

THE STATUS OF NORMS AGAINST NUCLEAR TESTING

by George Bunn

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Can the current global moratorium on nuclear weapon testing survive the May 1998 tests by India and Pakistan and the refusal of US Senate leaders to permit consideration of the Comprehensive Test Ban Treaty (CTBT) by the Senate? If nuclear testing resumes by India or Pakistan—or by Britain, China, France, Russia, or the United States—will it be condemned by most of the world as if an international norm against testing was already in effect? What will be the likely consequences for nonproliferation if tests resume? This article seeks to show that there are norms operating against nuclear testing even though the CTBT has not been ratified, and that renewal of testing would have widespread consequences.

The CTBT has now been pending in the US Senate for well over a year.¹ It cannot reach the Senate

floor for a vote because Senate Foreign Relations Committee Chairman Jesse Helms (R-NC) and Senate Majority Leader Trent Lott (R-MS) oppose it. Lott has called it “an unverifiable treaty overtaken by events”—the Indian and Pakistani tests.²

Republican presidents and presidential candidates starting with Ronald Reagan have opposed banning all nuclear weapon tests. Given the hostility of some conservative Republicans to the CTBT and to President Clinton, many Republican senators do not now support ratification. Indeed, Senator Lott interpreted a 1998 Senate vote *for* paying the US portion of the costs of international preparations to implement the CTBT as a “strong signal that the Senate is prepared to *reject* the treaty.” The vote in favor was 49 to 44, far less than the 67 votes needed to approve the treaty.³ While this

probably does not reflect what the vote will be after Foreign Relations Committee hearings and floor debate, as long as Helms and Lott prevent hearings and debate from happening, the CTBT cannot be approved by the Senate (but neither can it be rejected).

Ratification by the United States, among others, is necessary before the treaty will enter into force for any country. The treaty provides that 44 named countries, including the United States, must ratify it before it can become effective. Because the United States was a leader in negotiating the treaty, China, Russia, and some other necessary parties are apparently awaiting Senate action before ratifying themselves. If the treaty does not go into force for some years, will anything keep China, India, Pakistan, Russia, the United States, or others from conducting tests?

This article will set forth evidence suggesting that a worldwide norm against testing now exists even though the CTBT has not gone into effect. It will first describe different kinds of international norms and outline how lawyers and international relations experts determine whether they exist. Then, using this methodology, the article will argue that a *politically* binding norm now applies to India and Pakistan, two of the three *de facto* weapon states; and a *legally* binding one applies to the third, Israel, as well as to the five nuclear weapon states (Britain, China, France, Russia, and the United States) that are parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), and to all of the non-nuclear weapon states party to the NPT. Indeed, a no-testing norm of one kind or the other appears to apply to all the countries of the world. Whether this norm is strong enough to keep the current moratorium on testing alive only time will tell. But, this article will conclude, if testing resumes, the adverse consequences for international efforts to prevent the spread of nuclear weapons to additional countries will be severe.

CATEGORIES OF NORMS

The norms that are relevant here are international prescriptions for state conduct. They are “principles, standards or rules;” they can take several forms and they can have differing degrees of authority. But they are “*prescriptions for action in situations of choice*, carrying a sense of obligation, a sense that they *ought* to be followed.”⁴ This definition, by lawyers familiar with the work of international relations regime theorists, is similar to those theorists’

definition of regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors expectations converge in a given area of international relations.”⁵

Lawyers and foreign ministry experts sometimes classify international norms for nation states into treaty law, customary law, and “soft” law. The first two are “legally binding.” The third is “politically binding.” Treaty law is usually made by agreement between state governments. Treaties epitomize the idea that states can only be obligated to norms by their consent. To make treaties, states negotiate through their governments, meaning through authorized government officials. Private citizens sometimes influence this process, by influencing their own or other governments, but the focus here will be on state actions that can lead to norms.

While treaties are “made” by agreement, customary international law “grows” by practice, usually over a long period of time. It is defined as the law resulting from the general and consistent practice of states, where these practices are followed out of a belief that they are an obligation, not just a matter of courtesy. Its most widely quoted description is from the Charter of the International Court of Justice. This directs the Court to apply not just treaty law but “international custom, . . . evidence of a general practice accepted as law.”⁶

Whether a particular practice has grown into legally binding customary law for a state is ordinarily more difficult to determine than whether that state has joined a treaty. One must look not just at the practice of a state, but at whatever evidence

exists as to why the state engaged in that practice. Such evidence includes statements from a state’s official representatives, declarations of international conferences at which it was represented, and resolutions of international organizations in which it participated. These statements may involve either support or condemnation for a given form of conduct.

If officials of a state have said nothing while refraining from conduct that most other states were condemning, those other states would likely contend that the silent state was bound by the practice, and criticize or sanction that state if it suddenly did what had been widely condemned. A state’s long-continued practice may thus sometimes bind it to a customary rule of law by acquiescence, without the explicit consent that a treaty requires.

Since customary law grows over time rather than being “made” by a treaty, there is a time when it has not become widely enough accepted to be called “legally binding” for all or most relevant states, yet it nevertheless seems to influence the conduct of many. Customary international norms often come in shades of gray rather than black or white. When the gray is quite dark but not yet black, I will call the norm “politically binding,” as defined in the next paragraph.

“Politically binding” is a term usually used to describe multilateral conference reports reflecting agreed decisions not in treaty form, bilateral communiques to the same effect, and a wide variety of similar agreements that are not “legally binding” because the parties did not put them into the form intended for legal agreements and did not intend

to be legally bound by them. One of the classic examples of this sort of commitment, now sometimes called “soft law,” is the general rules for state behavior in the 1975 Final Act of the Helsinki Conference on Cooperation and Security in Europe.⁷ This was a major East-West compromise negotiated during the Cold War, and its agreed statements about equal rights and self-determination of peoples were cited repeatedly by dissidents in Eastern bloc countries.

Breaking a politically binding commitment may be easier than breaking a legal one, but, as an expert on UN practice put it:

States entering into a non-legal commitment generally view it as a political (or moral) obligation and intend to carry it out in good faith. Other parties and other states concerned have reasons to expect such compliance and to rely on it... [P]olitical texts which express commitments and positions of one kind or another are governed by the general principle of good faith.⁸

Like customary international law, political commitments are not generally submitted to the US Senate or other parliaments for approval. When questioned about them by the Senate Foreign Relations Committee, then Secretary of State Henry Kissinger once testified that the United States is not “morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue.”⁹

Violation of a politically binding commitment, according to the State Department, could result in “an ap-

propriate political response.”¹⁰ This could include, for example, condemnation of the offender by those who believe in or benefit from the commitment, unilateral economic sanctions against the offender, or violation of the commitment by others in a way that will harm only the offender. The consequences of violation can sometimes be similar to those for violating a treaty.

IDENTIFYING WHEN NORMS EXIST

Recent theoretical work in the field of international relations has begun complementing the perspective on norms embodied in international law, especially with respect to how one determines whether a norm exists. This reflects a major change in how international relations specialists view norms. The labels for categories of norms described so far are those typically used by international lawyers and foreign ministry experts. International relations scholars pay less attention to labels and to when a norm becomes “binding,” either politically or legally. They pay more attention to why states do what they do and hence focus on whether norms affect state conduct.

After the experience of World War II, even treaty norms were thought by some international relations realists to have little effect on what states do. These realists argued that states regularly followed their own security interests without much regard to norms, whether codified in treaties or not. Later, many realists came to see that, when treaties serve state interests, even powerful states tend to observe them, sometimes going to considerable efforts to persuade others to do so as well. As a

result, many realists now recognize that the regimes created by some treaties can affect state behavior.¹¹ For example, using the “regime” definition quoted earlier, the NPT established “principles, norms, rules and decision-making procedures around which actor expectations” converged, at least for those states that saw it in their security interest to prevent other states from acquiring nuclear weapons. What the NPT produced has even come to be called a “regime” by lawyers and foreign ministries. Some NPT norms are legally binding treaty language or accepted interpretations of that language. Some are politically binding agreed principles or goals for future negotiations, or definitions of materials and equipment that should not be exported to states that do not accept international inspections of all their nuclear activities. All appear to have affected state conduct.

The influence of norms has recently been given greater attention due to an interest in “social constructivist” theory in political science. Constructivism draws upon but goes beyond regime theory. Unlike many international relations scholars, constructivists do not look only at states’ behavior. They look, in addition, at states’ beliefs and expectations, and the justifications states offer for their behavior. Some realists would probably argue that the 1998 nuclear tests by India and Pakistan showed that, even if some norm had existed against such tests, it made no difference because the conduct of India and Pakistan had not been affected. Constructivists, in contrast, would review the historical evidence from many states on their beliefs and expectations as well as their practices relating to the claimed norm.¹² If a norm is con-

structed or accepted by states to serve particular purposes, then a look at the process of construction may help us explain some aspects of state behavior even if there have been violations of the norm. Just as a violation of the law does not mean that laws have no effect, so an occasional norm violation does not disprove the norm, especially if there are consequences to such norm violation.

The constructivist method of tracing the evolution of beliefs and practices is similar to what international lawyers and foreign ministry diplomats do to determine whether a norm exists. As one constructivist sees it, lawyers search for

evidence that states share a belief that some principle is law. The methods for doing so are much like the methods used by constructivist scholars in political science to establish the existence of a norm. They look at behavior and ask whether states act as if there is, in fact, a norm. Additionally, they look at discourse and ask if states justify actions by identifying and emphasizing the importance of the norm.¹³

In the rest of this article, I follow this same approach. To find out whether a norm against testing exists, I will examine not just the behavior of states with respect to testing, but the reasons given by those that opposed it, and any agreements to treaties, declarations, or UN resolutions attempting to prevent it.

DEVELOPMENT OF THE NO-TESTING NORM

A norm against nuclear weapon tests has indeed developed over the last 45 years. This section summarizes the relevant diplomatic history.

The next section draws on this history to assess the current status of the no-testing norm.

I trace the norm's origins to a 1954 US hydrogen bomb test over the Pacific. After fallout from this test caused radiation sickness to 23 Japanese fishermen, killing one of them, Prime Minister Jawaharlal Nehru of India called for a ban on nuclear testing. This was followed by almost 40 years of on-again, off-again negotiations that produced agreement only on partial, non-comprehensive bans on testing, until 1996, when the CTBT was signed. But agreement had been reached in 1968 on the NPT, which prohibited all its non-nuclear weapon parties from manufacturing or acquiring nuclear weapons. The NPT thus prohibited all these parties from testing, since testing requires first manufacturing a device. The NPT hence established a treaty ban on testing that grew as more and more non-nuclear weapon states joined the NPT. The NPT ban on testing now applies to 181 countries, including all the non-nuclear weapon states with some nuclear capability except the three *de facto* weapon states (India, Israel, and Pakistan), none of which has joined the NPT.

The NPT also called for negotiation of a CTBT, but did not itself prohibit testing by the five NPT "nuclear weapon states," a term it defined as a state "which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967." Britain, China, France, Russia (then the Soviet Union), and the United States had all tested before that date. Since India, Israel, and Pakistan had not done so, they were not within the definition, which is why I refer to

them as *de facto* nuclear weapon states.

As it was the initiator of the most recent testing, India's actions and statements deserve special scrutiny. From 1954, when Nehru first called for a ban on testing, to 1996, when the CTBT negotiations were concluding, India condemned nuclear weapon testing but refused to join the NPT. In 1956, India argued that "international law and international morality" were violated by nuclear tests. India was a leader in persuading the UN General Assembly to adopt a 1962 resolution that "[c]ondemns all nuclear weapon tests," a statement that India, Pakistan, and a large majority voted to approve. The United States, the Soviet Union, and some of their allies abstained.¹⁴ When China first tested in 1964, an Indian representative used this resolution to argue that the Chinese tests were "ipso facto condemned" and a "direct and callous affront to all humanity." India later criticized nuclear tests by China and other NPT weapon states as violations of this UN resolution and "in flagrant violation of the will of the international community."¹⁵

When India itself set off a nuclear explosion in 1974, its justification nonetheless acknowledged a norm against weapon testing. India insisted that the device it had exploded was for peaceful purposes and therefore not subject to condemnation under the UN resolution as a "nuclear weapon test." Pakistan, of course, disagreed. In 1978, Indian Prime Minister Desai announced a "unilateral decision to abjure explosions even for peaceful purposes. We now stand justified by the developing conscience of the whole world on it..." That same year, both

India and Pakistan voted for a UN General Assembly resolution that expressed “grave concern over the fact that nuclear weapon testing has continued unabated [by the five NPT nuclear weapon states] against the wishes of the overwhelming majority of Member States.”¹⁶

In 1995, as part of the package of measures that was the basis for extending the NPT indefinitely, the NPT nuclear weapon states agreed to “exercise utmost restraint in testing” while completing negotiation of a CTBT by the end of 1996. When the Chinese and then the French later tested, India and most other states supported a General Assembly resolution that, “[s]haring the alarm expressed internationally, regionally and nationally at recent nuclear tests, . . . [s]trongly deplores all current nuclear testing.”¹⁷

As the CTBT negotiations in Geneva moved toward a successful conclusion in 1996, India became critical of the draft treaty on various grounds, even though it had long supported the concept of a treaty banning all tests. In the end, it objected most strongly to a provision requiring it to join the CTBT before the treaty could go into effect for any state, and it refused to sign. Pakistan followed suit.¹⁸ When India tested nuclear weapons in May of 1998, again followed by Pakistan, neither had signed the CTBT or joined the NPT. However, as I will discuss in the next section, their actions prior to 1998 are also relevant to ascertaining whether they violated a norm by testing.

Finally, for the five NPT nuclear weapon states, recent developments have special relevance. All five signed the CTBT, and all declared that there should be no further tests

anywhere after the treaty was approved. India and Pakistan have also ceased testing for the time being. There is thus a moratorium on tests at the moment. As a result of their signing of the CTBT, the five NPT nuclear weapon states (and Israel, which also signed) are now barred from testing by an international law rule codified in the Vienna Convention on the Law of Treaties. This rule precludes signatories to a treaty not yet ratified from taking steps that are inconsistent with the “object and purpose” of the treaty they have signed—unless they decide they no longer wish to join that treaty.¹⁹ Testing would seem wholly inconsistent with the CTBT’s purpose to end testing, and therefore testing by any of the five nuclear weapon states would violate this rule.²⁰

The United States has not joined this Vienna Convention.²¹ But the United States has previously agreed that the Convention reflects a “customary” rule of international law governing executive branch action pursuant to unratified treaties. When President Jimmy Carter asked the Senate to put off consideration of the SALT II treaty because the Senate appeared unlikely to approve it, the State Department issued a statement that said:

The United States and the Soviet Union share the view that under international law a state should refrain from taking action that would defeat the object and purpose of a treaty it has signed subject to ratification. We therefore expect that the United States and the Soviet Union will refrain from acts that would defeat the object and purpose of the SALT II Treaty before it is ratified and enters into force. Such acts would include, for example, testing of missiles with more warheads than

would be permitted under the treaty or the testing of new types of missiles which would not be permitted under the Treaty.²²

Perhaps with this rule of international law in mind, President Clinton said on the day he signed the CTBT:

The signature of the world’s declared nuclear powers—the United States, China, France, Russia and the United Kingdom—along with those of the vast majority of its nations will immediately *create an international norm* against nuclear testing, even before the treaty enters into force.²³

The recognition of such a norm by President Clinton is of considerable importance in the United States, where testing was initially ended by a 1992 statute that prohibited US testing after September 30, 1996. The statute, however, added that if another country tested after this date, “the prohibition on United States nuclear testing is lifted.”²⁴ The tests by India and Pakistan thus ended the *statutory* ban on US testing—but they did not alter the belief that an international no-testing norm resulted from signing the CTBT.

Such a norm may still be challenged by US test ban opponents. According to Senate Majority Leader Lott, ratification of the CTBT “will . . . prevent the United States from conducting tests necessary to maintain the safety and reliability of our own nuclear deterrent.”²⁵ President Clinton, of course, does not agree that tests are necessary for this purpose. But, if a conservative Republican such as Majority Leader Lott became US president in 2001, he might order a resumption of US tests if the CTBT were not then in force. That would

be a violation of the customary rule of international law codified in the Vienna Convention—unless the president withdrew US support for the CTBT, a presidential prerogative.

The Vienna Convention's rule against a signatory state taking action inconsistent with the purpose of an unratified treaty applies only so long as the signatory state intends to ratify the treaty.²⁶ President Reagan, after refraining for several years from US action that would "undercut" the unratified SALT II Treaty negotiated by President Carter, decided that the United States no longer intended to become a party to the treaty, and that there was therefore no need to observe any norm coming from it. That was consistent with the customary rule codified in the Vienna Convention.

CURRENT STATUS OF THE NORM

If there is now a treaty norm against testing for all non-nuclear weapon NPT parties and a customary norm against testing for the five NPT nuclear weapon states and Israel because of their signatures to the CTBT, could a no-testing norm derived in part from other sources now be applicable to India and Pakistan? Is there now a norm against testing that would produce worldwide condemnation and perhaps economic sanctions if the United States resumed testing—even if it announced that it did not intend to ratify the CTBT?

Immediately after India and Pakistan tested, the UN Security Council, through its president, stated that the two had breached a "*de facto* moratorium" on testing, and most of the rest of the world acted as if these

two had breached a no-testing norm even though they had not joined the NPT or signed the CTBT. Those condemning the tests were NPT members, most of which had both signed the CTBT and voted with India and Pakistan for the earlier General Assembly resolutions condemning and deploring nuclear weapon tests by the five NPT nuclear weapon states. Without this prior opposition to testing, it is doubtful that the condemnations of the Indian and Pakistani tests would have been so widespread. They were made by more than three-quarters of the 61 members of the Conference on Disarmament, by all of the Group of Eight (G-8) major industrialized countries, by the five NPT nuclear weapon states, by the Arab League, by the ASEAN Regional Forum, by the Organization of American States, and, finally, by the UN Security Council.²⁷

Significantly, some developing countries, particularly members of the Organization of the Islamic Conference, refused to join in the May condemnation by the Conference on Disarmament because, some of them said, it did not also condemn the five NPT nuclear weapon states for failing to negotiate toward nuclear disarmament as required by the NPT. For Egypt and Iran, leaders of those refusing to join the condemnation, its failure to criticize Israel's undeclared weapon capability was no doubt also relevant.²⁸ Several months later, at a September meeting of the more than 100 developing countries that are members of the Non-Aligned Movement (of which India has long been a leader), the conferees refused to accord India and Pakistan even "second tier" status as nuclear weapon states as a result of their tests. With both

countries participating and decision by consensus, the conferees "noted the complexities arising from the nuclear tests in South Asia, which underlined the need to work even harder to achieve their [nuclear] disarmament objectives." The non-aligned leaders then expressed "concern over the failure of the nuclear weapon states [not including India or Pakistan in this category] to demonstrate a genuine commitment with regard to complete nuclear disarmament." By then, India and Pakistan had both said they would not test further, and the declaration also welcomed their statements.²⁹

The UN Security Council's May resolution condemning the Indian and Pakistani tests is of particular interest. Under the UN Charter, the Council has primary responsibility for dealing with threats to international peace and security.³⁰ Before condemning the tests, this resolution repeated the Council's earlier conclusion that the proliferation of weapons of mass destruction is a threat to international peace and security, implying that these tests constituted such a threat. In addition to condemning the tests, the resolution "[d]emands that India and Pakistan refrain from further nuclear tests and in this context *calls upon all states* not to carry out any nuclear weapon test explosion or any other nuclear explosion in accordance with the provisions of the [CTBT]."³¹

Since not "all states" have signed the CTBT, this suggests that a norm exists against nuclear tests even for those that have not signed, including India and Pakistan. Can a no-testing norm from a treaty that is in force for a large number but not every state (the NPT) and is broadened

in its application by a treaty that has been signed by many states but is not yet in force for any (the CTBT) be applicable to states that have not signed or ratified either treaty? Could the norm be applicable to the United States if a president after Clinton changed the US position on the CTBT?

Despite the sharp distinction between treaties and custom, treaties can sometimes be sources of customary international law for non-parties to those treaties.³² For example, the American Law Institute's prestigious "Restatement" of US views on "Foreign Relations Law" accepts that even countries that have not joined the UN Charter are bound by customary law to the Charter's prohibition against "the threat or use of force against the territorial integrity or political independence of any state."³³ The Restatement experts agree that, in addition to the Charter provisions designed to protect international security, a multilateral treaty can be the source of norms for non-parties if the treaty is "designed for adherence by states generally, is widely accepted, and is not rejected by a significant number of important states."³⁴ This was certainly the case with both the NPT and the CTBT, except that India and Pakistan rejected both—and they cannot be called unimportant states.

In its resolution quoted above, the Security Council appears to have concluded that application of the no-testing norm to India and Pakistan was of importance for maintenance of international peace and security. Is this not an attempt to enforce a norm essential to international security, as with the UN Charter norm just quoted? There seems little doubt

that the Council has the power to enforce such a norm—if none of the permanent members veto its doing so.

As we have seen, before their own tests in 1998, India and Pakistan condemned specific weapon tests by others. They also supported the 1962 UN General Assembly Resolution "condemning" such tests and the later resolutions expressing "grave concern" about them. India, indeed, argued before the 1962 resolution that nuclear weapon tests were illegal and, after the resolution, it accused states of violating it by testing—as if the resolution itself stated a legal norm applicable to every state. Before its 1996 opposition to the CTBT and its own 1998 tests, India supported this norm even though it did not join the NPT.³⁵

This evidence suggests that, before 1996, India unambiguously satisfied the requirement that its no-testing practice be "evidence of a general practice accepted as law," the standard for customary law set forth in the Charter of the International Court of Justice.³⁶ The "general" international practice against testing was that reflected in the resolutions, the NPT, and the CTBT. The Indian practice included its own abstention from weapons tests until 1998, and its condemnations of such testing as illegal, immoral, and in violation of the General Assembly resolutions against testing. If this practice is taken as evidence that it "accepted as law" the norm against testing expressed in the General Assembly resolutions as well as in the treaties, its change in practice reflected in its 1996 opposition to the CTBT and its 1998 tests came too late to absolve it.³⁷ The case against Pakistan is not as strong, but Paki-

stan did vote for the 1962 and later General Assembly resolutions, and it criticized India's 1974 test as violating a norm.

A September 1998 resolution by the members of the International Atomic Energy Agency (IAEA) suggests, however, that many countries are not prepared to say that the no-testing norm had become a *legal* obligation for India or Pakistan. While the IAEA resolution deplored the Indian and Pakistani tests, a preambular clause implied that the norm against testing was not yet legally binding for India and Pakistan:

Noting that the States concerned [India and Pakistan] have both imposed moratoria on further testing and have said that they are willing to enter into **legal** commitments not to conduct further tests and *reiterating* the need for such commitments to be expressed in **legal** form by signing and moving to ratify the Comprehensive Nuclear Test Ban Treaty.³⁸

By September 1998, when this resolution was adopted, both India and Pakistan had stopped testing and given some indication that they might sign the CTBT.³⁹ Moreover, many states may have felt it unfair to condemn India and Pakistan for violating a customary rule derived in part from General Assembly resolutions when their tests came less than two years after the last of many tests by the five NPT nuclear weapon states, in defiance of the same resolutions.

If the no-testing norm was not yet "legally binding" upon India and Pakistan in May of 1998, is there nevertheless a "political" norm against testing by either of them? Is there one against testing by any of the five NPT nuclear weapon states

that relieves itself of its Vienna Convention obligation not to defeat the object and purpose of the CTBT by announcing that it no longer intends to become a party to the CTBT? As we have seen, there are a variety of international declarations, communiques, and the like that are regarded as “politically” but not “legally” binding. And violations of “political” undertakings are subject to appropriate “political responses”—these can include condemnation, economic sanctions, and refusal to comply with related promises made for the benefit of the violating party.

Just as customary international law can be based upon the practices of states rather than upon international agreements, politically binding norms can also be so based. As early Indian criticisms of testing and the 1962 General Assembly resolution show, some sort of an emerging norm often exists long before states conclude that a customary rule is “legally binding.”⁴⁰ Such a no-testing norm applicable to India and Pakistan can be derived from their long practice consistent with such a norm up to 1998, their condemnations of testing conducted by others going back as far as 1954 in India’s case and 1962 in Pakistan’s, and the opposition to testing and the agreements not to test expressed by more and more other states.⁴¹

The norm against testing grew in strength and in numbers of adherents as more non-nuclear weapon states joined the NPT and the five NPT nuclear weapon states and Israel signed the CTBT. The norm had grown to such an extent that it produced a General Assembly resolution criticizing 1995-96 tests by China and France, even before the CTBT had been signed but after its

completion had been promised for 1996.⁴² The growing norm then produced strong, widespread condemnations of Indian and Pakistani testing in 1998, after the CTBT had been signed.⁴³ The criticism of the two countries became less severe in September after earlier condemnations, sanctions, and negotiations produced promises from India and Pakistan to abstain from testing and to cooperate in bringing the CTBT into force.⁴⁴ If India or Pakistan were to resume testing now, however, the worldwide condemnation could be at least as sharp and widespread as it was in May and June of 1998. The same would be true if any of the five NPT nuclear weapon states resumed testing. Most of the world clearly feels that a norm against testing exists for the five NPT nuclear weapon states as well as for India and Pakistan.

This norm has arisen from the practices of states and from the beliefs expressed in connection with their votes for General Assembly resolutions and their decisions to join the NPT and CTBT. Though apparently not enough to satisfy IAEA members in September 1998 that a legal norm existed, this evidence seems enough to satisfy many international lawyers and constructivist international relations theorists that a norm capable of affecting the conduct of states now exists.⁴⁵

ENFORCING THE NORM

Immediately after the Indian tests, the United States announced economic sanctions against India, including denial of military and dual-purpose exports, prohibitions on US assistance even to US companies doing business in India and Pakistan, and opposition to World

Bank and IMF loans. These sanctions were extended to Pakistan after its tests. Canada, Denmark, Japan, and Sweden took some similar steps, but Britain, France, Russia, and other industrialized countries were not prepared to impose economic sanctions—though the G-8 foreign ministers adopted a strong condemnation of the tests in June of 1998.⁴⁶ Steps to prevent further damage to the nonproliferation regime were urged on India and Pakistan in a joint statement by the five NPT nuclear weapon parties, then by the G-8 and the UN Security Council in the resolution already quoted. Besides condemning the tests, all of these statements asked both countries to:

- Join the NPT as non-nuclear weapon states;
- Refrain from weaponizing their nuclear explosives and from deploying nuclear weapons or nuclear-capable missiles;
- Desist from further weapons tests and join the CTBT;
- Participate constructively in the negotiation at the Conference on Disarmament of a treaty to ban the production of fissile material for nuclear weapons (the statements of the five NPT nuclear weapon parties and the G-8 urged, in addition, a halt to the production of such material immediately, pending negotiation of such a treaty); and
- Undertake written commitments to their stated policies against export of equipment, materials, or technology that could contribute to the acquisition by others of weapons of mass destruction or missiles capable of carrying them.⁴⁷

Press reports of the negotiations with India and Pakistan suggest pos-

sible agreement on the third, fourth, and fifth steps, provided that further negotiations produce agreement on a quid pro quo from United States and others to ease or remove sanctions. In their major addresses to the opening of the Fall 1998 General Assembly session, both countries announced that they would sign the CTBT—if negotiations give them what they want.⁴⁸ The United States has since revised many economic sanctions and can offer to end others—which was not possible until October 1998, when Congress gave the president authority for one year to do so.⁴⁹ Assuming negotiations are successful and India and Pakistan sign the CTBT, they will, because of that signing, be subject to the same international law customary rule reflected in the Vienna Convention to which the five NPT nuclear weapon states are subject. Later, they could eliminate that norm for themselves by announcing that they do not intend to ratify the CTBT—just as China, Russia, and the United States could still do because they have not ratified. But worldwide condemnation and, in some cases, economic sanctions would be likely because the underlying no-testing norm—the opposition to testing by the rest of the world—would likely continue.

CONSEQUENCES IF NORM FAILS TO PREVENT TESTING

By its terms, the CTBT cannot come into force until it is ratified by 44 specifically named states—all of which have nuclear reactors and are members of the Conference on Disarmament, where the CTBT was negotiated.⁵⁰ Of the 44, only India, Pakistan, and North Korea have not

yet signed the treaty. The United States is negotiating with all three countries to secure treaty signing. But even if these negotiations are successful, all 44 states, including the United States, must also ratify. So far, only 27 states have done so, including only two of the five NPT nuclear weapon states, Britain and France.⁵¹

The CTBT has been pending in the US Senate for more than a year without action. Signatures by India and Pakistan could put added pressure on Senators Helms and Lott to let the CTBT come to the floor of the Senate for a vote.⁵² But, so far, public support has not been expressed in a way that has moved the Republican leadership or demonstrated that the 67 votes are there. If the treaty supporters in the Senate were prepared to filibuster every other issue until the CTBT was brought up for a vote, they would get the attention of the leadership. That was one tactic that supporters of the START II Treaty used to get it to the floor. But so far the CTBT has not seemed sufficiently important to senators relative to other business before the Senate. And bringing the CTBT to the floor before 67 votes are likely to be there could be dangerous. Similar to when the League of Nations Charter was rejected by a Republican Senate in President Woodrow Wilson's time, Senate rejection of the CTBT could set back indefinitely the effort to end testing.

China, Russia, India, Israel, North Korea, and Pakistan—all among the 44 necessary parties to bring the CTBT into force—are unlikely to ratify before the United States does. The treaty authorizes a conference in 1999 of the countries that have

then ratified it to decide what steps can be taken to speed ratification by signers that have not ratified. The CTBT also authorizes annual conferences of this kind thereafter until the treaty enters into force.⁵³ One can anticipate that governments that have ratified will do their best to persuade the United States to follow their lead, and the persuasion may have some effect. But, until there is a US national debate on whether to ratify, a debate that convinces Senators of the wide public support for the CTBT shown by polls, it will probably not be possible to change enough senators' views to produce a two-thirds vote.⁵⁴

Can testing be prevented during this period? If agreement is reached with India and Pakistan to sign the CTBT, there is a good chance that their moratorium will continue. The norm against testing remains strong around the world, whether or not it is seen as legally binding. The international criticism of, and national sanctions against, India and Pakistan for testing will be remembered. Given this worldwide opinion, perhaps the Senate can at least be persuaded not to reject the CTBT and instead keep it pending until the day when there are enough votes to approve it. Perhaps, if the next US president does not support the CTBT, he will at least not state that the United States does not intend to ratify it—as Reagan did with SALT II. If India and Pakistan agree to sign the CTBT, they would probably not test again unless one of the five nuclear weapon states resumes testing, or unless entry into force is delayed indefinitely.

The present governments of Britain, China, France, and Russia are also unlikely to test for the time be-

ing if no other state tests. China and France resumed testing in 1995, soon after the NPT had been extended with promises from the NPT nuclear weapon states to achieve a CTBT by the end of 1996 and to “exercise utmost restraint” until then.⁵⁵ The widespread condemnation that China and France received for that testing, even from friends and allies, and the limited sanctions—cuts in financial assistance to China, denial of bidding opportunities for military sales to France, and informal boycotts of French products—will not soon be forgotten.⁵⁶ All of the five nuclear weapon states later joined in the condemnations of the 1998 tests by India and Pakistan. Worldwide criticism and economic sanctions could be expected if any of these states resumed testing in 1999 or 2000. There is thus some basis for hope that the strongly felt norm against testing can help to prevent a new round of tests even if the CTBT does not go into effect soon.

But compliance with the norm cannot be taken as a certainty. If the United States resumes testing, China and Russia will likely follow suit. India and Pakistan may also follow. If testing resumes, the damage to the NPT regime is likely to be severe. Testing by the five has been the single most contentious issue at all of the NPT Review Conferences, and the promise to end testing made at the 1995 NPT Extension Conference was crucial to its success. If the United States resumes testing, some non-nuclear weapon NPT parties may feel they have been relieved of their 1995 commitment to stay with the NPT indefinitely because the United States has, by testing, gone back on its 1995 NPT commitment to achieve a CTBT by 1996 (and also on its 1968 NPT commitment to ne-

gotiate in good faith to end the nuclear arms race, including ending testing).

Islamic Middle Eastern states are already angry at the United States for failing to push Israel harder in the Middle East peace process and for refusing to permit serious discussion at future NPT conferences of proposals for getting Israel to give up its nuclear weapons.⁵⁷ Would a group of these states threaten to withdraw from the NPT at the next NPT Review Conference in 2000 for these reasons if, in addition, the United States resumed testing? If India resumed testing after the United States did, would Iran become even more determined to secure nuclear weapons, and withdraw from the NPT to do so?⁵⁸ Would any of four Northeast Asian states that have the capability to produce nuclear weapons reconsider their membership in the NPT? North Korea may already be pursuing nuclear weapons. Could South Korea, Taiwan, or even Japan be far behind North Korea after further Indian, Pakistani, and US testing?⁵⁹ While there would be other causes at work besides US testing, the United States would be singularly unpersuasive in attempting to prevent others from testing if it resumed itself.⁶⁰

CONCLUSION

This article demonstrates that a strong international norm against nuclear weapon testing exists even though the CTBT has not yet gone into effect. The article traced this norm’s rise by examining treaties, state practices, and the reasons states gave in support of these practices. The growth of this norm over more than 30 years is thus reflected not

just in treaty texts, but also in widely supported UN resolutions and other condemnations applied to the 1998 tests by India and Pakistan, the 1995-96 tests by China and France, and the earlier tests by Russia, the United Kingdom, and the United States. Resumption of testing by any of these countries would produce new condemnations and, perhaps, economic sanctions, such as those applied by the United States to India and Pakistan after their tests.

International lawyers and foreign ministry experts will classify the no-testing norm as either “politically binding” or “legally binding.” International relations theorists will be less concerned about these labels and more interested in judging the strength of the norm by its effect on state behavior. But however it is judged, any future violation of this norm will likely have serious consequences. To most of the world, nuclear tests symbolize a nuclear arms race and the horrors of Hiroshima and Nagasaki. To non-nuclear weapon countries, they also symbolize the discrimination against them permitted by the NPT: under this treaty, some parties can have nuclear weapons and test, and some cannot. The NPT provided a remedy to end this discrimination: the obligation upon the nuclear weapon parties to negotiate in good faith to halt the nuclear arms race and to achieve nuclear disarmament. Ending testing was the agreed first step to meet this obligation when the NPT was signed over 30 years ago. Resumption of testing by the five NPT nuclear weapon states would probably be seen by most of the rest of the world as a violation of their NPT commitments and an abandonment by them of the NPT’s nonproliferation goals.

Gaining commitments from India and Pakistan to end their testing has been difficult enough in a period when the five NPT nuclear weapon states agreed to stop testing. If some of the five resume testing, it will likely be impossible to gain the international cooperation necessary to restrain India and Pakistan. Without that international cooperation, it may well be impossible to prevent the acquisition of nuclear weapons by other countries, such as North Korea, which would likely be followed by South Korea, Taiwan, and Japan. In order to minimize proliferation dangers, the five NPT and three *de facto* nuclear weapon states must recognize the politically binding and, in some cases, legally binding norms against further testing by them, and work to strengthen broader nonproliferation norms. An important step toward this goal would be for those of them that have not yet signed or ratified the CTBT to do so.

¹ See Message of the President of the United States transmitting Comprehensive Nuclear Test-Ban Treaty, Treaty Doc. 105-28 (Washington, DC: GPO, 1997), US Senate, 105th Cong., 1st Sess., September 23, 1997.

² See Letter of Chairman Helms to President Clinton dated January 21, 1998; Letter of Majority Leader Lott to the Editor, *New York Times*, June 12, 1998, p. A-22; Daryl G. Kimball, "Holding the CTBT Hostage in the Senate: The 'Stealth' Strategy of Helms and Lott," *Arms Control Today* 28 (June/July 1998), p. 3.

³ "Editorial Introduction" to "CTBT Updated," *Disarmament Diplomacy* 29 (Aug./Sept. 1998), p.11 (emphasis added). Some experts argue that a better measure of the number of opposing Senators is 26, the number who opposed ratification of the Chemical Weapons Convention (even though that was negotiated under the leadership of Republican President George Bush). See Joseph Cirincione, "Non-Proliferation Analysis: The Decline and Stall of U.S. Policy," *Disarmament Diplomacy* 30 (Oct. 1998), pp. 2, 4.

⁴ See Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement*, (Cambridge, MA: Harvard University Press, 1995), pp. 112-13 (Italics in the original).

⁵ Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983), p. 2.

⁶ Charter of the International Court of Justice, Article 38.1.b. An excellent description of customary law, how it is created, how it is influenced by politics, and how one can determine whether it exists appears in Louis Henkin, *International Law: Politics and Values* (Dordrecht, Netherlands: Martinus Nijhoff, 1995), pp. 29-44.

⁷ A Congressional Research Service study for the Senate Foreign Relations Committee states that politically binding agreements often "convey merely present intention to perform an act or a commitment of a purely personal, political or moral value. The Helsinki [Final Act of 1975, a negotiated agreement issued by a multilateral conference] avoids the words of legal commitment... Non-binding agreements may take many forms, including... declarations of intent, joint communiques and joint statements (including final acts of conferences), and informal agreements." *Treaties and other International Agreements: The Role of the United States Senate*, S. Print 103-53, 103rd Cong., 1st Sess. (November 1993), p.34. For a discussion of the binding nature (legal or political) of non-treaty declarations by nuclear weapon states agreeing not to use nuclear weapons against certain non-nuclear weapon states, see George Bunn, "The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States," *The Nonproliferation Review* 4 (Spring-Summer 1997), pp. 10-11.

⁸ Oscar Schacter, "International Law in Theory and Practice," *Recueil des Cours* 178 (1982, v.5), p. 130; see also Schacter, "The Twilight Existence of Nonbinding International Agreements," *American Journal of International Law* 71 (1977), p. 296.

⁹ *US Department of State Bulletin* 73 (1975), p. 613, quoted as representing the State Department's view in the Congressional Research Service study *Treaties and other International Agreements: The Role of the United States Senate*, p. 38.

¹⁰ US Department of State explanation of the consequences of violating political commitments in the first START Treaty. See *Treaties and other International Agreements: The Role of the United States Senate*, p.34.

¹¹ Krasner, ed., *International Regimes*, pp. 1,2, 16-20, 357, 359-360; Peter J. Katzenstein, "Introduction" in Katzenstein, ed., *The Culture of National Security: Norms and Identities in World Politics*, (New York: Columbia University Press, 1996), pp. 19-20; Ronald L. Jepperson, Alexander Wendt, and Peter J. Katzenstein, "Norms, Identity and Culture in National Security," in *ibid.*, pp. 33-34, 45-46.

¹² Martha Finnemore, *National Interests and International Society* (Ithaca, NY: Cornell University Press, 1996), p. 3; Richard Price and Nina Tannenwald, "Norms and Deterrence: The Nuclear and Chemical Weapons Taboos," in Katzenstein, ed., *The Culture of National Security*, pp. 114-15, 143-44; Ann Florini, "The Evolution of International Norms," *International Studies Quarterly* 40 (September 1996), pp. 363-89; Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* 87 (April 1993), pp. 205-09, 222; Anne-Marie Slaughter, Andrew S. Tulumello, and Stephan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship," *American Journal of International Law* 92 (July 1998), pp. 367, 373.

¹³ Finnemore, *National Interests and International Society*, p. 140.

¹⁴ The first quotation is from "Indian Proposal Introduced in the UN Disarmament Commission," July 12, 1956, Department of State, *Documents on Disarmament, 1945-56* (Washington, DC: Government Printing Office, 1960), p. 665. After 1960, *Documents on Disarmament* volumes were issued by the US Arms Control and Disarmament Agency. They will be cited hereafter as *Documents on Disarmament* followed by the year covered by the volume. The second quotation is from "Indian Draft Resolution: Suspension of Nuclear Weapon Tests," November 1, 1957, *Documents on Disarmament, 1945-56*, pp. 906-07. See also Statement of Prime Minister Nehru of November 28, 1957, *Documents on Disarmament, 1945-46*, pp. 917-18; Revised Indian Draft Resolution, October 14, 1958, *Documents on Disarmament, 1945-46*, pp. 1184-85; Letter of Indian Representative Jha to UN Secretary General: "Nuclear Test Item for the Provisional Agenda of the 16th General Assembly," July 29, 1961, *Documents on Disarmament, 1961*, pp. 270-71, 539, note 1 (1962); UN General Assembly Resolution 1762 (XCII), November 7, 1962, *Documents on Disarmament, 1962*, pp. 1029-30.

¹⁵ Statement by Indian Representative Dhar to the First Committee of the General Assembly, December 14, 1967, *Documents on Disarmament, 1967*, pp.692, 695-96; Statement by Indian Representative Husain to the First Committee of the General Assembly, May 14, 1968, *Documents on Disarmament, 1968*, pp. 325, 331.

¹⁶ On May 21, 1974, after the test, Indian Minister of External Relations Singh referred to it as a "peaceful nuclear explosion experiment," adding "We have no intention of developing nuclear weapons." *Documents on Disarmament, 1974*, p. 149. See also "Statement by Indian Atomic Energy Commission," May 18, 1974, *Ibid.*, p.146, and "Statement by Indian Representative to the Geneva Committee of the Conference on Disarmament," May 23, 1974, *Ibid.*, pp. 170, 171. Indian Prime Minister Gandhi stated that India's test was a "peaceful nuclear explosion" permitted by Article V of the NPT—although India was not a party to the NPT and had not complied with the procedures required by Article V. See Thomas Graham Jr. and Douglas B. Shaw, "Nearing the Fork in the Road: Proliferation or Nuclear Reversal," *Nonproliferation Review* 6 (Fall 1998), pp. 70, 72. Pakistani Prime Minister Bhutto condemned the 1974 Indian test as a "nuclear threat" and a violation of international norms just as much as if it had been a military weapon test.

Ibid., pp. 146, 148. The Desai quotation in the text above is from "Statement of July 31, 1978," *Documents on Disarmament, 1978*, pp. 482-84. The resolution is UN General Assembly Resolution 33/60, December 14, 1978, *Documents on Disarmament, 1978*, pp. 746-47. Resolutions with similar language were adopted with Indian and Pakistani support in other years. See, e.g., UN General Assembly Resolution (UNGA) 33/78, December 12, 1977, *Documents on Disarmament, 1977*, pp. 827-28; UNGA Res. 42/26 (1987), *Yearbook of the UN, 1987* (Dordrecht, Netherlands: Martinus-Nijhof, 1988), p. 51; UNGA Res. 43/63, *Yearbook of the UN, 1988*, p. 61; UNGA Res. 44/105 (1989), *Yearbook of the UN, 1989*, p. 52. In the 1990 resolution, the General Assembly expressed its "conviction that, pending conclusion of a comprehensive nuclear test ban treaty, the nuclear weapon states should suspend all nuclear test explosions through an agreed moratorium or unilateral moratoria." UNGA Res. 46/28 (1990), *Yearbook of the UN, 1990*, p. 40. India and Pakistan, and most of those voting (but not the nuclear weapon states) supported this resolution. This language was repeated for several years. UNGA Res. 47/46 (1992), *Yearbook of the UN, 1992*, p. 86; UNGA Res. 48/70 (1993), *Yearbook of the UN, 1993*, p. 117; UNGA Res. 49/69 (1994), *Yearbook of the UN, 1994*, p. 145.

¹⁷ The promises concerning testing made in connection with the NPT's extension appear in *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, NPT/CONF. 1995/L.5, par. 3. The resolution is UNGA Res. 50/70, *Yearbook of the UN, 1995*, p. 60 (emphasis in the original). China, France, and the United Kingdom opposed, Russia supported, and the United States and Pakistan abstained. Most others voted for the resolution.

¹⁸ See Rebecca Johnson, Acronym No. 10, pp. 13-17, 21; Dinshaw Mistry, "Domestic-International Linkages: India and the Comprehensive Test Ban Treaty," *The Nonproliferation Review* 6 (Fall 1998), pp. 25, 27-31; cf. T.V. Paul, "The Systemic Bases of India's Challenge to the Global Nuclear Order," *The Nonproliferation Review* 6 (Fall 1998), pp. 1, 6.

¹⁹ Vienna Convention on the Law of Treaties, adopted May 23, 1969, Art. 18(a). Article 18 (b) includes another exception: "provided that such entry into force is not unduly delayed."

²⁰ The then director of the US Arms Control and Disarmament Agency, John Holum, stated this view in an address to a committee of the American Bar Association on September 26, 1996. Holum quoted a speech by President Clinton, on signing the CTBT, in which he said the signatories would "create an international norm against testing, even before the treaty formally enters into force." He had earlier said: "The United States will continue its nuclear testing moratorium pending entry into force of the treaty." See "ACA Candidates Forum," *Arms Control Today* 26 (September 1996), p. 3. For a more detailed exposition, see George Bunn and John B. Rhinelander, "U.S. Should Lead Effort to Enforce Legal Norm Against Testing," *Arms Control Today* 26 (October 1996), p. 30.

²¹ The United States signed the treaty and submitted it to the Senate in 1971. The Senate has not acted upon it. See Covey T. Oliver, Edwin B. Firmage, Christopher Blakesley, Richard F. Scott, and Sharon Williams, *The International Legal System* (Westbury, NY: Foundation Press, 1995), p. 991.

²² See Marian Nash Leich, *Digest of United States Practice in International Law, 1980* (Washington, DC: Government Printing Office, 1986), p. 398-99. A legal opinion on this subject by State Department Legal Adviser Roberts B. Owen appears just after this quotation, pp. 399-406. Later, after Carter was succeeded by President Ronald Reagan, Reagan ordered the elimination of two submarines to keep within SALT II limits. Louis Henkin, Richard C. Pugh, Oscar Schachter, and Hans Smit, *International Law* (St. Paul, MN: West Publishing, 1987), p. 413, note 1. This was described by the Reagan Administration as not "undercutting" SALT II. General Counsel Richstein of the US Arms Control and Disarmament Agency took the position that the commitment not to "undercut" SALT II was a statement of "national policy" and therefore "not legally binding." See Marian Nash Leich, *Cumulative Digest of United States Practice in International Law, 1981-88*, v.3 (Washington, DC: Government Printing Office, 1995), pp. 3525-26. He did not, however, disagree with earlier statements by the State Department legal adviser that the Vienna Convention rule against taking action that violated the object and purpose of a signed treaty had become customary international law applicable to the United States as well as to other states. Still later, Reagan made the decision not even to hold open the possibility of joining SALT II and not to be bound even "politically" by the treaty any longer. See G. Bunn, *Arms Control by Committee* (Stanford, CA: Stanford University Press, 1992), note 40, p. 306. Thus the Reagan administration complied with the Vienna Convention without referring to it. US practice in arms control seems to be consistent with the Convention.

²³ President Clinton, Address to the UN General Assembly, September 24, 1996 (emphasis added).

²⁴ Section 507 of the 1992 Energy and Water Development Appropriations Act, Public Law 102-377.

²⁵ Letter to the Editor, *New York Times*, June 9, 1998, p. A-22.

²⁶ The Vienna Convention obliges a signatory to refrain from acts that would defeat the "object and purpose" of the treaty it has signed until "it shall have made its intention clear not to become a party to the treaty...." Art. 18 (a).

²⁷ See Programme for Promoting Nuclear Non-Proliferation, "Proliferation-Related Developments: India and Pakistan," *Newsbrief* 42 (Second Quarter 1998), insert; "Indian and Pakistani Tests: Special Feature," *Disarmament Diplomacy* 26 (May 1998), pp. 1-21; "India and Pakistan Nuclear Tests: Continuing Developments & Reaction," *Disarmament Diplomacy* 27 (June 1998), pp. 16-27.

²⁸ See Wade Boese, "India, Pakistani Nuclear Tests Elicit Condemnation at CD," *Arms Control Today* 28 (May 1998), p. 25; "47-State CD

Statement," *Disarmament Diplomacy* 26 (May 1998), p. 19.

²⁹ "NAM Summit, Final Document 12th Non-Aligned Movement Summit," *Disarmament Diplomacy* 29 (August/September 1998), p. 36; Donald H. McNeil, "Nonaligned Movement Meets, Out of Spotlight," *New York Times*, September 7, 1998, p. A-4 (National ed.); Wade Boese, "Indian, Pakistani Nuclear Tests Elicit Condemnation at CD," p. 25.

³⁰ UN Charter, Arts. 24 and 39.

³¹ UN Security Council Resolution 1172 (June 6, 1998), emphasis added.

³² See, e.g., *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua vs. United States), International Court of Justice (1986), p. 24, pp. 87 f.f.

³³ *Restatement of the Law Third: The Foreign Relations Law of the United States* (St. Paul, MN: American Law Institute, 1987), Sect. 102, Comment h, p. 27.

³⁴ Ibid., Comment i, p. 27. Examples are given in Antonia Chayes and Abram Chayes, "Regime Architecture: Elements and Principles," in Janne Nolan, ed., *Global Engagement: Cooperation and Security in the 21st Century* (Washington, DC: Brookings, 1994), p. 65. These include the NPT norm against additional states having nuclear weapons. Ibid., pp. 70-71. This is of course legally binding on parties to the NPT. But the Chayes chapter discusses the normative effect it has had on non-NPT parties.

³⁵ See the text above at notes 14-17.

³⁶ Statute of the International Court of Justice, Art. 38.1.b.

³⁷ By early opposition to an emerging norm, a state can avoid application of the norm to itself. But opposition must be consistent and begin fairly early in the growth of the norm. See, e.g., Paul Szasz, "General Law-Making Processes" in Schachter and Joyner, eds., *United Nations Legal Order*, p. 41. Instead, as this article has shown, India began arguing that testing was against international law in 1956 and it led the effort to condemn testing in a General Assembly resolution in 1962, before the NPT was negotiated and had established the first treaty norm against testing. Pakistan voted for the 1962 resolution condemning testing and also for the later resolutions criticizing testing less severely.

³⁸ IAEA Resolution GC(42)/26/RES/23 reported in Programme for Promoting Nuclear Non-Proliferation, *Newsbrief* 43 (Third Quarter 1998), p. 37. The italics have not been added; the "bold" emphasis for "legal" has. A paragraph with almost identical statements appeared in the resolution deploring the South Asian tests adopted by the UN General Assembly in a vote of 118 to 9 (with 33 abstentions) in December of 1998. UNGA Resolution 53/77G.

³⁹ This is reflected in the text of the resolution just quoted. At the end of 1998, US negotiations about nuclear weapons with India and Pakistan were continuing without agreement on terms pursuant to which they would sign the CTBT. Pakistani Prime Minister Nawaz Sharif met with President Clinton and agreement was announced on paying Pakistan back for US fighter jet air-

craft that had not been delivered as promised to Pakistan. But no announcement was made about Pakistan signing the CTBT. "U.S. to Pay Pakistan Back for Undelivered Jets," *New York Times*, December 22, 1998 (National ed.), p. A-15. In a lengthy speech to his Parliament, Indian Prime Minister Atal Behari Vajpayee restated India's determination to maintain a minimum nuclear deterrent, including various missiles for delivering nuclear warheads—despite criticisms from other states, including the United States. He repeated his earlier commitment made to the General Assembly to "bring discussions to a successful conclusion so that entry into force of the [CTBT] is not delayed beyond September 1999." But he boasted about India's nuclear tests, complained about the nuclear build ups by China and Pakistan, and repeated India's demand for "universal elimination of all nuclear weapons." See Prime Minister's Opening and Closing Statements to Parliament's Nuclear Debate, December 15-16, 1998. One American reporter suggested that India might test again soon. Mark Hibbs, "India May Test Again Because H-Bomb Failed, U.S. Believes," *Nucleonics Week*, November 26, 1998.

⁴⁰ See Chayes and Chayes, "Regime Architecture," p. 71.

⁴¹ See text above at notes 14-17.

⁴² See text above at note 17.

⁴³ See text above at notes 28-31.

⁴⁴ See text above at note 39.

⁴⁵ See, e.g., Paul Szasz, "General Law-Making Processes," pp. 45-46; Chayes and Chayes, "Regime Architecture," pp. 68-71; Martha Finnemore, *National Interests in International Society*, pp. 22-24.

⁴⁶ See Programme for Promoting Nuclear Non-Proliferation, *Newsbrief* 42 (Second Quarter 1998), insert, p. 3; Howard Diamond, "India Conducts Nuclear Tests; Pakistan Follows Suit," *Arms Control Today* 28 (May 1998), p. 22; US State Department, "Fact Sheet on India and Pakistan Sanctions," June 18, 1998; Press Briefing by Deputy Secretary Strobe Talbott on India and Pakistan, Washington, DC, June 18, 1998. The US sanctions were modified somewhat to permit sale of US wheat to India and Pakistan. See Eric Schmitt, "Senators Back Sale of Wheat to Pakistanis," *New York Times*, July 10, 1998 (National ed.), p. A-7; "House Passes Bill to Lift Nuclear Sanctions on Food for India and Pakistan," *New York Times*, July 15, 1998 (National ed.), p. A-9. World Bank and IMF loans to India were delayed at first by US opposition, but some were later permitted on humanitarian grounds. See David E. Sanger, "U.S. Allows An Exception in Supporting Loan for India," *The New York Times*, June 26, 1998 (National ed.), p. A-6.

⁴⁷ The texts of the declarations and resolutions appear in Programme for Promoting Nuclear Non-Proliferation, *Newsbrief* 42, insert, and in "India and Pakistan Nuclear Tests," *Disarmament Diplomacy* 27 (June 1998), pp. 16. They are summarized in Diamond, "India Conducts Nuclear Tests."

⁴⁸ John F. Burns, "Leaders in India and Pakistan

Tone Down Crisis," *New York Times*, May 30, 1998 (National ed.), p. A-1; "Talbott -Singh Talks," *Washington Times*, August 25, 1998; Nasir Malik, "No Giving up of N-Capability: Pakistan May Sign CTBT if Curbs Are Lifted," *DAWN Daily News by E-Mail*, August 26, 1998; <<http://DAWN.com>>; K. Subrahmanyam, "Jaswant, Talbott Work Towards Bridging the Gaps," *The Economic Times of India*, Aug. 26, 1998, <<http://economictimes.com>>; Barbara Crossette, "Pakistan Pledges A-Bomb Test Ban if Sanctions End," *The New York Times*, September 24, 1998 (National ed.), p. 1; Celia W. Dugger, "For Pakistan and India, Atom Pact is Hard Sell," *The New York Times*, September 30, 1998 (National ed.), p. A-3; David Stout, "Clinton Likely to Delay Trip to Pakistan and India," *New York Times*, September 19, 1998 (National ed.), p. A-9; Howard Diamond, "India, Pakistan Respond to Arms Control Initiatives," *Arms Control Today* 39 (June/July, 1998), p. 24; Programme for Promoting Nuclear Non-proliferation, *Newsbrief* 43 (Third Quarter 1998), pp. 16-18. At the end of 1998, negotiations between the United States and both India and Pakistan had failed to produce agreement with either of them. See note 39. See Address by Deputy Secretary of State Strobe Talbott, "U.S. Diplomacy in South Asia," November 12, 1998, *Disarmament Diplomacy* 32 (November 1998), pp. 44-48.

⁴⁹ Diamond, "India, Pakistan Respond to Arms Control Initiatives." In November, 1998, the US government imposed economic sanctions on more than 300 Indian and Pakistani government agencies and private companies for alleged nuclear and related military ties. Existing sanctions were revised, permitting resumption of government loans and other assistance for US concerns doing business in India and Pakistan. Lifting other sanctions in return for India and Pakistan signing the CTBT and taking other non-proliferation action appears to be part of the quid pro quo offered India and Pakistan, but agreement had not been reached by the end of 1998. Statement by White House Press Secretary, "Easing Sanctions on India and Pakistan," November 7, 1998, *Disarmament Diplomacy* 32 (November 1998), p. 48; Alexander Ferguson, "Indian, Pakistani Firm Face U.S. Sanctions," Reuters, November 13, 1998.

⁵⁰ CTBT, Art. XIV, Annex 2.

⁵¹ "Brazil Moves to Join CTBT, NPT," *Arms Control Today* 28 (June/July 1998), p. 34; Kimball, "Holding the CTBT Hostage in the Senate," pp. 3-4; US Arms Control and Disarmament Agency website, <http://www.acda.gov/ctbtpage/ctb_page.htm>, January 28, 1999.

⁵² Kimball, "Holding the CTBT Hostage in the Senate," pp. 3-4, 8-9.

⁵³ CTBT, Art. XIV.

⁵⁴ Recent polling results are described in Kimball, "Holding the CTBT Hostage in the Senate."

⁵⁵ "Principles and Objectives for Nuclear Non-Proliferation and Disarmament," NPT/CONF.1995/32/DEC.2, par. 4.

⁵⁶ See Programme for Promoting Nuclear Non-proliferation, *Newsbrief* 30 (Second Quarter

1995), p. 7; *Newsbrief* 31 (Third Quarter 1995), pp. 4-6.

⁵⁷ The 1998 NPT Preparatory Committee meeting to plan for the 2000 NPT review conference broke up without a substantive report on major issues because of disagreement on a few issues, including opportunity in the future to consider implementation of the 1995 NPT Conference "Middle East Resolution." This resolution, part of the quid pro quo given Middle Eastern NPT parties in return for their consent to extending the NPT, endorsed the objectives of the Middle East peace process as well as efforts to achieve a nuclear weapon-free zone in the Middle East. It called upon all states in the Middle East that have not done so to join the NPT. Israel is now the only such state in the Middle East. In a confrontation with Egypt at the 1998 NPT conference, the United States refused to agree to Egypt's proposals to discuss the issues raised by this resolution at the next preparatory committee meeting or at the 2000 NPT review conference. That was the straw that broke the camel's back and the 1998 conference gave up trying to gain a consensus on any substantive final report late in the night on the last day of the preparatory committee meeting. See Rebecca Johnson, *Reviewing the Non-Proliferation Treaty: Problems and Processes: A Report of the Second Preparatory Committee Meeting of the 2000 Review Conference*, Acronym No. 12 (September 1998), pp. 5, 9.

⁵⁸ See, e.g., Peter Jones, "Iran's Threat Perceptions and Arms Control Policies," The Nonproliferation Review 6 (Fall 1998), pp. 39, 47-8.

⁵⁹ For useful discussions of the impact of Indian-Pakistani tests on future proliferation of nuclear weapons in Asia and on the non-proliferation regime, see Wade Huntley, "Nonproliferation Prospects after the South Asian Tests," *The Nonproliferation Review* 6 (Fall 1998), pp. 95, 88-91; Graham and Shaw, "Nearing A Fork," pp. 70, 73-74.

⁶⁰ There are ways that the CTBT could be brought into effect provisionally while awaiting legislative approval in one or more of the 44 states that are necessary by the treaty's terms to bring it into force. See Amb. Thomas Graham, Jr., "South Asia and the Future of Nuclear Non-Proliferation," *Arms Control Today* 28 (May 1998), pp. 3, 6. However, the conference at which this would be likely to happen is open only to members of the 44 states that have ratified the CTBT. See CTBT, Art. XIV. If the United States had not ratified, it could not attend except perhaps as an observer. The members of the 44 that could attend could not bind the United States. If the United States had not then ratified, China, Russia, India, North Korea, and Pakistan would be unlikely to have done so either. Without most of the 44 necessary parties, including China, Russia, and the United States, an agreement of this sort to make the treaty provisionally effective would make little sense. On the other hand, an agreement simply to continue the existing moratorium would be quite possible if the political will existed to do so.