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The Nuclear Non-Proliferation Regime: Legitimacy as a Function of Process

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I. THE ISSUE IN CONTEXT

For much of the first decade of the new millennium many of the key assumptions that originally inspired the Nuclear Non-Proliferation Treaty (NPT) of 1969 appeared outdated, indeed dangerously inappropriate. Traditional restraints, both of a technical and political nature, seemed to have frayed to the point of threatening the unraveling of the international non-proliferation regime.[1] With at least forty-nine states presumed to have the scientific knowledge and technological capability to build nuclear weapons, sensitive nuclear know-how and expertise shared

* © 2010 Günther Handl. Eberhard Deutsch Professor of Public International Law, Tulane University Law School. The author gratefully acknowledges the research assistance by Jeremy Sporn, Tulane J.D. 2009, and Charley Rothermel, J.D. candidate 2012, Tulane University Law School.

1. *See* William J. Broad & David E. Sanger, *Fraying of Old Restraints Risks a Second Nuclear Age*, N.Y. TIMES, Oct. 15, 2006, at 1; Jeffrey Lewis, *A Crisis of Confidence*, BULL. ATOMIC SCIENTISTS, Jan./Feb. 2007, at 13, 15. Then-CIA Director George Tenet noted, "The 'domino theory' of the 21st century [might] well be nuclear." JOSEPH CIRINCIONE, BOMB SCARE: THE HISTORY AND FUTURE OF NUCLEAR WEAPONS 108 (2007) (internal quotation marks omitted).

globally and readily accessible,[2] the risk of illegal nuclear transfers—both of a state-to-state nature and, more insidiously, involving a mix of state and non-state actors—had become a serious threat as evidenced by the belated discovery of Abdul Qadeer Khan's international nuclear black-market network,[3] and the increase in reported trafficking of nuclear technology and fissile materials.[4] Moreover, the emergence of nuclear power as an alternative to carbon-intensive energy systems promised a renewed surge in the trade of nuclear materials and technology, thus posing future proliferation risks additional to those already in sharp relief.[5]

On the political side, various developments tended to enhance rather than diminish the role of nuclear weapons in national security doctrines and international politics. To begin with, all "classic" nuclear weapons states—the United States, Russia, the United Kingdom, China, and France—began modernizing their nuclear arsenals.[6] In this vein, in 2003 the United States Congress loosened a decade-old policy of restraint on

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2. Much of this new accessibility is a result of the explosive growth of Internet-based information exchanges. Sometimes governments themselves inadvertently disclose sensitive nuclear weapons information. *See* William J. Broad, *U.S. Web Archive Is Said To Reveal Nuclear Primer*, N.Y. TIMES, Nov. 3, 2006, at A1.

3. For a detailed analysis, see generally INT'L INST. FOR STRATEGIC STUDIES, NUCLEAR BLACK MARKETS: PAKISTAN, A.Q. KHAN AND THE RISE OF PROLIFERATION NETWORKS—A NET ASSESSMENT (Mark Fitzpatrick ed., 2007). *See also* DOUGLAS FRANTZ & CATHERINE COLLINS, THE NUCLEAR JIHADIST: THE TRUE STORY OF THE MAN WHO SOLD THE WORLD'S MOST DANGEROUS SECRETS . . . AND HOW WE COULD HAVE STOPPED HIM (2007); WILLIAM LANGEWIESCHE, THE ATOMIC BAZAAR: THE RISE OF THE NUCLEAR POOR (2007); David Albright & Corey Hinderstein, *Uncovering the Nuclear Black Market: Working Toward Closing Gaps in the International Nonproliferation Regime*, INST. FOR SCI. & INT'L SEC., July 2, 2004, http://www.isis-online.org/publications/southasia/nuclear_black_market.html.

4. Thus from 2002 to 2009, IAEA's Illicit Trafficking Database received reports on 1400 incidents. Yukiya Amano, Dir. Gen., Int'l Atomic Energy Agency (IAEA), Statement at Nuclear Security Summit (Apr. 13, 2010), http://www.iaea.org/NewsCenter/Statements/2010/amsp2010n007.html.

5. For an assessment of the nuclear black market after the (partial) dismantling of A.Q. Khan's network, see *The Nuclear Black Market: Still in Business*, ECONOMIST, May 5, 2007, at 74. *See also Congo Arrest over Missing Uranium*, BBC NEWS, Mar. 8, 2007, http://news.bbc.co.uk/2/hi/africa/6430031.stm; Sharon Weinberger, *Black Hole on the Black Sea: Inside Georgia's Nuclear Bazaar*, FOREIGN POLICY, May 5, 2010, http://www.foreignpolicy.com/articles/2010/05/05/black_hole_on_the_black_sea.

6. *See* Jochen Bittner, *Zurück zur Bombe*, ZEIT ONLINE, Feb. 1, 2007, http://www.zeit.de/2007/06/Atombombe; Lyle J. Goldstein, *Introduction*, *in* 22 NAVAL WAR COLLEGE: NEWPORT PAPERS, CHINA'S NUCLEAR FORCE MODERNIZATION 1, 3 (Lyle J. Goldstein & Andrew S. Erickson eds., 2005); Stephen Herzog, *Analysis of the French White Paper on Defence and National Security*, BRITISH AMERICAN SECURITY INFORMATION COUNCIL, GETTING TO ZERO PAPERS No. 3, July 2008, at 1, 2; Alan Cowell, *Blair Wins Vote To Renew Atom Arsenal*, N.Y. TIMES, Mar. 15, 2007, at A8.

the research and development of low-yield nuclear weapons.[7] The United States thus took a step, which, while technically not a violation of the NPT, clearly undermined the legal regime's non-proliferation message.[8] Additionally, the Bush Administration's different treatment of the so-called "axis of evil" countries in the U.S.-led "global war on terror" reinforced the perception of nuclear weapons as being of high strategic-political value. As Pakistan's Foreign Minister put it succinctly, "Nuclear weapons are the currency of power and many countries would like to use it."[9]

More ominously still, while Libya voluntarily renounced its nuclear weapons program in 2003,[10] the international non-proliferation system faced new existential challenges: North Korea's withdrawal from the NPT in 2003, its testing of nuclear devices in 2006 and again in 2009,[11] as well as Iran's uranium fuel enrichment activities in violation of its safeguards agreement, and its continued disregard of United Nations Security Council resolutions in this matter.[12] Coming on top of Israel's long-standing posture of nuclear ambiguity[13] and the nuclearization of South Asia in the 1970s, this new defiance of the international community, which has yet to be dealt with successfully today, suggested

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7. Congress repealed the ban on research and development of so-called mini-nukes with a yield of less than five kilotons established in 1994, but subjected any development of such a weapon to prior congressional authorization. *See* National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (Nov. 24, 2003). At the same time, however, in 2005, Congress halted funding on the so-called "Robust Nuclear Earth Penetrator," colloquially referred to as "nuclear bunker buster." *Nuclear Bunker Busters Are Dangerous, Ineffective, and Unneeded*, FED'N OF AM. SCIENTISTS, Oct. 26, 2005, http://www.fas.org/programs/ssp/nukes/new%20nuclear%20weapons/bnkrbstrrprt.html.

8. *See* Lawrence Scheinman, *Disarmament: Have the Five Nuclear Powers Done Enough?*, ARMS CONTROL ASS'N, Jan./Feb. 2005, http://www.armscontrol.org/act/2005_01-02/Scheinman.asp.

9. Jo Johnson & Farhan Bokhari, *Pakistan Warns on India-US Nuclear Deal*, FIN. TIMES, Mar. 17, 2006, http://www.ft.com/cms/s/0/174ecbaa-5bb5-11da-aa90-0000779e2340.html (internal quotation marks omitted). In this vein, several countries plan to develop their own nuclear power programs which indirectly confirms the wider inherent proliferation implications of Iran's nuclear program. *See* Hassan Fattah, *Arab Nations Plan To Start Joint Nuclear Energy Program*, N.Y. TIMES, Dec. 11, 2006, at A10; William J. Broad & David E. Sanger, *With Eye on Iran, Rivals Also Want Nuclear Power*, N.Y. TIMES, Apr. 15, 2007, at 1.

10. *Lessons of Libya*, N.Y. TIMES, Dec. 20, 2003, at A18.

11. For details, see *infra* text accompanying notes 121-125.

12. For a summation of the history of Iran's noncompliance with IAEA safeguards and multiple Security Council resolutions, see S.C. Res. 1929, U.N. Doc. S/RES/1929 (2010).

13. Israel follows a "doctrine of ambiguity" pursuant to which it neither denies nor confirms its status as a Nuclear Weapon State. For details, see AVNER COHEN, ISRAEL AND THE BOMB 1-7 (1998). Most recently, however, official documentary evidence of Israel's possession of nuclear weapons seems to have surfaced. *See, e.g.*, Chris McGreal, *Revealed: How Israel Offered To Sell South Africa Nuclear Weapons*, GUARDIAN, May 24, 2010, www.guardian.co.uk/world/2010/may/23/israel-south-africa-nuclear-weapons.

a regime in rapid decline. This impression was further strengthened by the failure of the 2005 NPT Review Conference,[14] as well as Syria's ill-fated clandestine nuclear activities at Al Kibar.[15] It is small wonder therefore that the nuclear arms control regime should have been referred to as "looking battered,"[16] as "making the world a more dangerous place,"[17] or, in the words of President Obama, as being on the "point where the center cannot hold."[18]

Upon taking office in January 2009, the Obama Administration launched a series of initiatives that aims to reverse the declining effectiveness of the international nuclear non-proliferation regime. In his April 2009 speech in Prague, the President, acknowledging a world without nuclear weapons as the ultimate objective, laid out steps the United States would be taking, including several nuclear arms control initiatives,[19] as well as measures to strengthen the NPT and the institutional framework for complementary international efforts.[20] Since then, the Administration has signed a new strategic nuclear arms control agreement with Russia,[21] pushed for reconsideration and approval of the Comprehensive Test Ban Treaty (CTBT)[22] by the United States Senate,[23]

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14. *See* Mark Turner, *Talks on Nuclear Arms End in Failure*, FIN. TIMES, May 28, 2005, http://www.ft.com/cms/s/0/4c770bb8-cf14-11d9-8cb5-00000e2511c8.html.

15. Israel put an end to these activities in 2007 when it attacked what appears to have been an (undeclared) nuclear reactor under construction. *See, e.g.*, David E. Sanger & Mark Mazzetti, *Analysts Find Israel Struck a Syrian Nuclear Project*, N.Y. TIMES, Oct. 14, 2007, at 1.

16. Mohamed ElBaradei, *Towards a Safer World*, ECONOMIST, Oct. 18, 2003, at 65. Other parties to the NPT—Libya, and pre-1991 Iraq—are known to have grievously flouted their obligations under the NPT and/or associated safeguards agreements. Some other states are merely suspected of having done so or committed violations of a less serious nature. For example, South Korean scientists carried out experiments producing enriched uranium of near-weapons grade quality. *See* Andrew Ward & Stephen Fidler, *UN Probes South Korea Nuclear Experiment*, FIN. TIMES, Sept. 3, 2004, at 1.

17. James Lamont, *Indian PM Warns on Nuclear Treaty*, FIN. TIMES, Sept. 30, 2009, at 5 (paraphrasing Manmohan Singh, Prime Minister of India).

18. Barack Obama, President of the United States, Remarks at Prague, Czech Republic (Apr. 5, 2009), www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/ [hereinafter Prague Speech].

19. Namely, targeting strategic nuclear weapons, the comprehensive nuclear test ban treaty, and pertaining to fissile nuclear materials. *Id.*

20. *Id.* The President specifically mentioned turning "into durable international institutions" efforts such as the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism. *Id.*

21. Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, done at Prague, U.S.-Russ., Apr. 8, 2010, http://www.state.gov/documents/organization/140035.pdf.

22. Prague Speech, *supra* note 18; Comprehensive Nuclear-Test-Ban Treaty, Sept. 24, 1996, S. Treaty Doc. No. 105-28, 35 I.L.M. 1439 (not ratified).

23. *See, e.g.*, Peter Baker, *White House Presses Republicans on Arms Treaty*, N.Y. TIMES, July 22, 2010, at A7.

and in its 2010 Nuclear Posture Review (NPR)[24] formally outlined an approach that seeks to reverse, if not annul, many policies of the previous administration.[25] Specifically, the NPR puts a renewed emphasis on nuclear non-proliferation and disarmament[26] by rejecting the development of new nuclear weapons[27] and proposing a significant reduction in the number of warheads.[28] These U.S. initiatives[29] have coincided with or have been complemented by various diplomatic gatherings to shore up support for the nuclear non-proliferation regime,[30] most notably the 2010 NPT Review Conference in May.[31] The latter's relative success[32] in particular has led some to conclude that the non-proliferation regime may have been granted "a temporary reprieve."[33]

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24. U.S. DEP'T OF DEF., NUCLEAR POSTURE REVIEW REPORT (Apr. 2010).

25. For example, the Obama Administration while declining to commit to a "no first use" pledge, offers enhanced "negative security assurances." Accordingly, the United States will "not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the NPT and in compliance with their nuclear non-proliferation obligations." *Id.* at 46.

26. Thus the NPR calls for the development of new non-nuclear weapons systems, so-called "prompt global strike" weapons, which might keep military conflicts "denuclearized" and thus undercut the political-strategic value of nuclear weapons. *See id.* at 34.

27. *See id.* at 39. At the same time the Obama Administration has, not inconsistently, "promised $80 billion over the next 10 years to sustain and modernize the nuclear weapons complex and $100 billion to refurbish nuclear weapons and delivery systems." *See* Editorial, *Ratify the Treaty*, N.Y. TIMES, Aug. 1, 2010, at A16.

28. See U.S. DEP'T OF DEF., *supra* note 24, at 7. On the other hand, the NPR—not inconsistently—calls for substantial new investment in nuclear weapons laboratories and "human capital." *Id.* at 40-42.

29. Other steps the Administration has taken include initiatives to permit U.S. participation in nuclear-free zones, such as those in Africa and the South Pacific. Hillary Clinton, U.S. Sec'y of State, Statement to the 2010 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons 6 (May 3, 2010), www.un.org/en/conf/npt/2010/statements/pdf/usa_en.pdf.

30. An International Conference on Access to Civil Nuclear Energy in Paris in March 2010 addressed, inter alia, the issue of countries' guaranteed access to nuclear fuel for civilian uses and of the suspension of civil nuclear cooperation as a sanction for noncompliance with the NPT. Nicolas Sarkozy, President of the French Republic, Opening Statement to the International Conference on Access to Civil Nuclear Energy (Mar. 8, 2010), http://ambafrance-in.org/france_inde/spip.php?article6264. The conference was followed by the Nuclear Security Summit in Washington, D.C., in April, which focused on enhancing nuclear security and reducing the threat of nuclear terrorism. *See* Press Release, The White House, Communiqué of the Washington Nuclear Security Summit (Apr. 13, 2010), http://www.whitehouse.gov/the-press-office/communiqu-washington-nuclear-security-summit.

31. *See* 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3-28, 2010, *Final Document*, pt. 1, U.N. Doc. NPT/CONF.2010/50 (Vol. I) (2010) [hereinafter 2010 Review Conference, *Conclusions and Recommendations*].

32. *See, e.g.*, WILLIAM POTTER ET AL., CNS SPECIAL REPORT: THE 2010 NPT REVIEW CONFERENCE: DECONSTRUCTING CONSENSUS 19 (2010).

33. Deepti Choubey, *Future Prospects for the NPT*, ARMS CONTROL ASS'N, July/Aug. 2010, http://www.armscontrol.org/act/2010_07-08/choubey ("For those who fear the nonproliferation regime is fraying, the results of the 2010 NPT Review Conference serve as a temporary reprieve.").

There is, of course, no denying that from a non-proliferation viewpoint recent U.S. and international developments are encouraging. However, it is much too early to tell whether they signal a true reversal of, as against perhaps a mere pause in, the decline of the non-proliferation regime. To begin with, in the United States, Senate approval of key arms control agreements, such as the new Strategic Arms Reduction Treaty (START) or the CTBT, may yet be held hostage to concerns over verification and/or compliance issues[34] or the safety and reliability of the U.S. weapons stockpile.[35] More fundamentally, at the international level, efforts at restoring the effectiveness of the regime are complicated by the NPT's complex, bifurcated structure and, directly related, by a legacy of distrust that continues to color relations between the nuclear-haves and have-nots. Thus, any campaign to strengthen international substantive policies that underpin the NPT's three pillars—non-proliferation, disarmament, and technology sharing—raises sensitive procedural or process issues, precisely because the Treaty, atypically, is premised on states parties' inherent inequality in terms of their rights and obligations. In other words, the international non-proliferation regime's effectiveness is also a function of the legitimacy of process, that is, the authoritative nature, or lack thereof, of procedures, fora, and frameworks through or in which critical decisions bearing on the parameters of the regime are being made and applied. As this Article will show, in the recent past in particular, lack of attention to process has seriously hampered the realization of important nuclear non-proliferation policy objectives. Therefore, for any of the new initiatives to ultimately succeed in bolstering the non-proliferation regime, states and other relevant actors

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34. *See, e.g.*, Walter Pincus & Mary Beth Sheridan, *Report Findings About Russia Could Complicate Debate on New START Pact*, WASH. POST, July 28, 2010, at A09. The referenced State Department report acknowledges that "a number of long-standing compliance issues . . . remained unresolved when the [START-1] Treaty expired on December 5, 2009." U.S. DEP'T OF STATE, ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL, NONPROLIFERATION, AND DISARMAMENT AGREEMENTS AND COMMITMENTS 8 (July 2010). In some quarters this acknowledgement has rekindled concerns about verification issues arising under the new START. In sum, however, opposition appears to be "a mixture of political opportunism, ignorance and perfectionism." *See Nuclear Weapons: Just Do It*, ECONOMIST, Sept. 25, 2010, at 16.

35. Such concerns have been expressed despite strong evidence pointing to their unfounded nature. In 2002 a National Academy of Science committee concluded that, given its stockpile stewardship program, the United States "has the technical capabilities to maintain confidence in the safety and reliability of its existing nuclear-weapon stockpile under the CTBT, provided that adequate resources are made available . . . and are properly focused on this task." COMM. ON TECHNICAL ISSUES RELATED TO RATIFICATION OF THE COMPREHENSIVE NUCLEAR TEST BAN TREATY, NAT'L ACAD. OF SCIS., TECHNICAL ISSUES RELATED TO THE COMPREHENSIVE NUCLEAR TEST BAN TREATY 1 (2002); *see also* TOM Z. COLLINA & DARYL G. KIMBALL, NOW MORE THAN EVER: THE CASE FOR THE COMPREHENSIVE TEST BAN TREATY 8 (2010).

will have to recognize and respond to, better than in the past, the sensitive process questions intrinsically associated with many of the substantive steps aimed at improving the regime presently under consideration or proposed.

II. KEY OBSTACLES TO RESTORING REGIME EFFECTIVENESS

Leaving aside the continued elusiveness of the goal of universalizing the NPT,[36] crucial causative factors of the NPT's declining effectiveness are the Treaty's asymmetry centered on the distinction between nuclear weapon states (NWS) and non-weapon states (NNWS), and, relatedly, states parties' uneven compliance with their respective NPT obligations that continues to feed resentment of states parties' unequal status under the Treaty.

NWS, for one, have been consistently criticized for meeting only partially or not at all their obligations under article VI to reverse the nuclear arms race and to move towards nuclear disarmament.[37] Their collective failure became particularly conspicuous during the millennium's first decade. Not only did NWS begin to upgrade their national nuclear stockpiles, but they also failed to act on key nuclear arms control treaties or, when they did engage in international negotiations, made little if any real progress towards nuclear disarmament.[38] An example of the latter is the 2002 Treaty on Strategic Offensive Reductions (SORT) between the United States and the Russian Federation.[39] As an arms control treaty, the "Moscow Treaty" dubiously

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36. The prospect of universal adherence to the Treaty remains uncertain. Thus following a long line of official exhortations, the 2010 NPT Review Conference, affirming the vital importance of this goal, again called on all states not parties to the NPT, namely Cuba, India, Israel and Pakistan, "to accede [to the Treaty] as non-nuclear-weapon States . . . promptly and without any conditions," particularly those states that operate unsafeguarded nuclear facilities. 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 19-20.

37. Treaty on the Non-Proliferation of Nuclear Weapons art. VI, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT Treaty].

> Each of the Parties to the Treaty undertakes 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, and on a treaty on general and complete disarmament under strict and effective international control.

38. *See supra* notes 6-7 and accompanying text.

39. *See* Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions, U.S.-Russ., May 24, 2002, S. Treaty Doc. No. 107-8, 41 I.L.M. 799. Article I provides:

> Each Party shall reduce and limit strategic nuclear warheads, as stated by the President of the United States of America on November 13, 2001 and as stated by the President of the Russian Federation on November 13, 2001 and December 13, 2001 respectively, so that by December 31, 2012 the aggregate number of such warheads does not exceed

distinguishes itself by the fact that it calls for nuclear weapons reductions that are reversible, of limited duration,[40] and not subject to international verification.[41] On the multilateral front, states made absolutely no progress in addressing what is a "key element in the effective implementation of [NPT] article VI and in the prevention of nuclear proliferation": the control of fissile materials.[42] To wit, the proposed Fissile Materials Cutoff Treaty (FMCT)[43] has been languishing on the international legislative agenda since 1993,[44] a situation that continues to this day.[45] Pending initiation and conclusion of negotiations on the

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> 1700-2200 for each Party. Each Party shall determine for itself the composition and structure of its strategic offensive arms, based on the established aggregate limit for the number of such warheads.

Id. art. 1.

40. The Treaty remains in force only until December 31, 2012, although it can, of course, be extended by agreement of the parties or superseded earlier by another agreement. *Id.* art. IV, para. 2.

41. While in theory the Treaty could bring about a drastic reduction in the number of deployed nuclear warheads by 2012, in reality it permits the parties to keep thousands of warheads in non-operational storage.

42. 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 3-28, 2010, *Note Verbale Dated 5 May 2010 from the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Conference*, ¶ 7, U.N. Doc. NPT/CONF.2010/35 (May 5, 2010) [hereinafter Note Verbale].

43. G.A. Res. 48/75, § L, U.N. Doc. A/RES/48/75 (Dec. 16, 1993) (calling for a ban on the production of fissile materials for use in nuclear weapons or other nuclear explosive devices).

44. Although other issues have also impeded progress in the negotiations towards the FMCT, the issue of verification turned out to be a major stumbling block. In 2004, the United States in an unexpected about-face rejected as counterproductive the inclusion of a provision on verification, arguing that extensive verification could compromise "core national security interests of key signatories" and would be "so costly that many countries would be hesitant to implement them." Hui Zhang, *Should and Can the FMCT Be Effectively Verified?*, INESAP INFO. BULL. NO. 28, Apr. 2008, at 50, 50 (internal quotation marks omitted). It thereby "ignor[ed] Ronald Reagan's famous cautionary advice, 'trust but verify.'" *Washington's Gift to Bomb Makers*, N.Y. TIMES, Aug. 6, 2004, at A18. The United States maintained, inter alia, that "the *appearance* of effective verification without supplying its *reality* could be more dangerous than having *no* explicit provision for verification." Conference on Disarmament, May 15-30, 2006, *U.S. Working Paper: White Paper on a Fissile Material Cutoff Treaty*, ¶ 5, U.N. Doc. CD/1782 (May 22, 2006). By rejecting verification as essentially unachievable, the United States foreclosed a potential opportunity to extend the existing ban on the production of nuclear materials for weapons purposes that applies to all NNWS parties by virtue of the NPT, to NWS, including, in particular, the states presently outside the NPT (India, Pakistan, Israel, and North Korea). It thus also wasted an opportunity to help mitigate the existing inequality of applicable safeguards standards as between NNWS and NWS.

45. Notwithstanding overwhelming international support for the FMCT, it is uncertain that FMCT negotiations will start any time soon. In 2009 the U.N. Conference on Disarmament did agree to establish a Working Group with a mandate to negotiate a FMCT. *See* Conference on Disarmament, May 18-July 3, 2009, *Decision for the Establishment of a Programme of Work for the 2009 Session*, ¶ 2, U.N. Doc. CD/1864 (May 29, 2009); *see also* G.A. Res. 64/29, U.N. Doc. A/RES/64/29 (Jan. 12, 2010). However, in early 2010 Pakistan signaled its renewed

FMCT, most NWS have now formally agreed to observe a moratorium on the production of fissile materials. However, other NWS not parties to the NPT and China[46] have refused to do so. Finally, as regards the CTBT, a critical pillar of the non-proliferation regime,[47] there was little movement towards bringing it into force during the past decade.[48] Indeed, the Bush Administration actively opposed ratification of the Treaty.[49] By contrast, President Obama had endorsed its ratification as a presidential candidate.[50] To date the CTBT has achieved very substantial adherence.[51] However, article XIV of the Treaty requires ratification by forty-four named states before the Treaty can enter into force. Of the forty-four states concerned, three—India, Pakistan, and North Korea—have not signed the Treaty. A further six states, all parties to the NPT except one, namely China, Egypt, Indonesia, Iran, Israel, and the United States, have signed but not ratified the Treaty.[52]

Under the NPT, NNWS have given up the right to receive, manufacture, or acquire nuclear weapons or explosive devices, or to seek assistance in the manufacture of such weapons or devices[53] in exchange for recognition of their "inalienable right" of access to and use of nuclear energy for peaceful purposes.[54] Leaving aside the special case of known or suspected violators, such as North Korea[55] and Iran,[56] NNWS have by

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unwillingness to support negotiations and has been blocking their start up. Jonathan Lynn, *Pakistan Blocks Agenda at U.N. Disarmament Conference*, REUTERS, Jan. 19, 2010, http://www.reuters.com/article/idUSTRE60I26U20100119.

46. *See* POTTER ET AL., *supra* note 32, at 8.

47. For a recent reaffirmation of this function, see 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, ¶ 83.

48. Thus from 2001 until the end 2009, only the four "named states" ratified the CTBT.

49. In 2002 the New York Times reported, "The Bush administration ha[d] no formal plans to resume nuclear testing, but the president ha[d] said he does not support the Comprehensive Test Ban Treaty, describing it as not verifiable and not enforceable." Thom Shanker, *Administration Says Russia Is Preparing Nuclear Tests*, N.Y. TIMES, May 12, 2002, at 4.

50. *Arms Control Today 2008 Presidential Q&A: President-Elect Barack Obama*, ARMS CONTROL ASS'N, Dec. 2008, http://www.armscontrol.org/2008election; *see* Prague Speech, *supra* note 18.

51. As of May 26, 2010, the CTBT has been signed by 182 states and has attracted 153 ratifications. *Status of Signature and Ratification*, CTBTO PREPARATORY COMM'N, http://www.ctbto.org/the-treaty/status-of-signature-and-ratification (last visited Sept. 24, 2010).

52. However, in his Prague Speech in April 2009, President Obama promised to seek Senate approval for ratification, *see* Prague Speech, *supra* note 18, while Indonesia indicated at the 2010 Review Conference that it would ratify the CTBT shortly.

53. *See* NPT Treaty, *supra* note 37, art. II.

54. *Id.* art. IV, ¶ 1.

55. *See infra* notes 121-133 and accompanying text.

56. In 2003 Iran was reported to the IAEA Board of Governors for failing to declare material and activities to the Agency, in violation of its safeguards agreement. IAEA, *Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran*, 1, IAEA Doc. GOV/2003/81 (Nov. 26, 2003). Compliance by Iran with its safeguards and NPT obligations has

and large upheld their end of this bargain.[57] However, as regards NNWS' safeguards obligations, their record of compliance is far from perfect. For example, eighteen NNWS parties to the NPT have yet to bring into force the basic comprehensive safeguards agreement[58] as required by article III. Many more states have not accepted the advanced safeguards that the International Atomic Energy Agency (IAEA) deems essential to enable it to verify the correctness and completeness of a state's declarations under the basic, comprehensive safeguards agreement. Thus, only approximately 100 states (plus the European Atomic Energy Community (EURATOM) and Taiwan) have finalized so-called Additional Protocols (APs), but this tally now also includes all official NWS.[59] Many other states—including several with significant nuclear activities—have yet to bring APs into force.[60] Acceptance of APs may not, strictly speaking, be mandatory under the NPT.[61] However, it would certainly comport with the spirit of the Treaty for states to submit to the stricter IAEA scrutiny that would be authorized under an AP.[62]

Until recently the campaign to universalize APs may have run up primarily against NNWS' resentment about NWS' lack of progress with respect to nuclear disarmament. With the finalization of the U.S.-India nuclear deal in 2008, another source of friction entered the equation: the

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been an issue on the international agenda ever since. Other countries that would have to be listed here include Syria. *See* Sanger & Mazzetti, *supra* note 15, at 19.

57. *But see* Mordchai Shualy, *The Future Nuclear Powers You Should Be Worried About*, FOREIGN POL'Y, Oct. 20, 2009, www.foreignpolicy.com/articles/2009/10/20/the_future_nuclear_powers_you_should_be_worried_about.

58. Status List: Conclusion of Safeguards Agreements, Additional Protocols and Small Quantities Protocols, IAEA, Aug. 5, 2010, www.iaea.org/OurWork/SV/Safeguards/sir_table.pdf.

59. *Id.* Among the official NWS thus accepting APs, the United States was the last to do so. Its AP entered into force on January 6, 2009. *Id.*

60. IAEA, *Safeguards and Verification: Status of Additional Protocols (as of 27 May 2010)*, www.iaea.org/OurWork/SV/Safeguards/sg_protocol.html (last visited July 22, 2010).

61. While the IAEA, NWS, and Western NNWS maintain that APs should be recognized as the controlling verification standard under the NPT, most NNWS resist this idea and insist that states' adoption of AP is voluntary, not legally required. This difference of opinion proved to be unbridgeable at 2010 Review Conference. *See* 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 3-5, 25-27.

62. In 1997 the IAEA Board of Governors approved the Model Additional Protocol to Safeguards Agreements. IAEA, NON-PROLIFERATION OF NUCLEAR WEAPONS & NUCLEAR SECURITY: IAEA SAFEGUARDS AGREEMENTS AND ADDITIONAL PROTOCOLS 6 (2005), *reprinted in* IAEA Doc. INFCIRC/540(Corr.) (Sept. 1997). As has been pointed out, since then "[c]alls for wider adherence to safeguards agreements and additional protocols have been made in resolutions of the United Nations General Assembly, by States parties to the NPT in the final document of the 2000 NPT Review Conference, and by Member States of the Agency in resolutions of the IAEA General Conference." *Id.* at 5; *see also* G8 SUMMIT, L'AQUILA STATEMENT ON NON-PROLIFERATION ¶ 3 (2009); S.C. Res. 1887, ¶ 15(b), U.N. Doc. S/RES/1887 (Sept. 24, 2009); 2010 Review Conference, Conclusions and Recommendations, *supra* note 31, at 25-27.

emergence within the international nuclear proliferation system of a new category of actor, namely a NWS, which, although outside the NPT,[63] still enjoys benefits exclusively reserved to states parties to that Treaty. This development—perhaps even more so than NWS's laggard compliance with article VI—accentuates the inherent inequality among NPT parties and thereby threatens the very foundations of the non-proliferation regime.

In 2005, the governments of India and the United States announced an understanding pursuant to which the United States would lift its ban on nuclear cooperation with India, which was imposed in 1974 in response to India's test of a nuclear device.[64] In return India undertook to separate its civilian and military nuclear facilities and place all of its civilian plants under IAEA safeguards, promised to continue to observe its moratorium on nuclear testing, but did not commit itself to either joining the NPT or stopping the production of fissile materials for weapons purposes.[65] These terms were eventually incorporated into a bilateral agreement,[66] which Congress approved in 2008.[67] Although the agreement was highly controversial both in the United States and the world at large, including India itself,[68] on November 24, 2009, President Obama declared that he intended "to fully implement the U.S.-India Civil Nuclear Agreement."[69]

Although the Bush Administration's primary objectives in pushing this deal may have been strategic—to offset China's growing power and

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63. *See, e.g.*, *Nuclear Proliferation in South Asia: The Power of Nightmares*, ECONOMIST, June 24, 2010, at 61 (discussing the Brazilian president's flat-out refusal to accept an AP upon learning of the American-Indian nuclear deal).

64. Press Release, White House Press Sec'y, Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh (July 18, 2005), http://georgewbush-whitehouse.archives.gov/news/releases/2005/07/print/20050718-6.html.

65. SHARON SQUASSONI, CRS REPORT FOR CONGRESS—INDIA'S NUCLEAR SEPARATION PLAN: ISSUES AND VIEWS 1-4 (Dec. 22, 2006), http://www.fas.org/sgp/crs/nuke/RL33292.pdf.

66. Media Note, U.S. Dep't of State, Agreement for Cooperation Between the Government of the United States of America and the Government of India Concerning Peaceful Uses of Nuclear Energy (123 Agreement) (Aug. 3, 2007), http://www.stimson.org/southasia/pdf/US-India-FinalTextof123Agreement.pdf.

67. United States-India Nuclear Cooperation Approval and Nonproliferation Enhancement Act, 22 U.S.C. §§ 8001-8008 (2006 & Supp. II 2008).

68. Thus the Indian Government itself had re-raised objections to clauses on conditions and sanctions in U.S. authorizing legislation. *See* Edward Luce & Jo Johnson, *US-India Nuclear Fuel Deal in Jeopardy*, FIN. TIMES, Apr. 19, 2007, http://www.ft.com/cms/s/0/e56efaf6-ee11-11db-8584-000b5df10621.html; Somini Sengupta, *India Debates Its Right to Nuclear Testing*, N.Y. TIMES, Apr. 21, 2007, at A7.

69. Press Release, White House Press Sec'y, Remarks by President Obama and Prime Minister Singh of India in Joint Press Conference (Nov. 24, 2009), www.whitehouse.gov/the-press-office/remarks-president-obama-and-prime-minister-singh-india-joint-press-conference.

to bolster India as a valuable ally in the fight against global terrorism[70]—the United States, much as other countries,[71] was keenly aware also of the commercial opportunities that the opening up of the Indian civilian nuclear market promised.[72] Whatever the exact mix of motives, the United States was prepared to justify its policy change on the grounds that India was a stable, democratic government, and "ha[d] demonstrated responsible behavior with respect to nonproliferation of technology related to [WMD] programs and the means to deliver them."[73] Although there may have been a need to adjust India's ambiguous status in the international non-proliferation regime, the U.S.-India deal undercuts the very logic of the non-proliferation treaty, and indeed makes a mockery of it.[74] Apart from the fact that such a deal might in itself violate the NPT,[75]

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70. For an assessment of these strategic objectives, see, for example, Dan Blumenthal, *Will India Be a Better Strategic Partner than China?*, *in* GAUGING U.S.-INDIAN STRATEGIC COOPERATION 291, 308 (Henry Sokolski ed., 2007).

71. For example, Russia and France have since signed agreements for the delivery of nuclear reactors to India.

72. Thus the economic incentives for the United States to conclude the nuclear deal with India have been referred to as "huge." Somini Sengupta, *Interests Drive U.S. To Back a Nuclear India*, N.Y. TIMES, Dec. 10, 2006, at 10.

73. United States and India Nuclear Cooperation Promotion Act of 2006, H.R. 5682, 109th Cong. § 2(6)(A)-(B) (2006). This assertion appears, however, flatly contradicted by the indictment in the United States of Indian governmental agencies for conspiracy to violate U.S. export regulations and to obtain secret U.S. weapons technology illegally. Mark Mazzetti & Neil A. Lewis, *U.S. Cites Indian Government Agencies In Weapons Conspiracy*, N.Y. TIMES, Apr. 3, 2007, at A7.

74. *See A Bad Nuclear Deal*, FIN. TIMES, Aug. 25, 2008, at 10. For a scathingly critical analysis, see, for example, George Perkovich, *Global Implications of the U.S.-India Deal*, DAEDALUS, Winter 2010, at 20, 22-23. It has been suggested, for example, that the change of direction that the deal implies, "damages the Non-proliferation Treaty, weakens multilateral export control regimes, stokes up the nuclear arms race in Asia, and hampers a peaceful solution of the conflict with Iran." Oliver Meier, *The US-India Nuclear Deal: The End of Universal Non-Proliferation Efforts?*, INTERNATIONALE POLITIK UND GESELLSCHAFT, Apr. 2006, at 28, 30.

75. Arguably, the deal could violate article I of the NPT, which provides:

> Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

NPT Treaty, *supra* note 37, art. I. India, a NNWS at the time of the adoption of the NPT, is covered by this language. Thus, by making nuclear fuel and technology available to India despite India's refusal to subject all its nuclear facilities to safeguards, the US-India deal—notwithstanding the Indian separation plan—might enable India to divert some of its indigenous nuclear materials from energy production to nuclear weapons development. *See also* PAUL K. KERR, CONG. RESEARCH SERV., RL 33016, U.S. NUCLEAR COOPERATION WITH INDIA: ISSUES FOR CONGRESS 17-21 (2010); Henry Sokolski, *Negotiating Obstacles to U.S.-Indian Strategic Cooperation*, *in* GAUGING U.S.-INDIAN STRATEGIC COOPERATION, *supra* note 70, at 1, 1-3. Additionally, it has been suggested that any nuclear cooperation that allows the transfer of nuclear

the agreement was clearly inconsistent with long-standing international nuclear policy. That policy—international non-acquiescence in the emergence of new NWS—has been authoritatively formulated and repeatedly endorsed by the states parties to the NPT,[76] the U.N. Security Council,[77] and, most recently, the 2010 NPT Review Conference.[78] At a minimum then, the U.S.-India deal disregarded long-standing international nuclear non-proliferation policy by endorsing a novel legal category of a NWS "in international good standing." It thus paved the way towards international acceptance of a nuclear weapon state not bound by the NPT, yet nevertheless enabled to partake fully of the benefits of the peaceful uses of nuclear energy otherwise reserved for parties to the NPT. Worse still, it undercut the credibility of international non-proliferation efforts targeting Iran and created a dangerous precedent[79] that other states have already successfully exploited for their own strategic or commercial reasons, a prime example of which is China's dealings with Pakistan.[80] As critics foresaw correctly, the U.S.-India deal is sending precisely the wrong message:[81] "[I]f America can bend the rules for India, then China can break them for Pakistan."[82] In sum, the U.S. drive to "normalize" India's status as a NWS not party to

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materials to unsafeguarded facilities is a violation of article III, paragraph 2 of the NPT. *See* R.M. Marty M. Natalegawa, Minister of Foreign Affairs of the Republic of Indonesia, Statement on Behalf of the NAM States Party to the Non-Proliferation of Nuclear Weapons Treaty Before the 2010 Review Conference of the Parties to the Non-Proliferation of Nuclear Weapons Treaty 5 (May 3, 2010), http://www.un.org/en/conf/npt/2010/statements/pdf/nam_en.pdf.

76. For example, the 2000 NPT Review Conference "urge[d] all States not yet party to the Treaty . . . to accede to the Treaty as non-nuclear-weapon States," and declared that India's and Pakistan's nuclear tests did "not in any way confer a nuclear-weapon-State status or any special status whatsoever." 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Apr. 24-May 19, 2000, *Final Document*, pt. 1, at 2, ¶¶ 8-9, U.N. Doc. NPT/CONF.2000/28 (Parts I and II) (2000) [hereinafter 2000 Review Conference].

77. *See, e.g.*, S.C. Res. 1887, *supra* note 62, ¶ 4.

78. *See* 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, ¶ 114.

79. Finalization of the U.S.-India deal was, in fact, preceded by Russia's plan to supply nuclear reactor fuel to India. *See* Guy Dinmore & Neil Buckley, *Concern in West over Russian Plan To Sell Nuclear Reactor Fuel to India*, FIN. TIMES, Mar. 16, 2006, at 8. However, it was the U.S.-India deal that formally created a new legal *fait accompli*.

80. Indeed, Pakistan itself had hinted at the need to develop such a nuclear cooperative relationship with China to counter the effects of the India-U.S. deal. *See* Jo Johnson & Farhan Bokhari, *Pakistan Warns US over N-Deal with India*, FIN. TIMES, Mar. 17, 2006, at 1. China is now proposing to sell two additional nuclear power reactors to Pakistan, which would be in violation of, at least, NSG Guidelines, unless of course, the Group were to grant another waiver, thereby further undermining the non-proliferation regime. *See Pakistan, India and the Anti-Nuclear Rules: Clouds of Hypocrisy*, ECONOMIST, June 24, 2010, at 15.

81. *The America-India Nuclear Deal: Worse Will Come*, ECONOMIST, Aug. 25, 2007, at 12.

82. *Nuclear Proliferation in South Asia: The Power of Nightmares*, *supra* note 63.

the NPT highlights a persistent and dangerous lack of uniformity or consistency of states' expectations regarding the operation of the international non-proliferation regime.

The U.S.-India deal, however, also raises serious process issues, to wit, its initial advocacy by the United States without advance or parallel substantive consultations with other states, the relevant international institutions, or the international NPT community at large.[83] In the end, the Bush Administration did seek and eventually obtained approval by the members of the Nuclear Supplier Group (NSG),[84] albeit only after much arm-twisting.[85] Unfortunately, NSG member states signed off on the deal without attaching conditions to the India waiver that could have mitigated the seriously adverse precedential implications for the international non-proliferation regime.[86] In the final analysis, the U.S.-India nuclear deal is thus not only substantively and procedurally flawed, but it also raises a larger systemic issue. As approved, it amounts to the assertion of a claim by a limited group of states to validly set aside, if not their very obligations under the NPT, at least their understanding of the import of these obligations,[87] notwithstanding the fact that these obligations operate *erga omnes*, or are owed to all states parties to the Treaty. Approval by the IAEA Board of Governors of a safeguards agreement applicable to those facilities that India chose to submit to

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83. *See, e.g.*, Perkovich, *supra* note 74, at 23.

84. Launched originally as the London Club in response to India's nuclear test in 1974, the NSG today is a forty-six-member informal group of states whose export controls, that is, guidelines on nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology, aim at strengthening the effectiveness of article III of the NPT and, beyond that, the bulwark against nuclear proliferation generally. For further details on the NSG, see IAEA, *Communication of 1 October 2009 Received from the Resident Representative of Hungary to the Agency on Behalf of the Participating Governments of the Nuclear Suppliers Group*, 1, IAEA Doc. INFCIRC/539/Rev.4 (Nov. 5, 2009).

85. *See, e.g.*, *Fighting the Nuclear Fight: When Nuclear Sheriffs Quarrel*, ECONOMIST, Nov. 1, 2008, at 68-69.

86. At the NSG meeting in Vienna in September 2009, several countries reportedly refused to go along with the U.S.-India deal, insisting instead on explicit rules that would stop co-operation if India carried out a nuclear test, prevent the transfer of enrichment and reprocessing material that could be used for weapons purposes, and provide for a review of the deal at a later stage. *Objectors Bar Path to Indian Nuclear Accord*, FIN. TIMES, Sept. 4, 2008, at 3.

87. NSG Guidelines ultimately reflect NSG member states' collective understanding of how best to facilitate compliance with, and the implementation of, their obligations under the NPT. In this vein, when at the 2010 NPT Review Conference the Non-Aligned Movement pointed out that the U.S.-India deal and the NSG India-waiver contradicted the 1995 Review and Extension Conference's decision requiring acceptance of full scope safeguards as a precondition for all new nuclear supply arrangements, the United States responded that the 1995 Principles and Objectives established a political commitment, not legal obligations. POTTER ET AL., *supra* note 32, at 14-15.

international scrutiny does not change this fact.[88] For the Board's stamp of approval on India-specific safeguards is hardly equivalent to acceptance by the NPT membership as a whole of India's special status, outside and in derogation from the Treaty scheme. Needless to say, such an extravagant claim in and of itself is bound to undermine the NPT and thus the effectiveness of international nuclear non-proliferation efforts.

III. ADAPTING THE NUCLEAR NON-PROLIFERATION REGIME TO NOVEL CHALLENGES: LEGITIMACY AS A FUNCTION OF PROCESS

It is fair to say that fundamental distrust between NWS and NNWS—both as symptom and cause of the failings of the NPT—has been a basic theme of the international nuclear non-proliferation and disarmament discourse. Mutual suspicions reached a critical stage at the 2005 NPT Review Conference prompting the chairman of the meeting, Sergio Duarte of Brazil, to muse in public as to whether the NPT "was actually further weakened by the session."[89] To a large extent, this wariness in NWS-NNWS relations is fueled by a widespread perception that the NPT, as an "unequal treaty" from its inception, continues to be implemented unequally. NNWS have complained about undue restrictions on dual-use materials and technology; indeed, a creeping abrogation of key entitlements guaranteed under the NPT, in particular access to nuclear technology for peaceful purposes.[90] Specifically, NNWS have often criticized "the way [in which] the nuclear powers . . . have sought to set the NPT agenda."[91] At the heart of these objections are allegations that some NWS and other developed countries have shifted decision-making from established multilateral treaty-based frameworks to other more pliable, better controllable fora and settings, or that they have resorted to "law-making" techniques that tend to eliminate the need to seek full participation by other states, if not their consent. For example, some states have objected to recourse to the U.N. Security

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88. *See* IAEA, *Nuclear Verification: The Conclusion of Safeguards Agreements and Additional Protocols* 5, 6, IAEA Doc. GOV/2008/30 (July 9, 2008).

89. David E. Sanger, *Month of Talks Fails To Bolster Nuclear Treaty*, N.Y. TIMES, May 28, 2005, at A1.

90. Some NNWS see these restrictions as representing a type of "nuclear apartheid." *See Nuclear Disarmament: What To Do with a Vision of Zero*, ECONOMIST, Nov. 15, 2008, at 73. This type of claim is, of course, also the essence of Iran's complaint. *See, e.g.*, Nazila Fathi & David E. Sanger, *Iran Won't Give Up Right To Use Atomic Technology, Leader Says*, N.Y. TIMES, June 28, 2006, http://query.nytimes.com/gat/fullpage.html?rres=9F01E3081730F93BA15755C0A9609C8B63.

91. *The Future of Non-Proliferation: An Awkward Guest-List*, ECONOMIST, May 1, 2010, at 60-61.

Council as international legislator.[92] In this vein, Security Council resolution 1540[93] has been the object of reservations about the legality of the measures[94] adopted thereunder to buttress the nuclear non-proliferation regime.[95] Other countries, taking a passing shot at the Council, have found it necessary to emphasize that none of the NPT's "bases or means of implementation" could be altered except within the contractual framework of the Treaty itself.[96] Most significantly, there has been widespread concern, if not suspicion, among NNWS, especially developing countries, about, principally, the activities of the NSG and, to a lesser extent, the Zangger Committee.[97] Critics have singled out in

92. Thus the Security Council acting under Chapter VII of the Charter has now on several occasions adopted "legislative" resolutions that establish binding obligations of an abstract and general nature for states, rather than limiting itself to resolutions that impose individualized obligations incumbent upon a specifically named state, society, or group. *See* Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 176-77 (2005); Eric Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542, 542 (2005).

93. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

94. For expressions of concern by several states, see U.N. SCOR, 59th Sess., 4950 mtg. at 23, U.N. Doc. S/PV.4950 (Apr. 22, 2004) (India); *id.* at 30 (Cuba); *id.* (resumption 1) at 4-5 (Mexico); *id.* (Resumption 1) at 13-14 (Nepal); and *id.* (Resumption 1) at 16-17 (Namibia). For a general discussion of the constitutional issues raised by legislative Security Council resolutions, see *infra* text accompanying notes 163-165.

95. Thus, John Bolton, former U.S. Ambassador to the United Nations, claims that "[o]ver the course of eight months the [Bush] Administration worked to craft what became . . . Security Council Resolution 1540, which achieved all of the goals set out by the President." John R. Bolton, *The Bush Administration's Forward Strategy for Nonproliferation*, 5 CHI. J. INT'L L. 395, 398 (2005) (footnote omitted).

96. Ahmed Aboul-Gheit, Minister for Foreign Affairs of the Arab Republic of Egypt, Address Before the Eighth Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons 5-6 (May 5, 2010), http://www.mfa.gov.eg/NR/rdonlyres/62B8A348-8EE8-480C-895F-03384A1BE70A/4937/NPT1.pdf.

97. The Zangger Committee, which today has thirty-seven members, was established in 1971 to reach common understandings on how to implement article III, paragraph 2 of the NPT and thereby to harmonize nuclear export control policies among supplier countries. It maintains a "trigger list" (triggering IAEA safeguards as a condition of export) of nuclear-related equipment and materials. IAEA, *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, attach 1, IAEA Doc. INFCIRC/482 (Aug. 23, 1995) [hereinafter IAEA, *1995 Review*]; *see* IAEA, *Communications of 15 November 1999 Received from Member States Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material*, IAEA Doc. INFCIRC/209/Rev.2 (Mar. 9, 2000). The 1995 NPT Review and Extension Conference basically endorsed the Zangger Committee's work but also informally agreed "that transparency in export controls should be promoted within a framework of dialogue and cooperation among all interested States parties to the Treaty." IAEA, *1995 Review*, *supra*, attach 2. The 2000 NPT Conference ended without language on "improved dialogue and cooperation" among interested states being included in the final conference documents.

particular a lack of transparency and inclusiveness as characteristic of decision-making in the NSG.[98]

There is no denying, of course, that sometimes states' reservations regarding process serve as a mere subterfuge, hiding substantive objections of a questionably meritorious nature. However, the legitimacy of process concerns was acknowledged by the 1995 Review and Extension Conference which called for increased "[t]ransparency in nuclear-related export controls . . . within the framework of dialogue and cooperation among all interested States party to the Treaty."[99] Process issues have been the focus also of repeated reminders by the U.N. General Assembly that multilateralism represents a core principle in negotiations on disarmament and non-proliferation, which in turn implies inclusiveness, non-discrimination, and transparency.[100] The NSG itself recognized the existence of such a problem early on[101] and has accepted the "need for appropriate transparency in facilitating the confidence in, adherence to and understanding of NSG guidelines and procedures."[102] Still, criticism has not only persisted but in the wake of the NSG's India waiver may actually have increased.[103]

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98. The NSG has been criticized for representing "an exclusive and non-transparent group" but also for violating the Treaty itself on account of its decision to go along with the U.S.-India nuclear deal. Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, May 4-15, 2009, *The Issue of Non-Compliance with Articles I, III, IV and VI: Working Paper Submitted by the Islamic Republic of Iran*, ¶¶ 11-12, U.N. Doc. NPT/CONF.2010/PC.III/WP.3 (Apr. 13, 2009) [hereinafter *Issue of Non-Compliance*]; *see* Abdurrahman M. Shalgham, Permanent Representative and Head of Libyan Delegation, Statement Before the General Debate of the 2010 Review Conference of the States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons 5 (May 5, 2010), http://www.un.org/en/conf/npt/2010/statements/pdf/Libya_en.pdf. Libya indirectly criticized the NSG when it asserted "that the IAEA is the only competent authority responsible for the verification and ascertainment that all States Parties comply with the safeguards agreements which they implement in fulfillment of their Treaty obligations." Shalgham, *supra*.

99. 1995 NPT Review and Extension Conference, *Decision 2: Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, ¶ 17, U.N. Doc. NPT/CONF.1995/32/Dec.2 (17 Apr.-12 May 1995). In response the NSG members launched various initiatives to promote "a genuine, open and all[-]inclusive dialogue" between suppliers and recipients as to "the legitimacy and effectiveness of nuclear export controls." Giuseppe Balboni Acqua, Ambassador of Italy, Report on NSG Transparency to the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Main Committee III ¶ 8 (Apr. 27, 2000).

100. *See, e.g.*, G.A. Res. 64/34, ¶ 3, U.N. Doc. A/RES/64/34 (Jan. 12, 2010).

101. *See, e.g.*, IAEA, *supra* note 84, at 10-12.

102. Public Statement, Nuclear Suppliers Group [NSG], Plenary Meeting at Budapest (June 11-12, 2009), http://www.nuclearsuppliersgroup.org/Leng/PRESS/2009-10-Budapest.pdf.

103. At the 2010 NPT Review Conference, several countries continued to express directly or indirectly criticism of the NSG. *See* Aboul-Gheit, *supra* note 96, at 2; R.M. Marty M. Natalegawa, Minister for Foreign Affairs of the Republic of Indonesia, Statement at the General Debate of the 2010 NPT Review Conference (May 3, 2010), http://www.un.org/en/conf/npt/2010/statements/pdf/indonesia_en.pdf; *see also Issue of Non-Compliance*, *supra* note 98, ¶¶ 11-12.

As intimated above, the United States shares responsibility for this state of affairs. Indeed, the Bush Administration sharply exacerbated process-related concerns when Administration officials began to suggest that "the NPT [was] no longer relevant for dealing with today's proliferation challenge" and instead saw "the future in the export controls of the nuclear suppliers group and interdictions under the proliferation security initiative."[104] Evidence of the Administration's dwindling faith in the NPT was certainly evident at the 2005 Review Conference when the Administration decided not to send Secretary of State Rice to the meeting, and instead indicated a preference for discussing proliferation issues in "other fora."[105] In the end, as John Bolton, former U.S. ambassador to the United Nations, put it, the Bush Administration opted for a non-proliferation policy that shuns reliance on "cumbersome treaty-based bureaucracies" and "stilted legal thinking."[106] The net result of such "US scepticism regarding the effectiveness of international institutions and instruments, coupled with a drive for freedom of action to maintain an absolute global superiority in weaponry and means of their delivery," was to set back treaty-based arms control and disarmament.[107] Towards the end, the Bush Administration showed signs that it might be willing to reconsider its essentially unilateralist approach to arms control matters.[108] However, there is no denying that for most of its tenure, the Administration tended to avoid formal multilateral cooperation,[109] and preferred "ad hoc-ism" or "coalitions of the willing"

Ironically, now that the proposed Chinese-Pakistan reactor deal is before the NSG, India has voiced criticism of several NSG members. *See India Steps Up NSG Diplomacy To Counter China-Pak Nuke Deal*, TIMES OF INDIA, July 25, 2010, http://timesofindia.indiatimes.com/india/India-steps-up-NSG-to-counter-China-Pak-nuke-deal/articleshow/6215324.cms.

104. *Living in the Shadow of the Bomb*, FIN. TIMES, Aug. 6, 2005, http://www.ft.com/cms/s/0/93832cd4-0615-11da-883e-00000e2511c8.html.

105. Statement of U.S. Representative Jackie W. Sanders, *quoted in* Sanger, *supra* note 89.

106. Bolton, *supra* note 95, at 395.

107. WEAPONS OF MASS DESTRUCTION COMM'N [WMDC], WEAPONS OF TERROR: FREEING THE WORLD OF NUCLEAR, BIOLOGICAL AND CHEMICAL ARMS 25 (2006). As the Commission observes, "'Over the past decade, there has been a serious and dangerous loss of momentum and direction in disarmament and nonproliferation efforts.'" Warren Hoge, *Lack of U.S. Leadership Slows Nuclear Disarmament, Report Says*, N.Y. TIMES, June 2, 2006, at A12 (quoting Hans Blix).

108. *See, e.g.*, Thom Shanker, *Pentagon Invites Kremlin To Link Missile Systems*, N.Y. TIMES, Apr. 21, 2007, at A1.

109. Indeed, the Administration had been practicing an à la carte multilateralism that extended well beyond arms control issues to the "war on terror," global environmental protection, and international justice issues. For example, in relation to climate change the Administration tried to set up an alternative voluntary undertaking by a group of like-minded states, the so-called Asia-Pacific Partnership on Clean Development and Climate, as a direct challenge to the Kyoto Protocol process. *See, e.g.*, Fiona Harvey et al., *European Anger at Bush Shift on Climate*, FIN. TIMES, June 2, 2007, http://www.ft.com/cms/s/0/a41ac506-10a5-11dc-96d3-000b5df10621.html. Similarly, as regards the International Criminal Court, the Bush Administration sought to

as a more efficient way of dealing with future foreign conflicts.[110] By contrast, from the very beginning, the Obama Administration has signaled a renewed commitment to multilateralism,[111] a policy of reengagement with international institutions, and much greater awareness of, and respect for, the legitimacy of process.[112]

However, decision-makers' temptation to relegate process legitimacy to the sidelines and opt for more convenient, though not necessarily inclusive or transparent, strategies to implement policy objectives is endemic to international politics and diplomacy, not an administration-specific risk.[113] Consider, for example, the recent suggestion by some countries to simply move the stalled FMCT project from the Geneva United Nations Conference on Disarmament, which operates on the basis of consensus, to a different venue with a different decision-making modus in which a single country could no longer block FMCT negotiations.[114] Given the nature of the nuclear proliferation challenge—the occasional need for adjustments of the "rules of the game" and the problem of consensus-based decision-making in the relevant institutions, or indeed the cumbersomeness of formal treaty-based international law-making[115]—the temptation to by-pass the normal

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undermine the jurisdictional reach of the Court by bringing into force a web of bilateral "Art. 98 agreements" to make sure that U.S. citizens would not have to face trial before the ICC.

110. As a senior State Department official put it, "'[w]e "ad hoc" our way through coalitions of the willing. That's the future.'" Guy Dinmore, *US Sees Coalitions of the Willing as Best Ally*, FIN. TIMES, Jan. 4, 2006, at 2 (quoting a Senior State Department official).

111. For example, in his Prague speech, the President, recognizing the need for a broad-based, sustained international effort to secure vulnerable nuclear materials, announced plans for a Nuclear Security Summit involving most key actors, including the IAEA. That meeting took place in Washington, April 12-13, 2010. *See* Press Release, The White House, *supra* note 30.

112. Consider, for example, the Administration's plans for a revamped Global Initiative to Combat Nuclear Terrorism, in relation to which the Administration pointed out that "ideas under consideration include[d] clearly identifying a policy making body, [and] having a decision making mechanism that is open to all partners." C.S. Eliot Kang, Acting Assistant Sec'y, Bureau of Int'l Sec. & Nonproliferation, Enhancing International Partnerships: Remarks at the 2009 Plenary Meeting of the Global Initiative to Combat Nuclear Terrorism (June 16, 2009), http://www.state.gov/t/isn/rls/rm/125349.htm.

113. An illustration of the latency of this risk is provided by present debates about how to proceed with climate change negotiations post-Copenhagen.

114. Referred to critically in a statement by Zamir Akram, Ambassador of Pakistan, Statement to the Conference on Disarmament 6-8 (Feb. 18, 2010), http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/7D3DAE2293155A1DC12576CE004A0443/$file/1170_Pakistan.pdf.

115. Specifically, regulatory change, if it involves a formal adjustment of the treaty concerned, will entail a time-consuming process of diplomatic negotiations, national domestic approval, and entry into force of the amendment. By the same token, because of the time factor involved in its emergence and consolidation, customary international law is intrinsically unsuited to play a significant role in meeting the need for urgent adjustments of international "regulatory" regimes.

"legislative" process may be understandable. However, any recourse to unorthodox or exceptional international decision-making procedures reflects upon legitimacy and, in the end, will affect outcomes.

In the international legal system, the legitimacy of unilateral or limited plurilateral action is a function of the degree to which there exists an organized constitutive setting in which decisions would normally be expected to be taken.[116] Nuclear non-proliferation issues are embedded in what by all accounts is a fairly structured, hierarchical system involving states, the IAEA, the U.N. Security Council, etc. within the framework of the NPT, Safeguards Agreements, and more. For this reason, any deviation from established decision-making processes or law-making procedures located within that structure will, if not deemed per se questionable, at least be subject to strict scrutiny as to its justifiability in terms of international public policy and law. In other words, states' discourse about the need for any such deviation must be transparent and inclusive. Most importantly, those who advocate recourse to processes and procedures that do not conform to general expectations must be ready to offer a principled explanation of why the by-passing of established treaty regimes and frameworks, including the NPT, might be exceptionally justifiable. At times, this may require absolute candor both about the limits of or gaps in existing normative frameworks and the need for new informal political understandings or formal normative arrangements, as necessary. Conversely, failure to abide by these tenets carries a potentially heavy cost of generating ill-will and suspicion among key states, and ultimately resistance to the very changes the modified decision-making modus aims for. Unfortunately, the recent history of non-proliferation policy initiatives is replete with examples of how the realization of highly desirable public policy objectives can be stymied by the shortcomings of the process through which they had been advocated.

A. Withdrawal from the NPT

An issue that captures well the inverse relationship between substantive advancement of the international non-proliferation agenda and deficiencies of process centers on the present-day relevance of article X of the Treaty. Substantively, the question that arises is whether states parties to the NPT might be entitled to invoke the Treaty's withdrawal

116. *See* W. Michael Reisman & Scott Shuchart, *Unilateral Action in an Imperfect World Order*, 8 AUSTRIAN REV. INT'L & EUR. L. 163, 164 (2003).

clause[117] at a time when the NPT is not only almost universally supported by states,[118] but also widely perceived to serve and protect an overriding international public interest in stanching the risks associated with the proliferation of nuclear weapons.[119] To put it differently, in a system of law that ostensibly remains steeped in the principle of state consent as a fundamental defining characteristic of international normativity,[120] and considering the express provisions of the NPT to the contrary, might it be plausibly asserted that states parties can no longer denounce the treaty? Procedurally, the question is how is this issue being addressed?

Ever since North Korea first signaled its intention to denounce the Treaty in March 1993 and eventually did so in January 2003,[121] the right

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117. Article X, paragraph 1 of the NPT Treaty, *supra* note 37, provides:

> Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

118. As of August 2010, 190 states had become parties to the NPT. *See* 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 17.

119. Typically, the spread of nuclear weapons significantly adds to the inherent risks involved in the possession of such weapons, for example, nuclear accidents, their use by mistake or deliberately, and nuclear terrorism. Besides, it is more likely than not to cause regional instability and in turn may well persuade further states to acquire nuclear weapons. *See* INT'L COMM'N ON NUCLEAR NON-PROLIFERATION AND DISARMAMENT, ELIMINATING NUCLEAR THREATS: A PRACTICAL AGENDA FOR GLOBAL POLICYMAKERS 31 (2009) [hereinafter ELIMINATING NUCLEAR THREATS].

120. It is, of course, a truism that today "international normativity" can no longer be explained simply in terms of state consent. International law making involves a great variety of settings—formal and informal—as well as nonstate actors, such as international organizations, multinational corporations, etc. *See, e.g.*, W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 16 (Rüdiger Wolfrum & Volker Röben eds., 2005). Nevertheless, it is still true that states, as the prototypical actors on the transnational legal plane, continue to play a critical role in the formation and application of international legal norms. In this sense, state consent remains also a critical, though not necessarily all-decisive, aspect of "normativity." For a strong, traditional defense of state consent as an essential feature of international law, see generally Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

121. On January 11, 2003, North Korea invoking the need to protect the "supreme interests" of the country announced its withdrawal from the NPT. North Korea maintained that its withdrawal would take effect the very next day, whereas many international legal observers assumed such notice would not be effective—if at all—until April 10. The government in Pyongyang thus maintained that it was forthwith free of any legal obligations under the NPT, as well as the Safeguards Agreement it had concluded with the IAEA in 1992. In explanation, North Korea asserted that it had only suspended its earlier, 1993 withdrawal from the treaty on the last day of the required three-month notice period, and it did not need to give a further notice to other NPT parties and the Security Council as required under article X of the Treaty. *See*

of withdrawal has been a major focus of debate. Although international reaction to North Korea's step was one of dismay, the states parties to the NPT collectively did not offer an agreed statement on the matter, neither did the NPT depositary states (Russia, the United Kingdom, and the United States), or indeed the U.N. Security Council. Earlier, during the first crisis over North Korea's nuclear activities in 1992-1994, the United States, Japan, and other countries had successfully challenged North Korea's notification of its intention to withdraw from the NPT by persuading North Korea to rescind its declaration.[122] Some of these early diplomatic protests and public comments might easily be taken to be premised on the implicit assumption that North Korea had no legal right to withdraw. However, by the end of 2003, Japan, South Korea, and the United States seemed to have accepted North Korea's withdrawal as a legal *fait accompli*.[123] In the end, all states participating in the Six-Party Talks on North Korea's nuclear program[124] shared the view that North Korea had ceased to be a party to the NPT.[125]

On the other hand, the IAEA, while initially acknowledging that the "status of the DPRK under the NPT [was] in need of clarification,"[126] has never wavered in its belief that North Korea was legally bound to honor the terms of its safeguards agreement. For example, the IAEA Board of Governors' position as communicated to the 2005 NPT Review Conference and endorsed by the participants to the Review Conference has been that the IAEA-North Korean safeguards agreement "remains

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Security Council Notified of DPR of Korea's Withdrawal from Nuclear Arms Accord, U.N. NEWS SERV., Jan. 10, 2003, http://www.iaea.org/NewsCenter/Focus/IaeaDprk/SC_Notified.pdf.

122. *See, e.g.*, Douglas Jehl, *U.S. Seeking U.N. Pressure To Compel North Korea to Honor Treaty*, N.Y. TIMES, Mar. 13, 1993, at 3.

123. Their agreement on a set of coordinated steps among the three directly concerned countries, the joint position, notably omits "any demand that North Korea return to the Nuclear Nonproliferation Treaty, as called for in the past." David E. Sanger, *U.S. and 2 Allies Agree on a Plan for North Korea*, N.Y. TIMES, Dec. 8, 2003, at A1.

124. Launched in 2003, the Six-Party Talks aim at ending North Korea's nuclear program through a negotiating process involving China, Japan, Russia, the United States, as well as North and South Korea.

125. In this vein, the Joint Statement of the Fourth Round of the Six-Party Talks, Beijing September 19, 2005, refers to the DPRK's commitment to "returning, at an early date, to the Treaty on the Non-Proliferation of Nuclear Weapons." Joint Statement of the Fourth Round of the Six-Party Talks, Six-Party Talks, Beijing, China (Sept. 19, 2005), http://www.state.gov/p/eap/regional/c15455.htm.

126. *See* IAEA, *Implementation of the Safeguards Agreement Between the Agency and the Democratic People's Republic of Korea Pursuant to the Treaty on the Non-Proliferation of Nuclear Weapons*, ¶ 14, IAEA Doc. GC(47)119 (Aug. 13, 2003).

binding and in force," despite North Korea's denunciation of the NPT.[127] This, however, flies in the face of article 26 of the Safeguards Agreement, which makes its continued applicability contingent upon North Korea being a party to the NPT.[128] In other words, while the Agency has emphasized that, not being a party itself to the NPT, it is not competent to determine North Korea's status under the Treaty, it has obviously disregarded North Korea's claim of having terminated its membership in the NPT.[129] The same legal position was evident most recently in September 2009 when the IAEA General Conference called upon the DPRK to comply fully with the NPT.[130]

By the same token, the Security Council, after initially avoiding a pronouncement on whether North Korea had validly invoked "extra-ordinary events relating to the subject-matter of the [NPT],"[131] in subsequent resolutions noted that North Korea could not have the status of a NWS in accordance with the NPT, and demanded that the country "retract its announcement of withdrawal from the [Treaty]."[132] However, in Resolution 1695 (2006), the Council unequivocally indicated that it operated from the legal assumption that North Korea had not effectively withdrawn from the Treaty when it deplored "the DPRK's announcement of withdrawal from the Treaty on Non-Proliferation of Nuclear Weapons . . . and its stated pursuit of nuclear weapons *in spite of its Treaty on Non-Proliferation of Nuclear Weapons . . . obligations*."[133]

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127. U.N. Dep't for Disarmament Affairs, PRESS KIT: 2005 REVIEW CONFERENCE OF THE PARTIES TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS pt. 5, at 16 (2005), http://www.un.org/en/conf/npt/2005/presskit.pdf.

128. IAEA, *Agreement of 30 January 1992 Between the Government of the Democratic People's Republic of Korea and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, art. 26, IAEA Doc. INFCIRC/403 (May 1992) ("This Agreement shall remain in force as long as the Democratic People's Republic of Korea is party to the Treaty.").

129. *See* IAEA, *supra* note 126.

130. IAEA, *Implementation of the NPT Safeguards Agreement Between the Agency and the Democratic People's Republic of Korea*, ¶ 6, IAEA Doc. GC(53)/RES/15 (Sept. 2009).

131. NPT Treaty, *supra* note 37, art x. In response to North Korea's earlier, 1993 declaration of intent to withdraw, the Council in S.C. Res. 825, preambular ¶, U.N. Doc. S/RES/825 (May 11, 1993), merely took note of a joint statement by Russia, the United Kingdom, and the United States "which questions whether the DPRK's stated reasons . . . constitute extraordinary events relating to the subject-matter of the Treaty." As to the latter, see Letter Dated 1 April 1993 from the Representatives of the Russia Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America Addressed to the President of the Security Council, Annex, U.N. Doc. S/25515 (Apr. 2 1993).

132. *See* S.C. Res. 1718, ¶ 3, U.N. Doc. S/RES/1718 (Oct. 14, 2006). The same language was used in S.C. Res. 1874, ¶ 5, U.N. Doc. S/RES/1874 (June 12, 2009).

133. S.C. Res. 1695, preambular ¶, U.N. Doc. S/RES/1695 (July 15, 2006) (emphasis added). Indeed, the resolutions have been taken as evidence that "a State can be obliged to become or remain a State party to a certain treaty against its expressed will and irrespective of the

Indeed, today official U.N. Web sites still list the DPRK as a state party to the NPT.[134]

It is thus evident that key international actors—states and relevant institutions—have expressed conflicting or ambiguous views as to North Korea's status under the NPT.[135] Indeed, some claims, especially those related to North Korea's continued safeguards obligations, are difficult to defend legally. The uncertainty surrounding North Korea's NPT status might be seen as temporarily serving the interests of both sides in the dispute over the country's nuclear activities.[136] However, in the long run the lack of legal clarity has implications beyond the narrow circumstances of North Korea's situation in that it shapes states' perceptions of the legal significance of article X, paragraph 1, generally. While, on the one hand, the lack of a resolute, clear, and consistent international response to North Korea's denunciation may provide an opening for those who conceivably contemplate defection from the Treaty,[137] on the

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treaty provisions on withdrawal." *See* Heike Krieger, *A Nuclear Test for Multilateralism—Changes to the Non-Proliferation Treaty as a Means of Arms Control*, *in* GERMAN YEARBOOK OF INTERNATIONAL LAW 17, 49 (2006).

134. *Status of Multilateral Arms Regulation and Disarmament Agreements*, U.N., http://disarmament2.un.org/TreatyStatus.nsf (select "View by country and treaty"; select "Democratic People's Republic of Korea"; select "NPT") (last visited Sept. 25, 2010).

135. Independent of whether or not the Security Council is willing to make a formal finding that North Korea's withdrawal does not meet the conditions of article X, the Council might simply rule North Korea's withdrawal impermissible. In the *Lockerbie* case, the International Court of Justice agreed that a Security Council resolution taken under Chapter VII of the United Nations Charter prevails over a state's inconsistent right guaranteed under any other international treaty. *See Case Concerning Questions of Interpretation and Application of 1971 Montreal Convention Arising from Aerial Incident at Lockerbie* (Libyan Arab Jamhiriya v. U.S.), 1992 I.C.J. 114, 126 (Apr. 14). While the decision did not meet with unqualified support, it is clear that in appropriate circumstances the Council could deny a particular state's right to withdraw from the NPT. *See, e.g.*, William Epstein & Paul C. Szasz, *Extension of the Nuclear Non-Proliferation Treaty: A Means of Strengthening the Treaty*, 33 VA. J. INT'L L. 735, 754 (1993). This conclusion appears all the more persuasive since, unlike the Security Council's intervention in the *Lockerbie* case into the allocation of rights and obligations among states parties to the Montreal Convention, the Council already plays a special role in the withdrawal procedure under article X, paragraph 1. Some commentators , however, have maintained that the very existence of the withdrawal clause and its wording affirming a state's unilateral assessment of the need to abandon the NPT, suggest that the Council is not authorized to override a state's decision to that effect. *See* Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, *in* 241 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 195, 273 (1993). Talmon, *supra* note 92, at 185, even claims that under article 26 of the U.N. Charter, the Council has only recommendatory powers as regards the regulation of armaments, and that therefore any resolution intended to override the specific terms of the NPT would be *ultra vires*.

136. For a discussion, see ELIMINATING NUCLEAR THREATS, *supra* note 119, at 88.

137. At least at one point high ranking Iranian officials advocated withdrawal from the NPT. Nazila Fathi, *Iran Cleric Suggests Nation Quit Nuclear Nonproliferation Treaty*, N.Y. TIMES, Sept. 20, 2003, at A2. More recently, in 2009, while several members of the Iranian

other hand, it also strengthens doubts about the present-day appropriateness of the withdrawal option.

Certainly, some advocates of nuclear non-proliferation and disarmament have long endorsed that the notion of once a party, always a party to the NPT is of fundamental importance to maintaining or strengthening the non-proliferation regime's effectiveness. For example, Mohamed ElBaradei, former IAEA Director-General, has singled out the importance of irreversibility when he asserts that the new structures of non-proliferation controls he envisages "should be regarded as a 'peremptory norm' of international law—not vulnerable to any nation subsequently withdrawing, based on the whim of a new government or a vote of the latest parliament."[138] Recently, the International Commission on Nuclear Non-Proliferation and Disarmament, while acknowledging the formal right of a state to withdraw from the NPT, suggested that "circumstances today—with the near-universality of the NPT and the increasing international concern to achieve progress with nuclear disarmament—argue for this no longer being considered an available option."[139] Indeed, conceptually, a "withdrawal clause which can be accommodated within arms control, sits less easily with disarmament,"[140] and NNWS obligations under the NPT are, of course, disarmament obligations. Other experts have taken exception to considering the NPT's withdrawal clause a dead letter. For example, in 2006 the Commission on Weapons of Mass Destruction, while accepting that withdrawal should be made more difficult, "doubt[ed] that it would be either possible or desirable to seek to eliminate the right of withdrawal from the NPT or other WMD treaties."[141] Still, given the large number of states parties—190—the issue at this point in the life of the Treaty should be less of how to attract new parties by way of guaranteeing a right to exit, but of how to protect the Treaty against defections of existing parties.

As noted before, the NPT as a cornerstone of the international non-proliferation regime undoubtedly addresses fundamental international

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parliament demanded that the country leave the NPT, government officials denied plans for such a move. Nazila Fathi, *Iran Will Not Quit Treaty, Its Nuclear Chief Asserts*, N.Y. TIMES, Dec. 6, 2009, at 18.

138. ElBaradei, *supra* note 16, at 66.

139. ELIMINATING NUCLEAR THREATS, *supra* note 119, at 88.

140. Nicholas A. Sims, *Withdrawal Clauses in Disarmament Treaties: A Questionable Logic?*, DISARMAMENT DIPLOMACY, Dec. 1999, www.acronym.org.uk/dd/dd42/42clause.htm. In disarmament treaties, Sims argues, "[a]bolition is a total, once-and-for-all action by the society of states; and the members of that society can hardly unite with confidence in renouncing the totality of a class of weapons . . . if there is a legitimised escape route which each member knows each other member is free to take." *Id.*

141. WEAPONS OF MASS DESTRUCTION COMM'N, *supra* note 107, at 51.

public policy concerns.[142] However, the issue of whether today the exercise of the withdrawal option should be considered permissible cannot easily be analogized to the withdrawal *problématique* under other global treaties of similar public policy import, such as in the field of human rights.[143] Thus the flat-out denial of a state's right to withdraw from, for example, the International Covenant on Civil and Political Rights (ICCPR),[144] does not offer a valid perspective on how to handle the NPT case. This is so because the ICCPR does not contain a withdrawal clause to begin with and despite the fact that both regimes' integrity might, with varying degrees of plausibility,[145] implicate peremptory norms of international law.[146]

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142. *See supra* text accompanying note 119.

143. It has been suggested that given that "human rights treaties constitute the moral foundation of the international community . . . [t]he progressive development of the law of treaties should take into account the imperatives of the global rule of law, which may not tolerate the denunciation of a certain treaty even if it contains a denunciation clause." *See* Yogesh Tyagi, *The Denunciation of Human Rights Treaties*, *in* THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 133, 188 (2009).

144. When—again—North Korea gave notice in 1997 of its intention to withdraw from the ICCPR, the Human Rights Committee offered a "clarification" to the effect that (a) "[t]he rights enshrined in the Covenant belong[ed] to the people living in the territory of the State party" and that the protection there under devolved with the territory and continued to belong to the people, notwithstanding any change in government or governmental policy; and (b) that therefore "international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it." Office of High Comm'r for Human Rights, General Comment No. 26: Continuity of Obligations, ¶¶ 4-5, U.N. Doc. CCPR/C/21/Rev.1/ Add.8/Rev.1 (Aug. 12, 1997). However, even the ICCPR is subject to the rules of the law of treaties, so that a state party could theoretically effect withdrawal, provided all other states parties consent thereto. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

145. Although some human rights listed in the ICCPR might easily qualify as amounting to peremptory norms of international law, it is highly doubtful that a state's denunciation of the Covenant itself could be considered a violation of *ius cogens*. Similarly, a state's withdrawal from the NPT while touching upon fundamental international community interests would be difficult to characterize as contrary to *ius cogens*. Undoubtedly, the emergence of each additional NWS increases the risk of a catastrophic event involving such weapons, either intentionally caused or due to an accident or miscalculation. In consequence, a denunciation of the NPT whose purpose, almost by definition, would be the acquisition of nuclear weapons is a matter of intrinsic and fundamental international concern. Thus, given the destructive powers of nuclear weapons, their potential to destroy all civilization, the proliferation of nuclear weapons (and the very real risks associated therewith) might understandably give rise to the notion that withdrawal from the NPT in making the nuclear nightmare scenario more plausible is or should be deemed prohibited by a peremptory norm of international law. Unfortunately, this *ius cogens* argument might find little support in international practice as the ICJ's nuclear weapons advisory opinion strongly suggests. In this decision the Court was called upon to ultimately weigh a state's right of survival against the horrors of the use nuclear weapons. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8). Although the ICJ did acknowledge that the threat and use of nuclear weapons implicated norms "fundamental to the respect of the human person and 'elementary considerations of humanity'" and "intransgressible principles of international customary law," *id.* at 243, 257, it managed to avoid addressing the *ius cogens* issue on a

On the other hand, the notion that nuclear arms control/reduction commitments should be considered irreversible has been endorsed at NPT Review Conferences,[147] albeit in the specific context of efforts to promote implementation of article VI of the NPT.[148] Thus in agreeing to and subsequently re-endorsing thirteen practical steps to bolster efforts to achieve nuclear disarmament, states have specifically identified the principle of irreversibility as applicable "to nuclear disarmament, nuclear and other related arms control and reduction measures."[149] In terms of their "nuclear arms control and disarmament" obligations, NNWS have renounced nuclear weapons and explosive devices. Thus, a NNWS denouncing the Treaty primarily signals its intention to reverse its commitments under article II. Prima facie it would, therefore, seem to be only a small and logical step to extend the principle of irreversibility from arms control and disarmament proper to membership in the NPT. However, many states continue to consider the right to withdraw, as enshrined in article X, an indispensable safeguard against NWS' failure to honor their article IV obligations.[150]

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technicality. *See id.* at 258. Still, if the very use of nuclear weapons could not be found to violate a peremptory norm of international law, it is difficult to imagine that the mere withdrawal from the NPT would be deemed subject to a *ius cogens* prohibition.

146. Such an argument would draw on article 64 of the VCLT pursuant to which any existing treaty or treaty provisions which is in conflict with a subsequently emerging peremptory norm, becomes void and is terminated. *See* VCLT, *supra* note 144, at 64.

147. *See, e.g.*, 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 20.

148. Note, for example, various states' submissions to the Preparatory Committee for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Vienna, Austria, Apr. 30-May 11, 2007, *Implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and Paragraph 4 (c) of the 1995 Decision on Principles and Objectives for Nuclear Non-Proliferation and Disarmament: National Report of Mexico*, ¶ 15, U.N. Doc. NPT/CONF.2010/PC.I/5 (Apr. 30, 2007); Preparatory Comm. For the 2010 Review Conf. of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Vienna, Austria, Apr. 30-May 11, 2007, *Implementation of Article VI and Paragraph 4(c) of the 1995 Decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament": Report Submitted by the Republic of Korea*, ¶ 17, U.N. Doc. NPT/CONF.2010/PC.I/11 (May 2, 2007).

149. "The Conference agrees on the following practical steps for the systematic and progressive efforts to implement article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4(c) of the 1995 Decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament." 2000 Review Conference, *supra* note 76, at 14, ¶ 15(5).

150. *See, e.g.*, Aboul-Gheit, *supra* note 96 (rejecting "attempts to impose new restrictions on the exercise by States Parties of their *inalienable right to withdraw* from the Treaty" (emphasis added)).

At the 2010 NPT Review Conference, participating states could not reach consensus on all important aspects of article X.[151] However, the Conference did affirm that withdrawal from the Treaty remained a sovereign right.[152] At the same time many states were adamant that the modalities of the exercise of the right be strengthened to make clear what consequences would flow from withdrawal from the Treaty and thereby deter such actions and further the goal of universal adherence.[153] Some of the specifically proposed "clarifications" regarding withdrawal from the Treaty appear unobjectionable irrespective of the specific method or process by which they might be achieved, as they squarely fall within the parameters of the language of article X, paragraph 1, itself, or of general international law. For example, given the conditional nature of the right of withdrawal, it is self-evident that both the Security Council as well as the member states, individually or collectively, play a significant role in validating a state's withdrawal notice. Thus, support "for the Security Council to address without delay any State party's notice of withdrawal . . . , including the events described in the required withdrawal statement by the State pursuant to article X"[154] should be uncontroversial,[155] as should be any clarification of the modalities under which states parties might respond collectively to a notification of withdrawal. By the same token, the principle that a state should remain accountable for any violation of its obligations under the Treaty committed prior to its withdrawal is both a matter of common sense and of general international law.[156] A state having committed an internationally wrongful act would be required to take action to restore the status quo ante, that is, the situation that would have existed if the

151. *See* 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 18.

152. *Id.*

153. *See, e.g.*, Kostyantyn Gryshchenko, Minister for Foreign Affairs of Ukraine, Statement at the General Debates on the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons 2 (May 4, 2010), http://www.un.org/en/conf/npt/2010/statements/pdf/ukraine_en.pdf (asserting that "one of the measures that will strengthen the Treaty is the elaboration of the modalities under which states can implement the Article X"). A proposal to strengthen the NPT by at least making it more difficult for states parties to invoke the treaty's withdrawal clause had already been on the agenda of the 2005 Review Conference. However, the Conference ended in recriminations among participants and without a consensus document, thus an official pronouncement on the issue.

154. *See* Note Verbale, *supra* note 42, ¶ 19.

155. Indeed, this very mandate, couched in verbatim language, had already been accepted by the Security Council itself in Resolution 1887. *See* S.C. Res. 1887, *supra* note 62, ¶ 17.

156. *See id.*

illegal act had not been committed.[157] Whether such action might include, for example, the return to the original supplier of any nuclear equipment and materials acquired during membership, might have to be determined ad hoc. In this sense, the determination of the legal consequences of withdrawal is process-sensitive, but cannot be deemed to be a priori outside the scope of legitimate review by either the Security Council or other states parties exercising their rights under article X.

By contrast, a clarification of the kind that seeks to perpetuate some of the defecting state's obligations, such as to comply with the separate safeguards agreement notwithstanding the termination of NPT membership,[158] would be inherently controversial and legally problematic. The NPT itself does not contain any provision on the specific consequences of a state's withdrawal, nor has there emerged as yet an agreed understanding in this respect among the parties. On the other hand, the Vienna Convention on the Law of Treaties provides that in such a case withdrawal from a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[159] However, the exact implications of this provision are not self-evident and would be difficult to assess in the context of the NPT.[160] In short, resolution of these important questions ultimately raises, once again, the process issue: Can this step be taken collectively, in a manner that meets states' expectations of transparency and inclusiveness? And if not, what are the alternatives, if any, and how could the exceptional recourse to an alternative decision-making modus be justified?

At the 2010 NPT Review Conference, those states that advocated clarification of withdrawal modalities consistently disavowed any intention to revise or formally amend article X.[161] Still, participating states remained divided over the very process by which to determine the legal consequences of a state's withdrawal from the Treaty. It should be evident therefore that a consensus-based decision on article X involving all states parties to the NPT will not be forthcoming in the near future, if

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157. *See* Case Concerning the Factory at Chorzów (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13, at 47; *see also* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, art. 35, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

158. *See supra* text accompanying note 128.

159. VCLT, *supra* note 144, art. 70, ¶ 1(b).

160. Indeed, at the 2010 NPT Review Conference participating states could not find a consensus on this very set of questions. *See* 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 18.

161. *See, e.g.*, Note Verbale, *supra* note 42, ¶ 19. Some states, including Syria, Iran, Egypt, and Libya, espoused exactly the opposite view, arguing that proposed article X language would amount to a reinterpretation of the Treaty. *See, e.g.*, POTTER ET AL., *supra* note 32, at 16.

ever. Given the undesirability of continuing the present status quo and the unavailability of other legitimate fora or processes,[162] the only realistic option for redressing the issue might therefore be through an intervention of the Security Council. To be sure, the Council has signaled its willingness to take on an active role in shoring up the foundations of the international non-proliferation regime, most notably in Resolution 1887.[163] However, in taking on the task of identifying in the abstract the specific legal rights and obligations as between a withdrawing state and the remaining states parties, the Council would be engaging in conduct which, though certainly not unprecedented,[164] would undoubtedly be highly controversial, namely international law-making proper.[165] In short, it is difficult to see how states might avoid controversy in attempting to settle the article X issue. In any event, if there were support among states, including, of course, the members of the Security Council itself, for a "clarifying" resolution by the Council under Chapter VII of the Charter, such a step ought to be preceded by a campaign that sets out clearly and convincingly the special policy reasons for abandoning broad-based, if not consensual, international decision-making for the less democratic, yet legally binding resolution through the auspices of a limited-membership institution.[166]

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162. In theory, recourse to the International Court of Justice for an advisory opinion on the issue might be possible. However, in light of the sensitivity of the subject matter for many states it is unlikely that a majority of U.N. member states would support a vote to this effect in the U.N. General Assembly, the most likely originator of a request for an advisory opinion.

163. *See* S.C. Res. 1887, *supra* note 62, ¶ 28.

164. Thus beginning with the adoption of Resolution 1373 (2001) in response to the 9/11 terrorist attacks, the Council has on several occasions acted as a legislator. *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). *See generally* Talmon, *supra* note 92; Rosand, *supra* note 92; Andreas Zimmermann & Björn Elberling, *Grenzen der Legislativbefugnisse des Sicherheitsrats—Resolution 1540 und abstrakte Bedrohungen des Weltfriedens*, 52 VEREINTE NATIONEN 71 (2004); ERICA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL (2004); Georg Nolte, *Lawmaking Through the UN Security Council*, *in* DEVELOPMENTS IN INTERNATIONAL LAW IN TREATY MAKING, *supra* note 120, at 237, 241-42.

165. Thus the Security Council's exercise of legislative powers has been characterized as "difficult to justify under the Charter." THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 709 (Bruno Simma ed., 2d ed. 2002); *see also* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, *in* THE METHODS OF INTERNATIONAL LAW 23, 25 (Steven Ratner & Anne-Marie Slaughter eds., 2004).

166. To this effect, see also SIMON CHESTERMAN, INST. INT'L LAW & JUSTICE, N.Y.U. SCHOOL OF LAW, RECOMMENDATION 11 OF THE U.N. SECURITY COUNCIL AND THE RULE OF LAW: THE ROLE OF THE SECURITY COUNCIL IN STRENGTHENING A RULES-BASED INTERNATIONAL SYSTEM, FINAL REPORT AND RECOMMENDATIONS OF THE AUSTRIAN INITIATIVE, 2004-2008, at iii (2008).

B. Interdiction of WMD on the High Seas

The fact that deficiency of process tends to undermine the realization of desirable non-proliferation outcomes can also be illustrated by reference to the enforcement of non-proliferation policies at sea, in particular the interdiction of weapons of mass destruction (WMD) on foreign flag vessels on the high seas. In the wake of the fall of Baghdad in the spring of 2003, President Bush launched the Proliferation Security Initiative (PSI),[167] resorting again to the "coalition of the willing" model.[168] One principal objective of PSI was to facilitate the boarding, search, and seizure of foreign flag vessels on the high seas suspected of carrying WMD, materials, or related personnel.[169]

On the high seas, under customary international law and the U.N. Law of the Sea Convention (UNCLOS), states have limited rights in respect to the boarding of foreign flag vessels without the consent of the flag state.[170] Thus a general right to visit foreign flag vessels exists only in circumstances in which there are reasonable grounds for suspecting the vessel concerned is engaged in piracy or slave trading, is stateless, or, subject to additional conditions, is engaged in unauthorized broadcasting.[171] UNCLOS does not permit the non-consensual boarding in cases beyond these specific circumstances.[172] Therefore, vessels

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167. PSI is not an organization but rather an informal organizational framework within which participating states seek to coordinate counter-proliferation measures, and was initially supported by eleven states. Today, ninety-five countries endorse PSI formally. For details, see Bureau of Int'l Sec. & Nonproliferation [ISN], *Proliferation Security Initiative*, U.S. DEP'T OF STATE, http://www.state.gov/t/isn/c10390.htm (last visited Sept. 13, 2010). *See generally* MARY BETH NIKITIN, CONG. RESEARCH SERV., RL 34327, CRS REPORT FOR CONGRESS—PROLIFERATION SECURITY INITIATIVE (PSI) (2010); Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526 (2004); Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARVARD INT'L L.J. 131 (2005).

168. Unlike "Operation Iraqi Freedom," the epitome of the "coalition of the willing," PSI attracted the support of both Germany and France which joined the initiative from its very beginning.

169. *See, e.g.*, ISN, *Interdiction Principles for the Proliferation Security Initiative*, ¶ 4(c), U.S. DEP'T OF STATE, Sept. 4, 2003, http://www.state.gov/t/isn/c27726.htm [hereinafter *PSI Interdiction Principles*]. At the fourth meeting in London, participating states reviewed a model boarding agreement proposed by the United States. *See* ISN, Proliferation Security Initiative: Chairman's Conclusions at the Fourth Meeting, U.S. DEP'T OF STATE, Oct. 10, 2003, http://www.state.gov/t/isn/115305.htm.

170. United Nations Convention on the Law of the Sea art. 110, ¶ 1, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

171. *Id.*

172. Notably, there is no general right either to the non-consensual boarding of foreign flag vessels suspected of drug trafficking. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 17, Dec. 20, 1988, 1582 U.N.T.S. 95 (providing the basic multilateral legal framework for interdiction of drug-trafficking at sea, simply reflects

suspected of trafficking in WMD, components thereof, or indeed "persons of interest" will in general remain beyond the reach of a potential boarding party unless the flag state consents to an interdiction.[173] It is this shortcoming of the law that the Bush Administration was particularly keen to redress.

One prong of its strategy was PSI. Ultimately, however, PSI delivered less than its original designers had hoped for in that it failed to ease traditional restrictions on vessel boarding on the high seas.[174] By its own terms, which include an express savings clause of consistency with international law and frameworks, PSI does not seek to modify the traditional principle of exclusive flag state jurisdiction over national vessels on the high seas.[175] In other words, the specific operational language of the PSI boarding provisions is consistent with the traditional allocation of jurisdictional powers between flag, port, and coastal states, except perhaps in respect of interdiction measures in the contiguous zone.[176] Moreover, none of the few reported or documented instances of so-called PSI interdiction[177] suggests that boarding states acted otherwise

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recognition of the traditional requirement of flag state consent). Nor exists there (as yet) similar authority to board a foreign flag vessel on the high seas suspected of causing pollution of the marine environment or violating applicable fisheries laws. Some fishing vessels may, of course, be subject to boarding on the high seas under applicable regional or subregional fisheries management regimes or arrangements. But this authority can be invoked only exceptionally as between participating states and their fishing vessels, and legally is premised on the flag state either being a party to the Regional Fisheries Management Organization (RFMO) concerned or to the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks; or on the flag state having accepted otherwise the terms of the RFMO.

173. *See* UNCLOS, *supra* note 170, art. 110.

174. *See, e.g.*, SHARON SQUASSONI, PROLIFERATION SECURITY INITIATIVE, at CRS-4 (2005).

175. *See PSI Interdiction Principles*, *supra* note 169.

176. Pursuant to article 4(d) of the PSI Interdiction Principles, *supra* note 169, states agree "[t]o take appropriate actions to . . . stop and/or search in their internal waters, territorial seas, or contiguous zones . . . vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified." However, this formulation may be overly broad as a coastal state's jurisdiction over foreign-flagged vessels in its contiguous zone is, inter alia, limited to preventing "infringement of its customs, fiscal, immigration or sanitary laws and regulations *within its territory or territorial sea*." *See* UNCLOS, *supra* note 170, art. 33, ¶ 1(a) (emphasis added). Thus, unless other special circumstances —such as giving rise to the right of self-defense—prevail, absent some facts that tie the vessel to a thus localized violation of laws or regulations, the coastal state has no legal authority to "stop and/or search" the vessel concerned.

177. Indeed, as has been pointed out, "[s]ince its inception, there has been little publicly available information by which to measure PSI's success." Nikitin, *supra* note 167, at 3. For similar criticism, see Yann-Huei Song, *The U.S.-Led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment*, 38 OCEAN DEV. & INT'L L. 101, 134 (2007).

than fully in compliance with customary international law and UNCLOS.[178]

In pushing PSI as part of its counter-proliferation strategy,[179] the Bush Administration appears to have run afoul of its own "global war on terror" rhetoric,[180] which implied no geographical limits as to the theater of war, nor any time limits,[181] thereby offering the prospect of potentially open-ended boardings and searches on the high seas, anywhere in the world, of suspect foreign flagged vessels. Not surprisingly, several important states refused to join and instead questioned PSI's legality, and indeed its necessity.[182] An additional, significant factor accounting for this standoffishness was the fact that PSI had been launched as an informal initiative with the initial participation of a select group of western states, and that it had neither been discussed nor negotiated within the U.N. framework.[183] Similar concerns influenced also debates at the United Nations on what was to become Security Council Resolution 1540. The Resolution requires states to adopt and enforce domestic legal controls to prevent the proliferation of WMD and their means of delivery.[184] As part of the package of measures to be approved

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178. For an analysis, see J. Ashley Roach, *Initiatives To Enhance Maritime Security at Sea*, 28 MARINE POL'Y 41 (2004).

179. *See* NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION 2 (Dec. 11, 2002), http://www.fas.org/irp/offdocs/nspd/nspd-wmd.pdf.

180. *See also* Mark J. Valencia, *The Proliferation Security Initiative and Asia*, *in* THE OCEANS IN THE NUCLEAR AGE: LEGACIES AND RISKS 265, 281 (David D. Caron & Harty N. Scheiber eds., 2010).

181. While the Obama Administration may have dropped the label, it has continued antiterror military operations on a global scale. *See* Scott Shane et al., *A Covert Assault on Terror Widens in Asia and Africa*, N.Y. TIMES, Aug. 15, 2010, at 1.

182. *See, e.g.*, Anthony Bergin, *The Proliferation Security Initiative—Implications for the Indian Ocean*, 20 INT'L J. OF MARINE & COASTAL L. 85, 92 (2005). These countries included China, India, and Indonesia. *See also* Letter Dated 18 May 2004 from the Chargé d'Affaires a.i. of the Permanent Mission of Cuba to the United Nations Addressed to the Secretary-General, U.N. Doc. A/58/807-S/2004/407, Annex, at 3-4 (May 19, 2004).

183. *See, e.g.*, Orlando Requeijo Gual, Ambassador of Cuba, Permanent Representative of the Republic of Cuba, Statement at the U.N. General Assembly Plenary Informal Meeting To Review the Report of the High-Level Panel on Threats, Challenges and Change (Jan. 28, 2005), http://embacuba.cubaminrex.cu/Default.aspx?tabid=3581; Adiyatwidi Adiwoso Asmady, Deputy Permanent Representative of the Republic of Indonesia to the U.N., Statement to the Informal Consultations of the General Assembly (Feb. 22, 2005), http://indonesiamission-ny.org/New Statements/om022205.htm; Wang Guangya, Permanent Representative of China, Statement on the Report of the High-Level Panel on Threats, Challenges and Change and the Millenium Project Report at the Informal Consultations of UNGA 59th Session (Feb. 22, 2005), http://www.china-un.org/eng/chinaandun/zzhgg/t184368.htm.

184. *See* S.C. Res. 1540, *supra* note 93, ¶¶ 2-3. *See generally* Masahiko Asada, *Security Council Resolution 1540 and International Legislation*, *in* PUBLIC INTEREST RULES OF INTERNATIONAL LAW: TOWARDS EFFECTIVE IMPLEMENTATION 141 (Teruo Komori & Karel Wellens eds., 2009).

by the Council, the Bush Administration had sought but failed to garner support for inclusion of a maritime interdiction provision.[185] As Lars Olberg explains, one reason was "widespread concern about the resolution's origins in the US desire to pull in support for the Proliferation Security Initiative (PSI). . . . China, Russia and many others made clear that this provision should not be understood as an authorisation for interdictions not otherwise permitted by international law."[186] Thus, in the end, the Administration's vaunted preference for informal, non-law based, and therefore also more easily controllable arrangements,[187] and its deeply controversial postulation of the doctrine of preemptive use of force,[188] all played a role in stoking states' resistance to the U.S. desire for carving out another exception to the principle of exclusive flag state jurisdiction. Such an additional exception—even with appropriate built-in safeguards—might, so many states feared, too easily be subject to abuse.

Similar considerations proved to be decisive, finally, during essentially parallel legislative efforts within the International Maritime Organization (IMO) aimed at addressing the maritime threat from WMDs. In revising the 1988 Convention for the Suppression of Unlawful Acts Against Navigation (SUA) and its related Protocol[189] to counter more effectively post-9/11 terrorist threats, the international community rejected non-consensual boarding on the high seas, an innovation the United States had been particularly interested in securing.[190] Instead, the 2005 Protocol to the Convention[191] reaffirms that

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185. *See* Nikitin, *supra* note 167, at 6.

186. Lars Olberg, *Implementing Resolution 1540: What the National Reports Indicate*, 82 DISARMAMENT DIPLOMACY (2006), http://www.acronym.org.uk/dd/dd82/82lo.htm.

187. *See supra* text accompanying notes 109-110.

188. The essence of the Bush Doctrine of preemptive use of force is a passage that was part of the 2002 National Security Strategy:

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

White House, *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*, NAT'L SEC. COUNCIL, June 1, 2002, http://georgebush-whitehouse.archives.gov/nsc/nss/2002/nss5.html.

189. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988, Mar. 10, 1988, 1678 U.N.T.S. 221, and Its Related Protocol to the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (2005).

190. Thus the boarding-at-sea provision, which the United States initially proposed to an intersessional Correspondence Group of IMO's Legal Committee in 2002, featured a right to

the boarding of a ship navigating "seaward of any State's territorial sea" shall be impermissible "without the express authorization of the flag state," even if that vessel (or a person onboard) can reasonably be suspected of involvement in an act of terrorism implicating WMD.[192] It also sets out certain "options" for the flag state that might be viewed as mitigating somewhat the harshness of the rejection of non-consensual boarding: Upon becoming party to the 2005 Protocol to the Convention, a state may either declare that with respect to vessels flying its flag, a requesting state is granted authorization to board (search, etc.), if its authorities do not respond in timely fashion to a request;[193] or it may give notice *in advance* of its authorization to board and search its vessel, to determine whether a WMD-related offense has been, is being, or is about to be committed.[194] However, these optional declarations by states are a far cry from a specific provision in the treaty itself that would eliminate altogether the need to obtain the flag state's consent or establish a legal presumption that boarding is authorized.

The absence of an additional generic international legal boarding authority is to be regretted.[195] Today, the potential threats associated with the seaborne proliferation of WMD would clearly warrant legal recognition of another exception to the principle of exclusive flag-state jurisdiction.[196] Nevertheless, states' exercise of enforcement jurisdiction on the high seas, even for purposes of countering the threat of nuclear proliferation, remains an intrinsically sensitive issue. This is borne out

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board without the specific consent by the flag state, as the default rule. *See* Annex 1, art. 8*bis*, ¶ 1, IMO Doc. LEG 85/4, *excerpted in* Christopher Young, *Balancing Maritime Security and Freedom of Navigation on the High Seas: A Study of the Multilateral Negotiation Process in Action*, 24 U. QUEENSLAND L.J. 355, 385 (2005).

191. *See* Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) [hereinafter 2005 Protocol to the Convention]. Corresponding changes were made to the 1988 Fixed Platforms Protocol. *See* Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, IMO Doc. LEG/CONF.15/22 (Nov. 1, 2005).

192. *See* Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (as amended), art. 8*bis*, ¶ 5, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005).

193. The period concerned is four hours from the flag state's acknowledgement of the receipt of a request to confirm the vessel's nationality. *See id.* art. 8*bis*, ¶ 5(d).

194. *Id.* art. 8*bis*, ¶ 5(e).

195. *See, e.g.*, NAT'L RESEARCH COUNCIL, MARITIME SECURITY PARTNERSHIPS 191 (2008); Natalie Klein, *The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 35 DENV. J. INT'L L. & POL'Y 287, 329-32 (2007).

196. "Maritime interception and enforcement actions are an indispensable element in maintaining public order in the oceans." CRAIG H. ALLEN, MARITIME COUNTERPROLIFERATION OPERATIONS AND THE RULE OF LAW 80 (2007). *See generally* MARTIN N. MURPHY, SMALL BOATS, WEAK STATES, DIRTY MONEY: THE CHALLENGE OF PIRACY (2009).

inter alia by the Security Council's repeated refusal to authorize non-consensual boarding as part of its nuclear proliferation-related measures under article 41 of the Charter targeting North Korea[197] and Iran.[198] In light of this, it thus remains a matter of speculation whether the United States might have succeeded with its efforts to establish another maritime security-related exception to the principle of exclusive flag state jurisdiction, had it not come to the international negotiating table with very heavy baggage. However, it is reasonable to assume that the United States, the proposal's originator and main proponent, was handicapped by widespread skepticism among states about its intentions and especially its mode of operation. These doubts had grown over time in response to its essentially unilateralist international security policy, disdain for international institutions and formal legal arrangements,[199] and the fact that the United States seemed to have "stepp[ed] away from international legitimation"[200] as epitomized by its war of choice in Iraq.

In the interim, the United States has sought to obtain high seas boarding authorizations through "the back-door," as it were, of bilateral agreements with mostly flag-of-convenience countries. Thus, on top of a host of maritime counterdrug agreements with Caribbean and Central and South American states,[201] as well as a few bilateral migration interdiction agreements,[202] to date the United States has concluded eleven ship-boarding agreements to interdict WMD.[203] These PSI-type agree-

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197. Thus far the Council has twice failed to authorize such boarding on the high seas, first in October 2006, then again in June 2009. S.C. Res. 1718, *supra* note 132, ¶ 8(f) (calling upon states "to take, in accordance with their national authorities and legislation, *consistent with international law*, cooperative action including through [sic] inspection of cargo to and from the DPRK, as necessary" (emphasis added)). Similarly, S.C. Res. 1874, *supra* note 132, appositive paragraphs 12-13, does not authorize boarding on the high seas without the permission of the flag state.

198. S.C. Res. 1929, ¶ 15, U.N. Doc. S/RES/1929 (June 9, 2010).

199. *See supra* text accompanying notes 109-110.

200. James Steinberg, *The Bush Foreign Policy Revolution*, NEW PERSPECTIVES Q., Summer 2003, at 5, 13.

201. The State Department's Bureau of International Narcotics and Law Enforcement Affairs lists as twenty-six the number of bilateral maritime counter drug agreements between the United States and Caribbean and Central and South American nations. *See International Narcotics Control Strategy Report*, U.S. DEP'T OF STATE, Mar. 2007 http://www.state.gov/p/inl/rls/nrcrpt/2007/vol1/html/80853.htm.

202. Such as with Haiti, the Dominican Republic, and the Bahamas. For details, see Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, 36 SYRACUSE J. INT'L L. & COM. 145 (2009).

203. Such PSI-inspired agreements of "cooperation to suppress the proliferation of weapons of mass destruction, their delivery systems, and related materials by sea," have been concluded with Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, the Marshall Islands, Mongolia, Panama, and St. Vincent and the Grenadines. *See, e.g.*, *Proliferation Security Initiative Ship Boarding Agreement with Liberia*, U.S. DEP'T OF STATE, Dec. 9, 2004,

ments, however, vary greatly in terms of enhancing the rights of the party seeking to board vessels flying the flag of the other cooperating party. Thus, far from establishing an unconditional right to board akin to the right of visit under article 110 of UNCLOS,[204] the agreements represent at best marginal advances relative to the traditional rules on ship boarding.[205] Moreover, they only offer a second-best solution: For the foreseeable time at least, the United States (and reciprocally—at least in theory—its bilateral partners) alone,[206] might find it easier to board non-national vessels on the high seas reasonably suspected of trafficking in WMD.[207] In other words, the limited changes that these agreements do achieve do not represent a change in the law itself, that is, of the international norms that govern high seas interdictions generally. Rather, the agreements create what amounts to a special entitlement for a single state. While substantively this development might be welcome as

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http://www.state.gov/t/isn/trty/32403.htm; *Ship Boarding Agreements*, U.S. DEP'T OF STATE, http://www.state.gov/t/isn/c37733.htm (last visited Sept. 25, 2010).

204. This is not the place for a detailed examination of this U.S. treaty practice. Here it may suffice to note that none of the agreements under review, that is, all except the two most recent ones, namely with St. Vincent and the Grenadines and Antigua and Barbuda, provide for an unconditional right. Rather, the would-be boarding state must first verify the nationality of the vessel to be boarded. Upon confirmation of the vessel's nationality, the flag state may authorize boarding, decide to conduct the boarding itself or jointly with the requesting state, or simply decline to authorize boarding by the requesting state. *See, e.g.*, *Proliferation Security Initiative Ship Boarding Agreement with Liberia*, *supra* note 203, art. 4.

205. Thus the would-be boarding state's authority has expanded only in fairly limited, conditional fashion. To begin with, all agreements recognize the requested state's right to subject its authorization to board to conditions. Further, while some agreements provide for a presumptive boarding authority in the event that the requested state fails to respond or is unable to verify the vessel's nationality, several other agreements, that is, those between the United States and the Bahamas, Cyprus, Croatia, and Malta, do not. Finally, one agreement even reinforces the traditional international boarding rules by stipulating that the requested party's consent, which is always required, must be given expressly and in writing. *See, e.g.*, *Proliferation Security Initiative Ship Boarding Agreement with Croatia*, art. 4, ¶ 4(d), U.S. DEP'T OF STATE, Mar. 5, 2007, http://www.state.gov/t/np/trty/47086.htm.

206. Although this practice could, of course, signal the beginning of the emergence of customary international law, so far no other states appear to have concluded similar security-related boarding agreements. However, Belize is reported to be "actively considering" entering into a similar arrangement with the United Kingdom. *See* DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 247 (2009).

207. For a highly critical, though perhaps somewhat too pessimistic, assessment of this strategy, see Ticy V. Thomas, *The Proliferation Security Initiative: Towards Relegation of Navigational Freedoms in UNCLOS? An Indian Perspective*, 8 CHINESE J. INT'L L. 657, 679 (2009) ("The PSI typifies the way in which hegemonic powers tend to create a network of enforcement agencies in the governments of different countries across the globe that go about implementing the political commitments of the PSI. Such implementation leads to the creation of a body of State practice that then attempts to legitimize itself by according it the necessary authority under international law through amendments to treaties like the SUA Convention and adoption of binding UN Security Council resolutions.").

signaling a potential improvement in maritime security, from a process point-of-view it is problematic as it once again calls attention to the prevailing inequality at law of states in matters of nuclear non-proliferation and disarmament.

A major step in the right direction recommended by the International Commission on Nuclear Non-Proliferation and Disarmament, would be instead to reconstitute PSI "*within the UN system as a neutral organization* to assess intelligence, coordinate and fund activities, and make both generic and specific recommendations or decisions concerning . . . interdiction."[208] Fortunately, in his Prague speech President Obama seems to have had in mind precisely such an evolution when he called for turning PSI into a durable international institution.[209]

IV. CONCLUSIONS

As the international community faces multiple crucial decisions on how to restore the effectiveness of the international nuclear non-proliferation regime, it serves us well to remember that in the nuclear non-proliferation context deficiency of process quickly thwarts even highly desirable substantive proposals for shoring up the regime. States and other relevant international actors thus are called upon to make decisions on policy issues—many of which were previously identified or discussed—where the importance of "getting it right" substantively appears easily matched, if not surpassed, by the importance of the process employed, that is, the manner in which the proposed solutions are being advanced: how to manage the inevitable adjustment of the status of NWS not parties to the NPT;[210] whether to seek clarification of the precise modalities of withdrawal from the NPT or to eliminate altogether the right to withdraw;[211] how to gain general acceptance of the additional safeguard protocol as the governing legal benchmark for the verification of compliance with the Treaty;[212] or how to balance advisable restrictions on sensitive nuclear technology by guaranteeing access to international nuclear fuel banks under the auspices of the IAEA[213] and enrichment

208. ELIMINATING NUCLEAR THREATS, *supra* note 119, at 253 (emphasis added).

209. *See supra* note 20 and accompanying text.

210. That this should be a priority item on the international non-proliferation agenda should be evident. For a call to this effect, see ELIMINATING NUCLEAR THREATS, *supra* note 119, at 254.

211. *See supra* text accompanying notes 138-157.

212. *See supra* text accompanying notes 58-62.

213. *See* 2010 Review Conference, *Conclusions and Recommendations*, *supra* note 31, at 27.

and/or reprocessing services provided by specially designated "fuel cycle states."[214]

The United States has begun to reengage with the world at large in pursuit of the objective of a strengthened non-proliferation regime. This realignment of U.S. policy with mainstream international legal and political expectations has been facilitated, of course, by the dynamics of post-Bush era international politics and new economic realities which have significantly reduced the room for U.S. unilateral maneuvering.[215] At the end of the day, the larger lesson to be learned is that the United States must embrace the simple truth that abidance by the international rule of law—across the board—and respect for commonly established frameworks and procedures for decision-making are indispensable building blocks of any successful strategy that aims at ensuring security at home and abroad. Whenever international norms, frameworks, or institutions are deemed inadequate, however, to meet the challenge of the day and where the need for unilateral or less than fully inclusive corrective action arises, the case for such action must be set out clearly and convincingly—in the appropriate international arena—and must be stated publicly and in principled fashion.

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214. *See, e.g.*, ELIMINATING NUCLEAR THREATS, *supra* note 119, at 257; Roula Khalaf, *Saudis Call on Iran To Join Gulf Nuclear Deal*, FIN. TIMES, Nov. 2, 2007, http://www.ft.com/cms/s/0/5606ffe2-88e6-11dc-84c9-0000779fd2ac.html; Choe Sang-Hun, *U.S. Wary of South Korea's Plan To Reuse Nuclear Fuel*, N.Y. TIMES, July 14, 2010, at A6.

215. *See, e.g.*, Richard N. Haas, *The Age of Nonpolarity: What Will Follow U.S. Dominance*, FOREIGN AFF., May/June 2008, http://www.foreignaffairs.com/articles/63397/richard-n-haass/the-age-of-nonpolarity.