

Options to facilitate CTBT Entry into Force: Embedding the CTBT in norms, law and practice

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More than 50 years after the first atomic weapon was tested in New Mexico, the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT) prohibited nuclear explosions in all environments – underground, atmospheric, under water and outer space, and established a global verification regime. The treaty's international monitoring system and organisational headquarters in Vienna have already proved their worth in detecting and identifying seismic events and releases of radioactivity, whether the cause is natural, such as earthquakes and tsunamis, accidental, such as Fukushima, or clandestine nuclear testing such as the three underground nuclear tests conducted by North Korea since 2006.

When the treaty was opened for signature, the United States was the first to sign.² The US Senate had mandated a moratorium on nuclear testing, following similar moratoria from Russia and France. China, however, continued to conduct one or two tests per year during the negotiations, which took place at the Conference on Disarmament (CD) in Geneva during 1994-96. And even though France dramatically violated its own moratorium to conduct six final tests in 1995-6, China and France joined the United States, Russia and United Kingdom in signing the treaty on the first day, 24 September 1996. No signatory state has conducted a nuclear test explosion since signing the CTBT.

Three states that have not yet signed are India and Pakistan, which each carried out 5-6 underground tests in May 1998, and North Korea, whose tests in 2006, 2009 and 2013 were detected and identified by the CTBT Organisation in Vienna. These are the last gasps from nuclear testing after more than 2050 nuclear explosions were carried out in the decades after 1945. Far from undermining the CTBT, they demonstrate why this nuclear test ban treaty is so important for national and global security.

¹ This presentation is based on a longer paper I recently wrote for UNA-UK, which has just been published with the name 'Embedding the CTBT in norms, law and practice'.

² President Bill Clinton signed with the same pen that President Kennedy had used for signing the Partial Test Ban Treaty in 1963.

Without the CTBT, all the nuclear-armed states would still be conducting nuclear tests, and new proliferators would have one less hurdle to overcome.

The CTBT is one of the most widely supported treaties in history, having been signed by 183 states and ratified by 159³. Regrettably, it has still not entered into force. The reasons have to do with the treaty's history, negotiating process and structural outcome, which included an entry into force requirement (Article XIV) of signature and ratification by all states on a list of 44 states with nuclear research capabilities (attached to the treaty as "Annex 2").⁴ Because of this structural requirement, which was most vociferously advocated during the negotiations by Russia, the UK, Pakistan and Egypt⁵, the security interests of the majority of governments who favoured early entry into force have been made hostage to the domestic politics of a few. Among the eight remaining states are the United States, China, India, Pakistan, the Democratic People's Republic of Korea (North Korea), Israel, Iran and Egypt.

Lessons can be learned from the flawed entry-into-force negotiations and outcome for future treaties, but that is not my purpose here. With over 180 states members of the CTBTO Preparatory Commission, the treaty is already more strongly embedded in the international non-proliferation and security regimes than some treaties that have legally entered into force.

The second term of President Obama has again raised hopes that the United States will ratify the treaty and bring several additional dominoes with it. This briefing

³ As of March 13, 2013, Comprehensive Test Ban Treaty Organisation website <http://www.ctbto.org/>

⁴ Article XIV of the CTBT states: "This Treaty shall enter into force 180 days after the date of deposit of the instruments of ratification by all States listed in Annex 2 to this Treaty". The criterion for Annex 2 listing was given as: "States members of the Conference on Disarmament as at 18 June 1996 which formally participated in the work of the 1996 session of the Conference and which appear in Table 1 of the International Atomic Energy Agency's April 1996 edition of 'Nuclear Power Reactors in the World', and of States members of the Conference on Disarmament as at 18 June 1996 which formally participated in the work of the 1996 session of the Conference and which appear in Table 1 of the International Atomic Energy Agency's December 1995 edition of 'Nuclear Research Reactors in the World'". The listed states are: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Democratic People's Republic of Korea, Egypt, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Mexico, Netherlands, Norway, Pakistan, Peru, Poland, Romania, Republic of Korea, Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Viet Nam, Zaire. All but 8 states in Annex2 have now ratified, including Russia, France and the UK.

⁵ Rebecca Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, (United Nations/UNIDIR, 2009)

considers the prospects for ratification (and, where relevant, signature) by the eight remaining states necessary for CTBT entry into force in accordance with Article XIV as it currently stands. If that proves to be out of reach in the near term, two different kinds of international approaches are considered with a view to preventing erosion of the test ban regime and bolstering its effectiveness for the future.

Since amending the treaty text is not currently viewed as desirable or feasible, one option consistent with treaty law would be for states that have ratified to make a collective agreement on 'provisional application' of the treaty until the full Article XIV conditions are met. Irrespective of whether such a legal strategy were decided upon, however, much could also be achieved through national, regional and international political approaches that would uphold and further embed the nuclear testing taboo enshrined in the CTBT and maintain and strengthen the role and capabilities of the CTBTO in detecting, monitoring and deterring nuclear explosions around the world. On the larger international security and non-proliferation canvas, potentially game changing initiatives are reducing the role and value attached to nuclear armaments, highlighting the humanitarian consequences of nuclear policies and weapons, and taking nuclear disarmament forward through progressively delegitimising and reducing existing arsenals and minimising proliferation incentives. Even if full entry into force continues to be thwarted by the domestic politics of a handful of states, the CTBT will continue to play a vital role in constraining horizontal and vertical proliferation and promoting the security conditions for a nuclear-weapon-free world.

During ratification debates in the United States, the treaty's scope and verifiability are most frequently raised, so I shall start with a brief overview of the treaty's background and negotiations on these core issues.

Prospects for full entry into force

To date, eight states are still impeding entry into force 17 years after the CTBT was opened for signature. The reasons vary from ideological opposition to politically difficult domestic processes to "after you" domino politics among certain states due to geostrategic or client relationships that mean that ratification by one may make it more likely that others will follow. Although all are supposedly sovereign and

independent, China appears to be waiting for the United States, where ratification requires a two-thirds majority of a highly partisan Senate. India, as discussed below, may be willing to have a more constructive debate about the CTBT, but not until the US and China have ratified. In the Middle East, Israel, Egypt and Iran may be applying political linkages to their ratification decisions. Therefore, the first question to be addressed is whether there are realistic prospects for obtaining the ratification (and in the case of India, Pakistan and North Korea, signatures) of these eight and if so, what price will be expected either by domestic supporters of nuclear weapons or in other foreign policy areas.

If ratification by all the 44 listed states is not achievable in the near term, other approaches for strengthening and implementing the test ban regime should also be taken forward. One legal approach that is seldom used but available would be for states that have already ratified to agree on provisional application pending full entry into force. A second, more political approach that is gaining adherents among the majority of non-nuclear governments, is to greatly strengthen the norms, regimes and laws that prohibit, constrain and delegitimise nuclear weapons, thereby facilitating full implementation of the CTBT, NPT and other related treaties without acceding to the undue structural power such treaties have accorded to the very nuclear-armed states that are most likely to try to keep their options open.

United States

Despite President Barack Obama's explicitly expressed commitment to the CTBT on many occasions, he chose to prioritise other issues in his first Administration. For internal reasons, the CTBT was lined up behind the New START treaty with Russia. When getting New START negotiated and then ratified proved more time consuming and challenging than initially anticipated, the CTBT slipped further down the agenda. Since CTBT ratification had been brought before the Senate in 1999, when a majority of Senators voted in favour of ratification but not by the required two-thirds majority, fear of failing a second time has led to higher than usual levels of caution and anxiety. To try to overcome partisan attitudes in the divided US Senate, numerous official, semi-official and NGO reports were undertaken during 2009-2011, in efforts to lay the groundwork for a more constructive debate in the Senate. Several, including from the National Academy of Sciences, the EastWest Institute, Nuclear Threat Initiative

and Arms Control Association⁶ highlighted the advances in verification technologies, the CTBTO's impressive verification and monitoring capabilities and other key changes since 1999. In different ways, all concluded that ratifying the CTBT is in US national security interests. In particular, as explained by the Arms Control Association, while the US continues to benefit from the CTBT as it stands, "without entry into force, the United States will be denied the full benefits of the treaty, including on-site inspections and compulsory consultation and clarification procedures".⁷

As recently as March 20, 2013, US Acting Under Secretary for Arms Control and International Security, Rose Gottemoeller, told an international audience that the CTBT "remains a top priority for the United States".⁸ She also reinforced the importance of this for US national security by quoting from the April 2010 US Nuclear Posture Review, that US ratification would contribute to "leading other nuclear weapons states toward a world of diminished reliance on nuclear weapons, reduced nuclear competition, and eventual nuclear disarmament".⁹ What is still missing is a coherent strategy and plan for achieving the required votes in the Senate.

Although it made a strong case on New START's merits, it appeared that the Obama administration's main strategy for persuading enough Republican senators to ratify the US-Russian treaty was through financial inducements, particularly a reported \$85 billion dollars promised to the US nuclear laboratories for "stockpile stewardship" and related programmes. Pork barrel politics are notoriously unreliable, and often result in trade-offs that are materially counterproductive, for example with inducements that offset the security purpose of the treaty in question or international

⁶ See for example, 'Findings and Recommendations Concerning the Comprehensive Nuclear Test Ban Treaty' http://www.state.gov/www/global/arms/ctbtpage/ctbt_report.html, Report by General John Shalikashvili (USA, Ret.), Special Advisor to the President and Secretary of State, submitted January 5, 2001 and John M. Shalikashvili, "Findings and Recommendations Concerning the Comprehensive Nuclear Test Ban Treaty", *Arms Control Today*, vol. 31, no. 1, 2001, pp. 18–28; Tom Z. Collina with Daryl G. Kimball, *Now More than Ever: The case for the Comprehensive Nuclear Test Ban Treaty*, (Washington DC: Arms Control Association, February 2010); Jacqueline McClaren Miller (ed.), *The Comprehensive Nuclear Test Ban Treaty: New technology, new prospects*, The EastWest Institute, New York, January 2010.

⁷ Tom Z. Collina with Daryl G. Kimball, *Now More than Ever: The case for the Comprehensive Nuclear Test Ban Treaty*, (Washington DC: Arms Control Association, February 2010), p 20. http://www.armscontrol.org/system/files/ACA_CTBT_Briefing_Book.pdf

⁸ Rose Gottemoeller Acting Under Secretary for Arms Control and International Security, Remarks to Geneva Centre for Security Policy, Geneva, Switzerland, March 20, 2013

⁹ Quote from 2010 US Nuclear Posture Review, in Gottemoeller, *ibid*.

credibility of US accession, thereby reducing the incentives for others to adhere. And after all the inducements and concessions have been delivered, there is still no guarantee that the most vocal opponents will vote in favour, as was borne out in the case of New START.

Since the US nuclear labs already received a big financial boost following New START, the chances of pork barrel inducements delivering CTBT ratification have become even thinner. The CTBT could, however, be won on its merits for US security, if the Obama administration were prepared to mount a robust offensive, spearheaded by Chuck Hagel and a raft of sensible military and political figures, preferably with Republican credentials. The strategy should be to shift the burden of proof to the Republicans – to make them explain why they are impeding ratification of a security treaty that is self-evidently in US interests.

The Case: whether or not the US ratifies the CTBT, there is no realistic likelihood that it will ever test again; a well-embedded CTBT will prevent any significant military rivals from being able to resume nuclear explosions; US ratification would pull other important states into the treaty, including China and India; US negotiators fought hard to get a strong verification including on-site inspections into the treaty, but inspections cannot be carried out unless the US ratifies and the treaty is brought into force. Conclusion: US security interests have much to gain and nothing relevant to lose from ratifying the CTBT, and those that continue to impede should be held accountable for holding American national security hostage to partisan politicking.

The case is undoubtedly enhanced by demonstrating the effectiveness of the CTBTO's impressive international monitoring system, its manifest civilian as well as verification benefits, the CTBT's importance for the non-proliferation regime and credibility of the NPT, and other internationally important arguments. In US politics, however, these benefits are unlikely to be clinchers. The technical, military and intelligence arguments for the CTBT that are showcased in numerous studies and analyses may not persuade Senators to ratify, but they will be important in providing rational justifications for members of the Senate who feel that they need to explain their ratification votes to party colleagues still trapped in the past. The studies and Commissions have done their job. The evidence and case for the CTBT are clear for

anyone who wants a rational debate. But to win the day there needs to be high level political determination and a robust rather than defensive strategy that challenges hold-out Senators to justify holding US security hostage. A well targeted media campaign needs to include moving programmes reminding of the humanitarian costs of nuclear testing in the “bad old days”, satire to lampoon the illogic of the hold outs, and national – but especially local – opinion pieces and editorials making the simple case for the CTBT on national security grounds, especially to mobilise constituents in the home states of Senators who are open-minded enough to be persuaded to vote on the treaty’s merits for US (and international) security. By now, the CTBT should be seen as low hanging fruit, ripe for plucking and eating early on in this second term. President Obama has been re-elected and should be confident enough now to put this one in the bag.

China

Around the time that Russia ratified the CTBT in 2000, China submitted the treaty to its National People’s Congress. Since then, China has repeatedly expressed its support for the CTBT and its adherence to the P5 moratorium on nuclear testing pending entry into force. At the 2012 NPT Preparatory Committee (PrepCom) meeting, for example, the position in the General Debate was given as: “China supports the Comprehensive Nuclear Test Ban Treaty and is dedicated to promoting its early entry into force.”¹⁰ This was slightly elaborated in the “Cluster 1” (disarmament) debate, where China argued: “countries that have not done so should sign and ratify the Comprehensive Nuclear Test Ban Treaty as soon as possible so that it may enter into force at an early date according to relevant provisions. Pending the entry-into-force of the Treaty, nuclear weapon states should continue to observe their moratoria on nuclear explosion tests.”¹¹ For many years I have argued that China should not wait for the US Senate, but should ratify the CTBT on its own merits for Chinese security, as had France, Russia and the UK.

During my visit to Beijing in October 2012, I pressed this argument again, asking (with studied naiveté) why ratification had been held up in the the National People’s Congress

¹⁰ Cheng Jingye, Head of Chinese Delegation and Permanent Representative to the UN in Vienna, General Debate Statement, First Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the NPT, Vienna, 30 April 2012.

¹¹ Wu Haitao, Chinese Ambassador for Disarmament Affairs, Statement on the Issue of Nuclear Disarmament at the first Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the NPT, Vienna, 3 May, 2012.

for more than 12 years and what still had to be done to facilitate their ratification. Government officials sought to convince me that some NPC members had raised genuine security concerns, but that they could assure me that China would be ready to ratify as soon as it became clear that US ratification would go through. One discussion touched on the fact that Beijing had seriously considered going ahead, in hope that by doing so they could positively feed into the US ratification debate. Apparently they decided against, on the assessment that in the politicised US debate early Chinese ratification could end up being pocketed, with the Administration losing the benefit of Chinese ratification as an incentive and China losing leverage, as they judge Russia did by ratifying before the 2000 NPT Review Conference. In one discussion with some Beijing foreign policy students there was speculation that Beijing might race the Obama administration to deposit its ratification instruments with the United Nations, but would only do so if Senate ratification looked certain. Be that as it may, it does seem clear that once the US ratifies, China would be unlikely to delay much longer.

India and Pakistan

Though India voted against the CTBT in September 1996, there have been growing signs that attitudes towards the treaty are changing, at least among policy elites in Ministries and major parties. One explanation is Delhi's desire to present itself as a responsible nuclear-armed state, particularly in view of the advantages India gained through the 2008 US-India nuclear deal, even though the George W. Bush administration blind spot caused it to ignore advice and neglect to promote India's accession to the CTBT as part of that deal. In wooing some of the nations that opposed the US-India deal, however, Indian officials themselves began indicating (usually in off-the-record meetings) that they would be prepared to reconsider accession to the CTBT if the US and China ratify. This was confirmed in an email exchange I had in May 2010 with a retired but influential diplomat whose opposition to the CTBT in 1996 had been very high profile. During a visit to India in January 2013 I sounded out various officials, scholars and civil society representatives. Some continued to give the long-expressed official line that India "would not stand in the way of entry into force" of the CTBT, which can be read in several ways. Others were more forthcoming, arguing that the CTBT could now be advantageous for India's security, since India remains committed to the bilateral no-testing moratorium with Pakistan.

While they took the view that India would be ready to have a more positive debate on the CTBT now, the majority of interlocutors underlined that there was no point in initiating a new debate until the US and China have ratified. Asked about Pakistan, opinion was divided. The majority alluded to Pakistan's position in 1996, which was presented as support for the CTBT in theory, but making Pakistan's signature and ratification dependent on India's signature and ratification. Others were not so sanguine that Pakistan would fall into place once its originally stated condition of Indian accession was met. They pointed to Pakistan's recent politics and long term blocking of the CD and expressed concerns that Islamabad might try to hold out even after India showed itself to be ready to join the treaty, perhaps in the hope of leveraging political or economic benefits (from the US rather than from India, it was suggested). Some thought that it might be necessary to manage accession by India and Pakistan to take effect simultaneously, [as France and the United Kingdom did in 1998](#).

Pakistan's statement to the 2012 UN General Assembly First Committee mentioned the CTBT only in passing, as an illustration of a successful agreement negotiated by the CD. No reference was made to Pakistan's own position on the treaty, despite the fact that many other statements called on the remaining Annex 2 states to sign and ratify. The few Pakistani officials that I've spoken to about the treaty in the past few months have repeated the official position that they've always voted for and continue to support the CTBT but will not join without accession by their larger neighbour.

[Pakistan's institutional and political interests are different from India's](#). Since the CTBT is in the security interests of both countries, the US, China and other influential political actors should avoid being drawn into any kind of trade-off that might exact a higher price for international security in other ways, particularly as [Pakistan's governing elite](#) may try to negotiate for [nuclear trade benefits](#) on a par with those provided to [India](#) through the [Bush administration's](#) nuclear deal.

Israel, Iran and Egypt

Iran, Israel and Egypt have all signed the CTBT, but not ratified. There were strong indications some years ago that Israel would have been willing to ratify if it had not been for Bush administration opposition, but it is not clear that this still applies, since Israel has not taken the opportunity to ratify during the past four years despite Obama administration support for the treaty. While it is still on the cards that Israel

would ratify if that is what the US supports (especially if the US itself succeeds in getting ratification through the Senate), this cannot be automatically assumed.

Though Israel does not have a problem with the test ban as such, it has some remaining concerns about the prospect of intrusive inspections at sensitive sites like Dimona. Further factors to take into account is Israel's heightened concerns about Iran's nuclear programme and the pressure from Egypt and other neighbours to participate in talks aimed at achieving a zone free of nuclear and other weapons of mass destruction in the Middle East (MEWMDZFZ), it is possible that Israel might now withhold or delay its ratification of the CTBT, perhaps for use as a bargaining chip.

On the other hand, Israel, like China, participates fully in the CTBTO and has a number of highly qualified personnel in staff or advisory positions, so this could potentially be leveraged further if Israeli decision-makers need to be persuaded that they have more to gain by ratifying than by continuing to stall.

Judging from recent discussions in Israel, there may now be pressure from some parts of the Israeli policy elite to parlay CTBT ratification for other security benefits, including (but not necessarily limited to) reciprocal ratification from Iran and Egypt and more concerted international efforts to curb the Iranian nuclear and missile programmes. This may not be explicitly required, but is likely to form part of the Israeli calculus.

Iran and Egypt both participated fully and constructively in CTBT negotiations in the 1990s, and were appointed to various responsibilities, including as Friends of the Chair. Both have continued to express public support for the CTBT, including in UN General Assembly debates and votes. However, the way in which Egypt and several other Arab states have linked their accession to the Chemical Weapons Convention (CWC) to Israel joining the NPT as a non-nuclear-state party suggests that such kinds of regional linkage will also be applied to their timetables for ratifying the CTBT. If so, that may need to be managed on the level of regional confidence building (whether stand alone or part of WMDFZ talks). While intrinsically valuable in terms of regional developments, such linkage may also foster further delays and complications for CTBT entry into force.

In view of concerns about Iran's nuclear programme, both Iran and its neighbours should have clear – if somewhat different -- incentives to get the CTBT locked down.

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Ratifying the CTBT would be an important way for Tehran to demonstrate that the international community can have confidence in its stated denials of any intention to emulate North Korea in the future by withdrawing from the NPT and using its civilian nuclear programme to make nuclear weapons. As part of the ongoing negotiations over Iran's uranium enrichment programme, it would make sense at the very least for Iran to demonstrate its good faith as an NPT party by ratifying the CTBT. Though Iran's ratification of the CTBT ~~by Iran~~ would not alleviate all concerns, it is clear that if (in the wake of US ratification) Tehran Iran continued to hold out, this would compound suspicions that it harbours an ambition to pursue nuclear weapons.

North Korea

On 9 October 2006, at 01h35 GMT, seismic stations across the world recorded tremors with the characteristics of a small underground nuclear explosion. Within two hours, CTBT signatory states were sent an automatic preliminary analysis from the Provisional Technical Secretariat (PTS) of the Preparatory Commission for the CTBTO in Vienna. This included data from more than 20 IMS stations, and located the explosion within the Democratic People's Republic of Korea (DPRK), with indications that it had a body wave magnitude between 3.58 and 4.2, i.e. characteristic of a small underground nuclear explosion. The North Korean leadership, which had announced its withdrawal from the NPT in 2002, subsequently admitted it had conducted a nuclear test. Since then, two further nuclear tests (in 2009 and 2013) have been conducted, part of the regime's concerted effort to convince others – most notably the United States, South Korea and Japan – that it has a nuclear weapon capability.

The tests have undoubtedly enabled the CTBTO to demonstrate the effectiveness of its multilateral monitoring system. They have negative implications for entry into force, however. The political value that North Korea's military-despotic government attaches to nuclear weapons, combined with international isolation, makes for a dangerous and unpredictable situation, compounded by weak leadership (a relatively young and insecure dynastic inheritor) and opaque decision-making. Recent experience indicates that approaches perceived as coercive backfire in conditions such as these. International pressure and sanctions have failed to head off North

Korea's nuclear programme, and may even have had the unintended consequence of increasing its salience, at least in domestic terms.

Realistically, North Korea is unlikely to sign and ratify the CTBT unless it changes its nuclear policy away from demonstrating weapons capability. This could follow regime change or arise from a significant but less extreme domestic policy shift, creating incentives to come in from the cold. Or it could be precipitated by some kind of political, military, nuclear or environmental 'shock' (such as a nuclear accident or 'Cuban missile crisis' type emergency). None of these scenarios is predictable in terms of timing or outcome, and a nuclear emergency is certainly not desirable, even if such a shock might be an effective precipitator for change. More positively, ratification by the US and China could potentially result in greater Chinese engagement to persuade North Korea to stop testing and accede to the CTBT. If [the Six Party Talks](#)¹² are able to be reconvened with a chance of making progress, then the Action Plan [should include North Korea's accession to the CTBT](#). Recent experience, however, indicates that this cannot be assumed, and success would be by no means assured even if Beijing proved willing to invest significant political capital into promoting such an objective.

It may be tempting for some to cite the North Korean tests as examples of how the CTBT has failed. If so, they would be wrong to draw such a conclusion. If anything, these tests emphasise the importance of strengthening the regime against nuclear testing. They have also had the unintended but extremely useful consequence of testing the treaty's verification regime, and showing how it has continued to improve. The tests have enabled the CTBTO to justify the arguments from many scientists during the negotiations that the different IMS technologies would work synergistically to provide detection and location of nuclear explosions significantly smaller than the verification system's baseline of 1kt. They vindicated the inclusion of noble gas sensors in some radionuclide monitoring stations and demonstrated the effectiveness of the IMS sensors. The tests also directed attention to what additional resources would be available if the treaty had entered into force: prompt on-site

¹² The Six Party Talks on North Korea take place among the six principal regional stakeholders: China, Japan, the Republic of Korea (ROK/South Korea), Russia and the United States as well as DPRK (North Korea). Of these, Japan, South Korea and Russia have already ratified the CTBT.

inspections, which cannot be launched while the CTBT is in legal limbo, would likely have resolved most if not all remaining uncertainties about the North Korean tests, including more precise information about exact location and yield.¹³

Provisional Application of the Treaty as a fall-back?

Provisional application is a rarely ~~evoked~~ employed but potentially useful mechanism to bypass extraordinary, temporary or unanticipated political obstacles impeding entry into force. It enables a treaty that is supported by a significant number of ratifiers to be implemented, at least for the consenting states, thereby preventing a minority from holding an international security objective hostage. Provisional application (similar to, but considered more operationally practical than provisional entry into force) is not a panacea or substitute for entry into force, but it can provide temporary reinforcement to bolster the legal authority of a treaty and prevent it from being undermined by transient and arbitrary circumstances. On the few occasions that it has been invoked in the recent past¹⁴, provisional application has contributed toward building confidence and helping to create more positive conditions and incentives to facilitate full entry into force.

According to Article 25 of the 1969 Vienna Convention on the Law of Treaties, “A treaty or part of a treaty is applied provisionally pending its entry into force” if “the treaty itself so provides”—which the CTBT does not—or if “the negotiating States have in some other manner so agreed”. Depending on how provisional application is entered into, this means that, pending entry into force, all or part of a treaty takes legal effect for those who wish to abide by the agreement. Though not binding on those who remain outside, a treaty that is provisionally applied by a large number of states has enhanced legal standing, increasing the political costs of violation.

¹³ See also Thomas R. Pickering, ‘US leadership needed to prevent nuclear testing by North Korea’, Christian Science Monitor, 20 February 2013, <https://www.google.co.uk/search?q=US-leadership-needed-to-prevent-nuclear-testing-by-North-Korea&ie=utf-8&oe=utf-8&aq=t&rls=org.mozilla:en-US:official&client=firefox-a>

¹⁴ For example, the 1990 Treaty on Conventional Armed Forces in Europe (CFE); and the Law of the Sea Convention (UNCLOS). See Rebecca Johnson, ‘Beyond Article XIV: Strategies To Save The CTBT’, *Disarmament Diplomacy* 73 (October-November 2003), accessed at <http://www.acronym.org.uk/dd/dd73/index.htm>

The CTBT text does not specifically mention provisional application, but nor does it prohibit it. During the difficult negotiations over entry into force, provisional application was discussed as a way to prevent an individual state from exercising a de facto non-effective veto. Though it was not explicitly referred to publicly, provisional application was envisaged and discussed among Canadian and Dutch diplomats and others as they were developing their ideas for special conferences in the event that the specified Article XIV and Annex 2 conditions made it difficult for the treaty to enter into force in good time.

Provisional application would require the agreement of most but not all states that had ratified the treaty. There are several ways in which this could be taken forward. At its most straightforward, a group of states could decide to convene a special conference and invite all states that had ratified (together with signatories, who would participate as non-voting observers) to negotiate and agree a protocol on provisional application. This could be done in conjunction with an Article XIV conference, or separately, in an extraordinary conference specially convened for the purpose. Based on precedent and the particular needs of the CTBT, it could then be endorsed by a majority vote in the UN General Assembly. The provisional application decision can be crafted to co-opt all ratifiers automatically (with a provision for opting out if a national decision is taken to that effect) as well as to provide a mechanism for signatories to opt in by executive decision. It is important to note that provisional application would only bypass Article XIV pending full entry into force. So it would increase and not negate incentives to bring the remaining hold-out states on board. All other obligations, rights and provisions in the treaty would be applied without modification.¹⁵

Reducing Nuclear Salience

Nuclear testing was embedded as both cause and consequence of nuclear arms races, from the Cold War to South Asia. The ending of the Cold War created a window of opportunity to negotiate a global ban. It is significant that since September 1996 none of the P5 nuclear armed states has tested, and that India and Pakistan felt

¹⁵ It is generally simpler if the decision to provisionally apply the CTBT does not require additional legislative or judicial action by states that have already ratified (unless specific conditions have already been attached to a state's ratification). See Rebecca Johnson, "Beyond Article XIV: Strategies to Save the CTBT", *Disarmament Diplomacy* 73 (October-November 2003); and Rebecca Johnson, "Is it time to consider provisional application of the CTBT?", *Disarmament Forum*, no. 2, UNIDIR, 2006.

compelled to declare moratoria on testing after they each carried out a flurry of underground nuclear explosions in May 1998. From conversations with some of the weapons scientists and military-nuclear establishments of several of these countries, it is clear that if it hadn't been for the CTBT they would have liked (and would have expected to get government support) to conduct further nuclear tests. Because the CTBT was already in place, with strong normative credibility, they were constrained, enacting a bilateral moratorium since India was not yet prepared to reconsider its ideological opposition to the CTBT. What this shows, however, is that treaties such as the CTBT contribute towards strengthening international norms, rules and institutions even before they enter into force or are acceded to by all relevant states. Strong, well supported treaties delegitimise certain activities, and experience shows that this can significantly constrain and influence the options and behaviour of non parties as much as parties.

The CTBT was not conceived as a stand alone treaty. From the beginning it was connected with calls for nuclear disarmament, and from 1968 became linked to the non-proliferation regime in NPT text and through review process negotiations. Whether or not it enters into force officially, the CTBT has already demonstrated its effectiveness. Though North Korea's tests are regrettable, they are the exceptions that in many ways prove the CTBT rule. Together with progressive reductions in the size of existing arsenals, further international initiatives aimed at implementing the NPT and banning nuclear weapons globally will further constrain any of the current nuclear-armed states or future proliferators that might still be trying to hedge their bets or keep open an option to resume nuclear testing. In this context, and in view of concerns that legislators or governments in some of the remaining Annex 2 states may attach a high price to their CTBT ratification in terms of nuclear deals, political blackmail, nuclear-related trade commitments or cash for their nuclear weapons establishments, some non-nuclear governments are questioning whether much international attention needs to be devoted to pursuing the final few signatures and ratifications. They will of course continue make public statements that call for "early entry into force" of the CTBT.

Conclusions

With 183 signatories, of which 157 have already ratified, a compelling argument can be made that the CTBT is already strongly embedded in the international non-proliferation and security regimes. Its legal effectiveness should be seen in the context of the progressive delegitimising of nuclear weapons worldwide. While entry into force is desirable, the remaining ratifications to enact formal entry into force should not be pursued at any cost.

US ratification will be key to unlocking the accession of many of the eight remaining states that must sign and/or ratify the CTBT for full entry into force. The key to US ratification will be a change in political approach, moving away from the defensiveness of technical overload combined with pork-barrel vote-buying to a strategy based on making a clear, simple, publicly engaging national security and humanitarian case and puts opponents in the Senate on the defensive if they try to justify obstructing this US security objective any longer.

To prevent the test ban regime unravelling if full entry into force takes a long time, it will be important to sustain a high level of political support and ensure that the CTBTO continues to be adequately funded. This will support the functioning and further development of the global monitoring system and enable participating states to benefit from training programmes in various aspects of verification as well as managing the regime. Signatory states can already participate in training and exercises, such as the CTBTO's Integrated Field Exercise for on-site inspections held on the decommissioned Semipalatinsk test site in Kazakhstan in 2008, which should be further supported and developed. Incentives could be provided to encourage the remaining hold-out states to participate more fully in the CTBTO, including in such exercises, to develop commitment and understanding as well as the skills and technologies for verification. Greater efforts should be made to involve non-signatories as well, increasing the incentives to draw their scientists and governments closer to the test ban regime.