50</sup> In some instances, there are officially declared “moratoria,” stating generally the terms and conditions for the pause; in other instances, there is simply a de facto halt.<sup>51</sup> For example, Russia last tested a nuclear explosive device

48. See Thomas Graham, Jr., *A New Pathway to Prohibiting Nuclear Testing*, WMD JUNCTION (June 3, 2014), [http://wmdjunction.com/140603\\_prohibiting\\_nuclear\\_testing.htm](http://wmdjunction.com/140603_prohibiting_nuclear_testing.htm); DARYL KIMBALL, ISRAEL INDICATES SUPPORT FOR CTBT, 44 ARMS CONTROL TODAY NO. 4, 27 (May 2014) (suggesting that Israel might be the next Annex 2 state to ratify the treaty); JEFFREY S. LANTIS, THE LIFE AND DEATH OF INTERNATIONAL TREATIES 117-53 (2009) (studying factors that make CTBT ratification easier or harder in several countries); RIZWAN ASGHAR, THE FUTURE OF THE CTBT 15, 17 (2014) (opining that “[o]nce the United States ratifies the Treaty, the remaining holdout States will most likely be stimulated to follow suit due to the fear of being marginalized by choosing to remain outside the Treaty”); *CTBT at 15*, *supra* note 28, at 22-31 (discussing “Pathways toward Entry into Force”).

49. CTBT, *supra* note 1, art. XIV(2); CTBTO PREPARATORY COMM’N, *About the Article XIV Conferences*, <http://www.ctbto.org/the-treaty/article-xiv-conferences/about-the-article-xiv-conferences/> (last visited Dec. 23, 2014); Conference on Facilitating the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty, Final Declaration and Measures to Promote the Entry into Force of the Comprehensive Nuclear-Test-Ban Treaty (Sept. 27, 2013), [http://www.ctbto.org/fileadmin/user\\_upload/Art\\_14\\_2013/Statements/Final\\_Declaration.pdf](http://www.ctbto.org/fileadmin/user_upload/Art_14_2013/Statements/Final_Declaration.pdf) (stressing that CTBT “constitutes a fundamental instrument in the field of nuclear disarmament and non-proliferation” and identifying concrete steps the signatories will take toward entry into force and universalization of the treaty).

50. ARMS CONTROL ASS’N, *supra* note 32.

51. CTBTO PREPARATORY COMM’N, *Nuclear Testing 1945-Today*, <http://www.ctbto.org/nuclear-testing/history-of-nuclear-testing/nuclear-testing-1945-today/> (last visited November 24, 2014).

on October 24, 1990; the United States on September 23, 1992; and China on July 29, 1996; only North Korea has tested during the current century.<sup>52</sup> These national policies are unilateral and revocable, but so far they have endured the vicissitudes of international and domestic politics.<sup>53</sup> Indeed, some authorities speculate that, as a practical matter, the United States may never return to conducting nuclear testing, absent some extreme outside provocation.<sup>54</sup>

Additionally, some of the institutional precursors to the contemplated CTBT organizational arms have been established. A November 19, 1996 resolution of the signatory states<sup>55</sup> created a “Preparatory Commission” for the CTBTO, to pave the way for eventual entry into force; in turn, the Preparatory Commission has hired and guided a Provisional Technical Secretariat.<sup>56</sup> This set of institutions, headquartered in Vienna, now employs 260 staff, with an annual budget of approximately \$120 million; its functions include developing and implementing the verification network so the entire mechanism will be ready to operate immediately upon the treaty’s entry into force.<sup>57</sup>

52. ARMS CONTROL ASS’N, *supra* note 32; CTBTO PREPARATORY COMM’N, *supra* note 51. The dates of the last nuclear test by the other countries are: United Kingdom, November 26, 1991; France, January 27, 1996; India, May 13, 1998; Pakistan, May 30, 1998; and North Korea, February 12, 2013. *Id.*

53. *Third P5 Conference: Implementing the NPT*, U.S. DEP’T OF STATE (June 29, 2012), <http://www.state.gov/r/pa/prs/ps/2012/06/194292.htm> (permanent members of the U.N. Security Council “called upon all States to uphold their national moratoria on nuclear weapons-test explosions”). Under the Vienna Convention on the Law of Treaties, art. 18, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331 (U.S. signed but did not ratify), a state is obligated “to refrain from acts which would defeat the object and purpose” of a treaty it has signed, pending its entry into force. The possible applicability of this rule to the CTBT—specifically, whether it would currently outlaw any testing by a signatory state—is controversial and is not addressed in this article. *See* Jonas, *supra* note 44; Ryan Chorkey Burke, *Losers Always Whine About Their Test: American Nuclear Testing, International Law, and the International Court of Justice*, 39 GA. J. INT’L & COMP. L. 341 (2011).

54. Daryl Kimball, “*It Is Almost Certain That the U.S. Will Not Test Again*,” *Says Former NNSA Administrator*, PROJECT FOR THE COMPREHENSIVE NUCLEAR TEST BAN TREATY (Dec. 6, 2011), <http://www.projectforthechtbt.org/It-is-Almost-Certain-that-the-US-Will-Not-Test-Again-Says-Former-NNSA-Administrator> (quoting Ambassador Linton Brooks); Tom Z. Collina & Daryl G. Kimball, *No Going Back: 20 Years Since the Last U.S. Nuclear Test*, ARMS CONTROL ASS’N (Sept. 20, 2012), <http://www.armscontrol.org/issuebriefs/No-Going-Back-20-Years-Since-the-Last-US-Nuclear-Test%20> (concluding that “the days of U.S. nuclear testing are over”).

55. Res. Establishing the Preparatory Comm’n for the Comprehensive Nuclear Test-Ban Treaty Organization, C.T.B.T. MSS/RES/1, U.N. Doc. A/Res/1 (Nov. 19, 1996).

56. *Establishment, Purpose and Activities*, CTBTO, <http://www.ctbto.org/the-organization/ctbto-preparatory-commission/establishment-purpose-and-activities/> (last visited Dec. 23, 2014).

57. *Who We Are*, *supra* note 27.

In particular, the task of establishing the International Monitoring System has been prioritized: of the contemplated 337 stations and other facilities, 278 are already certified (i.e., fully operational); eighteen are installed, but awaiting certification; twenty are under construction; and twenty-one are still in the planning phase.<sup>58</sup> In addition, an International Data Centre at the Vienna headquarters is fully functional, receiving the massive data flows from the worldwide collectors, integrating and processing them, and providing objective analysis.<sup>59</sup> The data and interpretive bulletins are available to all parties, in near real time, via a network of satellite communications service providers.<sup>60</sup>

Apart from the treaty, the United States maintains and continuously upgrades its own, independent capability for monitoring nuclear testing by other states. These “national technical means of verification” include a sophisticated network of satellites, long-range seismometers and other assets; they are not automatically integrated into the CTBTO collections, but provide an autonomous window into any possible clandestine nuclear activities.<sup>61</sup>

The CTBT’s provisions for conducting on-site inspection are not included in the mandate of the Preparatory Commission, and have not been implemented. The Provisional Technical Secretariat has conducted “trial” or practice OSI field exercises and has acquired the equipment necessary to carry out those functions, once the treaty’s entry into force activates those powers.<sup>62</sup>

#### F. *Political Prospects for the CTBT*

At this point, it is difficult to foresee a sufficient shift in the constellation of political forces that would be necessary to secure U.S. and other

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58. *International Monitoring System*, CTBTO, Map, <http://www.ctbto.org/map/> (last visited Dec. 23, 2014).

59. *Operations Centre and Computer Centre*, CTBTO, <http://www.ctbto.org/verification-regime/the-international-data-centre/operations-centreand-computer-centre/> (last visited Dec. 23, 2014).

60. *Distribution of Data and Data Bulletins to Member States*, CTBTO, <http://www.ctbto.org/?id=1296> (last visited Dec. 23, 2014).

61. NAT’L ACADEMY OF SCIENCES, *supra* note 12, at 38-39.

62. *Exercises*, CTBTO, <http://www.ctbto.org/?id=319> (last visited Jan. 9, 2015) (describing a series of on-site inspection training exercises and field experiments); ABDULLAH ENSOUR, THE INTEGRATED FIELD EXERCISE 26 (2014), *available at* [http://www.ctbto.org/fileadmin/user\\_upload/pdf/Spectrum/2014/Spectrum\\_22\\_web.pdf](http://www.ctbto.org/fileadmin/user_upload/pdf/Spectrum/2014/Spectrum_22_web.pdf). The Preparatory Commission is responsible for developing an Operational Manual for on-site inspections, which would be approved by the Conference of States Parties at its first meeting after the CTBT enters into force. Res. Establishing the Preparatory Comm’n for the Comprehensive Nuclear Test-Ban Treaty Organization, *supra* note 55, Annex, Appendix.

key ratifications of the CTBT. The U.S. Senate has considered the treaty once, on October 13, 1999, when the supporters' ill-conceived strategy led to a premature 51-48 vote against advice and consent to ratification.<sup>63</sup> Many members of the Senate have changed in the intervening fifteen years, and the treaty remains pending with the Senate, but the prospects for favorable action remain dim.

The Obama Administration has promoted CTBT, ranking it first on its "priorities list" for Senate consideration,<sup>64</sup> and senior officials, including the president, have emphasized support for the treaty and a commitment to pursue ratification at a propitious time.<sup>65</sup> But so far, precious little political capital has been expended to make that happen.

In other Annex 2 countries, too, progress toward CTBT has stalled. Only two Annex 2 countries (Colombia on January 29, 2008 and

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63. The story behind the failed 1999 vote and its possible implications for Senate consideration of the CTBT today is complex and contested. See Daryl G. Kimball, *Learning from the 1999 Vote on the Nuclear Test Ban Treaty*, ARMS CONTROL TODAY, (Oct. 2009), [https://www.armscontrol.org/act/2009\\_10/LookingBack](https://www.armscontrol.org/act/2009_10/LookingBack); Terry L. Deibel, *The Death of a Treaty*, 81.5 FOREIGN AFFAIRS 142 (2002); Helen Dewar, *Senate Rejects Test Ban Treaty*, WASH. POST (Oct. 14, 1999), <http://www.washingtonpost.com/wp-srv/politics/daily/oct99/senate14.htm>; ARMS CONTROL ASS'N, *Senate Rejects Comprehensive Test Ban Treaty; Clinton Vows to Continue Moratorium*, [https://www.armscontrol.org/act/1999\\_09-10/ctbso99](https://www.armscontrol.org/act/1999_09-10/ctbso99) (last visited Nov. 2, 2014). On the other hand, reaching a bit further back into contemporary U.S. political history, it was the Congress, rather than the executive branch, that led the United States to institute the current moratorium against nuclear testing. In Public Law 102-377, the Fiscal Year 1993 Energy and Water Development Appropriations Act, Congress restricted future U.S. nuclear testing to a very limited scope, leading to a decision to suspend tests altogether. See U.S. Dep't of Defense, *Nuclear Matters Handbook* 1.6, [http://www.acq.osd.mil/ncbdp/nm/nm\\_book\\_5\\_11/chapter\\_1.htm](http://www.acq.osd.mil/ncbdp/nm/nm_book_5_11/chapter_1.htm) (last visited Dec. 23, 2014).

64. Letter from Richard R. Verma, Assistant Secretary of State for Legislative Affairs, to John F. Kerry, Chair, Senate Committee on Foreign Relations (May 11, 2009), available at <http://www.state.gov/documents/organization/153474.pdf>.

65. President Barack Obama, Remarks in Prague (Apr. 5, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/) (pledging "my administration will immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty. After more than five decades of talks, it is time for the testing of nuclear weapons to finally be banned"); John Kerry, Remarks at the Friends of the Comprehensive Nuclear-Test-Ban Treaty Ministerial (Sept. 26, 2014), available at <http://www.state.gov/secretary/remarks/2014/09/232219.htm> (affirming "[s]o I come here to reiterate the Obama Administration's unshakable commitment to seeing this treaty ratified and entered into force"); Rose Gottemoeller, Under Secretary of State for Arms Control and International Security, *Nuclear Weapons Testing: History, Progress, Challenges: Verification and Entry Into Force of the CTBT* (Sept. 15, 2014), available at <http://www.state.gov/t/us/2014/231697.htm> (asserting that "it is in our interest to close the door on nuclear explosive testing forever," but noting that education, discussion and debate will have to precede the effort to secure Senate consent to the treaty).



Indonesia on February 6, 2012) have ratified the treaty since 2003, and none have signed the treaty since 1996.<sup>66</sup>

### G. *Bottom Line*

The CTBT—as fundamentally important as it is for the most profound U.S. and global arms control and non-proliferation goals—is stuck. It faces two seemingly intractable problems: (1) it may never surpass the Senate’s supermajority advice and consent hurdle; and (2) even if it does, there are show-stoppers in other essential Annex 2 countries. Critical elements—the moratoria on testing and the effectuation of the International Monitoring System—are in place, but only on a voluntary or provisional basis, and other necessary attributes, such as the power to conduct on-site inspections, are unavailable. Unless something dramatic and unforeseen occurs, the CTBT and the full panoply of its attributes may not enter into legal force for a very long time—if ever.

## III. NUCLEAR NON-PROLIFERATION

There are few national goals more important, or more difficult, than the effort to deter, dissuade, or obstruct the further spread of nuclear weapons, and there are few developments that would be more disruptive for U.S. security and global stability than the dissemination of capabilities for mass destruction to additional, unstable or renegade states and terrorist groups.<sup>67</sup>

### A. *The NPT*

The most important legal bulwark against those disastrous outcomes is the NPT, the “Magna Carta” of non-proliferation. This instrument lies at the center of a multi-faceted campaign against nuclear expansionism, and sustaining it—indeed, promoting it and building a consensus to further strengthen the regime it underpins—is a top global priority.<sup>68</sup>

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66. *Status of Signature and Ratification*, *supra* note 2.

67. JAMES R. CLAPPER, STATEMENT FOR THE RECORD: WORLDWIDE THREAT ASSESSMENT, OF THE U.S. INTELLIGENCE COMMUNITY 4-7 (2014), *available at* [http://www.dni.gov/files/documents/2014%20WWTA%20SFR\\_SASC\\_11\\_Feb.pdf](http://www.dni.gov/files/documents/2014%20WWTA%20SFR_SASC_11_Feb.pdf) (highlighting dangers of terrorism and proliferation of weapons of mass destruction).

68. *See* Statement by the Peoples’ Republic of China, France, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Vienna, ¶ 1, U.N. Doc. NPT/CONF.2015/PC./12 (May 3,

In broad outlines, the NPT constitutes an asymmetric contract between the “nuclear weapon states” (NWS) (i.e., the five countries that already possessed nuclear weapons when the treaty was negotiated, and that were not about to give them up)<sup>69</sup> and the “non-nuclear-weapon states” (NNWS) (i.e., all the other 184 members of the treaty, who agree never to receive, manufacture or otherwise acquire nuclear weapons).<sup>70</sup> In acknowledgement of this frankly two-tier structure, the NWS promised to share the peaceful, civilian benefits of nuclear energy,<sup>71</sup> and not to permit the NWS/NNWS dichotomy to persist forever. In particular, under article VI of the treaty, the parties commit “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.”<sup>72</sup> The “basic bargain” of the NPT, therefore, allows the NWS to maintain their privileged status only temporarily, while committing them to eliminate their nuclear oligopoly at some unspecified future date.<sup>73</sup>

Controversy over the adequacy of NWS compliance with the article VI disarmament obligations has been a hardy, painful perennial in NPT circles. The series of treaty-mandated “review conferences” has regularly grappled with this dispute, as NNWS have complained that they have been living up to their end of the bargain, while article VI is too much “honored in the breach.” Some of the review conferences have virtually broken down in discord over this issue.<sup>74</sup> Successive

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2012), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=NPT/CONF.2015/PC.I/12](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2015/PC.I/12) (reaffirming their unconditional support for the NPT, “which remains the cornerstone of the nuclear non-proliferation regime and the essential foundation for the pursuit of nuclear disarmament and the peaceful uses of nuclear energy”).

69. NPT, *supra* note 3, art. IX.3 (defining a “nuclear-weapon State” as a country that had manufactured and exploded a nuclear weapon before January 1, 1967). Only China, France, Russia, the United Kingdom and the United States satisfy that criterion. In addition, four other countries, each of which possesses nuclear weapons, are not parties to the NPT: India, Israel, North Korea and Pakistan. These countries would not, in fact, be “non-nuclear,” but they could not, in law, be “NWS” under the NPT. *But see* David S. Jonas, *Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Non-Proliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417, 418 (2005).

70. NPT, *supra* note 3, art. II.

71. *Id.* arts. IV, V.

72. *Id.* art. VI.

73. SHAKER, *supra* note 30, at 555-78; David S. Jonas, *General and Complete Disarmament: Not Just for Nuclear Weapons States Anymore*, 43 GEO. J. INT’L L. 587, 587 (2012) (highlighting that NPT article VI imposes obligations on all parties, not only the NWS, to pursue complete disarmament).

74. SHAKER, *supra* note 30, at 579-648; George Bunn & Roland M. Timerbaev, *Nuclear Disarmament: How Much Have the Five Nuclear Powers Promised in the Non-Proliferation Treaty?*, in AT

articulations of reinforced commitments—attempting to specify time-tables for the accomplishment of discrete disarmament measures; or to institute a series of thirteen “practical steps” toward the goal;<sup>75</sup> or to elaborate sixty-four “action items” as metrics<sup>76</sup>—have hardly solved the problem. At the next review conference, scheduled for New York from April 27 to May 22, 2015, the challenge of article VI—how to assess NWS performance, and how the NNWS may react to the perceived shortcomings—is sure to be on center stage.<sup>77</sup>

### B. CTBT and NPT

Of all the arms control measures associated with article VI—superpower reductions in nuclear weapons inventories,<sup>78</sup> negotiation of a treaty establishing a “cutoff” in the production of fissile materials for weapons,<sup>79</sup> creation of “nuclear weapon free zones,”<sup>80</sup> and the

THE NUCLEAR CROSSROADS, 1995, 11, 20-24 (John Rhinelander & Adam Scheinman eds., 1995) (highlighting controversies over article VI during negotiation of NPT and at review conferences); Tom Z. Collina, Lance Garrison & Daniel Horner, *Stage Set for 2015 NPT Review Conference*, 44 ARMS CONTROL TODAY 25 (2014).

75. NPT Review Conference, *Final Document*, ¶ 15, U.N. Doc. NPT/CONF.2000/28 (Vol. I, Part 1) (2000), available at <http://www.un.org/disarmament/WMD/Nuclear/2000-NPT/pdf/FD-Part1and2.pdf> (discussion of NPT Article VI and preambular paragraphs 8 to 12, para. 15, recording conference’s agreement on thirteen “practical steps for the systematic and progressive efforts to implement Article VI of the Treaty”).

76. 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Document*, U.N. Doc. NPT/CONF.2010/50 (Vol. I, Part 1) (2010), [http://www.un.org/ga/search/view\\_doc.asp?symbol=NPT/CONF.2010/50\(VOL.I\)](http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50(VOL.I)) (establishing sixty-four “action items” to pursue NPT’s object and purpose, including forty-six related to nuclear disarmament and proliferation); REACHING CRITICAL WILL, THE NPT ACTION PLAN MONITORING REPORT (2014), available at [http://www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPT\\_Action\\_Plan\\_2014.pdf](http://www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPT_Action_Plan_2014.pdf) (critically assessing states’ compliance with the sixty-four action items).

77. Collina, Garrison & Horner, *supra* note 74; Alexander Kmentt, *How Divergent Views on Nuclear Disarmament Threaten the NPT*, 43 ARMS CONTROL TODAY NO. 10, 8 (Dec. 2013), [http://www.armscontrol.org/act/2013\\_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT](http://www.armscontrol.org/act/2013_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT); Gaukhar Mukhatzhanova, *Rough Seas Ahead: Issues for the 2015 NPT Review Conference*, 44 ARMS CONTROL TODAY NO. 3, 20 (Apr. 2014), [https://www.armscontrol.org/act/2014\\_04/Rough-Seas-Ahead\\_Issues-for-the-2015-NPT-Review-Conference](https://www.armscontrol.org/act/2014_04/Rough-Seas-Ahead_Issues-for-the-2015-NPT-Review-Conference).

78. See ARMS CONTROL ASS’N, *supra* note 26.

79. ARMS CONTROL ASS’N, *Fissile Material Cut-off Treaty (FMCT) at a Glance* (Aug. 2013), <http://www.armscontrol.org/factsheets/fmct>.

80. A nuclear weapon free zone is a geographic region in which the local states have declared their respective territories to be “off limits” for nuclear weapons and associated activities, and have assumed verification and institutional arrangements beyond those specified in the NPT to ensure compliance. ARMS CONTROL ASS’N, *Nuclear-Weapon-Free Zones at a Glance* (Sept. 2012), <http://www.armscontrol.org/factsheets/nwffz>.

rest—the CTBT is surely the most important, longstanding, and demanded. The NNWS (and, intermittently, the NWS) have repeatedly identified a nuclear test ban as the single most critical step toward arresting the nuclear arms race and freezing the dissemination and intensification of the world’s nuclear arsenals; it is the *sine qua non* of implementation of the article VI commitment.<sup>81</sup> The CTBT is, for example, the single specific arms control measure that is identified in the preamble to the NPT.<sup>82</sup> No other topic attracts such keen attention; no other treaty incites such urgent passion.

In short, until the CTBT is firmly entrenched, the NPT is in trouble, too. Many of the NNWS feel cheated, or at least slighted, by the NWS shouldering aside their article VI obligations. NNWS may wonder aloud why they should, in return, continue with their own counter-performance. There is little immediate danger of a complete collapse of the NPT regime, because it manifestly still serves the needs and interests of the world community. However, at a time when no new front-page arms control negotiations are underway, and when several of the NWS are in the process of expanding and upgrading, rather than reducing and winnowing their nuclear arsenals,<sup>83</sup> the stasis on CTBT is

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armscontrol.org/print/2567; Peter Crail, *The Nuclear Weapons Free Zone Treaty Protocols and U.S. National Security*, 2 ARMS CONTROL ASS’N ISSUE BRIEF No. 4 (2011), <http://www.armscontrol.org/issuebriefs/NWFZTreatyProtocols>; Leonard S. Spector & Aubrie Ohlde, *Negative Security Assurances: Revisiting the Nuclear-Weapon-Free Zone Option*, 35 ARMS CONTROL TODAY No. 3 (2005), [https://www.armscontrol.org/act/2005\\_04/Spector\\_Ohlde](https://www.armscontrol.org/act/2005_04/Spector_Ohlde); see ARMS CONTROL ASS’N, *WMD-Free Middle East Proposal at a Glance* (July 2013), <http://www.armscontrol.org/factsheets/mewmdfz>.

81. See Graham, *supra* note 48 (calling CTBT “the essential glue holding the NPT strategic bargain together”); Bunn & Timerbaev, *supra* note 74, at 26 (concluding that in the eyes of the NNWS, “there is no question that a CTB is the most important measure the nuclear-weapon states can adopt in satisfying their Article VI obligations” and observing that the “failure to achieve a CTB received the greatest attention and was the reason two of the four conferences adjourned without agreement on a final declaration”); SHAKER, *supra* note 30, at 632; Howlett & Simpson, *supra* note 28; *Third P5 Conference*, *supra* note 53 (permanent members of the U.N. Security Council reiterate their commitment to promote and ensure the swift entry into force of the CTBT and state “[t]he moratoria, though important, are not substitutes for legally binding obligations under the CTBT”); Joint Ministerial Statement on the CTBT (Sept. 26, 2014), *available at* [http://www.ctbto.org/fileadmin/user\\_upload/statements/2014\\_ministerial\\_meeting/2014\\_joint\\_ministerial\\_statement\\_final.pdf](http://www.ctbto.org/fileadmin/user_upload/statements/2014_ministerial_meeting/2014_joint_ministerial_statement_final.pdf) (foreign ministers appeal to all states to “make the utmost effort to achieve the prompt entry into force of the CTBT”).

82. NPT, *supra* note 3, preamble ¶ 11.

83. Hans Kristensen, *Nuclear Weapons Modernization: A Threat to the NPT?*, 44 ARMS CONTROL TODAY 8 (2014), [http://www.armscontrol.org/act/2014\\_05/Nuclear-Weapons-Modernization-A-Threat-to-the-NPT](http://www.armscontrol.org/act/2014_05/Nuclear-Weapons-Modernization-A-Threat-to-the-NPT); Ray Acheson, *Modernization of Nuclear Weapons: Aspiring to “Indefinite Retention”?* 68 BULLETIN OF THE ATOMIC SCIENTISTS 88 (2012), <http://thebulletin.org/2012/september/modernization-nuclear-weapons-aspiring-“indefinite-retention”>; Amy F. Woolf, *Nuclear Moderniza-*

particularly troubling, and the entire edifice of non-proliferation is increasingly jeopardized. Certainly, any prospects for accomplishing the necessary improvements in the NPT—closing loopholes, enhancing safeguards, achieving universal coverage—are largely in abeyance while the test ban dangles in the wind.<sup>84</sup> Even more clearly, any resumption of nuclear weapons testing by any of the NPT’s five NWS would be catastrophic for the NPT regime.

#### IV. U.S. POLITICAL GRIDLOCK

Perhaps little need be said here about the parlous state of domestic U.S. politics. News and commentary about the sorry gamesmanship in Washington, D.C. are legion, as traditional mechanisms for compromise, conciliation, or simply accomplishing the nation’s business have fallen into desuetude in the face of partisan wrangling. Little seems to get done other than finger-pointing and blame-shifting. Public respect for government—especially for Congress—has fallen to historic lows.<sup>85</sup>

This paralysis is dominant in foreign policy, too, where the constitutionally-specified mechanism for entering into “entangling alliances”—according the president the power to make treaties pursuant to the advice and consent of two-thirds of the Senate<sup>86</sup>—seems to be particularly stultified. Only a precious few instruments have survived the legislative gauntlet in recent years.<sup>87</sup>

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*tion in an Age of Austerity*, 44 ARMS CONTROL TODAY No.20 (2013), [http://www.armscontrol.org/act/2013\\_03/Nuclear-Modernization-in-an-Age-of-Austerity](http://www.armscontrol.org/act/2013_03/Nuclear-Modernization-in-an-Age-of-Austerity); Jon B. WOLFSHTAL, JEFFREY LEWIS, & MARC QUINT, JAMES MARTIN CTR. FOR NONPROLIFERATION STUDIES, THE TRILLION DOLLAR NUCLEAR TRIAD: US STRATEGIC NUCLEAR MODERNIZATION OVER THE NEXT THIRTY YEARS (2014), *available at* [http://cns.miis.edu/opapers/pdfs/140107\\_trillion\\_dollar\\_nuclear\\_triad.pdf](http://cns.miis.edu/opapers/pdfs/140107_trillion_dollar_nuclear_triad.pdf).

84. See Graham, *supra* note 48 (noting that “the NPT has grown weaker without the CTBT in place”).

85. JEFFREY S. PEAKE, THE OBAMA ADMINISTRATION’S USE OF EXECUTIVE AGREEMENTS: BUSINESS AS USUAL OR PRESIDENTIAL UNILATERALISM? 10, 34 (2014), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445535](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445535); Norman Ornstein, *Worst. Congress. Ever.*, FOREIGN POLICY (July 19, 2011), [http://www.foreignpolicy.com/articles/2011/07/19/worst\\_congress\\_ever?page=full](http://www.foreignpolicy.com/articles/2011/07/19/worst_congress_ever?page=full); Sarah Binder, *Is This Really the Worst Congress Ever?*, BROOKINGS (July 27, 2011), <http://www.brookings.edu/research/opinions/2011/07/27-congress-binder>.

86. U.S. CONST., art II, § 2, cl. 2.

87. John B. Bellinger, *Obama’s Weakness on Treaties*, N.Y. TIMES, Dec. 18, 2012, [http://www.nytimes.com/2012/12/19/opinion/obamas-weakness-on-treaties.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2012/12/19/opinion/obamas-weakness-on-treaties.html?_r=0&pagewanted=print) (Obama administration’s first term secured Senate approval of only nine treaties, the fewest of any four-year presidential term since World War II); Bart M.J. Szewczyk, *Custom and Treaties as Interchangeable Instruments of National Policy*, AJIL UNBOUND (Apr. 30, 2014), <http://www.asil.org/blogs/custom-and-treaties-interchangeable-instruments-national-policy-agma-end-treaties> (United States ratified only a record-low five treaties in 2009-12); see also LANTIS, *supra* note 48, at 10 (noting

Ominously, treaties of far less consequence and controversy than CTBT have failed or languished recently due to partisan political machinations. The Disabilities Treaty (which would not require any changes to U.S. law or practice) was abruptly voted down on December 4, 2012,<sup>88</sup> and the Law of the Sea Convention (which has drawn support from the U.S. military, big business, and environmental groups alike) has been unable even to muster a slot on the Senate calendar for a definitive vote.<sup>89</sup>

Some legal commentators, reflecting upon the remarkable atrophy of the U.S. treaty-making process, have speculated about the “end” or “death” of the instrumentality, its relegation to a less prominent role in daily legal practice, or at least a search for alternative mechanisms.<sup>90</sup>

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that the U.S. Senate has historically often resisted treaties that the executive branch favored; there have been over 500 treaties endorsed by a president that were never ratified).

88. Convention on the Rights of Persons with Disabilities, *opened for signature* Mar. 30, 2007, 2515 U.N.T.S. 3. This treaty, modeled on the Americans with Disabilities Act, would press other countries to adopt protective standards already incorporated into U.S. law; 126 countries have joined it, and it would be of largely symbolic effect for the United States. Albert R. Hunt, *On Disabilities Treaty, the Right Fights with the Right*, N.Y. TIMES, Feb. 23, 2014, <http://www.nytimes.com/2014/02/24/us/politics/on-disabilities-treaty-the-right-fights-with-the-right.html>; Bellinger, *supra* note 87.

89. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. The Convention provides the basic international law governing human activities in, on, and under the sea; it has been joined by almost all the developed countries in the world, but not by the United States. It has attracted legions of disparate supporters and has twice been endorsed by the Senate Foreign Relations Committee, but has not yet received a floor vote. See U.S. DEP’T OF STATE, *Brief History of U.S. Efforts Relating to the Law of the Sea*, <http://www.state.gov/e/oes/lawofthesea/179798.htm>, *Supporters*, U.S. DEP’T OF STATE, <http://www.state.gov/e/oes/lawofthesea/statements/index.htm> (last visited Dec. 23, 2014); U.S. DEP’T OF STATE, *Fact Sheet: Why the United States Needs to Join the Law of the Sea Convention Now* (Mar. 21, 2012), <http://www.state.gov/e/oes/lawofthesea/factsheets/186605.htm>.

90. Emily Cumberland, *The End of Treaties? An Online Agora*, AJIL UNBOUND (Apr. 28, 2014), <http://www.asil.org/blogs/end-treaties-online-agma>; Cindy Galway Buys, *An Empirical Look at U.S. Treaty Practice: Some Preliminary Conclusions*, AJIL UNBOUND (May 7, 2014), <http://www.asil.org/blogs/empirical-look-us-treaty-practice-some-preliminary-conclusions-agma-end-treaties>; David Kaye, *Stealth Multilateralism: U.S. Foreign Policy Without Treaties—or the Senate*, FOREIGN AFFAIRS 113 (2013) (complaining about Senate erroneously rejecting proposed treaties, and about the resulting executive branch “end runs” around the advice and consent process); Oona Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008) (arguing for use of executive agreements rather than treaties); PEAKE, *supra* note 85, at 2-3, 9 (observing that to date, not a single multilateral treaty has received Senate consent during the Obama presidency and that the administration has abandoned treaties, turning to use of executive agreements instead); CARNEGIE ENDOWMENT FOR INT’L PEACE, BEYOND TREATIES: IMMEDIATE STEPS TO REDUCE THE NUCLEAR DANGERS (James M. Acton ed., 2012), available at [http://carnegieendowment.org/files/beyond\\_treaties.pdf](http://carnegieendowment.org/files/beyond_treaties.pdf).

Others see the situation as undercutting U.S. leadership in the most vital areas of international security policy.<sup>91</sup>

In this rancorous milieu, President Obama has exploited his “pen and phone” strategy. Introduced in connection with a January 14, 2014 cabinet meeting, the proposition is that executive branch initiatives need not passively await legislation, but can exploit all the diverse available tools to accomplish the assigned missions.

[W]e are not just going to be waiting for legislation in order to make sure that we’re providing Americans the kind of help they need. I’ve got a pen and I’ve got a phone—and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball forward in helping to make sure our kids are getting the best education possible and making sure that our businesses are getting the kind of support and help they need to grow and advance to make sure that people are getting the skills that they need to get those jobs that our businesses are creating. And I’ve got a phone that allows me to convene Americans from every walk of life—non-profits, businesses, the private sector, universities—to try to bring more and more Americans together around what I think is a unifying theme, making sure that this is a country where if you work hard, you can make it.<sup>92</sup>

Of course, complete executive autonomy is unattainable. Under our constitutional scheme, most important governmental functions require the concerted operation of both political branches. But the president’s “we can’t wait” refrain has found voice in numerous initiatives via executive order, rule-making, agency management, prosecutorial discretion, the creation of public-private partnerships, and comparable vehicles,<sup>93</sup> such as:

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91. COUNCIL ON FOREIGN RELATIONS, TASK FORCE REPORT: U.S. NUCLEAR WEAPONS POLICY 55 (2009), *available at* <http://www.cfr.org/proliferation/us-nuclear-weapons-policy/p19226> (concluding that “U.S. ratification [of the CTBT] has become, in the eyes of many, a litmus test for U.S. leadership in the overall effort to prevent the use and spread of nuclear weapons”).

92. *Remarks by the President Before Cabinet Meeting*, *supra* note 6.

93. *See* Press Release, The White House, Fact Sheet: President Obama Announces New Pen and Phone Actions to Spur Innovation and Entrepreneurship to Revitalize American Manufacturing (June 17, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/06/17/fact-sheet-president-obama-announces-new-pen-and-phone-actions-spur-inno>; THE WHITE HOUSE, YEAR OF ACTION: A FINAL PROGRESS REPORT ON THE OBAMA ADMINISTRATION’S ACTIONS TO HELP CREATE OPPORTUNITY FOR ALL (2014) *available at* <http://www.whitehouse.gov/sites/default/files/docs/>

- Prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity;<sup>94</sup>
- Convening twenty private sector “impact investors” pledging more than \$1.5 billion in social and environmental projects;<sup>95</sup>
- Declaring a vast marine sanctuary in the central Pacific Ocean, making the planet’s largest such zone off-limits to fishing and energy exploitation;<sup>96</sup>
- Requiring federal contractors to pay workers a higher minimum wage;<sup>97</sup>
- Capping monthly student loan repayments;<sup>98</sup>
- Ordering the Attorney General and the Secretary of Homeland Security to shift resources to border security and to identify administrative actions “to fix as much of our immigration system as we can”;<sup>99</sup> and
- Spurring foreign tourists coming to the United States by easing visa restrictions.<sup>100</sup>

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yoadec2014.pdf; Elena Kagan, *Presidential Administration*, 114 HARVARD L. REV. 22, 45 (2001); SARAH ROSEN WARTELL, *THE POWER OF THE PRESIDENT: RECOMMENDATIONS TO ADVANCE PROGRESSIVE CHANGE* (Nov. 2010).

94. Edward-Isaac Dovey & Jennifer Epstein, *President Obama Seeks Political Boost from LGBT Executive Order*, POLITICO, June 16, 2014, <http://www.politico.com/story/2014/06/obama-lgbt-nondiscrimination-executive-order-107900.html>.

95. Byron Auguste, Tom Kalil & Jonathan Greenblatt, *Executive Actions to Accelerate Impact Investing to Create Jobs and Strengthen Communities*, THE WHITE HOUSE OFFICE OF SCI. & TECH. POLICY, BLOG (June 25, 2014), <http://www.whitehouse.gov/blog/2014/06/25/executive-actions-accelerate-impact-investing-create-jobs-and-strengthen-communities>.

96. Juliet Eilperin, *Obama Proposes Vast Expansion of Pacific Ocean Sanctuaries for Marine Life*, WASH. POST, June 17, 2014, [http://www.washingtonpost.com/politics/obama-will-propose-vast-expansion-of-pacific-ocean-marine-sanctuary/2014/06/16/f8689972-f0c6-11e3-bf76-447a5df6411f\\_story.html](http://www.washingtonpost.com/politics/obama-will-propose-vast-expansion-of-pacific-ocean-marine-sanctuary/2014/06/16/f8689972-f0c6-11e3-bf76-447a5df6411f_story.html); see also Press Release, The White House, President Obama Designates Organ Mountains-Desert Peaks National Monument (May 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/21/president-obama-designates-organ-mountains-desert-peaks-national-monumen>.

97. Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

98. Press Release, The White House, Fact Sheet: Making Student Loans More Affordable (June 9, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/09/factsheet-making-student-loans-more-affordable>.

99. Barack Obama, Remarks by the President on Border Security and Immigration Reform (June 30, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>.

100. Press Release, The White House, Fact Sheet & Report: President Obama Visits Cooperstown to Highlight Travel and Tourism That Is Growing Our Economy and Creating Jobs (May 22, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/22/fact-sheet-report-president-obama-visits-cooperstown-highlight-travel-an>.



Of course, these aggressive initiatives have encountered pushback, especially from the Republican-controlled House of Representatives, characterizing an “imperial presidency” arrogating unprecedented powers and usurping what are properly legislative functions.<sup>101</sup> In a June 25, 2014 memorandum to House colleagues, House of Representatives Speaker John Boehner criticized the president for “ignoring some statutes completely, selectively enforcing others, and at times, creating laws of his own.”<sup>102</sup> He then moved to sue the president over this “aggressive unilateralism,” eventually suing in the United States District Court for the District of Columbia in November 2014.<sup>103</sup> Other commentators have likewise objected.<sup>104</sup>

Whether these audacious actions and others likely to follow in their train truly constitute severe challenges to the constitutional separation of powers, or whether they are mere passing tempests in the congressional teapot are questions beyond the scope of this Article. For present purposes, the key points are that these executive assertions are already well underway in a variety of domestic arenas; that the same political and programmatic incentives that drive them will also apply in the foreign and national security arenas as well; and that serious consider-

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101. See also Ted Cruz, *The Imperial Presidency of Barack Obama*, WALL ST. J., Jan. 28, 2014, <http://online.wsj.com/articles/SB10001424052702304632204579338793559838308> (criticizing presidential determination to “enforce his own policies via executive fiat”).

102. Memorandum from Speaker John Boehner to House Colleagues on the Separation of Powers (June 25, 2014), available at <http://www.speaker.gov/general/memo-house-colleagues-separation-powers>.

103. *Id.*; United States House of Representatives Compl., Nov. 21, 2014, available at <http://www.speaker.gov/sites/speaker.house.gov/files/HouseLitigation.pdf>; Ashley Parker, *Republicans Switch Firm Handling Obama Suit*, N.Y. TIMES, Sept. 19, 2014, [http://www.nytimes.com/2014/09/20/us/politics/republicans-switch-firm-handling-obama-suit.html?\\_r=0](http://www.nytimes.com/2014/09/20/us/politics/republicans-switch-firm-handling-obama-suit.html?_r=0) (the House Republicans voted to authorize a civil lawsuit challenging the president’s selective application of provisions of the Affordable Care Act); see also David Rivkin & Elizabeth Price Foley, *Can Obama’s Legal End-Run Around Congress Be Stopped?*, POLITICO, Jan. 15, 2014, <http://www.politico.com/magazine/story/2014/01/barack-obama-constitution-legal-end-run-around-congress-102231.html#.VJnk9rgAIg> (supporting the concept of a lawsuit against the president; arguing in favor of standing for members of Congress); Legal Memorandum No. 108, Elizabeth H. Slattery & Andrew Kloster, THE HERITAGE FOUNDATION, *An Executive Unbound: The Obama Administration’s Unilateral Actions* (Feb. 12, 2014), <http://www.heritage.org/research/reports/2014/02/an-executive-unbound-the-obama-administrations-unilateral-actions>.

104. *Frustration over Stalled Immigration Action Doesn’t Mean Obama Can Act Unilaterally*, WASH. POST, Aug. 5, 2014, [http://www.washingtonpost.com/opinions/frustration-over-stalled-immigration-action-doesnt-mean-obama-can-act-unilaterally/2014/08/05/9c7bc1c6-1c1c-11e4-ae54-0cfe1f974f8a\\_story.html](http://www.washingtonpost.com/opinions/frustration-over-stalled-immigration-action-doesnt-mean-obama-can-act-unilaterally/2014/08/05/9c7bc1c6-1c1c-11e4-ae54-0cfe1f974f8a_story.html) (arguing that “[o]bstinate, hopelessly partisan and incapable of problem-solving, Congress is a mess. But that doesn’t grant the president license to tear up the Constitution.”).

ation should now be given to the possibility of rescuing the CTBT, and with it the NPT, via creative, largely unprecedented forms of executive branch initiatives.

Taking that logic one step further, even if the Senate were to provide its advice and consent to the CTBT (which it will not), the treaty likely would still not enter into force promptly because of the probable continuing impediments in other Annex 2 countries. What is required, therefore, is a “pen and phone” strategy that surmounts international, as well as domestic U.S., bottlenecks.

## V. U.N. SECURITY COUNCIL RESOLUTION

The first potential alternative mechanism for innovating new international law restricting nuclear weapons testing would be via a novel resolution from the U.N. Security Council. Under Chapter VII of the U.N. Charter, the Security Council has the authority to “determine the existence of any threat to the peace . . . and shall make recommendations, or *decide* what measures shall be taken . . . to maintain or restore international peace and security.”<sup>105</sup>

The verb “decide” is critical here; the Security Council’s mandatory legislative powers are impressive. Under article 25, “The Members of the United Nations agree to accept and carry out the decisions of the Security Council,”<sup>106</sup> and under article 49, “[t]he Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”<sup>107</sup>

Most U.N. Security Council resolutions are narrowly focused on a particular country or conflict, but some are cast in broader terms.<sup>108</sup> Resolution 1540, of April 28, 2004, for example, addresses non-proliferation of weapons of mass destruction (WMD) *in toto*, and obligates all members to prohibit support for non-state actors seeking WMD; to adopt and enforce effective domestic legislation interdicting WMD proliferation; and to secure their relevant facilities, materials and

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105. U.N. Charter art. 39 (emphasis added).

106. *Id.* art. 25.

107. *Id.* art. 49; *see also id.* art. 48 (specifying that member states may be required to carry out Security Council decisions jointly or separately, and via international agencies or directly).

108. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 4, 901 (2002); JAMES D. FRY, LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES 79 (2013); Daniel H. Joyner, *The Security Council as Legal Hegemon*, 43 GEO. J. INT’L L. 225, 225 (2012); *see, e.g.*, S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 15, 2014) (regarding Syria); S.C. Res. 2164, U.N. Doc. S/RES/2164 (June 25, 2014) (regarding Mali); S.C. Res. 2145, U.N. Doc. S/RES/2145 (Mar. 17, 2014) (Afghanistan), <http://www.un.org/en/sc/documents/resolutions/2014.shtml>.

equipment against diversion to weapons programs.<sup>109</sup> Likewise, Resolution 2161, adopted on June 17, 2014, addresses “terrorism in all its forms and manifestations,” establishing a comprehensive program for freezing the assets of al-Qaida and other individuals, groups and entities associated with it.<sup>110</sup>

Similarly, Resolution 2094, adopted on March 7, 2013,<sup>111</sup> is the latest in a dismal series of Chapter VII condemnations of North Korea’s various weapons provocations.<sup>112</sup> In it, the Security Council, “determining that there continues to exist a clear threat to international peace and security,”<sup>113</sup> condemns Pyongyang’s most recent nuclear test,<sup>114</sup> and “decides” that the country “shall not conduct any further . . . nuclear tests.”<sup>115</sup>

Pursuant to these precedents, the Security Council could now, citing its Chapter VII authority, “determine” that any further nuclear weapons testing by any country would constitute a “threat to the peace” and “decide” that no such testing shall be done. This resolution would be legally binding upon all states, regardless of their status as signatories, ratifiers, or otherwise of the CTBT, and regardless of their posture as NWS, NNWS, or non-parties to the NPT.<sup>116</sup>

109. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004); *see also* U.N. President of the S.C., Statement on Nuclear Non-Proliferation (Apr. 19, 2012), <http://usun.state.gov/briefing/statements/188157.htm> (U.N. Security Council, acting through statement by its president, rather than via a resolution, reaffirms that “proliferation of weapons of mass destruction, and their means of delivery, constitutes a threat to international peace and security.”).

110. S.C. Res. 2161, U.N. Doc. S/RES/2161 (June 17, 2014); *see also* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (deciding that all states shall prevent and suppress financing of terrorist acts); S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014) (deciding that all states shall undertake specified actions against “foreign terrorist fighters”).

111. S.C. Res. 2094, U.N. Doc. S/RES/2194 (Mar. 7, 2013).

112. *See, e.g.*, S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009); S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006); FRY, *supra* note 108, at 144-54.

113. S.C. Res. 2094, *supra* note 111, preamble, ¶ 7.

114. *Id.* ¶ 1.

115. *Id.* ¶ 2.

116. *See* Graham, *supra* note 48; Szasz, *supra* note 108, at 904; Paul C. Szasz, *A New Approach to Achieving a CTBT*, 15 DISARMAMENT TIMES, No. 5, Nov. 24, 1992, *reprinted in* PAUL C. SZASZ, SELECTED ESSAYS ON UNDERSTANDING INTERNATIONAL INSTITUTIONS AND THE LEGISLATIVE PROCESS 2001, 59 (Edith Brown Weiss ed., 2001); FRY, *supra* note 108, at 58-59, 141; George Bunn & John B. Rhinelander, *NPT Withdrawal: Time for the Security Council to Step In*, ARMS CONTROL TODAY (May 2005), [https://www.armscontrol.org/act/2005\\_05/Bunn\\_Rhinelander](https://www.armscontrol.org/act/2005_05/Bunn_Rhinelander) (arguing that the Security Council has the authority and should act to prevent states from withdrawing from the NPT); *see also* S.C. Res. 2118, preamble para. 3, para. 1, U.N. Doc. S/RES/2118 (Sept. 27, 2013) (Security Council, “Reaffirming that the proliferation of chemical weapons, as well as their means of delivery, constitutes a threat to international peace and security” (preamble para. 3), “Determines

Of course, international political support for this type of stratagem cannot be taken for granted. Russia and China, in particular, might not support the concept, and under article 27 of the Charter, each wields the authority to veto any such resolution.<sup>117</sup> But those giants have long refrained from conducting any nuclear weapons tests themselves, and may seek to bind all states to that pattern of restraint. Russia and China have been supportive of the CTBT, and may thus welcome even a “back door” mechanism for effectuating its central provisions.<sup>118</sup> Another political shoal could be the danger that NNWS might resent or be suspicious of any heavy-handed U.S.-led or NWS-led ploy.<sup>119</sup> But there should be a path to finesse that appearance, such as working through the good offices of a respected and sympathetic NNWS, or initiating the approach via the U.N. General Assembly. It is noteworthy that all ten of the current non-permanent members of the Security Council have already ratified the CTBT, and presumably would welcome its prompt effectuation.<sup>120</sup>

A. *What This Mechanism Would (and Would Not) Accomplish*

The proposed resolution would, immediately upon adoption (or at any delayed effective date stated therein), make illegal any nuclear weapons testing, by any state, at any time or place. It would convert the current voluntary, unilaterally revocable moratoria into permanent, global international law. By simultaneously reaching all U.N. member states, the resolution would dispense with the process for individual

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that the use of chemical weapons anywhere constitutes a threat to international peace and security” (para 1)). *But see* Daniel H. Joyner, *Nuclear Non-Proliferation and the UN Security Council in a Multipolar World: Can International Law Protect States from the Security Council?*, INT’L LAW IN A MULTIPOLAR WORLD 43 (Matthew Happold ed., 2001) (criticizing Security Council legislation on arms control as being beyond the proper scope of the Council’s authority under the U.N. Charter).

117. U.N. Charter art. 27. Russia, France, and the United Kingdom have all ratified the CTBT. *Status of Signature and Ratification*, *supra* note 2.

118. At a joint ministerial meeting on September 26, 2014, the P5 issued a statement that urged “all states” to sign and ratify the CTBT without delay. Joint Ministerial Statement, *supra* note 81, ¶¶ 4, 11.

119. *See* Gusti Agung Wesaka Puja, Statement of Indonesia at second session of Preparatory Committee for 2010 NPT Review Conference, Geneva (Apr. 29, 2008), <http://www.un.org/NPT2010/SecondSession/delegates%20statements/Indonesia.pdf> (criticizing “the tendency for the Security Council to judge compliance and act as an enforcer of the NPT”).

120. The current non-permanent members of the Security Council are Argentina, Australia, Chad, Chile, Jordan, Lithuania, Luxembourg, Nigeria, Rwanda, and South Korea, each of which has ratified the CTBT. *See Status of Signature and Ratification*, *supra* note 2.

states having to sign and ratify the CTBT, and prevent any “holdout” states from gumming up the works. It would also deny any “reservations” states might proffer.<sup>121</sup> The resolution could be permanent (subject to replacement via another (vetoable) resolution), or it could contain an automatic sunset provision.

What about the rest of the treaty’s provisions? One possibility would be for the Security Council to legislate the entirety of the CTBT into the resolution, incorporating the full instrument by reference, or attaching it as an appendix. The resolution could “decide” that the full agreement is now legally binding on all states and/or order that all who have not yet done so shall sign and ratify the treaty.<sup>122</sup>

Less ambitiously, the Security Council might mandate only the ban on testing; it could also recommend or urge states to ratify the CTBT, but not enact the full treaty as international law. In that situation, the current Preparatory Commission and Provisional Technical Secretariat would continue to operate much as they already do, and the currently incomplete International Monitoring System would continue to wend its way toward 100% effectuation. Presumably, the entire system would benefit from a significant political boost, even if the CTBT were not quite yet legally in force. Until all the Annex 2 states ratify, the provisions for on-site inspection would not be operative, and the full panoply of organizational structures (e.g., the treaty-specified mechanisms for consultation, cooperation, and dispute resolution in the Conference, Executive Council and Technical Secretariat) would not be fully functional.

Notably, the drafters of the Security Council resolution would also have to address one other significant feature of the treaty: the “supreme interests withdrawal” clause. The CTBT, like most other modern arms control instruments, explicitly permits a country to exit the treaty

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121. Under the Vienna Convention, *supra* note 53, art. 2(1)(d), a reservation is a unilateral statement whereby a state attempts to exclude or modify the legal effect of a portion of the treaty. The CTBT prohibits reservations to its main provisions, but allows reservations to certain details, provided they are not incompatible with the object and purpose of the treaty. CTBT, *supra* note 1, art. XV.

122. See S.C. Res. 2094, *supra* note 111, para. 3 (reiterating Security Council’s demand that North Korea “immediately retract its announcement of withdrawal from the NPT”); S.C. Res. 1874, *supra* note 112, ¶ 29 (calling upon North Korea to join the CTBT at the earliest date); S.C. Res. 1172, ¶¶ 3, 13, U.N. Doc. S/RES/1172 (June 6, 1998) (demanding that India and Pakistan refrain from further nuclear tests, calling on all other states not to carry out explosions, and urging all states to join the CTBT without delay); S.C. Res. 1887, ¶ 7, U.N. Doc. S/RES/1887 (Sept. 24, 2009) (calling upon all states to refrain from nuclear testing and to sign and ratify the CTBT); FRY, *supra* note 108, at 137.

“if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests.”<sup>123</sup> Withdrawal from an arms control treaty has been rare, but the provision is often considered an important safety valve when entering into vital national security commitments.<sup>124</sup> A Security Council resolution outlawing nuclear testing would not necessarily have to incorporate such an escape hatch, but might do so. In a similar manner, the Security Council would also have to contemplate application of the CTBT provisions regarding amendments to the treaty—the U.N.-created prohibition on testing would presumably be subject to modification in the future only via a new Chapter VII resolution, not through the usual treaty mechanisms.<sup>125</sup>

What if a country were to violate the terms of the contemplated resolution, as North Korea has so consistently flouted the Security Council on similar matters? Enforcement of international law is a large, complicated topic,<sup>126</sup> generally beyond the scope of this Article, except to note that the problem is substantially similar regarding both treaties and Security Council resolutions. Indeed, under the CTBT provisions regarding “Measures to Redress a Situation and To Ensure Compliance, Including Sanctions,”<sup>127</sup> the treaty organs, when confronting a recalcitrant party’s adamant non-compliance, may have recourse to a menu of enforcement actions—the ultimate fallback of which is to “bring the issue, including relevant information and conclusions, to the attention of the United Nations.”<sup>128</sup> So regardless of whether the illegal nuclear testing would be characterized as a violation of the treaty *per se*, or of a Security Council resolution substantially incorporating the treaty, the bottom-line enforcement muscle (to be exercised via diplomatic, economic, military or other means)<sup>129</sup> continues to reside

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123. CTBT, *supra* note 1, art. IX(2).

124. See Christer Ahlstrom, *Withdrawal from Arms Control Treaties*, in STOCKHOLM INT’L PEACE RESEARCH INST., SIPRI YEARBOOK 2004: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 765 (2004), available at <http://www.sipri.org/yearbook/2004/files/SIPRIYB0419.pdf> (citing only the 2002 U.S. withdrawal from the SALT I Anti-Ballistic Missile Treaty and the 2003 North Korean withdrawal from the NPT).

125. CTBT, *supra* note 1, art. VII.

126. See generally BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 22-44 (6th ed. 2011) (addressing “the nature of international law and the compliance challenge: Is international law really law?”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

127. CTBT, *supra* note 1, art. V.

128. *Id.* art. V(4).

129. U.N. Charter arts. 39, 41, 42.

with the Security Council, in the further exercise of its Chapter VII responsibilities.<sup>130</sup>

B. *Bottom Line*

Congress does not directly participate in the U.S. activities at the U.N.—the exercise of the U.S. voice and vote inside the Security Council chamber has traditionally been within the exclusive province of the executive branch.<sup>131</sup> This Article’s proposed Security Council resolution would not run afoul of any domestic U.S. law or practice; it does not trample traditional constitutional separation of powers standards and would be a legally available course of action.

On the other hand, of course, arrogating such an expansive exercise of this authority, blatantly circumventing the usual treaty advice and consent procedure, would doubtless incur a substantial political price. It would agitate those who defend the institutional perquisites of the Senate in forging new international obligations.<sup>132</sup> Most importantly, it would deny to the CTBT the most authentic and reliable support that would derive from a true national debate about the merits of the treaty and a successful running of the legislative gauntlet.<sup>133</sup> In other countries, too, the democratic processes of treaty ratification would place

130. A Security Council resolution could also extend beyond the scope of the CTBT by instituting individual criminal liability for persons who caused or conducted a prohibited nuclear weapon test. The treaty (like the predecessor test ban agreements, the LTBT, *supra* note 36, TTBT, *supra* note 39, and the PNET, *supra* note 41) has no provisions of that sort, but the Security Council could create new international law in this area. *See generally* DAVID LUBAN, JULIE R. O’SULLIVAN & DAVID P. STEWART, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 3-25 (2010).

131. *But see* 22 U.S.C. § 262d (“[h]uman rights and U.S. assistance policies with international financial institutions”) (statute requiring U.S. government to exercise its “voice and vote” in international financial institutions such as the World Bank and the International Monetary Fund to promote human rights policies in countries that receive assistance); 22 U.S.C. § 262p-4r(b) (2004) (instructing U.S. executive branch officials to use “voice and vote” to support any loans from international financial institutions to countries that support U.S. efforts against terrorism).

132. Under Section 33 of the Arms Control and Disarmament Act of 1961, Congress stipulated that “[t]hat no action shall be taken under this or any other law that will obligate the United States to disarm or to reduce or to limit the Armed Forces or armaments of the United States, except pursuant to the treaty making power of the President under the Constitution or unless authorized by further affirmative legislation by the Congress of the United States.” 22 U.S.C. § 2573(b). This statute epitomizes the congressional insistence upon legislative participation in arms control policy, but it is arguably inapplicable here, because a test ban does not “reduce or limit” American armed forces or armaments. *See* Antonio F. Perez, *Delegalization of Arms Control—A Democracy Deficit in De Facto Treaties of Peace?*, 4 *CHI. J. INT’L L.* 19, 28 (2003).

133. Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 *GEO. L.J.* 725, 728 (2013) (noting that ratification of a treaty through the traditional route “sends a

the CTBT on a surer footing than would a “top down” Security Council mandate. Therefore, only if the possibility of crafting a true national and international consensus in support of the CTBT is artificially blocked by secondary political considerations, and only when the accomplishment of a test ban is essential for preservation of the global non-proliferation regime, would this strategy hold much appeal.

## VI. CUSTOMARY INTERNATIONAL LAW

The second plausible work-around concerns customary international law (CIL). CIL is a traditional, well-accepted form of international obligation, equivalent to treaties in legal dignity, and applicable to the full range of global and regional problems and disputes. It can be more subtle and indefinite than treaty law, because CIL is built upon countries’ sometimes-inchoate behavior (what they do and say in their international intercourse) without any negotiated text they ostentatiously sign and publish.<sup>134</sup>

The notion is that the United States, the other NWS, additional leading players, and the world community as a whole could now jointly declare that they recognize and accept a newly emerging CIL rule that comprehensively prohibits nuclear testing. Once established, the CIL norm would be automatically binding upon all states, regardless of whether they had previously chosen to affiliate with the CTBT or NPT.

Two components—the objective and subjective elements—must be combined to constitute a CIL rule.<sup>135</sup> The objective ingredient focuses on state deeds and words: what physical behaviors a state injects into

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powerful political message about how united our nation is behind a particular international obligation”).

134. Statute of the International Court of Justice art. 38.1.b, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, (treaty establishing I.C.J., identifying international custom as one of the sources of law that the court will apply); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW; VOLUME I: RULES (2005) [hereinafter ICRC]; Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001) (outlining different approaches to CIL, emphasizing different factors for establishing legal requirements); Szewczyk, *supra* note 87; Koh, *supra* note 133, at 738-43 (discussing modern U.S. practice regarding CIL and non-legally binding “diplomatic law talk”).

135. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102.2; ICRC, *supra* note 134, at xxxi-xlii. *But see* International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, ¶ 1, cmt. (b)(4) (arguing that the subjective element is not usually necessary to establish a rule of CIL).



the world, and how it responds to the actions and statements (and the inactions and silences) of others.<sup>136</sup> Here, the most relevant bits of conduct are the moratoria—the fact that no state other than North Korea has conducted a nuclear test since 1998, and for some states the pattern of restraint stretches back several years before that (indeed, none of the NPT’s NNWS parties has ever conducted a nuclear test<sup>137</sup>). In addition, on the occasions when the pattern has been broken (when North Korea tested, or before India, Pakistan and others adopted their own self-restraint), the world’s criticism of the outlier was emphatic. With near unanimity, the world has rejected the explosions as unacceptable and called upon the outlier to desist.<sup>138</sup>

The subjective component of CIL is more complicated.<sup>139</sup> We look to the reasons why the observed behavior has occurred, as it must be undertaken “from a sense of legal obligation.”<sup>140</sup> That is, the state must believe that its self-restraint is not simply voluntary and unilaterally revocable, but is already required by prevailing international norms.<sup>141</sup>

Here, the relevant states seem not to believe that their respective declared testing moratoria are currently obligatory.<sup>142</sup> But they could quickly and conclusively alter that characterization simply via new public declarations. Any state could overtly affirm that it now recognizes the pattern of restraint as a rule of CIL, and it will henceforth refrain from conducting further explosions out of a sense of legal

136. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102, cmt. b, n.2; North Sea Continental Shelf Cases (Ger. vs. Den. & Ger. vs. Neth.), 1969 I.C.J. 3, ¶¶ 41-45 (Feb. 20); ICRC, *supra* note 134, at xxxviii.

137. *See* North Sea Continental Shelf Cases, 1969 I.C.J. 3, ¶ 74 (noting that the behavior of the states “whose interests are specially affected” is particularly significant for the determination of the evolution of a rule of CIL).

138. S.C. Res. 2094, *supra* note 111 (condemning nuclear tests by North Korea); S.C. Res. 1172, *supra* note 122 (condemning nuclear tests by India and Pakistan).

139. RESTATEMENT 1969 I.C.J. 3, *supra* note 126, § 102.2, cmt. c, n.2.

140. *Id.* § 102.2.

141. There is a bit of circularity here, as states must (mistakenly) believe the rule is already legally mandatory in order for it to become so. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102, cmt. c, n.2.

142. Christopher J. LeMon, *International Law and North Korean Nuclear Testing*, ASIL INSIGHTS (Oct. 19, 2006), <http://www.asil.org/insights/volume/10/issue/27/international-law-and-north-korean-nuclear-testing> (“Given the recentness of the CTBT and the indications that its drafters viewed the treaty as expanding the law rather than codifying it, its prohibitions on nuclear testing cannot be considered to have attained the status of customary international law.”); *see also infra* Part VII.

obligation.<sup>143</sup> If enough other countries adopted cognate postures, the arising consensus could swiftly accrete into a rule of CIL. States could make these affirmations individually or collectively, such as in the form of a resolution of the U.N. Security Council or General Assembly.<sup>144</sup> The United States, for example, has routinely announced that it accepts all or portions of an un-ratified treaty as constituting customary international law, binding even without the endorsement of the Senate.<sup>145</sup>

The realm of arms control has repeatedly served as the milieu for this process of enunciating new restraints via CIL, even before a relevant treaty comes into force. Regarding outer space, for example, key aspects of the developing regime, including important limitations on the weaponization of the exoatmospheric realm, emerged as CIL at the dawn of the Space Age in the 1950s and 1960s, even before the foundational 1967 Outer Space Treaty incorporated similar rules into a negotiated text.<sup>146</sup> Likewise, the international law opposing the use of chemical weapons in international armed conflict had probably materialized as an accepted, but unwritten, rule of CIL well before the negotiation and widespread acceptance of the more tangible 1993 Chemical Weapons Convention (CWC).<sup>147</sup>

143. See, e.g., *White House Fact Sheet: New Actions on Guantanamo and Detainee Policy*, WHITE HOUSE (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (unilateral executive branch declaration that “[t]he U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 [of 1977 Additional Protocol I to the 1949 Geneva Conventions] as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well”).

144. A resolution of the U.N. General Assembly is ordinarily not legally binding *per se*, but can contribute to the generation of CIL by assembling and clarifying the relevant views of states. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 103, cmt. c, n.2.

145. See, e.g., *Vienna Convention on the Law of Treaties FAQ*, U.S. DEP’T OF STATE <http://www.state.gov/s/1/treaty/faqs/70139.htm> (explaining that the United States regards many provisions of this treaty to be CIL); Hillary Rodham Clinton, U.S. Sec’y of State, *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives for Ratification: Testimony before the Senate Committee on Foreign Relations*, 112th Cong. (2012) (statement of Hillary Rodham Clinton, U.S. Sec’y of State), <http://www.state.gov/secretary/20092013clinton/rm/2012/05/190685.htm> (noting that the United States relies upon much of the Law of the Sea Convention as CIL).

146. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102 n.2 (authoritative 1962 resolution of the U.N. General Assembly was accepted as a statement of international law, even before the 1967 Outer Space Treaty, *supra* note 38).

147. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 1(2), *entered into force* Apr. 29, 1997, 1974 U.N.T.S. 45, 32 I.L.M. 800; ICRC, *supra* note 134, at 259-63; R.R. Baxter & Thomas Buergenthal, *Legal Aspects of the Geneva Protocol of 1925*, 64 AM. J. INT’L L. 853 (1970) (“The weight of opinion

Importantly, a CIL rule is presumptively of universal coverage, governing the behavior of all states, even those that had, for whatever reason, stayed away from affiliation with a particular treaty.<sup>148</sup> In 2013, for example, when the Syrian government used chemical weapons against insurgent forces, it was widely criticized as having violated this foundational CIL rule, even though Syria was then one of the few non-parties to the CWC.<sup>149</sup>

The one exception to the scope of coverage of CIL concerns a “persistent objector.” That is, a country that overtly and consistently dissents from a putative CIL norm, from the time the pattern of behavior begins to emerge, is not bound to honor it.<sup>150</sup> There are not many instances of this self-exempting behavior, but it may remain an option for a state, such as North Korea, which discerns (and wants to resist) an emerging CIL against nuclear testing. In a sense, then, the CIL process reverses the presumption that applies to other international law: in the case of a treaty, a country is *not* legally bound unless it affirmatively acts to sign and ratify; conversely, in the case of CIL, a country *is* legally bound unless it affirmatively acts to exempt itself by dissenting.<sup>151</sup>

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appears today to favor the view that customary international law proscribes the use in war of lethal chemical and biological weapons.”); Lisa Tabassi, *Impact of the CWC: Progressive Development of Customary International Law and Evolution of the Customary Norm against Chemical Weapons*, THE CBW CONVENTIONS BULLETIN, No. 63, 1 (Mar. 2004); JONATHAN B. TUCKER, MULTILATERAL APPROACHES TO THE INVESTIGATION AND ATTRIBUTION OF BIOLOGICAL WEAPONS USE IN, IN TERRORISM, WAR, OR DISEASE? UNRAVELING THE USE OF BIOLOGICAL WEAPONS 270, 275 (Anne L. Clunan, Peter R. Lavoy, and Susan B. Martin, eds., 2008); Timothy L.H. McCormack, *International Law and the Use of Chemical Weapons in the Gulf War*, 21 CAL. W. INT’L L.J. 1, 5 (1991) (“It is generally assumed and commonly argued that the [Geneva] Protocol has become a part of customary international law and therefore binds all states whether or not they have become a party to it.”); *id.* at 6 (“No non-party state has ever made the claim that it is not bound by the Protocol and therefore justified in international law to use chemical weapons in warfare.”); George Bunn, *Banning Poison Gas and Germ Warfare: Should the United States Agree?*, 1969 WIS. L. REV. 375, 388 (1969).

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102, cmt. d (CIL is binding on states that participated in the pattern, that did not participate, that were unaware of it, and even that were not sovereign at the time it arose).

149. *Syria Chemical Attack Draws International Condemnation*, CENTRAL ASIA ONLINE (Aug. 29, 2013), [http://centralasiaonline.com/en\\_GB/articles/caii/features/main/2013/08/29/feature-01](http://centralasiaonline.com/en_GB/articles/caii/features/main/2013/08/29/feature-01). Syria subsequently joined the CWC and assumed the legal obligations of the treaty, as well as those of CIL. *Id.*

150. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102, cmt. d (CIL is not binding upon a dissenter; this possibility is rarely exercised).

151. An additional legal theory, not advanced here, would be to characterize a nuclear weapon test as a violation of “*jus cogens*,” defined as a peremptory norm of international law, from which no derogation is permitted. Only a few behaviors, such as slavery, piracy, and genocide rise

A. *Legal Effect*

The legal effect of a CIL rule against nuclear testing would be similar to that of a Security Council resolution. Both would be global and immediate in application, not depending upon individual ratifications by scores of autonomous sovereigns. Both would entrench as binding international law the central element of the CTBT—the legal prohibition against nuclear testing. However, neither would likely incorporate many of the associated verification and institutional aspects of the treaty regime. It would be hard to fashion a pattern of objective behaviors and subjective beliefs to generate a CIL rule that would require the more expeditious completion of the IMS network of sensors, authorize OSIs in the case of suspected violations, or create the permanent CTBTO. All those steps would require entry into force of the treaty (or an exceptionally detailed Security Council resolution).

In the same vein, CIL probably does not have much to say about a supreme interests withdrawal clause. The normal way to escape an outmoded CIL rule is via the creation of a new, contrary CIL rule that supersedes the prior constraints: states create the revised obligation by deliberately, conspicuously violating the old one, and prompting a cascade of world opinion and state practice in the new direction.

The CIL option also differs from the Security Council concept in lacking a definitive text. That is, with a Security Council resolution, as with the CTBT, there is a written, negotiated document that can be disseminated and construed—analysis can begin with the four corners of the instrument to interpret its meaning. With CIL behaviors, in contrast, we would ordinarily have a much more diffuse, ambiguous set of original materials, consisting of a series of independent, perhaps somewhat coordinated and somewhat contradictory, national statements of intention, interpretation, commitment, and reservation. Treaty texts and Security Council resolutions are not always paragons of clarity and comprehensiveness, but they would ordinarily offer an advantage over the dispersed, disorganized behaviors that constitute CIL.

B. *Bottom Line*

As with the Security Council, Congress does not regularly and directly participate in the formation of CIL.<sup>152</sup> While the legislative

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to that level; it would be a stretch to claim that nuclear testing is of that character. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102, cmt. k, n.6.

152. *But see* Jon Kyl, Douglas J. Feith & John Fonte, *The War of Law: How New International Law Undermines Democratic Sovereignty*, FOREIGN AFFAIRS 115, 124 (2012) (arguing that Congress should

branch can commit the country to some actions that contribute to CIL,<sup>153</sup> for the most part, it is the executive branch that enables the United States to “speak with one voice”<sup>154</sup> in conducting its international behaviors. Regarding nuclear weapons, it would be the president who decides whether to conduct additional explosive testing,<sup>155</sup> and it would be the president who could single-handedly issue an authoritative statement enunciating the national sense of legal obligation that would help transform the existing moratorium into binding CIL.

We sometimes think of CIL as being relatively slow to emerge. Indeed, in the *The Paquete Habana*, the leading case that established CIL as a rule of decision for the United States, the Supreme Court felt compelled to survey over 500 years of state maritime practice in order to determine the existence of a sufficiently robust pattern to establish a CIL rule regarding seizure of coastal vessels as “prizes of war.”<sup>156</sup> But not every application of CIL requires centuries of concordant behavior. As the illustration of the quick generation of law regarding outer space demonstrates, sometimes we observe the (somewhat oxymoronic) phenomenon of “instant customary international law.”<sup>157</sup> Perhaps a suddenly articulated and rapidly-accepted condemnation of nuclear testing could be promulgated as CIL of that sort, quickly and simultaneously embracing all countries.<sup>158</sup>

## VII. UNILATERAL UNDERTAKINGS

The third alternative mechanism is somewhat more obscure, but it builds upon the most directly applicable legal precedent, concerning

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enact legislation to reverse the executive branch’s adoption of customary international law standards on detainees).

153. See *Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804) (holding that a statute ought never to be construed to violate CIL unless there is no other possible construction).

154. See *United States v. Curtiss-Wright*, 299 U.S. 304, 319 (1936) (president is the sole organ of the U.S. federal government in the field of international relations).

155. Congress has by statute prohibited testing nuclear weapons, see 50 U.S.C. § 2530 (“[t]esting of nuclear weapons”), but could perhaps not constitutionally insist that testing be conducted over the opposition of the president.

156. *The Paquete Habana*, 175 U.S. 677, 686-712 (1900).

157. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 102, cmt. 2; *North Sea Continental Shelf Cases*, *supra* note 136, ¶ 74 (determining that “passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law”); Bin Cheng, *United Nations Resolutions on Outer Space: ‘Instant’ International Customary Law?* 5 INDIAN J. INT’L L. 23, 36 (1965).

158. See Szewczyk, *supra* note 87 (arguing that CIL is more adaptable than treaty law, and may be more appropriate than treaties for articulating rules in areas involving frequent technological or policy change).

the surprising legal effect in the I.C.J. of a unilateral national declaration about refraining from nuclear testing.

A. *French Nuclear Tests Case*

From 1966 to 1974, France conducted several series of atmospheric tests of nuclear weapons at Mururoa Atoll in the South Pacific.<sup>159</sup> Australia and New Zealand, aggrieved by the radioactive fallout and other sequelae of the testing, sued France in the I.C.J., alleging a variety of environmental and health and safety harms and seeking a definitive judgment that further atmospheric nuclear testing was inconsistent with international law.<sup>160</sup>

In 1974, the court ruled 9-6 in favor of France, but did so via an unforeseen jurisprudential pathway.<sup>161</sup> The court deemed the Australian and New Zealand claims effectively “moot,” on the basis of several public statements by the most senior French officials, to the effect that France was then completing its program of atmospheric explosions and would confine itself to underground events starting in the near future.<sup>162</sup> The I.C.J. decided that France’s unilateral declaration was legally binding, saying:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth

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159. France is not a party to the LTBT, which requires confining testing to underground sites.

160. Nuclear Tests Case (Aus. v. Fr.), 1974 I.C.J. 253, ¶ 18-19 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 457, ¶ 18-19 (Dec. 20).

161. See Nuclear Tests Case (Aus. v. Fr.), *supra* note 160, ¶¶ 15, 34-35; Nuclear Tests Case (N.Z. v. Fr.), *supra* note 160, ¶¶ 13-15. Note that France did not appear or submit arguments in the litigation. Nuclear Tests Case (Aus. v. Fr.), *supra* note 160, ¶¶ 13-15; Nuclear Tests Case (N.Z. v. Fr.), *supra* note 160, ¶¶ 13-15.

162. See, e.g., statement issued by the office of the French president, stating that “France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed.” Nuclear Tests Case (Aus. v. Fr.), *supra* note 160, ¶ 34; French embassy diplomatic note, “[t]hus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type.” *Id.* ¶ 35; press conference comments by French minister of defense, omitting the phrase “in the normal course of events” from the policy statement, *Id.* ¶ 40.

legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.<sup>163</sup>

The court conceded that “not all unilateral acts imply obligation,”<sup>164</sup> but ruled that there were no particular requirements regarding the form (written or oral) or wording of a binding unilateral undertaking.<sup>165</sup> The critical variable is whether the state has the intention of making the declaration binding; if so, then other “interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.”<sup>166</sup>

In the same vein, the International Law Commission (ILC) in 2006 adopted a set of ten “Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations.”<sup>167</sup> The ILC concluded that where a state acts via a formal (oral or written) public pronouncement, issued with the intent to create a legal commit-

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163. *Id.* ¶ 43.

164. *Id.* ¶ 44.

165. *Id.* ¶ 45.

166. *Id.* ¶ 46.

167. International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* (Sept. 9, 2006), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_9\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf). The International Law Commission was unable to reach sufficient consensus to propose a treaty codifying its results, but promulgated the guiding principles and the commentaries explaining their rationale. See Michael J. Matheson, *The Fifty-Eighth Session of the International Law Commission*, 101 AM. J. INT'L. L. 407, 421 (2007); Victor Rodriguez Cedeno & Maria Isabel Torres Cazoria, *Unilateral Acts of States in International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L L. ¶¶ 13-14 (Feb. 2013). The ILC's work on this topic was controversial, with different states asserting varying positions regarding the circumstances under which a unilateral undertaking would become legally binding, and how durable such a commitment would be. See International Law Commission, *Unilateral Acts of States, Replies of Governments to the Questionnaire*, U.N. Doc. A/CN.4/511 (July 6, 2000), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_511.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_511.pdf).

ment, its clear and specific undertaking can be non-revocable.<sup>168</sup> Importantly, notions of “acceptance” or “reliance” by other states are not essential to the determination of such a legal duty, and no negotiation, reciprocal exchange, or *quid pro quo* is necessary.<sup>169</sup>

States today are likely to characterize their existing respective testing moratoria as revocable “policy choices,” rather than as voluntary assumptions of legal commitments, and the ILC principles “do not apply to policy statements or even formal declarations that were not specifically intended to create legal results, even if other states might have relied upon them or asserted that they were legally binding.”<sup>170</sup> On the other hand, in 1974, neither France nor Australia and New Zealand realized the extent to which the French public pronouncements might be deemed to have permanent, inescapable legal status; no side had argued in the I.C.J. proceedings in favor of that interpretation or legal rule.<sup>171</sup>

In any event, the underlying point here is that any nuclear state today, if it so desired, could readily convert its existing moratorium declaration into an overtly binding unilateral commitment simply by making that legal intention clear. A state could issue the relevant statement to individual audience states or to the world community *erga omnes*.<sup>172</sup> The commitment could be incorporated into a single instrument or, as France did in 1974, expressed in a series of comments including press conferences, diplomatic notes, and other communications, as well as more formal, official documents.<sup>173</sup> NWS could issue these public unilateral undertakings in concert or seriatim; since this

168. ILC Guiding Principles, *supra* note 167, princ. 1, cmt. ¶ 2 (citing precedents involving Egypt’s 1957 declaration regarding the Suez Canal, Jordan’s waiver of claims to the West Bank territories, and Norway’s waiver of territorial claims); *id.* at princ. 3, cmt. ¶ 1 (citing I.C.J. cases); Cedeno & Cazorla, *supra* note 167.

169. ILC Guiding Principles, *supra* note 167, prins. 3, 7; Cedeno & Cazorla, *supra* note 167; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 126, § 301, cmt., n.3; Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L.J. 781, 799-814 (1994) (describing the development of the concept of unilateral undertakings as international promissory estoppel); FRY, *supra* note 108, at 96-103 (analyzing unilateral undertakings as a form of international estoppel).

170. Matheson, *supra* note 167, at 421-22; *see also* LeMon, *supra* note 142 (arguing that North Korea’s 2005 commitment to abandon its nuclear weapons programs did not constitute a legally binding unilateral undertaking, because it was not expressed in public and was not intended as a legal obligation).

171. Matheson, *supra* note 167, at 423.

172. ILC Guiding Principles, *supra* note 167, princ. 6; Cedeno & Cazorla, *supra* note 167, ¶¶ 20-22; Nuclear Tests Case (Aus. v. Fr.), *supra* note 160, ¶¶ 32, 50.

173. ILC Guiding Principles, *supra* note 167, princ. 5, cmt. ¶¶ 2-3; Nuclear Tests Case (Aus. v. Fr.), *supra* note 160, ¶¶ 36-40.



vehicle is in the nature of individual autonomy, rather than treaty or contract, the requirement for joint or simultaneous action is obviated.

B. *Legal Effect*

In contrast to the CIL mechanisms discussed above, the unilateral undertaking route does not depend upon the emergence of an inclusive international consensus—each state can proceed on its own to shoulder this legal obligation. If enough of the key states did so, the piecemeal undertakings could accumulate to a simulacrum of the central features of the CTBT.

As with the two courses of action parsed in previous sections, this pattern of unilateral undertakings, even if widespread, would not embrace the full content of the treaty—states would probably not use this route to assume legal duties regarding the IMS, OSI, and CTBTO provisions. On the other hand, if the unilateral obligations really are “irrevocable,” then they might in one respect actually exceed the level of fidelity to the treaty, because they would not admit of any withdrawal clause, even in the case of self-assessed “supreme national interests.” The concept is that withdrawal or suspension of a unilateral undertaking may not be “arbitrary,” and could be justified only by something akin to “fundamental change of circumstances.”<sup>174</sup>

Also, again similar to the findings in Parts V and VI of this Article, exercise of this unilateral undertakings route to a test ban lies wholly within the discretion of the executive branch, which could (as the French president, foreign minister, and minister of defense did in 1974) issue the legally operative statements of intention and commitment without legislative purchase.<sup>175</sup>

VIII. CONCLUSION

Any of the alternative proposals discussed in this Article would be awkward, extreme, and largely unfamiliar. Each would circumvent the traditional role of the U.S. Senate in the making of important international obligations, such as the CTBT, and they seem at odds with customary notions of constitutional separation of powers. On the other

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174. ILC Guiding Principles, *supra* note 167, princ. 10; Cedeno & Cazoria, *supra* note 167, ¶¶ 30, 33; Matheson, *supra* note 167, at 422.

175. ILC Guiding Principles, *supra* note 167, princ. 4 (identifying heads of state, heads of government and ministers of foreign affairs as authorities normally vested with the power to issue binding unilateral undertakings).

hand, the Constitution is not a “suicide pact,”<sup>176</sup> and each of these routes is a legally available option for dealing with one of the most critical national security issues of the day.

Even so, these are not great options. First, the usual constitutional processes for ratification of treaties (in the United States and elsewhere) are preferable—they are “usual” for good reason. Democratic accountability militates in favor of shared legislative-executive responsibility, and bringing the Senate on board such an important public policy choice is highly preferable (at least when partisan domestic politics is functioning in its “normal” mode). The treaty regime will be stronger if it is endorsed by both constituencies, rather than via an end run around one of them.

Second, the alternatives studied here are, for the most part, unable to institute the full array of CTBT provisions. They could succeed in enacting a legally binding restraint against the conduct of explosive nuclear tests—certainly the most important, central aspect of the desired regime. But the CTBT consists of far more than its simple article 1 prohibition. The mandates to fully enplace, operate, sustain, and as necessary upgrade the array of 337 facilities in the International Monitoring System;<sup>177</sup> to prepare for, practice, and as the occasion demands, to conduct challenge on-site inspections;<sup>178</sup> and to create, fund, and operate a full-scale, robust international CTBT Organization<sup>179</sup> are critical aspects of the treaty that probably could not be crammed into any of the three proposals. Those functions are already underway, and highly successful, on a “provisional” basis. However, only entry into force of the CTBT could place them on the most firm, legally reliable permanent footing.

Third, the international payoff from backing into a partial effectuation of the CTBT would not be as great as would be achieved by an overt, formal entry into force of the treaty. What the NNWS want, and what they have for decades specified as the most critical component of a good faith implementation of NPT article VI, is a “real” CTBT, not a cleverly cobbled-together approximation.

In addition, there would surely be intense political pushback against any of these proposed avenues, further poisoning the political atmosphere in Washington, D.C. Those who might oppose the CTBT on the

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176. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

177. CTBT, *supra* note 1, Protocol Part I.

178. *Id.* Protocol Part II.

179. *Id.* art. II.

merits would be aligned with those who resist an expansion of the “imperial presidency,” and they would doubtless inflict political retribution in other long-neglected areas of public policy.

But these are extraordinary times, and these are extraordinary issues. What is at stake is not only the CTBT, and its contributions to arresting the further qualitative improvement in nuclear arsenals, but also the entire NPT regime, and the effort to sustain and further strengthen this most vital contribution to resisting the further spread of nuclear weapons. Our current trajectory courts tragedy. Unless something positive is done soon about the CTBT, the strains on the non-proliferation system will surely intensify, and stability will be jeopardized. And meanwhile, fractious domestic politics precludes reasoned debate.

The three options surveyed in this Article would all reach a similar posture—not as good as ratification of the CTBT, but at least legally entrenching the existing moratoria against nuclear testing. But they would accomplish that objective via jurisprudential routes that are meaningfully different, and may have differing political acceptability. The option of a U.N. Security Council resolution is the only mechanism for compelling immediate, universal application of a test ban because the Security Council is uniquely empowered to cram a legal regime down the throats of all member states. The institution of customary international law does allow dissent, but tends to interpret silence as acquiescence, so a state that passively does nothing in opposition would be drawn into the regime. The concept of unilateral undertakings requires each individual state to act affirmatively to assume the legal obligation of a test ban, but it at least avoids the paralysis of the CTBT’s Annex 2, under which even a single opponent can stymie all the others.

Notably, each of the three contemplated legal structures would be, in one sense, even more durable than formal entry into force of the treaty. That is, a party to the CTBT would be legally allowed to escape it unilaterally, via exercise of the treaty’s supreme interests withdrawal clause.<sup>180</sup> But a Security Council resolution is not subject to comparable unilateral avoidance—only a new resolution (adopted subject to the standard veto power) could undo it. Likewise, a norm of customary international law would be modified or superseded only by another act of international law-making, not by one country’s purported with-

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180. *Id.* art. IX(2).

drawal. Unilateral undertakings, similarly, are a one-way street, not subject to unilateral withdrawal.

If nothing dramatic and non-traditional along these lines is done, perhaps the best we could hope for would be a situation in which: (a) there is no nuclear testing (with the possible exception of North Korea)—i.e., the current moratoria continue to string along; (b) there is no reliable global legal protection in place to prevent a resumption of such testing at a moment's notice by any country; and (c) nonetheless, some temporizing way is found to (once again) placate the NNWS and patch over the danger to the NPT.<sup>181</sup>

But it is not very satisfying (and not very safe) to teeter such important national and international security features on inertia and the hope for persistent good will, good judgment, and wise self-restraint by succeeding political leaders in Washington, D.C. and in all the other capitals in which power over nuclear weapons resides. The CTBT, and the edifice of the NPT upon which it rests, demand a more stable foundation. Under these exceptional pressures, the innovative international “pen and phone” alternatives surveyed here are worth contemplating.

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181. Some might label this pattern as an illustration of “soft law,” where states in fact observe the apparent rules of the relationship with some fidelity, despite the lack of formal legal obligation. See Richard L. Williamson, Jr., *Hard Law, Soft Law, and Non-law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59 (2003); Joel P. Trachtman, *Reports of the Death of Treaty Are Premature, But Customary International Law May Have Outlived Its Usefulness*, *AJIL Unbound Agora: The End of Treaties?*, AM. SOC'Y INT'L L. (2014), <http://www.asil.org/blogs/reports-death-treaty-are-premature-customary-international-law-may-have-outlived>; see also Joint Ministerial Statement, *supra* note 81 (foreign ministers assert that “without the lasting and legally-binding effect of entry into force of the Treaty, such a norm [i.e., the various states' voluntary moratoria against nuclear testing] remains fragile.”).