LOSERS ALWAYS WHINE ABOUT THEIR TEST: AMERICAN NUCLEAR TESTING, INTERNATIONAL LAW, AND THE INTERNATIONAL COURT OF JUSTICE

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I. INTRODUCTION

Nuclear weaponry first gave the United States the “biggest stick in the [international] playground.” It is with little surprise, then, that some members of the United States Senate should resist ratification of the Comprehensive Nuclear Test Ban Treaty (CTBT or the Treaty), which would, unlike any test ban treaty before it, compel the United States to cease all methods of nuclear testing, and finally drop the “stick.” In 1999, the Senate failed to reach even a majority in favor of the CTBT by a vote of 48–51, much less the sixty-seven votes needed for ratification. Senators voted largely along party lines, as Democrats sided with President Clinton in favor of the Treaty against Republicans’ steadfast, near unanimous opposition to ratification.

Arizona Senator Jon Kyl was instrumental in shepherding Republican opposition to the CTBT in the lead-in to the 1999 vote. Kyl focused the debate on three primary objections to the Treaty: that the Treaty is unverifiable, that it would not curb nuclear proliferation, and that it would undermine America’s nuclear deterrent. Particularly with respect to maintaining U.S. nuclear superiority, CTBT ratification might signal weakness to allies and challengers as the United States would forever foreswear nuclear testing, regardless of its motives to maintain a reliable, though aging, nuclear arsenal. Testing, however, is crucial to ensuring that

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these extremely complex weapons continue to function properly. During senatorial debate, Senator Mike Enzi argued that verification problems set a double standard because other countries may cheat "while the United States would scrupulously adhere to the CTBT, thereby losing confidence in its nuclear deterrent." President Barack Obama resurrected the CTBT as an issue of considerable importance in the United States Senate. During an April 2009 speech in Prague, President Obama reiterated a campaign pledge, announcing that his "administration [would] immediately and aggressively pursue U.S. ratification of the [Treaty]." Vice President Joe Biden, a key member of the Senate Foreign Relations Committee during the 1999 rejection of the CTBT, has been assigned the task of translating President Obama’s ratification pledge into the two-thirds vote required for ratification of a treaty.

As in 1999, President Obama faces similar resistance to the ratification of the CTBT. Senator Kyl, now the minority whip, is again leading Republican senators in their opposition to the Treaty. Once again, opponents challenge the Treaty principally on concerns over verification and deterrence; however, President Obama possesses significant advantages in his ratification campaign. Democrats notably control fifty-seven seats in the Senate compared with only forty-five held seats in 1999. President Obama also does not face some of the political challenges that worked regarding ratification of the CTBT] will increase international perceptions of an America that is ever less willing to provide for its own security.")

9 See Kyl, supra note 7, at 328 (arguing that complexity and twenty-year shelf lives of American nuclear forces require periodic testing).
13 Id.
14 See id. ("The anti-treaty forces are led by two key Republican senators: John Kyl of Arizona and Jeff Sessions of Alabama.").
15 See, e.g., Jon Kyl & Richard Perle, Our Decaying Nuclear Deterrent, WALL ST. J., June 29, 2009, at A13 ("[The test-ban treaty] simply is not verifiable. It also failed because of an understandable reluctance ... to forgo forever a test program that could in the future be of critical importance for our defense and the defense of our allies.").
17 See Deibel, supra note 6, at 147 (noting that all forty-five Democrats sent a letter to former Foreign Relations Committee chairman, Jesse Helms, asking for release of the CTBT from committee to face a floor vote).
against former President Clinton, such as the partisan atmosphere surrounding his impeachment proceedings.\(^{18}\)

Yet, as in 1999, it appears unlikely that the Obama administration will acquire the sixty-seven votes necessary for ratification, as all Republican senators indicate unwillingness to vote in favor of ratification.\(^{19}\) President Obama will likely need to invest a large amount of political capital to secure the seven to ten Republican votes necessary for ratification of the CTBT.\(^{20}\) Although some conservative senators appear resolved against ratification, it may be possible for the President to sway some moderate senators from across the aisle.\(^{21}\) For example, key senators John McCain and Richard Lugar have expressed some readiness to consider the CTBT.\(^{22}\) In particular, the President must speak to concerns about nuclear deterrence and address Republican support for a resumption of nuclear testing to garner the support that he needs for ratification.\(^{23}\)

The President could argue that the United States cannot lawfully break its moratorium on nuclear testing, even in the absence of CTBT ratification. This Note aims to contribute to that discussion by arguing that, if the issue were to come before the court, the ICJ should find that American nuclear testing is illegal. Such a ruling would establish a legal barrier to nuclear testing similar to ratification of the CTBT and would otherwise impact the

\(^{18}\) See Jofi Joseph, Renew the Drive for CTBT Ratification, 32 WASH. Q. 79, 84 (2009) (explaining that President Clinton faced a Republican majority that was highly skeptical of his national security positions, some of which refused to accept him as commander in chief, which negatively influenced political compromise on arms control agreements such as the CTBT).

\(^{19}\) See James Kitfield, Road to Zero Nukes Remains Fraught, NAT'L J., May 30, 2009, http://www.nationaljournal.com/njmagazine/nj_20090530_1512.php (quoting John Isaacs, Executive Director of the Center for Arms Control and the Non-Proliferation, as arguing that Obama will need to find some bipartisan compromise, since all forty Republicans signaled that they will vote against the CTBT); see also Isaacs, supra note 12 (“[G]etting from 60 probable votes to 67 sure votes is like forging a raging river at the finish line of a 10-mile hike.”).

\(^{20}\) See Kitfield, supra note 19 (quoting Isaacs: “At the end of the day, it’s probably going to come down to Obama or [Vice President] Biden sitting down with seven to 10 key Republicans and saying, ‘OK, what do you need in order to pass this treaty?’ ”).

\(^{21}\) See Joseph, supra note 18, at 80 (“With a healthy majority of Democratic senators in place, and close relationships with key moderate Republicans, Obama is within reach of the 67 votes necessary to secure ratification . . . .”).

\(^{22}\) See Editorial, The Test Ban Treaty, N.Y. TIMES, May 25, 2009, at A18 (noting that during the 2008 presidential campaign, McCain agreed another look at the Treaty was warranted and that Lugar “said he would ‘study [the Treaty] thoroughly’ ”).

\(^{23}\) See Joseph, supra note 18, at 84 (“Any serious campaign for a renewed bid for Senate ratification must address such key issues as verifiability and whether the United States can maintain a reliable and credible nuclear arsenal in the absence of future tests.”).
value and credibility of the American nuclear deterrent.\(^{24}\) Therefore, because
nuclear testing is unlawful in any event, opposition to CTBT ratification
premised on the legal freedom to resume nuclear testing should be
reconsidered.

Part II discusses several background issues regarding the CTBT and ICJ
opinions on the legality of nuclear testing outside the purview of the Treaty.
Part III investigates the current legal obligations of the United States
regarding a resumption of nuclear testing that favor an ICJ ruling that
underground tests are illegal as a matter of international law. Part IV
considers whether the United States could defeat the legal prohibition against
nuclear testing by “unsigned” the CTBT. Part V concludes with the
suggestion that because the United States faces similar legal obligations in
the absence of ratification as it would under a ratification regime, the
deterrence rationale for rejecting the CTBT should be reconsidered.

II. BACKGROUND

President George H. W. Bush signed a unilateral moratorium on nuclear
testing on October 2, 1992,\(^{25}\) and the United States has honored the
moratorium ever since.\(^{26}\) In this tradition, President Clinton signed the
CTBT shortly after it opened for signature on September 24, 1996, and
transmitted it to the United States Senate nearly one year later for advice and
consent on September 22, 1997.\(^{27}\)

Most methods of nuclear testing were prohibited well before the adoption
of the moratorium and the drafting of the CTBT. The Limited Test Ban
Treaty of 1963 (LTBT),\(^{28}\) ratified by the U.S. the same year, outlaws all
forms of nuclear testing with the exception of controlled underground
explosions within the territory of a party member.\(^{29}\) A decade later, the

\(^{24}\) See Legality of the Use by a State of Nuclear Weapons in Armed Conflict and Legality
of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995 I.C.J. 34, 63 (Nov. 15),
available at http://www.icj-cij.org/docket/files/95/5947.pdf (“[I]t is impossible to separate the
policy of deterrence from the legality of the use of the means of deterrence.”).

\(^{25}\) Rupert Cornwell, Bush Signs Nuclear Test Moratorium, INDEP. (Oct. 3, 1992), http://www.in
dependent.co.uk/news/world/bush-signs-nuclear-test-moratorium-1555090.html.

\(^{26}\) Philip Taubman, Op-Ed., Obama's Big Missile Test, N.Y. TIMES, July 9, 2009, at A31,

\(^{27}\) Letter from William J. Clinton, U.S. President, to the Senate (Sept. 22, 1997), in

\(^{28}\) Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under
1963; entered into force Oct. 10, 1963) [hereinafter LTBT].

\(^{29}\) See Christopher M. Petras, “Space Force Alpha” Military Use of the International Space
(describing the LTBT's prohibition of nuclear testing as limited to the explosion of nuclear
United States ratified the 1974 Threshold Test Ban Treaty, a bilateral treaty with the Soviet Union limiting the size of underground tests to 150 kilotons. The CTBT aims to close this loophole and prohibits all methods of testing. This restriction is consistent with the Nuclear Non-Proliferation Treaty (NPT), which in Article VI requires that nuclear states move toward abolition of their nuclear arsenals.

Should any party conduct a prohibited test after the CTBT enters into force, Article V of the CTBT prescribes remedies for a violation of the Treaty. Generally there are two remedies available to the party states. First, the Conference of States Parties (Conference) may elect to restrict or suspend the violating party from the exercise of its rights and privileges under the CTBT. Second, the Conference may recommend to party states collective measures that conform to international law, including sanctions.

Article VI governs disputes over application of the Treaty. If a party accused of violating the Treaty contests the interpretation or application of the relevant terms, that accused Party can attempt first to settle its dispute without judicial application. If, however, the parties ultimately cannot agree on the application of the Treaty, the parties may, by mutual consent, refer the matter to the ICJ.

The ICJ has handled disputes regarding nuclear testing in the past. In 1973, New Zealand filed suit at the court to determine the legality of French nuclear testing. France was conducting atmospheric nuclear tests in the oceans, atmosphere, or outer space, and not covering underground tests carried out within the territorial limits of the Treaty parties).

See id. at 448, 449 & n.233 (describing the goal of the CTBT as being a truly comprehensive ban on testing to close any gaps left by the LTBT and other treaties).


The Conference of State Parties is an organ established under the CTBT Organization. Id. art. II, para. 4.

Id. art. V, para. 2.

Id. para. 3.

Id. art. VI.

Id. para. 2.

Id.

South Pacific, and New Zealand specifically objected to this above ground method of testing.\textsuperscript{42} The complaint claimed that the French tests constituted a breach of legal norms against the atmospheric testing of nuclear weapons and that the tests would inflict significant environmental damage to New Zealand's territories, causing interference with maritime and air navigation.\textsuperscript{43} Before deciding the case on the merits, the court granted New Zealand's request for an interim protective order that "the French Government should avoid nuclear tests causing the deposit of radioactive fallout on [New Zealand]."\textsuperscript{44}

After the issuance of the protective order, but before the ICJ resolved the substance of the case, France concluded its atmospheric testing and announced that it would henceforth conduct only underground tests.\textsuperscript{45} The ICJ utilized this development to sidestep the question of the legality of the French tests, as "it found that there was no need to render judgment on New Zealand's claim of potential injury from French nuclear testing because France had shifted from atmospheric to underground testing."\textsuperscript{46} Given the specificity of the challenge to atmospheric testing in their complaint to the court and the fact that underground testing was not illegal, the court dismissed the complaint.\textsuperscript{47}

In 1995, only one month after the members of the NPT agreed to extend that treaty indefinitely, France announced its decision to resume nuclear testing in the South Pacific.\textsuperscript{48} Shortly thereafter New Zealand initiated a new round of proceedings at the ICJ.\textsuperscript{49} New Zealand argued that the 1973 case should be reopened to examine the legality of underground testing, based on the same arguments from the prior case that French tests were resulting in nuclear contamination of New Zealand's environment.\textsuperscript{50} As an intermediate step, New Zealand argued that because of treaty obligations, customary

\textsuperscript{43} Id. at 112.
\textsuperscript{45} Siskin, supra note 41, at 192.
\textsuperscript{47} Id. at 201. But see MacKay, supra note 44, at 1865 (arguing that New Zealand's complaint was not specific only to atmospheric testing and should not have been dismissed).
\textsuperscript{48} See MacKay, supra note 44, at 1857–58 (describing New Zealand as frustrated with Chinese and French nuclear testing in the area, which it felt was inconsistent with the obligations recently extended under the NPT).
\textsuperscript{49} Taylor, supra note 46, at 199.
\textsuperscript{50} Id. at 202; see generally MacKay, supra note 44, at 1870 (discussing that New Zealand tried to reopen the earlier case, rather than filing a new case, because after the initiation of the 1973 case France, withdrew from the compulsory jurisdiction of the ICJ).
international law, and the "precautionary principle" of international environmental law, France should be required to perform an environmental impact assessment prior to conducting underground tests.\(^{51}\)

As it had done in 1973, the ICJ resolved the case without reaching the merits by holding that the original complaint was limited to atmospheric testing, which France had not resumed.\(^{52}\) The court refused to reopen the case or consider the legality of nuclear testing.\(^{53}\)

Although the ICJ seemed reluctant in these cases to address the merits of legal questions regarding nuclear weapons, the court demonstrated a willingness to comment on this topic in later cases. For example, in 1996, only one year after dismissing New Zealand's challenge to reopen the 1973 case, the ICJ responded to requests by the World Health Organization (WHO) and the U.N. General Assembly for advisory opinions on the legality of the threat and use of nuclear weapons.\(^{54}\) New Zealand again appeared before the court, this time on behalf of the U.N. General Assembly, levying similar arguments against continued French nuclear tests as it had in the prior cases.\(^{55}\) Despite dismissing the WHO's advisory request,\(^{56}\) the court spoke directly to the substance of the legal issues in the U.N. General Assembly's petition, finding that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."\(^{57}\)

The court's advisory opinion on nuclear issues is significant for several reasons. First, it established that the ICJ is not so concerned with political repercussions that it will never reach the merits on a legal question regarding nuclear issues.\(^{58}\) Second, the court displayed an opinion that state conduct regarding nuclear weapons can be constrained by customary international

\(^{51}\) Taylor, supra note 46, at 202–03.

\(^{52}\) Id. at 204.

\(^{53}\) Id. at 205.

\(^{54}\) Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Michael J. Matheson, The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons, 91 AM. J. INT'L L. 417, 417 (1997).

\(^{55}\) MacKay, supra note 44, at 1885.

\(^{56}\) Matheson, supra note 54, at 419 ("[The] WHO may legitimately address the effects on public health of the use of nuclear weapons and possible means of dealing with these effects, but has no competence to address the legality or illegality of the use of this or any other type of weapons.").

\(^{57}\) Legality of the Threat or Use of Nuclear Weapons, supra note 54, at 266; see also Matheson, supra note 54, at 418 (quoting the International Court of Justice).

\(^{58}\) See Matheson, supra note 54, at 421 (explaining that the ICJ will decline a request for an advisory opinion from the U.N. General Assembly only for "compelling reasons," which, in the context of the legality of nuclear weapons, did not include the political character of the request).
Third, it showed that the U.N. General Assembly has the power to request advisory opinions from the ICJ and demonstrated a readiness to do so on nuclear issues.

III. NUCLEAR TESTING BEFORE THE INTERNATIONAL COURT OF JUSTICE

In the event that another state challenges the legality of American nuclear testing, the ICJ is the most likely forum to adjudicate the dispute. The ICJ's general jurisdiction gives the court the competence to hear disputes regarding the issue of nuclear testing. Although the court can refuse jurisdiction at its discretion if it determines that there are "compelling reasons" for doing so, such a course is unlikely given that the court rejected this rationale regarding nuclear weapons issues in its 1996 Advisory Opinion. In particular, the Court did not dismiss the advisory request on the grounds that it represented a political question.

Jurisdictional issues regarding parties, however, are somewhat more complicated. Although the Statute of the International Court of Justice (ICJ Statute) contains a mechanism for compulsory jurisdiction, this provision is inapplicable to countries, such as the United States, that do not consent to

59 See Larry D. Johnson, Protecting the World from Weapons of Mass Destruction: Reflections on the High-Level Panel Report on Threats, Challenges and Change, 38 CAL. W. INT'L L.J. 63, 67 (2007) (suggesting that it is of particular interest that the ICJ was asked to give advice on whether customary international law would be violated by use of nuclear weapons).

60 See Matheson, supra note 54, at 420 (noting that the United States, among others, did not contest the authority of the U.N. General Assembly to request an advisory opinion from the ICJ).

61 For the purposes of this Note, "nuclear testing" refers only to the detonation of warheads, and does not include nuclear testing through computer simulation.

62 See Laurence Boisson de Chazoumes & Philippe Sands, Introduction to INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS 1, 18-19 (Laurence Boisson de Chazoumes & Philippe Sands eds., 1999) (contending that the 1996 nuclear advisory opinion reflects increased respect for the ICJ generally and signals that the court is "likely to figure ever more prominently in the resolution of political and legal disputes").

63 See Renata Szafarz, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE, at ix (1993) ("The ICJ is the only contemporary world court with general powers.").

64 Ved P. Nanda & David Krieger, NUCLEAR WEAPONS AND THE WORLD COURT 108 (1998); see also Matheson, supra note 54, at 418 ("The Court also decided [that it would issue] an advisory opinion, finding that the General Assembly had raised a legal question that was within its competence to ask.").

65 Legality of the Threat or Use of Nuclear Weapons, supra note 54, at 234.


67 See id. art. 36(3) (allowing a party state to declare at any time its acceptance of the compulsory jurisdiction of the court subject to condition or termination at the discretion of the party state).
be bound by it. It is likely, however, that the United States would submit voluntarily to the jurisdiction of the court. Although France contested the jurisdiction of the court in its case with New Zealand by withdrawing consent for compulsory jurisdiction in 1973, the United States attended the advisory opinion proceedings and debated the issues on the merits. With international respect for the ICJ strong and increasing, political costs will probably compel the United States to notify the court that it has no objection to jurisdiction on the subject matter of nuclear testing.

If a case is not brought before the court, the ICJ may issue an advisory opinion regarding nuclear testing. The court’s jurisdiction regarding this mechanism is limited, however, since advisory opinions may be issued only upon the request of a body authorized by the United Nations Charter. The only organizations vested with such power are the General Assembly, the Security Council, “[o]ther organs of the United Nations and specialized agencies” authorized by the General Assembly. Although the 1996 Advisory Opinion on nuclear weapons signals some willingness on the part of the court to construe its advisory jurisdiction more broadly than in the past, it remains a narrow option.

Should the ICJ address the issue of American testing, its decision would likely focus on one of two issues. First, a neighboring state that fears it will be caught in the path of radioactive fallout could charge the United States

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69 See Constanze Schulte, Compliance with Decisions of the International Court of Justice 404 (2004) (noting that since 1984, no country, including the United States, has contested the jurisdiction of the ICJ in any case, and arguing that although possible, it is unlikely any country would do so in the future).


71 See Charles J. Moxley, Jr., The Unlawfulness of the Use or Threat of Use of Nuclear Weapons, 8 ILSA J. INT’L & COMP. L. 447, 450–51 (2002) (noting the positions argued by the United States on the merits before the ICJ during the proceedings regarding the legality of the use or threat of use of nuclear weapons).

72 Schulte, supra note 69, at 404.

73 See Szafarz, supra note 63, at 6 (suggesting that, in compliance with the Article 36(1) jurisdictional mechanism of the ICJ Statute, a state can express consent to jurisdiction via special agreement on the issue of the case).

74 ICJ Statute, supra note 66, art. 65(1).

75 U.N. Charter art. 96.

with violating international environmental laws.\textsuperscript{77} This type of argument would be similar to that pursued by New Zealand in its cases against France.\textsuperscript{78} The environmental argument would likely be somewhat less persuasive in the case of American testing than it was against France, however, as a new round of tests would likely take place underground and within the continental United States, limiting fallout.\textsuperscript{79} Second, nuclear testing could be challenged in light of relevant customary international law and obligations undertaken by the United States as a member of the NPT. These non-environmental rationales are explored in greater detail in the remainder of Part III.

A. Customary International Law

The ICJ should hold that the United States is bound by customary international law to refrain from testing nuclear weapons. As a preliminary matter, it is important to note that customary international law provides sufficient authority for the ICJ to issue such a holding. Article 38(1)(b) of the ICJ Statute grants the court the power to rule on "international custom, as evidence of a general practice accepted as law."\textsuperscript{80} The court can cite obligations it deems have arisen from diplomatic relations between states, practices of international organizations, and individual state law and practice.\textsuperscript{81}

Article 18 of the Vienna Convention on the Law of Treaties (Vienna Convention) requires a state to "refrain from acts which would defeat the object and purpose of a treaty when [that state] has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval...."\textsuperscript{82} Although the United States has signed the Vienna Convention, the U.S. is not bound as a treaty member because it has not ratified the document.\textsuperscript{83}

\textsuperscript{77} See Legality of the Threat or Use of Nuclear Weapons, supra note 54, at 241 (noting that a number of states argued before the ICJ that nuclear detonations violated various existing environmental treaties).

\textsuperscript{78} See supra text accompanying notes 41-44.

\textsuperscript{79} See Steve Tetreault, Senate Confirms Energy Secretary, LAS VEGAS REV.-J., Feb. 1, 2005, at 3B (noting that President George W. Bush prepared the Nevada Test Site in the event that further nuclear testing is required).

\textsuperscript{80} ICJ Statute, supra note 66, art. 38.


\textsuperscript{83} Hewitson, supra note 31, at 462.
Ratification notwithstanding, the ICJ should conclude that the tenets of Vienna Convention Article 18 have legal force because they reflect customary international law. Although some commentators dispute the issue, "the better view appears to be that [A]rticle 18 codified international law as it existed at the time the Vienna Convention was adopted."

The International Law Commission took this view when it drafted the Article, and historical evidence suggests that international tribunals recognized a similar obligation for a signatory "to refrain from acts that would frustrate a treaty's purpose long before the Vienna Convention was adopted." Significantly, the United States officially acknowledges that the Vienna Convention reflects customary international law generally and has made representations as such specifically regarding Article 18.

On the basis of Article 18, the ICJ should construe President Clinton's signature of the CTBT in 1996 as requiring that the United States generally avoid taking steps that would actively undermine the Treaty. Although discerning the precise object and purpose of the CTBT is a difficult task, there is little doubt that it includes a ban on the testing of nuclear weapons. In the Treaty's preamble, the document speaks to its purpose. For example, the parties recognize "that cessation of all nuclear weapon test explosions and all other nuclear explosions" as primary goals. In particular, a nuclear test designed to maintain and upgrade deterrent capabilities, especially if intended to produce new weapons, is expressly denounced in the text.

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85 Id. at 171–72.
86 Id. at 172.
89 See David S. Jonas, The Comprehensive Nuclear Test Ban Treaty: Current Legal Status in the United States and the Implications of a Nuclear Test Explosion, 39 N.Y.U. J. INT’L L. & POL. 1007, 1035 (2007) (cautioning that articulation of any treaty’s object and purpose is “a formidable task” and noting that an evaluation of the CTBT includes secondary steps such as investigating the goals of the NPT).
90 See Hewitson, supra note 31, at 464 (arguing that any test resulting in a nuclear explosion would defeat the object and purpose of the CTBT).
91 See CTBT, supra note 2, pmbl. (stating a number of arms control objectives, such as general nonproliferation, tangible steps toward disarmament, and cessation of all nuclear testing).
92 Id.
93 See id. ("[The party states aim to constrain] the development and qualitative improvement of nuclear weapons and [to end] the development of advanced new types of nuclear weapons.")
Whether other state behavior, such as failing to fund the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization, would violate the object and purpose of the CTBT is beyond the scope of this Note.

Although Article 18 prohibits a state from undermining a treaty that it has signed, Article 18 binds that state only “until it shall have made its intention clear not to become a party to the treaty.” Proponents of testing will likely argue that the Bush administration rejected CTBT party membership by refusing to resubmit the Treaty to the Senate for ratification and by considering the resumption of nuclear testing. Moreover, the United States may have manifested precisely the requisite intent by rejecting the CTBT when it came before the Senate in 1999.

The ICJ, however, should reject any contention that the United States does not intend to become a party to the CTBT. Although no definite standard exists regarding what constitutes an expression of the requisite intent, the court should make clear that more is required than contravening the principles of the Treaty in question. To hold otherwise produces an absurd result, whereby a state could dodge the obligation against frustrating the object and purpose of a treaty by intentionally violating that very same duty. If this were the case, Article 18 would be rendered meaningless, devoid of any substantive weight. As a result, the Bush administration’s pro-testing policies cannot have defeated the Article 18 commitment to the CTBT.

The Senate’s rejection of the CTBT should also be dismissed as inadequate evidence that the United States does not intend to become a party to the Treaty. While a Senate vote rejecting the Treaty may appear to resolve this issue against a continuing obligation, a closer look reveals that this is far

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95 Vienna Convention, supra note 82, art. 18(a).
96 See Hewitson, supra note 31, at 462 (noting little indication that the Bush administration felt bound by the United States’ signature of the CTBT).
98 See Swaine, supra note 88, at 2082 (noting that there is no guidance on how the intention not to become a party may be made manifest).
99 See generally Frank B. Cross, Essay, The Significance of Statutory Interpretative Methodologies, 82 NOTRE DAME L. REV. 1971, 1973 (2007) (discussing how the rule against surplusage—the judicial canon of interpretation that all terms in a statute have independent meaning and should not be construed so as to render any such term or phrase superfluous—would counsel against such a result).
from the case. After the 1999 Senate vote, the CTBT became the legal property of the Senate Foreign Relations Committee. If the Senate wished to signal a definite end to obligations under Article 18, it would have simply returned the Treaty to the President via a resolution, but the Senate did not do so. By not returning the Treaty, the Senate indicated that it could still act upon the Treaty. "In the meantime, a treaty in the posture of the CTBT has no legal effect, other than to impose the obligations... with respect to customary international law as codified in [Vienna Convention] Article 18." Moreover, executive commitment remains a strong signal in favor of becoming party to the CTBT, as President Clinton made clear that despite the Senate's rejection, the United States will continue to work toward CTBT ratification and President Obama renewed this pledge. Ultimately, the ICJ should have little difficulty finding that executive lobbying on behalf of the Treaty while the Senate holds the document creates an obligation for the United States to refrain from undermining its object and purpose pending efforts toward ratification.

B. The Nuclear Non-Proliferation Treaty

The ICJ should also hold that testing of nuclear weapons violates Article VI of the NPT. This provision requires parties to the NPT “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.” The court, quoting this language, should find that nuclear testing contravenes two independent commitments established therein: pursuit of good faith measures toward disarmament and curbing the nuclear arms race.

The disarmament obligation should be interpreted to preclude nuclear testing because nuclear testing is simply incompatible with a general treaty on disarmament. Nuclear tests are conducted for purposes that would violate any such treaty, such as a non-nuclear state seeking the technological wherewithal to produce rudimentary weapons and a nuclear state looking to upgrade existing stockpiles and develop advanced weapons designs.

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100 Jonas, supra note 89, at 1045.
101 GLENNON, supra note 84, at 173–74.
102 Jonas, supra note 89, at 1046.
103 Id.
104 Id. at 1029.
105 Joseph, supra note 18, at 89.
106 NPT, supra note 33, art. VI.
Obligations undertaken by NPT party states at member conferences confirm this premise. At the 1995 Review Conference, for example, the NPT party states committed in principle to the entry into force of the CTBT. This was done in part to broker a compromise whereby the nuclear weapons states were not immediately required to commit to a treaty that abolishes nuclear weapons as described by Article VI, and, in return, the NPT was permanently extended. Similarly, party states agreed at the 2000 Review Conference to a number of practical steps to implement the disarmament mandate of Article VI, including renewing the pledge to achieve urgent entry into force of the CTBT. These conferences suggest that the NPT party states themselves interpret Article VI as outlawing nuclear testing.

The ICJ should also rule that nuclear tests violate the clause in Article VI that requires that states pursue effective measures aimed at cessation of the nuclear arms race. Nuclear testing is antithetical to non-proliferation with tests deeply linked to weapons production. Notably, the drafters of the CTBT intended a test ban to prevent exactly such arms racing. Ultimately, it is hardly a stretch in logic for the court to rule that testing nuclear weapons is more consistent with arms racing than any cessation thereof. Although Article X of the NPT grants each party “the right to withdraw from the Treaty if it decides that extraordinary events . . . have jeopardized the explosive testing by nuclear states that would otherwise be used to create new weapons designs, such as micro-nuclear weapons, and contending that a ban on nuclear weapons will serve as an effective constraint on non-nuclear states from crossing the nuclear threshold).

108 Jonas, supra note 89, at 1035.
113 See Key Reasons for a Comprehensive Test Ban Treaty, CENTER FOR ARMS CONTROL & NON-PROLIFERATION, http://www.armscontrolcenter.org/policy/nuclearweapons/articles/reasons_cbtb/ (last visited Mar. 20, 2011) (arguing that testing is crucial for “threshold” states to develop a modern nuclear arsenal and for nuclear states to develop new weapons designs); see also Sarah Elizabeth Kreps & Anthony Clark Arend, Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes, 16 DUKE J. COMP. & INT’L L. 331, 355 (2006) (“Since testing a nuclear device is a key component of nuclear development, fulfillment of the CTBT provisions is almost a de facto prerequisite for NPT ratification by non-nuclear states.”).
supreme interests of its country,\textsuperscript{115} the United States has not taken such a step, and the permanent extension of the NPT provides a legal duty for the ICJ to cite in the meantime.\textsuperscript{116}

Moreover, the ICJ should find that language within the preamble of the NPT clarifies that abstention from testing is a requirement of both the disarmament and arms racing obligations of Article VI. The NPT preamble introduces the document by listing a number of proclamations.\textsuperscript{117} In particular the parties to the NPT declare "their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament" and urge "the cooperation of all States in the attainment of this objective."\textsuperscript{118} Although this language does not include the reference to a treaty on general and complete disarmament, it is otherwise strikingly similar to the text of NPT Article VI.\textsuperscript{119} Immediately following these proclamations, the preamble addresses nuclear testing. The text recalls the 1963 Limited Test Ban Treaty and expresses a determination to "achieve the discontinuance of all test explosions of nuclear weapons for all time\ldots."\textsuperscript{120}

The NPT's preamble language regarding testing should be interpreted as a subset of the broader disarmament and arms racing obligations. The structure of the text is consistent with this reading. Once the preamble recites the Article VI commitments and urges all states to comply therewith, only three statements remain. The first statement, addressed above, calls for the end of all nuclear testing. The second and third statements advocate liquidation of existing nuclear arsenals and abstention from threats of force that challenge a nation's territorial integrity.\textsuperscript{121} Read together, these provisions respectively outlaw the production, stockpiling, and use of nuclear weapons and thusly a blueprint for attaining compliance with Article VI.

Although testing proponents may argue that the proclamations in the NPT preamble are each distinct statements, this contention should be rejected. First, an examination of the text reveals that the clauses are separated by

\begin{itemize}
\item \textsuperscript{115} NPT, \textit{supra} note 33, art. X.
\item \textsuperscript{116} See Albright, \textit{supra} note 110 (noting that the United States lobbied vigorously for "the indefinite and unconditional extension of the NPT").
\item \textsuperscript{117} NPT, \textit{supra} note 33, pmbl.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} The phrases "nuclear disarmament" and "cessation of the nuclear arms race" appear as key phrases in both the preamble and Article VI. \textit{Id.} pmbl., art. VI. Interpretation of similar language in a statute or treaty is guided by the judicial cannon in pari materia, which suggests that the terms should be treated consistently. Particularly where the terms are identical, as is the case here, a court should interpret the terms to have the same meaning. See Jamie Darin Prenkert, \textit{Bizarro Statutory Stare Decisis}, 28 BERKELEY J. EMP. & LAB. L. 217, 234 & n.110 (2007) (discussing the \textit{in pari materia} canon).
\item \textsuperscript{120} NPT, \textit{supra} note 33, pmbl.
\item \textsuperscript{121} \textit{Id.}
\end{itemize}
commas rather than by periods, suggesting that the language taken together forms one complete paragraph, or at least one expression of intent. Second, specific wording within the preamble requires that the proclamations be read in reference to one another. For example, one paragraph urges the cooperation of all nations with “this objective,”122 which, when read in a vacuum, is rendered meaningless, without reference to the prior paragraph.

Significantly, the ICJ has relevant precedent on which it can rely when rendering a ruling that nuclear testing violates Article VI of the NPT. The 1996 Nuclear Weapons Advisory Opinion provides the grounds for the ICJ to more explicitly rule that NPT party states must complete concrete steps toward nuclear disarmament.123 In the 1996 Advisory Opinion, the court interpreted Article VI as requiring not only more than mere negotiations toward disarmament, but mandated the conclusion of these efforts.124 Prompted by this language, the U.N. General Assembly issued a resolution calling for multilateral negotiations to prohibit, among other things, testing nuclear weapons.125 The resolution has two important effects. First, the resolution demonstrates that the advisory opinion broadened the scope of Article VI, such that the ICJ can rely upon it as a code of conduct until the Treaty on general and complete disarmament envisioned by the NPT is completed.126 Second, the resolution serves as independent authority for the ICJ to rule that the United States is bound not to test nuclear weapons.127

Despite these arguments, the ICJ’s 1996 Advisory Opinion left room for the legitimate use of nuclear weapons. The court held that it could not definitively conclude that use of nuclear weapons would be unlawful in “an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”128 It is not at all clear, however, that the testing of

122 Id.
124 See Legality of the Threat or Use of Nuclear Weapons, supra note 54, at 267 (“There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” (emphasis added)); see also NANDA & KRIEGER, supra note 64, at 164 (noting that although there is a considerable dispute on the precedential weight accorded to other components of the advisory opinion, nearly all states recognize the conclusiveness on the rulings regarding disarmament negotiations).
125 Bosch, supra note 123, at 387.
126 Id.
127 Roger S. Clark, Treaty and Custom, in INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, supra note 62, at 171, 176 (noting that although the U.N. Charter does not grant legislative power to the General Assembly, the ICJ accepts that resolutions of the General Assembly are sufficient evidence of state practice such that the subject matter constitutes customary international law).
128 Legality of the Threat or Use of Nuclear Weapons, supra note 54, at 266.
nuclear weapons falls into this narrow exception. Nuclear testing is more readily characterized as a production measure and a means of deterrence than an immediate defensive use for state survival. Ultimately, proponents of nuclear testing would likely find it difficult to convince the court of this exception, as the advisory opinion was a rebuke of the legality of nuclear deterrence generally. Moreover, the ICJ should generally err against finding particular nuclear tests legitimate, since the court noted that treaties, such as the LTBT, “point to an increasing concern in the international community with [nuclear] weapons,” which calls into question the legitimacy of certain uses of the weapons.

IV. UNSIGNING

To legally resume nuclear testing, some scholars propose “unsigning” the CTBT. In practice, there is no procedural mechanism to remove a signature from a treaty. An option for the United States is to announce that it no longer intends to pursue ratification of the CTBT and that it formally considers its prior signature of the Treaty as carrying no legal weight. The suggestion to unsign the CTBT echoes a similar course the United States took regarding the Rome Statute of the International Criminal Court (ICC). On December 31, 2000, President Clinton authorized a U.S. representative to sign the Rome Statute, establishing the ICC. Although such a move was unprecedented, the Bush administration announced on May 6, 2002 that the United States no longer intended to be bound by President Clinton’s signature, effectively unsigning the ICC. The United

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129 NANDA & KRIEGER, supra note 64, at 164–65.
130 Legality of the Threat or Use of Nuclear Weapons, supra note 54, at 253.
131 Kathleen C. Bailey & Robert B. Barker, Why the United States Should Unsign the Comprehensive Test Ban Treaty and Resume Nuclear Testing, 22 COMP. STRATEGY 131, 137 (2003); see also Swaine, supra note 88, at 2089 (suggesting that, although there are some policy concerns regarding acts of unsigning, it should be accepted as a “legitimate and understandable course of action”).
132 Dominic McGoldrick, Political and Legal Responses to the ICC, in THE PERMANENT INTERNATIONAL CRIMINAL COURT 389, 414 (Dominic McGoldrick et al. eds., 2004).
135 Swaine, supra note 88, at 2064.
136 McGoldrick, supra note 132, at 414.
States' ‘‘unsigning’ signified and symbolized the US’s rejection of the ICC.’’\textsuperscript{137}

International law generally does not pose a barrier to unsigning treaties. Although some commentators argue that Article 18 of the Vienna Convention makes unsigning a treaty impossible,\textsuperscript{138} this argument is ultimately untenable. Article 18 only requires that a party refrain from undermining the object and purpose of a treaty “until it shall have made its intention clear not to become a party to the Treaty.”\textsuperscript{139}

The language in Article 18 creates only an interim obligation for the signing state during the period between signature and either ratification or repudiation.\textsuperscript{140} The interim obligation should not be construed to preclude unsigning, since this would create an illogical result, similar to that discussed in Part III regarding whether resuming nuclear testing could defeat the moratorium obligation.\textsuperscript{141} While it is absurd to allow a state to free itself of its legal obligations by flagrantly violating them, those same obligations cannot be imposed where a state lawfully declines to be bound by them. To prevent significant language in Article 18 from being rendered meaningless, states must be free to declare their intent not to become a party to a signed but ungratified treaty.\textsuperscript{142} The act of unsigning, in particular, provides a lawful means of expressing such intent.\textsuperscript{143}

A. Does Unsigning Eliminate the Obligation Not to Test?

If President Obama or a successor were to unsign the CTBT, the legal duties of the United States regarding nuclear testing would certainly be implicated. The interim obligation not to undermine the object and purpose of the Treaty would no longer apply because President Clinton’s signature

\textsuperscript{137} Id. at 414.
\textsuperscript{138} See Michael J. Kelly, Op-Ed., Imperfect Justice, SAN DIEGO UNION-TRIB., Feb. 7, 2001, at B-7 (contending that unsigning “undermine[s] the object and purpose of [a] treaty,’’ and thus is impossible).
\textsuperscript{139} Vienna Convention, supra note 82, art. 18(a).
\textsuperscript{140} Jonas, supra note 89, at 1031.
\textsuperscript{141} See supra notes 112–16 and accompanying text.
\textsuperscript{142} See Curtis A. Bradley, Unratified Treaties, Domestic Politics, and the U.S. Constitution, 48 HARV. INT’L L.J. 307, 334 (2007) (“As a matter of international law, there seems to be little question that a nation is entitled to declare its intention not to become a party to a treaty after signing it.”).
\textsuperscript{143} See Swaine, supra note 88, at 2082 (arguing that unsigning should constitute an expression of the intent not to become party to a treaty required by the interim obligation imposed by Article 18 of the Vienna Convention); see also Jonas, supra note 89, at 1043 (arguing that unsigning is consistent with Article 18).
would no longer be of legal significance.\textsuperscript{144} Thus, if a case were presented to the ICJ regarding the legality of American nuclear testing, the court could not cite the customary international law grounds regarding the object and purpose of signed treaties to conclude that American nuclear testing is illegal.

Regardless of the effect that unsigning the CTBT would have on the obligation of the United States regarding Article 18 of the Vienna Convention, the ICJ should find that American commitments not to conduct nuclear tests embodied in Article VI of the NPT would remain unchanged. Put simply, the disarmament and arms race obligations expressed in Article VI are legal barriers to testing independent of the CTBT. To evade this legal obstacle, the United States may have to withdraw from the NPT altogether.

Although, as a general tool, unsigning does not violate international law, the act of unsigning the CTBT may run contrary to the good faith negotiation requirements of Article VI of the NPT. This provision mandates that every state party to the NPT "pursue negotiations in good faith on effective measures" regarding the disarmament and arms race provisions discussed above.\textsuperscript{145} The ICJ has ruled that such a good faith requirement obligates parties to strive for meaningful negotiations and requires that the parties be willing to compromise on arms control.\textsuperscript{146} Assuming that the disarmament and arms race commitments include abstention from nuclear testing as some suggest,\textsuperscript{147} the ICJ should find that the act of unsigning the CTBT is a hostile rejection of compromise regarding effective measures toward disarmament which undermines meaningful negotiation toward a broader treaty aimed at abolition of nuclear weapons.

B. The Domestic Mechanics of Unsigning

Even if unsigning the CTBT could eliminate any and all American obligation not to test its nuclear weapons, domestic legal matters may make this route infeasible for testing proponents. As an initial matter, the U.S. Constitution provides the power to make a treaty to the President, once the

\textsuperscript{144} See Swaine, supra note 88, at 2082–83 (suggesting that if the United States wished to take actions inconsistent with the object and purpose of a signed treaty, unsigning would be an effective way to quickly disengage itself from its Article 18 obligations).

\textsuperscript{145} NPT, supra note 33, art. VI; see supra notes 112–16 and accompanying text.

\textsuperscript{146} See N. Sea Continental Shelf (F.R.G./Den., F.R.G./Neth.) 1969 I.C.J. 3, ¶ 85 (Feb. 20) (discussing a good faith negotiation requirement in the context of the North Sea continental shelf similar to Article VI of the NPT).

\textsuperscript{147} See Jonas, supra note 89, at 1035–36 ("Because a comprehensive test ban has been identified historically (and implicitly in the NPT) as a key element leading to eventual nuclear disarmament, this could arguably be an object and purpose of the CTBT as well.").
Senate approves it.\textsuperscript{148} Once the President submits a treaty for "the Advice and Consent of the Senate,"\textsuperscript{149} however, the document becomes "the legal property of the Senate Foreign Relations Committee," making it impossible for the President to unsign it until it is returned.\textsuperscript{150} Although the President could request that the Senate pass a resolution to return the Treaty, no President has done so with the CTBT.\textsuperscript{151} Proponents of unsigning could argue that because the President must ratify the Treaty after it has received the consent of the Senate, the President should possess the power to unsign the CTBT even if it is in the possession of another branch. Yet because the Treaty is not technically within the President's control, "custom apparently supports a requirement that the President seek Senate consent for the withdrawal of a disfavored treaty."\textsuperscript{152}

Although this may appear to be a purely technical or theoretical issue, the interbranch legal hurdle arose in practice. In early 2001, the Bush administration contemplated unsigning the CTBT, but ultimately concluded that it could not do so while the document remained in the possession of the Senate Foreign Relations Committee.\textsuperscript{153} The administration did not face a similar problem with the Rome Statute to the ICC because that document was never sent to the Senate for its advice and consent.\textsuperscript{154}

This interbranch legal hurdle is compounded by domestic politics. Initially, as noted in Part I, President Obama has provided strong support for the test ban, pledging to lean on Congress until it ratifies the Treaty. Given this commitment, it seems highly unlikely that the President could be convinced to request that the Senate return the CTBT to him so that he could unsign it. Second, even if another President were committed to unsigning the Treaty, the Senate may be unwilling to return it to the President,\textsuperscript{155} especially as Senate Democrats are expected to oppose such a move.\textsuperscript{156}

\textsuperscript{148} U.S. CONST. art. II, § 2, cl. 2.
\textsuperscript{149} Id.
\textsuperscript{151} See Jonas, supra note 89, at 1045–46 ("[T]he CTBT is languishing in the Senate Foreign Relations Committee . . .").
\textsuperscript{152} GLENNON, supra note 84, at 175.
\textsuperscript{153} See Shanker & Sanger, supra note 150 (noting that "[o]nce a treaty is sent to the Senate, there is little a president or a successor can do to dispose of it").
\textsuperscript{155} See Shanker & Sanger, supra note 150 (noting that two-thirds of the Senate must agree to any resolution to send a treaty back to the president).
\textsuperscript{156} See Joseph, supra note 18, at 85 (predicting the continued support of Senate Democrats for the CTBT because they believe in its merits).
Even if nuclear testing proponents in the Senate were able to muster the votes for a resolution to return the CTBT to President Obama or a successor, strong policy considerations may convince the President to forego unsigning the document. First, unsigning the CTBT is likely to undermine general treaty-making and encourage other states to ignore constraints imposed by international law. A second treaty unsigning may generate significant doubt in regards to American commitments to multilateralism and create resentment that could make future treaty negotiations more difficult or even impossible. International resentment has particular relevance to the nuclear testing context, as the reputational injuries that the United States would likely suffer from unsigning the CTBT may undermine arms control negotiations and anti-terrorism cooperation, ultimately impairing the security and stability that deterrence advocates hope to generate from modernized weapons. More generally, an unraveling of the basic treaty-making process will damage the international cooperative order that American military power relies on for effectiveness, thereby limiting the utility of deterrence.

A second policy concern that undercuts the utility of unsigning is the reaction that such a move would provoke from American allies. Generally, the Bush administration’s attitude and approach toward treaties provoked strong criticism from European partners. If President Obama or a successor were to unsign the CTBT—itself a significant symbol of international arms control—it could significantly harm recent progress

157 See Swaine, supra note 88, at 2064–65 (arguing that unsigning sets a precedent that may lay the groundwork for undermining a whole range of treaties).
158 See Antonia Chayes, How American Treaty Behavior Threatens National Security, 33 INT’L SECURITY 45, 75 (2008) (questioning whether the United States can undermine significant international treaties without signaling to other countries that it stands above international cooperation).
159 See id. at 51 (arguing that further withdrawal from treaties may hamper the United States as it negotiates and seeks support for new agreements).
160 See id. at 74–76 (suggesting that America’s reputation internationally may have declined significantly in the wake of the unsigning of the ICC and arguing that damage to the U.S. image undermines cooperation over such issues as nuclear and biological weapons proliferation).
161 See id. at 46 (contending that although the United States is the world’s sole superpower, military strength is ineffective without international cooperation gleaned from treaty-making).
162 See Strobe Talbott, From Prague to Baghdad: NATO at Risk, 81 FOREIGN AFF. 46, 47 (2002) (noting that although disputes between the United States and Europe are typical, the rancor over the Bush administration’s handling of treaties was unusually intense).
163 See Joseph, supra note 18, at 82 (arguing that the CTBT, more than any other single measure, symbolizes the commitment of the United States to the NPT and demonstrates respect for the concerns of nonnuclear weapon states).
made by the Obama administration in restoring America’s image\textsuperscript{\textsuperscript{164}} by
signaling that unsigning is an active tool of United States diplomacy, rather
than a relic of the Bush administration.\textsuperscript{\textsuperscript{165}} Alienating allies in this manner
would undermine one of the central purposes of renewed testing, which is to
build stronger military relations with security partners.

V. CONCLUSION

By pressing for its ratification, President Obama brought new life to the
debate regarding the CTBT. As was the case in the late 1990s, Republican
opposition led by Senator Kyl has focused on concerns over deterrence and a
need for a new round of nuclear testing. One question, which is often
overlooked in this debate, however, is whether the United States already has
a legal obligation not to test its nuclear weapons. If this is the case, the legal
impediments to breaking the moratorium on nuclear testing would not
substantially change under a ratified CTBT, and the deterrence rationale to
reject the Treaty should be reexamined.

If the United States announces plans to resume nuclear testing and a
challenge to these tests is presented before the ICJ, the court should hold that
the United States is in violation of international law. First, President
Clinton’s signature of the CTBT creates an obligation such that the United
States cannot undermine the object and purpose of the document. Nuclear
testing would clearly violate this principle. Second, tests would violate
America’s commitments under the NPT, regarding both disarmament and
halting the nuclear arms race. The ICJ should cite its advisory opinion on
nuclear use to support this holding.

If the Obama administration or a successor administration considers
unsigning the CTBT to defeat the legal obligation not to test nuclear
weapons, this course will likely be rejected. Initially, unsigning the CTBT
will not defeat an obligation to abstain from testing nuclear weapons existing
in Article VI of the NPT. Moreover, although international law generally
poses no significant barrier to unsigning treaties, the good faith negotiation

\textsuperscript{164} See Joseph Nye, Obama’s “Timidity” Is a Foreign Policy Virtue, HUFFINGTON POST
(Nov. 3, 2009), http://www.huffingtonpost.com/joseph-nye/obamas-timidity-is-a-fore_b_3440
64.html (contending that through symbolic gestures and conciliatory foreign policy, President
Obama has made significant progress in improving international opinion toward the United
States).

\textsuperscript{165} See Chayes, supra note 158, at 74 (arguing that an act of unsigning will lead to a
significant breakdown of cooperation with allies by engendering deep resentment); see also
168093 (contending that President Obama will not be burdened by the international opinion
problems of the Bush administration if the President avoids missteps on important symbolic
issues).
requirements of Article VI may make the act of unsigning the CTBT illegal. American domestic law is also a significant obstacle. The possession of the CTBT by the Senate Foreign Relations Committee currently precludes unsigning the document and prospects for a resolution returning the Treaty appear slim. Finally, even if all of these hurdles were overcome, policy considerations suggest that unsigning the Treaty is unadvisable.

Decisions cannot be made in a vacuum. Even assuming that deterrence advocates are correct in their assessment of the need for resumed nuclear testing, this concern has relevance only if the United States can legally test nuclear weapons in the absence of ratifying the CTBT. Because this very possibly is not the case, opponents of the CTBT should reconsider this rationale for rejecting the Treaty.