# 2022-23 TOPIC PROPOSAL: TREATIES

## Authors

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## Overview

### I. Elevator Pitch

The debate community should select **treaties** as the 2022-2023 season’s topic.

This subject bridges “legal” with “exciting,” two terms that rarely describe the same thing. Treaties are dynamic, living bodies of law that transpose legal analysis onto intriguing areas of research. Successful treaties can prevent conflict between adversaries or secure interstate responses to urgent transnational problems; bad treaties can decay into empty symbols or arm powerful nations with a weapon to subordinate their opponents. Above all, treaties are interesting because they enable national legal systems to *interact*. When states agree to make laws for one another, their doctrines, norms, and jurisprudence can overlap, clash, or synergize. The result is a rich, contested body of literature that promises to spawn intriguing debates and open up novel educational opportunities.

The literature is thorough and equitably balanced. The mechanisms are large enough to anchor debates in core controversies (ratifying a treaty is a rare and high-profile act) but conserve plenty of flexibility for season-long innovation. Plus, uniqueness is ironclad.

There are two resolutions in the final header of this section (under the label “Suggested Resolutions”). Both require the affirmative to approve an international agreement as a ratified treaty or a congressional-executive agreement (CEA).

The first resolution obligates the USFG to negotiate a new international accord that limits nuclear weapons technology, AI, or cyber-weapons. The second tasks the government with acceding to one of a range of a preexisting treaties that have been negotiated and signed by some states in advance, like the Comprehensive Nuclear-Test-Ban Treaty or the Convention on Biological Diversity.

### II. Core Controversy/T Legal

Legal topics channel debates and research into controversies about jurisprudence. Constructing an affirmative on a legal topic should require engaging questions like: how decision-makers should interpret the US’s founding legal documents, which actors should exercise authority over “X,” what core function the law should serve, how institutions can best ensure their rules are adopted, and what protocols the government should follow to change the law.

In the international context, “legal” means debates about: soft law vs. hard law, Article II treaties/CEAs vs. sole executive agreements, binding vs. non-binding, codified commitments vs. customary law, and different ways the US can comply with its international commitments given the Senate blockade.

Here are some of the controversies that the topic would require engaging [see addendum for more]:

#### a---the diverse legal pathways to making an international commitment, which includes separation of power concerns AND the constraints of constitutional, administrative, and international law.

Galbraith 17, Assistant Professor of Law, University of Pennsylvania Law School (Jean, “From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law,” University of Chicago Law Review 84, No. 4, pg. 1677-1681, <https://heinonline.org/HOL/P?h=hein.journals/uclr84&i=1701>)

A striking feature of these international commitments is the diversity of legal pathways by which the United States joins them. The Treaty Clause of the Constitution empowers the president to make treaties with the advice and consent of two-thirds of the Senate.4 This is the only way to enter into international commitments that is specified in the Constitution, and yet today international commitments are routinely reached in other ways. Of the four commitments named above, only one-the New START treaty-has gone through the process set out in the Treaty Clause.5 The others have all followed different paths. Basel III is nonbinding as a matter of international law and is being implemented by administrative agencies through powers delegated to them under the Dodd-Frank Wall Street Reform and Consumer Protection Acts and preexisting statutes.7 The Iran deal is also nonbinding as a matter of international law, and the executive branch can meet the US commitments under it by deploying previously delegated statutory authority.8 The Paris Agreement is binding under international law and took effect without any specific congressional approval, although the Obama administration intended to tie its implementation to previously delegated administrative authority.9 A fifth major agreement negotiated by the Obama administration-the Trans-Pacific Partnership (TPP)-would have required approval and implementation by congressional legislation but has since been abandoned by the Trump administration.10 Collectively, these examples illustrate that the US process for making international commitments has become multifaceted rather than unitary.

Scholars of foreign relations law typically break down US participation in international agreements into three main categories: treaties entered into pursuant to the Treaty Clause, congressional-executive agreements, and sole executive agreements.11 Congressional-executive agreements “are concluded by the president with either the advance authorization or subsequent approval of a majority of both houses of Congress.”12 Sole executive agreements “are concluded by the president alone.”13 This three-part categorization is long-standing-dating back at least to the 1920s-and has become “Lesson I of Foreign Relations Law 101.”14 Yet its usefulness is increasingly questionable. In a speech given during his tenure as State Department Legal Adviser, Professor Harold Koh criticized this framework as a “procrustean construct,” observing that international agreements often “do not fall neatly into any of these boxes.”16 This three-part categorization also takes account only of agreements that are binding under international law and thus does not cover purely nonbinding commitments, even those as important as Basel III or the Iran deal.

The emphasis on these three categories is problematic for a deeper reason, as well. It frames the process of making international commitments using the lens of constitutional law. The very names “congressional-executive agreements” and “sole executive agreements” evoke Articles I and II, and most scholarship engaging with these categories has focused on the extent to which the Constitution permits their use.1 6 But as important and foundational as this constitutional question indisputably is, there are other questions that one should ask, including: How does the United States decide which form of international commitment it will use? And what structural checks and balances operate in the current system? Answering these questions from a constitutional law perspective will at best give rise to only partial answers, and at worst may give rise to misleading ones.

This Article explores the multiple pathways available for making international commitments. To understand the structural landscape in which they exist, we must take into account three strands of law—not just constitutional law, but also international law and administrative law. Each strand plays a crucial role in shaping how the United States makes international commitments. The structure of the international legal system both encourages the use of multiple pathways and affects what pathways are available in particular contexts. Constitutional law places meaningful doctrinal limits on the available pathways, although these limits now have more force with regard to how international commitments are implemented than with regard to how they are made in the first place. Perhaps most significantly, administrative law influences the choice of pathways by affecting how international commitments can be implemented, by underlying the State Department's internal process for determining which pathway to pursue in a given context, and by shaping who is at the negotiating table for the United States.

This approach has important implications for separation-of-powers concerns. From the vantage point of constitutional law, the rise of myriad paths for making international commitments amounts to an unvarnished win for presidential power. The president has the power to choose which pathway to domestic approval to pursue for an international commitment, conditional on the use of this pathway being deemed constitutional. The more constitutionally permissible options there are, the more the president can evade the democratic and deliberative check of legislative review. As the Obama administration increasingly favored bypassing the subsequent approval of the Senate or Congress for international commitments, claims of presidential unilateralism followed quickly. “That's outrageous, and it's unlawful. And it's a clear example of the executive overreach in the area of foreign affairs,” said the convener of a congressional hearing on the administration's decision to join the Paris Agreement without going to the Senate.17

When all three strands of law are taken into account, the structural landscape looks quite different. For international law and administrative law have also given rise to constraints on presidential power. These constraints are ones that the Framers did not foresee, and yet they further James Madison's goal of “contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”18 These constraints arise at all stages of an international commitment—negotiation, domestic approval, and implementation. Some of these constraints are independent of the constitutional constraints, but others have their strongest bite at times when the constitutional constraints are the weakest. In other words, the more the president seeks to bypass the Senate and Congress, the more he or she is likely to run up not only against constitutional concerns, but also against alternative constraints arising from international and administrative law and from institutions empowered by these bodies of law—including international organizations, administrative agencies, and occasionally even US states. The president's power with respect to international commitments is thus not the power to avoid constraints entirely. Rather, it is the power to choose between different types of constraints.

#### b---non-binding alternatives like memorandums, soft law, and political commitments.

Meyer 20, Professor of Law and Director of International Legal Studies at Vanderbilt University Law School. (Timothy, “3. Alternatives to Treaty-Making—Informal Agreements,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 59-60) \*MOUs = Memorandums of Understanding

Questions like these have fascinated international lawyers and scholars for decades,6 although they have received increasing attention since the turn of the century. The end of the Cold War and the spurt of institution-building in the 1990s caused scholars to focus on the role of legalization in the international system.7 In a decade that saw treaties like the Kyoto Protocol (as well as treaties establishing institutions such as the International Criminal Court and the World Trade Organization), some struggled to understand why governments do not use formal treaties to codify the outcomes of all of their negotiations. Yet States continued to rely on multilateral non-binding agreements in a wide range of areas, ranging from banking regulation8 to food safety9 to arms control.10 States exhibit similar diversity in concluding a range of non-binding bilateral agreements on matters such as competition law,11 diplomatic relations,12 and even wartime relationships.13 At the same time, scholars also began to notice that actors other than States participate in international norm-making in ways that bear some similarities to norm-making among States.14 These alternatives to formal treaty-making produced a wide range of instruments with many different kinds of labels, such as MOUs, soft law, and political commitments. For their part, scholars sought to understand both the kinds of tradeoffs that States or non-State actors face when deciding between formal treaty instruments and the range of informal instruments available to them, as well as how treaties and informal international agreements differ in their influence on State behaviour.

#### c---how international commitments operate, what they regulate, and who acts as the regulator.

Hollis 20, Laura H Carnell Professor of Law at Temple University’s James E Beasley School of Law and a non-resident Fellow at the Carnegie Endowment for International Peace, formerly served in the US State Department Legal Adviser’s Office, including several years as the Attorney-Adviser for Treaty Affairs. (Duncan B., “1. Defining Treaties,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 44) \*italics in original

Conclusion

Today, the treaty is *the* dominant instrument through which international law operates. The aim of this chapter has been to illuminate its defining characteristics on two levels. First, it demonstrates that what a treaty ‘is’ and the consequences for its use vary by context. The treaty may be born of international law, but it is equally at home within domestic legal systems, and remains a key form of commitment for those seeking international coordination and cooperation.

Second, in the context of international law, this chapter sought to explain and expand upon the VCLT’s definition of the treaty. It shows how the existing list of treaty ingredients is both incomplete (excluding oral treaties and treaties involving IOs and other subjects of international law) and underdeveloped (in terms of what constitutes an ‘international agreement’ and what ‘governed by international law’ means, especially in terms of the parties’ intentions). It is difficult, however, to understand treaties solely by dissection. Thus, this chapter also explored how differentiating the treaty from other forms of commitment (unilateral declarations) and agreements (political commitments and contracts) informs our understanding of treaties themselves.

Finally, this chapter has surveyed the widely divergent functions the treaty concept serves. Its flexibility—and the law of treaties’ openness to contracting around default rules—has generated a spectrum of approaches in how treaties operate, what they regulate, and who acts as a regulator. The range of the modern treaty suggests that the single, generic approach to defining ‘the’ treaty and its associated rules ought to be revisited. This need not mean dispensing with international law’s existing definition, but perhaps augmenting it to situate various species of treaties within a larger treaty genus.

In the end, the project of defining treaties reveals the strength of McNair’s ‘sadly over-worked’ label for the treaty concept and raises a key question: should treaty-making remain the primary method for regulating all international problems? If international law owes much of its success to the treaty concept, might that concept also be responsible for some of its failures? The current chapter does not seek to answer these questions. But it lays the necessary foundation for such analysis by offering a deeper and more comprehensive approach to the treaty concept. In doing so, it may also aid treaty practitioners in identifying what ‘is’ a treaty, distinguishing it from other instruments, and appreciating the treaty’s limits. Defining treaties may not be a simple task, but given the present state of international law, it is a critical one.

#### d---the mechanisms (ratification or a CEA) encourage research into and debates about the law, its protocols, and the broad authority of presidents and international bodies

Hollis 20, Laura H Carnell Professor of Law at Temple University’s James E Beasley School of Law and a non-resident Fellow at the Carnegie Endowment for International Peace, formerly served in the US State Department Legal Adviser’s Office, including several years as the Attorney-Adviser for Treaty Affairs. (Duncan B., “1. Defining Treaties,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 14-16)

B. Defining treaties for purposes of domestic law

Most existing studies of the treaty focus on differences in meaning under the VCLT and international law.22 But this overlooks an equally, if not more important, context in which the treaty exists and requires definition—the domestic level. Although domestic law (occasionally supplemented by practice) differs from State to State, invariably treaties are defined within this context in at least two distinct ways. First, domestic law defines the treaty for purposes of elaborating the conditions for its formation. Second, domestic law also defines treaties to specify whether and how they operate within the national legal order.23

To be clear, domestic laws do not have to define treaties differently than international law. Some States (eg Japan, Russia) simply mimic the VCLT definition for domestic purposes.24 But other States do depart from the VCLT formula, defining treaties by their requisite domestic procedures. France limits its domestic definition of treaties (traités) to agreements receiving Presidential ratification; other international agreements (accords internationaux) are subject to parliamentary approval. Despite differing domestic law terminology, France regards both concepts as identical for purposes of international law.25 In 2014, Spain enacted a new ‘Treaties and Other International Agreements Act’ that also differentiates international treaties (tratado internacional) from international administrative agreements (acuerdo internacional administrative) based on the need for legislative approval of the former (even though both qualify as treaties under international law).26 In the United States, a ‘Treaty’ is an international agreement approved by two-thirds of the US Senate followed by Presidential ratification.27 Other ‘international agreements’ arise through different procedures—congressional approval, reliance on Presidential powers, or authorization by a prior Treaty.28 Like France and Spain, the United States views both ‘Treaties’ and ‘international agreements’ as treaties in the international law sense of that term.29 Chile and the Netherlands make similar domestic distinctions.30

For purposes of domestic law, therefore, treaty definitions implicate the State’s allocation of international treaty-making capacity among domestic political actors. Every State empowers its executive to represent the State in negotiating and concluding treaties.31 Frequently, however, States counterbalance this authority by allowing other domestic actors (most often the legislature, but sometimes courts, sub-national units, or even the general populace) to exercise their interests by having a say in what treaties the State makes.32 As noted, some States (like France, Spain, and the United States) explicitly use their ‘treaty’ definition to do this by requiring additional democratic approval via legislative participation for instruments so labelled, while excluding others that nonetheless qualify as ‘treaties’ for purposes of international law. But even States that do not limit their domestic treaty definition this way, still define the ‘treaty’ (or different categories of ‘treaties’) with an eye to the domestic procedures involved in their formation and implementation.33 And where those procedures are not followed, domestic law may not regard the resulting agreement as a ‘treaty’.34

Beyond procedures, States also define treaties domestically to situate them within the national legal order. All States may endorse pacta sunt servanda as a matter of international law, but States have not interpreted that principle to require any particular priority for treaties as a matter of domestic law. In the national context, the State’s constitutional framework, not international law, dictates the legal status of treaties. Some States do not regard treaties as part of their domestic legal order at all, relying on new or existing legislation to implement treaty obligations domestically.35 Other States give some treaties (but never all of them) direct effect as domestic law, whether upon the treaty’s entry into force internationally or the completion of some domestic procedures (eg publication).36 Moreover, States that grant treaties direct legal effect adopt differing approaches to their positions in the domestic law hierarchy. Some prioritize treaties over all national laws, including the Constitution; some subordinate them below all national laws; and some States afford treaties an intermediate status, equating them, for example, to statutes enacted by the national legislature.37

### III. Uniqueness

It’s ironclad. The number of treaties submitted to the Senate has been declining for over a decade. The two-thirds requirement for Senate approval is a tall hurdle, out of reach for all but the most uncontroversial treaties. Presidents in the first half of their terms are especially unlikely to seek ratification because they focus on securing wins in a far more salient area: the domestic sphere.

CEAs are unlikely too, because they provoke pushback from legislators—who passionately support upholding the Senate’s monopoly on international agreements.

With razor-thin majorities and a political incentive to do literally anything else, the Biden administration is extremely likely to leave treaties and CEAs entirely unused.

#### Veto players, norms, and nationalism block treaties and CEAs. Biden will only join international agreements that don’t require congressional approval.

Alvarez 21, Herbert and Rose Rubin Professor of International Law @ NYU (José, Winter 2021, “Biden’s International Law Restoration,” Journal of International Law and Politics, Volume 53, Number 2, <https://www.nyujilp.org/wp-content/uploads/2021/04/NYI205.pdf>)

A. Reluctance to Enter into Multilateral Treaties

Those who focus on multilateral treaties, the bright shining objects that draw the most attention of international lawyers, and hope that President Biden will usher in new U.S. accessions to treaties that much of the civilized world joined long ago are going to be brutally disappointed. It is more plausible that President Biden will join (or rejoin) high-profile multilateral arrangements only if they do not require congressional approval.

Although Democrats managed (just) to regain control of the Senate, it is unlikely that the United States will ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention of Human Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea (UNCLOS), or the Statute of the International Criminal Court (Rome Statute) or its Kampala amendments on the crime of aggression. Similarly, the Biden administration probably will not rescind all U.S. reservations from the International Covenant on Civil and Political Rights (ICCPR) or even the Convention Against Torture. The country that took some forty years to ratify the Genocide Convention does not change its spots quickly; certainly it will not do so at a time when much of the world (not only the United States) has been exceedingly wary about negotiating new global treaties.4

President Biden has already fulfilled his promise to have the United States rejoin the Paris Agreement on Climate Change,5 a move made easier by the fact that reentering the treaty did not require Congress’s approval,6 even though changes in U.S. law requiring congressional action would be desirable to make the agreement truly effective. His administration is also likely to pledge, as has China, that it will significantly lower the level of U.S. carbon emissions by a certain date. Changes to EPA policies and individual U.S. states’ climate change mitigation efforts may achieve such a goal even if Congress fails to act.7 Consistent with Pope Francis’s plea to protect the planet in his encyclical letter, Laudate, 8 and Biden’s embrace of climate change issues, the new administration could embrace related international proposals that received the back of the hand from Trump, including ideas for a global phase-out of fossil fuel subsidies through the G20 and WTO, efforts to protect the Arctic in the Arctic Council, or initiatives to reduce greenhouse gas emissions in maritime shipping under the International Maritime Organization.9 Because they do not require congressional approval, soft law pacts, such as the 2018 Global Compact for Safe, Orderly and Regular Migration intended to mitigate the harms of climate change migration,10 are also likely to attract the attention of Biden and his Climate Change czar, John Kerry.11 Of course, whether such soft commitments will actually affect the number of immigrants admitted into the United States remains unclear, particularly if majorities in Congress resist the more open immigration policies expected under the new administration.

Since the United States and China jointly account for forty percent of global greenhouse gas emissions, Biden is also likely to try to reignite the United States-China bilateral climate relationship begun under Obama. However, given the current level of hostility towards China, such efforts will likely encounter considerably stiffer political headwinds than in Obama’s time. An attempt to negotiate, for example, a United States-China cooperation arrangement to tap into the United States’ strength in inventing and China’s capacity to commercialize and cheaply produce clean energy technology (such as solar panels or electric batteries for zero-emission vehicles) would win the support of those who prioritize climate change efforts,12 but would risk antagonizing those worried about the export of U.S. jobs to China and who expect Biden to abide by his promise of creating new green jobs at home to replace jobs lost by the turn away from fossil fuels.13

Apart from the 2020 election’s failure to produce a “blue wave” to give Democrats clear majorities in both houses of Congress,14 there are many structural reasons why the U.S. return to international law will occur largely through occasional bilateral treaties that can secure congressional support, sole executive agreements, soft law instruments, or national law initiatives instead of high-profile multilateral treaty ratifications. As was clear in the Obama years—which saw an ever-dwindling number of attempts to get treaties through either the Senate by a two-thirds vote or a majority of both houses of Congress— the U.S. constitution and Capitol Hill traditions make concluding treaties purposely difficult. Indeed, one senator alone can prevent a treaty from emerging from the Senate Foreign Relations Committee.15 In the best of circumstances, presidents need the help of senators invested in foreign affairs. While the United States can enter into Congressional-Executive agreements by a simple majority vote in both houses, a President still needs to secure those majorities and is constrained by constitutional traditions requiring that some treaties (such as those involving human rights) respect the Senate’s two-thirds vote prerogative. Biden will have a difficult time amassing supporters to ratify treaties, as internationalist senators have been overtaken by those who subscribe to Trump’s “America First” mentality.16 Nor is he likely to find many senators who would relinquish their power over treaties by sharing a majority vote with the House.

### IV. Aff Ground

Advantage areas vary by treaty, but they share some conceptual similarities. Here are a few:

**Institutions**. Many treaties establish international courts, tribunals, or conventions to arbitrate disputes or conduct investigations. For a nation to influence these bodies and transmit its policy preferences, it needs to represent itself in their decision-making process—an option usually only available to the agreement’s signatories.

**Bargaining**. Some particularly costly or dangerous practices are impossible for one state to stop alone. Hammering out an agreement—for example, to mutually abstain from deploying certain weapons—can enhance global security without the risks that accompany unilateral disarmament.

**Formal Agreement**. International agreements codify shared expectations, understandings, and protocol. When something goes wrong, having a set of norms that are written out and agreed-upon in advance can dispel ambiguity and act as an invaluable brake on escalation.

#### The best data shows only treaties signal durability and commitment.

Nyarko 19, Postdoctoral Fellow in Empirical Law and Economics, Ira M. Millstein Center for Global Markets and Corporate Ownership, Columbia Law School. (Julian, “Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,” American Journal of International Law 113, No. 1, pg. 55-57, https://doi.org/10.1017/ajil.2018.103)

Why, the argument goes, should presidents go through the slow and cumbersome advice and consent procedure of the treaty if their policy objectives can be fulfilled more easily by use of congressional-executive agreements, which are not similarly constrained?9 After all, the latter’s authorization can be granted broadly and ex ante through simple majoritarian approval, thus allowing the president to conclude a myriad of agreements authorized under a single congressional act.10 If we see treaties used today, this account suggests, it would be for reasons that are orthogonal to the quality of the instrument itself, such as historical convention or selective senatorial preferences.11

At the same time, anecdotal evidence lends plausibility to alternative explanations as well. Consider, for instance, the bargaining process surrounding arms-reduction agreements between the United States and Russia. During the negotiations of SALT II, the United States proposed a preliminary congressional-executive agreement designed to ban new types of ballistic missiles and cruise missiles. However, former Soviet Foreign Minister Andrei Gromyko rejected the proposal due to the alleged inferior status of the congressional-executive agreement.12 Similarly, during the negotiations of the Strategic Offensive Reductions Treaty (SORT), the United States and Russia agreed to reduce their arsenal of active nuclear warheads to between 1,700 and 2,200 each. President Putin insisted on codifying the agreement as a formal treaty and spent considerable bargaining power on persuading President Bush, who favored a congressional-executive agreement.13 Outside the context of nuclear disarmament, negotiation partners have also pointed to the treaty as the desired, more serious form of commitment. For example, when the former President of the Philippines, Corazon Aquino, took office, she voiced her intention to replace the then-current congressional-executive agreements regulating the status of the U.S. military bases in the Philippines by “full-fledged” treaties.14

If treaties and congressional-executive agreements are not qualitatively different from one another, it seems hard to rationalize why negotiation partners at times display such great interest in the choice of instrument. Consequently, some scholars appear critical of the supposed lack of the treaties’ utility. The arguments come in different forms; some suggest that a president’s use of the treaty would signal a particularly high level of commitment,15 others that the struggle for senatorial approval may cause the government to reveal valuable information truthfully,16 or that the greater stability of senatorial preferences helps to ensure long-term compliance.17 What all these accounts have in common is an assumption that treaties, although more politically costly than congressional-executive agreements, confer certain benefits on the parties, in turn justifying their continuing existence as a valuable U.S. policy tool.

As of today, the debate surrounding the ongoing relevance of treaties in a context where congressional-executive agreements are so readily available and widely used remains unsettled. This Article seeks to shed light on the question of whether the treaty is a qualitatively different form of commitment than the congressional-executive agreement. It uses the most comprehensive dataset on U.S. international agreements available—the 7,966 agreements reported in the Treaties in Force Series from 1982 to 2012. In contrast to previous analyses, this Article is the first to directly contrast the consequences of relying on treaties versus executive agreements. Using survival time analysis, the Article demonstrates that, on average, an executive agreement made in 1982 had a 50 percent probability of breaking down by 2012, while a comparable promise made as a treaty broke down with only 15 percent probability.18 This result holds even after controlling for a number of observable characteristics, such as the composition of the House and the Senate, the subject area of the agreement, and the partner country. The findings also reveal that the difference between the instruments is most pronounced when comparing treaties to ex ante congressional-executive agreements.

The results are consistent with the view that promises made in the form of the treaty are qualitatively different from those struck as congressional-executive agreements. Against the backdrop of this empirical finding, it seems premature to call for the abandonment of the treaty, which may still serve important policy functions that cannot similarly be fulfilled by the congressional-executive agreement.

### V. Neg Ground

2Ns will have plenty of options. The following is a far from exhaustive list of generics.

**Concessions DA**. Senate Republicans can smell fear. When opposition party members detect that the president wants their approval vote, they have an empirically demonstrated tendency to extract significant policy concessions. The Obama administration secured GOP support for New START only by agreeing to an eye-watering budget increase to modernize all three legs of the US nuclear triad.

**Backlash/Populism DA**. International commitments have gifted right-wing nationalists with a target to rally their supporters and build opposition to the political establishment. On the campaign trail, Trump capitalized on popular backlash to agreements that diminished US sovereignty; when he entered office, he withdrew from many prominent institutions and put dozens of accords through the paper shredder (e.g., the Iran Deal, Paris, WHO, INF). Renewing the US’s multilateral obligations risks reigniting anti-globalization sentiment at home, a development that could quickly ripple overseas.

**Presidential Power DA**. Power to negotiate international agreements has concentrated in the executive branch. A high-profile treaty or CEA could reverse this trend and encourage Congress to reassert its influence in foreign affairs. The result could touch off an interbranch struggle for power and authority.

**Dip Cap DA**. Affirmatives that require reaching a new agreement (if the chosen resolution permits) would drain the State Department’s resources. Many treaties take months or even years of dedicated negotiation to hammer out. Trying to multitask in this environment of tight budgets and understaffed divisions may be especially risky.

**Sole Executive CP**. Emboldened by a gridlocked legislature and permissive judiciary, the executive has increasingly elected to unilaterally negotiate binding international agreements. Their scope is limited to the president’s Article II authority, but executive lawyers have a long track record of successfully defending their creative interpretations of the Constitution. This is especially the case before conservative justices, who tend to be bullish on executive foreign affairs power.

**Soft Law CP**. Agreements do not need to be binding to be effective. Clear writing or externally delegated enforcement responsibilities can build confidence in a legal commitment without tying the US’s hands.

## Topic Areas

### I. Aff---ReSTART

#### US-Russia arms control is in crisis. Negotiating a successor to New START that constrains emerging weapon systems AND manages the buildup of existing capabilities is key to stop a burgeoning arms race and prevent nuclear escalation.

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INTRODUCTION

Russia and the United States possess nuclear forces that could destroy both states and much of the rest of the world—many times over in a matter of minutes. For most of the last five decades, a series of treaties have regulated these arsenals. Today, just one of these treaties—New START—remains in force, and it is due to expire on February 5, 2021. The end of nuclear arms control would undermine the security of both Russia and the United States. The two states, therefore, should begin negotiations on a mutually beneficial follow-on treaty and, to buy time for this process, extend New START. This paper proposes key provisions for a follow-on treaty.

Treaties to verifiably limit nuclear forces enhance Russian and U.S. security in two primary ways. First, they can help avoid expensive arms build-ups that would heighten geopolitical tensions. For both Moscow and Washington, inferiority in strategic arms is unacceptable.1 However, striving to acquire sufficient capabilities to avoid inferiority (let alone those needed to achieve superiority) risks sparking an arms race. Arms control agreements prevent this outcome by verifiably facilitating parity at a lower level than would otherwise have been the case. And the resource savings extend beyond the weapons that are not built. The additional intelligence collection efforts needed to monitor a potential adversary’s nuclear forces with a high degree of confidence without cooperative verification arrangements would be much more costly than data exchanges and inspections.

Second, and perhaps even more importantly, arms control treaties can reduce the risk of escalation leading to nuclear use. In a conflict or deep crisis, a state that was concerned that its nuclear forces were vulnerable and that an attack on them was imminent could try to scare its adversary into backing off by issuing nuclear threats or even engaging in limited nuclear use. In extremis, the state might even launch a large-scale preemptive attack on its adversary’s nuclear forces in the hope of limiting the damage those weapons could do. Arms control can help to manage such crisis instability. Exaggerated fears can be dispelled by each state’s being transparent about the number, operational status, and deployment locations of its nuclear weapons. Well-grounded fears can be managed through limits on offensive capabilities, requirements or incentives to field forces that are more survivable or less useful for conducting a surprise attack, and even prohibitions on destabilizing technologies, particularly those that could be employed to attack an adversary’s nuclear forces.

Strategic arms control, exemplified by New START, plays a particularly important role in risk reduction. (In unhelpful jargon inherited from the Cold War, the term “strategic” is used to describe weapons with sufficient range to attack the other state’s homeland from their deployment locations.) Because Russian and U.S. strategic weapons—ICBMs, SLBMs, and heavy bombers—directly pose an existential threat to the other nation, imbalances are particularly likely to catalyze arms racing. Moreover, because a relatively large fraction of each state’s strategic forces and their supporting infrastructure are located in their homelands, the perceived threat of being attacked with strategic weapons is especially liable to spark escalation as the result of crisis instability.

The sharp decline in U.S.-Russian relations since New START entered into force has increased the risks of both a quantitative arms race and the kind of deep crisis or conflict that could make nuclear use imaginable. As a result, the need for strategic arms control is now greater than at any time since the end of the Cold War. Indeed, the U.S. National Defense Authorization Act for Fiscal Year 2020, which was passed with overwhelming bipartisan support, emphasizes that “legally binding, verifiable limits on Russian strategic nuclear forces are in the national security interest of the United States.”2

To preserve the benefits of strategic arms control, Russia and the United States should extend New START in its current form for five years, as permitted by the treaty. Russia has indicated its support for an unconditional extension.3 And the administration of President Donald Trump has not completely ruled one out—although it has expressed skepticism and suggested various conditions for an extension. Most recently, it has conditioned the extension of New START on Russia and the United States’ negotiating a nonbinding “framework” for future arms control, which “China will be expected to join.”4 Washington insists that, under this framework, Russia must commit to negotiating limits on all warheads, including those that are not accountable under New START.

Even if Russia and the United States can eventually manage to agree on an extension, it would serve only as a stopgap. Moscow and Washington, therefore, should also begin negotiations toward a follow-on treaty. Because such negotiations are likely to be drawn out, they should commence as soon as possible. (Obviously, if New START is not extended, negotiations on a new treaty would become all the more urgent.

OVERVIEW OF THE ISSUES

The starting point for negotiations toward a follow-on treaty should be—and likely would be—the text of New START. Overall, this agreement has functioned well. The Trump administration has repeatedly certified Russian compliance at a time when it has not been shy about accusing Russia of violating other agreements.5 Current and former military leaders espouse the value of the treaty’s verification provisions for military planning.6 That said, Trump administration officials, lawmakers, and analysts have criticized New START for what it does not constrain.7 Russia’s so-called exotic strategic weapons—that is, new strategic weapons of kinds other than ICBMs, SLBMs, or heavy bombers—have sparked considerable concern. One such system, the IGLBGM Avangard, has already been deployed. Because its booster is a treaty accountable ICBM, Russia has acknowledged that it is accountable under New START and is applying the treaty’s provisions accordingly. But developmental systems, including a nuclear-powered cruise missile and a long-range nuclear-powered torpedo—both of which are intended to be nuclear-armed—may not be captured by New START’s definitions (though neither is likely to be deployed during that treaty’s lifetime, even if it is extended). A follow-on treaty should address this lacuna.

### II. Aff---AI

#### The US should negotiate a global AI treaty that keeps humans in the loop, siloes AI from nuclear C2, bans critical infrastructure attacks, and develops oversight mechanisms.

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This is not the first time the country has worried about the economic and national security ramifications of new technologies. In the aftermath of World War II, the United States, Soviet Union, China, France, Germany, Japan, the United Kingdom, and others were concerned about the risk of war and the ethical aspects of nuclear weapons, chemical agents, and biological warfare. Despite vastly different worldviews, national interests, and systems of government, their leaders reached a number of agreements and treaties to constrain certain behaviors, and define the rules of war. There were treaties regarding nuclear arms control, conventional weapons, biological and chemical weapons, outer space, landmines, civilian protection, and the humane treatment of POWs.

The goal through these agreements was to provide greater stability and predictability in international affairs, introduce widely-held humanitarian and ethical norms into the conduct of war, and reduce the risks of misunderstandings that might spark unintended conflict or uncontrollable escalation. By talking with adversaries and negotiating agreements, the hope was that the world could avoid the tragedies of large-scale conflagrations, now with unimaginably destructive weapons, that might cost millions of lives and disrupt the entire globe.

With the rise of artificial intelligence, supercomputing, and data analytics, the world today is at a crucial turning point in the national security and the conduct of war. Sometimes known as the AI triad, these characteristics and other weapons systems, such as hypersonics, are accelerating both the speed with which warfare is waged, and the speed with which warfare can escalate. Called “hyperwar” by Amir Husain and one of us (John R. Allen), this new form of warfare will feature levels of autonomy, including the potential for lethal autonomous weapons without humans being in the loop on decision-making.

It will affect both the nature and character of war and usher in new risks for humanity. As noted in our recent AI book “Turning Point,” this emerging reality could feature swarms of drones that may overwhelm aircraft carriers, cyberattacks on critical infrastructure, AI-guided nuclear weapons, and hypersonic missiles that automatically launch when satellite sensors detect ominous actions by adversaries. It may seem to be a dystopian future, but some of these capabilities are with us now. And to be clear, both of us, and more broadly the world’s liberal democracies, are struggling with the moral and ethical implications of fully autonomous, lethal weapon systems.

In this high-risk era, it is now time to negotiate global agreements governing the conduct of war during the early adoption and adaptation of AI and emerging technologies to the waging of war and to specific systems and weapons. It will be much easier to do this before AI capabilities are fully fielded and embedded in military planning. Similar to earlier treaties on nuclear, biological, and chemical weapons in the post-war period, these agreements should focus on several key principles:

Incorporate ethical principles such as human rights, accountability, and civilian protection in AI-based military decisions. Policymakers should ensure there is no race to the bottom that allows technology to dictate military applications as opposed to basic human values.

Keep humans in the loop with autonomous weapons systems. It is vital that people make the ultimate decisions on missile launches, drone attacks, and large-scale military actions. Good judgment and wisdom cannot be automated and AI cannot incorporate necessary ethical principles into its assessments.

Adopt a norm of not having AI algorithms within nuclear operational command and control systems. The risk of global destruction is high with AI-based launch on warning systems. Since we do not know, and may never know, exactly how AI learns from training data, it is important not to deploy systems that could create an existential threat to humanity.

Protect critical infrastructure by having countries agree not to steal vital commercial data or disrupt power grids, broadband networks, financial networks, or medical facilities on an unprovoked basis through conventional digital attacks or AI-powered cyber-weapons. Creating a common definition on what constitutes critical infrastructure will be important to the implementation of this principle.

Improve transparency on the safety of AI-based weapons systems. It is crucial to have more information on software testing and evaluation that can reassure the public and reduce the risks of misperceptions regarding AI applications. That would provide greater predictability and stability in weapons development.

Develop effective oversight mechanisms to ensure compliance with international agreements. This would include expert convenings, technical assistance, information exchanges, and periodic site inspections designed to verify compliance.

The good news is there are some international entities that already are working on these issues. For example, the Global Partnership on Artificial Intelligence is a group of more than a dozen democratic nations that have agreed to “support the responsible and human-centric development and use of AI in a manner consistent with human rights, fundamental freedoms, and our shared democratic values.” This community of democracies is run by the Organization for Economic Cooperation and Development and features high-level convenings, research, and technical assistance.

That said, there are increasingly calls for the technologically advanced democracies to come together to aggregate their capacities, as well as leveraging their accumulated moral strength, to create the norms and ethical behaviors essential to governing the applications of AI and other technologies. Creating a reservoir of humanitarian commitment among the democracies will be vital to negotiating from a position of moral strength with the Chinese, Russians, and other authoritarian states whose views on the future of AI vary dramatically from ours.

In addition, the North Atlantic Treaty Organization, European Union, and other regional security alliances are undertaking consultations designed to create agreed-to norms and policies on AI and other new technologies. This includes effort to design ethical principles for AI that govern algorithmic development and deployment and provide guardrails for economic and military actions. For these agreements to be fully implemented though, they will need to have the active participation and support of China and Russia as well as other relevant states. For just as it was during the Cold War, logic should dictate that potential adversaries be at the negotiating table in the fashioning of these agreements. Otherwise, democratic countries will end up in a situation where they are self-constrained but adversaries are not.

It is essential for national leaders to build on international efforts and make sure key principles are incorporated into contemporary agreements. We need to reach treaties with allies and adversaries that provide reliable guidance for the use of technology in warfare, create rules on what is humane and morally acceptable, outline military conduct that is unacceptable, ensure effective compliance, and take steps that protect humanity. We are rapidly reaching the point where failure to take the necessary steps will render our societies unacceptably vulnerable, and subject the world to the Cold War specter of constant risk and the potential for unthinkable destruction. As advocated by the members of the National Security Commission, it is time for serious action regarding the future of AI. The stakes are too high otherwise.

### III. Aff---Cyber

#### The absence of clear international standards governing cyber-attacks catalyzes aggression. A treaty that prohibits certain conduct and lays out a proportionality standard for conflict solves.

Fenton 19, Duke University School of Law, J.D. expected 2019 (Hensey Fenton III, “Proportionality and its Applicability in the Realm of Cyber Attacks,” 29 Duke Journal of Comparative & International Law, pg. 357-358, Available at: <https://scholarship.law.duke.edu/djcil/vol29/iss2/6>)

While cyber warfare is primarily governed by the existing codified laws of armed conflict, these laws were written prior to the advent of modern computing technology.113 Consequently, the applicability of current international standards to cyberwarfare stems from a false notion of cyber-kinetic equivalency.114 The absence of laws explicitly developed for tackling the nuances of cyber war, in addition to the predominant application of other fields that are loosely related, create unnecessary challenges in regulating cyber war.115 The difficulty in applying laws that were written prior to the notion of computers let alone complex cyber warfare, hinders militaries that seek to utilize cyber-attacks as a means of war.116

Moreover, without an international standard governing cyber-attacks, nations will likely take advantage of the legal ambiguities existing within the current framework to initiate cyber-attacks without restraint. In other words, the lack of an international treaty governing cyberwar creates a void which will allow nations to employ lawfare as a means to circumvent restrictions on the use of cyber force.117 The recent actions of China in the South China Sea118 and Russia within the former Soviet bloc119 reveal a willingness for the world’s cyber super powers to take advantage of legal uncertainties—or creating them if necessary—for the sole purpose of circumventing existing legal restraints on their efforts for global hegemonic supremacy. Such a void will act as a catalyst in the creation of a pathway for the conducting of lethal cyber aggressions that are unrestrained by the laws of war.

As mentioned previously, the most beneficial means for combating legal ambiguities within the cyberwarfare context is to create an international treaty or some version of a multi-lateral agreement, that would govern cyberwar. The treaty must not only seek to prohibit illegal uses of cyberwarfare and provide standards for pre-strike proportionality analyses, but it must also establish codified expectations, or norms of behavior, that solidify foreign and defense polices and guide international cooperation.120

### IV. Aff---CTBT/FMCT

#### Ratifying the Comprehensive Nuclear Test Ban Treaty (CTBT) AND Fissile Material Cut-off Treaty (FMCT) would cause China to follow suit. That places durable and verifiable limits on Chinese nuclear modernization and prevents a global arms race.

Kulacki 21, PhD, China Project Manager @ the Union of Concerned Scientists, formerly associate professor of government @ Green Mountain College. (Gregory, 10-6-2021, “China’s New Missile Silos: How Should the United States Respond?”, All Things Nuclear, <https://allthingsnuclear.org/gkulacki/chinas-new-missile-silos-how-should-the-united-states-respond/>)

China, with a nuclear force nowhere near the size of Russia or the US, was never a major player in the old nuclear arms race or diplomatic efforts to stop it. But its new silos run the risk of jump starting another one. That’s a danger the United States government can avoid.

The most effective way to avoid it, while simultaneously limiting the improvement and expansion of China’s nuclear forces, is to revitalize international nuclear arms control. There are two clear negotiation outcomes that can verifiably limit China’s ability to improve the quality and increase the quantity of its nuclear weapons.

The first is the entry into force of the CTBT. The US Senate should immediately join the other 170 nations who already ratified it. China said it will ratify the treaty after the United States does. The Biden administration should then push the other six holdouts – Egypt, India, Israel, Iran, North Korea, and Pakistan – to do the same. This is a diplomatic challenge that can be met and is worth the effort.

US defense officials are justifiably worried about renewed Chinese interest in explosive nuclear testing. A resumption of testing would allow China to develop new warheads that are lighter and more efficient than those in their current arsenal. Lighter warheads would allow China to fit more of them on a single missile, multiplying the potential impact of its new silos. Using less fissile material in each warhead would allow China to construct a larger number of warheads. Moreover, renewed testing could enable China to develop low-yield warheads it does not currently possess. The entry into force of the CTBT would verifiably inhibit China from making all three of these improvements to its nuclear forces.

The second desired outcome is negotiating a Fissile Material Cut-off Treaty (FMCT). This international treaty would stop all production of weapons-grade nuclear material around the globe. China produced a limited amount of fissile material before agreeing to a voluntary moratorium it could end tomorrow. A treaty that verifiably cut-off China’s ability to produce more of this essential component of nuclear weapons would place a firm cap on the size of its nuclear arsenal. This is clearly in the interests of the United States and the best way to prevent a new nuclear arms race. The FMCT would place even stricter limits on the growth of China’s nuclear arsenal when combined with the entry into force of the CTBT, which would prevent China from conducting the tests that would be required to develop reliable new nuclear warheads that use less fissile material.

China is still willing to ratify the CTBT and negotiate an FMCT. The United States should seize the opportunity before it is too late. The only thing standing in the way is a lack of political will. US political leaders seem to lack faith in diplomacy. But greenlighting a new US nuclear build-up will never be able to solve the problem created by China’s new missile silos and protect the people of the United States from a Chinese nuclear attack. There is no indication that ballistic missile defense technology will ever be good enough to protect them either.

Now is not the time for the United States to hit the brakes on efforts to reduce the role of nuclear weapons in national security policy. It is the time to return to the international negotiating table where there is a chance to stop a new nuclear arms race before it gets started. President Biden should make this a priority as he puts together his Nuclear Posture Review.

Military minds always look for military solutions. But political leaders should know from experience that running a nuclear arms race is like playing tic-tac-toe. It is game no one can win. There is no military solution to the existential threat posed by nuclear weapons. Diplomacy, for all its faults and difficulties, is our only hope. When it comes to responding to China’s new missile silos, the entry into force of the CTBT and the FMCT would place verifiable and enduring limits on the size and sophistication of China’s nuclear forces.

### V. Aff---Ban Treaty

#### Replacing the NPT

Turner et al. 20, \*Katlyn M., research scientist in the Space Enabled Research Group at the MIT Media Lab. \*Lauren J. Borja, postdoctoral fellow at the Center for Global Affairs and Research at Lawrence Livermore National Laboratory. \*Denia Djokić, Postdoctoral Research Fellow at the Project on Managing the Atom at the Belfer Center for Science and International Affairs. \*Madicken Munk, postdoctoral scholar at the National Center for Supercomputing Applications at the University of Illinois at Urbana–Champaign. \*Aditi Verma, Stanton Nuclear Security Postdoctoral Fellow at the Belfer Center’s Project on Managing the Atom and the International Security Program (8-24-2020, "A call for antiracist action and accountability in the US nuclear community", Bulletin of the Atomic Scientists, <https://thebulletin.org/2020/08/a-call-for-antiracist-action-and-accountability-in-the-us-nuclear-community/>)

Perhaps the most lasting legacy of global colonialist attitudes in the nuclear field is the policy and discourse surrounding the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The nonproliferation regime of the NPT privileges “order” and security for the Western countries over justice, while leaving little space for considerations of race. The very notion of nuclear weapon and non-weapon states, and some of the language deployed to characterize this divide, perpetuates Western hegemony and dominance over the Global South. The existing nonproliferation regime lends credence and legitimacy to colonial attitudes about nuclear technology by legitimizing the possession of nuclear weapons by the United States, United Kingdom, France, Russia, and China while controlling the possession of both weapon and energy technology by other countries through a complex and intrusive international framework of safeguards and technology control. The NPT further gives nuclear weapon states a “big stick” over non-nuclear weapon states to lend legitimacy to military actions such as regime change against them. Finally, while the NPT calls for the weapon states to pursue “general and complete disarmament,” no nuclear weapon state has meaningfully complied with its treaty obligations to disarm—with the result that it indefinitely preserves an inequitable and unjust world order. (Despite early significant reductions in global nuclear warheads, progress has stalled and the rhetoric and policies of recent years have pointed toward nuclear modernization and arsenal expansion rather than disarmament.) Not only did the nonproliferation regime create an unjust and inequitable world order, it did so on the basis of a deeply flawed premise that proliferation could be prevented through supply-side technology controls.

The nuclear weapon states often minimize nuclear security causes championed by members of the Global South. At the 1955 Bandung Conference, representatives from 29 Asian and African countries called for disarmament and an end to the nuclear arms race, fully 15 years before the NPT came into effect. After France’s first nuclear test in 1960, widespread protests across the African continent condemned nuclear weapons testing in Algeria. Despite the outcry, the French government continued nuclear weapons testing at its Centre Saharien d’Expérimentations Militaires until 1966. To this day, France has not adequately compensated Algerian victims for the radioactive legacy of these tests. When South Africa’s apartheid government began to fray in the 1980s, it and the United States feared that its Western-aided nuclear program would fall into the hands of local liberation movements headed by African National Congress leaders. These fears played an important role in the apartheid government’s decision to unilaterally dismantle its weapons program and sign the NPT.

Most recently and notably, the United States dismissed and pressured its allies into dismissing the Treaty on the Prohibition of Nuclear Weapons, whose negotiation was presided over by Costa Rican Ambassador to the United Nations Elayne Whyte Gómez. Many established voices in the US nuclear community echoed the claim that the ban treaty would undermine the nuclear nonproliferation regime, despite the fact that it is fully in line with states’ NPT commitments to disarm. Additionally, the International Campaign to Abolish Nuclear Weapons received the 2017 Nobel Peace Prize for its “groundbreaking efforts” to establish the treaty, signaling the treaty’s gravity and importance and the statement it makes about peace and nuclear weapons. The minimization and delegitimization of the treaty’s early success—82 parties have signed on to date, all but five from the Global South—is part of a historic pattern of dismissing the united efforts and voices on nuclear policy from the Global South.

### VI. Aff---CBD

#### The US’s absence from the CBD discourages and fragments global ecosystem conservation---ratification revives cooperative efforts to safeguard biodiversity

Jones 21, MS, environmental reporter at Vox. Citing William Snape III, an environmental lawyer and an assistant dean at American University and senior counsel at the Center for Biological Diversity (Benji, 5-20-2021, "Why the US won’t join the single most important treaty to protect nature," Vox, <https://www.vox.com/22434172/us-cbd-treaty-biological-diversity-nature-conservation>)

Yet there’s one big problem with this post-Trump environmental renaissance: The US still hasn’t joined the most important international agreement to conserve biodiversity, known as the Convention on Biological Diversity (CBD). And it isn’t just a small, inconsequential treaty. Designed to protect species, ecosystems, and genetic diversity, the treaty has been ratified by every other country or territory aside from the Holy See. Among other achievements, CBD has pushed countries to create national biodiversity strategies and to expand their networks of protected areas.

Since the early 1990s — when CBD was drafted, with input from the US — Republican lawmakers have blocked ratification, which requires a two-thirds Senate majority. They’ve argued that CBD would infringe on American sovereignty, put commercial interests at risk, and impose a financial burden, claims that environmental experts say have no support.

With Biden now in office, some experts see a pathway to ratification — certainly, environmental groups are calling for it — while others say there’s no chance of wooing enough Republicans. But they all agree on one thing: The US’s absence from the agreement harms biodiversity conservation at a time when such efforts are desperately needed.

President Bush refused to sign a biodiversity treaty that the US helped craft

Nearly half a century ago, scientists were already warning that scores of species were at risk of going extinct — just as they are today. In fact, headlines from the time are eerily familiar: “Scientists say a million species are in danger,” read one in 1981, which is almost identical to a headline from 2019.

Those concerns ignited a series of meetings among environmental groups and UN officials, in the ’80s and early ’90s, that laid the groundwork for a treaty to protect biodiversity. US diplomats were very much involved in these discussions, said William Snape III, an environmental lawyer and an assistant dean at American University and senior counsel at the Center for Biological Diversity, an advocacy group.

“It was the United States who championed the idea of a Biodiversity Treaty in the 1980s, and was influential in getting the effort off the ground in the early 1990s,” Snape wrote in the journal Sustainable Development Law & Policy in 2010.

In the summer of 1992, CBD opened for signature at a big UN conference in Rio de Janeiro, Brazil. It laid out three goals: conserve biodiversity (from genes to ecosystems), use its components in a sustainable way, and share the various benefits of genetic resources fairly.

Dozens of countries signed the agreement then and there, including the UK, China, and Canada. But the US — then under President George H.W. Bush — was notably not one of them. And it largely came down to politics: It was an election year that pitted Bush against then-Arkansas Gov. Bill Clinton, and a number of senators in Bush’s party opposed signing the treaty, citing a wide range of concerns.

Among them was a fear that US biotech companies would have to share their intellectual property related to genetics with other countries. There were also widespread concerns that the US would be responsible for helping poorer nations — financially and otherwise — protect their natural resources, and that the agreement would put more environmental regulations in place in the US. (At the time, there was already pushback, among the timber industry and property rights groups, on existing environmental laws, including the Endangered Species Act.)

Some industries also opposed signing. As environmental lawyer Robert Blomquist wrote in a 2002 article for the Golden Gate University Law Review, the Pharmaceutical Manufacturers Association and Industrial Biotechnology Association both sent letters to Bush stating that they were opposed to the US signing CBD due to concerns related to IP rights.

President Clinton signed the treaty but failed to find support for ratification

In 1992, Clinton won the election and, in a move hailed by conservationists, signed the treaty shortly after taking office. But there was still a major hurdle to joining CBD — ratification by the Senate, which requires 67 votes.

Clinton was well aware of the CBD opposition in Congress. So when he sent the treaty to the Senate for ratification in 1993, he included with it seven “understandings” that sought to dispel concerns related to IP and sovereignty. Essentially, they make it clear that, as party to the agreement, the US would not be forced to do anything, and it would retain sovereignty over its natural resources, Snape writes. Clinton also emphasized that the US already had strong environmental laws and wouldn’t need to create more of them to meet CBD’s goals.

In a promising step, the bipartisan Senate Foreign Relations Committee overwhelmingly recommended that the Senate ratify the treaty, making it seem all but certain to pass. At that point, the biotech industry had also thrown its support behind the agreement, Blomquist wrote.

Nonetheless, then-GOP Sens. Jesse Helms and Bob Dole, along with many of their colleagues, blocked ratification of the convention from ever coming to a vote, Snape said, repeating the same arguments. The treaty languished on the Senate floor.

And that pretty much brings us up to speed: No president has introduced the treaty for ratification since.

GOP lawmakers still resist treaties — any treaties

Two and a half decades later, concerns related to American sovereignty persist, especially within the Republican Party, and keep the US out of treaties. Conservative lawmakers stand in the way of not only CBD but also several other treaties awaiting ratification by the Senate, including the UN Convention on the Rights of Persons With Disabilities.

“Conservative nationalists in the United States (including the Senate) have long mistrusted international agreements,” Stewart Patrick, director of International Institutions and Global Governance at the Council on Foreign Relations, said in an email to Vox. They view them, he added, “as efforts by the United Nations and foreign governments to impose constraints on US constitutional independence, interfere with US private sector activity, as well as create redistributionist schemes.”

In other words, not a whole lot has changed.

A week after Biden was sworn into office, the Heritage Foundation, an influential right-wing think tank, published a report calling on the Senate to oppose a handful of treaties while he’s in office, “on the grounds that they threaten the sovereignty of the United States.” They include CBD, the Arms Trade Treaty, and the Convention on the Elimination of All Forms of Discrimination Against Women, among others. (Environmental treaties like CBD tend to draw a stronger opposition from conservative lawmakers, who often fear environmental regulations, relative to other agreements, Snape said.)

Legal experts say concerns related to sovereignty aren’t justified. The agreement spells out that countries retain jurisdiction over their own environment. Indeed, US negotiators made sure of it when helping craft the agreement in the ’90s, Patrick recently wrote in World Politics Review. “States have ... the sovereign right to exploit their own resources pursuant to their own environmental policies,” reads Article 3 of CBD. (Article 3 goes on to say that states are also responsible for making sure they don’t harm the environment in other countries.)

“The convention poses no threat to U.S. sovereignty,” wrote Patrick, author of The Sovereignty Wars.

And what about the other concerns? The agreement stipulates that any transfer of genetic technology to poorer nations must adhere to IP rights in wealthier nations, Patrick writes. Clinton’s seven understandings also affirmed that joining CBD wouldn’t weaken American IP rights, and clarified that the treaty can’t force the US to contribute a certain amount of financial resources.

Joining the CBD is also unlikely to require anything in the way of new domestic environmental policies, Snape and Patrick said. “The U.S. is already in compliance with the treaty’s substantive terms: It possesses a highly developed system of protected natural areas, and has policies in place to reduce biodiversity loss in environmentally sensitive areas,” Patrick wrote.

Then again, given the country’s strong environmental laws, does it even matter if the US joins the agreement?

It would be a big deal if the US joined CBD

Many environmental groups and researchers say, yes, it does matter and are urging Biden to work with the Senate to ratify CBD. In a January 8 op-ed published in the Hill, Sarah Saunders, a researcher at the National Audubon Society, and Mariah Meek, an assistant professor at Michigan State University, wrote that “global biodiversity policy is at a pivotal crossroads, and the US needs to have a seat at the table before it is too late.” They also urged the US to fully fund the CBD secretariat, which oversees the convention.

The convention has its big meeting this coming fall in Kunming, China, at which parties will build a strategy for biodiversity conservation over the next decade and out to 2050, that’s likely to include a 30 by 30 pledge. The US plans to send a delegation to the conference, the State Department confirmed with Vox, but as a non-member, the country doesn’t have the right to vote (such as on CBD procedures, including the location of a meeting, and in elections for various leadership roles).

Some experts, including Patrick of the Council on Foreign Relations, say ratification is still possible. Conservation is among the few issues that have bipartisan support, he writes, mentioning that nearly a third of US House and Senate members are a part of the bipartisan International Conservation Caucus (ICC). (Vox reached out to all eight ICC co-chairs, including four GOP lawmakers. They all declined interview requests or did not respond.)

“Eventual US accession is possible,” Patrick wrote, assuming the treaty is accompanied by “specific reservations, understandings, and declarations to reinforce the intellectual property rights of American companies and mollify conservative Republican senators with unrealistic fears that the convention could undermine U.S. sovereignty.”

That sounds a lot like what Clinton tried to do back in the ’90s, leaving others with little optimism. Snape, for one, says there’s no chance of ratification in the next two years — and unlikely in the next 10. That view is shared by Brett Hartl, government affairs director at the Center for Biological Diversity. There’s simply not enough appetite among GOP lawmakers to sign treaties of any kind, they said. To get the required 67 votes, you’d need 17 of their votes, assuming all Democrats voted in favor of ratification.

(In response to a request for comment, the White House directed questions about the treaty to the State Department. A State spokesperson said the US “has always supported the objectives of the CBD and continues to be actively involved in its processes.” The department declined to comment on whether Biden would make ratifying the treaty a priority.)

But what experts can all agree on is that, by failing to join CBD, the US — which has a huge environmental footprint — is hampering global conservation efforts. “Our absence from the CBD keeps international biodiversity ‘out of sight, out of mind’ at a time when its priority needs to be elevated,” Brian O’Donnell, director of Campaign for Nature, a conservation group advocating to conserve at least 30 percent of Earth by 2030, said by email.

Nature isn’t bound by political borders, O’Donnell said. So, reaching the goals of CBD — which we have so far failed to do — requires international cooperation and coordination. The US’s absence makes that harder, he said. The US is also home to some of the world’s best conservation researchers and tools, including those used for monitoring wildlife populations, Snape added. “The rest of the world needs us,” he said.

There’s another key reason to join the agreement: The US could help other countries develop conservation strategies that don’t come at the expense of Indigenous people and local communities, which has been the case historically.

While the US is itself guilty of harming native populations for the sake of protecting wildlife (most famously when creating Yellowstone National Park), the country is trying to turn a new leaf on conservation, under the direction of Interior Secretary Deb Haaland, who is a member of the Laguna Pueblo. In its new 30 by 30 initiative, Interior vowed to do right by tribal organizations.

“Now that there’s a chance the US does the right thing on conservation, it’s important for them to join [CBD],” said Andy White, a coordinator at the nonprofit Rights and Resources Initiative. “The US participating in the CBD could bring a more rights-based approach to conservation.”

## Suggested Resolutions

### I. Resolution 1

The United States Federal Government should enter into an Article II treaty or congressional-executive agreement that substantially restricts one or more of the following:

- the quantity, deployment, and/or capabilities of its nuclear weapons

- the use, development, and/or deployment of artificial intelligence technology, including at least a prohibition on lethal autonomous weapon systems

- cyber-attacks on election infrastructure, nuclear systems, and/or critical infrastructure

### II. Resolution 2

The United States Federal Government should enter into an Article II treaty or congressional-executive agreement that binds it to one or more of the following:

- The Comprehensive Nuclear-Test-Ban Treaty

- The Treaty on the Prohibition of Nuclear Weapons

- The Rome Statute

- The UN Convention on the Law of the Sea

- The Convention on Biological Diversity

### III. Additional Wording Options

Options to more explicitly ensure that the commitment is enforced:

The United States Federal Government should enter into a **binding** Article II treaty or congressional-executive agreement that substantially restricts one or more of the following:

The United States Federal Government should enter into a **self-executing** Article II treaty or congressional-executive agreement that substantially restricts one or more of the following:

The United States Federal Government should enter into **and implement** an Article II treaty or congressional-executive agreement that substantially restricts one or more of the following:

The United States Federal Government should enter into **and enforce** an Article II treaty or congressional-executive agreement that substantially restricts one or more of the following:

### IV. Why Include Both CEAs and Treaties?

#### CEAs are treaties under international law. They’re almost always interchangeable.

Bradley 18, William Van Alstyne Professor, Duke Law School (Curtis A., “Exiting Congressional-Executive Agreements,” 67 Duke L.J. 1615, pg. 1626-1627, Available at: <https://scholarship.law.duke.edu/dlj/vol67/iss8/1>)

What about congressional-executive agreements? These agreements are fully “treaties” as a matter of international law.52 They also frequently contain withdrawal clauses just like those found in many modern Article II treaties. Presidential use of congressional-executive agreements in lieu of Article II treaties is generally assumed to be constitutionally permissible. It is not clear whether they are fully interchangeable with Article II treaties under U.S domestic law. A number of commentators, and the Restatement (Third) of Foreign Relations Law, argue that they are,53 **[BEGIN FOOTNOTE 53]** 53. See, e.g., RESTATEMENT (THIRD), supra note 8, § 303 cmt. e; HENKIN, supra note 7, at 217; Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 HARV. L. REV. 799, 806 (1995) (naming scholars who have argued in favor of full interchangeability); cf. Oona A. Hathaway, Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States, 117 YALE L.J. 1236, 1270 (2008) (concluding that congressional-executive agreements are almost always interchangeable with Article II treaties). **[END FOOTNOTE 53]** while others suggest modest limits based, for example, on historical practice.54 But everyone seems to agree that Article II treaties and congressional-executive agreements are roughly equivalent in legal status to federal statutes, and thus are subject to the later-in-time rule; that is, if a treaty or congressional-executive agreement conflicts with a federal statute, whichever came about later in time controls.55

#### There are procedural differences between an Article II treaty and a CEA, but there’s relative consensus that their outcomes are identical

Sia 20, JD Candidate, 2021, Fordham University School of Law. (Abigail L., November 2020, “Withdrawing from Congressional-Executive Agreements with the Advice and Consent of Congress,” Fordham Law Review 89, No. 2, pg. 803)

As a threshold matter, international law does not distinguish among Article II treaties, CEAs, and sole executive agreements as U.S. domestic law does.41 The Vienna Convention on the Law of Treaties (“the Vienna Convention”) considers all three types of agreements to be “treaties.”42 There also seems to be relative consensus in U.S. domestic law that Article II treaties and CEAs are interchangeable instruments.43

**[BEGIN FOOTNOTE 43]**

43. See RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 303 cmt. e (“Since any agreement concluded as a Congressional-Executive agreement could also be concluded by treaty . . . either method may be used in many cases. The prevailing view is that the Congressional-Executive agreement can be used as an alternative to the treaty method in every instance.”). But see generally Julian Nyarko, Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements, 113 AM. J. INT’L L. 54 (2019) (arguing that the distinct Article II treaty and CEA processes should be preserved); John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 MICH. L. REV. 757 (2001) (arguing against complete interchangeability); infra Part I.C (detailing differences between Article II treaties and CEAs).

**[END FOOTNOTE 43]**

### V. The Case for Resolution 1

We are confident that both proposed resolutions are excellent options for a topic. Of the two, the benefits of resolution 1 may not be apparent. Here are two positions we encourage you to consider:

a---neg ground. The DAs to the substance of many existing, unratified agreements are, candidly, limited. The US already complies with many of the provisions of the CTBT and UNCLOS. Outside the Heritage foundation, there’s little pushback to acceding to the Rome Statute or CBD. And since these options are negotiated in advance, no dip cap. The aff may not need to win “say yes” either, since many other powers have already adopted these agreements.

BUT, if the resolution forces the aff to propose a big treaty, the neg gets DAs to the diplomatic resources required to build a new agreement from the ground up. It also guarantees uniqueness for DAs regarding the substance of the agreement since the US cannot abide by the provisions of a treaty that does not yet exist.

b---more interesting debates. This is subjective, of course, but we are more strongly drawn to researching and debating about novel international agreements. Topics like the effects of exotic weapons, the concessions we’d offer to secure an agreement, whether other parties comply, and what happens if they don't are more intriguing and controversial than, say, whether the US should agree to ban nuclear testing (something we haven't done since 1992).

Concerned about limits? The resolution’s planks require large-scale, salient changes from the status quo that meaningfully constrain US freedom of action. A well-worded topic would bake in strong generics and narrow the range of viable affs. Great-power hostility, which the Ukraine crisis has deepened, already makes “say yes” a strenuous requirement. A treaty centered on something minute and inconsequential would struggle to surmount these barriers and defend itself against positions like unilat, soft law, and sole executive CPs.

# APPENDIX

## I. BACKGROUND

## Topic Primer

### I. Overview

#### The US has three ways to enter into a binding international agreement: a treaty, CEA, or sole executive agreement. International law recognizes all three as “treaties,” but the US reserves that term for Senate-approved and ratified agreements.

Taxman 19, JD, Georgetown; Law Clerk, Court of Appeals for the Eighth Circuit; Ensign, US Navy Reserve (Dyllan Moreno, Fall 2019, "Unratified Treaties and the Constitutionality of Signatory Obligations: A Conceptual Solution," University of Memphis Law Review 50, No. 1, pg. 140-141)

II. U.S. TREATY LAW AND EXECUTIVE AGREEMENTS

The United States enters into international agreements primarily in three ways: through treaties, congressional-executive agreements, and sole- or presidential-executive agreements.7 Each creates a legally binding obligation and is considered a "treaty" at international law.8

The term "treaty" has a distinct meaning in the context of U.S. domestic law. Only those international agreements that receive the advice and consent of the Senate by a two-thirds majority vote prior to ratification by the President are considered "treaties" under American law.9 Although Article II limits the President's power to make treaties by requiring a two-thirds vote in the Senate,10 the President, as the "sole organ of the nation in its external relations, and its sole representative with foreign nations," has unlimited authority in the actual negotiation of a treaty, including signing." If the Senate votes by a two-thirds majority to provide advice and consent,12 it then returns the approved treaty to the President for final ratification.13 After ratification, the United States is bound to observe the tenets of the treaty both under international and domestic law.14 If the Senate withholds advice and consent, the treaty remains with the Senate and can be held for another vote in the next Congress, or the Senate may decide to return the treaty to the President, who cannot then ratify the treaty.'15

#### These three mechanisms have different approval processes and requirements. Treaties require approval by two-thirds of the Senate, CEAs require approval by a simple bicameral majority, and sole executive agreements require no congressional input.

Nyarko 19, Postdoctoral Fellow in Empirical Law and Economics, Ira M. Millstein Center for Global Markets and Corporate Ownership, Columbia Law School. (Julian, “Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,” American Journal of International Law 113, No. 1, pg. 57-58, https://doi.org/10.1017/ajil.2018.103)

II. THEORY

The United States has two different mechanisms for concluding binding international agreements.19 The first option is the traditional treaty. Treaties follow the advice and consent procedure set forth in Article II of the Constitution, which requires that, while a treaty is negotiated by the executive, it must still be approved by a two-thirds majority in the Senate in order to be ratified and become binding.20

The second option is the executive agreement. Executive agreements can further be categorized into different types. Congressional-executive agreements require a simple majority in both the House of Representatives and the Senate.21 They are used in subject areas in which the executive does not have sole competences. Congressional approval can be obtained after the agreement was negotiated, as was the case with the North American Free Trade Agreement (NAFTA)22 or the Uruguay Round Agreements of the General Agreement on Tariffs and Trade.23 However, it is much more common for Congress to provide broad authorization to the president ex ante in a statute.24

If the executive has the competence to make policy without referring to Congress, the president may use sole executive agreements. Such areas encompass, among others, issues under the president’s general executive authority or his role as commander in chief of the armed forces.25 Sole executive agreements do not require congressional approval, but, like congressional-executive agreements, need to be reported to Congress under the Case Act.26

The terminology surrounding the different types of executive agreements has sometimes caused confusion. Political scientists rarely distinguish between different types of executive agreements. When the unmodified term “executive agreement” appears in the political science literature, it commonly refers to the collective of both sole and congressional-executive agreements. In contrast, when international legal scholars use the term “executive agreement,” they typically refer to sole executive agreements, whereas the collective of both sole and congressional-executive agreements is not associated with any specific term. In order to preserve flexibility and precision in language, the present Article uses modifiers whenever it refers to a specific type of executive agreement. The unmodified term “executive agreement” is used to refer to the collective of both sole and congressional-executive agreements.

### II. Congressional Involvement

#### Nearly 94% of international agreements involve no meaningful congressional input.

Bradley & Goldsmith 18, \*William Van Alstyne Professor of Law, Duke Law School. \*\*Henry L. Shattuck Professor of Law, Harvard Law School. (Curtis A. and Jack L., March 2018, "Presidential Control over International Law," Harvard Law Review 131, No. 5, pg. 1212-1213)

3. Decline of Congressional Participation in Nontreaty Agreements. – The relative decline of treaties and the relative increase in executive agreements do not by themselves tell us much about the frequency of unilateral executive lawmaking. To see the extent of presidential unilateralism and the decline of collaborative international lawmaking, we must break down the approximately 94% of U.S. international agreements made in the last several decades that are not treaties. One category of agreement, the ex post congressional-executive agreement, is akin to the treaty in terms of interbranch collaboration because Congress (as opposed to the Senate) can review the deal made by the President and decide whether or not to approve it. But the United States very rarely makes this form of agreement; based on our review, it has averaged no more than about one per year of these agreements in recent decades, having almost no effect on the percentages.26 As a result, close to 94% of binding international agreements made by the United States are made without meaningful interbranch deliberation and are thus vehicles for unilateral presidential lawmaking.

The largest category of U.S. international agreements, approximately 80-85% of the total, consists of ex ante congressional-executive agreements.27 As Professor Oona Hathaway has shown in her foundational work in this area, such agreements generally involve little if any meaningful congressional input.28 In contrast to treaties and ex post congressional-executive agreements, the President does not bring a negotiated ex ante agreement with specific terms to Congress for its debate and approval (or rejection). Instead, Congress provides the President with general advance authorization to make an agreement (or many agreements) that the President in his or her broad discretion can negotiate, conclude, and ratify without ever returning to Congress for its review, much less approval. Moreover, the purported authorization for most ex ante congressional-executive agreements is vague and enacted many years before the agreement.

#### Presidential unilateralism is dominant.

Bradley & Goldsmith 18, \*William Van Alstyne Professor of Law, Duke Law School. \*\*Henry L. Shattuck Professor of Law, Harvard Law School. (Curtis A. and Jack L., March 2018, "Presidential Control over International Law," Harvard Law Review 131, No. 5, pg. 1214-1215)

We can now see why the sharp decline in the percentage of treaties and the rise in executive agreements indicate a sharp drop in meaningful interbranch collaboration and a rise in presidential unilateralism in the making of international agreements. Genuine interbranch collaboration via Article II treaties or ex post congressional-executive agreements occurs for approximately 6-7% of binding U.S. international agreements. Approximately 80-85% of U.S. international agreements are ex ante congressional-executive agreements that involve no meaningful interbranch collaboration.3 5 Executive agreements pursuant to treaties, which we estimate make up approximately 1-3% of U.S. agreements, involve no more meaningful interbranch collaboration than ex ante congressional-executive agreements, and basically for the same reason. 36 And about 5-10% of U.S. agreements are sole executive agreements which Presidents make unilaterally on their own constitutional authority.37 While it is impossible to tell precisely the percentage allocation of these three instruments, one can say with confidence that they together make up close to 94% of all binding U.S. agreements.

In her 2009 study of congressional-executive agreements, Hathaway concludes that the task of making international agreements "has come to be borne almost entirely by the President alone."3 The President's unilateral powers have only increased since that time with the precipitous decline in the use of treaties under President Obama. Two other developments, to which we now turn, have left the President in an even more dominant position when it comes to making international agreements for the United States.

### III. Courts

#### Courts give treaty provisions the force of law only they’re implemented as a policy OR they’re found to be “self-executing,” meaning policymakers intended for the courts to enforce them without follow-on legislation. BUT, all agreements are binding.

Kirgis 97, Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. (Frederic L., 5-27-1997, “International Agreements and U.S. Law”, ASIL Volume 2 Issue 5, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>)

Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are “self-executing” or if they have been implemented by an act (such as an act of Congress) having the effect of federal law. Courts in this country have been reluctant to find such provisions self-executing, but on several occasions they have found them so---sometimes simply by giving direct effect to the provisions without expressly saying that they are self-executing. There are varying formulations as to what tends to make a treaty provision self-executing or non-self-executing, but within constitutional constraints (such as the requirement that appropriations of money originate in the House of Representatives) the primary consideration is the intent---or lack thereof---that the provision become effective as judicially-enforceable domestic law without implementing legislation. For the most part, the more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing. A provision in an international agreement may be self-executing in U.S. law even though it would not be so in the law of the other party or parties to the agreement. Moreover, some provisions in an agreement might be self-executing while others in the same agreement are not.

All treaties are the law of the land, but only a self-executing treaty would prevail in a domestic court over a prior, inconsistent act of Congress. A non-self-executing treaty could not supersede a prior inconsistent act of Congress in a U S. court. A non-self-executing treaty nevertheless would be the supreme law of the land in the sense that--as long as the treaty is consistent with the Bill of Rights--the President could not constitutionally ignore or contravene it.

#### Regardless of whether courts qualify a provision as self-executing, judges avoid creating legal conflicts with treaties and shield them from state pushback

Kirgis 97, Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. (Frederic L., 5-27-1997, “International Agreements and U.S. Law”, ASIL Volume 2 Issue 5, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>)

Even if a treaty or other international agreement is non-self-executing, it may have an indirect effect in U.S. courts. The courts' practice, mentioned above, of interpreting acts of Congress as consistent with earlier international agreements applies to earlier non-self-executing agreements as well as to self-executing ones, since in either case the agreement is binding internationally and courts are slow to place the United States in breach of its international obligations. In addition, if state or local law is inconsistent with an international agreement of the United States, the courts will not allow the law to stand. The reason, if the international agreement is a self-executing treaty, is that such a treaty has the same effect in domestic courts as an act of Congress and therefore directly supersedes any inconsistent state or local law. If the international agreement is a non-self-executing treaty, it would not supersede inconsistent state or local law in the same way a federal statute would, but the courts nevertheless would not permit a state of the union to force the United States to breach its international obligation to other countries under the agreement. The state or local law would be struck down as an interference with the federal government's power over foreign affairs.

### IV. Ratification

#### In the US, ratification is a three-step process involving negotiation, Senate approval, and entry into force.

Richmond Law 19 (Last updated: 6-18-2019, “Treaties and International Agreements: Important Concepts,” <https://law-richmond.libguides.com/treaties>)

The Process of Ratifying Treaties in the United States

1. Negotiation

A treaty often undergoes a number of negotiations and revisions before it is signed, but that is only the first step that it takes on the way to becoming an official, ratified treaty. Negotiation of treaties is the responsibility of the Executive Branch.

First, the Secretary of State authorizes the beginning of the negotiation process.

The U.S. Department of State Foreign Service generally conducts treaty negotiations. Representatives from the United States, which can include any number of diplomats, members of the Senate, and representatives from the Executive Branch, negotiate with the other states that will be parties to the agreement. Do not assume that the countries involved in negotiation are the only countries party to the treaty; other countries can later sign onto a treaty after it has entered into force through a process called “accession,” which has the same effect as ratification.

Once terms are agreed upon, the Secretary of State will authorize the signing of the treaty. Note that this does not automatically place the treaty in force.

Once a treaty is negotiated and signed by the President, an announcement is often made via Press Release from both the White House and the Department of State.

The White House and the Department of State will usually announce when the Executive Branch begins negotiation of a treaty via press release.

2. Transmission to Senate

Under U.S. law, a treaty is an agreement made “by and with the advice and consent of the Senate,” pursuant to Article II, Section 2, Clause 2 of the Constitution. In order to be considered a treaty under U.S. law, the document must go through a second set of steps in which it is approved by the Senate.

After the document is finalized by the Executive, it must be sent to the Senate for consideration before it can be ratified.

The Senate Foreign Relations Committee considers the treaty and reports to the full Senate.

A two-thirds majority vote is required in order for the Senate to approve the treaty.

3. Entry into Force

After approval, the President may proclaim that the treaty has entered into force.

Each treaty is different; multilateral treaties will have specific language about how and when a treaty will enter into force. For multilateral treaties, often a certain threshold number of parties must sign and ratify the treaty--through the process specific to that country--before it enters into force. Read the treaty language carefully when researching to determine whether the treaty is in force.

#### Here’s an overview of the treaty ratification process---it involves publishing extensive analysis, holding expert hearings, building political support, and warding off poison pills.

Brooks 21, served as the Under Secretary of Energy for Nuclear Security from 2002 to 2007. In the early 1990s, he was the chief U.S. negotiator for the first Strategic Arms Reduction Treaty. Currently a Senior Advisor at the Center for Strategic and International Studies, a Distinguished Research Fellow at the National Defense University, a member of the National Academy of Sciences Committee on International Security and Arms Control, and an advisor to six U.S. Department of Energy national laboratories (Linton F., September 2021, “How to Succeed at Arms Control Despite Tough Odds”, Arms Control Today 51:7, book review of *Negotiating the New START Treaty* by Rose Gottemoeller, pg. 43, Accessed via ProQuest)

The Ultimate Goal: Ratification

There are countries where ratification of a treaty signed by the president is a pro forma matter. The United States is not one of them. The constitutional requirement that U.S. treaties require the “advice and consent” of the Senate by a two-thirds majority vote fundamentally shapes ratification politics. The United States has a deep commitment to freedom of action and tends to dislike being bound by any treaty, no matter how benign. Thus, it is always an uphill battle to achieve advice and consent.

Ratification has official and unofficial components. The official aspects are well understood. When submitted, the treaty is accompanied by a detailed article-by-article analysis so that the Senate and the executive branch can be clear on what they are approving. Hearings are held, and hundreds, perhaps thousands, of questions for the record are asked and answered. Some questions may embody a deeply held concern that needs to be met by a skillful, nuanced answer. The crucial vote of a single senator could hang on that answer. Because it is difficult to know what questions could be important, immense effort must be put into all answers. The arduous nature of this process is only completely clear to those who have been through it.

Another aspect of ratification is building informal support from outside government. Gottemoeller's book is invaluable in illuminating this process. Working with long-time State Department official Terri Lodge, who performed a similar function with both treaties I negotiated but with far less help from me, Gottemoeller organized a deluge of pro-treaty letters aimed at individual senators, as well as pro-treaty statements from many religious denominations. The purpose was to strengthen support among senators already committed to the treaty and provide those who were still on the fence with further justification for favoring ratification.

The final aspect of ratification, also well described in the book, is to ensure that the resolution of ratification passed by the Senate does not contain any poison pills. The resolution for New START is six pages long. Few non-experts think it is important, and even fewer have read it. It provides some “sense of the Senate” nonbinding language and a long series of actions, primarily reports, the executive branch must take prior to ratification. What it does not include and what Gottemoeller and Lodge worked diligently to prevent was any condition requiring action by Russia that could preclude the treaty from coming into force. That is what happened in 1996 when the Senate’s approval of START II, which would have banned all intercontinental ballistic missiles with multiple independently targetable reentry vehicles, directed that ratification “shall not be interpreted as an obligation by the United States to accept any modification, change in scope, or extension” of the 1972 Anti-Ballistic Missile (ABM) Treaty. After the Russian legislature’s ratification law required U.S. ratification of the 1997 ABM Demarcation Agreements as a condition for START II to enter into force, it became impossible to bring the treaty into effect.

## Relevant Terms and Definitions

### I. Treaties

#### In the US, “treaties” describe binding agreements between nations made with the advice and consent of the Senate.

Library of Congress 01 (“What is a Treaty?”, <https://www.loc.gov/rr/main//govdocsguide/TreatyDefinition.html>)

Treaties are a serious legal undertaking both in international and domestic law. Internationally, once in force, treaties are binding on the parties and become part of international law. Domestically, treaties to which the United States is a party are equivalent in status to Federal legislation, forming part of what the Constitution calls “the supreme Law of the Land.” However, the word treaty does not have the same meaning in the United States and in international law. Under international law, a “treaty” is any legally binding agreement between nations. In the United States, the word treaty is reserved for an agreement that is made “by and with the Advice and Consent of the Senate” (Article II, Section 2, Clause 2 of the Constitution). International agreements not submitted to the Senate are known as “executive agreements” in the United States, but they are considered treaties and therefore binding under international law.

#### Under international law, a “treaty” is any interstate agreement---BUT, the US has narrowly interpreted the term as an agreement that has been approved by the Senate and ratified by the President

Kirgis 97, Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. (Frederic L., 5-27-1997, “International Agreements and U.S. Law”, ASIL Volume 2 Issue 5, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>)

Under international law a "treaty" is any international agreement concluded between states or other entities with international personality (such as public international organizations), if the agreement is intended to have international legal effect. The Vienna Convention on the Law of Treaties sets out an elaborate set of international law standards for treaties, broadly defined.

“Treaty” has a much more restricted meaning under the constitutional law of the United States. It is an international agreement that has received the “advice and consent” (in practice, just the consent) of two-thirds of the Senate and that has been ratified by the President. The Senate does not ratify treaties. When the Senate gives its consent, the President—acting as the chief diplomat of the United States—has discretion whether or not to ratify the instrument. Through the course of U. S. history, several instruments that have received the Senate's consent have nonetheless remained unratified. Those instruments are not in force for the United States, despite the Senate's consent to them.

#### The term “treaty” is reserved for international agreements submitted for Senate approval.

Duke No Date, \*Duke University School of Law, \*\*University of California, Berkeley, School of Law. (“U.S. Treaties & Agreements - The Process”, International Legal Research Tutorial, <https://law.duke.edu/ilrt/treaties_3.htm>)

U.S. Treaties & Agreements - The Process

Under U.S. law,

treaties are equivalent in status to Federal legislation;

a distinction is made between the terms treaty and agreement;

the word treaty is reserved for an agreement that is made by and with the Advice and Consent of the Senate (Article II, section 2, clause 2 of the Constitution);

agreements not submitted to the Senate are known as executive agreements; and

regardless of whether an international agreement is called a convention, agreement, protocol, accord, etc., if it is submitted to the Senate for advice and consent, it is considered a treaty under U.S. law.

Note that under international law, both types of agreements are considered binding.

For more information about treaties, see Frederic Kirgis, International Agreements and U.S. Law and Treaties and Other International Agreements: The Role of the United States Senate: A Study, prepared for the Committee on Foreign Relations, United States Senate, S. Print 106-71 (note that this is a long document and can take some time to load).

#### The Constitution requires treaties to secure Senate approval, but informal executive agreements can circumvent that requirement.

Wex 21, the Wex Definitions Team is a group of Cornell Law Students organized and supervised by LII Original Content Collections Manager Nichole McCarthy to provide enhanced definitions of important legal terms. (Nations, Last updated August 2021, “Treaty”, Legal Information Institute, <https://www.law.cornell.edu/wex/treaty>)

A treaty is a formally signed and ratified agreement between two or more nations or sovereigns; a contract between two or more countries that is adhered to by the nations party to it; an international agreement between two or more states that is governed by international law.

In the United States, treaties are federal law and thus preempt state law. The treaty power is granted by Article II, Section 2 of the Constitution, under which the President may make a treaty by and with the advice and consent of the Senate, with the concurrence of two-thirds of those present. To circumvent this requirement, a President may enter informal treaties by executive agreements with the leaders of other nations.

### II. Article II Treaties

#### “Article II treaties” must follow the Article II pathway for ratification, including securing the consent of two-thirds of the Senate.

Cohen 19, Professor in International Law, University of Georgia (Harlan Grant, “Introduction to the Symposium on Julian Nyarko, ‘Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,’” 113 AJIL Unbound 169, pg. 169-170, doi:10.1017/aju.2019.26\_

As Nyarko explains, the United States has multiple distinct processes for ratifying treaties. One, laid out in Article II of the U.S. Constitution, allows the president to negotiate treaties, and after receiving the advice and consent of two-thirds of the Senate, ratify them on behalf of the United States (Article II treaties). A second, developed through practice, allows the president to negotiate and, with either prior or subsequent consent of majorities of both houses of Congress, ratify the agreement (CEAs). A third relies on the president alone to bind the United States on issues within the president’s constitutional authority (sole executive agreements). Assuming that the first two are legally interchangeable,3 the question is whether to choose one method or the other. And the stakes of the question become even higher when weighed against the modern political reality that garnering the consent of two-thirds of the Senate is simply harder than getting congressional support for a CEA. In fact, for many potential agreements, a statute authorizing future agreements may already be on the books, ready to be used. If no good reasons can be shown for choosing the Article II route, perhaps—as Oona Hathaway suggests4—it should be abandoned altogether in favor of CEAs.

#### By definition, “Article II” means Senate approval.

Taxman 19, JD, Georgetown; Law Clerk, Court of Appeals for the Eighth Circuit; Ensign, US Navy Reserve (Dyllan Moreno, Fall 2019, "Unratified Treaties and the Constitutionality of Signatory Obligations: A Conceptual Solution," University of Memphis Law Review 50, No. 1, pg. 138-139)

In the case of unratified treaties, the President uses the Article II Negotiation Power to bind the nation to signatory obligations after signing a treaty that fails in the Senate.2 **[BEGIN FOOTNOTE 2]** 2. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(1), § 303 cmt. a, § 303 reporters' notes 1 (AM. LAW INST. 2018). By definition, the Article II treaty-making process requires the consent of the Senate. U.S. CONST. art. II, § 2, cl. 2. However, it is the President's Negotiation Power, pursuant to the execution of Article II treaties, that implicates the issue subject to this Essay's analysis. **[END FOOTNOTE 2]** The United States recognizes, as a feature of customary international law, that signatories to an unratified treaty have an obligation to refrain from acts that frustrate the "object and purpose" of the signed treaty.3 The Supreme Court has also held that rules of customary international law, like the "object and purpose" obligation, can be binding domestic law.4 Even under a narrow view of the "object and purpose" requirement, a signatory to the aforementioned hypothetical environmental treaty may frustrate the treaty's "object and purpose" by continuing to use prohibited pollutants, undermining global efforts to reverse or slow climate change. 5 But Article II requires Senate advice and consent for the treaty to become law, and it appears unlikely that the President could implement the signatory obligations of the unratified environmental treaty using constitutionally enumerated powers alone. 6 How can the United States resolve its obligation under international and domestic law to preserve the "object and purpose" of an unratified treaty when doing so may require acts outside the President's constitutional authority, and the provisions of Article II have not been satisfied?

#### An “Article II treaty” requires a Senate supermajority.

Bradley et al. 18, \*Curtis, Professor of Law and Public Policy Studies at Duke. \*\*Oona A. Hathaway, Professor of International Law and director of the Center for Global Legal Challenges at Yale. \*\*\*Jack Goldsmith, Professor at Harvard Law, co-founder of Lawfare, and a Senior Fellow at the Hoover Institution. (12-13-2018, "The Death of Article II Treaties?", Lawfare, <https://www.lawfareblog.com/death-article-ii-treaties>)

First, a little background. The only process specified in the U.S. Constitution for making international agreements is the one set forth in Article II, which requires that the president obtain the advice and consent of two-thirds of the Senate. For many decades, however, presidents have concluded the vast majority of international agreements through executive agreement processes involving either majorities in both houses of Congress (“congressional-executive agreements”) or unilateral presidential action (“sole executive agreements”). Some commentators, including one of the present authors (Hathaway) have suggested that ex post congressional-executive agreements in particular—those approved by Congress after negotiation, like the North American Free Trade Agreement—have become legally interchangeable with Article II treaties, or at least nearly so. But ex post congressional-executive agreements are even rarer than treaties. The vast majority of international agreements, 93 percent or so, do not receive post-negotiation approval from any chamber of Congress. They are, instead, either ex ante congressional-executive agreements (in which Congress authorizes the president in advance to make and conclude agreements), executive agreements pursuant to a prior treaty or sole executive agreements (the president acting alone).

Despite the availability of these alternatives, presidents in the past have still used the Article II process for some agreements. Most human rights, extradition and arms control agreements have been submitted to the Senate, for example. Sometimes presidents submit agreements to the Senate even though it is clear that consent from two-thirds of that body will be difficult to obtain, and in many instances those treaties are either not reported out of the Senate Foreign Relations Committee or even defeated on the Senate floor. Sometimes the Senate has insisted that certain agreements, such as arms control agreements, be concluded through the Article II process, and presidents have sometimes acquiesced. In other words, Article II treaties, although a small fraction of the overall number of agreements concluded by the executive, have until recently played a meaningful role in U.S. foreign relations law and policy. That no longer seems to be the case.

### III. Treaties vs. Executive Agreements

#### Here’s a comparison of the process of treaty-making and agreement-making.

Duke No Date, \*Duke University School of Law, \*\*University of California, Berkeley, School of Law. (“U.S. Treaties & Agreements - The Process”, International Legal Research Tutorial, <https://law.duke.edu/ilrt/treaties_3.htm>)

Ratification & Implementation of U.S. Treaties and Agreements

When conducting U.S. treaty research, it is important to understand the ratification and implementation process. Negotiation of treaties and international agreements is the responsibility of the Executive Branch.

Outline of the Treaty Making Process

Secretary of State authorizes negotiation.

U.S. representatives negotiate.

Agree on terms, and upon authorization of Secretary of State, sign treaty.

President submits treaty to Senate.

Senate Foreign Relations Committee considers treaty and reports to Senate.

Senate considers and approves by 2/3 majority. President proclaims entry into force.

Outline of the Agreement Making Process

Secretary of State authorizes negotiation.

U.S. representatives negotiate.

Agree on terms, and upon authorization of Secretary of State, sign agreement.

Agreement enters into force.

### IV. CEAs

#### “Congressional-executive agreements” are binding international agreements authorized by Congress.

Taxman 19, JD, Georgetown; Law Clerk, Court of Appeals for the Eighth Circuit; Ensign, US Navy Reserve (Dyllan Moreno, Fall 2019, "Unratified Treaties and the Constitutionality of Signatory Obligations: A Conceptual Solution," University of Memphis Law Review 50, No. 1, pg. 141)

Congressional-executive agreements are legally binding international agreements authorized by an act of Congress.16 Congress can either prospectively authorize the President to execute an international agreement, or it can retrospectively authorize a finalized agreement, giving it the force of law.17 Congressional-executive agreements are not considered treaties at domestic law and are not subject to the Article II advice and consent requirement.18 Congressional-executive agreements require House and Senate majorities and have broad applicability.19 While certain areas of international deal-making are customarily reserved for Article II treaties,20 congressional-executive agreements have come to significantly outnumber Article II treaties in usage.21

#### Trade agreements, for example, have been treated as CEAs rather than treaties.

Smith et al. 13, all legislative attorneys (Jane M., Daniel T. Shedd, Brandon J. Murrill, 4-15-2013, “Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than Treaties,” CRS, <https://sgp.fas.org/crs/misc/97-896.pdf>)

Summary

U.S. trade agreements such as the North American Free Trade Agreement (NAFTA), World Trade Organization agreements, and bilateral free trade agreements (FTAs) have been approved by majority vote of each house rather than by two-thirds vote of the Senate—that is, they have been treated as congressional-executive agreements rather than as treaties. The congressional-executive agreement has been the vehicle for implementing Congress’s long-standing policy of seeking trade benefits for the United States through reciprocal trade negotiations. In a succession of statutes, Congress has authorized the President to negotiate and enter into tariff and nontariff barrier (NTB) agreements for limited periods, while permitting NTB and free trade agreements negotiated under this authority to enter into force for the United States only if they are approved by both houses in a bill enacted into public law and other statutory conditions are met; implementing bills are also accorded expedited consideration under the scheme. This negotiating authority and expedited procedures are commonly known as Trade Promotion Authority (TPA).

### V. Accession

#### “Accession” means becoming party to a treaty that other states have already signed and negotiated.

UNTC No Date, United Nations Treaty Collection. ("Glossary of terms relating to Treaty actions," <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>)

Accession

"Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question.

[Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]

### VI. Ratification

#### The UN defines “ratification” as an act that indicates a state’s consent to be bound to a treaty.

UNTC No Date, United Nations Treaty Collection. ("Glossary of terms relating to Treaty actions," <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>)

Ratification

Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty.

[Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]

#### The Senate approves or rejects a resolution of ratification. After Senate approval, it becomes available for ratification.

US Senate 21 (3-3-2021, Date obtained via carbon dating, “U.S. Senate: About Treaties”, <https://www.senate.gov/about/powers-procedures/treaties.htm>)

The United States Constitution provides that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur” (Article II, section 2). Treaties are binding agreements between nations and become part of international law. Treaties to which the United States is a party also have the force of federal legislation, forming part of what the Constitution calls ''the supreme Law of the Land.''

The Senate does not ratify treaties. Following consideration by the Committee on Foreign Relations, the Senate either approves or rejects a resolution of ratification. If the resolution passes, then ratification takes place when the instruments of ratification are formally exchanged between the United States and the foreign power(s).

The Senate has considered and approved for ratification all but a small number of treaties negotiated by the president and his representatives. In some cases, when Senate leadership believed a treaty lacked sufficient support for approval, the Senate simply did not vote on the treaty and it was eventually withdrawn by the president. Since pending treaties are not required to be resubmitted at the beginning of each new Congress, they may remain under consideration by the Senate Foreign Relations Committee for an extended period of time.

In recent decades, presidents have frequently entered the United States into international agreements without the advice and consent of the Senate. These are called “executive agreements.” Though not brought before the Senate for approval, executive agreements are still binding on the parties under international law.

### VII. Acceptance/Approval

#### “Acceptance” and “approval” have the same legal effect as ratification and codify a treaty as binding.

UNTC No Date, United Nations Treaty Collection. ("Glossary of terms relating to Treaty actions," <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>)

Acceptance and Approval

The instruments of "acceptance" or "approval" of a treaty have the same legal effect as ratification and consequently express the consent of a state to be bound by a treaty. In the practice of certain states acceptance and approval have been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state.

[Arts.2 (1) (b) and 14 (2), Vienna Convention on the Law of Treaties 1969]

### VIII. Entry into Force

#### “Entry into force” describes when the treaty’s provisions become binding.

UNTC No Date, United Nations Treaty Collection. ("Glossary of terms relating to Treaty actions," <https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml>)

Entry into Force

Typically, the provisions of the treaty determine the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty. Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of states to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied, e.g., by specifying that a certain category of states must be among the consenters. The treaty may also provide for an additional time period to elapse after the required number of countries have expressed their consent or the conditions have been satisfied. A treaty enters into force for those states which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally.

[Art.24, Vienna Convention on the Law of Treaties 1969]

## Uniqueness

### I. U

#### [Also in the overview] Veto players, norms, and nationalism block treaties and CEAs. Biden will only join international agreements that don’t require congressional approval.

Alvarez 21, Herbert and Rose Rubin Professor of International Law @ NYU (José, Winter 2021, “Biden’s International Law Restoration,” Journal of International Law and Politics, Volume 53, Number 2, <https://www.nyujilp.org/wp-content/uploads/2021/04/NYI205.pdf>)

A. Reluctance to Enter into Multilateral Treaties

Those who focus on multilateral treaties, the bright shining objects that draw the most attention of international lawyers, and hope that President Biden will usher in new U.S. accessions to treaties that much of the civilized world joined long ago are going to be brutally disappointed. It is more plausible that President Biden will join (or rejoin) high-profile multilateral arrangements only if they do not require congressional approval.

Although Democrats managed (just) to regain control of the Senate, it is unlikely that the United States will ratify the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the American Convention of Human Rights, the Convention on the Rights of the Child, the United Nations Convention on the Law of the Sea (UNCLOS), or the Statute of the International Criminal Court (Rome Statute) or its Kampala amendments on the crime of aggression. Similarly, the Biden administration probably will not rescind all U.S. reservations from the International Covenant on Civil and Political Rights (ICCPR) or even the Convention Against Torture. The country that took some forty years to ratify the Genocide Convention does not change its spots quickly; certainly it will not do so at a time when much of the world (not only the United States) has been exceedingly wary about negotiating new global treaties.4

President Biden has already fulfilled his promise to have the United States rejoin the Paris Agreement on Climate Change,5 a move made easier by the fact that reentering the treaty did not require Congress’s approval,6 even though changes in U.S. law requiring congressional action would be desirable to make the agreement truly effective. His administration is also likely to pledge, as has China, that it will significantly lower the level of U.S. carbon emissions by a certain date. Changes to EPA policies and individual U.S. states’ climate change mitigation efforts may achieve such a goal even if Congress fails to act.7 Consistent with Pope Francis’s plea to protect the planet in his encyclical letter, Laudate, 8 and Biden’s embrace of climate change issues, the new administration could embrace related international proposals that received the back of the hand from Trump, including ideas for a global phase-out of fossil fuel subsidies through the G20 and WTO, efforts to protect the Arctic in the Arctic Council, or initiatives to reduce greenhouse gas emissions in maritime shipping under the International Maritime Organization.9 Because they do not require congressional approval, soft law pacts, such as the 2018 Global Compact for Safe, Orderly and Regular Migration intended to mitigate the harms of climate change migration,10 are also likely to attract the attention of Biden and his Climate Change czar, John Kerry.11 Of course, whether such soft commitments will actually affect the number of immigrants admitted into the United States remains unclear, particularly if majorities in Congress resist the more open immigration policies expected under the new administration.

Since the United States and China jointly account for forty percent of global greenhouse gas emissions, Biden is also likely to try to reignite the United States-China bilateral climate relationship begun under Obama. However, given the current level of hostility towards China, such efforts will likely encounter considerably stiffer political headwinds than in Obama’s time. An attempt to negotiate, for example, a United States-China cooperation arrangement to tap into the United States’ strength in inventing and China’s capacity to commercialize and cheaply produce clean energy technology (such as solar panels or electric batteries for zero-emission vehicles) would win the support of those who prioritize climate change efforts,12 but would risk antagonizing those worried about the export of U.S. jobs to China and who expect Biden to abide by his promise of creating new green jobs at home to replace jobs lost by the turn away from fossil fuels.13

Apart from the 2020 election’s failure to produce a “blue wave” to give Democrats clear majorities in both houses of Congress,14 there are many structural reasons why the U.S. return to international law will occur largely through occasional bilateral treaties that can secure congressional support, sole executive agreements, soft law instruments, or national law initiatives instead of high-profile multilateral treaty ratifications. As was clear in the Obama years—which saw an ever-dwindling number of attempts to get treaties through either the Senate by a two-thirds vote or a majority of both houses of Congress— the U.S. constitution and Capitol Hill traditions make concluding treaties purposely difficult. Indeed, one senator alone can prevent a treaty from emerging from the Senate Foreign Relations Committee.15 In the best of circumstances, presidents need the help of senators invested in foreign affairs. While the United States can enter into Congressional-Executive agreements by a simple majority vote in both houses, a President still needs to secure those majorities and is constrained by constitutional traditions requiring that some treaties (such as those involving human rights) respect the Senate’s two-thirds vote prerogative. Biden will have a difficult time amassing supporters to ratify treaties, as internationalist senators have been overtaken by those who subscribe to Trump’s “America First” mentality.16 Nor is he likely to find many senators who would relinquish their power over treaties by sharing a majority vote with the House.

#### Every single treaty will stay in Senate limbo---razor-thin majorities and GOP obstructionism.

Feffer 21, director of Foreign Policy In Focus at the Institute for Policy Studies. (John, 3-11-2021, “Multilateralism and the Biden Administration”, RLS-NYC, <https://rosalux.nyc/multilateralism-and-the-biden-administration/>) \*typo edited in brackets

But the Biden administration does not have sole control over U.S. foreign policy. The Constitution gives the Senate the sole power to approve, by a two-thirds majority, any treaties that the United States might be considering. As with the filibuster, however, this treaty power has as much influence in its threatened use as in its actual deployment. As noted above, Kerry insisted on voluntary commitments in the Paris climate accords to avoid triggering a Senate vote. The Obama administration negotiated the Iran nuclear deal as an agreement, not a treaty, to avoid the two-thirds vote in the Senate. According to one academic study, presidents negotiated nearly 4,000 executive agreements between 1977 and 1996 but only 300 treaties.

With the slimmest of majorities in the Senate, the Democrats have little hope of bringing controversial treaties to a vote. Republican opposition will ensure that the Senate blocks many of the key methods of transforming the United States into a fully [cooperative] cooperate player in the multilateral system. In other words, under Biden, there is little chance that the United States will join the International Criminal Court, the UN Convention on the Law of the Seas, the Comprehensive Test Ban Treaty, the Convention on Biological Diversity, the Convention on the Elimination of All Forms of Discrimination Against Women, or the ILO convention protecting the right to organize trade unions, to name just six of the 37 treaties that languish in Senate limbo.

American exceptionalism is practically embedded in the structure of U.S government since the Republican Party has historically refused to cede any measure of sovereignty to global institutions. Of course, the Biden administration will also face Republican opposition (and some pushback from conservative Democrats as well) at the legislative level—to his more comprehensive immigration policy, his version of a Green New Deal, and any major increases in funding for international authorities. Whether through treaties or legislation, the indifference to global norms and regulations shown by a noncompromising bloc of senators over the years represents the chief obstacle to a fully international United States.

#### The number of approved international agreements has plummeted---reflexive partisanship and sovereignty concerns.

Lissner 21, PhD, assistant professor in the strategic and operational research department at the U.S. Naval War College and nonresident scholar at Georgetown University’s Center for Security Studies. (Rebecca, April 2021, “The Future of Strategic Arms Control,” Discussion Paper Series on Managing Global Disorder No. 4, pg. 13, <https://cdn.cfr.org/sites/default/files/report_pdf/lissner-dp_final.pdf>)

The first trend is sharpening partisan polarization in the United States—not only among the mass public, but also evident among policy elites—as Democrats and Republicans have sorted into two opposing political camps.51 Partisan polarization hampers U.S. foreign policy in many respects, including by presenting barriers to treaty ratification, which requires a two-thirds vote by the U.S. Senate. Over the last two decades, the number of new international agreements concluded by the United States has plummeted. Treaty ratification has experienced an especially sharp downward turn.52 Although not solely attributable to partisan polarization, this trend does reflect fundamental divergence on the nature of U.S. interests and the best methods to achieve national security objectives, especially as concerns about the encroachments of international law on U.S. sovereignty have become a particular stalking horse of some on the ideological right.53 Diminished congressional interest in arms control issues makes reflexive partisanship even likelier, as members decline to consider the merits of an agreement substantively and instead vote along party lines or weaponize arms control politically.54

#### The Senate will remain a treaty graveyard.

Bradley 20, Professor of Law at Duke, where he is a co-director of the Law School's Center for International and Comparative Law (Curtis, Forthcoming 2020, “Article II Treaties and Signaling Theory,” in *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, Duke Law School Public Law & Legal Theory Series No. 2019-49, pg. 3-4, Available at: https://ssrn.com/abstract=3429179)

Of the various means of concluding international agreements, the Article II process is generally regarded as the most difficult politically for the president. This is because the president must obtain agreement from a supermajority in the Senate, which typically means that, even during times of unified government, the president will need the agreement of members of the opposing party and also the agreement of members far from the median in terms of partisanship and general support for international cooperation.3 The difficulty of obtaining such agreement is compounded by the Senate’s frequent reliance on unanimous consent procedures that allow individual Senators to block the consideration of treaties. The Senate has sometimes been dubbed the “graveyard” of treaties because of the difficulty of the advice and consent process. In recent decades, heightened political polarization has meant that it has been even more difficult to obtain the requisite senatorial consent for all but the most uncontroversial treaties.

### II. U---Courts

#### Activist courts hem in any effort to implement international law or treaties.

Alvarez 21, Herbert and Rose Rubin Professor of International Law @ NYU (José, Winter 2021, “Biden’s International Law Restoration,” Journal of International Law and Politics, Volume 53, Number 2, pg. 568-570, <https://www.nyujilp.org/wp-content/uploads/2021/04/NYI205.pdf>)

The predicted tempered restoration of international law suggests that Harold Koh’s conclusion that a single term of a Trump presidency would lead only to “pyrrhic” short term victories against “resilient” international law was a tad premature and optimistic.147 Koh’s hopeful take on Trump’s impact on the U.S. judiciary and foreign relations law is a case in point.148 Trump’s notorious success in appointing relatively young, conservative judges to lifetime positions on the U.S. Supreme Court and on lower federal courts is likely to fuel reliance on doctrines that make it more difficult for advocates to deploy international law as a sword—the very essence of what Koh calls “transnational legal process.”149 Trump-era judges, all of whom survived the gauntlet of close Federalist Society scrutiny, include many constitutional originalists of a particular persuasion. Trump did not manage to appoint to the bench only Justice Kavanaugh, whom Koh correctly describes as a “young, reliably conservative, international-law skeptic,”150 He has appointed many others who are likely to demand clear statutory text to incorporate customary international law, require explicit self-executing language before permitting treaties to be invoked in U.S. courts, be exceedingly skeptical of using foreign or international law to interpret the U.S. Constitution, and revive federalist concerns with the scope of President’s treaty power to override U.S. state laws and the scope of Congress’s power to enact legislation to give effect to a treaty. The new 6-3 Supreme Court conservative majority may even be activist enough to revive the long discredited idea of subject-matter limits on the scope of the treaty power, consistent with Justice Thomas’s concurring opinion in Bond v. United States. 151

Despite the United States’ dwindling soft power, judges around the world still pay attention to what U.S. courts say, particularly when it comes to questions of common concern such as whether, or to what extent, to give effect to international law. The “transjudicial forms of communication” on which the hopes of some liberal international lawyers once rested may now transmit skepticism towards international law around the world.152 Of course, U.S. judicial views of international law will be most keenly felt with respect to the foreign affairs powers of the executive and the interpretation of U.S. law. Absent unlikely structural changes to the federal judiciary, such as the number or tenure of Supreme Court justices, there is little that President Biden can do to eliminate the possibility that even his foreign policy initiatives, while traditionally accorded considerable deference, will be resisted by the third ‘least dangerous’ branch.

As this suggests, Trump’s promotion of new and revived isolationist tendencies in U.S. foreign policy have gone global, thereby making the expected restoration of international law within the United States difficult.153 That effort is hemmed in by structural realities: a divided Congress, resistance by some federal judges and bureaucrats, legal constraints on prompt reversals of federal regulations, and loss of faith in the credibility and competence of U.N. system organizations as well as in the United States itself. These realities pose challenges for those who have emphasized the capacity of international law to overcome its state-centric origins in pursuit of global community interests.154 Indeed, the fear expressed in Koh’s articles—that eight years of Trump could permanently overcome international law’s resiliency—should inspire caution about the staying power of the liberal international order. If the standard tenure of a single U.S. President can dismantle the nearly eighty-year effort to construct the post-WWII international legal order, that order is far more fragile than many believed it to be. Trump’s reign provides a lesson in humility for international lawyers generally.

### III. U---AT Tax Thumper

#### Won’t happen.

Williams 21, reporter @ Financial Times. (Aime, 7-6-2021, "Can a global tax deal survive political gridlock in the US?", Financial Times, https://www.ft.com/content/950db44b-a4ab-426b-b5c8-99fb383cdca2)

What are the chances of securing the votes of two thirds of the Senate?

Exceedingly slim. Republican senators have lined up to criticise the fledgling agreement. John Barrasso, the second most senior Senate Republican, earlier this month slammed the plans as “anti-competitive, anti-US and harmful”. Pat Toomey, the most senior Republican on the powerful Senate banking committee, has called the plans “crazy”.

Mike Crapo, the top Republican on the Senate finance committee, has also criticised the deal, and has written to Treasury secretary Janet Yellen to express concern that the US is ceding the right to tax its own companies to foreign countries.

#### It can’t and won’t be reconciled.

Williams 21, reporter @ Financial Times. (Aime, 7-6-2021, "Can a global tax deal survive political gridlock in the US?", Financial Times, https://www.ft.com/content/950db44b-a4ab-426b-b5c8-99fb383cdca2)

Can Biden find a way around this?

Possibly, but any attempt to circumvent the Senate is likely to be the subject of technical and legalistic arguments on Capitol Hill.

Manal Corwin, a former senior Treasury official in Barack Obama’s administration who now works at KPMG, said there could be a way to override existing treaties by passing both Pillar 1 and Pillar 2 using the reconciliation process.

Although under US law, domestic legislation and treaties are given equal weight, Corwin said, a provision known as the “last in time” rule allows new US legislation to override existing treaties.

Because the agreement would give the US the right to tax some large multinationals with annual revenue greater than €20bn and pre-tax profit margins of at least 10 per cent, the US tax code would need to be changed, Corwin said, with the secondary effect of overriding some treaties.

“A treaty says ‘we would do this, if they would do that’, and we’re overriding that through a legislative vehicle that changes the Internal Revenue Code, which is eligible for reconciliation,” Corwin said.

But Brian Jenn, another former Treasury official who has worked in both Democratic and Republican administrations, warned that passing legislation through the reconciliation process was subject to strict rules.

Efforts to pass legislation using this method are closely scrutinised by the Senate parliamentarian, who advises on the interpretation of the upper chamber’s rules and precedents. Earlier this year the parliamentarian, Elizabeth MacDonough, ruled that a federal minimum wage increase could not be included in Biden’s $1.9tn stimulus bill.

A bill “clearly overriding a treaty” may not be eligible for reconciliation either, said Jenn, who is now a partner at the law firm McDermott Will & Emery.

Efforts to override treaties using the reconciliation process would “likely offend even Democratic senators” prone to “jealously” guarding the upper chamber’s prerogative, Jenn added.

One European diplomat warned that if the US used “legal chicanery” to pass parts of the deal, it might “open itself [up] to a concerted political challenge” in Washington.

## T: Legal Addendum

### AT: T Legal---Addendum

#### Could you understand the heart of the topic by Googling it without ever digging through legal scholarship? No. That requires researching “the theories that generated a particular treaty law, the content of that law, and the ways that law is applied in practice.”

Hollis 20, Laura H Carnell Professor of Law at Temple University’s James E Beasley School of Law and a non-resident Fellow at the Carnegie Endowment for International Peace, formerly served in the US State Department Legal Adviser’s Office, including several years as the Attorney-Adviser for Treaty Affairs. (Duncan B., “Introduction,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 7) \*language edited in brackets

So, who should read this book? Certainly, Part VII and many of the earlier chapters are drafted for international lawyers and policy-makers who attend treaty conferences, negotiations, and meetings of States parties. But, it would be a mistake to characterize this book as some sort of practitioner’s manual. Although there is a largely unspoken expectation in international law that written work will adopt either an academic or practical approach (but never both), The Oxford Guide to Treaties rejects this dichotomy as a false one. Theories about treaties and explanations of actual treaty practice are neither mutually exclusive nor adversarial in nature. Practitioners who operate without understanding the scope and rationale for a particular treaty rule are short-handing themselves when it comes to working with that rule in the novel situations that inevitably arise. Similarly, those who focus only on theoretical explanations for treaty-making without understanding how States and others actually use them risk making [counterproductive] disabling assumptions. In other words, a true guide to treaties requires an appreciation of the theories that generated a particular treaty law, the content of that law, and the ways that law is (or is not) applied in practice. It is such a holistic approach that lies at the root of the current compilation. Thus, The Oxford Guide to Treaties is designed to serve as a primary reference point for everyone who works with treaties, whether international lawyers, diplomats, IO officials, NGO representatives, academics, or students.

Today, treaties are an essential vehicle for organizing international cooperation and coordination. In both quantitative and qualitative terms, they are the primary source for existing international legal commitments and, indeed, international law generally. States, IOs, and other subjects of international law have concluded tens of thousands of treaties; to date, some 72,000 treaties have been registered with the United Nations alone.22 From a qualitative perspective, treaties dictate the content (and contours) of every field of international law, from trade to the environment, from human rights to aviation. They now occupy, in whole or in part, most areas of international relations and quite a few areas of domestic regulation as well. As the 2006 ILC Study Group argued, moreover, the law of treaties may prove key to accommodating international law’s fragmentation as different treaty obligations pull States (or other stakeholders) in different directions and multiple institutions claim authority to address the same legal issue or situation.23

Simply put, a facility with treaties has become an indispensable part of the job description for all those who work in the fields of international law or international relations. Chances are that when a lawyer or policy-maker confronts a question of international law today, it is likely (if not inevitable) that one or more treaty provisions will prove relevant to the inquiry. The Oxford Guide to Treaties seeks to broaden and deepen how we approach and answer such questions and to assist all those who study treaties in appreciating the potential (and limits) of this august form of international agreement.

#### More examples of legal debates this topic would facilitate:

#### a---the “bindingness” of an agreement, its linguistic clarity, and who can implement it.

Hollis 20, Laura H Carnell Professor of Law at Temple University’s James E Beasley School of Law and a non-resident Fellow at the Carnegie Endowment for International Peace, formerly served in the US State Department Legal Adviser’s Office, including several years as the Attorney-Adviser for Treaty Affairs. (Duncan B., “1. Defining Treaties,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 17-18)

At the same time, questions have arisen about using treaties as a discrete category of international commitment. International relations scholars often think of international commitments in terms of legalization, a concept that can be disaggregated along three independent dimensions: (i) obligation, which asks the extent to which a commitment is legally binding; (ii) precision, which involves the clarity of the commitment and expected means of performance; and (iii) delegation, which entails the extent to which third parties (eg courts and administrative organs) are designated to implement the commitment.44 Although the legalization perspective does not redefine the treaty, this approach to international coordination and cooperation impacts the treaty concept in two key ways.45

First, evaluating the extent of a commitment’s ‘obligation’ suggests that its ‘bindingness’ exists along a continuum of possibilities. Thus, unlike the traditional binary approach to defining treaties (where a commitment is either a legally binding treaty or it is not), this view highlights the possibility that negotiators may vary how strongly (or weakly) a commitment legally binds its participants. The existence of a legal obligation thus shifts from a black-or-white issue to one encompassing various shades of grey. Second, by emphasizing variables other than obligation—precision and delegation—the essentiality of legal obligations is called into question. A commitment may be fully binding but of little practical use if its content is imprecise or there are no external checks on implementation. Conversely, a non-binding or ‘soft’ obligation might effectively achieve cooperation or coordination if it is stated in highly precise terms and/or delegates responsibility for implementation to third parties.46 Taken together, a graduated view of bindingness and an emphasis on precision and delegation suggest that the treaty may not be an optimal (let alone essential) vehicle for achieving international cooperation and coordination.

On the other hand, whatever explanatory value legalization may have for analysing cooperation and coordination, it remains contested. Some scholars deny any ‘spectrum of legality’, insisting that the legal quality of a commitment cannot be differentiated, rejecting any concept of ‘soft law’ in the process.47 For them, the treaty remains a highly relevant category. States, moreover, appear to agree: they regularly and consciously employ the treaty concept in a binary fashion, choosing it as the label for those commitments they intend to create legal obligations and using other labels (eg political commitment) for other forms of agreement.48 Nor are these labels merely international rhetoric. At the domestic level especially, the treaty concept implicates domestic law in ways distinct from the impact (if any) of other international commitments. Those impacts, moreover, may be precisely what give the treaty commitment its credibility and hence its utility in facilitating international cooperation and coordination.49

#### b---the legal form of the treaty and its effectiveness. The entire subject is anchored in international and domestic jurisprudence.

Hollis 20, Laura H Carnell Professor of Law at Temple University’s James E Beasley School of Law and a non-resident Fellow at the Carnegie Endowment for International Peace, formerly served in the US State Department Legal Adviser’s Office, including several years as the Attorney-Adviser for Treaty Affairs. (Duncan B., “1. Defining Treaties,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 16-17)

Defining treaties for purposes of international cooperation and coordination

Defining the ‘treaty’ has clear legal consequences with respect to both international and national law. But lawyers are not the only actors interested in treaties; they also matter to those working on transnational issues. Negotiators (and the policy-makers they represent) are more interested in a treaty’s capacity to be effective—to achieve its desired goals—than in the specific legal criteria by which treaties are defined.38 Treaty goals vary but most often involve (a) international cooperation that would otherwise not occur due to a collective action problem, or (b) international coordination of future behaviour that might otherwise be dissonant.39 Cooperation and coordination may arise through a coincidence of interests, coercion, or pursuant to a commitment. In this context, the treaty is one of several forms of commitment (others include unilateral declarations and political commitments). For political scientists, a treaty may be defined by its ability to enhance the credibility of the commitments it contains.40

What makes a treaty commitment credible? It appears to come from the seriousness and stability such instruments provide.41 Treaties are serious because their legal form communicates to States, their respective domestic constituencies, and third parties an expectation of performance that may not accompany the same commitment in a non-legal form.42 Their stability derives from the treaty’s existence under both international and national laws. In international law, the law of treaties provides default rules that create shared expectations for how treaty commitments will be formed, applied, and interpreted. The law of treaties also explicitly prefers treaty continuity; it has relatively few options for (and significant restrictions on) unilateral exit. Moreover, violations of treaty commitments may trigger reputational consequences that treaty parties likely wish to avoid.43

Meanwhile, at the national level, procedural conditions on State consent help to ensure that information about the treaty is distributed internally within the State. Participation by domestic actors other than the executive in a treaty’s formation can also increase expectations of performance. For States giving treaties direct domestic legal effect, additional mechanisms—judicial interpretation and enforcement—may further ensure continued treaty performance. Thus, for those concerned with international cooperation and coordination, the treaty cannot be defined solely in international or national law terms, but requires a separate, more hybrid, definition.

#### c---sole executive agreements---it’s a competitive counterplan that taps into separation of power concerns.

Kirgis 97, Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. (Frederic L., 5-27-1997, “International Agreements and U.S. Law”, ASIL Volume 2 Issue 5, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>)

Not all international agreements negotiated by the United States are submitted to the Senate for its consent. Sometimes the Executive Branch negotiates an agreement that is intended to be binding only if sent to the Senate, but the President for political reasons decides not to seek its consent. Often, however, the Executive Branch negotiates agreements that are intended to be binding without the consent of two-thirds of the Senate. Sometimes these agreements are entered into with the concurrence of a simple majority of both houses of Congress (“Congressional-Executive agreements”); in these cases the concurrence may be given either before or after the Executive Branch negotiates the agreement. On other occasions the President simply enters into an agreement without the intended or actual participation of either house of Congress (a “Presidential,” or “Sole Executive” agreement). The extent of the President's authority to enter into Sole Executive agreements is controversial, as will be noted below.

#### d---CEAs---using them for arms control sets off constitutional skirmishes.

Spiro 01 (Peter Spiro, the Charles Weiner Chair in international law, Rusk Professor of Law at the University of Georgia Law School, where he also served as Associate Dean for Faculty Development, former law clerk to Justice David H. Souter of the U.S. Supreme Court, Professor Spiro was ranked in the top 15 nationally among international law scholars, 2001. “Treaties, Executive Agreements, and Constitutional Method.” <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=266969>)

1. Arms Control Agreements and Mutual Security Pacts.- As Ackerman and Golove, as well as other proponents of full interchangeability, are quick to stress,” the Arms Control and Disarmament Act [ACDA] of 1961 expressly contemplated the approval of arms control accords as congressional-executive agreements [CEAs].” It is also true that an important component of the SALT I negotiations, the 1972 Interim Agreement on Strategic Offensive Arms, was approved by joint resolution. 67 But that is hardly the end of the story. Every arms control agreement since 1972 has been approved as a treaty.6 That practice has been more than a matter of political choice on the part of the executive branch. Since at least 1991,169 the Senate has formally expressed its institutional opinion that arms control agreements must be submitted as treaties. In consenting to ratification of the 1991 Conventional Armed Forces in Europe (CFE) Treaty, the Senate declared its intent to approve international agreements that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner only pursuant to the Treaty Power as set forth in Article II, Section 2, Clause 2 of the Constitution. 170 Other recent agreements have included similar declarations, to the point that it appears to have assumed the status of boilerplate.17' Ackerman and Golove dismiss these statements as “empty senatorial pronunciamentos.” ' 72 That seems to substantially underestimate their significance, as more recent practice is bearing out. Leaving aside the fact that Ackerman and Golove repeatedly resort to similar evidence in attempting to establish that the congressional-executive agreement before 1944 was not yet accepted as constitutional, the Senate's insistence on the use of the treaty form in this context is evidently amounting to something more than mere gestures. The Clinton Administration acceded to the Senate's position in reversing a decision to submit the 1997 CFE Flank Agreement as a congressional-executive agreement [CEA]. The pact was submitted as a treaty after the initial decision drew constitutional fire from the Senate majority leader, and the President's about-face did not even attempt to defend full interchangeability in the arms control context.174 That leaves the assertion of full interchangeability rather the emptier proposition. We now have a consistently stated constitutional position on the part of the Senate that has been accepted by at least one chief executive. Can it be doubted that had the moderately controversial Chemical Weapons Convention or the highly controversial Nuclear Test Ban Treaty been submitted as a congressional-executive agreement that they would have sparked at least constitutional skirmishes, and possibly more pitched conflicts? 75 The Arms Control Act may still be on the books, but one might wonder whether the provision permitting legislative approval of arms control agreements still represents good law. 76

#### e---courts---whether a provision is self-executing, implemented by legislation, or supersedes conflicting acts

Kirgis 97, Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. (Frederic L., 5-27-1997, “International Agreements and U.S. Law”, ASIL Volume 2 Issue 5, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>)

Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are “self-executing” or if they have been implemented by an act (such as an act of Congress) having the effect of federal law. Courts in this country have been reluctant to find such provisions self-executing, but on several occasions they have found them so---sometimes simply by giving direct effect to the provisions without expressly saying that they are self-executing. There are varying formulations as to what tends to make a treaty provision self-executing or non-self-executing, but within constitutional constraints (such as the requirement that appropriations of money originate in the House of Representatives) the primary consideration is the intent---or lack thereof---that the provision become effective as judicially-enforceable domestic law without implementing legislation. For the most part, the more specific the provision is and the more it reads like an act of Congress, the more likely it is to be treated as self-executing. A provision in an international agreement may be self-executing in U.S. law even though it would not be so in the law of the other party or parties to the agreement. Moreover, some provisions in an agreement might be self-executing while others in the same agreement are not.

All treaties are the law of the land, but only a self-executing treaty would prevail in a domestic court over a prior, inconsistent act of Congress. A non-self-executing treaty could not supersede a prior inconsistent act of Congress in a U S. court. A non-self-executing treaty nevertheless would be the supreme law of the land in the sense that--as long as the treaty is consistent with the Bill of Rights--the President could not constitutionally ignore or contravene it.

#### f---legal conflicts with the domestic policy landscape. A thorough understanding of the nature of those clashes is key.

Dean 15, assistant legal adviser for nonproliferation and arms control at the U.S. Department of State. He previously was head of the U.S. Treaty Office. He also served as the U.S. delegation legal adviser for New START and was the lead lawyer for the treaty’s ratification. (Paul, September 2015, “The Role of Negotiation in International Arms Control Law”, Arms Control Today, <https://www.armscontrol.org/act/2015-09/features/role-negotiation-international-arms-control-law>)

The process of negotiation is perhaps an underappreciated aspect of promoting adherence to and respect for international law. The act of negotiating lends durability and effectiveness to international law in a few important ways.

First, negotiation takes time, and time allows for thorough consideration. This may sound like a drawback to those looking for quick answers, but a state can use the period of negotiations to thoroughly calibrate its domestic laws and policies to the international obligations being negotiated before undertaking them. In the United States, there is a process in which the Department of State reviews every proposed international agreement before negotiations commence, during the course of the talks, and prior to conclusion of the agreement. This process includes a thorough legal review to ensure that the United States is in a position to implement the obligations that would be reflected in the final agreement.

The United States takes extremely seriously the rules reflected in the Vienna Convention on the Law of Treaties, which make it clear that unless otherwise agreed, a state may not invoke its domestic law as a justification for failure to perform its international treaty obligations. The U.S. government’s detailed internal legal review of all proposed agreements provides confidence that the United States will be able to implement any legal obligations it assumes. The United States does this for every one of the 200 to 300 international agreements into which it enters every year. It does so because it takes international law seriously and is committed to ensuring that it signs up only to obligations that it is in a position to implement fully.

This exacting approach to international law formation makes it more likely that a state will implement its obligations over the long run. The process of negotiation gives states the opportunity to take this approach.

## II. TOPIC AREAS/AFF GROUND

## Mechanism: Treaty

### Aff---Treaty Key---Signaling Theory

#### The best data shows only treaties signal durability and commitment. Russia and China reject anything else.

Nyarko 19, Postdoctoral Fellow in Empirical Law and Economics, Ira M. Millstein Center for Global Markets and Corporate Ownership, Columbia Law School. (Julian, “Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,” American Journal of International Law 113, No. 1, pg. 55-57, https://doi.org/10.1017/ajil.2018.103)

Why, the argument goes, should presidents go through the slow and cumbersome advice and consent procedure of the treaty if their policy objectives can be fulfilled more easily by use of congressional-executive agreements, which are not similarly constrained?9 After all, the latter’s authorization can be granted broadly and ex ante through simple majoritarian approval, thus allowing the president to conclude a myriad of agreements authorized under a single congressional act.10 If we see treaties used today, this account suggests, it would be for reasons that are orthogonal to the quality of the instrument itself, such as historical convention or selective senatorial preferences.11

At the same time, anecdotal evidence lends plausibility to alternative explanations as well. Consider, for instance, the bargaining process surrounding arms-reduction agreements between the United States and Russia. During the negotiations of SALT II, the United States proposed a preliminary congressional-executive agreement designed to ban new types of ballistic missiles and cruise missiles. However, former Soviet Foreign Minister Andrei Gromyko rejected the proposal due to the alleged inferior status of the congressional-executive agreement.12 Similarly, during the negotiations of the Strategic Offensive Reductions Treaty (SORT), the United States and Russia agreed to reduce their arsenal of active nuclear warheads to between 1,700 and 2,200 each. President Putin insisted on codifying the agreement as a formal treaty and spent considerable bargaining power on persuading President Bush, who favored a congressional-executive agreement.13 Outside the context of nuclear disarmament, negotiation partners have also pointed to the treaty as the desired, more serious form of commitment. For example, when the former President of the Philippines, Corazon Aquino, took office, she voiced her intention to replace the then-current congressional-executive agreements regulating the status of the U.S. military bases in the Philippines by “full-fledged” treaties.14

If treaties and congressional-executive agreements are not qualitatively different from one another, it seems hard to rationalize why negotiation partners at times display such great interest in the choice of instrument. Consequently, some scholars appear critical of the supposed lack of the treaties’ utility. The arguments come in different forms; some suggest that a president’s use of the treaty would signal a particularly high level of commitment,15 others that the struggle for senatorial approval may cause the government to reveal valuable information truthfully,16 or that the greater stability of senatorial preferences helps to ensure long-term compliance.17 What all these accounts have in common is an assumption that treaties, although more politically costly than congressional-executive agreements, confer certain benefits on the parties, in turn justifying their continuing existence as a valuable U.S. policy tool.

As of today, the debate surrounding the ongoing relevance of treaties in a context where congressional-executive agreements are so readily available and widely used remains unsettled. This Article seeks to shed light on the question of whether the treaty is a qualitatively different form of commitment than the congressional-executive agreement. It uses the most comprehensive dataset on U.S. international agreements available—the 7,966 agreements reported in the Treaties in Force Series from 1982 to 2012. In contrast to previous analyses, this Article is the first to directly contrast the consequences of relying on treaties versus executive agreements. Using survival time analysis, the Article demonstrates that, on average, an executive agreement made in 1982 had a 50 percent probability of breaking down by 2012, while a comparable promise made as a treaty broke down with only 15 percent probability.18 This result holds even after controlling for a number of observable characteristics, such as the composition of the House and the Senate, the subject area of the agreement, and the partner country. The findings also reveal that the difference between the instruments is most pronounced when comparing treaties to ex ante congressional-executive agreements.

The results are consistent with the view that promises made in the form of the treaty are qualitatively different from those struck as congressional-executive agreements. Against the backdrop of this empirical finding, it seems premature to call for the abandonment of the treaty, which may still serve important policy functions that cannot similarly be fulfilled by the congressional-executive agreement.

#### The political costs of securing ratification make it the sole trustworthy mechanism for a high-stakes commitment

Nyarko 19, Postdoctoral Fellow in Empirical Law and Economics, Ira M. Millstein Center for Global Markets and Corporate Ownership, Columbia Law School. (Julian, “Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,” American Journal of International Law 113, No. 1, pg. 63, https://doi.org/10.1017/ajil.2018.103)

Hypotheses Suggesting Qualitative Difference

In contrast to the hypotheses mentioned in the previous subsection, several accounts suggest that promises made in the form of a treaty are qualitatively different than those made as congressional-executive agreements. These accounts rest on the view that the treaty, although more politically costly, may also confer certain benefits on the parties, which ultimately may lead to a more robust commitment. In interactions where the benefits outweigh the costs, the treaty would then be the preferable instrument, whereas a congressional-executive agreement would be preferred in others.

An account that ascribes political benefits to the treaty is illustrated by the work of John Setear49 and Lisa Martin.50 Their reasoning focuses on the high legislative hurdles of the treaties’ advice and consent procedure. Since presidents typically lack enough support in the Senate to secure a two-thirds majority, they often have to go through a substantial political struggle to convince senators to vote in favor of a proposed treaty. This political struggle demands not only time and resources, but securing sufficient support may also require the president to make substantial concessions in other subject areas.51 Because the conclusion of a treaty comes at such a high political cost, Setear and Martin argue that only presidents who are especially committed to the agreement would be willing to go through the advice and consent procedure. If a high level of commitment is not required, the president would instead opt for the sole or congressional-executive agreement,52 which, as the authors allege, comes at a lower cost. Other countries are aware of this signaling dynamic. When contracting with the United States, they would thus observe the form of agreement that is proposed and, in some high-stakes scenarios, they may refuse to agree unless the president is willing to commit via treaty.

Martin conducts an empirical analysis to support the signaling theory. She provides an analysis of 4,953 international agreements concluded between 1980 and 1999 and finds that the value of the underlying relationship governed by the agreement is determinative of whether a president uses a treaty or an executive agreement.53 Value is proxied using an indicator for whether the agreement is multilateral, the GNP per capita of the contractual partner, as well as the total GNP.54 Martin finds that presidents are especially likely to rely on the treaty if the underlying value of the relationship is high. She concludes from these findings that the treaty is reserved for high stakes negotiations in which the president needs to signal a strong commitment to treaty partners.

### Aff---Treaty Key---Commitment

#### Only approval from a supermajority assures other states the US won’t walk back the agreement when the government’s political composition changes

Nyarko 19, Postdoctoral Fellow in Empirical Law and Economics, Ira M. Millstein Center for Global Markets and Corporate Ownership, Columbia Law School. (Julian, “Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,” American Journal of International Law 113, No. 1, pg. 64, https://doi.org/10.1017/ajil.2018.103)

Addressing some of these limitations, a second hypothesis put forth is that the treaty’s high legislative hurdles help solve commitment problems arising out of executive turnover. They purport that the strong legislative support implicit in the treaty mechanism reassures negotiation partners that the United States is likely to cooperate in the long run, even if administrations change.55 This rationale hinges on the assumption that senatorial preferences are more stable than the preferences of the presidency, for example, because the Senate represents a broader consensus among the voting population that is less sensitive to political shocks,56 or because senators serve longer terms and avoid changing their position in order to not be seen as wavering.57 This would in turn allow other countries to rely more heavily on a promise made in the form of a treaty.

### Aff---Treaty Key---Information

#### Having to persuade opposition is the only guarantee of executive transparency, which is key to international buy-in

Nyarko 19, Postdoctoral Fellow in Empirical Law and Economics, Ira M. Millstein Center for Global Markets and Corporate Ownership, Columbia Law School. (Julian, “Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements,” American Journal of International Law 113, No. 1, pg. 64, https://doi.org/10.1017/ajil.2018.103)

Lastly, some scholars have argued that a key difference between treaties and congressional-executive agreements lies in the information that is produced in the process of securing legislative approval.58 That is, in the course of concluding an agreement as a treaty, the executive needs to reveal important private information in order to make a convincing case and ensure approval of a qualified majority in the Senate. This dynamic can be illustrated by borrowing the leading example posited by John Yoo, who considers a potential military conflict between the United States and China over a territory and negotiations surrounding how this territory would be divided up. The domestic struggle for approval of a treaty requires negotiators to truthfully indicate to the Senate the chances of them winning a war against China. Yoo argues that observing this process would allow China to gain more accurate information about U.S. beliefs than the congressional-executive agreement provides. China may thus insist on the agreement being concluded in the form of a treaty and because the underlying information is more accurate, be incentivized to put more trust into continuing compliance with the agreement.

### Aff---Treaty Key---Arms Control

#### The Senate cemented a norm that arms control must be treaties

Spiro 01 (Peter Spiro, the Charles Weiner Chair in international law, Rusk Professor of Law at the University of Georgia Law School, where he also served as Associate Dean for Faculty Development, former law clerk to Justice David H. Souter of the U.S. Supreme Court, Professor Spiro was ranked in the top 15 nationally among international law scholars, 2001. “Treaties, Executive Agreements, and Constitutional Method.” http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=266969)

1. Arms Control Agreements and Mutual Security Pacts.- As Ackerman and Golove, as well as other proponents of full interchangeability, are quick to stress,” the Arms Control and Disarmament Act [ACDA] of 1961 expressly contemplated the approval of arms control accords as congressional-executive agreements [CEAs].” It is also true that an important component of the SALT I negotiations, the 1972 Interim Agreement on Strategic Offensive Arms, was approved by joint resolution. 67 But that is hardly the end of the story. Every arms control agreement since 1972 has been approved as a treaty.6 That practice has been more than a matter of political choice on the part of the executive branch. Since at least 1991,169 the Senate has formally expressed its institutional opinion that arms control agreements must be submitted as treaties. In consenting to ratification of the 1991 Conventional Armed Forces in Europe (CFE) Treaty, the Senate declared its intent to approve international agreements that would obligate the United States to reduce or limit the Armed Forces or armaments of the United States in a militarily significant manner only pursuant to the Treaty Power as set forth in Article II, Section 2, Clause 2 of the Constitution. 170 Other recent agreements have included similar declarations, to the point that it appears to have assumed the status of boilerplate.17' Ackerman and Golove dismiss these statements as “empty senatorial pronunciamentos.” ' 72 That seems to substantially underestimate their significance, as more recent practice is bearing out. Leaving aside the fact that Ackerman and Golove repeatedly resort to similar evidence in attempting to establish that the congressional-executive agreement before 1944 was not yet accepted as constitutional, the Senate's insistence on the use of the treaty form in this context is evidently amounting to something more than mere gestures. The Clinton Administration acceded to the Senate's position in reversing a decision to submit the 1997 CFE Flank Agreement as a congressional-executive agreement [CEA]. The pact was submitted as a treaty after the initial decision drew constitutional fire from the Senate majority leader, and the President's about-face did not even attempt to defend full interchangeability in the arms control context.174 That leaves the assertion of full interchangeability rather the emptier proposition. We now have a consistently stated constitutional position on the part of the Senate that has been accepted by at least one chief executive. Can it be doubted that had the moderately controversial Chemical Weapons Convention or the highly controversial Nuclear Test Ban Treaty been submitted as a congressional-executive agreement that they would have sparked at least constitutional skirmishes, and possibly more pitched conflicts? 75 The Arms Control Act may still be on the books, but one might wonder whether the provision permitting legislative approval of arms control agreements still represents good law. 76

#### Binding treaties with strong verification components are Russia’s gold standard.

Kühn 3-31-2022, PhD, MA, nonresident scholar @ Carnegie Endowment, the head of the arms control and emerging technologies program @ the University of Hamburg’s Institute for Peace Research and Security Policy (Ulrich, “The crisis of nuclear arms control”, Springer, Zeitschrift für Friedens- und Konfliktforschung/ZeFKo Studies in Peace and Conflict, <https://link.springer.com/article/10.1007/s42597-022-00069-5>)

Informality

Unfortunately, both sides will probably be unable to achieve the same level of formal negotiated outcomes as those achieved during the Cold War. The increasing inability of the U.S. political establishment to find common ground on arms control, coupled with the volatility of the U.S. political system and Russia’s often non-compliant behavior, could force the United States to pursue less formal agreements than those made in the past (Lissner 2021). The verification-rich, detailed treaties that required the formal advice and consent of the U.S. Senate, and that therefore rested on a broad bipartisan basis of domestic acceptance, are perhaps gone for good. A successor to New START may no longer be achievable as a legally binding treaty. As a consequence, less formal arrangements that are not legally binding and that would not entail the detailed, intrusive verification and transparency stipulations of past agreements could be one way forward for future U.S. administrations (Williams 2018; also Schelling 1985). One model could be the PNIs, as these unilateral measures rested solely on the principle of non-verifiable voluntariness. From a Russian point of view, however, legally binding agreements have often been considered the “gold standard” of arms control negotiations (Wolfsthal 2020). Whether Moscow would be willing to settle for less formal arrangements remains to be seen. At the same time, Beijing might find unilateral instruments with a low degree of transparency tempting. In any case, a strategic environment characterized by mutual accusations and increasing tensions—as is currently the case for the U.S.-Russia and U.S.-China dyads—will make it more difficult to pursue arms control policies and (re)build trust. In the early 1990s, the PNIs were only the latest step in a series of trust-building measures that had developed over years. Without the ability to forge legally binding treaties with strong verification components, it may be difficult to achieve that level of trust in the current contested strategic environment.

#### Ratified agreements are the most authoritative and legally durable.

Gottemoeller 20, served as the Deputy Secretary General of NATO from October 2016 to October 2019 and currently works as the Frank E. and Arthur W. Payne Distinguished Lecturer at Stanford University’s Freeman Spogli Institute and as a nonresident senior fellow in Carnegie’s Nuclear Policy Program. (Rose, 9-15-2020, “Rethinking Nuclear Arms Control”, The Washington Quarterly, 43:3, https://doi.org/10.1080/0163660X.2020.1813382)

However, treaty-based arms control should not be abandoned. Although the ratification process is difficult in the United States, it is worth the trouble, because legally binding treaties are among the most authoritative documents of the land. Under the US Constitution, they require both the executive and legislative branches to take responsibility for their importance to US national security. Of course, they too have their withdrawal clauses and can be discarded if a president decides that they are no longer in the US national security interest. But no other document matches their stature on the international and domestic legal scene, which provides an assurance that they cannot be treated lightly.

## Mechanism: CEA

### Aff---CEA Key---Credibility

#### CEAs are key to signal consensus and durability – that’s key to a credible signal

Stone 02 (Christopher, Associate, Sullivan & Cromwell; J.D., University of California-Berkeley School of Law, “Signaling Behavior, Congressional-Executive Agreements, And The Salt I Interim Agreement” George Washington International Law Review, 34 Geo. Wash. Int'l L. Rev. 305)

Although the President acts as the nation's mouthpiece, he must emphasize that the signal enjoys wide consensus throughout the  [\*351]  American polity, so as to boost the signal's credibility. To do so, he can marshal support for the signal in Congress, like President Nixon did in the case of the Interim Agreement. [n179](http://www.lexisnexis.com.ezproxy1.lib.asu.edu/us/lnacademic/frame.do?tokenKey=rsh-20.866345.005691851&target=results_DocumentContent&reloadEntirePage=true&rand=1249091474994&returnToKey=20_T7071902582&parent=docview" \l "n179) Where the signal takes the form of an international accord, use of the congressional-executive agreement as a ratification vehicle, unlike a treaty, underscores the potency of this consensus. Because citizens of small states have disproportionate representation in the Senate, two-thirds of the Senate can potentially represent a minority of America's population. [n180](http://www.lexisnexis.com.ezproxy1.lib.asu.edu/us/lnacademic/frame.do?tokenKey=rsh-20.866345.005691851&target=results_DocumentContent&reloadEntirePage=true&rand=1249091474994&returnToKey=20_T7071902582&parent=docview" \l "n180) Thus, signaling via a treaty can undermine the recipient's confidence in popular support for the message. By contrast, congressional-executive agreements [CEAs] promote democracy by infusing foreign policymaking with House participation. [n181](http://www.lexisnexis.com.ezproxy1.lib.asu.edu/us/lnacademic/frame.do?tokenKey=rsh-20.866345.005691851&target=results_DocumentContent&reloadEntirePage=true&rand=1249091474994&returnToKey=20_T7071902582&parent=docview" \l "n181) A signal that has won the support of a majority of both the House and Senate likely commands the support of a majority of Americans, and consequently it is a more powerful signal. House participation lends the congressional-executive agreement an aura of popular legitimacy. In a sense, then, the use of congressional-executive agreements allows signaling to take advantage of network externalities: the more people who subscribe to a signal, the more valuable it becomes. [n182](http://www.lexisnexis.com.ezproxy1.lib.asu.edu/us/lnacademic/frame.do?tokenKey=rsh-20.866345.005691851&target=results_DocumentContent&reloadEntirePage=true&rand=1249091474994&returnToKey=20_T7071902582&parent=docview" \l "n182)

#### Perception of irreversibility is essential to solve the aff

**Ingram 17**(Paul Ingram, Executive Director of the British American Security Information Council (BASIC), a think tank focusing on nuclear disarmament, previous Project Leader for the Oxford Research Group, an international security policy think tank, BA in Politics and Economics from the University of Oxford, June 2017. “Renewing Interest in Negative Security Assurances.” http://www.basicint.org/sites/default/files/NSAs-June2017\_0.pdf)

4. Tightening NSAs could be irreversible over time. If a nuclear-armed state needs to ‘reset’ its NSAs (perhaps as security situations deteriorate) this could send undesirable signals and worsen international security at a sensitive moment. This **resistance to irreversibility** gives away a **deep assumption of commitment** to **indefinite nuclear postures** that contradicts diplomatic commitments to a world free of nuclear weapons. Irreversibility is an important notion within the diplomatic process; but it is this very irreversibility that creates resistance to agreement. 5. Ministries of Defence are institutionally resistant to limiting their options in advance of any conflict, particularly after they have allocated substantial resources to the acquisition and upkeep of the capabilities concerned. This freedom of action is often seen as a sign of their sovereignty in an uncertain future strategic security environment. 6. Attention drawn to scenarios that might merit a threat to use nuclear weapons could focus public attention on these scenarios and generate unwelcome debate on whether this threat would be justified. On the other hand, it may also highlight the state’s dependence upon nuclear deterrence and thus strengthen resistance to any evolution in policy or move away from nuclear deployments. Equally, the downsides of ‘too much’ ambiguity include: 1. Deterrence credibility requires some level of specificity and clarity in communicating intent, otherwise adversaries can underestimate or otherwise misread the intent of the leadership in the Nuclear Weapon State. There needs to be some confidence on the part of the state being deterred that the nuclear threat is genuine, but will not be exercised unless it transgresses strong boundaries. A strengthening nuclear taboo could tempt future bluff calling. 2. Ambiguity is no friend to a Nuclear Weapon State offering extended deterrence assurances to its allies. Dennis Healey, when UK Defence Secretary in the 1960s, famously said that it takes 5% credibility to deter the Soviets but 95% credibility to assure allies. Allies are more clearly 2 reassured if their nuclear sponsor’s arsenal and posture is clearly there to deter the nuclear state they also feel threatened by. A more ambiguous posture is less assuring. 3. Ambiguity undermines nuclear legitimacy within the international community. NNWS are not only seeking to improve their own security by insulating themselves from nuclear threat; they also look to the nuclear armed states to act with responsibility and restraint more generally towards the international community. If nuclear armed states show little willingness to act with such restraint and be specific about when they would or would not consider nuclear use it harms the trust in their commitment to their NPT obligations. 4. Exceptions to NSAs draw attention to nuclear threats that are deeply unacceptable to a majority of the international community, or trigger undesirable responses from those states that lie outside the guarantees. Withdrawal of these exceptions would be a recognition from the Nuclear Weapon States of the boundaries to nuclear deterrence within the international community. Non-proliferation & disarmament NSAs are critical signals of acknowledgement that NNWS have reduced their freedom (and sovereignty) by joining international non-proliferation arrangements from which all states benefit from. Weak NSAs are an affront to this commitment and to the very idea of a cosmopolitan international community. NSAs have been a consistent and at times high-profile demand of the NNWS within the NPT process. They are an important tool in the international community’s management of nuclear security and proliferation. They also reduce the freedom of action for nuclear armed states. The strength of particular NSAs on offer is therefore an indication of a nuclear armed state’s willingness to accept such restrictions for the wider benefits they bring. These focus particularly on encouraging NNWS to stick to their obligations and thereby strengthen confidence in the non-proliferation regime. The impact of NSAs goes further than the security calculations of the states directly involved. They are an expression of the bargain at the heart of the NPT, an invitation for Nuclear Weapon States to demonstrate political will in reducing the salience of nuclear weapons. In this respect they are also a modest disarmament measure. NSA exceptions **Strengthening NSAs** essentially means reducing the number of exceptions and **enshrining the guarantee in law**. The exceptions to negative security assurances (NSAs) have at times involved: ● States that attack in alliance with a nuclear armed state ● States that are deemed to be in breach of their non-proliferation obligations ● States that use chemical or biological weapons By and large, the NSA exceptions expressed by most nuclear armed states are determined by military scenario planning. These exceptions are included to ensure that NSAs will not constrain any options that may be seriously contemplated by a future leader.

#### ONLY CEA’s signal irreversible US commitment and restore US cred as a negotiator

Hathaway 08 (Oona Hathaway, Gerard C. and Bernice Latrobe Smith Professor of International Law and Counselor to the Dean at the Yale Law School, Professor of International Law and Area Studies at the Yale University MacMillan Center, on the faculty at the Jackson Institute for International Affairs, and Professor of the Yale University Department of Political Science, March 20, 2008. “Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States.” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1108065)

Congressional-executive agreements [CEAs] create more reliable international commitments than do Article II treaties. This is an important and perhaps surprising advantage. It is important because the central purpose of an international agreement is to commit states to act in ways consistent with the agreement. It may be surprising, because, as just argued, the bar in Congress is generally higher for Article II treaties—which might be thought to create a stronger assurance of political durability. Indeed, the very limited scholarship on the issue to date has argued that, because of this higher bar, treaties do in fact create a stronger commitment.236 That scholarship is misguided. Fixated on vote thresholds in the Senate, it has missed the two core reasons why congressional-executive agreements [CEAs] create stronger commitments than do Article II treaties: their stronger domestic legal status and their more stringent rules regarding withdrawal from an enacted agreement. There is a beneficial side effect of a move away from Article II treaties toward congressional-executive agreements. As we shall see, avoiding commitments that are unenforceable or that the President might withdraw from without congressional involvement also promises to bring better balance to the exercise of authority by Congress and the President over international lawmaking, while at the same time more effectively protecting the House’s traditional scope of authority. 1. Enforcement of Treaties and Congressional-Executive Agreements International law and domestic law are separate but deeply intertwined legal systems.237 The mere fact that a state is bound as a matter of international law does not ipso facto mean that the state is bound as a matter of domestic law. Whether it is or not depends on domestic law—that is, how and when international legal obligations are “brought back home.” International law truly binds only when there is a way to enforce a state’s obligation under international law in domestic courts. This is where the difference between treaties and congressional-executive agreements becomes interesting: a congressional-executive agreement [CEA] creates a more reliable commitment on behalf of the United States than does a treaty because unlike a treaty it erases this line between domestic and international law—allowing for a one-stage rather than a multi-stage process to create an enforceable legal commitment. To understand this difference, we must examine how international obligations become enforceable as a matter of U.S. domestic law. With treaties, this is often a two-step process. The U.S. Constitution specifies that once ratified, treaties are the “Supreme Law of the Land.”238 That would seem to settle the matter. When it comes to applying this rule, however, it becomes quite a bit more complicated than it first appears. To begin with, there are two types of treaties: those that are self-executing—meaning that they become part of domestic law immediately upon ratification—and those that are non-selfexecuting—meaning that they require Congress to enact implementing legislation before they become enforceable.239Treaties that are self-executing are, by virtue of the Supremacy Clause, enforceable in domestic court upon ratification. Yet this does not necessarily mean that treaties are always and in every case enforced. The relative legal status of state law, federal statutory law, treaties, and constitutional law has been an active subject of debate over the course of American history. Today, most scholars agree that treaties have a status equivalent to the federal statutory law.240 Hence where treaty obligations are inconsistent with the Constitution, the Constitution will prevail.241 Where they are inconsistent with a federal statute, courts apply the “last in time rule” whereby the obligation imposed later in time prevails. And where they are inconsistent with state law, the treaty obligations prevail. Enforcement of treaties that are not self-executing is even more complicated. In such cases, two problems can emerge. First, a non-selfexecuting treaty could impose an international obligation on the United States that would be unenforceable as a matter of domestic law—because the necessary implementing legislation has not been passed—leaving the country in violation of its international obligations.242 To avoid this problem, the Senate generally postpones its advice and consent to a non-self-executing treaty until implementing legislation can be enacted concurrently.243 Alternatively, it might give its advice and consent to the ratification of a treaty contingent upon the subsequent enactment of implementing legislation.244 Although sensible, these solutions are not costless. Under each approach, nonself-executing treaties face an additional hurdle to ratification: in both cases, the treaty cannot be ratified until implementing legislation is passed. In other words, the treaty must have the support of the President and two-thirds of the Senate, and a majority in both the Senate and the House of Representatives to enact separate implementing legislation. This is not the only dualist dilemma posed by the Supremacy Clause. The placement of the authority to consent to treaties solely in the Senate has created some constitutional puzzles as well. Chief among them is the question of the rights and responsibilities of the House of Representatives regarding treaties that involve powers granted to it by the Constitution, such as the power to appropriate funds.245 The constitutional grant of authority to the Senate to make treaties without the House creates two seemingly untenable alternatives regarding the House’s power of appropriations: either it is empowered to nullify treaties that require appropriations by failing to appropriate the funds necessary to carry it out, or it is required to make the appropriations specified in a treaty without exercising any independent judgment.246 Neither option hasproven appealing or persuasive. To address the conundrum, early presidents adopted the custom of sending a message to the House of Representatives when a treaty might require an appropriation. In some of those cases, the appropriation was voted before the presentation of the treaty to the Senate.247 Similar arguments have been made in the past about treaties that provide for reciprocal raising and lowering of duties, the acquisition or cession of territory, regulations of commerce with foreign nations, naturalization of aliens, and agreements to engage in or refrain from war.248 Congressional-executive agreements avoid many of these dualist dilemmas. Congressional-executive agreements [CEAs] are, after all, created by means of legislation. That legislation not only has the status equivalent to federal statutory law, it is federal statutory law. There is little difference between most congressional-executive agreements and self-executing treaties that do not infringe on the House’s traditional scope of authority—in both cases, they create binding legal obligations that are inferior to the Constitution, subject to the later-in-time rule with federal statutes, and superior to state law. Yet when an agreement is not explicitly self-executing, a congressional-executive agreement can offer significant advantages. Congressional-executive agreements [CEAs] are generally presumed self-executing unless specified otherwise. The legislation creating them, moreover, can include any necessary implementing language. The legislation provides, in effect, one-stop shopping: the same act that provides the authority to accede to the international agreement can also make the necessary statutory changes to implement the obligation incurred. This advantage is even more pronounced in the wake of the Supreme Court’s recent decision in Medellin v. Texas. 249 The Court held that none of the treaty obligations at issue in the case were self-executing and hence the obligations were unenforceable in federal court in the absence of implementing legislation.250 Though the full impact of this ruling is not yet entirely clear, the decision appears at the very least to raise new doubts about whether many U.S. treaty obligations are binding under domestic law—doubts that would be largely absent were the agreements instead enacted as congressional-executive agreements [CEAs]. Yet another advantage of congressional-executive agreements arises because the House is an equal participant in creating them. The constitutional dilemma that exists when a treaty requires making decisions traditionally within the House’s core scope of authority does not exist in the case of a substantively identical congressional-executive agreement because the House is directly involved in the creation of the agreement. We can see this by looking once again at the changes in the way that international trade obligations are agreed to. Before enactment of the Tariff Act of 1890, international agreements to raise or lower duties ran squarely into the dilemma outlined above. A House Report from 1925 recounted that in “treaties affecting revenue legislation or the raising or lowering of duties . . . . [t]he necessity of the concurrence by the House . . . has been very generally asserted by that body and acquiesced in by the Senate.”251 The usual solution to this dilemma was to insert into the treaties a condition that the changes provided in the treaty would not be effective without the concurrence of Congress.252 The gradual move toward concluding trade agreements primarily as congressional-executive agreements put an end to this two-stage process. Unlike treaties on the same topic, reciprocal trade agreements approved by Congress did not need to be separately submitted for approval by Congress before taking effect. A congressional-executive agreement thus creates a more reliable commitment on behalf of the United States than does a treaty.253 Unlike treaties, congressional-executive agreements [CEAs] are not subject to conditional consent and the law creating them is unquestionably federal law, enforceable by the courts. As a result, the United States is able to be a more reliable negotiating partner. At the same time, the process of enacting congressionalexecutive agreements simply and effectively protects the prerogative of theHouse to participate in decisions that lie within its traditional scope of authority.254 2. Withdrawal from Treaties and Congressional-Executive Agreements Treaties and congressional-executive agreements differ not only in how they are made. They also differ in 65how they are unmade. It should be noted immediately that this area of law is unsettled and deserves deeper treatment than is possible here. Nonetheless, even a brief analysis of this unsettled area makes one conclusion clear: the case for congressional control over withdrawal from congressional-executive agreements is much stronger than the case for congressional control over withdrawal from treaties. On the whole, then, treaties will generally be easier to undo than congressional-executive agreements [CEAs]. Treaties therefore constitute a less reliable commitment. The Constitution is silent on the issue of withdrawal, both from treaties and from congressional-executive agreements.255 The open questions left by this silence have inspired a centuries-long debate. To understand it, we must begin with the somewhat paradoxical way in which treaty obligations are made. The President has the power to present (or not present) a negotiated treaty to the Senate for approval. Once presented, it cannot be revoked by him without the Senate’s concurrence.256 Yet this is something of a pyrrhic power, for while the Senate is vested with the authority to give its “advice and consent” on the treaty, it is the President who actually ratifies the treaty once the Senate has offered its approval. Hence even if the Senate were to vote to approve the treaty, a President who has turned against it (or who never was for it, the treaty having been submitted to the Senate by a prior administration) might simply refuse to file the papers necessary to give that consent effect—and do so entirely legally.257 If the President does enter the ratification after receiving the advice and consent of the Senate, the obligation thereby enters into effect as a matter of both domestic and international law.258 Under international law, any subsequent effort to withdraw from that treaty is governed by the treaty itself or, if it is silent on withdrawal or revocation, by the Vienna Convention on the Law of Treaties. But that well-settled rule tells us nothing about withdrawal from treaties as a matter of domestic law—nor about the allocation of power among the branches of government in the decision to withdraw. The Constitution provides no direct guidance on the question. Though it specifies the process for making treaties, it is silent on the question of withdrawal.259 Some have argued that because the President has the power not to ratify a treaty even after the Senate’s consent has been given, the President must have the parallel authority to withdraw that ratification regardless of the Senate’s position on withdrawal. The Restatement endorses this view, stating that “[u]nder the law of the United States, the President has the power . . . to suspend or terminate an agreement in accordance with its terms.”260 This view has never been formally upheld by the courts and remains controversial.261 Thecourts have twice refused to settle the issue, declining to intervene to prevent unilateral withdrawal from a treaty by the President on the grounds that the challenge to the President’s authority posed a political question, among other reasons. 262 The Senate, perhaps not surprisingly, opposes the idea that the President can unilaterally withdraw from a ratified treaty. The Senate Foreign Relations Committee has repeatedly contended that the termination of treaties requires the participation of the Senate or Congress.263 A report prepared in 2001 by the Senate Foreign Relations Committee concluded that whether termination of a treaty “requires conjoint action of the political branches remains . . . a live issuewhich the Supreme Court has sidestepped in the past.”264 Yet it admitted that “[a]s a practical matter . . . the President may exercise this power since the courts have held that they are conclusively bound by an executive determination with regard to whether a treaty is still in effect.”265 Indeed, in a recent case the Senate did not object to the unilateral withdrawal from a treaty by the President.266 If the law on withdrawal from treaties is unsettled, the law on withdrawal from congressional-executive agreements is even more so. Some advocates of interchangeability have argued that congressional-executive agreements and treaties are fully interchangeable in every respect—withdrawal included.267 John Setear, for example, argues that “the president may unilaterally and decisively choose not to ratify the [congressional-executive agreement] or decide later to terminate the [congressional-executive agreement] after its ratification.”268This simple analogy is mistaken. Even were there “no significant difference between the legal effect of a congressional-executive agreement and the classical treaty,”269 it would not necessarily follow that the two devices are procedurally interchangeable in every respect. In fact, treaties and congressional-executive agreements are defined by their procedural differences. The full interchangeability argument, moreover, is incoherent if it holds that congressional-executive agreements operate like ordinary federal legislation before ratification but like treaties after ratification.270 To settle the question of who has the power to withdraw from congressional-executive agreements, it is first important to consider the source of the power to conclude the agreements. On this point, as on nearly every other constitutional issue regarding congressional-executive agreements, there is substantial disagreement. Setear, for example, suggests that the congressional-executive agreement arises from a “hybrid form of law making”: The congressional-executive agreement resembles legislation in its basic voting rules—a majority of each house of Congress—but the absence of a veto override mechanism and the fact that the president may unilaterally invalidate the congressional action clearly distinguish the congressional-executive agreement from the constitutionally prescribed pathway for statutory law. The congressional-executive agreement is neither Article I legislation nor Article II advice and consent.271 Ackerman and Golove, by contrast, place congressional-executive agreements within Article I, explaining that “Articles I and II set up alternative systems through which the nation can commit itself internationally.”272 On the opposite side of the political spectrum, John Yoo concurs with this vision of congressional-executive agreements as arising from Article I, though it leads him to a very different conclusion.273 The case that congressional-executive agreements rest on authority granted in Article I is by far the most persuasive. In practice, the vast majority of congressional-executive agreements—both ex ante and ex post—arise from legislation that proceeds through precisely the same process that is used for ordinary Article I legislation: it must be passed by a majority of both houses of Congress and is subject to veto by the President. Even the nonconstitutional procedural rules are the same as those that apply to regular legislation. For example, the legislation proceeds through the same subject matter committees, and the Senate is able to filibuster the legislation, except when both houses of Congress have previously agreed to expedited procedures that preclude a filibuster.274 Two features separate legislation that creates congressional-executive agreements from regular legislation, though they are not sufficient to transform the constitutional foundation of the enterprise. The first is that ex post congressional-executive agreements are themselves almost always initially drafted by the executive branch in consultation with the foreign country partner or partners rather than by Congress. This is not as significant a transfer of power as it might at first appear. The legislation actually putting that agreement into effect is generally drafted in a way similar to drafting in the ordinary legislative process. Moreover, there are significant amounts of regulardomestic legislation drafted in the first instance by parties outside Congress— including the executive branch and even private entities. Hence this alone is not sufficient to call into question the constitutional source of the power being exercised. The second and more significant difference between congressionalexecutive agreements and regular legislation is that, in the former case, the President might be seen to possess an absolute veto that cannot be overridden through a supermajority vote. A congressional-executive agreement is either initiated by legislation (in the case of an ex ante agreement) or confirmed by legislation (in the case of an ex post agreement). In either case, before the agreement can be perfected, the executive must give the consent of the United States to the deal in whatever manner specified by the agreement or sponsoring international organization.275 The authority of the President to formalize the nation’s commitment in this way is nearly always recognized in the legislation that makes the agreement possible. For example, the NAFTA Implementation Act stated that “Congress approves . . . the North American Free Trade Agreement,” but specified under the heading “Conditions for Entry Into Force of the Agreement” that “[t]he President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force . . . of the Agreement for the United States . . . .”276 Alternatively, the legislation might provide that the agreement “as contained in the message to Congress from the President of the United States . . . is approved by Congress as a governing . . . agreement” and “shall enter into force and effect with respect the United States on the date of the enactment of” the Act.277 In such cases, the agreement has been negotiated and approved by the executive before being submitted to Congress for its approval. This arrangement does not create a veto power that exceeds that provided in the Constitution for Article I legislation. The legislation itself is subject to an ordinary veto—a veto that may be overridden—in the same way that anylegislation would be. The President’s power is not a power to interfere or intercede in the legislative process. Rather, it is a power to serve as the representative of the United States on the world stage—and hence as the only entity of the U.S. government that can legally represent the assent of the country to an international agreement. This is, in the United States, no mere ministerial authority, at least in the treaty context. When it comes to Article II, with the authority to file the instrument of ratification comes the power to independently assess the merits of the decision to ratify. The question is whether the same is true of congressional-executive agreements. Put another way, if Congress approves an agreement and the President either signs it or fails to sustain a veto of it, is the President required to carry out that approval by committing the United States to the agreement against his or her own better judgment? This vexing constitutional dilemma has been avoided by the careful approach that Congress has taken in the authorizing legislation for congressional-executive agreements. Those that offer ex ante approval for negotiation of agreements do not require the President to conclude agreements, but instead “authorize,” “approve,” or otherwise grant the authority to the President to proceed with the agreement. Even legislation approving ex post agreements usually “authorizes” the exchange of notes to formalize the agreement, leaving room for exercise of discretion by the President. This is the constitutionally appropriate approach. While Congress may set the terms and conditions of agreements in great detail—and may approve or refuse an agreement—requiring the President to formalize the commitment would improperly interfere with the President’s constitutional capacity to speak for and to represent the United States abroad. The President does not exercise an absolute veto, but he retains some measure of discretion in the execution of the legislation insofar as it requires him to exercise his authority to act as the “sole organ of the federal government” on the world stage.278Yet that discretion is not unlimited. It can be cabined by Congress, even dramatically so. The legislation giving rise to congressional-executive agreements varies a great deal in the degree to which it specifies the conditions of the agreement. In some cases, as in the Atomic Energy Act,279 the legislation specifies detailed requirements for the agreements. In others, the legislation simply authorizes the President to conclude “fisheries agreements” or agreements that “provide for the sale of surplus agricultural commodities,”280 with little detail offered as to the expected content of the agreements. Congress is acting within its authority when it imposes even the most significant conditions on such agreements. To the extent that Congress has the power to withhold its approval altogether, it necessarily has the lesser included power to condition its approval.281The conditions that Congress can attach to its approval are not unlimited, however. Congress can place a wide array of substantive conditions on the agreements it authorizes the President to negotiate (requiring, for example, that fisheries agreements meet certain environmental standards or that atomic energy agreements be made only with nations that are members of the Nuclear Nonproliferation Treaty282). Similarly, Congress may impose conditions under which the President may withdraw. Congress may grant the President full discretion to withdraw, may permit withdrawal when the conditions giving rise to the agreement change, or may limit withdrawal only to circumstances specified in the agreement itself. Congress can even require that withdrawal from an agreement occur only if Congress passes a statute permitting it or prohibit withdrawal altogether, which would have precisely the same effect (a later-in-time statute could always modify the prohibition). What Congress probably cannot do, however, is condition its approval of an agreement on the requirement that it participate in subsequent decisions to modify or withdraw from agreements through any process other than the enactment of a statute— for example, through majority votes in both houses of Congress without a requirement of presentment.283 There are also very limited circumstances inwhich the President might legitimately take actions that necessarily render an agreement obsolete even in the face of congressional limits on withdrawal.284 That Congress can condition and even prohibit withdrawal does not mean that the President loses all authority over the terms of the agreement. Far from it. As the sole actor charged with representing the United States on theinternational stage, the President retains the power to negotiate (or not) the terms of the agreement with the foreign party and to formally communicate (or not) the consent of the United States. Thus Congress is well advised to take into account any objections the President might have to conditions it seeks to impose on the terms of an agreement. If it fails to do so, it might find it has no international agreement.285 The interbranch cooperation required at the point of creation of congressional-executive agreements has deep significance for the level of cooperation required at the point of termination. Termination of congressional-executive agreements by the President is more complicated than is withdrawal from Article II treaties. Congress cannot prevent the President from communicating with foreign governments about the termination of a congressional-executive agreement (as long as the termination is consistent with the terms of the statute that created the agreement). Hence the President could unilaterally withdraw the United States from a congressional-executive agreement by communicating the withdrawal to the foreign parties. Yet the act of withdrawing from the international agreement does not undo the statute on which the agreement rests—which cannot be undone without the cooperation of Congress. Even though the President may be able to “unmake” the international commitment created by a congressional-executive agreement as a matter of international law, the President cannot unmake the legislation on which the agreement rests.286 As the Supreme Court stated in INS v. Chadha, “Amendment and repeal of statutes, no less than enactment, must conform with Art. I,” including the requirements of bicameralism and presentment.287 The President is not able to terminate a statute unilaterally, and hence cannot terminate the statutory enactment that gives rise to a congressional-executive agreement [CEA].288 And insofar as the statute specifies a course of action by the United States,289 the President is required to execute it unless and until the underlying statute is repealed or superseded. This approach solves a constitutional dilemma that has plagued the congressional-executive agreement. Many scholars have acknowledged that the statutory basis of congressional-executive agreements [CEAs] cannot be terminated by the President without the consent of the majority of both houses of Congress.290 Yet if this is true, then a peculiar consequence would seem to result: Congress usually has the authority to initiate legislation without the involvement of the President and, if it can override a veto, can engage in lawmaking without the President’s consent. If congressional-executive agreements are indeed equivalent to legislation, then it would seem to follow that Congress should be able to initiate and negotiate the agreements as it would any other piece of legislation. Yet this would be an impermissible encroachment on the President’s inherent foreign affairs powers, for it would allow Congress to conclude international agreements over the President’s objection.291The approach described above solves the problem by marking out the areas of authority of each branch: Congress approves the legislation necessary to authorize (in the case of ex ante agreements) or to approve (in the case of ex post agreements) the agreement. The President, on the other hand, manages the negotiations of the agreement with the foreign government and registers the formal assent of the United States to the agreement (based on the authority or assent offered by Congress), thereby binding the country as a matter of international law. Neither can craft an agreement without the other. Congress cannot encroach on the President’s foreign affairs power, for it cannot communicate assent to the agreement on behalf of the United States—only the President can do so. What it can do without the President is enact legislation. Congress could not commit the United States to a free trade agreement without the President, for Congress cannot speak with a legally binding voice on behalf of the United States on the international stage. But it might achieve a similar result by passing a statute that unilaterally reduces tariffs on goods imported from a particular country.292 Moreover, as already noted, Congress can condition its consent to a congressional-executive agreement through detailed legislation.293 The bottom line is that while there are some similarities between treaties and ex post congressional-executive agreements at the time of withdrawal, the President is on the whole likely to find it more difficult to withdraw unilaterally from a congressional-executive agreement [CEA] than an Article II treaty. This is because Congress can, as part of the legislation authorizing the agreement, commit the country to a certain course of action even in the absence of a formalized international commitment. A congressional-executive agreement [CEA] therefore can create a more reliable commitment than an Article II treaty. The claim that congressional-executive agreements establish a stronger international commitment than do treaties runs against the grain of the very limited scholarship on the issue to date.294 That scholarship is, in my view, misguided. Though the treaty might appear to require a “higher degree of consensus than is needed to pass an ordinary law” because it requires a twothirds vote in the Senate,295 it is far from clear that a majority vote in the Senate and House requires any less of a consensus. Moreover, it may be true that foreign governments have in the distant past been wary of accepting a commitment that is not labeled a “treaty,”296 but it seems unlikely that wariness would remain once they understand the nature of the legal framework. Indeed, that foreign states have been entirely willing to enter trade agreements with the United States where a congressional-executive agreement was used rather than an Article II treaty suggests that other countries are perfectly willing to accept agreements concluded outside the Article II process. Moreover, the vast majority of foreign nations make their own international legal commitments in precisely this way (that is, through a process that is identical to that used for domestic lawmaking).297 It would be passing strange for them to find a similar process in the United States insufficiently reliable. Replacing treaties with congressional-executive agreements would make for better international lawmaking in the United States. The process would be more democratically legitimate, less cumbersome, and less subject to political manipulation, and the United States would be able to make more reliable international legal commitments. The next Part turns to the issue of howcongressional-executive agreements could come to play this near-exclusive role in U.S. international lawmaking. Far from insurmountable, the legal and practical issues that this change presents are eminently manageable. A better process is within reach.

#### Congressional-executive agreements are the only way to signal irreversible US commitment AND no circumvention

Yoo 11 (John Yoo, Professor of Law, Berkeley Law School, University of California at Berkeley; Visiting Scholar, American Enterprise Institute, November 2011. “Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining.” https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3225&context=clr)

Congressional-executive agreements [CEAs], by contrast, may present the opposite trade-off on signaling information versus commitment. Adopting an international agreement by the Article I statutory route sends a less credible signal about the reliability of revealed information because of the lower number of votes required for approval. But because of differences in terminating procedures, congressional-executive agreements [CEAs] may send a stronger signal than Article II treaties about commitment. Unlike treaties, congressional-executive agreements [CEAs] require legislative approval before termination because of their different constitutional pathways. Recall the constitutional difference between treaties and congressional-executive agreements. Treaties are executive acts-hence the location of the advice-and-consent clause in Article II alongside the similar provision for the appointment of executive branch officers. The location of the treaty power in Article II was an important piece of evidence for the courts in Goldwater in agreeing that the President could terminate treaties and that the courts had no authority to review the decision.1 28 The constitutional argument for presidential termination of treaties mimics the argument for presidential removal of subordinate officers. While the Senate must consent to the appointment of major officers of the government, the Constitution remains silent about their removal. The Constitution has been understood to grant removal to the President, except in certain circumstances, because the Senate's consent is a specific exception to what would have been a general executive power to both appoint and remove unilaterally. Similarly, the Constitution is silent about treaty termination, but the lower courts have read it as remaining with the President because the Senate's advice-and-consent role is a specific exception to a general executive authority to make or terminate treaties. 129 Congressional-executive agreements [CEAs], by contrast, are statutes. They are passed using the same process as other laws enacted within Congress's Article I, Section 8 powers. They combine the approval of the international agreement with the necessary domestic implementing legislation. As with removal or treaties, the Constitution only sets out the process for the affirmative enactment of a statute. Article I does not explicitly address the negative act of terminating the law. Unlike removal or treaties, however, the Constitution has not been understood to allow for alternate methods for reversing an earlier statute. If Congress or the President wants to terminate a federal law, they must enact a second law overriding the first. One exception might be judicial review, but a court's striking down of a federal law conceptually amounts to no more than judicial refusal to enforce a law, rather than the actual removal of the law from the U.S. Code. Generally, statutes must be reversed by later-in-time statutes. Hence, a President who wishes to withdraw from a congressionalexecutive agreement [CEA] must convince a majority of Congress to consent. And the supermajority nature of enactment works against breaking the international commitment. The President needs not only 51% of the House, but also fifty-one Senators. If the twenty-five smallest states oppose terminating the congressional-executive agreement, the President may need to persuade Senators who represent as much as 84% of the population to consent. And, taking into account the Senate filibuster rule, the President may even need to win over Senators who represent as much as 90% of the nation's population. That is not quite the 93% needed for two-thirds of the Senate, but a high political cost nonetheless. The difference between treaty and statutory termination allows the United States to send signals of varying credibility about its commitment to keep an international promise. Treaties will send a lesser signal of commitment than congressional-executive agreements [CEAs] because of the President's power to unilaterally terminate the former. The President's main domestic cost will arise from opposition political parties and interest groups that support the policies in the treaty. A President would suffer those same costs in terminating a congressional-executive agreement, but he must go to the greater effort of assembling majorities in both the House and Senate. These audience costs could be significant, especially if opposition aligns along differences in state geography or population. The additional political resources required to terminate a statute provides a credible signal, at the time of the signing of the international agreement, of commitment. This trade-off between treaties and congressional-executive agreements may help explain some consistencies in U.S. practice. Some scholars, such as Ackerman and Golove. insist that the instruments should be fully interchangeable, 130 and others, such as Hathaway, argue that they already are.1 31 These scholars claim that congressionalexecutive agreements are easier to ratify and more justified as a matter of democratic theory. Nevertheless, the United States has continued to use treaties for significant political agreements, such as the Treaty of Versailles, U.N. Charter, NATO, and the settlement of the Cold War in Europe. It still chooses the Article II treaty form for armscontrol pacts, such as the ABM Treaty, SALT, the INF and START agreements, the chemical weapons convention, the Comprehensive Test Ban Treaty, and now the New START. If full interchangeability were correct, Presidents should always use the Article I route, even for political and arms-control agreements. In fact, if interchangeability were correct, a President could take a treaty rejected by the Senate (such as the Treaty of Versailles or the Comprehensive Test Ban Treaty) and resubmit it for simple majority approval as a statute. This appears to have never happened. Supporters of interchangeability might claim that Presidents still choose treaties because the Senate demands it. Senators who are concerned about maintaining their institution's prerogatives could threaten to block any international agreements that come through Article I, rather than Article II. The smallest states should have the greatest interest in preserving the Senate's constitutional place. They demanded the creation of the Senate as the price of the Constitution's creation and ensured that the Senate would have a veto over any form of federal lawmaking.' 32 It would require the twenty-five smallest states, which today represent 16% of the population, to band together to block all congressional-executive agreements, so that a mere 7% of the population through the one-third smallest states can block any future treaty. Ackerman and Golove, however, claim that the Senate gave up any effort to play defense in the wake of World War II, when it allowed the IMF and Bretton Woods through as congressional-executive agreements, rather than treaties. 133 Nor did any defenders of the Senate's prerogatives appear when NAFTA-perhaps the last international agreement to spur widespread public debate (Vice President Gore publicly debated 1992 presidential candidate Ross Perot on national radio and television over NAFTA's merits)- went through Congress by simple majorities.134

#### The difference in commitment signal by the plan vs the CP is HUGE and significant enough to impact successful international cooperation

Ku and Yoo 15 (Julian G. Ku, law professor at Hofstra University Law School, John Yoo, law professor at UC Berkeley and a visiting scholar at the American Enterprise Institute, May 2015. “Bond, the Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties.” Notre Dame Law Review. https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4606&context=ndlr)

A system that gives the national legislature the authority to carry out treaties would improve the nation’s ability to send credible signals of commitment. First, the enactment of legislation introduces other institutions committed to complying with the international agreement. While a treaty receives the consent of the President and the Senate, implementing legislation adds the approval of the House, which represents the part of the government most directly accountable to the electorate. If the legislation creates a private cause of action or criminal provision, it may also have the effect of including the judiciary into the equation. Judicial review would represent a powerful commitment device by giving implementation authority to a branch of the government independent of elections or direct control by the other branches of government. Second, if the House and Senate implement a treaty, they are using their domestic powers to live up to the terms of an international promise. The domestic powers are independent of the agreement because the legislature’s powers and the measures that they enact operate even in the absence of the treaty. Congress does not need an international agreement to set taxes at a certain level or to enact a criminal law regulating interstate commerce. A statute, for example, that lowers import barriers to comply with a free trade pact would still operate even if the trade pact no longer existed. An implementing statute sends a more powerful signal of commitment because it adopts a policy that will continue until Congress repeals the law. Third, congressional implementation raises the costs of breaking the agreement. In part, this is due to constitutional practice. The Constitution could have made available the greatest signal of commitment if it had required the agreement of two-thirds of the Senate to terminate a treaty. Indeed, John Jay proposed this very rule because it would help overcome the enforcement problem between nations. Responding to Antifederalists in Federalist No. 64, Jay admonished: “These gentlemen would do well to reflect that a treaty is only another name for a bargain . . . .”110 Wrote the former U.S. Minister for Foreign Affairs under the Articles of Confederation: “[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it.”111 Jay argued that to encourage nations to enter treaties with the United States, the Constitution should allow treaty termination only when the President and two-thirds of the Senate agreed.112 Constitutional practice, however, evolved in the opposite direction. Congress, rather than the President and the Senate, terminated America’s very first international agreement, the 1778 alliance with France.113 President Washington had already undermined the treaty by unilaterally interpreting it to allow U.S. neutrality in the wars of the French Revolution.114 By 1798, the Federalist Congress terminated the alliance by statute as part of the Quasi-War with France.115 Presidents have also terminated treaties without Congress as far back as Abraham Lincoln and as recently as President George W. Bush’s withdrawal from the Anti-Ballistic Missile (ABM) pact.116 Presidents had already deprived the ABM Treaty of much of its force by interpreting it to allow research and development of a national missile defense system. While congressional agreement made the funding of national missile defense possible, President Bush did not need legislative approval to withdraw from the treaty. Unilateral presidential authority over treaties reduces their strength as a signal of commitment. Requiring approval by both branches increases the political costs of treaty termination. Either the Senate may be unwilling to terminate or the President may have to expend political capital to persuade a supermajority of Senators, and at the very least coordinating both branches’ actions can be costly even when controlled by the same political party. Requiring legislative approval bears resemblance to the idea of audience costs because the President will have to make political commitments to the Senate and perhaps the House to consent to treaty termination. His political promises may backfire if he cannot follow through on the foreign policies accompanying withdrawal. The current practice, however, does not require congressional consent. Presidents today need not incur political costs to persuade the House and Senate to agree to treaty termination, which makes treaties a less valuable sign of commitment. A non-self-execution approach like that of the CWC, however, may cure this problem. If a treaty cannot take domestic effect without legislative implementation, an international agreement will usually require the participation of the House. As an act of Congress, the implementing legislation will require another act of Congress for repeal. A President’s termination of a treaty will dissolve the formal legal obligation, but the policy of the United States will still continue because he cannot repeal the implementing legislation. For example, even if the President withdrew the United States from the Chemical Weapons Convention, the CWCIA would still make the possession of chemical weapons a federal crime. Executing legislation has the effect of creating a mechanism similar to John Jay’s proposal for Senate consent to treaty withdrawal. While the votes required would demand a majority of both Houses rather than two-thirds of the Senate, the filibuster rule in the Senate would still allow a minority of states to block repealing legislation. Notice that the rule of non-self-execution allows the United States to send varying degrees of signals about its commitment to an international agreement. A sole executive agreement may provide the weakest sign, because it will only survive as long as the President in office chooses to follow policies consistent with the pact. A treaty standing alone provides a great deal of information to another nation but it does not provide a much higher level of commitment. A treaty plus an implementing statute creates the highest level of American commitment because to renege on the promises demands the cooperation of the President, Senate, and House together. No one branch can terminate both the international agreement and the accompanying domestic policy. Non-self-execution, in other words, may help improve the achievement of American foreign policy goals. A non-self-execution regime gives the United States more tools to overcome the enforcement obstacles to international agreements and allows the United States to better reap the benefits of international cooperation.

### Aff---CEA Key---Implementation

#### Treaties lack backing legislation – that means international actors won’t see it as binding or durable

Ku and Yoo 15 (Julian G. Ku, law professor at Hofstra University Law School, John Yoo, law professor at UC Berkeley and a visiting scholar at the American Enterprise Institute, May 2015. “Bond, the Treaty Power, and the Overlooked Value of Non-Self-Executing Treaties.” Notre Dame Law Review. https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=4606&context=ndlr)

International relations scholars have noted that the lack of a credible enforcement mechanism is an obstacle to successful international cooperation through agreements. In an anarchic international system, states will often demand credible commitments from their treaty partners as a price of cooperation. Seen in this light, non-self-execution makes the U.S. commitment to the treaty even more credible than if it had merely ratified the treaty via the Senate. Whereas courts have allowed treaties to be terminated by the President without the approval of the Senate, the President cannot unilaterally terminate a statute implementing a treaty obligation. Non-self-executing treaties thus represent a meaningfully deeper commitment to an international obligation than a standard self-executing U.S. treaty. This could (andin the case of the CWC, does) enhance prospects for international cooperation. This value in non-self-executing treaties is too often overlooked in critical commentary about non-self-execution.

### Aff---CEA Key---Arms Control

#### The treaty process kills US arms control leadership and makes future agreements impossible – CEAs are key

Rubin 10 (James P. Rubin, teaches at Columbia’s School of International and Public Affairs, was an assistant secretary of state for public affairs during the Clinton administration, November 21, 2010. “Farewell to the Age of the Treaty.” https://www.nytimes.com/2010/11/22/opinion/22rubin.html?mtrref=www.google.com&mtrref=www.nytimes.com&gwh=10F5B6905865575196AB481C91500605&gwt=pay)

DESPITE months of negotiations on Capitol Hill, Senate approval of President Obama’s New Start arms control treaty is in serious jeopardy. And it raises the question: Are treaties, and in particular arms control treaties, even worth the trouble anymore? In fact, most of our international objectives on arms control and other matters can be met much more easily with domestic actions. For much of the world, treaty ratification is a simple matter. In parliamentary systems like those in Britain and France, ratification is virtually automatic, because the government also controls the legislature. In China, it is a mere formality ordered from the top. But the same treaties that are so easily ratified in other countries are, for good or ill, often left to languish in the Senate, where 67 votes are needed for approval. The result is international frustration with American leadership, as many widely shared goals — from children’s rights to a ban on nuclear weapons testing — are held hostage by a small group of senators, who often represent a tiny percentage of the American public. Treaties on arms control, with elaborate legal definitions and verification procedures, were necessary during the cold war because the Soviet Union was a closed society, in which military programs were closely guarded secrets. And given the high stakes involved, treaties helped ensure that large-scale cheating could be detected in time to respond. But that era is long gone. The freer flow of information makes American and Russian military programs and arms negotiations far more transparent, rendering formal treaties less important. At the same time, the ratification process can create a perverse effect: in the case of New Start, Republican senators led by Jon Kyl of Arizona are holding up the treaty to force the Pentagon to increase spending on the modernization of nuclear weapons and associated delivery systems. Their demand comes despite the more than $180 billion already committed to modernization over the next decade and assurances from retired military commanders and former secretaries of defense that the treaty wouldn’t undermine America’s nuclear deterrent. The trouble is that spending more money on nuclear modernization would undercut a key purpose of the treaty, which is to demonstrate to the world that the two countries are reducing their reliance on nuclear weapons — and thus strengthen our leverage against states like Iran and North Korea, which seek to enter the nuclear club. Ratification, in short, creates a platform for partisan grandstanding wholly at odds with the treaty itself. Fortunately, there is an alternative: we could achieve roughly the same results without signing a treaty. International negotiations would still be needed, but instead of a binding treaty, the administration could commit to pursuing Congressional action to accomplish the agreed terms. The effect would be the same, but the process would be much easier at home, requiring a simple majority in the Senate, instead of two-thirds. This strategy is already being used on climate policy. After the Senate failed to ratify the Kyoto Protocol on climate change that was negotiated during the Clinton administration, it became clear that any treaty to cut greenhouse gas emissions would be a lost cause. In recent years negotiators have continued to pursue international climate agreements, but with the understanding that adherence would occur through domestic energy legislation that the rest of the world could then examine and assess. The same model could work for nuclear arms control. If the Senate continues to stall on New Start, Moscow and Washington could simply set the same level of 1,550 strategic warheads through domestic legislation and exchange deployment plans consistent with the treaty’s other provisions. Crucial verification procedures, especially on-site inspections, could be established through executive agreements, which may not even require legislative approval. In any case, it is hard to imagine Congress opposing a bill to monitor Russia’s nuclear forces. Further arms-control efforts planned by the Obama administration — reducing strategic nuclear forces, prohibiting nuclear weapons testing and controlling the production of special nuclear material — could be handled in the same way. True, the Russians might prefer the legal imprimatur of a treaty. But given the alternative, they would probably be willing to adjust. For reasons that go beyond the Senate, the era of treaty-making may largely be over. Thanks to decades of global efforts, the international system has most of the rules it needs in the areas of human rights, terrorism, crime and nonproliferation. What’s more important is for individual governments to muster the will to enforce them. Treaties still have their uses, but they should be reserved for rare cases, like the creation of a mutual defense pact or perhaps President Obama’s vision for the elimination of nuclear weapons. In most circumstances, the bright light of national laws will work just fine.

#### The aff sets a precedent that encourages future arms control CEAs

Weiss 92 (Jack S. Weiss, Law Clerk to the Hon. Lourdes G. Baird, United States District Court, Central District of California., Editor-in-Chief, UCLA Law Review, 1992. “The Approval of Arms Control Agreements as Congressional Executive Agreements.” 38 UCLA L. Rev. 1533)

CONCLUSION The chemical weapons agreement may be concluded as a congressional-executive agreement should the executive branch, the Senate, and the House reach the proper political accommodation. Time, courts, and practice have eroded the sharp edges from Article II, section 2 of the Constitution. Over time, it has become clear that the political process provides each branch with a sufficient opportunity to protect its prerogatives in the making of America's international agreements. The Supreme Court has endorsed this development, and it seems consistent with the more democratic nature of our form of government. Should the President submit the chemical weapons agreement to Congress as a congressional-executive agreement [CEA], the House's interests in America's international agreements will be best served if it seizes the opportunity to establish a record that will support the conclusion of future arms control agreements as congressional-executive agreements. The House Foreign Affairs and Judiciary Committees should hold hearings regarding the role of Congress in the approval of America's international agreements. Only by establishing a comprehensive case for the constitutionality of approving the chemical weapons agreement as a congressional-executive agreement will the House ensure that the chemical weapons agreement stands as a precedent for the nation's future international commitments.

### Aff---CEA Key---Politics

#### CEAs avoid the Senate approval process, which is structurally vulnerable to gridlock AND enables a one-third minority to extract concessions

Sia 20, JD Candidate, 2021, Fordham University School of Law. (Abigail L., November 2020, “Withdrawing from Congressional-Executive Agreements with the Advice and Consent of Congress,” Fordham Law Review 89, No. 2, pg. 807-809)

2. Efficiency Considerations

Turning to the functional differences between CEAs and Article II treaties, because CEAs only require simple majorities from both chambers of Congress, 84 the president may find it much easier to get a CEA approved as compared to an Article II treaty. 85 The Senate approval process can be especially vulnerable to partisan politics. 86 A perfect storm might arise in an election year if the president's rival party were to control the Senate and decline to approve a significant treaty “in order to deny a President a political advantage.”87 Because the Constitution requires a two-thirds Senate majority vote to approve an Article II treaty, the one-third minority can wield enormous negotiating power and force concessions from the president.88 Professor Lawrence Margolis's study of presidents from Franklin D. Roosevelt to Jimmy Carter seems to support this theory. 89 These presidents negotiated 13.7 executive agreements for every Article II treaty when their own political party controlled two-thirds of the Senate; however, when the opposite party controlled two-thirds, these presidents averaged 24.4 executive agreements for every Article II treaty.90

Modern times are not so different. The current political climate is incredibly divided and fractious. 9 1 Former Secretary of State John Kerry, who previously served as chairman of the Senate Committee on Foreign Relations, once remarked, “I spent quite a few years trying to get a lot of treaties through the United States Senate, and, frankly, it has become physically impossible … [Y]ou can't pass a treaty anymore.” 92 At the time of this Note's publication, approximately fourty Article II treaties still await Senate approval.93

### Aff---CEA Key---Democracy

#### CEAs key to democratic legitimacy.

Sia 20, JD Candidate, 2021, Fordham University School of Law. (Abigail L., November 2020, “Withdrawing from Congressional-Executive Agreements with the Advice and Consent of Congress,” Fordham Law Review 89, No. 2, pg. 809-810)

3. Democratic Legitimacy

Unlike Article II treaties, CEAs notably assign the House of Representatives a role in the international agreement-making process. 94 The Framers excluded the House from the Article II treaty process based on their concerns about the House's constant fluctuations in membership and the need to maintain secrecy. 95

Professor Oona A. Hathaway explains that excluding the House from the Article II treaty process is especially democratically troubling today because it ignores democratic procedure. 96 Only the United States, Mexico, and Tajikistan relegate part of their national legislatures to significantly smaller treaty-making roles as compared to their legislative roles, yet still make the end result binding on domestic law. 97 Furthermore, modern international law has expanded beyond diplomatic relations and border disputes to encompass matters relevant to domestic law and policy (such as education and tax policy), and legislating in these areas would necessarily require House participation. 98

Hathaway also points out significant costs to the two-thirds supermajority requirement. As of 2008, Senators representing 8 percent of the U.S. population could stymie the Article II treaty process. 99 To win a two-thirds majority vote, presidents must cater to the “polarized extremes of modern American politics.” 100 By contrast, requiring House participation and simple majority votes in each chamber, as CEAs do, could capture a broader swath of the country's views on any particular international agreement by requiring appeals to a middle ground.101

## [1.0] Area: Nuclear Arms Control

### I. Overview

#### Nuclear arms control is at an inflection point. The unraveling of US-Russia agreements, spread of emerging technologies, and rise of China have spawned an extensive literature base discussing whether and how to update Cold War-era initiatives.

Bronder 21, PhD in military history, PhD in astrophysics, Lieutenant Colonel in the USAF, recently Materiel Leader at the Air Force Technical Applications Center, where he managed a large portfolio of nuclear surveillance and treaty-monitoring programs (T. Justin, October 2021, “Future Directions for Great Power Nuclear Arms Control: Policy Options and National Security Implications”, Center for the Study of Weapons of Mass Destruction Occasional Paper, No. 13, pg. 4-5) \*typo edited in brackets

Introduction

Arms control in the nuclear age has proved a useful tool of national security, meeting ends as diverse as reducing the risks of nuclear war to channeling strategic competition.1 Yet recent trends indicate arms control may be at an inflection point; the suitability of this tool in general and the viability of securing new agreements specifically are both unclear.2 The unraveling of key U.S.-Russian agreements, an international security environment marked by Great Power competition (GPC), and the emergence of potentially destabilizing new technologies all underscore that the current arms control paradigm, which is essentially grounded in Cold War-era principles, is under duress. The recent New Strategic Arms Reduction Treaty (New START) extension somewhat reverses the trend that has witnessed the collapse of the foundational bilateral deals in the Anti-Ballistic Missile Treaty (ABM) and Intermediate-Range Nuclear Forces (INF) Treaty.

The pathway to a future ratified treaty, however, is uncertain due to continued mistrust between Washington and Moscow and the politically polarized domestic environment in the United States.3 Russia’s recent history of violating binding agreements, New START excluded, adds additional obstacles to continued bilateral coordination.4 Looking beyond the two nuclear superpowers, uncertainty regarding China’s nuclear modernization and expansion is also challenging how U.S. leaders consider both regional and strategic [stability] tability.5 The continued development of nonnuclear strategic technologies such as precision strike or hypersonics and increased military competition in domains such as space and cyberspace add still further complications for long-held views on deterrence, stability, and arms control.6

In this dynamic geopolitical context, there is a wealth of academic, defense, and advocacy publications discussing new approaches for nuclear arms control.7 These publications provide a wide range of detailed policy considerations on this critical subject, yet the broader implications of potential policy prescriptions are not thoroughly compared in any existing work. Important implications for interconnected elements of U.S. strategy—defense budgets, force postures, deterrence, and nonproliferation, to name a few—are often not fully explored. This study aims to close this gap by leveraging the extensive body of recent arms control proposals while applying a well-defined analytical framework to enable a systematic and thorough comparison of potential arms control courses of action. This evaluation essentially takes a two-step approach: synthesizing proposed arms control approaches into four distinct options and then methodically comparing each approach against a set of qualitative criteria. This qualitative comparison is complimented by models estimating U.S.-Russian strategic nuclear force exchanges under the separate arms control regimes.

#### Recent publications have converged around advocating the one of following policy options: extend US-Russia arms limitations; negotiate a multilateral agreement to reduce the US’s nuclear arsenal; seek nonratified agreements to promote strategic stability; OR, discard arms control to pursue nuclear superiority.

Bronder 21, PhD in military history, PhD in astrophysics, Lieutenant Colonel in the USAF, recently Materiel Leader at the Air Force Technical Applications Center, where he managed a large portfolio of nuclear surveillance and treaty-monitoring programs (T. Justin, October 2021, “Future Directions for Great Power Nuclear Arms Control: Policy Options and National Security Implications”, Center for the Study of Weapons of Mass Destruction Occasional Paper, No. 13, pg. 16-17)

Future Policy Options

The unique challenges of today’s dynamic security environment have prompted a large body of publications recommending future directions for nuclear arms control or competition. These proposals include new frameworks and conditions encompassing a wide range of policy choices, including:

◆ extending purely U.S.-Russian bilateral arms control regimes39

◆ how to incorporate America’s other Great Power competitor in China40

◆ ways forward without an arms control agreement at all.41

The authors for these publications—ranging from leaders with expertise in negotiating agreements, such as Rose Gottemoeller, to leading thinkers representing U.S., Russian, and Chinese perspectives, such as Linton Brooks, Brad Roberts, Steven Pifer, James Acton, Dmitri Trenin, Alexey Arbatov, and Tong Zhao—provide some of the most well-informed viewpoints on this topic available outside of the official government and military agencies engaged in the nuclear enterprise. However, these works often lack a more complete treatment of policy recommendations, such as comparing the potential impacts of different courses of action.42

This study leverages these expert opinions to provide a new and focused analysis, synthesizing and methodically comparing plausible arms control courses of action and their impacts through 2036. Based on a thorough review of the publications most relevant to the potential post–New START world, four distinct arms control policy approaches are proposed:

◆ bilateral strategic arms limitations—maintaining bilateral U.S.-Russian strategic arms limitations at similar New START levels

◆ long-term multilateral reductions—pursuing major long-term nuclear warhead reductions in a legally binding multilateral framework

◆ bilateral nonratified frameworks—a set of bilateral U.S.-Russian and U.S.- Chinese agreements based on nonratified agreements covering a range of nuclear and nonnuclear topics

◆ pursue nuclear superiority—abandoning arms control to pursue U.S. nuclear superiority

### II. Timeliness

#### The next few years will determine the trajectory of nuclear arms control.

Bronder 21, PhD in military history, PhD in astrophysics, Lieutenant Colonel in the USAF, recently Materiel Leader at the Air Force Technical Applications Center, where he managed a large portfolio of nuclear surveillance and treaty-monitoring programs (T. Justin, October 2021, “Future Directions for Great Power Nuclear Arms Control: Policy Options and National Security Implications”, Center for the Study of Weapons of Mass Destruction Occasional Paper, No. 13, pg. 10-11)

The overall conclusion, unsurprisingly, is that the worth of a nuclear arms control agreement must be judged in a greater strategic context. Interconnected topics such as deterrence, stability, alliance cohesion, and defense budgets need to be considered in light of overall strategic goals—not to mention the other parties’ priorities—to ensure any arms control agreement is a useful tool of national security and not merely an end it itself. Indeed, the longest lasting agreements embodied multiple agendas while adapting to new contexts.

These conclusions are not novel in the rich intellectual history of arms control, but they do form a useful guide for framing a new analytical method to compare potential future arms control options. Completing this type of analysis is important to help the United States and its allies navigate a dynamic, multipolar international security environment. As the clock begins to wind down toward the 2026 sunset of the only remaining strategic bilateral agreement in New START, now is the time to set the trajectory for the next period of arms control agreements or, conversely, to determine if such tools remain suitable for achieving national security goals in this new era. Starting from the conclusion that disparate strategic considerations are required to fully understand the utility and implications of any arms control agreement, the next section defines several useful and specific criteria for adjudicating the relative merits of new arms control policies. This analytical methodology is then applied to four specific arms control frameworks, synthesized from recent publications, to more fully explore the national security implictions stemming from the many expert opinions on this crucial topic.

#### The Ukraine crisis both raises barriers to arms control and underscores its importance.

Meier 4-1-2022, PhD, senior researcher at the Institute for Peace Research and Security Policy at the University of Hamburg. (Oliver, “Back to Basics: The Nuclear Order, Arms Control, and Europe”, Arms Control Today, <https://www.armscontrol.org/act/2022-04/features/back-basics-nuclear-order-arms-control-europe>) \*language edited

Russia has given its illegal, reckless war against Ukraine a distinct nuclear dimension. In a largely futile attempt to deter NATO states from supporting Ukraine politically and militarily, Russian President Vladimir Putin issued several nuclear threats, including raising the alert level of Moscow’s strategic forces.

Such nuclear chest-beating, in conjunction with a hot war in the alliance’s immediate vicinity, is unprecedented. Russia’s attack on Ukraine marks the first time that nuclear [extortion] blackmail has been used to shield a full-scale conventional invasion. Moscow thus has raised the nuclear stakes to new and dangerous levels. Fortunately, U.S. and NATO responses have been calm and measured, so far avoiding a dangerous escalatory spiral.

Any assessment of the implications of Putin’s policies for the nuclear order, arms control, and European security must be preliminary. The conflict is still unfolding. Putin could continue to leverage Russian nuclear weapons, raise the stakes further, or even go down in history as the first leader to use nuclear weapons to “win” a war of his own choosing. Major players are still repositioning themselves, including China. Although Russia finds itself with fewer allies, the degree of its isolation is yet to be seen. The full impact of Russian aggression will thus materialize over time. One thing is certain: The war will have serious, long-lasting effects on how the world views nuclear weapons, how it seeks to control them, and how Europe develops a new security structure.

The conflict will likely increase the salience of nuclear weapons. This development would be at odds with the 2010 commitment by all parties to the nuclear Nonproliferation Treaty (NPT) “to further diminish the role and significance of nuclear weapons in all military and security concepts, doctrines and policies.”1 States at the 10th NPT Review Conference, scheduled for August 1–26, will have to note the growing importance that nuclear-weapon states attach to nuclear deterrence. Attributing responsibility for the greater role of nuclear weapons will be contentious, creating a major obstacle for a successful review conference.

The growing importance nuclear-weapon states attach to their nuclear weapons will also complicate arms control. For example, U.S. proposals to include nonstrategic weapons in negotiations are less likely to resonate now with Russia, which compensates for the weakness of its conventional forces with a vast stockpile of 2,000 or so tactical nuclear weapons. This function will become more important because of the Russian military’s poor performance in Ukraine and Moscow’s inability to fix the problem because of Western economic sanctions. Even more disconcerting is the possibility that Russia might revert to chemical or biological weapons for asymmetrical deterrence.

NATO’s new strategic concept, to be agreed by alliance leaders at a summit this summer, will likely account for Russia’s increased reliance on its nuclear weapons. Even if Russia’s conventional capabilities do not pose the military threat once believed, Putin’s willingness to wage unprovoked war in Europe will strengthen the hands of those who favor increasing NATO’s reliance on nuclear deterrence.

It is not clear if Russia and the United States will resume their strategic stability dialogue to discuss a follow-on agreement to the New Strategic Arms Reduction Treaty (New START). Regardless, avoiding new nuclear arms races in Europe, including the possible deployment of highly destabilizing intermediate-range nuclear forces, will require a rethink of arms control priorities.

Another implication of Russia’s nuclear posturing is that nuclear-weapon states will have to urgently address the risks of nuclear escalation, inadvertent and intentional. This means nuclear arms control will return to its origins. The 1958 Surprise Attack Conference, a failed attempt to find ways to reduce the risk of a nuclear first strike, marked the beginning of modern arms control. Finding ways to prevent nuclear war will have to be the backbone of any future nuclear arms control agenda again.

Fortunately, neither side needs to start from scratch. Nuclear risk reduction had moved up on the arms control agenda even before the war in Ukraine. On the table exists a broad menu of measures to reduce nuclear dangers, ranging from better communication channels to taking weapons off high-alert status and separating warheads from delivery vehicles. In hindsight, it seems cynical that Putin at the 2021 Geneva summit with U.S. President Joe Biden reaffirmed the Reagan-Gorbachev formula that “a nuclear war cannot be won and must never be fought.” Such statements sound hollow today. Therefore, any future risk reduction steps will have to be tangible, verifiable, and probably reciprocal.

### III. Uniqueness/Inherency

#### A US-Russia arms control treaty is politically inconceivable---GOP opposition, Ukraine, and Russian noncompliance.

Williams 4-1-2022, visiting fellow with the Project on Managing the Atom in the Belfer Center at the Harvard Kennedy School. She is visiting from King’s College London, where she is a senior lecturer in the Defence Studies Department. (Heather, “How to Avoid the Dark Ages of Arms Control”, Foreign Policy, https://foreignpolicy.com/2022/04/01/russia-war-ukraine-nuclear-arms-control-dark-ages-renaissance/)

Russia’s invasion of Ukraine is upending one long-standing geopolitical norm after the other, with nuclear arms control potentially one of the next to go. In 2021, the United States and Russia extended the 2010 New START pact—the only remaining major nuclear agreement between the two countries—through 2026. Russia is now threatening to halt U.S. military inspections required under the agreement, but there are challenges for the future of arms control that go beyond the fate of New START.

There are two possible pathways for arms control after Russia’s war in Ukraine. The first, less likely scenario is an arms control renaissance. The 1962 Cuban missile crisis, for example, was a wake-up call for the United States and Soviet Union to the dangers of nuclear escalation. The decade after the crisis saw a suite of arms control efforts, including the Limited Test Ban Treaty, the Nuclear Non-Proliferation Treaty (NPT), the Strategic Arms Limitation Talks, the Anti-Ballistic Missile Treaty, and a series of risk-reduction measures, such as the Incidents at Sea Agreement. The Ukraine crisis may prove another impetus for post-conflict cooperation, albeit a costly one.

The second pathway is more harrowing. We could see any existing vehicles of cooperation dry up, including New START. It would be the dark ages of arms control. Even before Russia invaded Ukraine, a New START follow-on under the Biden administration was domestically inconceivable in Washington because it would require a two-thirds ratification by the U.S. Senate. (Many Republicans have consistently opposed arms control agreements, including Senate Minority Leader Mitch McConnell, who voted against New START in 2010 on the grounds that it “does nothing to significantly reduce the Russian Federation’s stockpile of strategic arms.”)

Russia’s legacy of noncompliance and the U.S. withdrawal from the Cold War-era Intermediate-Range Nuclear Forces Treaty in 2019 also undermined trust between Washington and Moscow. And Russian President Vladimir Putin’s invasion is turning his country into an international pariah, potentially ruling out cooperation for the foreseeable future.

A breakdown in nuclear arms control would have repercussions for U.S.-China relations as well. In the final year of his administration, then-U.S. President Donald Trump unsuccessfully attempted to engage China in nuclear negotiations. More recently, the Biden administration has expressed interest in arms control with China in order to “reduce the dangers from China’s modern and growing nuclear arsenal.” In recent years, the United States sought trilateral arms control negotiations with Russia and China to incorporate the latter into existing agreements. But the conflict in Ukraine has thrown into question prospects for future trilateral arms control.

It is too soon to determine if arms control will be reinvigorated or relegated because of Putin’s invasion. Instead, this is a moment for a strategic arms control rethink. Some reports indicate the Biden administration has already taken this step by halting strategic stability dialogues with Russia. Additionally, future meetings of the P5 process—an annual gathering of the five nuclear weapon states recognized by the NPT (China, France, Russia, the United Kingdom, and United States)—also remain uncertain given that diplomats are walking out of international forums of dialogue with Russia. The P5 jointly stated in January 2022 that “[a] nuclear war cannot be won and must never be fought,” yet Russia’s invasion and aggressive nuclear posture suggest these were hollow words for Moscow. It is questionable whether Putin can be trusted in any future dialogues or cooperation on nuclear weapons.

This rethink in strategic arms control coincides with the upcoming release of both the delayed U.S. Nuclear Posture Review, which will outline the Biden administration’s nuclear policy, doctrines, and capabilities as mandated by Congress, and NATO’s Strategic Concept, which will provide guidance for the alliance’s strategy and initiatives. During the rollout and implementation of both of these, Washington should reestablish three priorities for future arms control.

The top priority should be consulting with and reassuring NATO. Historically, NATO has balanced deterrence and collective defense obligations with its commitment to arms control and disarmament. While this dual-track approach should remain the alliance’s guiding principle, the balance has historically shifted between deterrence and détente, and it is likely to lean toward the former in the coming years. So while NATO allies have always been important to Washington’s security strategy, they will likely have an even louder voice in Washington’s arms control and disarmament efforts after the Ukraine crisis. For example, if future cooperation with Russia jeopardizes U.S. credibility to NATO allies in Eastern Europe, Washington should proceed slowly and cautiously. Assuring allies should be more important than cooperation with Russia in the aftermath of the war in Ukraine.

Washington should also prioritize reducing the risks of crisis escalation. Previous agreements, such as New START, provided important transparency and predictability measures to avoid arms racing and crisis escalation. NATO could take a lead in strategic risk reduction, with France, the United Kingdom, and the United States working together to identify the most serious risks of crisis escalation, encourage transparency of nuclear doctrines, and develop crisis communication tools accordingly. These guardrails would also prove useful for risk-reduction efforts in the Indo-Pacific.

Risk reduction will be more valuable than ever after the Ukraine crisis. Putin’s announcement on Feb. 27 of a change in Moscow’s military alert status to a “special service regime” amid the invasion led to confusion in the West and increased risks of misperception—for example, Washington or European capitals could have interpreted the announcement as Russia preparing its nuclear weapons for use. Thanks to arms control, numerous communication channels existed for Moscow’s leadership to clarify the announcement to their U.S. counterparts to avoid any risks of misunderstanding, though we do not know if these were used.

A final priority for the United States should be to uphold its legal obligation to make progress toward nuclear disarmament under the NPT. It may be tempting to shun disarmament altogether in the face of Putin’s aggression, but that would be a mistake. Putin’s attack on Ukraine is an attack on the international order, and his nuclear bullying is an attack on the nuclear order. The NPT is the foundation of that order. Through bilateral agreements with Russia, the United States has reduced its nuclear arsenal by 88 percent from the height of the Cold War. While further reductions may not be feasible in the near term, the United States can continue to fulfill its obligations under New START, restate its commitment to the NPT, and partner with states such as Sweden, which is currently leading a major international initiative for nuclear disarmament, to advance risk reduction.

Whichever trajectory nuclear arms control takes after the war in Ukraine, it will look very different from the past. It probably will not include treaties requiring U.S. Senate ratification because of U.S. domestic politics and Russia’s legacy of noncompliance. Treaties such as New START remain the ultimate objective for arms control and should not be abandoned altogether. But in the aftermath of Russia’s invasion, arms control might instead focus in the near term on risk-reduction measures and establishing rules of the road that are more agile than previous arms control treaties. These new arms control efforts might include agreements to reduce the risks of entanglement scenarios and incidents in space, following the model of the 1972 U.S.-Soviet Incidents at Sea Agreement, which includes noninterference measures and requires that ships maintain a specific safe distance to avoid escalation.

#### Especially now. Supporting compromise with US adversaries is a career-ending offense.

Perkovich 4-1-2022, Ken Olivier and Angela Nomellini Chair and vice president for studies at the Carnegie Endowment for International Peace. (George, “An Optimist Admits That It Is Difficult to See a Path Forward”, Arms Control Today, <https://www.armscontrol.org/act/2022-04/features/optimist-admits-difficult-see-path-forward>)

Today, however, the world is watching what may be the defining security crisis of a generation unfold, one that risks catastrophic nuclear escalation. Yet, it is extremely difficult to see a path forward for arms control and cooperative security measures between the United States and Russia, the United States and China, India and China, India and Pakistan, or anyone else.

There is no shortage of ideas to improve this dismal environment. Nuclear policy experts can all recite concrete proposals for confidence-building and risk-reduction measures, crisis management hotlines, and verification experiments, all of which could reduce insecurity among conflicting states. One underexplored area of potential cooperation is the establishment of standards for activities in and toward objects in outer space, especially low earth orbits, to prevent the creation of more debris and ensure that orbital and spectrum capacity are distributed and preserved for the benefit of all humanity.

None of these objectives will be realized as long as the United States, Russia, China and, regarding some issues, India and Pakistan, are internally dysfunctional (omitting North Korea because I do not know its internal dynamics). This dysfunction, whatever the causes, has reduced the capacity of diplomats and other knowledgeable officials to effectively manage or reduce competition and conflict. Everything is hostage to political leaders who often lack the expertise, interest, and temperament required to break impasses and make wise compromises. Indeed, in the five countries referenced here, compromise has become either unthinkable or, in the case of the United States, politically suicidal, especially for Democratic presidents. That is a fact, not a partisan comment.

#### Republicans face stronger incentives for short-term obstructionism than long-term investments. Mustering a two-thirds majority was already difficult---now, it’s nearly impossible.

Perkovich 4-1-2022, Ken Olivier and Angela Nomellini Chair and vice president for studies at the Carnegie Endowment for International Peace. (George, “An Optimist Admits That It Is Difficult to See a Path Forward”, Arms Control Today, <https://www.armscontrol.org/act/2022-04/features/optimist-admits-difficult-see-path-forward>)

U.S. Dysfunction

It has long been difficult to muster the two-thirds majority needed in the Senate to ratify treaties. The U.S. Constitution’s allocation of two Senate seats per state regardless of population has allowed relatively unpopulated, internationally isolated states to block the ratification of treaties that a large majority of the population would support. It took 40 years to ratify the Convention on the Prevention and Punishment of the Crime of Genocide. The 1994 UN Convention on the Law of the Sea remains unratified, as does the 1996 Comprehensive Test Ban Treaty, although the United States abides by both. The New Strategic Arms Reduction Treaty was ratified in 2010 only because President Barack Obama promised in return a massive infusion of funds to modernize the U.S. nuclear arsenal.

In the current U.S. context, it is easier and more profitable politically to pursue short-term, even xenophobic, obstructionism than invest in long-term policy goals. Today, almost all Republican senators would reject any treaty to which Russia, China, North Korea, or Iran would agree, even if many of those senators could not pass a basic quiz on the treaty’s contents.1 Beyond treaties, Republican opposition led by Senators Ted Cruz (Texas), Josh Hawley (Mo.), and others is blocking the confirmation of unprecedented numbers of presidential nominees for important national security positions, undermining the government’s ability to do its job.2

Rather than ratify new arms control treaties, Republican administrations have become more inclined to withdraw from old ones. Unsurprisingly, these short-sighted decisions have significant consequences that leave the United States less secure than if they had remained committed to the original agreement. Abrogating the Anti-Ballistic Missile Treaty (President George W. Bush in 2001) stimulated Russia to design alarming new delivery systems that could be immune to U.S. defenses, which are little more effective than would have been the case under the treaty.3 The withdrawal from the Joint Comprehensive Plan of Action (Trump in 2018) has enabled Iran to increase its nuclear know-how and production of fissile material, while delivering no benefits for the United States and its regional partners. This predilection to withdraw from treaties reinforces the view in Moscow, Beijing, and elsewhere that there is no point negotiating with the United States, and it erodes Washington’s diplomatic capital to engage on other crucial U.S. interests abroad.

The old saying about politics stopping at the water’s edge means that, in engaging other countries, especially competitors and adversaries, U.S. politicians would display unity. That notion and practice have become increasingly laughable since the 1994 “Gingrich Revolution.”

The Cold War was infamous and internally destructive for the red-baiting and politically forced narrowness of policy debates. There are lots of negative examples, particularly Vietnam policy in the Johnson administration, but perhaps most telling was the Cuban missile crisis, when President John F. Kennedy kept secret his accommodating decision to withdraw U.S. missiles from Turkey. Soviet leader Nikita Khrushchev needed a quid pro quo to agree to withdraw the nuclear-armed missiles from Cuba, and Kennedy gave it to him, even though the Soviets initiated the crisis. Would such a move be kept secret today? If not, would a similar existential crisis be resolvable? Political discourse toward China is starting to chill thinking and debate in recognizable ways, making it difficult politically to advocate win-win approaches to problems with China, in which both sides would need to compromise.

#### Republican hostility toward “liberal arms control” is entrenched.

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Additional changes have also affected the domestic factor. The first is the U.S. political establishment’s growing inability to find common ground on arms control policies. Again, diverging views between Republicans and Democrats had periodically overshadowed or interrupted Cold War arms control relations, e.g., during the Carter presidency. Today’s inability to compromise, however, has become a structural impediment to arms control and has made it almost impossible for the current administration (and indeed for future administrations) to conclude legally binding arms control agreements that would pass the test in the U.S. Senate. The scrupulousness with which Trump officials dismantled the treaty-making legacy of President Obama—not just in the arms control realm—shows that Republican hostility towards Democratic arms control is now an entrenched feature of U.S. politics. In addition, the GOP’s turn away from arms control marks a distinct departure from the Cold War-era administrations of Presidents Nixon, Reagan, and Bush Senior, who had valued arms control for its contribution to U.S. national security. U.S. agreement-making power during and shortly after the Cold War had rested to a large degree on Republican shoulders. George W. Bush was the first Republican President since Richard Nixon not to have a dedicated interest in arms control with Moscow. It took twenty years after the signing of START I for another verifiable nuclear arms reductions treaty, New START, to enter into force in 2011. Since 1991, no verifiable nuclear arms control agreement with Moscow has been negotiated and brought into force by a Republican administration. The main change to the domestic factor in the new millennium did not concern topic-specific differences between Republicans and Democrats over missile defense or quarrels over the political vs. legal stipulations of SORT, however. Instead, it occurred at the level of narratives, according to which GOP lawmakers argued that bilateral arms control per se had outlived itself and was no longer in the security interest of the United States (see Sololsky 2001; Böller 2021; Krepon 2021).

#### Major power arms control isn’t coming back. Engaging Russia is politically toxic, the bilateral relationship is in shambles, and new tech developments undermine verification.

Trenin 20, PhD, director of the Carnegie Moscow Center, chairs the research council and the Foreign and Security Policy Program. (Dmitri, 9-15-2020, “Stability amid Strategic Deregulation: Managing the End of Nuclear Arms Control”, The Washington Quarterly, Volume 43, Issue 3, Taylor & Francis, <https://doi.org/10.1080/0163660X.2020.1813401>)

Major Power Arms Control Isn’t Coming Back

The United States still has significant advantages—technological, industrial, strategic—over China and Russia, and the logic of rivalry dictates that it makes full use of those. Why should Washington still be bound by treaties with Moscow, which is no longer its strategic equal, when China poses a credible threat? The United States needs to be completely unbound. The strategy that worked against the Soviet Union could be tried again: pressure US opponents into conceding to US demands or bankrupt them in a new arms race. This strategy would today be aimed at China in the first place, and then also at Russia.

In November 2020, the United States is facing a presidential election. If Joe Biden becomes the next US president, arms control could be rehabilitated—but only a little bit. New START can still theoretically be salvaged by February 2021. Follow-on talks with Russia on strategic issues might begin, but a positive result is by no means guaranteed. US-Russia relations are fundamentally broken and impossible to repair in the foreseeable future. Even a minimum of goodwill that is required to start serious negotiations is lacking. To most in the US political class, Russia remains absolutely toxic.

Russia’s foreign policy is unlikely to change in the direction desired by the United States. In Moscow policy circles, the Trump administration is regarded as wholly untrustworthy. In particular, no “walks in the woods” to sketch out the contours of a possible accord are possible anymore: Americans leak information profusely, for short-term political reasons. Whoever wins in November, US domestic politics will hardly see a truce in the bitter partisan war. In this climate, any agreement negotiated and signed with Russia will face an exceedingly difficult time in the US Senate. Even in the much quieter and more civil atmosphere of a decade ago, the New START ratification was not immediately assured.

As diplomats are stymied, strategists seem to be rehabilitating ideas about a limited nuclear war.6 Despite official Russian protestations, many in the United States and NATO countries believe that Moscow seeks a strategy of “escalating to de-escalate”7—in other words, using nuclear weapons in a conventional military conflict that it fears it might lose. On the Russian side, there is concern that limited nuclear warfighting scenarios are gaining currency in the West. A Moscow proposal to Washington to formally restate the Reagan-Gorbachev statement that “nuclear war cannot be won and should never be fought” has unexpectedly gotten stuck in the bureaucratic morass on the US side, thus only enhancing Russian concerns.8 The new emphasis in the United States on small-yield nuclear weapons is backing up those concerns with material evidence.

Russia is concerned that limited nuclear warfighting scenarios are gaining currency in the West

Russia itself, of course, has just completed a new round of nuclear force modernization, with the development and imminent deployment of the fifth-generation silo-based ICBM Sarmat (RS-28 or SS-X-30) with the hypersonic Avangard guided warhead that has an enhanced capability to obviate and penetrate US missile defenses. The United States is on the cusp of its own nuclear modernization program. However, including these new systems that simply modernize older ones in a hypothetical new US-Russia arms control agreement is not as difficult as dealing with a range of wholly new developments that have greatly complicated the strategic weapons environment. Beyond advanced missile defense systems, these developments include the prompt global strike concept and the emergence of strategic non-nuclear systems linked to it, the emergence of space-based weapons, and the role of cyber tools in the strategic sphere. There is also the issue of entanglement: joint basing of nuclear and non-nuclear weapons that are hard to distinguish by a target country.

Thus, arms control is no longer about numbers of generally similar weapons; it is about the capabilities of a broad range of diverse systems, each of which impacts the strategic calculus. Placing all this under effective control and verifying the implementation of agreements will be enormously difficult, if at all possible. So, from a technological perspective, future arms control will be exceedingly challenging—much more difficult than it was during the Cold War.

#### Congress’s commitment to missile defense, Biden’s focus on domestic issues, polarization, and the collapse of the INF put arms control out of reach.

Schepers & Thränert 21, \*Névine Schepers, Researcher in the Swiss and Euro-Atlantic Security Team at the Center for Security Studies, \*\*Dr. Oliver Thränert, Head of the Think Tank at the Center for Security Studies (March 2021, “Arms Control Without Treaties”, CSS Policy Perspectives, 9(3), pg. 2, Accessible at: <https://doi.org/10.3929/ethz-b-000476183>)

Moreover, short-range nuclear weapons, also known as tactical nuclear weapons, have never been limited by past US-Russian arms control agreements. Given Russia’s significantly larger arsenal of these weapons and their impact on the interests of US allies in Europe and Asia, the US has raised their inclusion in arms control negotiations. Moscow sees new arms control accords as only worth considering if Washington is willing to put missile defense systems, which Beijing is also concerned with, on the table. This, in turn, seems unfeasible as missile defense enjoys wide bipartisan support in Congress and serves to defend the US and its allies against potential aggression, mainly from North Korea and Iran.

Finding a compromise, in the form of a legally binding and verifiable treaty, to address both US and Russian concerns has long appeared nearly impossible given the complexity of what is at stake. In addition to missile defense, there are other non-nuclear technologies that arms control negotiations should consider, given their potential impact on nuclear systems and strategic stability. In particular, the vulnerability of nuclear command, control, communication, and intelligence (C3I) systems to increasingly sophisticated conventional weapons as well as cyber-attacks has become a major source of concern.2 Artificial Intelligence’s potential as an enabling technology, and the various ways in which it could be incorporated into nuclear systems, also poses a number of risks related to escalation and strategic stability.3 Neither case is easily amenable to traditional arms control treaties that deal with specific quantities and capabilities rather than behaviors.

There are further political and systemic factors that make it more difficult to negotiate and ratify arms control treaties. US leadership is sorely needed to initiate and see through discussions that would address a range of capabilities. However, such leadership may be in short supply as the Biden administration focuses its attention at home and on a range of other issues such as the health and climate crises. The ratification of any arms control treaty requires a two-thirds majority in the US Senate, which seems unlikely due to severe polarization along party lines. The collapse of the Intermediate-range Nuclear Forces (INF) treaty, which banned all US and Russian ground-based intermediate forces, over Russian violations also casts a shadow over any agreement negotiated with Moscow and fuels skepticism over future compliance.

#### Polarization and ideological opposition hamper attempts at arms control.

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Sadly, the consensus for negotiated constraints on nuclear forces has been weakened by the broader domestic polarization in the United States and a lack of strategic consensus on how to deal with the geopolitical challenges posed by Russia and China. Ideological commitment to certain programs—primarily national missile defense—at the expense of preserving global nuclear stability and the inability of the American political system to sustain support for negotiated treaties from one administration to the next have increased instability and reduced the perceived viability of arms control.10 Building support for new agreements in the United States will take time, patience, and an investment of political capital, but in the end should be pursued if they enhance American security.

#### Some believe that Senate-approved arms control deals have no viable future.

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Today, nuclear arms control is a polarizing term in the United States, and some analysts believe that legally binding, Senate-approved arms control deals have no viable future due to perceived costs and objectionable Russian behavior.4 While some experts and officials see nuclear treaties as commonsense enhancements to national security and defense policy that should be pursued despite partisan opposition, critics see nuclear deals as dangerous and an unnecessary constraint on American freedom of action in the face of growing Russian and Chinese dangers.5

### Aff---ReSTART

#### US-Russia arms control is in crisis. Negotiating a successor to New START that constrains emerging weapon systems AND manages the buildup of existing capabilities is key to stop a burgeoning arms race and prevent nuclear escalation.

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INTRODUCTION

Russia and the United States possess nuclear forces that could destroy both states and much of the rest of the world—many times over in a matter of minutes. For most of the last five decades, a series of treaties have regulated these arsenals. Today, just one of these treaties—New START—remains in force, and it is due to expire on February 5, 2021. The end of nuclear arms control would undermine the security of both Russia and the United States. The two states, therefore, should begin negotiations on a mutually beneficial follow-on treaty and, to buy time for this process, extend New START. This paper proposes key provisions for a follow-on treaty.

Treaties to verifiably limit nuclear forces enhance Russian and U.S. security in two primary ways. First, they can help avoid expensive arms build-ups that would heighten geopolitical tensions. For both Moscow and Washington, inferiority in strategic arms is unacceptable.1 However, striving to acquire sufficient capabilities to avoid inferiority (let alone those needed to achieve superiority) risks sparking an arms race. Arms control agreements prevent this outcome by verifiably facilitating parity at a lower level than would otherwise have been the case. And the resource savings extend beyond the weapons that are not built. The additional intelligence collection efforts needed to monitor a potential adversary’s nuclear forces with a high degree of confidence without cooperative verification arrangements would be much more costly than data exchanges and inspections.

Second, and perhaps even more importantly, arms control treaties can reduce the risk of escalation leading to nuclear use. In a conflict or deep crisis, a state that was concerned that its nuclear forces were vulnerable and that an attack on them was imminent could try to scare its adversary into backing off by issuing nuclear threats or even engaging in limited nuclear use. In extremis, the state might even launch a large-scale preemptive attack on its adversary’s nuclear forces in the hope of limiting the damage those weapons could do. Arms control can help to manage such crisis instability. Exaggerated fears can be dispelled by each state’s being transparent about the number, operational status, and deployment locations of its nuclear weapons. Well-grounded fears can be managed through limits on offensive capabilities, requirements or incentives to field forces that are more survivable or less useful for conducting a surprise attack, and even prohibitions on destabilizing technologies, particularly those that could be employed to attack an adversary’s nuclear forces.

Strategic arms control, exemplified by New START, plays a particularly important role in risk reduction. (In unhelpful jargon inherited from the Cold War, the term “strategic” is used to describe weapons with sufficient range to attack the other state’s homeland from their deployment locations.) Because Russian and U.S. strategic weapons—ICBMs, SLBMs, and heavy bombers—directly pose an existential threat to the other nation, imbalances are particularly likely to catalyze arms racing. Moreover, because a relatively large fraction of each state’s strategic forces and their supporting infrastructure are located in their homelands, the perceived threat of being attacked with strategic weapons is especially liable to spark escalation as the result of crisis instability.

The sharp decline in U.S.-Russian relations since New START entered into force has increased the risks of both a quantitative arms race and the kind of deep crisis or conflict that could make nuclear use imaginable. As a result, the need for strategic arms control is now greater than at any time since the end of the Cold War. Indeed, the U.S. National Defense Authorization Act for Fiscal Year 2020, which was passed with overwhelming bipartisan support, emphasizes that “legally binding, verifiable limits on Russian strategic nuclear forces are in the national security interest of the United States.”2

To preserve the benefits of strategic arms control, Russia and the United States should extend New START in its current form for five years, as permitted by the treaty. Russia has indicated its support for an unconditional extension.3 And the administration of President Donald Trump has not completely ruled one out—although it has expressed skepticism and suggested various conditions for an extension. Most recently, it has conditioned the extension of New START on Russia and the United States’ negotiating a nonbinding “framework” for future arms control, which “China will be expected to join.”4 Washington insists that, under this framework, Russia must commit to negotiating limits on all warheads, including those that are not accountable under New START.

Even if Russia and the United States can eventually manage to agree on an extension, it would serve only as a stopgap. Moscow and Washington, therefore, should also begin negotiations toward a follow-on treaty. Because such negotiations are likely to be drawn out, they should commence as soon as possible. (Obviously, if New START is not extended, negotiations on a new treaty would become all the more urgent.

OVERVIEW OF THE ISSUES

The starting point for negotiations toward a follow-on treaty should be—and likely would be—the text of New START. Overall, this agreement has functioned well. The Trump administration has repeatedly certified Russian compliance at a time when it has not been shy about accusing Russia of violating other agreements.5 Current and former military leaders espouse the value of the treaty’s verification provisions for military planning.6 That said, Trump administration officials, lawmakers, and analysts have criticized New START for what it does not constrain.7 Russia’s so-called exotic strategic weapons—that is, new strategic weapons of kinds other than ICBMs, SLBMs, or heavy bombers—have sparked considerable concern. One such system, the IGLBGM Avangard, has already been deployed. Because its booster is a treaty accountable ICBM, Russia has acknowledged that it is accountable under New START and is applying the treaty’s provisions accordingly. But developmental systems, including a nuclear-powered cruise missile and a long-range nuclear-powered torpedo—both of which are intended to be nuclear-armed—may not be captured by New START’s definitions (though neither is likely to be deployed during that treaty’s lifetime, even if it is extended). A follow-on treaty should address this lacuna.

#### Bilateral arms control isn’t obsolete. A New START follow-on treaty would provide transparency over strategic forces and roll back nonstrategic arms races.

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WHY U.S.-RUSSIA ARMS CONTROL STILL MATTERS

The Trump administration argued that bilateral U.S.-Russian arms control is outdated, and it prioritized negotiating a trilateral treaty that limits China’s nuclear forces alongside those of the United States and Russia. Engaging China is a worthwhile goal that deserves real diplomatic efforts, as discussed below. It would, however, be a significant mistake to allow Beijing to veto U.S.-Russian arms control efforts. Bilateral arms control with Russia remains an important tool for enhancing the security of the United States and its allies. The United States should pursue it alongside efforts to engage China.

The United States and Russia size and posture their nuclear forces to compete against each other. Without arms control, this interdependence could intensify an expensive and dangerous competition in strategic forces—a particularly acute risk, given Russia’s development of new “exotic” nuclear weapons. Russia’s opaque nonstrategic nuclear forces are of particular concern to the United States and NATO. Russia has many such weapons, deploys them close to the territories of NATO’s easternmost members, and maintains options for using them early in a conflict. The United States is moving to counter Russian capabilities with new air- and sea-based capabilities of its own. Arms control could provide much-needed transparency in this domain and eventually help to cap and roll back the emerging nonstrategic nuclear forces competition.

BASIC STRATEGY

If the United States wants Russia to deal with U.S. concerns, it must be prepared to discuss and help address Russian concerns—in particular, about the survivability of its nuclear forces. These concerns have grown as a result of advances in non-nuclear weaponry, including high-precision conventional weapons and ballistic missile defenses, as well as projected modernization of U.S. nuclear forces.

Before addressing concerns about future arms racing and instability, the United States and Russia will need to deal with each other’s deep dissatisfaction over past performance in upholding earlier arms control treaties and international agreements. The United States, with evidence and reason, emphasizes Russia’s violations of the INF and Conventional Forces in Europe treaties, as well as problems with Russian practices related to the Open Skies Treaty. It also points to Russia’s recent violations of Ukrainian sovereignty and territorial integrity. Russia, for its part, emphasizes the U.S. withdrawal from the ABM Treaty, the INF Treaty, and the Joint Comprehensive Plan of Action with Iran, as well as the U.S. decision to withdraw from Open Skies. The result is that many Americans believe Russia will violate arms control agreements while Russian leaders believe the United States will withdraw from them when an administration believes it is unilaterally advantageous to do so. The moral and legal “superiority” of withdrawing from agreements compared to violating them is clearer to Americans than it is to many others, including U.S. allies that rely on the same accords for their security.

The United States and Russia will be unlikely to undertake new agreements if they do not explicitly agree on measures to reassure each other that their pattern of unilateral noncompliance and withdrawal will not be repeated. Updating verification measures in new agreements is one way to address these concerns.

#### Specific options for a follow-on treaty include:

#### ---Limiting boost-glide missiles, which threaten to circumvent New START, AND inhibiting Russian MIRVs.

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CENTRAL LIMITS

New START imposes three separate limits: 700 deployed ICBMs, SLBMs, and heavy bombers; 800 deployed and nondeployed ICBM launchers, SLBM launchers, and heavy bombers; and 1,500 deployed strategic warheads (with each deployed heavy bomber counted as one such warhead). All of the United States’ strategic-range nuclear weapons and the vast majority of Russia’s are captured by these limits (Russia’s nuclear-armed SLCMs are the only exception). However, to account for technological developments since New START’s negotiation, a follow-on treaty should, in various ways, manage a broader range of strategic offensive arms—boost-glide missiles, air-launched ballistic missiles (ALBMs), NTs, and nuclear-powered cruise missiles—while encouraging Russia to further reduce its reliance on vulnerable silo-based ICBMs loaded with large numbers of warheads.

Intercontinental ground-launched boost-glide missiles and nuclear-powered torpedoes. IGLBGMs and NTs represent new kinds of strategic offensive arms. For a follow-on treaty to be credible, it is just as important to limit these weapons as it is to limit ICBMs or SLBMs. If IGLBGMs and NTs were not accountable, deploying them would enable the United States or Russia to circumvent the treaty’s limits.

IGLBGMs are launched by large rockets, but rather than arcing high above the Earth like ICBMs, they reenter the atmosphere quickly and then glide unpowered through it at hypersonic speeds. In 2019, Russia started to field the first IGLBGM, Avangard, which is intended to penetrate U.S. homeland missile defenses and will likely be deployed exclusively with nuclear warheads.11 Because its booster is a treaty-accountable ICBM, this missile counts toward New START’s limits—but future Russian IGLBGMs may not. The United States, meanwhile, is focused on the development of nonnuclear boost-glide weapons with shorter ranges, but it has conducted flight tests of intercontinental-range systems, which also may not be captured by New START’s limits.12 Russia is concerned that U.S. IGLBGMs, whether nuclear or conventionally armed, could threaten its nuclear forces. Managing these concerns is another reason for limiting IGLBGMs. Given the similarities between ICBMs and IGLBGMs, there should be few technical challenges to making IGLBGMs accountable under a follow-on treaty.

Concerns about U.S. ballistic missile defenses also motivated Russia to develop the Poseidon nuclear-powered torpedo, which will have an extremely long range (described by the U.S. Department of Defense as “intercontinental”) and carry a high-yield nuclear warhead.13 Russia’s position is that its inclusion in New START would require an amendment. For now, the issue is moot because Poseidon will likely not be deployed within the lifetime of New START or even during a possible extension. Looking forward, because Russia’s NTs will reportedly be deployed aboard a dedicated carrier submarine—in much the same way that SLBMs are deployed on SSBNs—it should be technically straightforward for a follow-on treaty to limit them.14

**[BOX OMITTED]**

Multiple independently targetable reentry vehicles. Although not a new technology, MIRVs—multiple independently targetable warheads—undermine crisis stability. In particular, many of Russia’s vulnerable silo-based ICBMs are loaded with four, six, or even ten warheads.15 The United States could destroy each of these weapons before they were launched, with high confidence, by targeting them with just two warheads a piece. As a result, in a major conflict, the United States would have particularly strong incentives to attack Russia’s silo-based ICBMs preemptively—which would, in turn, create strong pressures on Russia to use those weapons while it still could.

Although a prohibition on MIRVed silo-based ICBMs would be desirable, Moscow would be highly unlikely to accept it today—not least because these weapons, which make up almost half of Russia’s deployed ICBM warheads, significantly reduce the costs of maintaining parity with the United States.16 Nonetheless, a follow-on treaty could still discourage loading large numbers of warheads onto individual missiles. In particular, to meet the central limits of a treaty that mandated steeper reductions of warheads than of deployed delivery systems and launchers, Russia would probably need to reduce the warhead loadings on some MIRVed ICBMs. While this approach would not require Russia to abandon such weapons entirely, it might lead Moscow to reassess the utility of Sarmat—a new heavily MIRVed ICBM currently under development—and deploy it in smaller numbers or, perhaps, not at all and instead place a greater emphasis on more survivable mobile ICBMs (in particular, the mobile variant of the RS-24 ICBM, which is currently under production).

#### MIRVed silo-based ICBMs are key targets for arms control.

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Finally, the United States and Russia still share an interest in limiting MIRVed silo-based ICBMs. Both countries committed to these limitations in order to enhance strategic stability under the START II Treaty, even though the treaty never entered into force. This goal is still important. Reducing silo-based ICBMs would reduce the most destabilizing type of MIRVs—those that are fixed and therefore prone to strategic instability. Although Russia’s interest in MIRVs remains strong—and is well explained by Russian Ministry of Foreign Affairs official Vladimir Leontiev—the possible deployment of a new U.S. ICBM and other modern delivery systems could create incentives to negotiate.14

The specifics of an agreement which would reduce silo-ICBMs obviously must be left to arms control negotiators with access to confidential information on U.S. and Russian force structures. The U.S.-Russian proclivity to seek numerical parity across kinds of delivery systems as well as overall warheads will require creative force-structure planning and negotiating. If either or both governments move beyond demands for parity of numbers and focus instead on stability, more options for agreement would arise.

#### ---Curbing Russian boost-glide weapons and nuclear-powered missiles. In exchange, the US could dial back missile defense or disarm some of its strategic warheads.

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NEGOTIATION OF A NEW START FOLLOW-ON

Even if New START is extended, the United States and Russia will be pressed for time to negotiate a successor agreement. It is difficult to imagine that they will be doing so in a decidedly better political relationship. Therefore, the most feasible objectives would be to:

Use the framework and verification approach of New START to further reduce deployed strategic delivery systems, launchers, and warheads, and to apply limits to new technologies that are strategically significant but not technically covered by New START. The aim should be to enhance stability and, as much as possible, lower the scale of global catastrophe if deterrence fails.

Specifically, the agenda for follow-on negotiations should address Russia’s intercontinental ground-launched boost-glide weapons, nuclear-powered torpedoes, nuclear-powered cruise missiles, and air-launched ballistic and boost-glide missiles.2 The United States’ air- and sea-launched boost-glide missiles now under development also would need to be included. In addition to limiting U.S. ballistic missile defenses, Russian negotiators obviously will posit additional priorities. These would likely include more specifically limiting the number of nuclear warheads that covered aircraft may deploy. (Under New START counting rules, each bomber plane counts as one warhead against the overall limit of 1,550, although each bomber may carry 6 to 20 nuclear weapons when deployed.)3 Russia also would at the very least demand that the United States redress its concerns over SLBM and B-52H conversions.4

Strategists often argue that targeting and operational objectives should be decisive in determining numerical limits for weapons, and that lowering numbers for their own sake is astrategic. Yet somehow, for decades, the target-based logic produced overkill in the quantity of deployed nuclear weapons, and successive new administrations repeatedly sought to correct this issue.5 Indeed, throughout much of the Cold War, military planners searched for targets to match the growing number of weapons on hand or in the pipeline. In this sense, the number of available weapons set a “budget” for targeting. If the number and explosive yields of weapons that that United States and Russia wield today could produce global climatic (and fallout) catastrophe in an all-out nuclear war, the strategic and legal case can be made to set a “destructiveness budget” to limit the number and yields of their arsenals. The numbers of weapons that the United States and Russia possess and deploy in toto today belie claims that targeting “requirements” are so precise. All treaties to date adopt limits in increments of fifties of weapons, not tens or ones.6

In 2013, the Pentagon concluded that the United States could fulfill its strategic deterrent requirements with 1,000 weapons under New START counting rules. In other words, the United States could unilaterally reduce by more than 500 deployed strategic warheads below New START warhead limits. The Obama administration made a political judgment not to pursue this course, and instead to reduce further only with reciprocity from Russia.7 For their part, unofficial Russian experts also have spoken and written of making a deployed warhead limit of 1,000 an objective for a follow-on agreement to New START.8

One reason for making 1,000 an objective is that it would still leave the United States and Russia with strategic weapons numbering in four digits, signifying their strategic superiority compared with the three digits of the next largest nuclear arsenals, France (300) and China (low 200s and growing). The attraction of this symbolism is understandable from several perspectives, but it is a liability from others. The rest of the world, particularly most of the 185 non-nuclear-weapon states under the NPT, are so frustrated with the lack of progress in nuclear disarmament that they support the 2017 UN Treaty on the Prohibition of Nuclear Weapons. To the extent that the nuclear nonproliferation regime remains important for international security, keeping these states invested in that regime is an important objective. A U.S.-Russia agreement that brought both countries’ arsenals below the 1,000-warhead threshold could be useful in this regard. It is ridiculous to argue that either the United States or Russia would be less secure with, say, 999 operationally deployed strategic weapons than they would be with 1,000.

#### ---Capping operationally deployed nuclear warheads at 1,000. That’d be straightforward and verifiable.

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Reducing Existing Nuclear Weapons

What next? The Trump administration has argued for a new treaty that limits all nuclear warheads, including non-deployed nuclear warheads held in storage facilities. This limitation is a worthy goal, although it is more ambitious than anything ever achieved at the negotiating table. Past treaties focused on constraining the delivery vehicles for warheads (sea- and ground-launched missiles) and their launcher systems (such as mobile transporters, submarines, and bombers) because these are large pieces of hardware that even satellites in space can easily count. Warheads, once they came off the missiles, were typically taken out of deployment and stored. Thus, they were no longer a direct threat to the other party.

Constraining all nuclear warheads, including those that are non-deployed or associated with shorter-range missiles—that is, “non-strategic” systems—has never been tried before. It is difficult because neither side has ever wanted the other to come into its sensitive nuclear storage facilities—among the most secret locations in either country. Working out the verification and monitoring regime for such an agreement would be complex and difficult with our negotiating partners.

In the end, however, I am confident that verification could be worked out because of innovations that have developed over the years in technologies such as remote video monitoring and movement detection. New START also pioneered verification techniques in reentry vehicle on-site inspection (RV OSI) to confirm the numbers of warheads on the front ends of missiles, using soft covers and radiation detection equipment to check on non-nuclear objects. Such innovations make warhead monitoring possible, though extremely complicated. Nonetheless, constraining all nuclear warheads is the right goal for the next big negotiations.

For that reason, we should look for a quick win with further reductions while we plan these new negotiations. Here, I return to the important innovation that the George W. Bush administration developed in 2002: the Strategic Offensive Forces Treaty (SORT). SORT took advantage of a treaty that was in force, START, to maintain a simple approach. Only a few pages long, it called for a further reduction below the START limit of 6,000 deployed warheads on each side to 2,200. START continued, so its verification regime was still being implemented. The new reductions were accounted for in the database, notifications and inspections of START. It was an elegant solution.

This model could be readily used for an additional reduction below the New START level of operational warheads, which is 1,550 (down from the 2,200 in SORT). In 2013, the Joint Chiefs of Staff of the United States indicated their view that up to a one-third further reduction in operationally deployed strategic warheads could be taken without effect to US security.13 The United States proposed it at the time to the Russians, but there was no interest. If renewed, such a proposal would reduce US and Russian operationally deployed strategic nuclear warheads to approximately 1,000 on each side. If New START were extended, then its verification regime would continue to be implemented, so the new reductions would be accounted for in its database, notifications, and inspections.

This model could provide a quick success for nuclear arms control policy. Of course, nuclear reductions must be ratified by the US Senate and Russian legislature, as SORT was. With continuing support from US military leadership, a ratification process can be successful, although it will be difficult to achieve, just as New START initially was.

#### ---Constraining Russian silo-based ICBMs---they’re most destabilizing, and there’s a opening for horse-trading.

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Whatever number negotiators would seek, another key strategic objective should be to reduce the weapons that are the greatest source of instability and environmental damage in a potentially escalatory conflict. Those are silo-based ICBMs, especially ones with multiple warheads. (See chapter 4 for the problems associated with these weapons.)

There are roadblocks to negotiating the eventual elimination of silo-based ICBMs. Russia continues to depend on multiple-warhead silo-based ICBMs as a cost-efficient way to deploy large numbers of warheads.9 The warheads on these large ICBMs ostensibly pose the greatest risk to the geographically vast U.S. ICBM launch facilities. As U.S. missile defenses advance, the Kremlin places more importance on this objective.10 Even as Russia has shifted more of its deployed strategic nuclear forces to mobile ICBMs over the past ten years, it is replacing the aging SS-18 heavy-silo ICBM with the even larger Sarmat, which will be deployed in the 2020s. The Sarmat and a variant of the SS-19 silo-ICBM also serve as planned delivery systems for the Avangard boost-glide vehicle. Russia chose to advance the Avangard-carrying missiles over certain mobile ICBM systems in its ten-year armament plan.11 This decision may reflect a priority on countering U.S. homeland missile defenses. In that case, Avangard—if retained while Russia reduces other multiple warhead ICBMs—could help reassure Russia that U.S. homeland missile defenses will not negate Russia’s deterrent.

Both countries’ armed forces and military-industrial complexes are attached to silo-based systems.12 Nevertheless, the United States and Russia also have a shared interest in reducing them. Each side’s silo-based ICBM force largely justifies the modernization of the other’s. The strategic interactions between the two create incentives to prepare for and possibly use ICBMs in preemptive strikes. This dynamic, while meant to strengthen deterrence, can also weaken crisis stability and create opportunities for inadvertent escalation. Stability could be enhanced instead by increasing the ratio of highly survivable delivery systems in each country’s nuclear force and discarding less survivable systems, recognizing that survivability requires a weapon to be able to penetrate adversary defenses.

The timing is right within each country’s modernization programs to halt or limit new (or replacement) silo-ICBM deployments. Each country’s domestic military budgeting, development, and operational planning for future silo-ICBMs is not finished. Russia’s Sarmat is nearing the end of its development cycle, but not deployed yet. The GBSD is still on the drawing board. The development of each missile will advance rapidly in the next two to three years. After deployment, Washington and Moscow (and their respective silo-ICBM stakeholders) will be less inclined to eliminate the new missiles. Before deployment, GBSD and Sarmat represent good starting points for the traditional horse-trading that accompanies preparation for arms control negotiations. An agreement to not deploy, or to reduce newly deployed silo-ICBMs (by replacing older ones on a less than one-to-one basis), could be an early confidence-building measure by the parties while the details of a New START follow-on are jointly pursued.13

#### “MIRV” refers to a Multiple Independent Reentry Vehicle, a missile technology that can launch nuclear warheads at different trajectories.

Encyclopaedia Britannica No Date (“MIRV”, <https://www.britannica.com/technology/MIRV>)

MIRV, abbreviation of Multiple Independent Reentry Vehicle, any of several nuclear warheads carried on the front end, or “bus,” of a ballistic missile. Each MIRV allows separately targeted nuclear warheads to be sent on their independent ways after the main propulsion stages of the missile launch have shut down. The warheads can be released from the bus at different speeds and on different trajectories. MIRV technology was first developed by the United States. By the late 20th century both the United States and the Soviet Union had many intercontinental and submarine-launched ballistic missiles equipped with MIRVs.

### Aff---ReSTART---Arms Racing Advantage

#### A renewed push for nuclear arms control is key to prevent the Ukraine crisis from morphing into a nuclear war.

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Less than four years ago, experts would acknowledge the possibility that Ukraine could eventually become an arena for Russian-NATO confrontation and predict that “any significant reescalation of military hostilities in Ukraine, pushing NATO, Russia or both to intervene directly or indirectly, may quickly grow into a direct military engagement in the most sensitive areas along their shared border,” as suggested by the Organization for Security and Co-operation in Europe (OSCE) network of think tanks and academic institutions. Such a development would also bear the danger of potential nuclear escalation of the conflict.1

Although this scenario appeared remote at the time, Russia is weeks into its war in Ukraine; and the possibility of a nuclear escalation involving Russia, NATO, and the United States has reached levels not seen since the end of the Cold War. Since the beginning of the war in late February, Russia and the United States have played the nuclear deterrence card to communicate what they would see as redlines, the crossing of which could trigger World War III. As the hostilities evolved, however, these redlines seemed to blur, opening grey areas and thus increasing the ambiguity as to what developments could lead to inadvertent nuclear escalation. This highlights the need for a more robust mechanism, including relevant arms control measures, to appropriately address this inherent danger.

Mutual Signaling

From the beginning of the conflict, the United States and NATO repeatedly conveyed the message that they would not send troops to defend Ukraine, although they were prepared to arm the government in Kyiv and raise the costs of the intervention for Russia. Still, while launching the military operation, Russian President Vladimir Putin explicitly warned the West not to think of intervening militarily, implicitly threatening that this could lead to a nuclear war. “I would now like to say something very important for those who may be tempted to interfere in these developments from the outside,” Putin said on February 24. “No matter who tries to stand in our way or, all the more so, create threats for our country and our people, they must know that Russia will respond immediately, and the consequences will be such as you have never seen in your entire history. No matter how the events unfold, we are ready. All the necessary decisions in this regard have been taken. I hope that my words will be heard.”2

At the same time, U.S. President Joe Biden also signaled that the United States would not shy away from entering a world war that, by default, would become nuclear should the Russian military operation be extended beyond the borders of Ukraine and spill over onto the territory of any NATO member states. “If they move once—granted, if we respond, it is World War III, but we have a sacred obligation on NATO territory,”3 Biden said on March 11. Yet, the devil is in the details. In the course of the hostilities, many questions have arisen and more may arise in the future as to whether a particular action could be seen by one or another side as an escalation that could lead to direct engagement.

Although the politically controversial option of establishing a no-fly zone in Ukraine was rejected by the United States and NATO because it might lead to direct engagement between Russian and NATO combat aircraft, the consequences of other options were less obvious. Could the continuous supply of weapons to Ukraine from NATO member states amid the hostilities be interpreted as direct interference by the Western alliance in the war? Although Moscow would not take it that far, the Kremlin has made it clear that “any cargo moving into Ukrainian territory, which we would believe is carrying weapons, would be fair game.”4 It seems that this proposition is tacitly accepted in the West. Yet, if the Ukrainian air force launches from airfields on the territory of neighboring NATO member states, such as Romania and Poland—an option considered for a while during the early weeks of the war—would that provoke Russian strikes against such facilities, thus extending the military operation beyond the borders of Ukraine, and would NATO consider it a casus belli?

Such questions suggest how developments on the ground and decisions made by top leaders could further blur the redlines established by nuclear deterrence postures on both sides and set in motion an inadvertent escalation of the war. So far, Russia and the United States have exercised restraint in order to avoid such unintended escalation. One example was the U.S. decision to postpone a scheduled Minuteman III intercontinental ballistic missile flight test.5 Nevertheless, uncertainties persist and grow as the war continues.

A Wake-Up Call?

What lessons will be learned about the long-standing Russian and U.S. nuclear deterrence postures when the war in Ukraine is over? Will the war serve as a wake-up call similar to the Cuban missile crisis of 1962 and lead to cooperative measures to reduce the risk of a nuclear war, not least by means of arms control agreements that could keep the escalatory dynamic from spinning out of control? Will this conflict lead to a new conventional and nuclear arms race extended to new domains, such as cyberwarfare? The answers to these questions are not obvious, but the world is more dangerous now than it was 20 or even 10 years ago.

At the moment, there is no way to know how the war in Ukraine might end. It seems that, for the time being, Kyiv is ready to negotiate with Moscow and may be prepared to abandon the goal of NATO membership for Ukraine, pending approval by a constitutional majority of the Ukrainian parliament or by a referendum. The issue of Ukraine’s territorial integrity and the status of Crimea and the Donbas will poison relations between Moscow and Kyiv and Moscow and the West over the long term. So far, all options remain open, including Ukraine being pulled back into the Russian orbit; retaining room for maneuvering between Russia and the West as a nonaligned country like Finland, Yugoslavia, or Austria did during the Cold War; or even continuing to pursue its European option without aspiring for NATO membership.

Whatever the outcome, with Russia drawing its redlines on the ground unilaterally, the current dividing line in Europe will deepen. There will be no easy way to return to the discussion of a wider European security agenda, as anticipated in talks preceding the war, including on the concept of indivisible security, a concept that was at the heart of Russian proposals for years.6 An OSCE summit to address these issues, as proposed by French President Emmanuel Macron, is off the agenda for the time being. Nevertheless, the war has highlighted the enduring need to continue addressing relevant issues of strategic stability in order to minimize the risk of an unintentional stumble into the danger of nuclear escalation in a crisis.

As argued in 1958 by Alfred Wohlstetter, the existence of nuclear weapons does not automatically prevent a nuclear war but increases the danger of accidental wars particularly during a crisis, although this risk can be mitigated by arms control measures.7 This finding, which at the time seemed mostly intellectual, was reinforced by practical experience as Moscow and Washington engaged in crisis management when decisions had to be made under severe emotional stress, time pressure, and insufficient and contradictory information. The need for nuclear arms control was one of the most important lessons learned from this experience so that, in the end, it was not nuclear arms but nuclear arms control that has prevented a nuclear World War III.8

It is the evidence of the grey zone, in which the redlines of mutual nuclear deterrence tend to blur in the ongoing war in Ukraine, that suggests that nuclear arms control must be strengthened and not further dismembered despite the current collapse of Russian-Western relations.

#### Arms control’s downward trajectory incites a US-Russia arms race that draws in China.

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Arms racing

This may be particularly true as regards the possibility of renewed arms racing. As shown in Sect. 1, bilateral nuclear arms control has at times contributed to halting and even reversing the Cold War arms race dynamics. It is therefore not far-fetched to conclude that without some of the critical constraints put in place by bilateral nuclear arms control arrangements such as the INF Treaty or the ABM Treaty, arms racing could once again become a possibility.

The first signs of a possible arms race between Moscow and Washington became evident during President Putin’s 2018 speech scolding Washington for its withdrawal from the ABM Treaty (Lewis 2021). Some experts saw Putin’s announcement that Russia would develop and field a range of novel missiles as an indication that arms racing had already returned (Kimball 2018; Schlosser 2018). Thus far, Washington has yet to respond to Russia’s vertical diffusion of novel offensive missiles with similar new military programs. The beginning U.S. nuclear force modernization cycle, however, may provide ample opportunity for proponents of a tit-for-tat strategy to make their points, including in defense of further expanding U.S. missile defense programs (e.g., Kroenig, Massa and Trotti 2020). Further complicating things, a possible future arms race is not guaranteed to remain bilateral. Revelations in 2021 that China had secretly been building two large additional ICBM launching fields in its most westerly territories and had tested a novel hypersonic glide vehicle have triggered various reactions in Washington (see, e.g., Pomper and Santoro 2021), with some arguing that the United States and China were “stumbling into an arms race that is largely driven by U.S. investments and missile defense” (Warrick 2021). If that were true, the United States’ decision to exit the ABM Treaty would also have increased arms race pressure on China, which still commands a much smaller strategic nuclear arsenal than the United States or Russia.

An additional area in which U.S.–Chinese arms racing could take place is in the ranges below New START. As already argued, the United States’ decision to exit the INF Treaty likely had less to do with immediate concerns about Russian military advantages in Europe than with China’s vertical diffusion of land-based intermediate-range weapons, which can target U.S. naval forces in the South China Sea (Zhao 2020). Following the dissolution of the INF Treaty, the U.S. military was quick to launch different INF-range development programs—a move that could incentivize China, and perhaps Russia, to further increase their ongoing efforts (Arms Control Association 2019).

In any case, without some of the constraints of bilateral nuclear arms control, managing a three-pronged arms race will demand an extremely complex level of diplomacy and may even be impossible as long as Washington is unwilling to reengage diplomatically on the missile defense component of its strategic forces (Lewis 2021). In the end, however, expensive arms racing could provide financial incentives to return to arms control.

#### The demise of treaty-based nuclear arms control unravels constraints on escalation, sparks nuclear arms racing, and undermines the NPT.

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Nuclear arms control treaties and the associated dialogue they fostered have enabled both countries to reduce and manage the risks of nuclear confrontation and competition throughout the course of the Cold War and beyond. Today, with relations among Washington, Moscow, and Europe at their lowest point since the end of the Cold War, nuclear arms control is even more vital to contain nuclear risks, ease worsening U.S.-Russian tensions, and prevent a new nuclear arms race that would be costly and dangerous.

Nuclear arms control has been particularly important during past times of U.S.-Russian tensions. It minimized the possibility for miscalculation or misinterpretation of military activities and headed off unintended or inadvertent escalation. The harrowing experience of the Cuban missile crisis in 1962 demonstrated the critical importance of effective dialogue. The maintenance of strategic stability is key to ensuring that U.S. and Russian nuclear policies are more predictable and less dangerous to one another and to the world.

Measures such as reciprocal obligations, timely implementation of agreements, and verifiable compliance with nuclear arms control commitments have assured the leadership on each side that the other was not seeking military advantage. Yet, should the nuclear arms control regime be permitted to erode or even collapse, such assurances would evaporate. Each side would be more likely to adapt worst-case assumptions and move toward unconstrained nuclear competition.

Arms control is also vital for addressing mounting challenges of nuclear proliferation. Should the United States and Russia enter a new nuclear arms race, it would be more difficult to prevent further spread of nuclear weapons. It would diminish the effectiveness of the regime based on the nuclear Nonproliferation Treaty (NPT), which is central to addressing the acute proliferation challenges posed by North Korea and Iran. This would further complicate the maintenance of peace and stability.

#### Tag

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Nuclear arms control agreements that effectively constrain an opponent’s capabilities in exchange for some form of American constraint can benefit American security and the security of its allies. Specifically, bilateral nuclear arms control agreements between the United States and the Russian Federation and between the United States and other nuclear-weapon states, and eventually broader multilateral arrangements, have the potential to enhance American security and global stability by reducing the risks of nuclear use and avoiding the dangers associated with arms racing and arms race instability. Such agreements have in the past reduced the risks of nuclear conflict, shaped and limited areas of nuclear competition, and tailored the global landscape in ways that benefitted global and American security.

Reaching such agreements, and making them effectively verifiable, takes time, leadership, political commitment, clear goals, and political compromise: commodities currently in short supply in the United States. However, this state of affairs is far from permanent and it remains likely that a future president may pursue such negotiated agreements.

Arms control agreements are far from perfect, but the same is true of deterrence, reassurance, military planning, and, of course, armed conflict. All of these elements of American nuclear statecraft entail risks. Some arms control agreements have produced major security wins for the United States, while others never entered into force or collapsed due to neglect or outright violations. Even in the wake of an imperfect record, arms control can be used in the future to improve U.S.-Russian nuclear stability and global security. Rejecting the idea of arms control out of hand due to past failures or ideological opposition is dangerous: it risks depriving security officials of a proven method for addressing both emerging and uncontrolled areas of military competition. Just as it would be folly to support arms control blindly without a clear strategy and well-crafted agreements, it is folly to reject arms control when it can produce real benefits.

Assessing how critical arms control agreements were in building and preserving a stable U.S.-Soviet nuclear relationship and providing a mechanism to end decades of nuclear competition is a complex challenge.1 During the main period of strategic arms control between Moscow and Washington–1969 until 2010– nuclear arms control agreements helped reduce the scale and impact of the Cold War arms race, created confidence between the United States and the Soviet Union that neither sought to initiate a wholesale nuclear conflict, codified an end of efforts by both states to gain nuclear superiority, and created norms of behavior and methods for communication that helped avoid conflicts that could escalate to nuclear war.2 In some cases, these agreements shaped the landscape, and in others, deals were used to lock in a certain dynamic.

Perhaps the main feature of Cold War arms control was that the United States and the Soviet Union were able, over the course of their negotiations, to develop confidence that they had a shared goal: to create a strategically stable condition in which neither had an incentive to use nuclear weapons first or to initiate a nuclear conflict. Each was able to gain confidence that it could retain a critical element of deterrence, a survivable second-strike retaliatory nuclear force capable of inflicting unacceptable damage on an attacking state.3 This shared definition of strategic stability was an essential element for why agreements from 1972 until the mid-2000s were sustainable. The breakdown of confidence that this remains a shared U.S.-Russian goal, as much as any other single factor, has undermined the role that arms control can play and has increased the risk of nuclear use through either deliberate acts, via escalation, or through accident or miscalculation.

### Aff---ReSTART---Nonproliferation

#### Only a treaty adequately supports NPT Article VI commitments.

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Proliferation: Negative to Neutral. Executive agreements and ongoing dialogues to aid mutual U.S.-Russian restraint would minimize certain proliferation risks, but these may not be enough to fully support NPT Article VI commitments without a legally binding regime. The expanded discussions on nonnuclear technologies, though important for overall escalation management, would similarly have limited impacts on the NPT regime or other regional proliferation issues. Although the new framework proposed under Approach 3 could positively affect the calculus of latent powers allied with the United States, this treaty regime would be more limited in influencing other potential proliferators in Southwest Asia or the Middle East. Without a binding treaty securing U.S.-Russian cooperation, multilateral steps to address other proliferators could also be limited. The net effect would likely be neutral, but some of these impacts also warrant a negative consideration as a realistic floor.

#### Deadlock on nuclear arms control signals disregard for Article VI, eroding the NPT.

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Erosion of the non-proliferation regime

The burgeoning arms race tendencies among Washington, Moscow, and Beijing may ultimately further weaken the NPT. The link between arms control, disarmament, and nonproliferation is an old one and is explained in depth in the article by Jana Baldus, Harald Müller, and Carmen Wunderlich in this special issue. Back in 1958, a now-declassified National Intelligence Estimate argued that “[a] U.S.-USSR agreement provisionally banning or limiting nuclear tests would have a restraining effect on independent production of nuclear weapons by fourth countries. However, the inhibiting effects of a test moratorium would be transitory unless further progress in disarmament—aimed at effective controls and reduction of stockpiles—were evident” (quoted in Cirincione 2007: 32). What was true in 1958 remains true today. Global nuclear disarmament will be less likely if the crisis of bilateral nuclear arms control continues or worsens while arms racing returns in a trilateral context. Nuclear proliferation could in turn become more likely, at least in those regions directly affected by “great power competition.”

The first signs of the erosion of the NPT are already evident. In early 2021, the Treaty on the Prohibition of Nuclear Weapons (TPNW)—a consequence of a majority of NPT member states’ frustration with the five NPT nuclear-weapon states’ non-commitment to Article VI—entered into force (Müller and Wunderlich 2020). All five NPT nuclear weapon states, also known as the Permanent Five (P5), strongly oppose the agreement and have argued that the new instrument “contradicts, and risks undermining, the NPT” (P5 Joint Statement 2018). This fear may be warranted, should a majority of NPT Member States decide to leave the Treaty in order to give the TPNW more political clout (Pretorius and Sauer 2021). Then again, precisely this consequence could ultimately force the P5 to take their NPT disarmament obligations more seriously than they have in the past and to pursue arms control policies accordingly (Sokov 2020).

#### Lack of US-Russia leadership on arms control threatens the NPT’s existence---nuclear superiority fails.

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Proliferation: Negative. The lack of nonproliferation efforts from the nuclear superpowers and the corresponding larger force postures from the United States, Russia, and China would exacerbate regional issues and proliferation pressures. The secondary and tertiary effects from these impacts could prompt cascading proliferation among current declared states and potential proliferators. These trends, and the lack of U.S.-Russian leadership in arms control, would severely challenge the NPT as well. These effects could even conceivably threaten the continued existence of this multinational agreement. Advocates of nuclear superiority would contend that the larger U.S. arsenal could be used for more effective coercive or compellent strategies to combat potential proliferators.104 However, the United States already enjoys a marked advantage over rogue regimes in North Korea and Iran, and this has proved to be limited in curbing their nuclear ambitions. These impacts highlight another negative change from the U.S. perspective.

#### US-Russia disengagement on nuclear arms control incites backlash to the NPT, risking prolif cascades

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The cornerstone of the non-proliferation regime is the 1970 Treaty on the Non-Proliferation of Nuclear Weapons, or Non-Proliferation Treaty (NPT), as it is better known. Since its indefinite extension in 1995, the treaty has been subjected to a series of body blows, which has led many non-proliferation experts, policymakers and pundits to prophesise an impending cascade of nuclear-weapons spread and the possible demise of the NPT as we currently know it. Among the most pressing challenges are: North Korean nuclear brinkmanship, following its withdrawal from the NPT; uncertainty about the durability of the Joint Comprehensive Plan of Action with respect to Iran; increased risk of nuclear accidents and weapons use as a result of command-and-control vulnerabilities and potential cyber attacks; increased reliance on nuclear weapons by nuclear-weapons possessors and the slow pace of disarmament; diminished interest in and support for multilateral processes and international institutions by the US; a crisis in US leadership and diminished confidence among US allies in the credibility of security assurances a nuclear-arms race in South Asia; the rise of non-state actors as nuclear suppliers, middlemen and end users; the subordination of global non-proliferation objectives to other domestic and regional economic and political considerations by states party to the NPT; a growing gulf between nuclear-weapons states (NWS) and non-nuclear-weapons states (NNWS), the absence of effective ‘bridge-builders’ across the divide, and little prospect of their emergence; significant acrimony between proponents and critics of the Treaty on the Prohibition of Nuclear Weapons and its potentially negative impact on the NPT review process; an uncritical embrace of nuclear power by most states without adequate attention to the full range of economic, safety, terrorism and opportunity costs; complacency and ignorance about issues of disarmament and non-proliferation by otherwise well-educated citizens and their elected officials; inadequate adherence to and implementation of NPT provisions by states party to the treaty, compounded by the absence of an effective enforcement mechanism; the conflict between the inalienable right to peaceful nuclear use and the prudent exercise of that right; the politicisation of the International Atomic Energy Agency; the re-evaluation by a number of NPT states of the value of the NPT for their security, raising the prospect of additional NPT withdrawals. All of the aforementioned challenges are significant and merit sustained attention and collective action, and their remediation in many instances will require cooperative engagement by Moscow and Washington. The potential for such collaboration, however, appears dim given the continuing downward spiral in US-Russia relations. Indeed, looking forward, arguably the most acute nuclear danger arises from the total absence of trust between the two largest nuclear-armed states. As wise statespeople and analysts have noted, the US-Russia bilateral relationship is at its lowest point in the post-Cold War era and, in some respects, is more dangerous than during the Cold War.2 At this moment of heightened danger, Moscow and Washington are largely disengaged in areas of significant importance to both parties, including, notably, on matters of nuclear non-proliferation. This devolution of interactions and interruption of routine consultations did not occur overnight, and can be traced to a number of factors, many of which do not pertain directly to nuclear issues and occurred before the crisis in US–Russia relations over Crimea in 2014. They include: lingering Russian anger over NATO expansion; scepticism over rationales provided by the US regarding missile-defence deployments in Eastern Europe; US accusations about Russian violations of the Intermediate-Range Nuclear Forces (INF) Treaty; Russian concern about possible future ‘colour revolutions’ orchestrated by the West; domestic politics in both countries that cater to nationalist policies; diverging Russian and US threat perceptions and preferred approaches for dealing with proliferation problems and problem countries; and ill-considered policies poorly informed by past practices. As a result of these and other developments, both countries scaled back, and in some instances cut off altogether, important joint programmes. Russia, for example, decided not to extend the Nunn-Lugar Cooperative Threat Reduction Program – one of the most important and long-standing cooperative activities involving Russian and US scientists and defence officials – ostensibly because it no longer had a need for US financial and technical assistance, and also due to a growing priority attached to protecting national-security information.3 It also pulled out of the last round of the Nuclear Security Summit process in 2016, one of US President Barack Obama’s signature non-proliferation initiatives and an area that previously had highlighted Russian and US cooperation. More recently, in 2017, Russia suspended implementation of the joint Plutonium Management and Disposition Agreement. For its part, the US also contributed to the near standstill in routine interactions by suspending its participation in the work of the US–Russia Bilateral Presidential Commission, which included working groups on nuclear energy and nuclear security, foreign policy and fighting terrorism, and arms control and international security. The US government also greatly restricted participation by scientists from its national laboratories in international meetings held in Russia and curtailed their engagement in other bilateral activities. Even in the traditionally collaborative environment among NWS in NPT Review Conference meetings, the last such meeting in 2015 featured major US-Russia disputes and ended without a consensus final document, in large part due to the inability of Moscow and Washington to resolve their differences over the Middle East. Ironically, one of the very few areas in which Russian and US nuclear perspectives appear to coincide today involves denunciation of the recently concluded Treaty on the Prohibition of Nuclear Weapons. While this rare convergence of views is unlikely to cement their cooperation at the next NPT Review Conference, it may well produce a backlash among the overwhelming majority of NNWS, especially if Moscow and Washington are unable to put forward a viable alternative disarmament or nuclear-risk-reduction initiative. The paucity of high- and mid-level governmental interaction in the nuclear-arms-control space does not augur well for crisis prevention and management, nuclear-risk reduction, bilateral nuclear-arms control, reinforcement of a frayed NPT regime and prevention of the spread of nuclear weapons to third parties, including non-state actors. The greatest risk of nuclear catastrophe is likely to result from a fateful error, rather than intentional action, and yet both countries are proceeding in a fashion that makes such mistakes more likely.4

#### Failure to move US-Russia arms control forward sows global discord over NPT commitments.

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Reviewing the role that arms control has played in the past and can play in the future with the appropriate investment in political and strategic capital is also critical in thinking about the long-term effort to address the risks posed by nuclear weapons. Nuclear-weapon states—the United States, Russia, the United Kingdom, France, and China—and indeed all states under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) remain committed to ending the arms race and to general and complete disarmament. The global discord over the extent to which the United States and Russia (and other NPT nuclear states) are fulfilling this commitment is real, even if its effects are uncertain. Negotiated, verified agreements will clearly have to be part of that broader effort as envisioned by the originators of the NPT. Thus, questions about the future of U.S.-Russian arms control, how and at what point to expand the process (quantitatively or qualitatively) to include countries with smaller nuclear arsenals (China, France, and the United Kingdom), and how finally to expand an effective nuclear constraint system to include the countries outside of the NPT that possess nuclear capabilities remain undefined and daunting. These hurdles become much higher even to contemplate if the possessors of the world’s two largest nuclear arsenals, with a history of engagement and cooperation to prevent nuclear risks, can no longer muster the political will or commitment to continue the arms limitation and reduction process.

### Aff---China

#### Advocate for increasing arms control engagement with China and jointly shoring up the NPT.

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Russian isolation in the wake of the invasion of Ukraine will jeopardize further progress on nuclear nonproliferation. A conference to review the NPT, repeatedly postponed due to the COVID-19 pandemic, is now tentatively scheduled to take place this August. Normally, Russia would join the four other nuclear weapons states recognized by the NPT—China, France, the United Kingdom, and the United States —to push forward on disarmament goals. Just this January, these countries jointly reiterated a statement issued by Ronald Reagan and Mikhail Gorbachev in 1985 that a nuclear war cannot be won and must never be fought, a symbolic act intended to bolster the NPT regime.

A productive review conference in August seems absurd, now that Putin has threatened to use nuclear weapons to deter others from joining in his fight with Ukraine. This posturing may be purely strategic, a form of saber-rattling designed to signal Russian strength and determination. But it has made the unthinkable a little more thinkable. If Putin decides to use even one nuclear weapon, the world will enter territory untrodden since the U.S. bombings of Hiroshima and Nagasaki in 1945.

Russia, one can only hope, will not go down this path, instead walking back from the nuclear brink and again committing to diplomacy around nonproliferation. It will be a slow climb-back, however. The first order of business will be to rebuild confidence among negotiators. The current generation of negotiators from the five major nuclear states know one another and understand the nonproliferation regime, so this task should not be impossible. Next, the NPT member states should closely examine the current disarmament and nonproliferation superstructure, built around the NPT, to see whether it should be strengthened. This review should also extend to the organization and operating procedures of the International Atomic Energy Agency, an institution charged with the mission of promoting and safeguarding the peaceful use of nuclear technology.

Putin has made the unthinkable use of nuclear weapons a little more thinkable.

The states invested in preserving the NPT face considerable pressure from nonnuclear countries that back the Treaty on the Prohibition of Nuclear Weapons, which entered into force in January 2021 and which seeks full disarmament and the prohibition of nuclear weapons. The signatories of this treaty are unhappy with the progress achieved in the NPT regime and are likely to push for tougher measures to expedite disarmament, such as economic sanctions against any state continuing to deploy nuclear weapons. With Russia issuing nuclear threats—and worse, potentially using a nuclear weapon—state and corporate actors may respond more willingly to such pressures. The NPT states, including the nuclear weapon states, are going to have to find ways to build common objectives with the Ban Treaty community.

It will also take time to renew confidence in bilateral negotiations between Russia and the United States, but it is possible. Negotiators from both countries know each other and have been working steadily on maintaining strategic stability—the incentives that prevent the first use of nuclear weapons—and on the renewal of the Iran nuclear deal. Washington and Moscow should begin by restoring constraints on intermediate- range ground-launched missiles, also known as INF missiles, in Europe. Both sides agree broadly on this issue—at least, they did before the present crisis. Russia was willing to remove from Europe missiles that violated the INF treaty and move them east of the Ural Mountains, with a verification regime to monitor their deployment. For its part, the United States was willing to consider foregoing the deployment of INF missiles in Europe. Adopting these measures would help lay the groundwork for broader U.S.-Russian cooperation on maintaining and strengthening the arms control regime.

Russia and the United States will have a harder time coming to an agreement about replacing the New START treaty, currently in force but set to expire in 2026. Before the current crisis, the two sides were far apart in what they wanted to see in the next round of talks. The United States wanted constraints on Russian nonstrategic nuclear warheads and new exotic systems, such as nuclear-propelled naval weapons, while the Russians wanted constraints on U.S. precision strike conventional missiles and missile defenses. Despite these differences, negotiators were inching toward mutual understanding, outlining what each side believed was essential in any new treaty— until Russian soldiers rolled into Ukraine. These dynamics must cause the United States to think long and hard about what it can achieve with Russia at the nuclear negotiating table. As always, the U.S. national security interest must be paramount. If negotiations serve the national interest in countering the fundamental threat that nuclear weapons pose, then the United States should be ready to talk.

Putin looms over these considerations and puts in doubt any kind of meaningful cooperation. He seems bent on cutting Russia off from the outside world and plunging the country further into autarky. If he remains in office, the return of Russia to any negotiating table will be hard, never mind talks about nuclear weapons. Russia could be turning into a very big nuclear pariah state, which the United States must deter not only with military force but also with sound policy and the strength of its ideas. The entire international community will come to depend on the United States. Putin may try to widen his circle of admirers beyond Cuba, Nicaragua, and Venezuela, but in the main, the world will not be turning to Russia as a trusted player.

A BIGGER SEAT FOR CHINA

With Russia at best a less reliable partner, China’s role in the international arms control regime will become increasingly vital. China has hidden behind Russia and the United States for many years, arguing that their much larger strategic nuclear arsenals require them to take the lead in nuclear nonproliferation and disarmament discussions. China’s own arsenal is now growing and Beijing seems inclined, at least in the context of the NPT regime, to play some leadership role. Tellingly, China also seems willing to facilitate a cease-fire in the current war in Ukraine.

If Russia absents itself from nuclear diplomacy, the United States and China will have to consider how they, budding superpower rivals, can develop a greater partnership to resolve problems in the global arms control regimes. Of course, U.S. and Russian nuclear arsenals are a lot larger than the Chinese one, and China’s ongoing modernization and military buildup will not change that fact any time soon. The primary purpose of cooperation between the United States and China in the immediate period should be to work together closely to shore up the NPT regime, ensuring that the upcoming review conference does not fail and working with the other NPT countries to strengthen the regime. The two countries should also work to preserve other arms control mechanisms such as the Organization for the Prohibition of Chemical Weapons, which implements the global ban on chemical weapons, and the Comprehensive Nuclear Test Ban Treaty Organization, which monitors the moratorium on nuclear testing and prepares for the entry into force of the Comprehensive Nuclear Test Ban. In both cases, China and the United States can do much to further new verification procedures and expedite decision-making within the organizations. Without these concerted efforts, Russia may begin to play a wrecking role, preventing new ideas from moving forward and obstructing the work of negotiators and policymakers. China and the United States might also consider working to constrain weapons systems where they have relatively equal capabilities, such as in INF missiles and direct ascent antisatellite weapons.

If China and the United States can demonstrate successful cooperation in these areas, it will help other powers breathe more easily and feel reassured that the world is not heading into a free-for-all of weapons of mass destruction. The crisis in Ukraine can be the shock that boots the global community into redoubling its efforts to constrain such weapons. If states do not seize this chance, they risk ushering in a new, terrifying arms race.

### Aff---AT Unilateral/CIL CP

#### Negotiations key:

#### 1---they buy time to screen US polices for legal conflicts

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The Advantages of Negotiation

The second half of this essay outlines the advantages inherent to future negotiated international agreements to which states possessing nuclear weapons are parties—advantages that do not apply to an advisory opinion from the ICJ or attempts to advance a new rule of customary international law. This point is reinforced by the survey of existing law noted above, which provides examples of effective international legal obligations in the area of nonproliferation and disarmament that have taken the form of negotiated and verifiable agreements.

The process of negotiation is perhaps an underappreciated aspect of promoting adherence to and respect for international law. The act of negotiating lends durability and effectiveness to international law in a few important ways.

First, negotiation takes time, and time allows for thorough consideration. This may sound like a drawback to those looking for quick answers, but a state can use the period of negotiations to thoroughly calibrate its domestic laws and policies to the international obligations being negotiated before undertaking them. In the United States, there is a process in which the Department of State reviews every proposed international agreement before negotiations commence, during the course of the talks, and prior to conclusion of the agreement. This process includes a thorough legal review to ensure that the United States is in a position to implement the obligations that would be reflected in the final agreement.

The United States takes extremely seriously the rules reflected in the Vienna Convention on the Law of Treaties, which make it clear that unless otherwise agreed, a state may not invoke its domestic law as a justification for failure to perform its international treaty obligations. The U.S. government’s detailed internal legal review of all proposed agreements provides confidence that the United States will be able to implement any legal obligations it assumes. The United States does this for every one of the 200 to 300 international agreements into which it enters every year. It does so because it takes international law seriously and is committed to ensuring that it signs up only to obligations that it is in a position to implement fully.

This exacting approach to international law formation makes it more likely that a state will implement its obligations over the long run. The process of negotiation gives states the opportunity to take this approach.

#### 2---hard-fought compromises give both sides a stake in preserving the agreement

Dean 15, assistant legal adviser for nonproliferation and arms control at the U.S. Department of State. He previously was head of the U.S. Treaty Office. He also **served as the U.S. delegation legal adviser for New START and was the lead lawyer for the treaty’s ratification**. (Paul, September 2015, “The Role of Negotiation in International Arms Control Law”, Arms Control Today, <https://www.armscontrol.org/act/2015-09/features/role-negotiation-international-arms-control-law>)

Second, negotiation lends durability and effectiveness to international law because, in the process of striking a hard-fought and carefully negotiated bargain, states are often forced to compromise. Compromises in a negotiated deal mean that each side has gotten something it wants by agreeing to something the other side wanted. In many ways, the mutually reinforcing, reciprocal nature of a negotiated solution is a key enforcement mechanism of international law.

These two points are especially salient in the area of disarmament. States undertaking arms control and disarmament obligations use the negotiating process to ensure they are ready to comply with their obligations once undertaken, and the trade-offs reflected in the final deal lend strength and effectiveness to the treaty itself. Other approaches to disarmament, such as efforts to advance new rules of customary international law, would not enjoy the advantages inherent in a negotiated outcome. Similarly, a hypothetical nuclear-weapon-ban treaty would enjoy these benefits only if the states possessing nuclear weapons participated in its negotiation.

#### 3---engaging other countries’ defense establishments is key to hammer out verification details---those make arms control meaningful

Dean 15, assistant legal adviser for nonproliferation and arms control at the U.S. Department of State. He previously was head of the U.S. Treaty Office. He also **served as the U.S. delegation legal adviser for New START and was the lead lawyer for the treaty’s ratification**. (Paul, September 2015, “The Role of Negotiation in International Arms Control Law”, Arms Control Today, <https://www.armscontrol.org/act/2015-09/features/role-negotiation-international-arms-control-law>)

The second advantage to negotiation turns not on the implications of the negotiating process, but rather on the substantive nature of arms control and disarmament. A negotiated agreement is the tool that will allow states to address verification, an unglamorous but nevertheless essential element of disarmament.

States are more likely to uphold their disarmament obligations if they have confidence the other parties to the agreement will uphold theirs as well. This confidence can be achieved through the negotiation of verification measures, which are invariably technical and complicated.

The New Strategic Arms Reduction Treaty (New START) is an example. In one simple paragraph, totaling about 10 lines of text, the United States and Russia undertook to further reduce and limit their deployed strategic delivery vehicles and nuclear warheads. Yet, the treaty is 356 pages long.

The treaty’s length is one illustration of the way in which effective disarmament is about much more than an obligation to get rid of nuclear weapons. It is about establishing a stable and predictable relationship through data exchanges and other notifications. It is about mutually agreed rules that govern precisely how states are to eliminate their arsenals. Most of all, it is about ensuring the right to conduct intrusive on-site inspections to verify compliance with a treaty.

One example from New START illustrates how such a treaty is implemented in practice. The United States periodically provides Russia with data on U.S. strategic offensive arms covered by the treaty. Under the treaty, however, Russia is not expected to take the United States at its word. The treaty allows Russia to send inspectors to U.S. military bases and ensure that the data provided by the United States are accurate. Each side’s inspectors have access to some of the most sensitive national security sites in the other country.

There are countless rules negotiated by the two sides that strike a delicate balance between protecting their own security and giving the other side confidence that the treaty’s central obligations are being fulfilled. There are rules for how often inspections can take place, where inspectors can enter the country, and what routine activities must cease at a site after it has been designated for inspection. Once inspectors arrive at a site, there are rules that specify the parts of the site to which they have access, the equipment they can use to take measurements, the amount of time they can take to view particular items, and the angles from which they can view these items.

As with any treaty, technical issues invariably arise through the life of its implementation. New START provides a forum to discuss these types of issues twice a year through the treaty’s Bilateral Consultative Commission.

The hundreds of pages of detailed, painstakingly negotiated rules are not somehow incidental to effective disarmament; they are at the heart of effective disarmament. Yet, one does not hear those who advocate for a new rule under customary international law prohibiting nuclear weapons also advocating for a new rule under such law on the duration of an inspection, the angle of view for inspectors observing a weapons system, or the use of radiation detection equipment. Just hearing that sounds preposterous, but those provisions are key features of the inspection regime that makes New START an effective step in the ongoing process of disarmament. Such provisions often are difficult to negotiate, but are included because of their importance to the agreement. In the case of New START, the United States and Russia recognized that, without detailed provisions addressing verification, that short 10-line provision on reductions would not be meaningful international law.

Efforts to sidestep the negotiating process will not enjoy these benefits. The same is true of efforts to launch a negotiation without the participation of the states that possess nuclear weapons. Some have argued that the Mine Ban Treaty and the Convention on Cluster Munitions could serve as models for a future nuclear-weapon-ban agreement. Some even go so far as to argue that a future nuclear-weapon-ban treaty could generate customary international law prohibiting the possession of nuclear weapons, even if the states possessing nuclear weapons are not parties.

Yet, certain states continue to possess anti-personnel landmines and cluster munitions, which they assert are legitimate weapons with military utility, and have not joined the relevant treaties. This makes it impossible to demonstrate an extensive and virtually uniform state practice followed out of a sense of legal obligation, which is the test for customary international law formation. This would be even more true of a hypothetical nuclear-weapon-ban treaty to which no state possessing nuclear weapons was a party.

Further, the analogy between anti-personnel landmines and cluster munitions on the one hand and nuclear weapons on the other is imprecise and perhaps revealing. Although some states that previously had landmines and cluster munitions have undertaken legal obligations to eliminate them in treaties not containing intrusive verification procedures, the same does not seem likely to be true of nuclear weapons. The history of arms control demonstrates that states are unlikely to agree to prohibit nuclear weapons unless the prohibition is part of a carefully negotiated agreement containing exacting verification to ensure that treaty partners are complying with their obligations.

Concluding Thoughts

In conclusion, it is important to recognize and draw lessons from existing international law that effectively and verifiably addresses the problem of nuclear weapons. That body of law teaches policymakers to fully appreciate the significant value of negotiation in future international legal efforts toward disarmament. Negotiation lends durability and effectiveness to international law. Furthermore, careful and collaborative negotiation is the process through which states can reach agreement on the verification mechanisms that will likely be a critical feature of future arms control and disarmament agreements.

### Aff---AT Deterrence CP

#### Pursuing nuclear overmatch causes allies to back out and Russia to dig in

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The negative changes potentially resulting from Approach 4 are more attributable to the approach itself rather than any underlying assumptions. No major hypothetical assertions are required to project how aggressive nuclear posture changes from the United States or Russia would have negative reverberations in an increasingly tense international security environment. However, this analysis has ignored the potential for the overt pursuit of nuclear superiority to help auger an improved arms control agreement. Echoing NATO’s Dual-Track efforts in the 1980s, many of the negative projected impacts from Approach 4 could be turned to positives if done in conjunction with persuasive arguments to foster an improved bilateral or multilateral arms control agreement. Again, history shows that multilateral engagement is key to such an undertaking. Without buy-in from NATO or Asian allies, who could be directly affected by such an approach, its chances of success would be limited. Domestic or constitutional fitness factors for each competitor in such a scenario would play a significant role as well, considering how the moribund Soviet economy proved crucial to the ultimate success of the arms race control dynamic of the 1980s.112

Even assuming a united front from the United States and its allies and weaknesses in Russia’s domestic economic or political foundation, today’s geopolitical context indicates Approach 4 is unlikely to repeat the dual-track success. The projected force postures (see tables 8 and 9) and potential strategic exchanges (see tables 14 and 15) do not point to a clear enough asymmetry that would motivate Russia to seek a new bargain. Statements by Putin possibly indicate the opposite case is true and that Russia’s leaders feel their pursuit of destabilizing new systems such the Status-6 Poseidon autonomous submarine or Avangard hypersonic glide vehicle have put Washington at a disadvantage.113 Even more distressing, Moscow could choose to rapidly employ a large fraction of its NSNWs with intermediate- or short-range systems, increasing its leverage while directly threatening NATO Allies.

#### Forward-deploying nukes polarizes allies AND stokes Russian and Chinese arsenal increases that undermine assurances

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Extended Deterrence: Negative. Approach 4 would field larger nuclear forces, indicating a more capable and credible U.S. extended deterrence guarantee. However, the lack of an associated arms control framework would exacerbate cross-cutting domestic and international pressures among NATO and East Asian allies on nuclear issues, undermining U.S. deterrence. Some allies would potentially welcome additional BMD deployments and a larger U.S. nuclear force posture possible under this approach, but this would likely only constitute the minority opinion.103 Furthermore, resulting force posture increases in Russia and China would intensify regional security issues for European and Asian allies, putting U.S. extended deterrence at more of a disadvantage rather than improving it. In the more competitive environment under Approach 4, Russia could easily more aggressively posture its large NSNW arsenal, for example, further complicating deterrence and escalation management for the United States. These considerations imply overall negative changes from today’s already complicated extended deterrence situation.

### Aff---AT Russia Cheats

#### Arms control is worth pursuing despite the risk of Russian noncompliance

Wolfsthal 20, Senior Advisor to Global Zero and Director of the Nuclear Crisis Group. He served from 2014 to 2017 as the Senior Director on the National Security Council for Arms Control and Nonproliferation and as Special Assistant to the President of the United States. He has served in the U.S. government in a variety of positions, including as a Foreign Affairs Officer at the U.S. Department of Energy and as Special Advisor to Vice President Joseph Biden for Nuclear Security (Jon Brook, Spring 2020, “Why Arms Control?”, Daedalus 149 (2), pg. 103, <https://doi.org/10.1162/daed_a_01792>)

It is, of course, of concern that Russia has violated past arms control agreements. Even when the option for legal withdrawal is available, Russia has consistently either skirted or materially violated some arms control agreements. This lack of legal compliance has a direct bearing on both American security and the viability of negotiating future agreements with Moscow. However, the United States’ consistent efforts to verify the terms of agreements and its ability to respond in a timely manner to potential Russian breaches has helped prevent Russia from gaining a clear military advantage through its violations. It also is true that Russia remains in full compliance with important agreements, including the 2010 New Strategic Arms Reduction Treaty (New START). That pact provides the United States with irreplaceable information on Russian nuclear activities and developments and remains squarely in the interest of America and its allies. However, in the face of Russian violations of multiple agreements, experts and politicians wonder why any new deals should be negotiated. Such behavior raises the bar on negotiating such agreements and suggests that the United States needs to consider new steps to improve the durability of negotiated deals, including considerably extending the timelines for withdrawal and the mechanisms for addressing issues of noncompliance.

While America should expect a treaty partner to abide by its commitments, good agreements have verification provisions built on the assumption that this will not be the case. Past arms control agreements were negotiated to enable the United States to take steps to protect its interests even in the face of violations.6 Thus, even when Russia has proven to be less than 100 percent reliable, the United States has been able to pursue and implement other agreements. When Russia has violated its commitments, verification has made timely detection possible, allowing the United States to take steps either to bring Russia back into compliance or to secure its objectives through other means.7 Despite the bleak current outlook for the future of nuclear arms control, negotiated, verified, and legally binding treaties and other understandings continue to hold great promise in managing the new competition between Russia and the United States, who together hold more than 90 percent of the world’s nuclear weapons.8

### \*\*NEG\*\*

### DA---Arms Control---Appeasement

#### Arms control treaties fail but constitute appeasement that culminates in extinction

Peter Pry 19. Executive Director of the Task Force on National and Homeland Security and Director of the U.S. Nuclear Strategy Forum, served on the Congressional EMP Commission and worked for the House Armed Services Committee and the CIA. “The Case Against Arms Control.” https://www.realcleardefense.com/articles/2019/06/24/the\_case\_against\_arms\_control\_114528.html

Arms Control versus Reality

Nuclear arms control began with failure, the USSR rejecting the 1946 Baruch Plan to ban atomic weapons, detonating its first A-bomb in 1949.

Unfortunately, principles of negotiation, compromise, legality, and “win-win” outcomes are alien to totalitarian and authoritarian states. These are led by ruthless elites who have often murdered their way to the top, believe that “power comes from the barrel of a gun” (to quote Mao), and the lives of men and nations is a “zero-sum” game of victors and defeated, of the living and the dead.

Consequently, the presumed benefits of arms control are more fictional than real.

Arms control agreements can limit arms only if the agreements are obeyed, which has generally not been the case, for example, with Russia, the USSR, or North Korea.

Verification provisions for arms control agreements that are supposed "confidence-building measures" for growing trust between nations typically are woefully inadequate.

Verification provisions for New START, the Presidential Nuclear Initiative, or for any nuclear arms control agreements between Washington and Moscow have never been adequate to confirm with high-confidence the number of Russian (or during the Cold War, Soviet) nuclear weapons deployed operationally or stockpiled. Russia could have thousands of nuclear weapons operationally deployed over New START limits—and we would not know.

Another notorious example of verification inadequacy is the Joint Comprehensive Plan Of Action (JCPOA), allowing inspections of Iran’s civilian nuclear facilities only—not military facilities, where a clandestine nuclear weapons program almost certainly continues.

The Iran nuclear deal epitomizes almost everything wrong with arms control. Iran can be in technical compliance with JCPOA, but according to highly competent U.S. and Israeli experts probably already has nuclear weapons. (“Underestimating Nuclear Missile Threats From North Korea And Iran” National Review February 12, 2016)

The JCPOA, like arms control generally, provides the false illusion of security.

Dr. Mark Schneider, former senior Defense Department official and nuclear strategist, in “Trading Arms Control for Nuclear Modernization: An Old Scam” (RealClearDefense.com June 12, 2019), spent decades at the Pentagon exasperated by arms controller’s dangerous hypocrisy:

“The U.S. arms control enthusiast establishment generally cares little about the substance of arms control agreements, their verifiability, or whether the Russians actually comply with them. They support arms control agreements irrespective of whether the agreements actually accomplish anything useful. They fight against the U.S. determining Russian arms control violations, terminating U.S. compliance with arms control agreements that Russia is violating or responding to them by weapons developments and deployments. Their position on these issues is almost identical to the Russian Federation, and this has been going on for decades.”

As for “convergence”—the promise that arms control will build trust and a safer world—the world is more dangerous because of arms control.

Arms Control Failures

Before “arms control” it was called the Versailles Treaty, the League of Nations, the Kellogg-Briand Pact (outlawing war), and the Washington and London Naval Treaties. All of these were violated or exploited by Nazi Germany and Imperial Japan to prepare for their nearly successful bid to win World War II.

Then as now, advocates of appeasement (before World War II “appeasement” was a policy, not a dirty word) went through extraordinary mental gymnastics to deny or justify ignoring “pocket battleships”, submarines, tank armies, air forces, and acts of aggression that violated what today would be called the “international arms control regime”.

During the 1960s and 1970s, the Anti-Ballistic Missile (ABM) Treaty and then the Strategic Arms Limitation Treaties (SALT I and SALT II) allegedly enshrined the principle of Mutual Assured Destruction (MAD) for the U.S. and USSR, while supposedly capping numbers of permitted strategic forces, even while allowing modernization.

In reality, the USSR and Russia today never subscribed to U.S. theories about respecting MAD by constraining “destabilizing” offensive and defensive capabilities. Moscow exploited arms control to constrain the U.S. and gain strategic advantages to prevail in nuclear diplomacy and war.

For example, President Reagan’s blue-ribbon General Advisory Committee on Arms Control and Disarmament, in their summary of “A Quarter Century of Soviet Compliance Practices Under Arms Control Commitments: 1958-1983” examined 26 arms control treaties, agreements, and commitments. The USSR violated all the most important arms control treaties of that era, including:

The ABM Treaty

SALT I

SALT II

Limited Test Ban Treaty

Biological Weapons Convention

Conventional Weapons Convention

Today, 25 years after the publication of the GAC Report Summary, the State Department should declassify the still-classified main report, so policymakers and the public see a full accounting of the failures of arms control during Cold War years 1958-1983.

During the 1980s through today, the Intermediate-range Nuclear Forces (INF) Treaty eliminated an entire class of nuclear weapons. The Strategic Arms Reduction Treaties (START and New START), and Presidential Nuclear Initiative (PNI) made deep reductions in strategic and tactical nuclear weapons (mostly on the U.S. side) while permitting modernization (almost entirely on the Russian side).

Now the decades-long experiment in nuclear arms control has failed catastrophically, shredded by Russian cheating:

The INF Treaty is broken by Moscow’s deployment of at least one and possibly four illegal missile types;

The PNI is broken such that Russia now has an advantage in tactical nuclear weapons of at least 10-to-1.

START and New START are broken, according to some astute analysts like Mark Schneider and Stephen Blank, by Russia having possibly thousands of strategic warheads over the allowed limits. (Blank, “Russia’s Military Strategy and Doctrine," Jamestown Foundation, 2019; Schneider, "Does Russia Have 2-to-1 Advantage In Deployed Strategic Nuclear Weapons?” RealClearDefense.com, January 12, 2019)

Most recently, according to the Defense Intelligence Agency, Russia has been cheating on the Comprehensive Test Ban Treaty for nearly 30 years, developing new generations of advanced nuclear warheads.

“Convergence” between Washington and Moscow toward mutual trust and a safer more strategically stable world order has not happened, as promised by arms control. The New Cold War with Russia, China, North Korea, and Iran may well be more dangerous than the old.

Yet the arms control community refuses to face these realities.

Instead, they criticize the United States for withdrawing from treaties already broken by Russia. They complain about U.S. modernization of its nuclear deterrent, while for years watching Russia’s illegal nuclear build-up in uncomplaining silence.

Arms Control Costs

Arms control has cost the West a lot more than champagne and caviar for diplomats in Geneva.

The United States and its allies have paid a steep price for their arms control addiction in worsened international security. Specific examples abound, some already described above, of how arms control has constrained the U.S. unilaterally and given Russia and other potential adversaries significant strategic advantages.

Perhaps even more dangerous is how the ideology of arms control has become second nature to U.S. policymakers, consistently misleading them to disadvantage the United States.

Arms control pretends to an objective “rational actor” model that assumes moral equivalence and makes no distinction between the worldviews, histories, and behaviors of the United States and its arms control "strategic partner." Indeed, the focus is on controlling arms, especially nuclear arms, not on controlling nations, as if the weapons themselves are the most dangerous variable.

Such thinking, fixated on controlling inherently dangerous nuclear weapons, was a significant factor driving the United States to profoundly reduce tactical nuclear weapons under the PNI and strategic nuclear weapons under START and New START.

No one in Washington seemed to consider the possibility that the U.S. and global security might NOT benefit from deep reductions in U.S. nuclear weapons—to levels where Russia could afford to sustain nuclear parity. Arms control, seeking to maintain the U.S.-Russia nuclear balance, instead forfeited to Moscow (and also possibly to Beijing) numerical and technological superiority they never enjoyed during the Cold War.

If the U.S. had not sacrificed its Cold War inventory of about 10,000 strategic and 15,000 tactical nuclear weapons, perhaps today Russia and China would be so far behind they would not even dream of nuclear arms racing.

Perhaps the costliest national security sacrifice on the altar of arms control is President Reagan’s Strategic Defense Initiative (SDI), and the opportunity through space-based defenses to render nuclear missiles obsolete.

President Clinton would not withdraw from the ABM Treaty and the MAD relationship with Russia, that he deemed “the cornerstone of strategic stability” in order to deploy SDI’s Brilliant Pebbles space-based anti-missile system, then ready to go. Instead, President Clinton canceled both SDI and Brilliant Pebbles—thereby surrendering the only plausibly realistic pathway to achieving the dream of both President Reagan and President Obama for “a world without nuclear weapons.”

Historically, arms control was not even able to ban the crossbow. Technological innovation made the crossbow obsolete—and can “ban” The Bomb.

Arms control has also cost the United States and the world dearly by terminating or stunting peaceful uses of nuclear energy that had the potential for revolutionary advancements in technology and science. For example:

The Limited Test Ban Treaty (LTBT) stopped U.S. and Soviet projects to develop peaceful nuclear explosive devices, that produced little or no radioactive fallout, for a wide variety of purposes, including excavating underground storage facilities, canals, tunnels, making much easier and faster very large-scale construction projects.

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) moved the U.S. to de-emphasize the nuclear power industry and stunt development of innovative new technologies, like modular nuclear reactors, abandoning the realizable promise of a global revolution in cheap, clean, safe energy.

The LTBT also killed a potential revolution in space travel. In the 1950s, programs like the U.S. Project Orion were successfully experimenting with the concept of nuclear-powered propulsion by shockwaves, that could possibly propel enormous spaceships, weighing hundreds of tons and capable of carrying hundreds of passengers, to the planets and beyond.

Arms control may yet cost humanity the ultimate price—extinction.

### DA---Nuclear Arms Control---Deterrence

#### New arms-control treaties undermine deterrence.

Bryan Bender 21. Senior national correspondent for POLITICO, where he focuses on the Pentagon, NASA, and the defense and aerospace industries, 1/27/21. “‘This is going to be quite a show’: Biden’s arms control team eyes nuclear policy overhaul.” https://www.politico.com/news/2021/01/27/biden-nuclear-weapons-policy-463335

But veterans of the last administration fear this newly empowered group of progressives may be naive about what can be achieved without undermining U.S. security, and are already warning them to prepare for a shock when they read the latest intelligence.

Taking up posts at the Pentagon, State Department and National Security Council are a cadre of experts who collectively have their sights on a renaissance in nuclear restraint, after President Donald Trump withdrew from three arms control pacts, threatened a nuclear war with North Korea and expanded the role of nuclear weapons in war planning.

Biden has already agreed to extend the last remaining nuclear agreement with Russia, the New Strategic Arms Reduction Treaty, and called for further negotiations with Moscow to place new limits on their arsenals, the world’s largest. And the group of arms control experts he is enlisting to carry out his agenda represents the vanguard of a decades-long progressive push to pull back from the nuclear brink and seek the elimination of atomic weapons.

“The stars are aligned,” said Joe Cirincione, a veteran nonproliferation advocate who mentored a number of Biden’s picks. “Extending New START for five years is just the opening gambit. This is going to be quite a show.”

Yet former Trump officials predict the appointees will be hit by a new reality when they learn more about real-world threats, including China’s major nuclear buildup in recent years.

#### Nuclear parity erodes deterrence toward China and rogue regimes.

Bronder 21, PhD in military history, PhD in astrophysics, Lieutenant Colonel in the USAF, recently Materiel Leader at the Air Force Technical Applications Center, where he managed a large portfolio of nuclear surveillance and treaty-monitoring programs (T. Justin, October 2021, “Future Directions for Great Power Nuclear Arms Control: Policy Options and National Security Implications”, Center for the Study of Weapons of Mass Destruction Occasional Paper, No. 13, pg. 42)

From the U.S. perspective, the vastly reduced warheads could generate vulnerabilities beyond the primary U.S.-Russian dynamic from China or rogue regimes. U.S. Strategic Command (USSTRATCOM) leaders have highlighted the command has a built in “margin” at New START levels for deterrence beyond bilateral competition. At a 500-warhead limit and facing both Russian and Chinese arsenals with rough numerical parity, this margin would clearly be severely challenged.93 These considerations warrant the inclusion of a negative lower bound.

### DA---Nuclear Arms Control---Assurances

#### Nuclear limitations spark allied abandonment fears---the US would compensate by expanding its conventional footprint, which worsens instability without preserving extended deterrence

Bronder 21, PhD in military history, PhD in astrophysics, Lieutenant Colonel in the USAF, recently Materiel Leader at the Air Force Technical Applications Center, where he managed a large portfolio of nuclear surveillance and treaty-monitoring programs (T. Justin, October 2021, “Future Directions for Great Power Nuclear Arms Control: Policy Options and National Security Implications”, Center for the Study of Weapons of Mass Destruction Occasional Paper, No. 13, pg. 42)

Extended Deterrence: Negative. The reduced role of nuclear weapons and collaboration with potential adversaries are steps under Approach 2 that could reassure allies and reduce risks to extended deterrence. In comparison with the contemporary status quo, however, the degraded ability of the United States to concurrently deter Russia and China would generate concerns from allies about the credibility or effectiveness of U.S. deterrence guarantees. The United States could make up for these concerns with expanded conventional force deployments. Yet such an increased American footprint could spur additional tensions or escalation possibilities, again damaging extended deterrence in a self-fulfilling security dilemma. From today’s perspective, these concerns would be severe enough to warrant a solidly negative rating regarding the perception of U.S. extended deterrence capabilities.

### Turn---Arms Control---Russian Reductions Bad

#### Russian nuclear weapon reductions would threaten their second-strike capability---that’s destabilizing.

Bronder 21, PhD in military history, PhD in astrophysics, Lieutenant Colonel in the USAF, recently Materiel Leader at the Air Force Technical Applications Center, where he managed a large portfolio of nuclear surveillance and treaty-monitoring programs (T. Justin, October 2021, “Future Directions for Great Power Nuclear Arms Control: Policy Options and National Security Implications”, Center for the Study of Weapons of Mass Destruction Occasional Paper, No. 13, pg. 41-42)

Approach 2: Long-Term Multilateral Reductions

Summary. Approach 2 would be difficult to achieve without a breakthrough in international relations, but the proposed two-step process provides a possible pathway. Yet without assuming the more benign security environment required to make this approach a reality, the resulting arms control outcomes would result in negative changes across evaluated criteria. Specifically, the vast reductions in U.S. nuclear forces would present risks to strategic stability and extended deterrence, while the specific focus on nuclear arsenals may not adequately address new technologies in a way that positively affects U.S. competitive advantage.

Strategic Stability: Negative to Neutral. Approach 2 retains U.S.-Russian stability while bringing China into an official framework.92 Strategic exchange calculations show that a secure second-strike capability remains for both the United States and Russia with little relative change from the percentage of arriving forces compared to today’s New START–limited regime (tables 14 and 15), supporting a neutral rating. One possible destabilizing trend can be considered under Russia’s worst-case scenario (day-to-day forces and electing to “ride out” the attack under the 500 warhead limit), in which “only” 39 warheads would reach targets in the United States. At this low number, Moscow could argue that U.S. BMD systems and conventional prompt-strike capabilities present a destabilizing “splendid” first-strike capability. The potential erosion of Russia’s second-strike capability could also foster a “use them or lose them” scenario in a major crisis.

### Turn---Arms Control---Overambition

#### Overreaching completely collapses negotiations---leads to an unregulated deterrence relationship that turns stability

Vaddi & Acton 20, \*JD, fellow in the Nuclear Policy Program at the Carnegie Endowment for International Peace. \*\*PhD in Theoretical Physics, holds the Jessica T. Mathews Chair and is co-director of the Nuclear Policy Program at the Carnegie Endowment for International Peace. (Pranay & James M., 10-2-2020, “A ReSTART for U.S.-Russian Nuclear Arms Control: Enhancing Security Through Cooperation”, *Carnegie Endowment for International Peace*, <https://carnegieendowment.org/2020/10/02/restart-for-u.s.-russian-nuclear-arms-control-enhancing-security-through-cooperation-pub-82705>)

The result could be considerable pressure to expand the scope of negotiations. Yielding to this pressure would be a mistake, however. Precisely because relations between Russia and the United States are so poor, there is little prospect of their reaching a comprehensive agreement that includes capabilities as sensitive as nonstrategic nuclear warheads and ballistic missile defenses. Overambition would risk a total collapse of negotiations and, in turn, the emergence of a more unregulated deterrence relationship that is prone to dangerous arms racing and escalation.

### \*\*\*DEFINITIONS\*\*\*

### I. Nuclear Arms Control

#### “Nuclear arms control” refers to interstate agreements to regulate the character, deployment, or use of nuclear armaments. It’s distinct from conventional arms control AND disarmament.

Newman 01, PhD student in the Department of Political and Social Enquiry, Monash University (Andrew, “Cooperative threat reduction: ‘Locking in’ tomorrow's security,” Contemporary Security Policy, 22:1, pg. 97, DOI: 10.1080/13523260512331391076)

Arms Control, Disarmament and CTR

Before tackling the question of whether CTR can ‘lock in’ the achievements that it has made, a preliminary issue ought to be resolved: what is arms control?

Arms control refers to any agreement between states to regulate some aspect of their military capability or potential. Nuclear arms control refers to agreements between states to regulate nuclear capability or potential ‘whether in respect of the level of armaments, their character, deployment or use’.94 Disarmament, on the other hand, has been defined as the elimination of ‘military incentives and capabilities’.95

#### “Nuclear arms control” denotes measures that limit, reduce, or abolish nuclear weapons.

Muller et al. 08, \*Harald, executive director of the Peace Research Institute Frankfurt (PRIF) and ¨ professor of International Relations at the University of Frankfurt. \*\*Simone Wisotzki, research fellow at PRIF and lecturer at the Technical University of Darmstadt. \*\*\*Una Becker is research associate at PRIF. (“Democracy and Nuclear Arms Control—Destiny or Ambiguity?”, Security Studies, 17:4, 810-854, DOI: 10.1080/09636410802507941)

**[FOOTNOTE 6]**

6. “Nuclear arms control” here denotes bi- or multilateral measures designed to limit, reduce, and/or abolish nuclear weapons and to end/prevent their proliferation, provided they are consistent with international law and agreed upon by consensual procedures. Cf. also Stuart Croft, Strategies of Arms Control: A History and Typology (New York: Manchester University Press, 1996); Nancy Gallagher, ed. “Arms Control: New Approaches to Theory and Policy,” Contemporary Security Policy (Special Issue) 18, no. 2 (August 1997); Jozef Goldblat, Arms Control: The New Guide to Negotiations (London et al.: Sage, 2003); and Jeffrey A. Larsen, ed. Arms Control: Cooperative Security in a Changing Environment (Boulder: Rienner, 2002)

#### “Nuclear arms control” describes an agreement among several powers to regulate their nuclear capability or potential. Distinguishing between arms control, non-proliferation, and disarmament is paramount because the terms aren’t interchangeable.

Fanielle 16, LLM, Inspector/Expert in Nuclear Safeguards and Security at the Federal Agency for Nuclear Control in Belgium, PhD Candidate in Political Science at the University of Antwerp (Sylvain, “Towards Nuclear Disarmament: State of Affairs in the International Legal Framework,” Nuclear Law Bulletin 97, pg. 35-36, <https://heinonline.org/HOL/P?h=hein.journals/nuclb101&i=37>)

1. UN nuclear disarmament machinery – Between achievements and doubts

Due to its interdisciplinary nature, guaranteeing a consistent, clear and accurate terminology in all areas of international nuclear law is of paramount importance.2 In fact, for this article, it is essential to distinguish the terms “arms control”, “non-proliferation” and “disarmament”, which, while interlinked, are often misperceived as interchangeable. Nuclear arms control is defined as “any agreement among several powers to regulate some aspects of their military capability or potential.”3 Despite the fact that they exist at a multilateral level, these agreements are most commonly found at a bilateral level, for example with the treaties regulating nuclear stockpiles and their strategic implications between the United States and the Russian Federation. Nuclear non-proliferation is understood as “efforts to limit the proliferation of nuclear weapons and nuclear-weapons-related technology”, which de facto embodies all bilateral, regional and multilateral political and legal initiatives.4 Finally, nuclear disarmament consists of “multilateral or unilateral reduction of nuclear weapons, aiming at a gradual elimination of all existing arsenals so as to achieve a nuclear-weapons-free world”.5

### II. Delivery

#### “Delivery vehicles” refer to ballistic/cruise missiles or bombers.

NATO 07, NATO and NATO-Russia (“PART 1: Nuclear Terms and Definitions in English,” https://www.nato.int/docu/glossary/eng-nuclear/nuc\_glos-e.pdf)

delivery vehicle

A ballistic or cruise missile or bomber that carries one or more warheads through its flight to target (USIA).

## [1.0] Area: AI/LAWS

### Aff---AI

#### Negotiate global treaties on AI that incorporate ethical principles into autonomous systems, keep humans in the loop, keep AI out of C2, ban critical infrastructure attacks, improve transparency, and develop oversight mechanisms.

Allen & West 21, \*MA, President of the Brookings Institution, retired four-star general and former commander of the NATO International Security Assistance Force. \*\*PhD, vice president and director of Governance Studies and holds the Douglas Dillon Chair in Governmental Studies at Brookings. (John R. and Darrell M., 3-24-2021, “It is time to negotiate global treaties on artificial intelligence”, Brookings, <https://www.brookings.edu/blog/techtank/2021/03/24/it-is-time-to-negotiate-global-treaties-on-artificial-intelligence/>)

This is not the first time the country has worried about the economic and national security ramifications of new technologies. In the aftermath of World War II, the United States, Soviet Union, China, France, Germany, Japan, the United Kingdom, and others were concerned about the risk of war and the ethical aspects of nuclear weapons, chemical agents, and biological warfare. Despite vastly different worldviews, national interests, and systems of government, their leaders reached a number of agreements and treaties to constrain certain behaviors, and define the rules of war. There were treaties regarding nuclear arms control, conventional weapons, biological and chemical weapons, outer space, landmines, civilian protection, and the humane treatment of POWs.

The goal through these agreements was to provide greater stability and predictability in international affairs, introduce widely-held humanitarian and ethical norms into the conduct of war, and reduce the risks of misunderstandings that might spark unintended conflict or uncontrollable escalation. By talking with adversaries and negotiating agreements, the hope was that the world could avoid the tragedies of large-scale conflagrations, now with unimaginably destructive weapons, that might cost millions of lives and disrupt the entire globe.

With the rise of artificial intelligence, supercomputing, and data analytics, the world today is at a crucial turning point in the national security and the conduct of war. Sometimes known as the AI triad, these characteristics and other weapons systems, such as hypersonics, are accelerating both the speed with which warfare is waged, and the speed with which warfare can escalate. Called “hyperwar” by Amir Husain and one of us (John R. Allen), this new form of warfare will feature levels of autonomy, including the potential for lethal autonomous weapons without humans being in the loop on decision-making.

It will affect both the nature and character of war and usher in new risks for humanity. As noted in our recent AI book “Turning Point,” this emerging reality could feature swarms of drones that may overwhelm aircraft carriers, cyberattacks on critical infrastructure, AI-guided nuclear weapons, and hypersonic missiles that automatically launch when satellite sensors detect ominous actions by adversaries. It may seem to be a dystopian future, but some of these capabilities are with us now. And to be clear, both of us, and more broadly the world’s liberal democracies, are struggling with the moral and ethical implications of fully autonomous, lethal weapon systems.

In this high-risk era, it is now time to negotiate global agreements governing the conduct of war during the early adoption and adaptation of AI and emerging technologies to the waging of war and to specific systems and weapons. It will be much easier to do this before AI capabilities are fully fielded and embedded in military planning. Similar to earlier treaties on nuclear, biological, and chemical weapons in the post-war period, these agreements should focus on several key principles:

Incorporate ethical principles such as human rights, accountability, and civilian protection in AI-based military decisions. Policymakers should ensure there is no race to the bottom that allows technology to dictate military applications as opposed to basic human values.

Keep humans in the loop with autonomous weapons systems. It is vital that people make the ultimate decisions on missile launches, drone attacks, and large-scale military actions. Good judgment and wisdom cannot be automated and AI cannot incorporate necessary ethical principles into its assessments.

Adopt a norm of not having AI algorithms within nuclear operational command and control systems. The risk of global destruction is high with AI-based launch on warning systems. Since we do not know, and may never know, exactly how AI learns from training data, it is important not to deploy systems that could create an existential threat to humanity.

Protect critical infrastructure by having countries agree not to steal vital commercial data or disrupt power grids, broadband networks, financial networks, or medical facilities on an unprovoked basis through conventional digital attacks or AI-powered cyber-weapons. Creating a common definition on what constitutes critical infrastructure will be important to the implementation of this principle.

Improve transparency on the safety of AI-based weapons systems. It is crucial to have more information on software testing and evaluation that can reassure the public and reduce the risks of misperceptions regarding AI applications. That would provide greater predictability and stability in weapons development.

Develop effective oversight mechanisms to ensure compliance with international agreements. This would include expert convenings, technical assistance, information exchanges, and periodic site inspections designed to verify compliance.

The good news is there are some international entities that already are working on these issues. For example, the Global Partnership on Artificial Intelligence is a group of more than a dozen democratic nations that have agreed to “support the responsible and human-centric development and use of AI in a manner consistent with human rights, fundamental freedoms, and our shared democratic values.” This community of democracies is run by the Organization for Economic Cooperation and Development and features high-level convenings, research, and technical assistance.

That said, there are increasingly calls for the technologically advanced democracies to come together to aggregate their capacities, as well as leveraging their accumulated moral strength, to create the norms and ethical behaviors essential to governing the applications of AI and other technologies. Creating a reservoir of humanitarian commitment among the democracies will be vital to negotiating from a position of moral strength with the Chinese, Russians, and other authoritarian states whose views on the future of AI vary dramatically from ours.

In addition, the North Atlantic Treaty Organization, European Union, and other regional security alliances are undertaking consultations designed to create agreed-to norms and policies on AI and other new technologies. This includes effort to design ethical principles for AI that govern algorithmic development and deployment and provide guardrails for economic and military actions. For these agreements to be fully implemented though, they will need to have the active participation and support of China and Russia as well as other relevant states. For just as it was during the Cold War, logic should dictate that potential adversaries be at the negotiating table in the fashioning of these agreements. Otherwise, democratic countries will end up in a situation where they are self-constrained but adversaries are not.

It is essential for national leaders to build on international efforts and make sure key principles are incorporated into contemporary agreements. We need to reach treaties with allies and adversaries that provide reliable guidance for the use of technology in warfare, create rules on what is humane and morally acceptable, outline military conduct that is unacceptable, ensure effective compliance, and take steps that protect humanity. We are rapidly reaching the point where failure to take the necessary steps will render our societies unacceptably vulnerable, and subject the world to the Cold War specter of constant risk and the potential for unthinkable destruction. As advocated by the members of the National Security Commission, it is time for serious action regarding the future of AI. The stakes are too high otherwise.

### Aff---LAWS

#### A new treaty banning the development, production, and use of autonomous weapons is key to clarity and compliance.

Docherty 20, JD, senior researcher in the Arms Division at Human Rights Watch, lecturer on law and associate director of armed conflict and civilian protection at the International Human Rights Clinic at Harvard Law. (Bonnie, 6-1-2020, “The Need for and Elements of a New Treaty on Fully Autonomous Weapons”, Human Rights Watch, <https://www.hrw.org/news/2020/06/01/need-and-elements-new-treaty-fully-autonomous-weapons>)

The Need for a Legally Binding Instrument

The unacceptable risks posed by fully autonomous weapons necessitate creation of a new legally binding instrument. It could take the form of a stand-alone treaty or a protocol to the Convention on Conventional Weapons. Existing international law, including international humanitarian law, is insufficient in this context because its fundamental rules were designed to be implemented by humans not machines. At the time states negotiated the additional protocols to the Geneva Conventions, they could not have envisioned full autonomy in technology. Therefore, while CCW states parties have agreed that international humanitarian law applies to this new technology, there are debates about how it does.[12]

A new treaty would clarify and strengthen existing international humanitarian law. It would establish clear international rules to address the specific problem of weapons systems that operate outside of meaningful human control. In so doing, the instrument would fill the legal gap highlighted by the Martens Clause, help eliminate disputes about interpretation, promote consistency of interpretation and implementation, and facilitate compliance and enforcement.[13]

The treaty could also go beyond the scope of current international humanitarian law. While the relevant provisions of international humanitarian law focus on the use of weapons, a new treaty could address development, production, and use. In addition, it could apply to the use of fully autonomous weapons in both law enforcement operations as well as situations of armed conflict.[14]

A legally binding instrument is preferable to the “normative and operational framework” that the CCW states parties agreed to develop in 2020 and 2021.[15] The phrase “normative and operational framework” is intentionally vague, and thus has created uncertainty about what states should be working toward. While the term could encompass a legally binding CCW protocol, it could also refer to political commitments or voluntary best practices, which would be not be enough to preempt what has been called the “third revolution in warfare.”[16] Whether adopted under the auspices of CCW or in another forum, a legally binding instrument would bind states parties to clear obligations. Past experience shows that the stigma it would create could also influence states not party and non-state armed groups.

#### There’s precedent for a treaty, but negotiations need to start now.

HRW 20 (Human Rights Watch, 10-20-2020, “New Weapons, Proven Precedent”, <https://www.hrw.org/report/2020/10/20/new-weapons-proven-precedent/elements-and-models-treaty-killer-robots>)

Summary

Fully autonomous weapons would usher in a new era of armed conflict, similar to the advent of air warfare or the proliferation of nuclear weapons. Also known as lethal autonomous weapons systems or “killer robots,” these systems would select and engage targets without meaningful human control. The prospect of delegating life-and-death decisions to machines raises a host of moral, legal, accountability, and security concerns, and the systems’ rapid development presents one of the most urgent challenges facing the world today. Since 2014, the Convention on Conventional Weapons (CCW) has held eight meetings, attended by more than 100 countries, to discuss these concerns, but the gravity of the problem warrants a much more urgent response.

A majority of CCW states parties and the Campaign to Stop Killer Robots, a global civil society coalition coordinated by Human Rights Watch, are calling for the negotiation of a legally binding instrument to prohibit or restrict lethal autonomous weapons systems. The Campaign advocates for a treaty to maintain meaningful human control over the use of force and prohibit weapons systems that operate without such control. While the exact language would be worked out during negotiations, the Campaign identified key elements of such a treaty in a November 2019 publication, prepared by Human Rights Watch and the Harvard Law School International Human Rights Clinic.[1]

While some states have suggested that the cutting-edge nature of fully autonomous weapons will significantly complicate the treaty process, drafters of an instrument on the topic can look to existing international law and principles for guidance. These weapons systems present distinctive challenges, and no single source constitutes a model response, but creating new law from scratch could unnecessarily slow the progress of negotiations. International law and non-legally binding principles of artificial intelligence (AI) provide ample precedent for the elements of a new treaty. Lessons from the past can and should be adapted to this emerging technology.

This report provides precedent for each of the treaty elements and shows that constructing a legally binding instrument does not require an entirely new approach. Earlier law and principles, often driven by similar concerns and objectives, can inform the structure of a treaty on fully autonomous weapons, and when negotiations start, facilitate crafting of language. The existence of relevant models should make it legally, politically, and practically easier to develop a new treaty.

Elements of a New Treaty

The proposed treaty elements apply to all weapons systems that select and engage targets based on sensor processing, rather than human inputs. They include three types of obligations. First, a general obligation requires maintaining meaningful human control over the use of force. Second, prohibitions ban the development, production, and use of weapons systems that autonomously select and engage targets and by their nature pose fundamental moral or legal problems. These prohibitions cover weapons that always operate without meaningful human control and those that rely on data, like weight, heat, or sound, to select human targets. Third, specific positive obligations aim to ensure that meaningful human control is maintained in the use of all other systems that select and engage targets.

The concept of meaningful human control, another key element of the treaty, cuts across all three types of obligations. It can be distilled into decision-making, technological, and operational components.

Methodology

This report elaborates on the content and rationale for the treaty elements listed above. It then presents parallels with existing law and principles. It draws on two main sources.

The report examines international legal instruments, especially international humanitarian law and disarmament treaties. The instruments include Additional Protocol I to the Geneva Conventions, a cornerstone of civilian protection, the Arms Trade Treaty, and numerous conventions banning specific weapons. The report also considers relevant precedent from international human rights law and international environmental law. These legal sources provide especially useful support for the obligations and terminology proposed for the treaty.

Given that emerging weapons systems raise some novel issues for international law, the report also considers principles from the technology sector regarding the development, deployment, and governance of artificial intelligence. The report draws in particular from “Principled Artificial Intelligence: Mapping Consensus in Ethical and Rights-Based Approaches to Principles for AI,” a white paper produced by the Berkman Klein Center at Harvard Law School, which analyzes 36 “AI principles” documents issued by governments, the private sector, and civil society from around the world.[2] That paper identifies common themes and principles that cut across the diverse documents. The conclusion of “Principled Artificial Intelligence” and the sources it cites support the objectives of the proposed prohibitions and the understanding of the concept of meaningful human control.

Recommendations

To increase momentum for adoption of a timely and effective legally binding instrument on fully autonomous weapons, states should:

Agree to launch negotiations by the end of 2021, with the aim of swiftly adopting a new international treaty to retain meaningful human control over the use of force and prohibit weapons systems that lack such control.

Consider and build on the precedent provided by earlier treaties and normative frameworks to address the concerns posed by fully autonomous weapons and expedite their work towards a new treaty.

Articulate their national positions on the structure and content of a new treaty.

### Aff---Emerging Tech Arms Control

#### Arms control agreements on emerging tech work and are possible

Bell and Futter 18 (Alexandra Bell, senior policy director at the Center for Arms Control and Non-Proliferation in Washington, Dr. Andrew Futter is an associate professor of international politics at the University of Leicester, United Kingdom, October 4, 2018. “REPORTS OF THE DEATH OF ARMS CONTROL HAVE BEEN GREATLY EXAGGERATED.” https://warontherocks.com/2018/10/reports-of-the-death-of-arms-control-have-been-greatly-exaggerated/)

Amid these developments, [warnings abound](http://carnegie.ru/2015/03/16/unnoticed-crisis-end-of-history-for-nuclear-arms-control-pub-59378) from [nuclear policy experts](https://twitter.com/RANDCorporation/status/1033428150301089792) and government officials that the entire span of treaties that currently reduce nuclear risks are in [danger of collapse](http://tass.ru/en/politics/866497). Indeed, [fatalism is taking over](http://carnegie.ru/2015/03/16/unnoticed-crisis-end-of-history-for-nuclear-arms-control-pub-59378) and the statement that [arms control is dead](https://carnegieendowment.org/2018/04/17/farewell-to-arms-.-.-.-control-pub-76088) is becoming commonplace. Fortunately, the reports of the death of nuclear arms control are not only premature, they seem to miss the point. Arms control has been used to varying degrees of success for over 50 years. Even during the darkest days of the Cold War, Americans and Russians managed to [continue strategic stability discussions](https://www.palgrave.com/gb/book/9780333652985) (the late 1960s and the mid-1980s being good examples). Leaders in Washington and Moscow knew they had no other choice and understood the magnitude of what was at stake. That sober wisdom seems lost on today’s leaders, who have spent far more time on dangerous posturing and rhetoric than on productive discussions. To be sure, previous methods of arms control, such as the intensive verification and counting systems of the [Strategic Arms Reduction Treaty](https://www.state.gov/t/avc/trty/146007.htm) (START), might be less relevant today for some issues, but what is needed is an updated approach to arms control that accounts for today’s emerging technologies and threats, not a rejection of the concept entirely. Where many in the old guard of arms control experts see a dead end, we see an opportunity to reinvigorate the concept and tailor it to modern challenges. Arms control is a tool and it is adaptable, flexible, and resilient. New, successful arms control agreements will require new thinking, new frameworks and without a doubt, new people. To begin, it is important to look at how the global security environment is being reshaped by [emerging technologies](http://press.georgetown.edu/book/georgetown/hacking-bomb) such as drones, precision strike weapons, hypersonic weapons, improved ballistic missile defenses, lethal autonomous systems, and [artificial intelligence](https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE296/RAND_PE296.pdf) [AI]. All of these technologies have the potential to undermine decades of nuclear orthodoxy – that is, the [rules of the nuclear game](https://www.mitpressjournals.org/doi/full/10.1162/isec_a_00320) based on the condition of mutually assured destruction and deterrence through punishment that have endured since the earliest days of the Cold War. Expertise on nuclear deterrence is not a requirement to see the danger of nuclear weapons that can be delivered without human control. Policymakers must also consider the potential impact of new domains of military conflict, such as cyber space and outer space, on the nuclear order, as well as the relationship between nuclear and advanced conventional weapons and offensive and defensive systems. These challenges will not and cannot be ignored. New technologies could re-introduce the temptation of disarming first strikes and arms racing. Without dialogue, these advances will muddy the nuclear information space, increasing fear and uncertainty in nuclear relations. The good news is that we have the ability to get ahead of this trend and manage the threats before they fully materialize. Governments can actually prevent potential nuclear crises before they start. Indeed, given that arms control efforts related to nuclear reduction are currently stalled, perhaps the time has come for pre-emptive arms control. The work could begin among the P5 (the United States, the United Kingdom, France, Russia, and China) and focus on common concerns about emerging technologies and their relationship to nuclear weapons. Conversations can then shift to points of agreement on dangers that can be avoided altogether. For example, it is hard to imagine any state objecting to the assertion that cyber attacks against their nuclear command and control systems are a bad idea, given the possibility of causing accidental or unauthorized nuclear use. By starting from a point of mutual agreement, countries can build a framework of norms and confidence-building measures. That progress, in turn, can be used to create space for discussions on more concrete understandings and binding agreements that would limit, control, or monitor new technologies. Beyond expanding the scope of work, new arms control agreements will require thinking outside the box. Old methods of monitoring, verification, and symmetry may no longer match the realities of today’s world, especially in the far less tangible realms of cyberspace or artificial intelligence. U.S. START inspectors used to [ski around](https://www.gao.gov/assets/220/214949.pdf) Russian facilities looking for anomalies. You cannot exactly ski around the entire internet. With all the capabilities the modern digital age affords, the potential for neutral, but intrusive, verification technology is unprecedented. All countries should be supporting initiatives like the [International Partnership for Nuclear Disarmament Verification](https://www.ipndv.org/) (a group of 25 nuclear and non-nuclear weapons states working to identify potential procedures and technologies to address the challenges associated with nuclear disarmament) and encouraging academics and the private sector to aid in these efforts. It is the height of hubris to think that we have exhausted our ability to achieve verifiable arms control agreements simply because the traditional ways no longer seem viable. It is also shortsighted to dismiss initiatives that focus more on norm development, such as non-binding commitments to refrain from testing or specific targeting plans or from declaratory policies ([No First Use](https://www.cfr.org/backgrounder/no-first-use-and-nuclear-weapons) or [Sole Purpose](https://fas.org/sgp/crs/nuke/IN10553.pdf)). Furthermore, it is also worth reviewing asymmetric bargains in which countries agree on certain ratios between particular weapons systems, or agreements that simply dictate a ceiling on weapons whether nuclear or non-nuclear, offensive or defensive, strategic or tactical. For example, countries could collectively agree to an overall number of certain delivery vehicles, but leave specifics up to individual parties. The third necessary task for the reinvigoration of arms control is the integration of fresh thinking. Ideally these new perspectives would come from those who entered the field at the end of or after the Cold War. People who had no role in creating the current nuclear infrastructure or who have not been burned by previous unsuccessful negotiations are less attached to the status quo. They have yet to develop bad relationships with their counterparts which have often derailed derail negotiations. New thinkers are also less burdened by longstanding ideas about insurmountable challenges, like agreements on ballistic missile defense or non-strategic nuclear weapons. Younger people are also more likely to be comfortable talking about and dealing with the new technological environment. In addition to including new voices, it is also time to foster new inter-personal relations across both generational and geographical divides. No matter what, young people will inherit a global nuclear arsenal of 15,000+ weapons and they need to learn from and interact with established experts. Such connections may well act as a confidence-building measure and help to generate new ideas. In the longer run, these efforts could even serve as the driver of a more institutionalized multinational community for sharing nuclear knowledge. It took decades to put together the nuclear arms control structures of the Cold War, and no matter the focus, we should not assume that the next generation of arms control agreements will be created quickly or easily. But we are not doomed to repeat the expensive and destabilizing arms competition of the Cold War. We can we find new ways to meet the challenges of today and tomorrow. The people who say arms control is dead largely fall into two categories: those who have never supported arms control and those who have simply run out of ideas or energy. When it comes to the 21st century’s unique nuclear challenges, the answer is not to abandon arms control, but to allow a new generation of thinkers to have a go.

### Aff---GCR

#### A binding treaty regulating global catastrophic risks is flexible, comprehensive, and the only solution to the threats emerging from nanotech, bioengineering, and AI

Wilson 13, JD, Deputy Director at the Global Catastrophic Risk Institute (Grant, “Minimizing Global Catastrophic and Existential Risks from Emerging Technologies Through International Law,” Virginia Environmental Law Journal, 2013, Vol. 31, No. 2, pg. 348-350, <https://www.jstor.org/stable/44679544>)

IV. Recommendations for an Emerging Technologies Treaty

While bioengineering that poses a GCR/ER is subject to several nonbinding international instruments, no internationally binding obligations sufficiently reduce the catastrophic risks arising out of bioengineering.250 One possible solution is to expand several of these existing instruments and use them together in a piecemeal approach to regulate the various aspects of GCRs/ERs arising out of bioengineering. However, because the current regimes are inadequate and because the scope of emerging technologies that present a GCR/ER will likely increase as science continues to develop at a rapid pace, the better solution is for states to agree to a comprehensive treaty that can sufficiently mitigate the unique aspects of GCRs/ERs arising from all emerging technologies. Therefore, this paper proposes the framework of a model treaty that would mitigate GCRs/ERs arising out of emerging technologies with the following regulatory mechanisms: use of the precautionary principle, a body of experts, a review mechanism, public participation and access to information, binding reforms for scientists, laboratory safeguards, and oversight of scientific publications.

A. New International treaty

GCRs/ERs arising out of emerging technologies are unique in that a single event can result in widespread destruction. If a GCR/ER regulatory regime only regulates some states but not others, dangerous emerging technologies could instead be developed and utilized in the unregulated states. An example of this is when Richard Seed, an American physicist who wished to be the first person to clone a human, threatened to conduct his cloning in Mexico or Japan if the United States banned human cloning.251 And if some states ban or regulate emerging technologies while others do not, this could threaten global security because rogue states would have a monopoly over dangerous emerging technologies. 252 Furthermore, without a truly global treaty, countries competing to quickly develop emerging technologies may engage in a race to arms that promotes speed over safeguards.253 Finally, some states may believe that, absent regulations binding upon all states, their emerging technology industries will be placed at a competitive disadvantage to unregulated countries. Thus, all states should agree to an international treaty imposing evenhanded regulations.

An international treaty could potentially cover all emerging technologies that pose a GCR/ER, beginning with the three in this paper - nanotechnology, bioengineering, and AI. One significant reason that a GCR/ER international treaty should regulate nanotechnology, bioengineering, and AI is that these emerging technologies are predicted to overlap in many areas. Examples of potential convergences of nanotechnology, bioengineering, and AI are nano-sized components that interact with bioengineered organisms, like a bioengineered photosynthesis protein from a plant integrated with a nanotech film to capture sunlight and convert it into electricity; 254 a targeted-killing weapon that integrates a lethal genetically engineered organism with a nanoparticle that releases the organism upon detecting certain genetic traits in an individual's DNA;255 a sophisticated form of AI that creates new technologies utilizing nanotechnology or bioengineering;256 and the use of nanotechnology, bioengineering, and AI to either “enhance” humans (termed “posthumans”) or to create a superintelligent machine with biological and nanotech properties.257 An international treaty that covers all of these emerging technologies is best equipped to regulate their use as the boundaries blur between them. Furthermore, nanotechnology, bioengineering, and AI all have broad social and ethical implications, and so placing all of them under the auspices of one convention creates a central hub where the public can discuss what risks they are willing to take and what technologies should become pervasive in society. Finally, scientists are likely to uncover yet unknown GCRs/ERs from emerging technologies in the future, and so a GCR/ER treaty for emerging technologies could be flexible enough to incorporate other emerging technologies that may pose a GCR/ER in the future such that regulators can take relatively quick action on the international level rather than having to negotiate new legal instrument.

#### Nonbinding AND patchwork regimes fail.

Wilson 13, JD, Deputy Director at the Global Catastrophic Risk Institute (Grant, “Minimizing Global Catastrophic and Existential Risks from Emerging Technologies Through International Law,” Virginia Environmental Law Journal, 2013, Vol. 31, No. 2, pg. 353-354, <https://www.jstor.org/stable/44679544>)

Negative, nonbinding, or exception-type applications of the precautionary principle are not ideal to effectively regulate GCRs/ERs arising from emerging technologies. First, the negative application of the precautionary principle would merely suggest or require that states not use scientific uncertainty about GCRs/ERs arising from emerging technologies as a reason for not taking action, but this does not impose an obligation upon states to affirmatively mitigate any risks (although applying the negative precautionary principle could be useful to eliminate “excuses” for noncompliance with other provisions of an emerging technologies GCR/ER treaty). Second, an exception-type application of the precautionary principle for GCRs/ERs from emerging technologies would be ineffective because this approach would result in different levels of protections from GCRs/ERs in different states. A more effective emerging technologies GCR/ER treaty would impose roughly uniform standards because a GCR/ER that materializes in any single state would have a global impact. On the other hand, this version of the precautionary principle may be useful if, for example, states negotiated exceptions to the WTO liberalized trade scheme as part of a treaty on GCRs/ERs arising from emerging technologies. Finally, a nonbinding application of the precautionary principle would limit the treaty's overall effectiveness because states are less likely to abide by its terms.

An affirmative and obligatory version of the precautionary principle would be most effective in regulating GCRs/ERs arising from emerging technologies. This approach could require states to take certain affirmative actions to regulate emerging technologies that pose an uncertain or undecided degree of GCR/ER. This is ideal because emerging technologies have the potential to result in global, permanent damage to the habitability of the Earth, and so requiring every state to implement precautionary measures is the most prudent course of action. This is especially important considering the rapid speed at which emerging technologies are developing. Furthermore, an affirmative and obligatory application of the precautionary principle is the best way to ensure that all states actually integrate precautionary mechanisms into their domestic law, because the level of requisite precaution can be determined and prescribed on the global level rather than having a patchwork of precautionary mechanisms from country-to-country that may or may not result in a sufficient level of protection on the global scale

### \*\*NEG\*\*

### DA---Arms Control---Dead Hand Good

#### AI Dead Hand key to deterrence. Emerging tech makes machine-speed escalation key.

Lowther & McGiffin 19, \*Dr. Adam Lowther is Director of Research and Education at the Louisiana Tech Research Institute (LTRI) where he teaches deterrence strategy, NC3 History, and Integrated Tactical Warning and Attack Assessment in several nuclear command, control, and communication courses for the U.S. Air Force. He served in several nuclear strategy and policy positions within the federal government and began his career in the U.S. Navy. \*\*Curtis McGiffin, Associate Dean, School of Strategic Force Studies, at the Air Force Institute of Technology and an adjunct professor for Missouri State University’s Department of Defense and Strategic Studies where he teaches strategic nuclear deterrence theory and NC3 education. He is a retired U.S. Air Force colonel with over 26 years of service, including 17 years serving within the nuclear enterprise. (8-16-2019, “America Needs a “Dead Hand”“, *War on the Rocks*, https://warontherocks.com/2019/08/america-needs-a-dead-hand/)

America’s nuclear command, control, and communications (NC3) system comprises many component systems that were designed and fielded during the Cold War — a period when nuclear missiles were set to launch from deep within Soviet territory, giving the United States sufficient time to react. That era is over. Today, Russian and Chinese nuclear modernization is rapidly compressing the time U.S. leaders will have to detect a nuclear launch, decide on a course of action, and direct a response.

Technologies such as hypersonic weapons, stealthy nuclear-armed cruise missiles, and weaponized artificial intelligence mean America’s legacy NC3 system may be too slow for the president to make a considered decision and transmit orders. The challenges of attack-time compression present a destabilizing risk to America’s deterrence strategy. Any potential for failure in the detection or assessment of an attack, or any reduction of decision and response time, is inherently dangerous and destabilizing.

If the ultimate purpose of the NC3 system is to ensure America’s senior leadership has the information and time needed to command and control nuclear forces, then the penultimate purpose of a reliable NC3 system is to reinforce the desired deterrent effect. To maintain the deterrent value of America’s strategic forces, the United States may need to develop something that might seem unfathomable — an automated strategic response system based on artificial intelligence.

Admittedly, such a suggestion will generate comparisons to Dr. Strangelove’s doomsday machine, War Games’ War Operation Plan Response, and the Terminator’s Skynet, but the prophetic imagery of these science fiction films is quickly becoming reality. A rational look at the NC3 modernization problem finds that it is compounded by technical threats that are likely to impact strategic forces. Time compression has placed America’s senior leadership in a situation where the existing NC3 system may not act rapidly enough. Thus, it may be necessary to develop a system based on artificial intelligence, with predetermined response decisions, that detects, decides, and directs strategic forces with such speed that the attack-time compression challenge does not place the United States in an impossible position.

### DA---Arms Control---Emerging Tech

#### New-tech arms control backfires---incentivizes development.

Amy J. Nelson 22. Rubenstein Fellow in the Foreign Policy Program and with the Talbott Center for Security, Strategy and Technology at the Brookings Institution, as well as an affiliated researcher with the Center for International Security Studies at the University of Maryland, 4/24/22. “How Emerging Technology Is Breaking Arms Control.” https://www.lawfareblog.com/how-emerging-technology-breaking-arms-control

Going forward, the prognosis is poor. To date, efforts to modernize control lists and update regimes with additional agreements have not yielded much success. Moreover, not only is the evolving nature of technology facilitating this arms control system erosion, but the very idea of augmenting regimes to better manage the threat is at once problematic and motivational. As international relations scholar Robert Jervis has pointed out, “[R]estrictions can increase an actor’s incentives to engage in the forbidden activity. … [T]he very banning of an activity may make it more attractive.”

### CP---AI---CBMs

#### Delay, ambiguity, and international tensions ruin a treaty. CBMs solve better.

Boulanin 21, PhD, Senior Researcher at SIPRI. (Vincent, 3-3-2021, “Regulating military AI will be difficult. Here's a way forward”, Bulletin of the Atomic Scientists, <https://thebulletin.org/2021/03/regulating-military-ai-will-be-difficult-heres-a-way-forward/>)

If the international community doesn’t properly manage the development, proliferation, and use of military AI, international peace and stability could be at stake. It’s not too early for national governments to take action. The big question is what are the right tools for doing so. For now, instead of the slow-moving process of drafting an international treaty, governmental negotiators should focus on efforts to build trust. They should look to some of the same mechanisms that helped the Soviet Union and the United States keep a nuclear war at bay. These confidence-building measures could be key to reducing the risks posed by military AI.

Why a treaty isn’t the answer. Officials in the arms control community like to push for internationally agreed regulations such as legally binding treaties to address military risks; these have the greatest normative power. However, there are three reasons that pursuing an AI treaty similar to those that ban biological weapons, chemical weapons, and anti-personnel landmines will be challenging.

First, capturing what military AI and its risks are in the language of a treaty is no easy task. AI is a fuzzy technological area, and experts themselves still disagree about what it is and isn’t. Perceptions also change over time; what people considered AI in the 1980s is standard software technology today. The arms control community would face significant conceptual and political hurdles if it pursued a blanket regulation on military AI.

To make their task easier, treaty negotiators might try and focus on regulations targeted at more problematic military AI applications such as autonomous weapons systems or elements of nuclear command and control. But not even this will be easy. Negotiators at the United Nations have been debating about lethal autonomous weapon since 2013 and still haven’t reached a consensus on what these weapons are and how they will be used. In fact, governments have yet to articulate use cases for most applications of military AI.

Second, it might take years or even decades for governmental negotiators to reach an agreement on an AI arms control treaty. Given how fast AI technology evolves, officials may find that the eventual outcome of any international negotiation is out of tune with technological reality and obsolete from the get go, especially if a treaty is based on technical characteristics.

The private sector, which develops most AI technology, has already been reluctant to participate in regulatory efforts on military AI, likely due to public relations concerns. Many companies have shied away from participating in the UN lethal autonomous weapons debates.

Third, the political outlook for a new arms control agreement is gloomy. As tensions rise between Russia, China, and the United States, it’s difficult to imagine these countries having many constructive discussions on military AI going forward.

A way forward? Luckily, arms-control negotiators have more tools to work with than formal debates and internationally agreed regulations. They also can look to other processes and risk-reduction measures to identify and mitigate the spectrum of risks that may stem from military AI.

To a large extent, countries could effectively mitigate risks through the creative use of the suite of confidence-building measures that the arms control community came up with during the Cold War. The United States and the Soviet Union had, for instance, regular dialogues, a hotline to help them communicate during nuclear tensions, and scientific cooperation programs aimed at increasing mutual understanding and trust.

Confidence-building measures—in the form of sharing information or engaging in dialogue—are extremely valuable tools for addressing the conceptual problems posed by AI and developing collaborative risk-reduction initiatives. They can help diplomats and other officials working on arms control and strategic issues create a common vocabulary, a shared understanding of the state and trajectory of the technology, and a mutual understanding of the risks posed military AI applications.

Trust-building activities such as conferences where experts interact with one another or scientific collaboration programs can help the arms control community to not only follow technological developments but also to involve private sector and academic experts in identifying risk-reduction measures. These activities are also well suited for discussing narrow technical issues like the testing methods that could ensure AI safety that may otherwise be difficult to address in treaty-based arms control forums.

World governments can use confidence-building activities as keys to open politically deadlocked multilateral arms control processes, like the nearly decade-long UN debates on lethal autonomous weapons. For the major military powers of the world, a lack of mutual trust is the biggest hurdle they face in pursuing their arms control objectives on AI. Information sharing, expert conferences, and other dialogues can help them develop a better understanding of one another’s capabilities and intentions.

## [1.0] Area: Cyber

### I. Background

#### There’s widespread controversy over whether a treaty is an appropriate means to address the legal power vacuum of cyberspace.

Krasikov & Lipkina 21, \*Dmitry, Chair of International Law Department and Professor @ Saratov State Law Academy, \*\*Nadezhda, Institute of Scientific Information for Social Sciences of the Russian Academy of Sciences. (“The Cyber Dialogue at the Crossroads: Why States Disagree on the Need for a New Cyber Treaty?”, SHS Web of Conferences 93, pg. 3, <https://doi.org/10.1051/shsconf/20219302008>)

3.1. The states’ disagreements and the state of legal uncertainty

Modern.

It is a matter of broad consensus between states that the existence and development of information technologies and means of telecommunication carries not only advantages, but also risks.

In its Resolution 53/70 of 4 December 1998 ‘Developments in the field of information and telecommunications in the context of international security’ the UN General Assembly expresses ‘its concern that these technologies and means can potentially be used for purposes that are inconsistent with the objectives of maintaining international stability and security and may adversely affect the integrity of the infrastructure of States to the detriment of their security in both civil and military fields’ and considers ‘that it is necessary to prevent the use of information resources or technologies for criminal or terrorist purposes’. Basically, the same language can be found in a number of the UNGA resolutions on the issue adopted since 1998 (among the latest – Resolution 73/266 of 22 December 2018 and Resolution 73/266 of 2 January 2019). According to the UN Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, ‘[e]xisting and potential threats in the sphere of information security are among the most serious challenges of the twenty-first century’. The UN Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security is planning to include a special section on existing and potential threats in its report.

At the same time, states disagree on the legal means of eliminating and reducing the risks: some defend the need to adopt a new binding international instrument (a treaty), others consider the existing rules fully applicable to cyberspace and sufficient to address the risks, while recognizing the need for their clarification in terms of how they are applied to cyber conduct. This disagreement deepens the lack of clarity about how this behavior is regulated and whether it is regulated at all. Insisting on their views the states give birth to doubts about the ability of international law to properly address the risks. As Kubo Mačák puts it: “the reluctance of states to engage in international law-making has left a power vacuum, lending credence to claims that international law fails in addressing modern challenges posed by rapid technological development” [6]. Could it be that neither side makes concessions because both of them are interested in maintaining the state of uncertainty?

#### Counterplan: Interpret existing international rules as applying to cyberspace and use soft law to promote norms. It’s mutually exclusive and solves better.

Krasikov & Lipkina 21, \*Dmitry, Chair of International Law Department and Professor @ Saratov State Law Academy, \*\*Nadezhda, Institute of Scientific Information for Social Sciences of the Russian Academy of Sciences. (“The Cyber Dialogue at the Crossroads: Why States Disagree on the Need for a New Cyber Treaty?”, SHS Web of Conferences 93, pg. 7-8, <https://doi.org/10.1051/shsconf/20219302008>)

A similar rationale determines the benefits of negotiating a new treaty for the proponents of such initiative: the potential choice of this path and its implementation will have a significant restrictive effect on the applicability of existing regulations. Even reaching an agreement on the need to develop a new treaty in itself can reinforce doubts on the applicability of the existing norms of international law on controversial issues (especially those that the participants will put up for discussion). At the same time, even inclusion of provisions in the proposed agreement that are essentially similar to the current rules is incapable of fully translating their content and their subjects into the area, as noted above. In addition, for the supporters of a new treaty, insisting on this option becomes an important strategy for defending their material positions, since the very idea of a treaty raises doubts if the existing rules are applicable.

Inequality of the disputing states’ capabilities of control over formation and approval of rules within the two scenarios is another important explanation for the persistence of the instrumental contradiction. Such capabilities are stronger for states that refuse to recognize the necessity and timeliness of a new treaty and insisting on this view is an effective tool for its supporters to promote their material preferences.

The new treaty opponents have got an obvious advantage regarding the choice of the instrumental path itself, and it makes little sense to abandon it, since they largely control this choice itself. Seen as preferred by a substantial part of the international community, the option of existing rules’ interpretation supplemented by soft law tools is a way to move forward that can and will be implemented by default, since there is no effective way for any opposing state or group of states to prevent its implementation and to fully ignore this process. The supporters of a new treaty need a positive consent of a significant number of states on and for its effective implementation, while the opponents do not need anything to do for their view to prevail except objecting to the new treaty initiative. The effect is that any state’s attitude towards legal regulation of cyberspace and any kind of its behavior in the area, in fact, automatically follows the interpretation path. In addition, unlike objections to a new binding legal instrument, there can be no justified objections to interpretation as such, and any related accusations of maintaining the state of uncertainty are leveled by the fact that such new instrument opponents do not speak out against it in principle, but argue that this is a premature initiative and it is first necessary to understand how the existing law is applied to cyberspace. Additionally, any doubts in moral legitimacy of the objections to a new treaty are reduced by the respective states’ insisting on the applicability of existing norms and by the political achievements (including the adoption of “voluntary, non-binding norms of responsible State behavior”).

Also, the opponents to a new treaty have greater control over the implementation of their option to eliminate the legal uncertainty. Interpretation, supplemented by the development of non-binding rules, allows the existing rules to evolve or new rules to appear gradually, which is not the case within the path of a new instrument drafting, since the latter is a more or less comprehensive package deal.

#### Part of the controversy

Krasikov & Lipkina 21, \*Dmitry, Chair of International Law Department and Professor @ Saratov State Law Academy, \*\*Nadezhda, Institute of Scientific Information for Social Sciences of the Russian Academy of Sciences. (“The Cyber Dialogue at the Crossroads: Why States Disagree on the Need for a New Cyber Treaty?”, SHS Web of Conferences 93, pg. 5, <https://doi.org/10.1051/shsconf/20219302008>)

3.2. The interrelation of instrumental and material disagreements: an absolute interdependence?

The disagreement between states regarding legal regulation of cyberspace is twofold: states have divergent views on the way of eliminating the state of uncertainty (or vacuum, as some see it) and on the substantive rules that determine international obligations in the field. Besides, the same groups of states oppose each other in both disagreements: those who advocate the need to negotiate an international treaty on cyberspace oppose the applicability of certain existing international rules to cyberspace, and vice versa.

There is an evident correlation between the respective positions within the instrumental and the material disagreements, but it should not be seen as an absolute interdependence. At first glance, it seems natural that insisting on inapplicability of certain existing norms, the respective states argue in favor of a new treaty: they believe that the corresponding relationships should be regulated differently than under the existing norms. For example, in its contribution to the discussion of the OEWG Draft Report China reiterated its position that “when it comes to state responsibility, which, unlike the law of armed conflicts or human rights, has not yet gained international consensus, there is no legal basis at all for any discussion on its application in cyberspace” and also proposed developing a universally-accepted approach to attribution of conduct under the auspices of the UN.

However, it cannot be assumed that advancing a position on any rules which are different than the existing ones necessarily involves insisting on a new treaty. In other words, it would be incorrect to believe that the option proposed by the opponents of a new binding instrument totally excludes the possibility to recognize that the existing substantive rules operate differently than in other areas, or to conclude that any of such rule is in whole or in part inapplicable to cyberspace. To take the interpretation path and to stop insisting on a new treaty would not automatically mean recognizing the applicability of all existing rules in the same way that they apply to noncyber relationships. The interpretation path supporters call on states to express their views on the matter, and the views can be different, which affects the way these rules are applied. The positions of states are of fundamental importance for formation of customary law and can influence the interpretation of existing norms according to the 1969 Vienna Convention of the Law of Treaties. The concept of evolutionary interpretation [14] proceed from the legal rules’ potential to evolve, and this process involves a significant convergence of the states’ practice and attitudes. Thus, there is no absolute interdependence between the views of the supporters of a new treaty and their preferences about the proper rules of conduct in cyberspace, since the interpretation path does not totally deprive them of the possibility to defend their views on material regulation.

### II. Uniqueness

#### The US has avoided any formal commitments on cyber conflict. Concerns over wording, precedent, government overreach, and confirming Russian agreement motivate continued abstention.

Klimburg 21, PhD, Director of the Global Commission on the Stability of Cyberspace Initiative and Secretariat, and the Director of the Cyber Policy and Resilience Program at The Hague Centre for Strategic Studies (Alexander, December 2021, “Pro: Transposing the Incidents at Sea Agreement – A Thought Experiment,” Cyberstability Paper Series: New Conditions and Constellations in Cyber, pg. 185, Accessible at: <https://hcss.nl/wp-content/uploads/2021/12/Cyberstability-Paper-Series.pdf#page=175>) \*typo corrected in brackets

The position of the United States (and most of the like-minded group of liberal democracies) over the last decade has been to avoid any formal political agreement on cyber conflict, for at least four good reasons: Firstly, most potential terms in cyber “treaties” were considered to be unverifiable, and would lead only to rampant cheating (or the expectations of such) and thus would prompt even more instability. Secondly, the implication that current International Law was not sufficient would create a precedent to open up other areas to new negotiation. Thirdly, any treaties on cyberspace would imply that states were the ultimate arbiter of the entire domain, conflicting with the Western position of a nonstate-led Internet. Fourthly, Russia has persistently led China and others in trying to equate what they view as psychological information warfare with technical cyberattacks. Effectively, this has amounted to focusing on means to protect what they call their “Internet segment” from content they consider destabilizing. When in September 2020 Russia’s President Putin offered to negotiate with the United States on INCSEA-for-cyber,5 these four points were clearly apparent, and he added a fifth reason to refuse such an offer: not giving Russia the status of a peer with the United [States] Sates in a bilateral agreement, something undeniably politically important to Vladimir Putin. As a result, the Russian INCSEA-C offer was largely and understandably dismissed by US and Western commentators.6

### Aff---Cyber

#### The absence of clear international standards governing cyber-attacks catalyzes aggression. A treaty that prohibits certain conduct and lays out a proportionality standard solves.

Fenton 19, Duke University School of Law, J.D. expected 2019 (Hensey Fenton III, “Proportionality and its Applicability in the Realm of Cyber Attacks,” 29 Duke Journal of Comparative & International Law, pg. 357-358, Available at: <https://scholarship.law.duke.edu/djcil/vol29/iss2/6>)

While cyber warfare is primarily governed by the existing codified laws of armed conflict, these laws were written prior to the advent of modern computing technology.113 Consequently, the applicability of current international standards to cyberwarfare stems from a false notion of cyber-kinetic equivalency.114 The absence of laws explicitly developed for tackling the nuances of cyber war, in addition to the predominant application of other fields that are loosely related, create unnecessary challenges in regulating cyber war.115 The difficulty in applying laws that were written prior to the notion of computers let alone complex cyber warfare, hinders militaries that seek to utilize cyber-attacks as a means of war.116

Moreover, without an international standard governing cyber-attacks, nations will likely take advantage of the legal ambiguities existing within the current framework to initiate cyber-attacks without restraint. In other words, the lack of an international treaty governing cyberwar creates a void which will allow nations to employ lawfare as a means to circumvent restrictions on the use of cyber force.117 The recent actions of China in the South China Sea118 and Russia within the former Soviet bloc119 reveal a willingness for the world’s cyber super powers to take advantage of legal uncertainties—or creating them if necessary—for the sole purpose of circumventing existing legal restraints on their efforts for global hegemonic supremacy. Such a void will act as a catalyst in the creation of a pathway for the conducting of lethal cyber aggressions that are unrestrained by the laws of war.

As mentioned previously, the most beneficial means for combating legal ambiguities within the cyberwarfare context is to create an international treaty or some version of a multi-lateral agreement, that would govern cyberwar. The treaty must not only seek to prohibit illegal uses of cyberwarfare and provide standards for pre-strike proportionality analyses, but it must also establish codified expectations, or norms of behavior, that solidify foreign and defense polices and guide international cooperation.120

#### A binding international agreement that guides the military application of cyber weapons is key to reduce the scale and scope of cyberwarfare.

Dumbacher 18, MA, senior program officer for the Scientific and Technical Affairs program at the Nuclear Threat Initiative (Erin D., “Limiting cyberwarfare: applying arms-control models to an emerging technology,” The Nonproliferation Review, 25:3-4, pg. 204-205, DOI: 10.1080/10736700.2018.1515152)

To reduce tensions between nations and limit the chances or consequences of armed conflict, international arms-control agreements have limited the development and use of certain weapons. Yet conventional understanding holds that arms-control agreements provide few useful models for controlling behavior within the anarchic, virtual space of the internet. Arms-control experts posit that certain basic thresholds for attaining international agreements have yet to be reached. Information technologists have yet to determine how parties could share information and reliably identify stealthy attackers. National-security analysts prefer to maintain offensive options and continue weapons development rather than agree to limits or begin the long, slow process of developing international norms that would reduce cyber conflict. Arms control in cyberspace lacks a constituency. Meanwhile, the use of offensive cyber operations is increasing.5

But by expanding the definition of an international arms-control agreement, the potential applications of arms control to cyberwarfare become clearer. The internet is not the first novel technology with both civilian and military applications. Instead of limiting the potential types of arms-control agreements to commonly recognized forms like reducing nuclear stockpiles or test bans, arms control can be a tool for guiding appropriate technology applications and demarcating lines between peaceful and military use.

To address the applicability of arms control to cyberwarfare, this article categorizes and evaluates past arms-control agreements with a historical lens and adopts a mixed-methods approach to investigating arms-control mechanisms. The findings challenge the conventional wisdom of conflict prevention in cyberspace, that the norms to which nations must adhere are the optimal, or only, first step toward preventing conflicts in cyberspace today. The findings do not oppose the notion that cyberspace is currently in anarchy; formal “rules of the road” for state behavior are necessary.6 Instead, a more ambitious policy alternative exists to form binding international agreements and potentially international organizations to reduce the scale and scope of cyberwarfare. The governance model of international civil aviation offers lessons for governing conflict in cyberspace. Adopting a broader definition of arms control could also inform governance and conflict-management policies for other emerging technologies.

#### Codifying basic rules for cyber-conflict into a treaty preserves flexibility, forges broader consensus, and jumpstarts comprehensive regulation

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2.2 Flexible and sectoral approach

Overcoming “pactophobia” and making meaningful progress in promoting the rule of law in cyberspace requires acknowledgement that a “free, open and secure Internet for the benefit of all”28 is a matter of such global significance that it merits international codification. This means moving beyond simply adding “cyber labels” to existing international rules, and articulating clearly how existing and emerging laws apply to cyberspace. Policymakers need to move from “grafting” to drafting international legal instruments specifically designed for governing cyberspace.

In this brief, we propose two principal means of overcoming “pactophobia” and progressing towards the effective governance of cyberspace: (1) making full use of the flexibility provided under international treaty law; and (2) adopting a sectoral rather than a comprehensive approach to treaty-making.

Those who doubt that international treaties are a viable means of governing cyberspace often fail to appreciate the inherent flexibility of international agreements. The International Law of Treaties, as laid down in the Vienna Convention on the Law of Treaties,29 offers a number of ways to make treaties more acceptable to potential signatories. These include opt-outs, political offence exceptions, reservations, and termination clauses. The Budapest Convention on Cybercrime makes ample use of such clauses and serves as a useful example here.

• Opt-out clauses allow parties to a treaty to abstain from applying certain parts of the treaty. For instance, the Budapest Convention sets out a list of offences related to child pornography that are to be criminalized under domestic law (Article 9, Budapest Convention). Whereas all parties have to criminalize “offering or making available child pornography through a computer system,” the Convention leaves to the discretion of the parties whether to apply provisions on criminalizing, for instance, possession of child pornography in a computer system or data storage medium.

• Political offence clauses allow a party to refuse to cooperate with another state in matters such as extradition (Article 27). Likely scenarios for the invocation of exceptions would involve treason, espionage and sedition.

• Reservations can be issued by states when signing up to a treaty to exclude or modify the legal effect of certain provisions. In order to limit the potential for abuse, the issuing of reservations can be prohibited for certain core provisions of a treaty, which is the case for the Budapest Convention, which uses a positive list of articles which allow reservations, while disallowing them elsewhere (Article 42). For instance, no reservations are allowed with regard to criminalizing “systems interference” (Article 5), for instance by denial of service (DOS) attacks or computer-related fraud (Article 8).

• Termination clauses offer states the option of withdrawing from an international agreement. In the Budapest Convention, termination “shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General of the Council of Europe” (Article 47). No country, therefore, is eternally bound by a treaty.

The second means of achieving international legal codification with regard to cyber issues is adopting an incremental, sectoral approach to treatymaking. This approach can be modeled on the international anti-terrorism treaty regime,30 and can take the Budapest Convention as a starting point. This involves, in the first instance, making use of the flexibility afforded by international treaty law to promote ratification of existing agreements by more countries. In addition, policymakers should carefully select specific cyber issues on which there is some consensus as a basis for drafting viable new agreements.

Cyber issues on which sectoral agreements could focus include: cyber security strategies and best practices; cyber capacity-building initiatives; technical assistance programs for enhancing access in remote and underdeveloped areas; regulation of dual-use cyber technologies; and basic rules of cyber warfare (i.e. turning (parts of) the Tallinn Manual into a treaty). Sectoral agreements can help forge broader consensus and serve as stepping stones towards a global, comprehensive set of rules, such as a cyber equivalent to the United Nations Convention for the Law of the Sea.

#### Signatories would comply.

Dumbacher 18, MA, senior program officer for the Scientific and Technical Affairs program at the Nuclear Threat Initiative (Erin D., “Limiting cyberwarfare: applying arms-control models to an emerging technology,” The Nonproliferation Review, 25:3-4, pg. 208-209, DOI: 10.1080/10736700.2018.1515152)

If among major powers cyberwarfare is currently within the period of unstable peace —in the early stage of conflict after the point of rising tensions but before confrontation prompts a crisis—preventive diplomacy could be “especially operative,” however.39 If current trends continue, “emergence and early development of constraining norms will be challenged and may not occur at all” as a result of the major powers’ inability to see strong controls as being in their self-interest.40 Interdependence could create positive externalities or shared benefits.41 Some scholars and business leaders prefer treaty-based models that would “prevent cyberspace from becoming the default platform for states seeking to settle conflicts outside the reach of customary international law and diplomacy.” 42 Once in place, an agreement has normative power; binding international obligations are followed more often than not.43 Parties to a verified arms-control agreement could expect counterparts to notice and respond if they were caught undermining the agreement. Technology companies are starting to band together to promote ideas like a Geneva Convention for cyberspace and principles of cybersecurity protection for users everywhere.44 Thus the question arises: are more ambitious models than norm development available for limiting cyberwarfare? The interconnected infrastructure of civil aviation may present a more apt analogy to cyberwarfare than, for example, nuclear nonproliferation.45

#### There are incentives for a global cyber treaty, but West’s unwillingness to negotiate locks in legal uncertainty.

Krasikov & Lipkina 21, \*Dmitry, Chair of International Law Department and Professor @ Saratov State Law Academy, \*\*Nadezhda, Institute of Scientific Information for Social Sciences of the Russian Academy of Sciences. (“The Cyber Dialogue at the Crossroads: Why States Disagree on the Need for a New Cyber Treaty?”, SHS Web of Conferences 93, pg. 4, <https://doi.org/10.1051/shsconf/20219302008>)

In addition, the state of uncertainty and its maintenance can serve as a lever for pushing through one's preferences on material norms: it generates public criticism on states and can force them to make concessions on the substance of obligations in order to achieve certainty. According to E. Tikk and M. Kerttunen, ‘the western rejection [of the cyber treaty negotiating initiative], as well as the argument of sufficiency of existing international law, can be seen as an attempt to avoid restraint. Accordingly, the West will have difficulties convincing the international community of its stand’ [1].

Besides, a state of uncertainty on legal rules can be viewed as more advantageous in comparison with the emergence or approval of undesirable material norms: in the midst of disagreements between states regarding material regulation in cyberspace, one may prefer the lack of clarity to a clear and precise but unfavorable rule which the opponents insist on. Nevertheless, these factors cannot be considered as advantages for each and every state: if all states were to a larger extent “cyber-like-minded” (regardless of belonging to one side of the debate or another), it is unlikely that the state of uncertainty could be their common choice. This is evidenced by the actual readiness to accept mutual legal obligations by states that have common views on the regulation of cyberspace.

First, the uncertainty obviously does not help in countering cyber threats, which are recognized with a certain degree of sincerity by all states. States have different views on values and corresponding cyber threats [2], but uncertainty does not eliminate the latters whatever they are. And although self-judgment and self-help is always available, the effect of measures taken by an injured state (such as countermeasures) in response to an allegedly wrongful conduct is diminished: the legitimacy of such measures is questionable as a result of doubts about the wrongfulness of the conduct, and as a consequence, their impact on the alleged violator is also limited.

Second, freedom of action can be an (equal) advantage only for states with equal opportunities, equally vulnerable and with similar interests, which is clearly not the case. Indeed, a cyber “savvy” state may be interested in a greater freedom of action, but at the same time such states are more sensitive to cyber risks (they are highly dependent on cyber infrastructure and are vulnerable to malicious treatment of their citizens, manufacturers and goods abroad), which forces them to seek compromises with each other and to remove uncertainty in mutual relations (e.g., the 2015 agreement between the United States and China concerning economic espionage), while remaining being opponents within the global debate.

### Aff---INCSEA

#### A cyber agreement modeled on the Incidents at Sea Treaty could establish baseline rules against interference with civilian services, the core infrastructure of the internet, and nuclear C2 systems.

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But if all this were possible, that would leave the final, perhaps most important, question: what would an INCSEA-for-cyber actually do? What would it look like? This is where the efficacy of the original INCSEA agreement comes into play, where the military negotiators crafted a bare-bones agreement on three pages and with five articles of agreement.8 As a thought experiment, it is an interesting challenge to transpose the document directly to cyber, although, immediately, some transpositions are easier than others.

For instance, Article I of the INCSEA would already seem a stumbling block. In the original document, definitions of “ship,” “aircraft,” and “formations” are agreed upon—and only in 122 words. This would undoubtedly be trickier for INCSEA-C; while the Internet, computers and networks might be easy to define, the stumbling block cyber/information/data “weapon” could be huge. The solution? Do not refer to weapons, but rather to possible effects (such as “interfering with..”) that are technologically independent. A similar track has been taken with the current norms of restraint put forward in the UN First Committee processes.

Article II of INCSEA directly references and invokes the “International Regulations for Preventing Collisions at Sea” (later called COLREGs), a set of agreements under the International Maritime Organization that are commonly referred to in the document as “Rules of the Road.” Veteran watchers of the UN First Committee Processes will remember that the eleven norms agreed upon in the 4th Group of Governmental Experts (GGE) Report9 are often described as “rules of the road.” In both cases, the intent was to reinforce existing international law while explicitly spelling out nonbinding and voluntary norms of behavior. The same principle could apply for Article 2 in an INCSEA-C: a clear commitment to the UN General Assembly-endorsed eleven norms would provide both a common point of departure while reinforce existing international law. Just like the COLREGs outlined in 1972, the eleven GGE norms would represent a “common language” on specific behavior that is partially only further spelled out in the INCSEA-C. The importance of this common baseline is critical; one criticism of a similar bilateral military agreement between China and the United States is that it has largely failed due to a lack of common rules of the road being spelled out.10

Article III of INCSEA focuses on “hazardous actions and maneuvers,” and a number of ideas are remarkably pertinent for a transposition to cyber. For instance, Article III paragraph 6 directly says that the Parties should “not simulate attacks,” by aiming guns or such, at each other. One of the most significant challenges in cyber is that some activities do not seem to have other functions (such as intelligence gathering) and are either a clear threat of the use of force, or even a case of advanced preparation of the battlefield. For instance, leave-behinds (large encrypted files) in critical infrastructure networks without any meaningful raw intelligence value can often only be interpreted as a preparation for attack. Often enough, activities observed, e.g., in the power grid meet this case, and sometimes the attacker may even draw attention to their existence by a cyber “shot across the bow” that may be excessively escalatory. In the same paragraph 6, another interesting parallel can be found, namely “not using searchlights or other powerful illumination devices to illuminate the navigation of bridges of passing ships.” The reason for this is obviously one of blinding the crew and thus imperiling ship navigation. A near parallel for this could actually be “excessive” or malicious port and network scanning activities. While port and network scanning are regular and should be considered part of the background noise of the Internet, excessive or malicious port scanning, such as shining a blinding light into a ship’s pilot’s eyes, can cause a defender undue concern that a serious attack is coming. It can even directly affect some network activity. Speaking of affecting network activity, paragraph 3 explicitly excludes navy ships from conducting maneuvers through areas of heavy traffic. Something similar could be said about an injunction of governments prohibiting the conducting of training (or offensive peacetime operations) that unduly infringes upon the availability or integrity of civilian services.

One of the most intriguing parallels to be drawn in Article III is, however, paragraph 4. It reads “ships engaged in surveillance of other ships…avoid executing maneuvers embarrassing or endangering the ships under surveillance.”11 In seaman’s terms, “embarrassing another ship” means causing it to take evasive actions in a way that may endanger it or others. There is a case to be made that there is such a thing as “cyber embarrassment”: a case where the surveilling actor causes the defending actor to undertake actions damaging to itself or others. If, for instance, a cyber espionage case is so severe that, e.g., a foreign ministry is forced to disconnect itself from the Internet to attempt to clean up the attack, this “cyber maneuver” would cause significant follow-on effects, such as, for instance, citizens in urgent need of help would not be able to contact their representatives. This example is made even more poignant in purely civilian cases, such as when emergency or 911 numbers and similar numbers are affected. This author has speculated on what cases of cyber-espionage could potentially rise to the level of a threat or the actuality of use-of-force,12 and more recently law scholars have also started to opine on the matter.13 The notion of a “cyber embarrassment” is therefore a potentially rich field for deliberation that easily exceeds this short essay.

Article IV of INCSEA concentrates on the hazardous maneuvering of aircraft over ships. But it provides a useful point of departure for a cyber version to concentrate on something similarly connected to one domain but part of another—and that is security of communication links, in particular those of undersea cables and satellite. While nations have always considered spying on communication cables (and satellites) to be a justified activity in peacetime, some limitations may be reasonable if there is a reasonable chance that the availability or integrity of civilian services could be affected. This would include any kind of interference that interrupts the communication completely, such as, for instance, by inadvertently cutting a cable while tapping it, or a poorly-designed cyber espionage attack on a satellite or ground station that renders the system temporarily inoperable. While these infrastructures are already indirectly covered in international law as well as the 4th and 6th UN GGE Report, they have not been previously explicitly mentioned. This would also be a great opportunity to directly address the security of the global undersea cable infrastructure overall, also highlighting that implied conventional threats carried out with loitering with naval vessels (as occurred in 2015, 2018, and recently in 202114) would be out of bounds as well. Artful wording in this paragraph would even be able to address yet another increasingly problematic issue, namely, one of wideband GPS jamming, which has led to a number of naval incidents as of late.15 Ideally, a separate Article could even be considered binding all parties to non-interference in the availability of integrity of the basic backbone infrastructure of the global Internet. A norm proposed by the Global Commission on the Stability of Cyberspace (GCSC) on the non-interference with this so-called “public core” could provide a baseline; indeed, much of the spirt of the GCSC’s work was already adopted in the reports of the 2021 Open-Ended Working Group and GGE.

This Article could also allow the introduction of a category of protection found in a different milmil agreement, namely the “Special Caution Areas” (SCAs) mentioned in the 1991 Prevention of Dangerous Military Activities Agreement.16 SCAs are defined by each party in mutual agreement, and have special protective measures assigned to them. For instance, an SCA could include the dedicated nuclear command and control infrastructure of a country,17 and the activity in question could be a prohibition on all kinds of cyber activity in this SCA to avoid any appearances that these capabilities were to be preemptively eliminated. SCAs could also, however, include a number of civilian infrastructures, including large Internet Exchange Points and others. Indeed, the aforementioned “public core of the Internet” infrastructure would represent an easy SCA to which all could likely agree.

### Aff---CWS

#### A cyber treaty modeled on the Chemical Weapons Convention should establish an independent organization to monitor transboundary attacks AND prohibit certain offense cyber operations. That solves arms racing.

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Towards a Cyber-Specific Treaty

A treaty specific to cyber operations is no novel idea. The treaty approach was not adopted because the United States did not want to limit its rich and multifaceted cyber-interventions abroad. But a failure to pursue a treaty framework will likely come at the US’s own peril. Not only the US, but also Russia and China have become major players in this field. If one wishes to limit the damage the three can impose on each other, some agreement is required. Perhaps even merely negotiating a cyber-treaty has some value. Such a process highlights controversies and disagreement; at the same time, it “limits the arms race and paves the way to peace.”

Back in 2012, Russia sought to conclude a treaty. At that time, Vladislav P. Sherstyuk, deputy secretary of the Russian Security Council, laid out what he described as Russia’s “bedrock positions” on disarmament in cyberspace. Russia’s proposed treaty was modeled on the Chemical Weapons Convention (CWC). Russia proposed that such treaty “would ban a country from secretly embedding malicious codes or circuitry that could be later activated from afar in the event of war.” This emphasis was likely motivated by a desire to rebuke the US and Israel for the famous Flame and Stuxnet malware that infiltrated Iranian nuclear facilities’ computer systems in 2010.

As Mary Ellen O’Connell and Louise Arimatsu explained in a report from the same year, the US’s resistance to proposals for a treaty may have related to:

“US plans to use the Internet for offensive purposes […] U.S. officials claim publicly that Cyber Command is primarily defensive, but the reluctance to entertain the idea of a cyberspace disarmament treaty is raising questions about the true U.S. position.”

In 2015, Russia and China signed a pact that includes a pledge not to hack each other, as well as provisions on law enforcement cooperation and exchange of cybersecurity technologies. While Russia failed to get the US to agree on basic cyber-security principles, the two other super-powers moved forward bilaterally.

To be sure, Russia’s good intentions are nothing that we can opine about (as we do not attempt to determine Obama’s intentions). However, even if the commitment to the new cyber-specific treaty is merely a matter of optics, it may seriously help reducing risks. To understand how that might work, consider the wisdom of Sherstyuk’s appeal to the CWC in particular.

The Chemical Weapon Convention (CWC) Model for a Cyber-Treaty

The CWC is a 1997 arms-control convention, originally signed by 95 nations (188 as of today). Signatories pledged to eliminate chemical weapons, their production facilities, as well as refrain from using chemical weapons under any circumstances. The CWC also requires states to adopt measures to implement the treaty. Signatories are required, for example, to legislate statutes that penalize activities contrary to the provisions of the treaty. Finally, the CWC establishes the Organisation for the Prohibition of Chemical Weapons (OPCW), which oversees the adherence to the convention by carrying out inspections in the territory of State parties. The establishment of the OPCW is truly the most revolutionary aspect of the CWC.

The OPCW provides assistance to state parties. Among other work, it engages in advocacy promoting the abolition of chemical weapons, and provides assistance in the peaceful use of chemistry. In 2014, the OPCW led the collection and elimination of Syrian chemical weapons. While this operation has not clearly eliminated the threat of chemical weapons in Syria, it certainly played an important role.

This could also be applicable to cyberspace. A cyber-treaty based on the CWC, would establish an independent organization to monitor trans-boundary cyber activities, assist with real-time ongoing cyber-attacks, and provide intelligence to attribute cyber operations to a particular actor. This will be challenging, as cyber-security is one of the most sensitive and classified parts of contemporary national security. However, a treaty-based organization could opt for a representative structure and decision-making processes that will protect its work from being monopolized by any one super-power. Such an organization will also provide training to officials of state parties that do not have the knowledge or the means to acquire cyber security training.

The authority of the Organization will be naturally limited, but serious violations may be submitted to the United Nations, whether the General Assembly, or in more serious cases, the Security Council. The CWC rests on these assumptions. They should also be incorporated in the cyber-treaty.

The CWC requires states to legislate appropriate laws to comply with the stipulations of the Convention. A more recent example relevant to cyberspace is the 2001 Council of Europe Convention on Cyber Crime, which requires states to adopt specific laws prohibiting illegal access, data interference, computer related fraud, and more.

This model would work alongside the cyber-treaty intergovernmental organization, and will provide some sort of common ground for policy, since states parties will adopt similar domestic laws limiting the development and use of cyber offensive techniques. For example, the cyber-treaty could require states parties to adopt laws prohibiting private companies and individuals from developing certain offensive codes and techniques.

Finally, one of the CWC’s main purposes is to differentiate between desirable civilian uses of chemistry and the development of chemical weapons. The idea is to prevent the latter while not discouraging the former. This basic tenet too is applicable to the cyber realm, where some research and new technologies may be very beneficial.

A Few Important Caveats

To be sure, adapting the CWC model (with relevant modifications) to cyberspace will still not solve all threats and challenges. As David Koplow has shown in an important work, both the US and Russia are systematically violating key provisions of the CWC. Why would a cyber-treaty modeled on the agreement fare any better?

While key players are expected to continue to search for ways around their treaty-based duties, such a treaty will advance cyber-peace and cooperation between states. Russia has shown interest in developing such a treaty, while the US has not been particularly cooperative. Cyber offense is a two-way road. Back in 2012, Schneier explained this very clearly: “We might have an offensive advantage—although that’s debatable—but we certainly don’t have a defensive advantage.” Since the US is planning to maintain its attacks and surveillance of other states, it is likely to remain the target of similar activities. Recent events have proven that this is indeed the reality we live in.

### Aff---Russia

#### Negotiating a cyber treaty with Russia establishes mutual de-escalation protocols, red lines, and verification mechanisms.

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Today, the U.S faces two main nation-state rivals in cyberspace, Russia and China. This rivalry unfolds in the context of multiple conventional challenges facing our over-extended military and security forces, including deployments in war zones, North Korea, Iran, terrorism, and regional conflicts. In the case of cyberspace, there is already an insatiable demand to recruit, train, and retain qualified personnel in both government and the private sector. We recognize the potential for massive harm that nation-state sponsored cyber-attacks present. It is in our national interest to negotiate some limits to this activity to reduce these threats and the human and financial resources needed to address them.

In contemplating a cyber treaty with Russia, traditional arms control negotiations give us ample lessons to draw from. Even if no longer in effect, the INF, CFE, and other strategic treaties had a full and valuable service life and achieved their purpose well. The elaborate verification and confidence-building measures made possible through arms control treaties provided us greatly enhanced security. They established protocols and venues for dialogue among genuine experts when things inevitably went awry. The CFE Joint Consultative Group is one such example: staffed by experts from the 22 signatory nations, the group was always ready to discuss the smallest perceived violation. The on-site inspections of the INF treaty supplemented national technical means, and, perhaps most importantly, fostered constant communication among U.S. and Russian counterparts.

We were genuinely concerned about the prospect of a full-scale conventional or nuclear war with Russia when we signed these treaties. Negotiating them was not a sign of weakness or capitulation, but rather one of strength. We continued to build and improve our military forces in ways that met our global national security objectives. Ronald Reagan came to see the value in arms control treaties, even as he started a massive investment in missile defense (the Strategic Defense Initiative). He certainly was not “soft” on the Soviet Union when he signed the INF Treaty and set the Strategic Arms Reduction Treaty negotiations on a path to its entry into force in 1994.[1] Decades later, most Americans no longer go to bed at night worrying about a massive attack on the homeland by Russia. While both nations retain considerable capabilities, nuclear fallout shelter drills are a distant memory. Today, some abandoned U.S. missile silos even serve as trendy subterranean residences.[2]

The Evolving Cyber Threat

Cyberspace has emerged as one of our overwhelming national security preoccupations, affecting the state, private sector, and individual alike. Hardly a news cycle goes by when we do not hear of some new hack by unknown or unverified actors or are ourselves one of millions that are directly affected. Commercial breaches have become so commonplace that we are now familiar with the well-worn response: an offer of a year of free credit monitoring, a weak public apology from the CEO, and a brief drop in the company’s share price. Then we move on to the next event.

More unsettling, but hardly unpredictable, is the inexorable expansion of nation-state cyber operations into the centuries-old practices of covert influence. This has ranged from the manipulation of information and creation of “fake news,” to theft and public exposure of sensitive data and intellectual property outside of pure military and intelligence targets, and interference in elections. Documented Russian cyber operations in Estonia, Ukraine, and Georgia have demonstrated just how damaging these attacks can be.[3] They also provide clear indications of what Russia identifies as its critical security interests, and its willingness to act on those interests.

Further, the target list of cyber-attacks attributed to sovereign states has expanded well beyond traditional espionage objectives to include institutions such as the World Anti-Doping Agency and the International Olympic Committee (by Russia), Sony Pictures (by North Korea), and the Office of Personnel Management (by China). What was once the domain of spies, agents of influence, physical theft, signal intercepts, media campaigns, and other covert techniques can now be accomplished remotely and inexpensively through the Internet.

We must understand that cyber-targets that are acceptable to one country may not be to another. The U.S. may argue that state-sponsored hacking to uncover and benefit from commercial secrets is out of bounds; the Chinese and Russians clearly have other views. Surely, we engage in activity they do not like, whether in the cyber arena or in other areas where we have distinct advantages.

Finally, there is a long and convoluted history contesting who did what first in the realm of cyber warfare. The Stuxnet cyberattack on the Iranian Natanz nuclear enrichment facility, first detected by the International Atomic Energy Agency in 2010, is one such case in which the United States stands accused of changing the rules on cyber activity.[4] The alleged repurposing of U.S. hacking tools by criminals and nation-states in such cases as WannaCry and NotPetya cloud lines of responsibility and accountability.[5]

The Need for a Cyber Treaty

In the current environment of accusations and counter-accusations, and the virtual absence of any meaningful dialogue between the U.S. and the Russian Federation, a period of genuine negotiations over cyber conduct would be of value.[6] The Russians and Chinese saw a clear need for such bilateral engagement when they cut a deal in 2015 not to conduct cyberattacks against each other that could “destabilize the internal political and socio-economic atmosphere,” “disturb public order,” or “interfere with the internal affairs of the state.”[7] Both wanted to avoid the cyber version of the two-front war that so preoccupied Bismarck. They did not actually need a full-blown treaty to do this, as both knew that the cyber “front” they would be focused on was not each other.

The United States did negotiate with China to reign in cyber espionage during the Obama administration, in a limited effort that likely had at least some salutary effect on the level of Chinese commercial espionage. The agreement’s fatal flaw, however, was in being vague and non-enforceable.[8] Such agreements can be effective when there is clear “good will,” but an unambiguous treaty with implementation and verification mechanisms, especially when dealing with a clear adversary, would certainly be preferable. President Reagan’s adaptation of the Russian proverb “trust, but verify” still resonates.

Even a cyber treaty of limited duration with Russia would be a significant step forward. While our current domestic political situation, and the very recent demise of the INF treaty, may not offer the best environment for negotiation, we should at least start laying the groundwork for negotiations. Within a few years, the world will have moved well beyond our current conceptions of cyber warfare to include broader applications in the realms of artificial intelligence, identity management and biometrics, DNA data manipulation, and technological advances of which we have not yet conceived.

Even today, there is no internationally recognized definition of what constitutes a cyber-attack, although the NATO-sponsored “Tallinn Manual” of 2013 did lay out some fundamentals. With its 2017 revisions, the “Tallinn Manual” provides a solid foundation for negotiating global norms and could serve as the basis for future “digital Geneva Conventions.”[9] A multilateral approach to a cyber treaty, however, could take years to come to fruition, and would not address our immediate security concerns with the Russian Federation. Efforts such as the Paris Call for Trust and Security in Cyberspace, subscribed to by 64 nations and numerous corporations and organizations as of January 23, 2019, are noble but lack the enforcement mechanisms needed to ensure compliance.[10]

The stakes are high. Cyber reconnaissance of the U.S. electrical grid, energy sector, and nuclear power industry are obvious causes for concern. The assault on our digital economy and online lifestyle should be as well. Hacks of social media attributed to Russian state-sponsored actors, both real and imagined, are ubiquitous. Intrusions into platforms such as Facebook and Twitter have shaken our confidence in widespread means of communication that increasingly dominate our lives. The political divisions and infighting caused by Russian cyber intrusions are perhaps equally significant.

Matters will only worsen. Cyber operations are a valuable tool for nation-states, both to achieve immediate policy goals and in “preparation of the battlefield” for future conflict. Assessing the source of an attack, especially when the attacker takes care to cover his tracks, is difficult. Attribution is even more complex in an era of trolls, proxies, patriotic hackers, ubiquitous encryption, increasingly sophisticated obfuscation techniques, and independent hackers simply seeking acclaim for their skills. Publicly revealing who gave the order, even when possible, inevitably involves the revelation of sensitive sources and methods that can be more damaging than the actual attack. Indictments and public shaming of cyber actors are increasingly valuable tools, but have done little to alter Russian cyber policies. In some cases, our responses may even benefit the attackers, either through providing feedback on our tactics, or resulting in recognition and reward back home.

A Cyber Treaty with Russia

Given these myriad challenges, what would a cyber treaty with Russia look like? We would need to start with terms of reference, carefully defined and mutually agreed upon. The “Tallinn Manual” could be a starting point, although the Russian Federation played no part in its drafting and would want its own input. Russia first proposed a cyber limitation resolution before the UN General Assembly in 2008, for example.[11] Ten years later, we now confront a dizzying array of areas vulnerable to cyberattack, including military, national security, commercial and industrial, political and electoral, and social media. Identifying and categorizing these clearly will be essential.

One would not expect for a moment that espionage against legitimate military and national security targets could or should end, nor preparations for cyberattacks against these in wartime. Negotiators will need to clearly elaborate exactly which targets would be prohibited, and under what circumstances. For example, while hacking military command and control systems likely would fall outside the scope of a treaty, attacks on air traffic control or theft of aerospace industry information could be prohibited. Addressing cyber intrusions into a civilian power grid connected to a nuclear or command and control center might provoke a more vigorous debate. One argument might be that Supervisory Control and Data Acquisition (SCADA) systems or Internet of Things (IoT) devices at the center might not be subject to limitations, but intrusions that could shut down a nearby hospital would be covered. Given the complexity of such targeting, many issues would have to be addressed, not necessarily with the goal of prohibiting them, but at least to establish a mechanism to address these threats when detected.

The most important element of treaty negotiations, however, would be how to handle perceived violations. There is little doubt that denial of responsibility, plausible or otherwise, would often be the first response of the accused party. Such denial has been true in treaty implementation throughout history, from the obvious massing of troops on a national border to the use of prohibited weapons systems. Active mechanisms to enable dialogue among genuine experts will be the key to success. Above all, the goal must be to avoid the rapid escalation of misunderstandings that could lead to reprisals or even armed conflict.

A cyber treaty, with the establishment of formal deconfliction, verification, and inspection mechanisms, could take very clear cues from previous arms control treaties. While cyberattacks are very much based in the real and physical, from servers, routers, data storage facilities, and cloud infrastructure, to the very buildings where cyber operators work, we are not talking about counting tanks or inspecting missile production facilities. Rather, such measures as investigation of IP addresses, unpacking of malware by investigators, procuring records from internet service providers, identifying botnets, and other technical measures might be envisioned. Absolute specificity of intent and action will be required in any treaty language.

As we learned in arms control, Russians are pragmatic and not prone to acting “in the spirit” of an agreement. In the CFE treaty, for example, one variant of gun barrel destruction by explosive charges required that “the tube is split or longitudinally torn within 1.5 meters of the breach.”[12] That is the kind of clear language that will be needed for effective compliance, and the Russians both understand and prefer lack of ambiguity. Revisions over time to keep pace with technological developments will be essential. Neither the Americans nor the Russians will be eager to reveal capabilities or vulnerabilities through the process of negotiating an agreement on cyber conduct. Cyber verification is not the same as counting missiles, and inspection and confidence-building visits to cyber and signals intelligence facilities are unlikely ever to be envisioned or even relevant. Consider, however, that not so long ago the INF Treaty allowed us to perform non-intrusive cargo scans of train cars and ski around the Votkinsk Machine Building Plant looking for holes big enough to exfiltrate an SS-20 missile. We arranged a mechanism to schedule and route flights over our respective territories under the multilateral Treaty on Open Skies. These seemed impossible before they happened. Perhaps the required leap in cybersecurity may not be as far as it seems.

#### Codified rules of the road should bar interference with election infrastructure, obtrusion on civilian and military nuclear systems, and destructive attacks on civilian facilities.

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Attacks on Critical Infrastructure and Reckless Activities in Cyberspace

An agreement to bar certain attacks on critical infrastructure would be the most important inclusion in bilateral cyber rules of the road, in our opinion, and some version of it could be pursued within a less formal framework as well. The U.S. has identified 16 critical infrastructure sectors deemed vital to U.S. security, public health/safety and national economic security,13 though the list is quite broad. In 2017 DHS designated election infrastructure as critical as well. If the U.S. and Russia could roughly agree on these designations, and given that both countries would benefit from a decrease in cyber intrusions targeting these systems, the two should consider pursuing rules of the road concerning attacks on or intrusions into these areas. Such prohibitions, as noted before, may require whittling down the list of banned targets and would certainly apply to nation-states; ideally, they would cover non-state actors operating at the behest of a state or with its tacit support, as well, but this is a thornier question that is likely to require lengthy negotiations. It is also worth noting that in the United States critical infrastructure is mostly civilian-owned and -operated, a point brought up in the Elbe Group dialogue on cyber in October 2019. An article published in 2020 describes Russian critical infrastructure as run by the state and by private companies with the goal of a “unified state system.” This difference between the two countries highlights how differently they may interpret those portions of the Law of Armed Conflict that concern distinguishing between combatants and civilians as well as proportionate damage to civilian lives and infrastructure. Of particular concern, we believe, would be cyber activities that impact election infrastructure and commercial and military nuclear systems (including weapons systems), as well as attacks on critical infrastructure resulting in material damage, loss of life, and other physical harm.

1. Election infrastructure and processes

Many U.S. policymakers consider the protection of domestic election infrastructure to be of utmost importance, with one former senior military official whom we interviewed classifying it among the key national interests existing today. Below, we critique a few existing proposals that a bilateral agreement could potentially draw upon and suggest narrower rules that may be most acceptable to both Washington and Moscow.

Both the Tallinn Manual 2.0 and the Paris Call for Trust and Security in Cyberspace offer bans on election meddling, but these are likely too broad for inclusion in U.S.-Russia rules of the road. The former bars states from intervening, “including by cyber means, in the internal or external affairs of another state,”14 while the latter proposes an expansive norm arguably most in line with U.S. interests: “Defend electoral processes: Strengthen our capacity to prevent malign interference by foreign actors aimed at undermining electoral processes through malicious cyber activities.” Moscow has long viewed U.S. support for certain NGOs and other political actors operating in Russia as interference in its affairs; the Paris wording, moreover, would entail a hard-to-achieve level of verification and enforcement.

However, rules that narrowly focus on technical infrastructure—for example, forbidding illicit changes to ballots or hacks of election software and hardware—may be the most palatable for both sides. One such norm was proposed by the Global Commission on the Stability of Cyberspace (GCSC): “State and non-state actors must not pursue, support or allow cyber operations intended to disrupt the technical infrastructure essential to elections, referenda or plebiscites.” The Tallinn Manual 2.0 says that activities that “alter electronic ballots and thereby manipulate an election” would violate international law.15 The lack of evidence that a foreign actor attempted to alter technical aspects of the 2020 U.S. presidential elections may indicate growing alignment on such a rule.

2. Civilian and military nuclear systems

We believe the U.S. and Russia should consider barring all cyber activities on each other’s nuclear systems, including both civilian nuclear power facilities and military nuclear weapon systems. The potential for nuclear catastrophe or unintended miscalculation that leads to nuclear war poses too great a risk to allow even cyber espionage on certain systems, in our view. In the SolarWinds hack, a terrifying precedent was set via the breach of the DOE as well as the National Nuclear Security Administration. We strongly believe that a reciprocal continuation of this trend will end in disaster.

Going forward, the U.S. and Russia might leverage work undertaken by the Nuclear Threat Initiative’s Cyber-Nuclear Weapons Study Group to establish norms to not attack nuclear communication, command and control (C3) systems and other nuclear weapons systems. As noted in the group’s 2018 report, the U.S. and Russia would also benefit from communicating their red lines pertaining to cyber activities on nuclear facilities, indicating which activities would be considered an act of war or warrant serious retaliatory actions.

3. Attacks, whether targeted or indiscriminate, on civilian critical infrastructure resulting in material damage, loss of life, or other physical harm.

Finally, we believe the U.S. and Russia should pursue norms that seek to prevent targeted or indiscriminate intrusions and attacks leading to material damage, disruption/destruction of critical processes or services and loss of life or other physical harm, particularly among civilians.16 An example of such an attack could be shutting off a power grid, disrupting gas pipelines, tampering with the water supply and impacting hospitals and killing or otherwise adversely affecting patients. In a similar vein, state actors should be held responsible for attacks like NotPetya and WannaCry as cyber-weapons operators and, much like with conventional weapons and conflict, should be compelled by international law to discriminate between civilian and military targets. (The Paris Call’s first principle is to “protect individuals and infrastructure,” calling on parties to “prevent and recover from malicious cyber activities that threaten or cause significant, indiscriminate or systemic harm to individuals and critical infrastructure.” Although theoretically desirable, the breadth of this recommendation again makes it very difficult to implement. For example, the U.S. and Russia would need to agree on the meaning of “significant, indiscriminate or systemic harm,” as well as guidelines for demonstrating a state did all it could to “prevent and recover from” or “protect” individuals from an indiscriminate, potentially unintentional, attack.)

#### Both sides have incentives to stabilize cyberspace, and creative verification mechanisms solidify compliance. Independently, a treaty gives the US and Russia room to address existential threats

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As he started his European tour this week, which culminates in a summit in Geneva with Vladimir Putin, President Joe Biden said he wants a stable, predictable relationship with Russia. Moscow has been echoing that sentiment. Although each side has a different understanding of what those qualifiers mean and expectations for the meeting are very low, the hacks on SolarWinds and Colonial Pipeline demonstrate that cyberspace is the most glaring threat to stability and predictability.

In early spring of 1985, when Ronald Reagan and Soviet leader Mikhail Gorbachev had their first meeting in that Swiss city, expectations were also low. The Soviet downing of a Korean commercial airliner in 1983 and Reagan’s not-off-mic comment in 1984 about outlawing and bombing the USSR clearly indicated just how tense relations were.

The upcoming Biden-Putin summit provides an opportunity to begin discussing a framework for an Internet version of the most significant U.S.-Russian cooperation to date: the product of work done at the Geneva and, later, Reykjavik summits: The Intermediate Range Nuclear Forces (INF) treaty signed by Reagan and Gorbachev in 1987.

Reagan adopted the Russian phrase “Trust but Verify” and developed respect for a Soviet leader whose ideology he loathed. Gorbachev vanquished internal foes to ensure successful treaty implementation. The result was thought to be impossible: military intelligence officers inspected the opposing countries’ missile storage and launch facilities. Another thirty inspectors from each side took up residence at the gate of their former enemy’s most secret rocket-motor manufacturing facility.

The idea of on-site inspection had been discussed for years, but no one believed both sides could push the boundaries of sovereignty and counter-intelligence concerns to make it work. But INF did work. All 2,693 short and intermediate range nuclear missiles were destroyed and mutual trust established. The treaty ushered in two decades of bilateral cooperation, including the Cooperative Threat Reduction program, which secured and eliminated strategic and chemical weapons across the former Soviet Union.

Critics, no doubt, will regard applying the arms control approach to cyber security as naïve, impractical, and even dangerous. But it’s worth remembering that big problems require bold solutions. And the incentive is clear: hackers threaten governments, the private sector and individuals, electric grids, transportation and energy facilities, defense installations and intellectual property. A tit-for-tat response to an attack may well escalate into armed conflict.

A cyber treaty is certain to be based on little trust, with lots to verify. Technological challenges, however, can be overcome. Both sides have extensive experience in monitoring public communications. From Solzhenitsyn’s days in a “sharashka” (scientific labor camp) developing decoding technology for Stalin, to the now ubiquitous SORM (an abbreviation for “network eavesdropping”) boxes attached by security services to the equipment of every telco and internet provider in the country, Russian officials know who is doing what to whom.

American systems are more poetically nicknamed: PRISM, MYSTIC, Carnivore, Boundless Informant. Government agencies conduct packet sniffing and people snooping—at home to benefit local law enforcement and abroad to spy on friends and enemies, counter ISIS and track monsters like Bin Laden.

What if each side allows the other to install such systems on the global Internet Exchange Points (IXPs) on their territory and let loose the algorithms and other tools necessary to identify botnets, hackers and disinformation campaigns?

A monitoring center staffed by experts from both countries could be established with anomalies and threats displayed in real time. The UN could supply neutral inspectors and arbitrate disputes. The treaty should provide protocols for deterring and punishing bad actors.

As with INF, the devil will be in the details. Thousands of IXPs will have to be monitored. Though many Russians and Americans understand that their digital privacy has already been compromised, meta-anonymity could be maintained to protect individuals.

A cyber treaty could also help both countries combat drug trafficking, terrorism and child pornography.

The advantages of a don’t trust, do verify “cyber-INF” seem clear. But do our leaders have the political will to go forward? Without in any way minimizing the obstacles, we believe there are reasons for cautious optimism. In 2015, Russia and China agreed not to conduct cyberattacks against each other that would “disturb public order” or “interfere with the internal affairs of the state.” In September 2020, President Putin proposed a cyber agreement with the United States. President Biden seems cautiously open to seeking out commonalities, without, of course, the unrequited bromance his predecessor had with Putin.

There’s no time to lose. A digital iron curtain is descending. Russia continues to turn the screws on internet freedom and is examining ways to isolate itself from the WWW, while pressing foreign content providers to submit to local rules about appropriate content and come on shore with their customer data – or face fines, restrictions and eventual blocking.

Should our leaders find the courage to create a monitorable digital peace, perhaps they’ll be willing to turn their attention to the other urgent problems of the 21st century – climate change, terrorism, inequality, pandemics and unchecked artificial intelligence.

#### There’s broad international support for ruling out attacks on critical infrastructure.

Barrera 17, Colonel assigned to the Air War College, Air University, former chief of offensive plans and the US senior national representative at NATO Combined Air Operations Center Uedem (Mark, “The Achievable Multinational Cyber Treaty,” Air Force Research Institute Papers, pg. 6-7, <https://www.airuniversity.af.edu/Portals/10/AUPress/Papers/CPP_0003_BARRERA_MULTINATIONAL_CYBER_TREATY.PDF>)

Critical Infrastructure Protection Treaty Debate

There is already broad support in the international community to establish measures or norms to protect national critical infrastructure and their connected industrial control systems (ICS). The European Network and Information Security Agency (ENISA) describes industrial control systems as command-and-control networks designed to support industrial processes. The largest subgroup of ICS is supervisory control and data acquisition (SCADA). Most of the ICS worldwide are legacy, proprietary, computer systems originally designed for operations unconnected to networks. However, now it is common for these control systems to be interconnected to increase efficiency and allow remote command and control. This interconnectivity allows hackers to gain access to ICS and cause serious damage.48 What is most disturbing in this situation is that many control systems were designed and built long before there were any security concerns.49

The DHS is charged with assisting critical-infrastructure owners and operators. Critical infrastructures include agriculture, food, water, public health, emergency services, government, the defense industrial base, information and telecommunication, energy, transportation, banking and finance, the chemical industry, the postal system, and shipping.50 Eighty-five percent of the nation’s critical infrastructure is owned or operated by the private sector.51 The cyberspace threats of technological and physical damage to critical infrastructures are real, and they dominate the headlines today with dramatic and potentially doomsday accounts. For example, a SCADA software bug in the northeastern United States caused an alarm system to fail after the disruption of a high-voltage power line. The software bug ultimately resulted in the deaths of 11 persons and $6 billion in damage from rail, air, energy, and communication shutdowns.52 In another example from Australia, a disgruntled employee intentionally altered a computerized treatment plant’s software to release 200,000 gallons of sewage into parks around a hotel, resulting in millions in damage.53

Conclusions from International Diplomacy and Politics

The 2004 United Nations General Assembly Resolution 58/199 stands out as the most defining advocacy of a global cybersecurity culture and the protection of critical infrastructures. Resolution 58/199 invites all to “consider protecting critical information infrastructure in any future work on cyber security and within their respective national strategies and regulations and international cooperation.”54 The 2010 GGE report furthered the discussion, recommending “dialogue on norms for State use of ICTs to reduce risk and protect critical infrastructure.”55 In an ENISA analysis of numerous national security strategies, a common theme emerged, that of identifying and protecting critical infrastructure.56 The Organization of American States communicated the need to develop and implement a cyber strategy against demonstrated threats to critical infrastructure.57 The OSCE also strongly advises states to “reduce the risks of misperception, tension, and conflict” to “protect national and international critical infrastructures, including their integrity.”58

James Lewis of the Center for Strategic and International Studies considered the high risks and proposed that countries should consider “pledging to avoid attacks.” He also suggested that international norms of behavior could “stigmatize” certain cyber weapons against critical infrastructure as weapons of mass destruction.59 The concept of “ruling out” cyber attacks against critical infrastructure is a recommendation by the International Stability Advisory Board to the US Department of State that stated, “Norms might, for example, include ruling attacks on critical infrastructure … as being unacceptable.”60 The US National Research Council Committee on Deterring Cyber Attacks noted that such agreements “may establish rules limiting appropriate targets.”61 Some international law experts recommend that potential targets such as power grids, food supplies, and financial infrastructures be restricted from cyber attack in the same way civilian aircraft are restricted from attack under all circumstances and all cyber war activities be restricted to the use of force in armed conflict.62 Finally, the International Committee of the Red Cross (ICRC) has stated that international law has “already established a rule that forbids attacks on civilian infrastructure, even in cyberspace.”63

The strongest persuasive argument for this norm of behavior toward critical infrastructure would be the United States’ practice and unilateral actions during times of crisis and war. Examples would include the US decision not to hack into financial systems during Operation Allied Force and the Global War on Terror. Also, there was restraint against hacking the Iraqi financial system in 2003.64

Despite all of this, the actualization of norms against cyber attacks against critical infrastructure will likely center on the laws of armed conflict and the debates that will be generated. The United States has already asserted that “the United States reserves the right, under the laws of armed conflict, to respond to serious cyber attacks with a proportional and justified military response at the time and place of its choosing.”65 A “zone of ambiguity” remains with regard to exploitation, attack, and espionage in cyberspace that will have to be closed for full development of global norms or treaties protecting critical infrastructure.66

### \*\*NEG\*\*

### Neg---Cyber---Solvency

#### Russia and China say no or cheat.

Katagiri 21, PhD, MA, Associate Professor of Political Science @ Saint Louis University. (Nori, “Why international law and norms do little in preventing non-state cyber attacks,” Journal of Cybersecurity, Volume 7, Issue 1, <https://doi.org/10.1093/cybsec/tyab009>) \*“be” added in brackets to correct an error

The final problem is that states have chosen not to subject themselves to international standards and instead have resorted to other options [8, 17, 18]. The bypassing is logical; existing law makes no clear conceptual and policy guidelines and extends neither penalty for violation nor incentives for compliance. In other words, states receive no legal protection from international institutions from cyberattacks by nonstate actors. While violators would face reputation costs and the risks of domestic political action [3], many care more about abusing the system for immediate gains. Some even welcome the opportunity to build their reputation via defiance of law. China knows that, for instance, defiance of the Western system often serves its political narrative, so it runs espionage campaigns against Western media critics, such as The New York Times and The Washington Post. Beijing has similarly coerced firms like Google and Facebook to submit backdoor security information in exchange for operating in its “cyber sovereignty.” While China’s actions may have weakened its soft power in general, they help strengthen its image [19]. Contrary to expectations, the reputational incentives actually make it hard to prevent violators from exploiting the flawed system.

Of course, the flaws in the law do not make cyberspace devoid of order. Order is given in part by existing institutional arrangements that offer a “patchwork” of separate regulations over issues like online crimes and attacks on telecommunications systems. In a way, compartmentalization is the way to go; it helps nations identify vulnerabilities and build a case for broader preventive mechanisms [20]. Yet, it does not relieve states’ fear of commitment. For example, the 2001 Convention on Cybercrime is an international treaty that requires signatories to penalize illegal access, interception, and misuse of devices. As of February 2021, 65 nations were signatories to the so-called Budapest Convention. In other words, more than a majority of independent states in the world have failed or declined to ratify it for nearly 20 years since the Convention came into being. One of the problems with it is that it gives no clear law enforcement authority on data interception and network search, nor does it protect confidentiality and system integrity [21]. Another problem is that it has done little to restrict the diffusion of malicious software or regulate state actions with threats of penalty [8, 22]. Signatories have little incentive to honor the accord, and nonsignatories like Russia and China simply do what they want. Russia has rejected the Convention because it is unwilling to let its cyber criminals who operate against the West [be] prosecuted [23]. In fact, Moscow garnered international support at the end of 2019 to create a different treaty on cybercrime. China, on the other hand, has stayed out of the Convention so as to continue regulating its cyber-sovereignty and back Russia’s bid for the counter treaty.

#### Opposed interests and lack of verification make cyber rules of the road infeasible.

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The principal reason that establishing U.S.-Russia cyber rules of the road is currently not feasible is that the two countries’ near-term cyber and related political goals appear diametrically opposed. Of top concern for the U.S. government, in our view, is stopping foreign interference and disinformation intended to undermine American democracy, protecting critical infrastructure, preventing or guarding against reckless malware and safeguarding confidential communications—with the associated threats emanating directly from Russia. One of Moscow’s chief interests, on the other hand, according to a former CIA senior executive, is weaponizing cyber capabilities to sow discord and embarrass Western powers it views as undermining its sovereignty (principally the United States, especially in the wake of the unauthorized disclosure of classified NSA operations by Edward Snowden). Another Russian interest is maintaining control over domestic cyberspace to ensure political stability, according to an internationally recognized expert on cyber conflict.

In both cases, in our research-based assessment, Moscow sees a need and an opportunity to strengthen its geopolitical position and to counter what it perceives as malign Western influence or threats to its interests. Achieving these goals, as well as many others, is aided by aggressive cyber espionage, compromising networks, releasing sensitive information and disinformation operations aimed at the civilian population, business and infrastructure—in other words, the most vulnerable parts of the United States.4 The limited nature of bilateral dialogues widens the chasm between the two countries: A U.S.-Russian working group on cyber issues was suspended shortly after its creation in 2013 in the wake of Moscow’s armed intervention in Ukraine. Although some limited cooperation between the countries’ officials seems to have continued, U.S. political will to engage the Russians on cyber issues is wanting. The SolarWinds hack, which compromised several U.S. government agencies’ data and could have affected up to 18,000 customers of SolarWinds’ network management system, does nothing to engender goodwill.

One might argue that during the Cold War Washington’s and Moscow’s interests were no less antipodal and their relations no less adversarial, yet they managed to sign some pivotal arms control agreements, including the bilateral 1972 Anti-Ballistic Missile Treaty (ABM), Strategic Arms Limitation Talks Agreement (1972 SALT I and 1979 SALT II) and 1987 Intermediate-Range Nuclear Forces Treaty (INF), as well as the multilateral 1963 Limited Test Ban Treaty (LTBT). One key distinction between those deals and potential rules of the road for the cyber domain lies in verification. Ensuring compliance with arms treaties involves rigorous on-site inspections, information exchanges and the ongoing monitoring of facilities. (NPT verification even relies on an independent U.N. body, the International Atomic Energy Agency, or IAEA.) These mechanisms have been critical to the continued success of arms control treaties. But “cyber verification is not the same as counting missiles,” in the words of Robert Papp, a former director of the CIA’s Center for Cyber Intelligence. In his opinion, “inspection and confidence-building visits to cyber and signals intelligence facilities are unlikely ever to be envisioned or even relevant,” and the United States and Russia will have to think more creatively about verification under any cyber agreements.5

Nonetheless, we believe that attribution and verification of claims will be central obstacles to successful cyber agreements between adversaries. The challenge goes beyond the extreme unlikeliness that governments—particularly the U.S. and Russia—will allow inspections of their cyber-related facilities. In some instances when the U.S. has alleged cyber malfeasance by Russia in the past, a former Bush and Trump administration official told us, Moscow has asked for more copious evidence than U.S officials are willing to provide, loath to reveal classified information on methods or sources. Even when the U.S. has collected sufficient evidence for cyber-related indictments against Russian intelligence officers, Moscow has continued to deny involvement. This set of problems is exacerbated by a lack of consensus around the threshold of evidence required for definitive attribution of cyberattacks.

#### Even if ratified, a treaty would get watered down to the lowest common denominator

Kilovaty 22, SJD, LLM, Associate Professor of Law @ The University of Tulsa (Ido, “Cyber Conflict and the Thresholds of War,” Forthcoming, *Is the International Legal Order Unraveling?* David Sloss, ed., Oxford University Press, pg. 34, <https://ssrn.com/abstract=3871931>)

B. New Treaties

Some of the required revisions to the jus ad bellum and jus in bello could be achieved through a new treaty. Indeed, Itamar Mann and I have argued that it may be possible for states to agree on a limited treaty addressing basic definitions and boundaries in cyber warfare.115 However, given recent global developments, especially the recent collapse of the U.N. Group of Governmental Experts process, reaching an agreement on these issues in written form may prove challenging.116

Michael Schmitt observed: “A new treaty governing cyberspace appears unlikely, at least on a global scale.”117 In a similar vein, during the Open-Ended Working Group session in February 2020, the Australian representative said: “A legally binding instrument in this space would take years to negotiate. It would likely end up with the lowest common denominator result and offer less protection than we currently have with the existing framework.”118

### Neg---Cyber---Deterrence DA

#### Russia and China will coopt a cyber treaty to amplify their attacks on the US-led order. Using offensive cyber operations early and often is the only path to stability.

Yoo & Stradner 22, \*John, visiting fellow at the Hoover Institution, the Emanuel S. Heller Professor of Law at the University of California, Berkeley, and a visiting scholar at the American Enterprise Institute. \*\*Ivana, visiting research fellow at the American Enterprise Institute. (Winter 2022, “The Best Defense... State-sponsored cybercrime costs billions and endangers national security. When will President Biden finally do something about it?”, Hoover Digest (Issue 1), <https://link.gale.com/apps/doc/A694379057/AONE?u=anon~626a1048&sid=googleScholar&xid=eba7680f>)

After the United States' humiliating Afghanistan retreat, America's rivals will amplify their assaults on our credibility and defenses. China could attack Taiwan; Russia might further encroach on Ukraine; Iran or North Korea may seek more extortion over their nuclear programs. It's also possible that adversaries will launch their first jabs where America is most vulnerable: cyberspace.

While President Biden has warned the Kremlin that Washington will “respond with cyber” if Moscow's cyberattacks affect critical infrastructure, he also wants to cooperate with the Russians. This contradictory approach fails to notice that Beijing and Moscow have exploited the international order by co-opting key institutions in their low-intensity cyberwar against the United States.

To make good on his promise to curb cyberattacks, Biden should adopt a strategy of deterrence rather than of international cooperation. Today, the most effective path forward for the United States is retaliation. If Biden takes such a step, it would be a striking, and welcome, departure from the soft policies he has adopted.

Cybercrime costs the United States billions of dollars, makes money for criminals, and derails critical infrastructure. To protect the nation, the administration must strengthen, and even use, its offensive cyber capabilities. Biden shouldn't shy away from deploying offensive and pre-emptive cyberattacks. Those actions don't violate international law, and America's adversaries have co-opted the international institutions that could hypothetically resolve such conflicts anyway.

Some in the defense community want to improve network security, but defensive capabilities are expensive and imperfect. Offense, by contrast, comes cheaply and easily.

These basic facts mean that the most effective means of security lie in deterrence based on the threat of reciprocal attack. During the Cold War, when nuclear weapons were inexpensive, US and Soviet strategies of mutually assured destruction produced international stability. Similarly, America can deter future cyberattacks by demonstrating its capability and resolve to respond now.

The Biden administration can't rely on multilateral gabfests to control cyber conflict. International law remains vague on cyberwarfare. Yes, diplomats and scholars have tried to adapt conventional laws of war to cyber conflict in a document known as the Tallinn Manual. But while these rules may dominate the discussion in academe, they don't bind states--certainly not Russia and China.

And while Washington has signed the Budapest Convention on Cybercrime, an international agreement governing hacking and other cybercrimes, Russia, China, North Korea, and Iran have refused to do so. NATO, for its part, seems content to simply declare that international law should apply in cyberspace without taking public measures to respond to foreign hacking.

Meanwhile, Russia and China are developing their own international legal schemes to regulate cyberspace. In recent years, Moscow and Beijing signed bilateral agreements on information-security cooperation, attempted to take over the United Nations International Telecommunication Union, and extended a cooperation treaty with the goal of destroying the global free flow of online information.

With Chinese support, the Kremlin has also manipulated the United Nations so that Russia, a sponsor of cybercrimes, is leading efforts to draft a new international cyber treaty. Any cyber treaty developed by Moscow and Beijing would allow their hacker proxies to continue operating while granting political cover to authoritarians who repress online free speech. It's as if Congress invited the Mafia to draft laws against racketeering and extortion. Inexplicably, the Biden administration and the US Office of the Coordinator for Cyber Issues still support some UN control over cyber rules.

As rogues and rivals challenge the US-led order, Washington should not be fooled into thinking that Russian and Chinese support for international institutions signals genuine cooperation. Both countries will continue to pursue their national interests through international law and institutions in the short term, even as they seek to destroy the broader system that supports those rules in the long term.

America can prevail in this struggle but only from a position of strength—not naivete. American cyber capabilities are still the most powerful in the world. To maintain its advantage, the United States must develop and use its offensive cyberweapons. Most nations will understand that Washington is defending itself by launching pre-emptive cyberattacks.

#### A rules-of-the-road agreement hamstrings US flexibility and enables Russia to poach global prestige.

Zabierek 21, \*Lauren Zabierek, Executive Director of the Cyber Project at Harvard Kennedy School’s Belfer Center, \*\*Christie Lawrence, director for research and analysis at the National Security Commission on Artificial Intelligence, concurrent MPP/JD candidate at Harvard/Stanford Law, \*\*\*Miles Neumann, investor focusing at Insight Partners, a New York private equity firm (6-10-2021, “Prospects for US-Russia Cyber Rules of the Road: An American Perspective”, Russia Matters, <https://russiamatters.org/analysis/us-russian-contention-cyberspace-are-rules-road-necessary-or-possible>)

Finally, to go a step further, we argue that, given the current divergence of U.S. and Russian cyber-related priorities, any rules-of-the-road agreement right now would likely be counterproductive, if not detrimental, to U.S. interests. First of all, we believe it could hamstring U.S. cyber options, especially considering the likely lack of enforcement mechanisms and compliance verification, not to mention Russia’s recent track record of noncompliance with other treaties. Second, particularly in light of past failed attempts at developing bilateral cyber guidelines, negotiations toward such a deal may simply serve as a maneuver that benefits Russia—whether as PR or as a means of advancing its vision of a “sovereign and controlled” internet. At the same time, these negotiations might waste U.S. resources and possibly undermine U.S. legitimacy, if the talks’ failure is blamed on Washington.

### Neg---Cyber---Human Rights DA

#### New cyber treaties undermine human rights---they’re used as a cover to criminalize free expression and gut privacy

Deborah Brown 21. Senior Researcher and Advocate, Digital Rights, Human Rights Watch, 8/13/21. “Cybercrime is Dangerous, But a New UN Treaty Could Be Worse for Rights.” https://www.hrw.org/news/2021/08/13/cybercrime-dangerous-new-un-treaty-could-be-worse-rights

The sudden disappearance of REvil, a cybercrime group behind the massive ransomware attack that swept through businesses worldwide in early July, temporarily eased tensions over the barrage of cyberattacks believed to be linked to Russia. But international attention to cybercrime is likely to continue to grow, and not only because the risks are expanding.

A global comprehensive treaty to counter cybercrime first proposed by Russia has gained enough support at the United Nations for negotiations to begin early next year. In addition to the irony of a government that faces criticism for turning a blind eye to cybercriminals operating within its borders pushing a global cybercrime treaty, the proposal is dangerous. A binding international treaty has the potential to expand government regulation of online content and reshape law enforcement access to data in a way that could criminalize free expression and undermine privacy.

Until now, there has been very little scrutiny of this process from a human rights – as opposed to a geopolitical – perspective. A closer look at who is proposing the treaty, the way many states have defined “crime” in the cyber context, how efforts to fight cybercrime have undermined rights, and the shortcomings of multilateral negotiating processes reveals the dangers that this treaty process poses.

In recent years, there has been a surge in cybercrime laws around the world, some of which are overly broad and undermine human rights. Governments often use them to persecute journalists, human rights defenders, technologists, opposition politicians, lawyers, religious reformers, and artists. Many governments, including some that are most supportive of a global treaty, treat forms of free expression such as criticism and dissent as crimes. A cybercrime treaty that normalizes this approach runs counter to human rights obligations.

Governments should protect people from criminal activity carried out through the internet, but that should not come at the expense of people’s rights. Thankfully, there are alternative approaches to the proposed treaty.

The UN Cybercrime Treaty Process

Russia has been promoting a global cybercrime treaty for at least a decade, presumably to replace the Budapest Convention, a treaty developed by the Council of Europe that opened for signatories in 2001 and entered into force in 2004. Since then, 65 countries have ratified it, including governments in other regions. Russia has not joined, even though it is a Council of Europe member. While it is sometimes referred to as the “gold standard” because it is the most comprehensive multilateral cybercrime treaty, human rights experts have long criticized it for not having stronger safeguards for human rights.

Ideally, treaty negotiations would enhance the safeguards of the Budapest Convention. But the dynamics at the U.N. and around this treaty in particular threaten to erode human rights protections, because many of the governments leading the initiative use cybercrime as a cover to crack down on rights and because generally U.N. negotiations need to be more transparent and inclusive of civil society.

In December 2019, the U.N. General Assembly adopted a resolution that set in motion a process to draft a global comprehensive cybercrime treaty. Negotiations will commence in January 2022 and are expected to conclude in 2023. The initiative advanced despite a total of 93 states either voting against or abstaining from the 2019 resolution, compared with 79 votes in favor of it. The U.N., the U.S., the EU, and many States parties to the Budapest Convention made up the opposition. Leading digital rights organizations warned against rushing ahead with the treaty because the proposal’s treatment of cybercrime is extremely vague and open to abuse, it supplants ongoing work elsewhere in the U.N., and the process so far has excluded civil society.

The divisive vote on the treaty exposed more fundamental disagreements – like what constitutes cybercrime, how law enforcement should gain access to data for cross-border investigations, and more broadly the role of governments in regulating the internet. Such questions have significant implications for human rights, such as freedom of expression, association, privacy, and due process.

Russia, which has been the driving force behind the proposed treaty, has significantly expanded its laws and regulations in recent years to tighten control over internet infrastructure, online content, and the privacy of communications. The result has widened surveillance of users, restricted their ability to access content, and threatened them with the prospect of being cut off from the outside world online.

When it first formally submitted the 2019 UNGA resolution, Russia was joined by seven co-sponsors. They include China, which employs technology for coercion, control, and repression, in a model of techno-authoritarianism that is spreading around the world. Cambodia, another initial co-sponsor, has proposed a cybercrime law that threatens increased surveillance of internet users, including whistleblowers, and would restrict free expression online and reduce privacy. This comes on top of several repressive laws, including its recently approved National Internet Gateway, which will enable the government to significantly increase its control over the internet.

My organization, Human Rights Watch, has documented efforts to restrict the use of the internet for the exercise of human rights — sometimes in the name of combatting cybercrime — in each of the other initial co-sponsoring governments — Belarus, Myanmar, Nicaragua, North Korea, and Venezuela.

However, support and opposition to the treaty are not clear cut. Governments with a range of human rights records from several regions have lent their support to the initiative. And understandably, some governments that are not party to the Budapest Convention feel they should be able to provide input for a global treaty rather than sign onto one they had no hand in drafting. To complicate matters further, governments that opposed the treaty, like Australia, the United States, Japan, Estonia, and Poland, are now vice-chairs of the committee that will draft it. Presumably, now that the initiative is moving forward regardless of their opposition, they see value in participating and shaping the outcome. The EU’s position, for example, is that it will promote complementarity between U.N. efforts and existing international instruments, like the Budapest Convention, emphasize the importance of respect for human rights and fundamental freedoms, and promote transparency and inclusion in the process.

Getting International Cooperation Right on Cybercrime

Efforts to improve international cooperation on cybercrime often aim to make it easier for law enforcement to access data, including data held outside of the country of the law enforcement agencies seeking it. While efforts to speed up cross-border access to data for criminal investigations may be important to ensure accountability, they often involve measures that bypass or weaken due process protections or erode the right to privacy (sometimes with the support of major companies).

One example is the 2018 U.S. Clarifying Lawful Overseas Use of Data (CLOUD) Act, which Human Rights Watch and other civil society groups opposed, and which transformed the system for cross-border access to data in criminal investigations. It empowers U.S. authorities to order U.S. service providers to turn over data regardless of storage location, and authorizes law enforcement in one country to directly serve requests for the production of data like email contents, or to issue a wiretap, internationally, without the oversight of the nation where the interference occurs, once an executive agreement between the U.S. and another country is in place. The subsequent U.S.-U.K. CLOUD Act Executive Agreement weakened privacy and due process protections of U.S. and U.K. citizens.

Likewise, the Second Additional Protocol to the Budapest Convention, which outlines new rules on enhanced international cooperation and access to evidence in the cloud, has been criticized by the Electronic Frontier Foundation, an international digital rights group, for lacking strong privacy safeguards and placing few limits on law enforcement data collection. “The Protocol can endanger technology users, journalists, activists, and vulnerable populations in countries with flimsy privacy protections and weaken everyone’s right to privacy and free expression across the globe,” the group said.

Many governments also want to make it easier for law enforcement to access data extraterritorially. For example, Indonesia’s Ministerial Regulation 5 (MR5) requires all private digital service providers and platforms, including foreign companies, to allow law enforcement authorities to access electronic data for criminal investigations into any offense carrying a penalty of at least two years in prison. The regulation also requires companies to provide access to both their “systems” and their “data” for “supervision” purposes whenever requested to do so by the authorities. Giving authorities direct access to massive amounts of information collected and stored by private companies is a clear risk to human rights. Such requirements are particularly prone to abuse, tend to circumvent key procedural safeguards, and can easily exceed the limits of what can be considered necessary and proportionate.

Multilateral negotiations often exclude civil society and others who are rights defenders, especially on issues that are considered the domain of law enforcement, like cybercrime. For example, though it’s customary for Council of Europe committee sessions to invite civil society into drafting plenary meetings, this was not the case in the negotiations over the recent Second Additional Protocol, even after almost 100 organizations called for transparency in the process. The process also did not allow for sufficient time to provide input on key provisions on data-protection safeguards.

## [2.0] Area: CTBT

### Aff---CTBT

#### Ratifying the CTBT with China establishes institutional links and diplomatic credibility, securing broader cooperative threat reduction.

Stutte 21, Master’s in Diplomacy, staff writer for Charged Affairs. (Jonathan, 1-27-2021, “Want US-China Nuclear Arms Control? Start With the Comprehensive Test Ban Treaty.”, The Diplomat, <https://thediplomat.com/2021/01/want-us-china-nuclear-arms-control-start-with-the-comprehensive-test-ban-treaty/>)

The Trump administration’s repeated push for a nuclear arms control agreement with China failed due in equal parts to bad faith and ignoring China. Beijing has consistently refused to entertain even the prospect of talks regarding its nuclear arsenal, but the new Biden administration can still pursue successful arms control with China without mentioning nuclear stockpiles. A good faith effort to ratify the Comprehensive Test Ban Treaty (CTBT) would be a remarkable first step on joint nuclear arms control between Beijing and Washington, and a bigger step in establishing cooperation to preclude conflict between the two countries. It would also signal broader commitments to reducing threat of nuclear war, enhancing nuclear non-proliferation, and protecting the climate.

Contemporaneous ratification of the CTBT sidesteps most of the barriers that direct arms control talks might suffer from. Under the previous Trump administration, the United States upended several decades of international norms surrounding nuclear weapons, forcing the United States’ reputation as a reliable negotiation partner to suffer. The Trump administration backed out of the Intermediate Nuclear Forces Treaty with Russia, manufactured and deployed a new submarine-launched low yield nuclear intercontinental range ballistic missile, threatened nuclear war with another nuclear state, and openly considered resuming nuclear testing.

China itself has repeatedly rejected arms control invitations. China refuses to entertain arms control initiatives until both Russia and the United States pare their nuclear stockpiles down to levels similar to China’s. U.S. Department of Defense estimates put China’s current nuclear warhead stockpile in the low 200s, hardly comparable to the United States’ 5,800 and Russia’s 6,300. Drastic reductions aren’t expected anytime soon, much less in the next four years,

There’s also little urgency on either side to resolve any outstanding security issues through nuclear arms control agreements. Previous agreements were born out of the precariousness of the Cold War, a constant nuclear will they/won’t they between the United States and the Soviet Union and the nuclear arms race. Previous nuclear arms control agreements increased transparency and limited stockpiles to reduce tensions and the possibility of nuclear mishaps; it’s not clear that there is an agreement that could accomplish anything similar today.

But it would benefit both countries to move forward together on something, even if the greater issues of nuclear arms control remain tentatively out of reach. Ratifying the Comprehensive Test Ban Treaty together, something neither country has yet done, would be a tremendous signal of threat reduction cooperation and a significant step toward future arms control engagement. Ratifying the CTBT together would also provide an important incentive to continue working together toward nuclear threat reduction while providing both countries with the necessary institutional knowledge for future collaboration.

#### Ratification prevents a return to nuclear weapon testing---sets off global arms races.

Stutte 21, Master’s in Diplomacy, staff writer for Charged Affairs. (Jonathan, 1-27-2021, “Want US-China Nuclear Arms Control? Start With the Comprehensive Test Ban Treaty.”, The Diplomat, <https://thediplomat.com/2021/01/want-us-china-nuclear-arms-control-start-with-the-comprehensive-test-ban-treaty/>)

Ratifying the CTBT would reduce the possibility that either country might someday resume testing nuclear weapons. The Trump administration had threatened to do so, and nuclear experts warned that it could trigger a wave of tests by numerous nuclear capable nations. Live testing presents significant challenges to threat reduction. It affords nuclear countries the possibility to test more sophisticated weapon designs, opening up the possibility of future arms races as states compete for a technological edge. Testing invariably requires production, reestablishing the nuclear weapons supply chains needed for testing and increasing the risk of proliferation.

#### Nuclear testing inflicts violence on Pacific Islander communities and destroys the environment. Ratification strengthens the US’s commitment to climate protection.

Stutte 21, Master’s in Diplomacy, staff writer for Charged Affairs. (Jonathan, 1-27-2021, “Want US-China Nuclear Arms Control? Start With the Comprehensive Test Ban Treaty.”, The Diplomat, <https://thediplomat.com/2021/01/want-us-china-nuclear-arms-control-start-with-the-comprehensive-test-ban-treaty/>)

Nuclear testing is also a grave threat to the environment. U.S. nuclear testing wreaked havoc on natural habitats and Pacific Islander and American communities. Ratifying the CTBT would signal a serious intent to better steward the environment and preserve it for future generations. It would be a welcome symbol after the Biden administration rejoins the Paris Climate Agreement, bolstering the administration’s support of climate protection.

#### Ratification enables the US and China to persuade or pressure other countries to follow on.

Stutte 21, Master’s in Diplomacy, staff writer for Charged Affairs. (Jonathan, 1-27-2021, “Want US-China Nuclear Arms Control? Start With the Comprehensive Test Ban Treaty.”, The Diplomat, <https://thediplomat.com/2021/01/want-us-china-nuclear-arms-control-start-with-the-comprehensive-test-ban-treaty/>)

Ratification would also be an opportunity to encourage other countries to join as well. Egypt, Israel, and Iran have all signed but not ratified the CTBT but may reconsider with leadership from both China and the United States. India, Pakistan, and North Korea have not signed the treaty and would be more difficult to persuade. But the ratification would present Beijing and Washington with the momentum and opportunity to jointly open dialogue with these countries or apply requisite pressure. Admittedly, the histories of conflict and poor relations between these five countries require a Herculean effort; however, the treaty cannot be enacted without their signatures and ratifications.

The process wouldn’t be without its own difficulties. On the American side, Biden would need two-thirds of the U.S. Senate to approve a resolution of ratification to proceed. This requires obtaining 16 votes yes votes from the opposition party, a tall order. But it’s not out of the question, and any effort to bolster both regional and national security should be met with serious consideration.

#### Another advocate for U.S. and China ratifying the CTBT.

William Lambers 21. Author of Nuclear Weapons, The Road to Peace and Ending World Hunger, has been published by the New York Times, History News Network, Newsweek and many other outlets. “It’s time for the United States to ratify the nuke test ban treaty | Opinion.” 10/19/21. https://www.pennlive.com/opinion/2021/09/its-time-for-the-united-states-to-ratify-the-nuke-test-ban-treaty-opinion.html

Although the U.S. has not test exploded a nuclear weapon since that time, the failure to approve the treaty has left the door open for a resumption of tests. Only North Korea has tested a nuclear weapon in the last two decades. But how long will a general moratorium continue? As Daryl Kimball of the Arms Control Association warns, “We cannot afford to take the non-testing norm for granted.” Without U.S. treaty approval, other nuclear states like China, India and Pakistan are not likely to ratify.

The major benefit of the Comprehensive Nuclear Test Ban Treaty (CTBT) was to create the conditions where deeper nuclear arms cuts could take place. There has not been much progress on nuclear disarmament in recent decades.

The United States and Russia signed treaties in 2002 and 2010 to reduce nuclear arms but still thousands of weapons on each side remain. Other nuclear states have been building up arsenals and modernizing. There is an increasing risk of a dangerous arms race between the U.S. and China. This is even more reason for both nations to finally ratify the CTBT. It would be a disaster if China or the U.S. started test exploding nuclear weapons again. Neither country has test exploded a nuke since the 1990s.

The United States and China should reach ratify the CTBT without delay. This would be an important psychological step for each nation to shut the door on nuclear testing forever, instead of just a fragile moratorium that could be broken at any minute. It could open the door for more agreements on nukes.

Each nation has much to gain in stopping an arms race. Neither China nor the United States can afford to divert precious resources towards nukes, especially with pressing needs at home and other international priorities. Most importantly cooperation on the CTBT can set the foundation for serious disarmament talks. This could involve the United States, China and Russia as well as other nuclear powers. According to the Arms Control Association the United States and Russia each have thousands of nuclear warheads still active and China is around 300. The three nations account for well over 90 percent of nuclear weapons worldwide.

In addition, China’s ratification of the CTBT might be the only thing that can get North Korea to end its nuke testing program. North Korea has conducted six nuclear sets since 2006 and we certainly don’t want to see any more. China, its ally and neighbor, might be the only influence strong enough to get North Korea to ratify the treaty. Twenty-five years is a long enough wait. Republicans and Democrats need to demonstrate leadership and get the Comprehensive Nuclear Test Ban Treaty ratified. We need this step toward peace.

#### General advocate for CTBT ratification.

Togzhan Kassenova 21. Nonresident fellow in the Nuclear Policy Program at the Carnegie Endowment. “Why Biden should push for ratification of the Comprehensive Test Ban Treaty.” 1/26/21. https://www.tandfonline.com/doi/full/10.1080/00963402.2020.1859860?scroll=top&needAccess=true

The most crucial argument in favor comes from US military officials and nuclear scientists: The United States does not need nuclear tests to keep its nuclear arsenal safe, functional, and reliable, and locking in the test ban will create another hurdle to prevent other countries from building nuclear weapons (Kimball 2013). As a decades-long advocate of the treaty, Biden knows this better than anyone else.

What has changed is the context. Biden is starting his presidency at a moment of confluence of three important factors.

First, the United States urgently needs to rebuild its standing as a leader in the international security sphere. Coming on the heels of an administration that reversed the long-standing US commitment to international cooperation, the United States should rebuild its reputation as a country that cares about international security, international treaties, and the common good. Ratifying the treaty will send a clear signal that the United States is back in business as a responsible international player.

Second, tensions in the global nuclear order are running at an all-time high, and the United States is well-positioned to make a meaningful contribution to improving this worrying dynamic. The chasm between nuclear “haves” and “have nots” – countries that have nuclear weapons or are protected by a nuclear umbrella and countries that chose not to have nuclear weapons – is wide. Non-nuclear weapon states are frustrated with the lack of progress toward disarmament. The adoption and the imminent entry into force of the Treaty on the Prohibition of Nuclear Weapons, which the majority of the countries in the world support but which countries with nuclear weapons reject, is just one of many visible signs of the divide. Notwithstanding the differences, most countries, whether they have nuclear weapons or not, agree that nuclear tests should be banned. The fact that 184 countries signed the test ban treaty speaks firmly to this fact. By ratifying the Comprehensive Test Ban Treaty and prompting other outstanding signatory states to do the same, the United States will bring the treaty closer to entry into force and dial down existing tensions in the global nuclear realm.

### Aff---CTBT + FMCT

#### Chinese nuclear modernization will jumpstart a global nuclear arms race. Ratifying the Comprehensive Nuclear Test Ban Treaty (CTBT) AND the Fissile Material Cut-off Treaty (FMCT) would result in durable and verifiable limits on China’s nuclear arsenal

Kulacki 21, PhD, China Project Manager @ the Union of Concerned Scientists, formerly associate professor of government @ Green Mountain College. (Gregory, 10-6-2021, “China’s New Missile Silos: How Should the United States Respond?”, All Things Nuclear, <https://allthingsnuclear.org/gkulacki/chinas-new-missile-silos-how-should-the-united-states-respond/>)

China, with a nuclear force nowhere near the size of Russia or the US, was never a major player in the old nuclear arms race or diplomatic efforts to stop it. But its new silos run the risk of jump starting another one. That’s a danger the United States government can avoid.

The most effective way to avoid it, while simultaneously limiting the improvement and expansion of China’s nuclear forces, is to revitalize international nuclear arms control. There are two clear negotiation outcomes that can verifiably limit China’s ability to improve the quality and increase the quantity of its nuclear weapons.

The first is the entry into force of the CTBT. The US Senate should immediately join the other 170 nations who already ratified it. China said it will ratify the treaty after the United States does. The Biden administration should then push the other six holdouts – Egypt, India, Israel, Iran, North Korea, and Pakistan – to do the same. This is a diplomatic challenge that can be met and is worth the effort.

US defense officials are justifiably worried about renewed Chinese interest in explosive nuclear testing. A resumption of testing would allow China to develop new warheads that are lighter and more efficient than those in their current arsenal. Lighter warheads would allow China to fit more of them on a single missile, multiplying the potential impact of its new silos. Using less fissile material in each warhead would allow China to construct a larger number of warheads. Moreover, renewed testing could enable China to develop low-yield warheads it does not currently possess. The entry into force of the CTBT would verifiably inhibit China from making all three of these improvements to its nuclear forces.

The second desired outcome is negotiating a Fissile Material Cut-off Treaty (FMCT). This international treaty would stop all production of weapons-grade nuclear material around the globe. China produced a limited amount of fissile material before agreeing to a voluntary moratorium it could end tomorrow. A treaty that verifiably cut-off China’s ability to produce more of this essential component of nuclear weapons would place a firm cap on the size of its nuclear arsenal. This is clearly in the interests of the United States and the best way to prevent a new nuclear arms race. The FMCT would place even stricter limits on the growth of China’s nuclear arsenal when combined with the entry into force of the CTBT, which would prevent China from conducting the tests that would be required to develop reliable new nuclear warheads that use less fissile material.

China is still willing to ratify the CTBT and negotiate an FMCT. The United States should seize the opportunity before it is too late. The only thing standing in the way is a lack of political will. US political leaders seem to lack faith in diplomacy. But greenlighting a new US nuclear build-up will never be able to solve the problem created by China’s new missile silos and protect the people of the United States from a Chinese nuclear attack. There is no indication that ballistic missile defense technology will ever be good enough to protect them either.

Now is not the time for the United States to hit the brakes on efforts to reduce the role of nuclear weapons in national security policy. It is the time to return to the international negotiating table where there is a chance to stop a new nuclear arms race before it gets started. President Biden should make this a priority as he puts together his Nuclear Posture Review.

Military minds always look for military solutions. But political leaders should know from experience that running a nuclear arms race is like playing tic-tac-toe. It is game no one can win. There is no military solution to the existential threat posed by nuclear weapons. Diplomacy, for all its faults and difficulties, is our only hope. When it comes to responding to China’s new missile silos, the entry into force of the CTBT and the FMCT would place verifiable and enduring limits on the size and sophistication of China’s nuclear forces.

#### Ratifying the CTBT and FMCT lead to Chinese reciprocation---that caps China’s nuclear modernization.

Kulacki 19, Manager of the China Program at the Union of Concerned Scientists. (Dr. Gregory Kulacki, 11-18-2019, “China’s nuclear development shows its acceptance of limitations”, *The Hill*, https://thehill.com/opinion/international/470764-chinas-nuclear-development-shows-its-acceptance-of-limitations)

The best way for Congress and the American public to address legitimate concerns about China’s nuclear modernization program is to constrain it with two binding international arms control agreements: the CTBT and the Fissile Material Cut-off Treaty (FMCT). Ratification and entry into force of the CTBT would verifiably prevent China from resuming explosive nuclear testing it would need to develop more efficient and varied warhead designs. Successfully negotiating the entry into force of the FMCT would verifiably cap the size of China’s nuclear arsenal at its current level.

China repeatedly has expressed a willingness to participate in international nuclear arms control negotiations in the United Nations. Chinese participants in multilateral nuclear dialogues have said that China will ratify the CTBT when the United States does. China also has stated it is open to beginning negotiations on the FMCT.

China’s willingness to accept these constraints on its nuclear forces is worth remembering when considering questions about the magnitude and purpose of its current modernization programs.

## [2.0] Area: CBD

### Aff---CBD

#### Neglecting the CBD forfeits the diplomatic leverage necessary to galvanize a global solution to the biodiversity crisis.

Patrick 21, PhD, James H. Binger senior fellow in global governance and director of the International Institutions and Global Governance Program at the Council on Foreign Relations. (Stewart M., 3-1-2021, "It’s Long Past Time for the U.S. to Ratify the ‘Treaty of Life’", World Politics Review, <https://www.worldpoliticsreview.com/articles/29457/to-confront-biodiversity-threats-the-u-s-must-finally-ratify-the-cbd>)

At first blush, the U.S. failure to ratify the biodiversity convention seems inexplicable. America has been a global leader in domestic environmental conservation since the 1970s, including through measures like the Endangered Species Act of 1973. It also spearheaded the early push for a global biodiversity treaty during the 1980s. In a 1991 message to Congress, President George H. W. Bush lauded America’s domestic environmental legacy, while reminding legislators that “environmental threats do not stop at a line on a map.” Bush called for the U.S. “to broaden our dialogue with other nations and international institutions and together address environmental issues that know no boundaries.”

The biodiversity convention, approved at the U.N. Conference on Environment and Development in Rio in 1992, reflected the handiwork of U.S. negotiators. It created a balanced and flexible multilateral framework to advance three objectives: conserving diversity within and among species and ecosystems; promoting the sustainable use of living natural resources; and ensuring the “fair and equitable” sharing of any benefits obtained from exploiting genetic resources.

Despite America’s influence in drafting it, Bush declined to sign the convention during a heated election year. His rival for the White House, Bill Clinton, went on to sign it during his first months as president in June 1993, submitting it to the Senate that November. The next year, the Senate Foreign Relations Committee endorsed it on a bipartisan basis by a 16-3 vote. Unfortunately, the treaty soon died in the Senate, as the then-minority leader, Republican Bob Dole, mobilized a blocking minority to oppose it. None of the next three presidents—the younger George W. Bush, Barack Obama, or, of course, Donald Trump—resubmitted it for Senate reconsideration.

Yet over these ensuing decades, the state of global biodiversity has gone from bad to worse, thanks to the rapid degradation of land- and seascapes, the quickening pace of climate change, overexploitation of animals and plants, massive nutrient pollution, and the introduction of invasive species around the world.

Bold U.S. leadership is needed now more than ever to address this biodiversity crisis. In May, China will host the pivotal 15th conference of parties, known as COP15, to the Convention on Biological Diversity in Kunming. As a nonparty to the treaty, the U.S. can participate only as an “observer,” diluting its diplomatic leverage.

#### Implementing the CBD strengthens Indigenous rights and autonomy.

Reyes-García et al. 21, PhD, ICREA Research Professor at the Institut de Ciència i Tecnologia Ambientals (ICTA) of the Universitat Autònoma de Barcelona. (Victoria, 5-18-2021, "Recognizing Indigenous peoples’ and local communities’ rights and agency in the post-2020 Biodiversity Agenda," Ambio Volume 51, Springer, <https://link.springer.com/article/10.1007/s13280-021-01561-7>)

Introduction

The Convention on Biological Diversity (CBD) is now working to formulate the goals that will frame global biodiversity policy for decades to come. The Parties to the Convention are doing so while facing the fact that they failed to achieve most of the targets of the 2011–2020 Strategic Plan for Biodiversity while global biodiversity continues to decline precipitously (Green et al. 2019). Moreover, the window of opportunity to take action is narrowing (Díaz et al. 2019; IPBES 2019a, b). To slow biodiversity loss, transformative change, i.e., a fundamental system-wide reorganization, is needed in the ways biodiversity policies are designed, implemented, and enforced, from international to national scales, and across sectors (Díaz et al. 2020).

In this ‘Perspective’, we argue that transformative change requires the foregrounding of Indigenous peoples and local communities’ (IPLC) rights and agency in biodiversity policy. Much of the world’s biodiversity now exists in landscapes and seascapes traditionally owned, managed, used and/or occupied by IPLC (Brondizio and Le Tourneau 2016; Garnett et al. 2018). Moreover, despite increasing resource extraction pressures (Díaz et al. 2019) and growing violence against IPLC who are defending their territories and resources (Scheidel et al. 2020), biodiversity is declining more slowly in areas managed by IPLC than elsewhere (Garnett et al. 2018; Fa et al. 2020; O’Bryan et al. 2020).

However, IPLC continue to face challenges to full participation in the crafting and implementation of biodiversity policy at local, regional, and global levels (Witter et al. 2015; Forest Peoples Programme et al. 2020). For example, while  about 40% of terrestrial protected areas overlap with IPLC lands (Garnett et al. 2018), IPLC only formally govern < 1% of them (UNEP-WMCM et al. 2018). Further, the current zero draft of the post-2020 biodiversity framework continues to make the same long-standing calls for promotion of traditional knowledge and “full and effective participation” of IPLCs without the more concrete measures they have requested (see Box).

Four key points underscore the importance of recognizing IPLC rights and agency in biodiversity policy. First, IPLC hold knowledge essential to setting realistic and effective biodiversity targets that simultaneously improve local livelihoods. Second, IPLC conceptualizations and understandings of nature are aligned with CBD's 2050 vision. Third, IPLC participation in biodiversity policy as rights-holders enhances the social elements needed to meet CBD 2050 vision. And fourth, engagement in biodiversity policy is essential for Indigenous peoples and local communities to be able to fully exercise the rights to territories and resources that have been recognized by international agreements. We draw on the work of both Indigenous and non-Indigenous scholars to illustrate these four key points. We acknowledge that we are non-Indigenous academics working in partnership with and informed by IPLC and their representatives. We do not claim to speak on behalf of IPLC, but we gratefully acknowledge the depth of knowledge and perspectives shared with us over the years that shape this ‘Perspective’.

#### Advocate.

William J. **Snape III 10**, Senior Counsel at the Center for Biological Diversity and a Practitioner in Residence at American University Washington College of Law, 2010, “Joining The Convention On Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up,” https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1043&context=sdlp

U.S. leadership is needed to protect domestic and global biological resources. According to the best experts in the field, the past 50 years have witnessed changes in natural systems more rapid and extensive than in any comparable period of time in human history. The species extinction rate has increased by as much as 1,000 times background rates, and upward of one-third of mammal, bird, and amphibian species are now threatened with extirpation. The time to act is now. It is time for the United States to join the CBD. The United States was a leader in drafting the Convention on Biological Diversity in the late 1980s and early 1990s, and the United States again needs to protect its interests. The United States currently has only observer status in the COP. Ratification of the Convention will, for instance, allow the U.S. to **gain an official seat** at the table for future decisions and negotiations under the Convention, including the pending negotiations of an ABS legal binding instrument. The Convention will not necessitate the addition, repeal, or change of any U.S. laws. The U.S. State Department’s transmittal package to the U.S. Senate found that no new legislation would be needed to implement the Convention. President Clinton signed the Convention and the State Department transmitted it with accepted legal understandings in 1993-94. These understandings included statements ensuring that “the existing balance of Federal and State authorities” would not be disrupted and that the “intellectual property rights” of Americans would not be weakened under the treaty. The Senate Foreign Relations Committee favorably reported the Convention to the Senate floor in 1994 on a strong and bipartisan vote of 16-3. This should not be a controversial issue.120 **The CBD’s values are as American as apple pie**.121 The CBD is an important tool to help address the impacts of global warming, unstable weather patterns, and other abrupt changes caused by stressed ecological systems. The CBD helps humans and wild species impacted by these habitat changes through adaptation measures. Protecting biodiversity maximizes the resilience of ecosystems and large regions, indeed the entire world, so that use of land, water and air is done sustainably. This is good for food and water security, overall global well-being, and the long-term maintenance of biodiversity’s many economically beneficial services. The CBD is the one legal tool that brings these important issues together. It should be ratified by the U.S. Senate in short order because it is without legal controversy, it will benefit the United States’ people, and it will make the world a better place for all its inhabitants.

#### US key.

William J. **Snape III 10**, Senior Counsel at the Center for Biological Diversity and a Practitioner in Residence at American University Washington College of Law, 2010, “Joining The Convention On Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up,” https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1043&context=sdlp

Now more than ever, the **engagement and leadership of the United States is necessary** to protect biological diversity and the natural services enjoyed by Americans and others throughout the world. No country possesses an inventory, description, and understanding of its wildlife, habitat networks, and ecological processes greater than the United States. In addition, the U.S. **possesses transparent laws**, **dispenses significant foreign aid, and embodies a tradition of public engagement that leads to greater biodiversity-related protection and enforcement than most countries**. The U.S. has also been a good international partner in other environmental agreements and treaties such as the Convention on International Trade in Endangered Species (“CITES”), the Ramsar Convention on Wetlands, and the Montreal Protocol on Substances that Deplete the Ozone Layer. The interests of the United States stand to benefit greatly from such multilateral cooperation and continued ability to access biological diversity from other countries across the globe.

Significantly, **no new federal or state laws are necessary** for the United States to ratify and join the CBD, and absolutely **no loss of legal or natural resource sovereignty is even possible** under the express terms of the Convention. The United States will, in fact, benefit under the treaty by better organizing its own biodiversity-related programs, and by similarly helping nonU.S. geographic areas, many in strategically important locations. The United States will also benefit by possessing a formal seat at the table for important upcoming negotiations and discussions under the Convention, particularly with regard to the proposed protocol on Access and Benefit-sharing (“ABS”), and by being connected to other Parties through various biodiversityrelated projects such as scientific research, climate offsets, ocean protection, alien invasive species work, and enforcement coordination. Many worldwide biodiversity cooperative programs flow from the Convention, including partnerships with other U.N. agreements and the World Trade Organization.

#### What it does

William J. **Snape III 10**, Senior Counsel at the Center for Biological Diversity and a Practitioner in Residence at American University Washington College of Law, 2010, “Joining The Convention On Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up,” https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1043&context=sdlp

The Convention on Biological Diversity was adopted on May 22, 1992 and entered into force on December 29, 1993. The U.S. signed the treaty on June 4, 1993. The CBD was the result of a decade’s worth of diplomatic effort, originally led by the United States, which included several different U.S. administrations from both political parties. The preamble of the Convention is premised upon “the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components . . . (and) also of the importance of biological diversity for evolution and for maintaining life sustaining systems in the biosphere.” The CBD further affirms “that the conservation of biological diversity is a common concern of humankind,” is “(c)oncerned that biological diversity is being significantly reduced by certain human activities,” and is “(d)etermined to conserve and sustainably use biological diversity for the benefit of present and future generations.”26

The objectives of the Convention are **three-fold**: (**1) the conservation of biological diversity** (e.g., Articles 6-9, 11, and 14); **(2) the sustainable use of its components** (e.g., Articles 6, 10, and 14); **and (3) the fair and equitable sharing of the benefits arising from the use of biological and genetic resources** (e.g., Articles 14, 15, 16, and 19-21).27 Thus, “conservation” of biological diversity, the “sustainable use” of its components and the “fair and equitable sharing of the benefits,” together form the heart or basic agreement of the Convention. The central concept of “sustainable use,” which also governs much of the U.S. public land system, is defined under the CBD as “the use of components of biological diversity in a way and at a rate that **does not lead to the long-term decline of biological diversity**, thereby maintaining its **potential to meet the needs and aspirations of present and future generations**.”28 The CBD seeks to have parties **integrate conservation and sustainable use into its decision-making**, to avoid and minimize adverse impacts to biological diversity, and utilize customary and local efforts as appropriate.29

Perhaps the most fundamental point about the CBD is that its legal power is inherently limited by design. The Convention’s clear enunciation of national control over domestic biological resources is the starting point: States have, in accordance with the Charter of the United Nations and the principles of international law, **the sovereign right to exploit their own natural resources pursuant to their own environmental policies,** and the responsibility to ensure that activities within their jurisdiction or control **do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction**.30 As a matter of interpretation, the CBD authorizes much but mandates little. Terms such as “as far as possible and as appropriate” are scattered throughout the treaty. However, the convention’s conservation provisions and programs prompt countries such as the U.S. to focus on the “big picture” by connecting policies and funds in a manner that benefits all. Consequently, the CBD is considered more of a “framework” convention because it, inter alia, does not set many precise obligations.31 As one scholar puts it, “a framework convention sets the tone, establishes certain principles and even enunciates certain commitments … As a rule, it does not contain specific obligations … nor does it contain a detailed prescription of certain activities.”32 Contrary to the rhetoric of some extreme ideologues who seemingly oppose involvement in any multilateral cooperative endeavor, the CBD creates a **global structure that is implemented with wide latitude and discretion at the national leve**l, specifically allows for negotiation (or rejection) of annexes or protocols, does not mandate binding dispute settlement and provides connection with other accepted international agreements. This concept of “**framework**” in conjunction with the precise language of the treaty is crucial in understanding the full sovereignty the United States retains when it becomes a party to the Convention on Biological Diversity.33

#### How the US meets conservation obligations

William J. **Snape III 10**, Senior Counsel at the Center for Biological Diversity and a Practitioner in Residence at American University Washington College of Law, 2010, “Joining The Convention On Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up,” https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1043&context=sdlp

Much of the conservation agenda of the Convention is contained in Articles 6, 8, and 14.34 These articles and others cover the gamut of biodiversity conservation including tasks the CBD already does well: fostering coordination in addressing harmful invasive species, implementing a global strategy for plant conservation; providing support for vital scientific discipline of taxonomy; catalyzing large-scale protected area protection; and linking with important global warming and climate change efforts.35 Every U.S. governmental analysis of the Convention’s conservation provisions has concluded that existing U.S. laws already meet the commitments of the Convention.

Article 6 of the CBD, General Measures for Conservation and Sustainable Use, requests that “Each Contracting Party shall, in accordance with its particular conditions and capabilities: a) Develop national strategies, plans or programmes36 for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect . . . [such] measures . . .; and b) Integrate as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.” Although the U.S. currently does not possess a “biodiversity plan” per se, its impressive array of conservation statutes and programs to protect and use biological resources of all sorts certainly could be considered to constitute one de facto. 37 If anything, the CBD should help the U.S. coordinate and prioritize its biodiversity agenda even better.

Inherent in this system of federal protection is the important role that state governments play in the protection of biological diversity under the U.S. Constitution, as well as a variety of relevant natural resource statute and programs. States possess primary responsibility for fish, wildlife, habitat, and other “biodiversity” trusteeship duties (e.g., water rights) not otherwise covered by valid federal authority.38 States also possess explicit authority under U.S. pollution statutes such as the Clean Air Act and Clean Water Act.39 Because of this reality, state authorities, powers, and priorities would absolutely not be altered by the CBD unless the state voluntarily and willingly chose to do so. Same as with the national level of biodiversity-related programs, the states possess a rich tapestry of current, popular, and effective biodiversity programs.40

Article 8 of the Convention, In-Situ Conservation, is where the plans in Article 6 actually take root. It is also where the most comprehensive list of conservation commitments is explained. While it is clear that the list of measures to be considered under Article 8 conservation is long, it is equally clear that most measures are largely hortatory and/or plainly covered by existing U.S. laws or programs, which are quite well-developed and enough to center its entire Article 8 program, from “a” to “m.” First and foremost, the U.S. has established “a system of protected areas and or areas where special measures need to be taken” under Article 8(a).41 Integrally related to this natural system, the United States has developed and now manages “for the conservation of biological resources” pursuant to Article 8 (b)-(c) through various federal and state statutes relating wildlife, plants, fish, forests, wetlands, coasts, lakes, rivers, water, endangered species, rangelands, parks, refuges, and other public lands. The U.S. “promotes” the protection of domestic and foreign ecosystems, natural habitats and the maintenance of viable populations of species and “recovery plans” under CBD Articles 8(d), 8(f), 8(k), and 8(m).42 The U.S. similarly “promotes” environmentally sound and sustainable development “in areas adjacent to protected areas” under CBD Article 8(e) through statutes such as the Endangered Species Act (e.g., habitat conservation plans under Section 10), Coastal Zone Management Act state-federal plans, the Clean Water Act’s wetland program, and the Bureau of Land Management’s Areas of Critical Environmental Concern (“ACEC”) program, among others. The United States’ philosophy on municipal, industrial, and hazardous waste is also consistent with CBD Article 8(e).43 The U.S. has established “means” to regulate or control risk associated with living modified organisms under CBD Article 8(g) through several statutes.44 The U.S. possesses authority to “prevent” the introduction of alien species under Article 8(h) through statutes such as the Federal Noxious Weed Act and the Nonindigenous Aquatic Nuisance Prevention and Control Act.45 The U.S. “endeavors” under CBD Article 8(i) to provide conditions for present uses and conservation of biological diversity through all of its public land laws,46 the Endangered Species Act, and countless state/local zoning ordinances. The U.S. also already possesses—under its legal system of endangered species, public land, pollution, and environmental assessment laws—“processes” designed precisely to oversee predicted adverse impacts to biological diversity (under CBD Article 8(l)).47 The U.S. legal system also, based on both its trustee role for Indian tribes as well as its respect for tribal sovereignty, possesses a rich legal fabric of respect for and maintenance under CBD Article 8(j) of Native American “knowledge, innovations and practices … relevant for the conservation and sustainable use of biological diversity.”48 Pertinent to CBD Articles 8(m) and 22, the U.S. already actively participates in a number of multilateral initiatives to conserve, protect, use, and share biological diversity.49 All these conventions, treaties, agreements, declarations, and funding actions50 have proven constructive, some significantly so, to U.S. foreign and environmental policy across party lines over the past half-century. Understanding and minimizing site-specific impacts to biodiversity is laid out in Article 14(a)-(b) of the CBD which, inter alia, states: “Each Contracting Party, as far as possible and as appropriate, shall … Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures … ensure that the environmental consequences … are duly taken into account.”51 This request, which the United States already implements through environmental review procedures under the National Environmental Policy Act (“NEPA”), the grandparent of U.S. environmental law,52 which generally mandates that “every federal agency action” “significantly” “affecting” “the quality of the human environment”53 be accompanied with an “environmental impact statement” that includes “adverse environmental effects which cannot be avoided,” a reasonable number of “alternatives,” and “any irreversible and irretrievable commitments or resources.” Multilaterally, the United States regularly analyzes the environmental impacts of its commercial and other actions,

#### Explanation/Impact

William J. Snape III 10, Senior Counsel at the Center for Biological Diversity and a Practitioner in Residence at American University Washington College of Law, 2010, “Joining The Convention On Biological Diversity: A Legal and Scientific Overview of Why the United States Must Wake Up,” https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1043&context=sdlp

The Convention on Biological Diversity1 defines biological diversity as “the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and ecosystems.”2 As revealed by its linguistic roots, the term “biological diversity” (or “biodiversity”) describes the variety of life on our planet. It includes literally all of the millions of animals, plants, fungi, lichens, and microorganisms. It includes the evolutionary variation of life, built up over the several billion years of the planet’s existence— at the genetic, species, and ecosystem levels. And, it includes the stunning diversity of species and natural processes with and between many different ecological regions. In sum, biodiversity is all life on earth.3

The planet is currently losing biological diversity at a rate not seen since the mass species die off that claimed the dinosaurs in the Cretaceous geologic period sixty-five million years ago.4 The loss of biological diversity, including the approximately 1.9 million existing known and identified species as part of the roughly 15 million estimated number of all total existing species,5 can be lumped into three main, overarching causes: habitat loss and degradation; intentional take and related forms of trade or commerce; and various forms of pollution (e.g., dirty water, toxics, invasive species, greenhouse pollutants).

### Aff---CBD---Innovation Advantage

#### Failure to ratify the convention prevents US firms from sharing genetic resources globally, bottlenecking pharmaceutical and agricultural innovation.

Patrick 21, PhD, James H. Binger senior fellow in global governance and director of the International Institutions and Global Governance Program at the Council on Foreign Relations. (Stewart M., 3-1-2021, "It’s Long Past Time for the U.S. to Ratify the ‘Treaty of Life’", World Politics Review, <https://www.worldpoliticsreview.com/articles/29457/to-confront-biodiversity-threats-the-u-s-must-finally-ratify-the-cbd>)

Finally, the biodiversity convention contains adequate protections for the intellectual property rights of American corporations, while safeguarding their access to other countries’ biodiversity. Like many multilateral treaties, the biodiversity convention embodies a bargain between developed and developing countries. Its benefit-sharing provisions are intended to provide “rich but biodiverse poorer countries” with access to genetic resources, in return for providing financial resources and technology to “poor but biodiverse-rich countries.” Fortunately, these equity provisions are carefully worded to emphasize the “mutually agreed terms” of such arrangements. These safeguards help explain why so many U.S. corporations, including in the agriculture and biotechnology sectors, strongly support the convention’s long-overdue ratification.

By remaining a nonparty, the United States undercuts its claims to international leadership on biodiversity issues, while also sacrificing influence over the global conservation agenda and forfeiting an opportunity to protect U.S. interests under the convention’s consensus-based decision-making procedures. Failure to ratify it prevents the U.S. from becoming party to the convention’s Nagoya Protocol, as well, which established rules regarding access to and the fair and equitable sharing of benefits from genetic resources. This puts U.S. scientists, as well as pharmaceutical, biotechnology, agricultural and other firms, at a potential disadvantage.

### Aff---CBD---Synthetic Biology Advantage

#### CBD’s the only international regulatory framework to mitigate the risks of synthetic biology

Keiper & Atanassova 20, \*Felicity, PhD, JD, Expert in Global Regulatory Affairs at BASF, \*\*Ana, PhD, Regulatory Policy Manager at BASF. (4-1-2020, "Regulation of Synthetic Biology: Developments Under the Convention on Biological Diversity and Its Protocols," Frontiers in Bioengineering and Biotechnology, Volume 8, <https://www.frontiersin.org/articles/10.3389/fbioe.2020.00310/full>)

At the international level, the United Nations Convention on Biological Diversity (CBD)1 was one of several significant environment-related outcomes of the 1992 Earth Summit in Rio De Janeiro2. The CBD is ratified by 196 countries (“Parties”), which include all countries of the world except for the United States of America (USA) and the Holy See3. The objectives of the CBD (and its subsidiary treaties) are set out in Figure 1. During the drafting of the CBD, the potential for biotechnology to contribute to its objectives was recognized, provided that adequate safety measures were applied to its development and use (Secretariat of the Convention on Biological Diversity [SCBD], 2003). The resulting treaty obligates Parties to “regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts…” (emphasis added) [Article 8(g)]. It also provides the legal basis for a supplementary protocol [Article 19(3); see Figure 2] which CBD Parties started negotiating in 1995 (COP2; Decision I/9) and adopted in 2000 as the CBD’s first subsidiary agreement, the Cartagena Protocol on Biosafety to the CBD (“Cartagena Protocol”) (Secretariat of the Convention on Biological Diversity [SCBD], 2000). The Cartagena Protocol sets out a regulatory framework for the safe use, handling and transfer of living modified organisms (LMOs; analogous to genetically modified organisms/GMOs) (Secretariat of the Convention on Biological Diversity [SCBD], 2003). Some key provisions and definitions of the Cartagena Protocol that impact on the CBD synthetic biology debate are set out in Figure 2.

In addition to the Cartagena Protocol, the CBD has produced a second subsidiary agreement, the Nagoya Protocol on Access and Benefit Sharing to the CBD (“Nagoya Protocol”) (Secretariat of the Convention on Biological Diversity [SCBD], 2011a), with the Cartagena Protocol also having a supplementary protocol on the topic of liability and redress (see Figure 1; Secretariat of the Convention on Biological Diversity [SCBD], 2011b). These two treaties are not the focus of this review, however they are relevant to the overall international biotech regulatory framework. The CBD and each of the Protocols have their own governing bodies, and since 2016 these have met in concurrent sessions during a 2-week “Biodiversity Conference.”

At the time of writing (February 2020), several programs of work are in progress on various CBD and Protocol issues with relevance to synthetic biology, the outcomes of which will be considered by major meetings of CBD subsidiary bodies in May 2020 and the treaty governing bodies in October 2020 at the biannual Biodiversity Conference. Some of these issues are also under consideration as part of an extensive preparatory process underway for the development of the “Post-2020 Global Biodiversity Framework” that is expected to be adopted at the Biodiversity Conference in October 2020. While synthetic biology is a CBD issue, it has overlap with other issues under the CBD’s subsidiary protocols, as well as aspects of the Post-2020 Global Biodiversity Framework. This paper provides an overview of major developments in biotechnology regulation and relevant policy developments, examines what “synthetic biology” is, and reviews the development of the synthetic biology debate under the CBD and its Protocols, including the major issues expected in the lead up to and during the Biodiversity Conference in 2020. To begin, a brief overview is provided of the CBD treaty processes that form the basis of this discussion.

### Neg---CBD---Colonialism K

#### The CBD is colonial---it homogenizes indigenous peoples as “role models” and appropriates their knowledge to advance state interests

Reimerson 13, PhD, associate professor in Political Science at Umeå University. (Elsa, "Between nature and culture: exploring space for indigenous agency in the Convention on Biological Diversity," Environmental Politics, Volume 22, Issue 6, <https://www.tandfonline.com/doi/full/10.1080/09644016.2012.737255>)

Discourses on indigenous rights and nature conservation govern what is possible to say and know about indigenous interests and needs, political claims, culture, and traditions, as well as the purpose of setting aside protected areas, what such protection should mean in terms of restrictions of use, the relationship between indigenous and majority population land use and interests, and so on. The subject positions of indigenous people in nature conservation discourse can be assumed to have an impact on policy design and implementation as well as indigenous people's political agency, the claims they can make, and what influence they are able to exert with regards to land and natural resource management (cf. Conklin and Graham 1995, Conklin 1997, Mörkenstam 1999, Hames 2007, Green 2008, Johansson 2008). The discourses in focus for this paper thus have very real political implications. They are also the effect of political processes and power relations – the subject positions made available to indigenous people can be assumed to be a result of power relations and discursive notions about nature, different groups of humans, and the relationships between them.

Analytical tools

In the discursive struggle over interpretations of reality, the formulation and representation of (collective) problems, and the proposed solutions to them, is central (Mörkenstam 1999, p. 57). Policies articulate and shape problems, and in doing so fixate elements within discourse in accordance with some interpretation of the world (Bacchi 2009, pp. 25–32). The construction of problems shapes subject positions by attributing identities to individuals or groups, thereby also determining their authority as knowledgeable or political actors (Bacchi 2009, pp. 16–17). Conceptions of groups often lie at the base of problem and policy formulations, and notions of group identities explain and legitimise certain solutions to problems. By problematising and critically interrogating the formulations and representations of problems, the assumptions underlying these representations, and the effects of particular problem formulations, the relationships between and mutual conditionality of policy and constructed group identities can be elucidated and examined (Mörkenstam 1999, pp. 57–58, Bacchi 2009, pp. 2–21).

Subject positions, or identities, can also be understood as discursively constructed through chains of equivalence, where signs are sorted and linked together in chains that define how the subject is, and how it is not, in opposition to other chains (Laclau and Mouffe 1985, pp. 127–130, Winther Jørgensen and Phillips 2002, p. 43). People are constituted as groups in much the same way as individual identity is constituted – through a process which makes some possibilities of identification relevant or privileged while others are ignored, and which takes place through the establishment of chains of equivalence. Discursive group formation is a political process, as it excludes alternative identifications and ignores differences within the groups, thereby also excluding other ways in which groups could have been formed (Winther Jørgensen and Phillips 2002, p. 44). Conceptions of groups and concrete political actions mutually condition each other, as notions of groups are used both to formulate and explain problems and to justify solutions (Mörkenstam 1999, p. 57).

This paper will use these two tools for analysis – problem formulations and chains of equivalence – to investigate the discursive construction of indigenous subjects and subject positions within nature conservation discourse. The analysis also needs to be carried out with respect to how overarching discourses and power relations inform and affect them. Above, I have discussed the colonial discourse still shaping contemporary discourses on both nature conservation and indigenous rights. To sum up, its core features include:

The concept of nature as separated from culture – or, in other words, the ‘othering’ of nature. Nature, and natural resources, have certain values to humans and can be used to serve human needs. These values can be expressed in terms of economics or conservation, but still hinge on the nature–culture dichotomy.

The ‘othering’ and subjugation of non-white, non-Western subjects – e.g. indigenous people. Indigenous people are stereotyped and homogenised, be it as backwards and inferior or as ‘ecologically noble savages’.

The failure to recognise indigenous land use and land rights and the view of indigenous lands is as untouched and wild.

The reluctance to recognise indigenous people as peoples, with rights to self-determination and collective rights to land, water, and natural resources.

The Convention on Biological Diversity

The United Nations Convention on Biological Diversity (CBD) (United Nations 1992) was opened for signature at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro (UNCED; also known as the Rio Summit, Rio Conference or Earth Summit) and entered into force on 29 December 1993 (SCBD n.d.-a). It is a legally binding treaty, which means the 193 state parties to the convention must implement decisions made by the Conference of the Parties (COP). The CBD has three main objectives: 1) the conservation of biological diversity; 2) the sustainable use of the components of biological diversity; and 3) the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. To conserve biodiversity, parties to the convention commit to conserve genes, species, and ecosystems in their natural surroundings (in-situ conservation) by, among other measures, establishing protected areas. The governments of state parties report implementation and progress to the COP (SCBD 2000).

The main provision for issues regarding indigenous peoples in the context of the CBD is Article 8(j) and its related provisions (Articles 10(c), 17.2 and 18.4) (COP-CBD 1996). Article 8(j) states that:

Each contracting party shall, as far as possible and as appropriate …

Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Indigenous peoples were initially concerned with certain aspects of the CBD – some of which will be discussed below, such as the omission of the word ‘peoples’ after the term ‘indigenous’ and the affirmation of state sovereignty over natural resources (Fourmile 1999, p. 227). Discussions and decisions on Article 8(j) and related provisions have been lobbied intensely by representatives of indigenous peoples and local communities, and indigenous participation in the work under the CBD has increased and led to results in terms of demands and suggestions met by the COP (Oldham 2001–2002). Indigenous representatives attending meetings held under the CBD form a caucus referred to as the International Indigenous Forum on Biodiversity (IIFB), which was formed at the third COP in 1996 to help coordinate indigenous strategies, provide advice, and influence decisions and interpretations (IIFB n.d.). The fifth COP in 2000 acknowledged the participation of IIFB in advising the COP on the implementation of Article 8(j) and related provisions (COP-CBD 2000).

The CBD has become a major focus for advancing indigenous peoples’ environmental claims, and is an important instrument through which indigenous people can seek protection for their natural resources (Posey 1996, Fourmile 1999, Richardson 2001). Although the impact and implementation of the CBD has been subject to critical discussion, it remains one of the main international frameworks for nature conservation legislation and policy (cf. Chandra and Idrisova 2011, Harrop and Pritchard 2011, Morgera and Tsioumani 2011). The position and influence of the CBD makes it an important area of critical study, and its discourse can be assumed to affect nature conservation policy and practice on different levels.

The texts used for this analysis is the text of the CBD regarding indigenous people, with a specific focus on the preamble to the convention and Article 8(j). The text of the convention forms the basis of further texts and statements, and can be assumed to represent broad tendencies in the CBD discourse on indigenous rights and nature conservation. Additionally, texts from the website of the Secretariat of the Convention on Biological Diversity (mainly regarding Article 8(j) and the Programme on Traditional Knowledge, Innovations and Practices (SCBD n.d.-c)) have been used to exemplify and clarify the discussion and conclusions.

Problem formulations

The preamble of the CBD recognises:

the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

The first part of the preamble paragraph acknowledges a connection between indigenous peoples and biodiversity and natural resources. Article 10(c) somewhat connects to this recognition, as it regards the protection of customary use of natural resources. However, the convention text focuses mainly on traditional knowledge and indigenous and local communities’ role as holders of such knowledge.

There are no explicit definitions of ‘traditional knowledge’ in the convention text, but on the website of the Secretariat of the Convention on Biological Diversity (SCBD) traditional knowledge is defined as knowledge of indigenous and local communities which has been developed over a longer period of time, is locally specific, orally transmitted and collectively owned, and is of a practical nature (SCBD n.d.-c). This corresponds with commonly accepted definitions of traditional (ecological) knowledge,1 although the concept is continuously contested, problematised and subjected to critical discussion (cf. Berkes 1993, Agrawal 1995, Berkes et al. 2000, Martello 2001).

The second part of the preamble paragraph establishes the importance of equitable sharing of the benefits arising from the use of traditional knowledge, innovations and practices relevant for the conservation and sustainable use of biological diversity and its components. Traditional knowledge is ascribed a role as valuable (producing benefits) to those who depend on it in their daily lives, to modern industry and agriculture, and as a potential significant contributor to sustainable development (SCBD n.d.-c). The SCBD website makes references to indigenous and local communities’ contributions to sustainable development based on their sustainable cultivation and use of biological diversity, and on those of their practices that have been proven to ‘enhance and promote biodiversity at the local level’. Indigenous and local communities are put forward as role models; their skills and techniques providing ‘valuable information to the global community and a useful model for biodiversity policies’ (SCBD n.d.-c).

Much of the work on Article 8(j) and related provisions centres on the participation of indigenous and local communities and the equitable sharing of benefits arising from the use and application of traditional knowledge (cf. COP-CBD 2000, SCBD 2004). The SCBD website states that ‘indigenous and local communities have a direct interest in the work of the Convention’ (SCBD n.d.-c). The text also describes how representatives of indigenous and local communities ‘have been invited to participate fully in the working group on traditional knowledge’, and refers to actions that have been taken to ‘facilitate the participation of indigenous and local communities in meetings held under the Convention’ and to ‘ensure the effective participation of indigenous and local communities in decision-making and policy-planning’. The first statements could be read as a verification of the connection between indigenous peoples and biodiversity and natural resources, and perhaps also as a positioning of indigenous and local communities as more active parties in relation to the CBD and its objectives. The text refers to effective participation, indicating a will to avoid token representations and make actual influence possible. The formulation in Article 8(j), providing for the approval and involvement of the holders of traditional knowledge, also contains notions of active participation and the power to disapprove of and resist the wider application of their knowledge.

The problem formulations of the analysed text are centred on the connection between indigenous and local communities embodying traditional lifestyles on biological resources, the traditional knowledge, innovations and practices they hold, and the assumed value of such knowledge, innovations and practices. The solution to these problems, as presented in the texts, is to respect, preserve and maintain the traditional knowledge of indigenous and local communities embodying traditional lifestyles, to promote the application of such knowledge, and to ensure equitable sharing of the benefits arising from that utilisation. The convention text thus defines the indigenous (and local) subjects that are of interest to, and protected under, the convention as indigenous and local communities living ‘traditionally’ and holding traditional knowledge relevant to the conservation and sustainable use of biological diversity. After initially recognising the dependency of many indigenous and local communities on biological resources, the convention mainly refers to these subjects as holders of traditional knowledge that is assumed to contribute to the convention's objectives (cf. Mörkenstam 1999, pp. 57–58, Bacchi 2009, pp. 2–9, 16–17).

Chains of equivalence

The convention text refers to indigenous and local communities ‘embodying traditional lifestyles’ (preamble and Article 8(j)) and their ‘close and traditional dependence’ on biological resources (preamble). This could be interpreted to mean that the recognition does not apply to indigenous or local populations as a whole, but is limited to those living ‘traditionally’; and it does not recognise territorial ties other than the dependency on biological resources. Article 8(j) specifies the definition of traditional knowledge protected under the convention as that of ‘indigenous and local communities embodying a traditional lifestyle’ and that which is ‘relevant for the conservation and sustainable use of biological diversity’. Knowledge that meets the criteria of ‘traditionality’, but is not deemed relevant for the conservation and sustainable use of biological diversity, or knowledge that is held by indigenous and local communities leading a lifestyle that is not ‘traditional’ (enough), cannot be considered to be protected under the convention. It could be argued that this opens up arbitrary interpretations of what constitutes a ‘traditional lifestyle’, or which knowledge is considered relevant for the purposes of the convention. It could also be taken to mean that indigenous or local communities not holding ‘relevant’ knowledge have no protection under the convention to influence or participate in the conservation of biological diversity or the use of biological resources.

The convention consistently refers to indigenous (and local) communities, not peoples. This wording was a deliberate choice, following states’ rejection of previous drafts where reference was made to indigenous peoples (Woodliffe 1996, pp. 265–266) and is the subject of on-going debate and critique from indigenous representatives (cf. International Alliance of Indigenous-Tribal peoples of the Tropical Forest & International Work Group for Indigenous Affairs 1996, p. 106, IIFB 2011). The recognition of peoplehood has commonly been an important goal for indigenous peoples’ political mobilisations and struggles (cf. Mörkenstam 2005, Johansson 2008, ch. 1, 3). With status as a people comes the right to self-determination, and the grounds to claim rights to manage own lands and natural resources – which, in this case, would problematise the states’ sovereign rights over natural resources within the states’ territory (as stated in the preamble of the CBD and affirmed by Article 15.1 of the convention) and possibly mean that indigenous peoples could be entitled to status as parties to the convention.

Throughout the texts, indigenous subjects relevant for the conservation of biological diversity and the sustainable use of its components are discursively positioned as holders of relevant traditional knowledge, where such knowledge is defined as held by indigenous and local communities living traditionally and relevant for the conservation and sustainable use of biodiversity. The connection between indigenous peoples and nature conservation in the discourse of the CBD, and the role of indigenous peoples in nature conservation as constructed by the CBD discourse, can thus be understood through a chain equating indigenous – traditional lifestyles – traditional knowledge – relevant for conservation and sustainable use of biodiversity. Following this logic, indigenous peoples not embodying traditional lifestyles, or not holding relevant traditional knowledge, are not relevant (in the role of ‘indigenous’) for the conservation and sustainable use of biodiversity under the CBD. Both ‘traditional lifestyles’ and ‘relevance for biodiversity conservation’ as concepts open up for arbitrary interpretations – they can be considered nodal points within this discourse, and contestations and struggles over their exact meaning could be expected in the implementation of the convention's provisions (cf. Laclau and Mouffe 1985, pp. 127–130, Mörkenstam 1999, pp. 58–60, Winther Jørgensen and Phillips 2002, pp. 43–44).

A narrow recognition

The texts present a rather narrow space for political agency for indigenous people regarding the influence over and participation in the management of biological resources. The concept of nature as separated from nature is less apparent, but at least three of the main features of the colonial discourse described above are visible in the analysed texts, and consequently inform the discursive construction of indigenous subject positions within the context of the CBD.

The recognition of indigenous people's role in nature conservation borders on the notions inherited from colonial discourse – imagining indigenous people as being ‘closer to nature’, and their knowledge and practices being somehow inherently sustainable or automatically positive for biological diversity conservation. This corresponds to the ‘othering’, stereotyping, and homogenising of non-white, non-Western subjects within colonial discourse. The explicit focus on traditionality (traditional lifestyles, traditional knowledge) throughout the texts resonates notions of indigenousness within colonial discourse, where ‘traditional’ has been imagined as an opposition to ‘modern’ and interpreted through the eyes of European colonisers. While it could be argued that the focus on the positive contributions of indigenous traditional knowledge to the conservation of biological diversity may allow indigenous people certain leverage in nature conservation policy and management, and a possible role as important contributors to the conservation of biological diversity, the use of stereotypes still makes for considerable constraints of the space for political agency for indigenous people (cf. Conklin and Graham 1995, Conklin 1997, Nadasdy 2005).

The inclusion of indigenous subjects seems to be based mainly on the possible contributions they can make to the objectives of the convention and the work of the state parties to the convention, not on their possible rights as peoples to self-determination and collective rights to land, water, and natural resources, or as possible parties in their own right. The focus on state's sovereignty over their biological resources indicates a failure to recognise indigenous land use and rights. Measures have been taken to facilitate the participation of indigenous and local communities in the work of the CBD, such as the acknowledgement of IIFB as an advisory body to the COP on the implementation of Article 8(j) and related provisions (COP-CBD 2000) and initiatives of financial and logistical support to enable indigenous and local communities to attend meetings (SCBD n.d.-b). However, indigenous representatives still point to important goals and targets not being met, and call for greater influence of indigenous peoples in the decision-making process of the CBD as well as for full recognition of their rights to land, territories and resources (cf. IIFB 2008, 2010, 2011).

## [2.0] Area: Rome Statute

### Aff---Rome Statute

#### Biden’s return to piecemeal engagement and conditional cooperation with the ICC undermines the court AND US efforts at international justice.

Kersten 21, Consultant at the Wayamo Foundation and a Fellow at the Munk School of Global Affairs, University of Toronto. (Mark Kersten, 3-5-2021, “Biden and the ICC: Partial cooperation, selective justice”, Al Jazeera, <https://www.aljazeera.com/opinions/2021/3/5/biden-and-the-icc-partial-cooperation-selective-justice>)

If you listen closely, you might just hear a collective sigh of relief from advocates of international justice and staff at war crimes tribunals.

Finally, the Trump administration is gone, and its vicious attacks on the International Criminal Court (ICC) are over. But before popping the champagne, it is worth asking: how will the new administration of President Joe Biden approach the ICC?

All signs point towards a return to piecemeal engagement, where Washington uses the court when it suits its interests and undermines it when it does not. Biden has said the United States is “back”. But on international justice, there’s a need to be different – and better.

A tumultuous relationship

The relationship between the US and the Hague-based court has always been tumultuous.

While the US has never been a member of the ICC, ever since the adoption of the Statute of the Court (Rome Statute) in 1998, every American administration has affected the court and also been affected by it.

President Bill Clinton’s administration participated in the negotiations that led to the creation of the court, and influenced its eventual jurisdiction. But it also had serious reservations about the emergence of an independent court that Washington cannot control through the United Nations Security Council. Clinton signed the Rome Statute in 2000, but did not send it to Senate to be ratified.

When George W Bush came to power, he immediately embarked on a hostile campaign against the ICC. He officially renounced the Rome Statute, citing fears that the Court may unfairly prosecute American citizens for “political reasons”. He pressured governments around the world to enter into bilateral agreements that required them not to surrender US nationals to the ICC. He also signed into law the American Service Members’ Protection Act, which legally prohibited several forms of cooperation between Washington and the ICC, and authorised the US president to use “all means necessary and appropriate to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court”. This authorisation, which meant Washington could use military force against the court, led the law to be nicknamed “the Hague invasion act”.

The US attitude towards the ICC softened during the administration’s second term, when Bush realised that the court could actually serve American interests in places where US nationals are unlikely to be the target of prosecution, such as Africa. As a result, the Bush administration did not veto a UN Security Council request to the ICC prosecutor to investigate crimes in Darfur, Sudan in 2005.

When the Obama administration took over, it stated its intent to “positively engage” with the court. Indeed, Washington’s rhetoric towards the ICC improved significantly under Obama’s leadership, and American diplomats started attending ICC conferences and cooperating with it. The administration, however, made clear that this cooperative attitude has its limits, and Washington would only support ICC investigations and prosecutions that also serve American interests.

During the Obama years, American cooperation was invaluable for the court. By sharing evidence and ensuring that the court’s warrants are enforced, Washington helped the ICC get people into the dock and successfully complete several investigations.

But the Obama administration’s partial engagement with the court also worried many who felt that it promoted selective justice. Indeed, during this period the US had more of an influence on the ICC – and more of the court’s attention – than any of the states that actually joined the institution. As a result, crimes committed by the US itself and its allies continued to remain beyond the court’s reach, while those that lacked US support were readily investigated by ICC.

Then came Donald Trump. The Trump administration was hostile towards the court from the very beginning. Trump’s Secretary of State, Mike Pompeo, regularly derided the court as a threat to the US that needs to be isolated and even publicly referred to it as a “kangaroo court”. His one-time National Security Adviser, John Bolton, declared in a speech to the Federalist Society that the court is “dead” to Washington. His so-called Ambassador at Large for Global Criminal Justice, Morse Tan, meanwhile, openly stated that under Trump’s leadership “the US would seek the dissolution of the court”.

Trump was hostile to the ICC because he feared that the court may soon start issuing warrants for US officials following its investigation into alleged war crimes in Afghanistan. Moreover, he wanted to thwart any move by the court to open an investigation into alleged Israeli atrocities in Palestine.

To ensure US officials and allies remain beyond the reach of the ICC, the Trump administration not only embarked on a propaganda campaign against the court, but also took action to intimidate its staff. It issued sanctions against the ICC’s Chief Prosecutor Fatou Bensouda and the head of its Jurisdiction, Complementarity and Cooperation Division, Phakiso Mochochoko.

A new chapter in US-ICC relations?

With Joe Biden in the White House, it is certain that Washington will not be as hostile towards the court as it was during the Trump era. Many are optimistic that the Biden administration will pave the way for closer cooperation between the US and the ICC. But expectations need to be measured.

The ICC and Washington remain on a collision course over the investigation into the alleged atrocities in Afghanistan. Like every administration before it, this one will not tolerate ICC warrants against American citizens involved in alleged war crimes in Afghanistan. Moreover, even under Biden’s leadership, Washington will not support any investigation into the alleged atrocities committed by its ally Israel in Palestine.

Biden already demonstrated his stance on these issues, and his ambivalence towards the ICC, in both subtle and obvious ways. Biden has a close relationship with former President Bush, who was in the White House when all of the alleged war crimes in Afghanistan under investigation by the ICC were committed. While several Biden administration officials have said that they will “take action” against those responsible for the post-9/11 torture programme, Biden feted Bush during and after his inauguration, sending a clear message to the international community that he has no intention of holding him or his administration to account for their alleged crimes. Biden is also a staunch supporter of Israel and repeatedly said he is proud of Washington’s special bond with Tel Aviv. While he is not as protective of the current Israeli leadership as Trump, there is no indication that his administration will abandon the longstanding US policy of protecting Israel from being prosecuted for its alleged crimes against the Palestinians at the ICC.

Biden also decided not to issue an executive order to immediately rescind the sanctions his predecessor imposed on ICC staff. Instead, the Biden State Department has placed the sanctions under “review”. This can be read two ways. On the one hand, it may be a sign that the administration is preparing to reverse course. On the other hand, it can be viewed as an effort to appear supportive of global criminal justice without actually doing anything. Indeed, what is there to review? Sanctions are a tool that should be used against dictators and war criminals, not people who are working to hold them to account.

By not immediately rescinding the sanctions against Bensouda and Mochochoko Biden sent a clear message to The Hague: Trump may be gone, but Washington can still use coercive measures to bring the court in line if it dares to proceed with investigations and prosecutions that are not in line with US interests.

Like all his predecessors, Biden is less interested in supporting the ICC than catering to his own base. If a bi-partisan anti-ICC letter issued last year by US senators is any indication, that base is still willing to attack the ICC over prospective trials of American political and military figures.

For now, all signs indicate that Biden’s relationship with the ICC will be similar to Obama’s – a partial and conditional cooperation, where the US helps and supports the ICC when it serves its interests, but undermines the court whenever it voices a desire to investigate the alleged crimes of the US and their allies.

Since winning the presidential election, Biden has insisted that “America is back”. Indeed, when it comes to Washington’s approach to international justice, the hypocrisy that dominated the Obama years appears to be back in action. That must change if Biden is to restore America’s reputation as a moral and political leader on the world stage.

#### Obstructing the ICC endangers its credibility, but a change of course reaffirms global justice initiatives.

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The US, however, argues that the ICC has no jurisdiction over its citizens because it is not a state party to the Rome Statute. President Bill Clinton signed the treaty in 2000 but did not submit it to the senate for ratification. In 2002, President George W. Bush “unsigned” the treaty and declared the US had no obligations under it. Current US Secretary of State Mike Pompeo was not being subtle when he called the ICC a “thoroughly broken and corrupted institution”, reiterating long-standing US derision of the Court’s work and purpose.

The present point of contention for the US and the cause of its grandstanding is that the crimes being investigated by the ICC with respect to Afghanistan could include not just the actions of the Taliban and Afghan government forces, but also US citizens, such as CIA operatives and US military personnel. This could comprise crimes committed in secret CIA detention centres in Afghanistan as well as outside the country, including in Poland, Romania and Lithuania. As these are states parties to the treaty, the actions of foreign nationals within these territories are subject to the jurisdiction of the ICC.

The imposition of sanctions in response by the US on ICC officials, which includes asset freezes and also a travel ban, calls into question the future of the ICC’s ability to operate as an independent global court in the face of political interference – and in particular the opposition of influential states such as the US.

Pompeo has warned that these sanctions may be extended to others who assist Bensouda, which is concerning as the Court attempts to carry out its work. To investigate effectively, Bensouda and her team of investigators and lawyers require access to the US and Afghanistan to gather evidence, and they need to be able to do that work without fear of reprisal. The US, however, seems to be doing everything possible to make sure that the ICC is obstructed in its operations, likely hoping eventually to frustrate the investigation.

It is therefore becoming apparent that the US is supportive of international prosecutions only as long as its own citizens will not be held accountable.

The US can’t have it both ways. It either supports international justice, as it should, or it doesn’t. To both support and criticise international justice invites accusations of hypocrisy and a lack of sincerity in US foreign policy. This is particularly so when the US, as a permanent member the UN Security Council, refers situations of potential international crimes in other states to the ICC – as it did in the case of Libya – but then vocally decries the Court’s intervention in its own affairs.

Therein lies the challenge for international justice going forward. But this is also an opportunity for president-elect Joe Biden to step up and support the work of the ICC, despite the challenging policy stance of leaving one’s citizens open to potential prosecution.

Biden should pivot from Trump’s contempt for the ICC and reframe US policy on international justice as universal and inclusive, rather than selective and circumstantial, presenting himself as a global leader who values justice and the rule of law. Effective international justice requires global support, and the US is a critical part of that global community.

Without a significant change in the stance of US leadership on the ICC, on the other hand, it is unlikely that a US citizen will ever find him or herself prosecuted in The Hague. The US remains outside the Rome Statute, and while that does not mean the ICC has no jurisdiction, it does mean the US will continue to deny the Court’s jurisdiction and will use political leverage and obstruction to prevent its citizens from being detained and prosecuted by the Court – all the while advocating for the rule of law and the prosecution of citizens from most other countries.

At this pivotal moment in US politics and engagement with the international community, a US change of course and demonstration of support for international justice would affirm it as a state which respects the rule of law and the rights of all individuals – whether they are US citizens or not.

#### Ratification strengthens the ICC’s mandate and enables cooperative efforts to counter cybercrime, human trafficking, and terrorism.

Courts 21, JD, Appellate Attorney, Notary Public. (Ian, 6-16-2021, “The U.S. Should Sign and Ratify the Rome Statute; Global Peace & Accountability Depend On It!”, Medium, <https://ianlamarcourts.medium.com/the-u-s-should-re-sign-and-ratify-the-rome-statute-global-peace-accountability-depend-on-it-e70558d92363>) \*typo edited in brackets

In 1998, The Rome Statute was created to combat global terrorism, war crimes, crimes against humanity, and genocides committed by political actors — both individuals and nation-states. Moreover, the statute created the International Criminal Court to oversee the investigation, prosecution, trial, and enforcement of international criminal law. The United States was integral to the formation, creation, and drafting of the Rome Statute despite our initial hesitance about the court’s function, importance and need. However, our commitment to global peace and criminal justice, specifically regarding the Rome Statute, has not always been steady. The Biden-Harris administration has the opportunity to embark on a new path of cooperation, thus turning a new page in the fight for international peace and justice.

Changes in Administrations & Shiftings in Commitment

President Bill Clinton failed to submit the Rome Statute treaty to the United States Senate, which the Republican Party then controlled, and thus the Rome Statute treaty was never ratified. Ratification is important because that is the only way international treaties become binding federal law on our country and governmental actors and agencies. Furthermore, under the President George Bush Administration, the United States’s posturing toward the International Criminal Court and United Nations waxed cold due to actions relating to the invasion of Iraq. Under President Barack Obama, our relationship with the Rome Statute began to thaw, and we once again became observers of the Statute though still not ratifiers. Conversely, under the Trump Administration, we halted all interactions with the International Criminal Court, revoked our signature, and even revoked the visa of the former International Prosecutor, Fatou Bensouda. Yes, as you can see, our commitment to the provisions of the Rome Statute has been lukewarm at best to acrimonious at worst. However, President Biden has the opportunity to forge a new path and fully embrace the provisions of the Rome Statute and turn a new page in global peace and criminal justice by signing and submitting to the US Senate for ratification of the statute.

The Importance of the Rome Statute & the existence of the International Criminal Court

The Rome Statute is a significant acknowledgment by the international community, of our shared responsibility, as humanity, in the atrocities that have been committed in the name of religion, racism, and political ideology. The I.C.C. is the court of last resort — by statute and de facto for many countries worldwide. In articles 13 and 14 of the Rome Statute, the ICC has the authority to hear cases brought to it by referral from ratifying-nations, by request from the Security Council to the International Prosecutor, or sua spontae by the I.C.C.’s determinations that a violation of Section 5 “outlining war crimes, genocide, crimes against humanity, etc.” has been committed by either a ratifying-state or another country or individual committing Section 5 violations on the soil of a ratifying state. The I.C.C. is divided into three sections Pre-trial, Trial, and Appeals, each tasked with administering the Rome Statute’s mandate and commission. Section 5 of the Rome Statute provisions allow the Court and even national courts to prosecute and enforce international law concerning war crimes, genocides, and crimes against humanity. Section 5 of the Rome Statute essentially provides the statutory authority to the I.C.C., and domestic courts worldwide, to combat transnational and international crime such as cybercrime, human trafficking, ethnic cleansing, mercenaries, etc. A comprehensive body of jurisprudence concerning international criminal law, which is one of the purposes of the I.C.C., would aid in combating international crime and global political violence. The International Criminal Court is important because of its mandate and its opportunity to contribute to global accountability and peace.

The Challenges of the ICC

Impartiality

One of the biggest issues facing the I.C.C. is maintaining the appearance of impartiality. In the I.C.C.’s 20+ years of existence, the Court has only achieved 4 convictions — Lubanga, Katanga, Bemba, and al-Mahdi — all from African countries, which has led many African nations to challenge the intent behind I.C.C. prosecutions. Former International Prosecutor Fatou Bensouda has tried to buck this appearance of impartiality by launching investigations into the United States and the government of Afghanistan alleged Section 5 violations in Afghanistan. The announcement of an I.C.C. investigation prompted a strong rebuke and retaliation from former President Trump and Secretary of State Pompeo. For the I.C.C. to be effective, the Court will have to acknowledge the appearance of targeting African political actors over other ethnic and governmental actors while also seriously investigating actions of Western countries, not only the United States.

Transparency

According to a 2019 Open Society Justice Initiative report, the ICC, specifically the International Prosecutor’s office, needs to increase its transparency and visibility to its stakeholders — mainly its ratifying states. To increase the legitimacy of the I.C.C. in the eyes of the global community, the Court must be transparent in its internal data on its investigations and prosecutions and its enforcement methods. In response to this report, the International Prosecutor’s Office has committed to increasing transparency in its operations.

Accountability

The I.C.C.’s jurisdiction is limited; furthermore, the enforcement of its judgments is predicated on the parties' acceptance and submission to the terms of the judgment. Global accountability has historically been difficult for international organizations such as the United Nations and International Criminal Court. Global accountability for political actors is largely [dependent] dependant on the volitional decision of powerful people to submit to consequences or the cooperation of more powerful people to force lesser powers to accountability. A global system that relies solely on global cooperation will continue to produce haphazard or piecemeal justice measures. The I.C.C. absent an independent enforcement body, or the cooperation of the United States will continue to be impeded in holding malicious global actors accountable.

The U.S. and I.C.C. & the Opportunity for Cooperation and Agreement

Despite the U.S. and the I.C.C.’s complicated relationship history, there is a real opportunity under the Biden-Harris Administration and subsequent presidential administrations to foster genuine cooperating with the Court while holding each other accountable. The Rome Statute's mandate fits with the United States’s belief in the rule of law and promotion of justice. By signing and ratifying the Rome Statute, the U.S. would signal to the world that it is committed to truth and accountability. Further, the U.S.’s ratification of the Rome Statute would demonstrate our hopes to remedy both intentional and unintentional harm created by our global political actions. Additionally, the ratification of the Rome Statute would further open our federal courts, notably the Supreme Court of the United States, to weigh in and develop international jurisprudence on war crimes, genocides, crimes against humanity, etc. Furthermore, it would put other nation-states on notice that the United States and the International Criminal Court are partnered together to enforce international criminal law and justice, thus hopefully ushering in a new age of global accountability.

Our world has become more interconnected; moreover, when political violence occurs in one nation today, its effects reverberate across the globe. We can look at the global Black Lives Matter demonstrations last year to prove that our global community is solidifying around truth, equity, and justice. The mandate of the Rome Statute and the I.C.C. is critical to transforming the “shared feelings” among our global communities into genuine accountability. Moreover, cooperation between the United States and the I.C.C. will strengthen the enforcement of our global values and the combating of international political crimes. The Biden-Harris [administration] has the opportunity to engender a stronger relationship between the International Criminal Court and the United States, thus bolstering the Court’s mandate and reaffirming the U.S.’s commitment to the rule of law.

### Aff---Rome Statute---Russia Advantage

#### Abstention from the ICC precludes accountability for the War on Terror and undermines US efforts to investigate Russian war crimes.

Mathis 4-4-2022, contributing writer. (Joel, “Why the U.S. can't lead on punishing Russia's war crimes”, Yahoo News, <https://news.yahoo.com/why-u-cant-lead-punishing-095807054.html>) \*”of” added in brackets to correct an error

Vladimir Putin is a war criminal. That's not a strict legal judgment — not yet, at least — but the evidence keeps growing. Ukraine officials over the weekend said they had discovered a mass grave in the Kyiv suburb of Bucha, and journalists visiting the city described its streets as strewn with the bodies of civilians apparently executed by retreating Russian forces.

“This is genocide,” Ukrainian President Volodymyr Zelensky said Sunday.

Outside observers are calling for prosecutions. Carla Del Ponte, a former war crimes prosecutor, over the weekend called for authorities to issue an international arrest warrant against Putin. That would probably be fine with the United States: President Biden has also called the Russian leader a “war criminal,” and Secretary of State Anthony Blinken followed up last month with the announcement that the American government has formally determined that “members of Russia's forces have committed war crimes in Ukraine.”

“As with any alleged crime,” Blinken said in the official statement, “a court of law with jurisdiction over the crime is ultimately responsible for determining criminal guilt in specific cases.”

The U.S., though, is ill-positioned to help bring about that justice — not without cloaking itself in immense hypocrisy, at any rate.

American leaders have spent the last two decades undermining the International Criminal Court, which prosecutes war crimes, genocide, and other crimes against humanity. The U.S. has used intimidation, sanctions and the heft of its hegemonic power to guarantee that none of its soldiers or officials will ever be brought before the court, no matter how deserving they might be.

“The United States is the number one advocate of international criminal justice for others,” Princeton University's Richard Falk wrote in 2012. But the U.S. also “holds itself self-righteously aloof from accountability.”

A short history: The U.S. under President Bill Clinton was initially a signatory to the treaty that created the court. “We do so to reaffirm our strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity,” Clinton said on his way out of office in 2000. “We do so as well because we wish to remain engaged in making the ICC an instrument of impartial and effective justice in the years to come.”

That didn't happen. The treaty was never submitted to Congress.

And in 2002, President George W. Bush — who was already contemplating an invasion of Iraq — “unsigned” the treaty, saying the U.S. would not submit to the ICC's jurisdiction or submit to its orders. But the U.S. didn't just go absent from the treaty: Later that year, Bush signed the American Service-Members Protection Act, which made it illegal for U.S. authorities to cooperate with the court in any way — and which authorized “all means necessary and appropriate” to rescue any American or allied official from the court's clutches, if it ever came to that. Human Rights Watch dubbed the law the “Hague Invasion Act.”

Even that wasn't enough impunity. In 2020, the Trump administration levied sanctions against ICC prosecutors. The Biden administration later reversed the measures, but the message was sent: Don't even think about investigating or charging Americans with war crimes. The message was clearly received.

There has been plenty to investigate. The ICC's existence has coincided almost precisely with America's “forever war” era. During the last 20 years, the U.S. has launched an unprovoked war of aggression against Iraq; tortured prisoners at Abu Ghraib, Guantanamo Bay and black sites around Europe; bombed civilians in Syria; and committed countless other acts worthy of scrutiny. Accountability has been rare. Gina Haspel ordered the destruction of evidence of torture and then was named CIA director. Others received pardons and were transformed into heroes for the Fox News set. We haven't always been the good guys.

Opponents of the ICC have claimed the institution interferes with American sovereignty, and that the ICC's trial process has insufficient protections for the accused. Mostly, though, it's difficult to escape the sense that America won't submit to the court's jurisdiction simply because it doesn't have to. What's the point of being the most powerful country on the planet if you have to follow the world's rules? The ICC is for other, smaller, weaker countries.

None of this justifies Putin's actions, of course. But it does suggest that America is seeking a kind [of] justice to which it won't itself submit. And that means the U.S. — which has otherwise done an excellent job of managing the present crisis — can't provide much leadership in the matter of Russia's alleged war crimes against Ukraine.

#### Refusal to fully endorse the ICC delegitimizes investigations.

Bixby & Vavra 4-6-2022, \*Scott, the White House reporter for The Daily Beast. \*\*Shannon, a national security reporter for The Daily Beast. Citing Fred Abrahams, an associate program director with Human Rights Watch (“Why Biden May Struggle to Hold Russia to Account for War Crimes”, Daily Beast, <https://www.thedailybeast.com/why-joe-biden-may-struggle-to-hold-russia-to-account-for-war-crimes>)

America’s on-again, off-again support for the International Criminal Court over the years will likely complicate any role it takes in the investigation of atrocities in Ukraine, experts in international law and crimes against humanity told The Daily Beast. And the potential pursuit of war crimes charges against Russian leaders could stretch the Biden administration’s commitment to justice to its limits. “The International Criminal Court and the United States have had a stormy relationship,” said Professor Leila Nadya Sadat, one of the world’s leading experts on crimes against humanity and a professor of international criminal law at the Washington University School of Law. “The United States can still play a material role, but it can’t offer the kind of major financial and logistical support that it could with the Yugoslavia tribunal, for example.” The entire ~~civilized~~ world has seen clear evidence of atrocities committed by Russian forces against unarmed civilians in Ukraine. Secretary of State Antony Blinken announced that the U.S. government has confirmed them, and President Joe Biden has declared that Vladimir Putin should be prosecuted for them. But the outrage expressed by the Biden administration in response to the apparent massacre of hundreds of Ukrainian civilians in the city of Bucha, experts and lawmakers told The Daily Beast, can only go so far. “It would be easier if the U.S. leaned in and signed the Rome Statute—it would make the position more forcibly based on values and the pursuit of justice,” said Fred Abrahams, an associate program director with Human Rights Watch who has documented war crimes for decades, referring to the international treaty that established the International Criminal Court. “It would say, ‘We’re not doing this because of some political aim’—the goal is to hold perpetrators of war crimes to account.” The troubled history between the U.S. and the ICC—the Obama administration stepped up assistance for investigations of potential war crimes in Syria, while the Trump administration sanctioned the court’s top prosecutor—complicates what should be a straightforward matter of supporting human rights, Abrahams said. The International Criminal Court has already begun the work of gathering evidence for potential war crimes charges against Russian military and government leaders—an effort that the Biden administration has pledged to support. “There has to be accountability for these war crimes,” National Security Advisor Jake Sullivan told reporters on Monday, noting that the U.S. had coordinated efforts with the ICC in the past, despite not being a signatory. “That accountability has to be felt at every level of the Russian system, and the United States will work with the international community to ensure that accountability is applied at the appropriate time.” But international human rights organizations, as well as members of Congress, are starting to push for the Biden administration to put its full weight behind investigations that could someday hold Putin accountable. “I think we can’t ask for accountability if we have delegitimized the bodies that would be doing that accountability,” Rep. Ilhan Omar (D-MN), a member of the House Foreign Affairs Committee, told The Daily Beast. Omar has previously introduced legislation that would prompt the United States to ratify the Rome Statute—and vowed to push the Biden administration to support its ratification in the coming days. “It doesn’t bode well with the fact that we are now saying we want the ICC to do these investigations,” Omar said. The calls come amidst a flood of images, videos and firsthand accounts from Bucha, a city just outside of Kyiv where authorities and journalists have observed mass graves of Ukrainians allegedly shot by Russian troops. Satellite imagery shared with The Daily Beast early this week shows a 45-foot-long trench in the city serving as a mass grave. And even though the images are jarring, the United States’ role in pursuing prosecutions may turn out to be limited. “To put it in a nutshell, the U.S. can assist with providing evidence for specific cases. They can also provide certain kinds of assistance, like witness relocation,” said Alex Whiting, a visiting professor at Harvard Law School and an expert on international criminal prosecution issues. “But it cannot, for example, provide funding or pay for prosecutors or investigators to go to the Hague.” Linda Greenfield, the U.S. ambassador to the UN, called for Russia to be suspended from the United Nations Human Rights Council on Tuesday morning, a first step to reducing its influence at the international organization—but that’s not enough, said Rep. Lee Zeldin (R-N.Y.). Next, the United States ought to move to kick Russia out of the UN Security Council, Zeldin told The Daily Beast. “Russia—[and] Putin specifically—has earned that consequence for Putin’s invasion of Ukraine,” said Zeldin, who serves on the House Foreign Affairs Committee, warning that the steps the Biden administration takes against Putin must be strong and decisive. Otherwise, Putin will keep going, running his massacre possibly beyond Ukraine. “If Putin isn’t held accountable… he’s someone with ambition to commit additional crimes against humanity, potentially in other countries,” Zeldin warned. The Biden administration’s agreement to assist in investigating potential crimes in Ukraine is no small thing—particularly when the crime scene effectively stretches across a country nearly the size of Texas. “Where the United States can play a substantial role is in helping to organize that information,” said Sadat. “That is going to take a lot of person-power in order to process and organize evidence and be able to use all of that information. That is where the United States, which has some expertise in this, is able to do that.” “You have to think of what’s happening in Ukraine as an incredibly complex crime scene,” echoed Abrahams. “The bodies that are out on the street—we’ve all seen these photos and videos—they should record the wounds, try and photograph the bodies, document the cause of death. Then you’ve got the witness statements, then you’ve got the ballistics analysis, and then you’ve got the big question: who done it?” “All of that takes time.” But the timeline for an investigation leading to a prosecution—even one in absentia—could take years, said Dr. Courtney Hillebrecht, a professor of international relations at the University of Nebraska-Lincoln and an expert in human rights. “These are incredibly difficult tasks under the best of circumstances, and these are obviously not the best of circumstances,” Hillebrecht said. “Justice will not be forthcoming in the immediate term. We are talking years, not weeks or months.” White House press secretary Jen Psaki admitted as much in a briefing on Tuesday, emphasizing U.S. economic sanctions as its primary mechanism for punishing Russian war crimes in the near term. But that timeline is too slow for many of Biden’s Democratic allies on the Hill, some of whom are now pushing for the administration to expel Russia’s ambassador to the United States in response to the Bucha massacre. “There are horrific war crimes being committed by the Russian forces. We need a response,” Rep. Ted Lieu (D-CA), a member of the House Foreign Affairs Committee, told The Daily Beast. “The United States needs to expel the Russian ambassador to the United States.” More broadly, international law experts expressed fear that America’s refusal to fully endorse the ICC risks making its support of a potential tribunal on Russian war crimes look like a strategic maneuver against a geopolitical foe, rather than a humanitarian action that would punish a moral obscenity. “The U.S. is not a nonpartisan participant in this conflict. They’re delivering weapons to the Ukrainians and are politically clearly aligned, so there’s an issue of independence and perceptions of independence,” said Abrahams, who testified in the ICC’s war crimes trial of former Serbian president Slobodan Milošević. “In some ways, the U.S. is a party to this conflict—they’re not fighting, but they clearly have taken sides.” “That puts them in a bind. It’s a thin line for them to walk.”

#### Investigating Russia without acceding to the Rome Statute makes the ICC look like a geopolitical weapon, discrediting it AND the entire structure of international law. Ratification solves, neutralizes Russian claims of hypocrisy, and forces US foreign policy restraint

Hudson 4-11-2022, staff writer for Jacobin magazine and a 2019-2020 Leonard C. Goodman Institute for Investigative Reporting Fellow at In These Times. (Michael, “Holding Putin Accountable Would Require an Actual Rules-Based World Order”, Jacobin, <https://jacobinmag.com/2022/04/vladimir-putin-rules-based-world-order-international-criminal-court-us-ukraine-russia-war-crimes>)

\*CW: this card has un-underlined description of war crimes in some places

They are, after all, the ones directly in charge of policy, and are the ones who chose to put the grunts (in this case, some of them conscripts) in positions where they, predictably, wind up committing war crimes. This is why George W. Bush is rightly called a war criminal, and why Nazi leadership were tried and executed after World War II, even though few of them were actually out on the battlefield, mutilating enemy bodies or summarily executing civilians by their own hands. Hence, US president Joe Biden and other Western leaders are now calling Putin a war criminal, and pundits and experts are calling for him to be put on trial.

There’s only one problem: the “rules-based international order” that’s theoretically meant to make this kind of justice happen doesn’t actually exist. The international system we live in now was shaped in large part by the victors of World War II, principally the United States, and so while we’ve created the semblance of a system that’s governed by rules, laws, and institutions that enforce them, in reality we’re still all living in a relatively anarchic world order where governments that are powerful enough can, to a certain extent, do whatever they want.

The International Criminal Court (ICC) is a prime example. The ICC was expressly created by the 1998 international Rome Statute to serve as an avenue of justice for exactly these types of offenses, since the existing International Court of Justice is for settling legal disputes between countries, and the European Court of Human Rights (which Russia withdrew from last month) is meant to be a last resort for people unable to get justice for human rights violations in their own country. But unfortunately, the way the ICC is structured makes it highly unlikely anything meaningful will happen to hold Putin to account.

For one thing, three of the permanent members of the United Nations Security Council (China, Russia, and the United States, who are also three of the world’s most powerful countries) never actually ratified the Rome Statute (former president Bill Clinton signed it, but it was never ratified by the Senate). After all, if you know some kind of war is in your near-to-medium future, why open yourself to prosecution over it?

Besides denting the court’s legitimacy, it also means there’s little that can be done about Russia. The only way to get a non-signatory country into the Hague is by a Security Council vote, which Russia would simply veto. You can blame that one on the leaders left standing after World War II, who instead of creating an actual democratic governance mechanism in which they’d be outnumbered and would find it much harder to get their way, decided instead to give themselves permanent veto power. To this day, relatively friendless Libya and Sudan are the only two non-signatories that have been taken to the Hague, since they don’t hold this extraordinary privilege.

Go look at the ICC’s list of cases and you might spot a pattern: all of the defendants happen to be from the Global South, overwhelmingly Africa. Even in Libya, destroyed and plunged into murderous anarchy by a NATO war, only the Libyan perpetrators have a warrant out for their arrest. What they don’t tell you about the “rules-based international order” is that those rules only apply to countries without a whole lot of power.

Then there’s that pesky issue of legitimacy. In society, a fundamental part of the rule of law is that it’s supposed to apply to everyone. You might agree in theory that someone who committed a murder should be arrested and prosecuted, but if a rich and powerful person routinely gets away with a whole slew of murders out in the open and nothing happens to them — or worse, they’re the ones leading the prosecution — you would probably start to lose faith in that system or even see it as fundamentally unfair, hypocritical, and politically driven, undermining its legitimacy.

That’s basically what we have now, as US officials declare Putin a war criminal and call for the US government to assist a war crimes investigation into what happened in Bucha and elsewhere in Ukraine. While normally assistance in an investigation like this would be helpful, in this case, any US involvement, or even the perception there’s any, would make the process look indistinguishable from victor’s justice.

Why? Because unfortunately, the United States not only wouldn’t ratify the Rome Statute on the basis that its nationals would be vulnerable to “politicized prosecutions” — making it, like Russia, effectively immune to its jurisdiction — but it’s been implacably hostile to the idea of being accountable to an international criminal court at all.

Under George W. Bush, the US government curtailed support for the ICC, withdrew military assistance to countries that signed the Rome Statute, coerced governments into signing bilateral deals not to extradite Americans to the Hague, and most controversially, passed what some call the “Hague Invasion Act,” allowing Washington to use military force to liberate any US nationals who might be held there, a law that’s still on the books. Things got worse under Donald Trump, who sanctioned the ICC over its potential investigation and prosecution of crimes carried out by Americans and Israelis in Afghanistan and Palestine.

So in the same way that years of Western hypocrisy on the issues of war and territorial sovereignty, some going on right now, undermined a unified global response to Putin’s war, there’s a good chance US involvement in a war crimes investigation against Russia would do serious damage to not just the court’s standing, but to the entire concept of international law, if it looks like simply a tool being selectively used to settle geopolitical scores. Unfortunately, given the way Western countries have been serially let off the hook for a variety of wars of aggression, this might still happen even without US involvement.

In principle, it doesn’t have to be this way. The United States could both assist any war crimes investigation and lend it global legitimacy by finally ratifying the Rome Statute, becoming party to the ICC, and repealing the hostile stance to the body that dates all the way back to the Bush years. This would send a powerful signal that this isn’t just an opportunistic use of human rights as a geopolitical weapon, but that the United States is serious about international law. It would also neutralize Russian claims of hypocrisy, strengthen international law, and finish the nearly three-decade-old work of a Democratic administration, which played a key role in the negotiations that created the court in the first place.

Of course, this is easier said than done. But it’s telling that this isn’t even being so much as called for by anyone with a meaningful platform in US political discourse, outside of some left-wing voices like Representative Ilhan Omar and Democracy Now!’s Amy Goodman and Denis Moynihan. In urging Biden to help with a war crimes investigation in Ukraine, former Democratic senator Chris Dodd and former Bush advisor John B. Bellinger III wrote that “The United States can help the court in appropriate cases while still strongly opposing ICC investigations (including of US personnel) that do not meet the court’s strict threshold requirements.” A commitment to impunity is a bipartisan value.

It’s not hard to see why. Far from risking the prosecution of “peacekeeping” forces, as US officials claimed when justifying their refusal to submit to the court, being party to the ICC would mean US war criminals might face some actual justice. Just in recent weeks, we’ve learned the US combat strategy in Raqqa, Syria in 2017 increased civilian casualties there, that a group of Green Berets got off with a slap on the wrist after torturing an Afghan suspect to death, and that a US-targeted airstrike on an ISIS bomb factory carelessly killed eighty-five Iraqi civilians, wiping out a man’s whole family in one instance, and injured as many as more than five hundred. To put it plainly, the fear of war crimes prosecutions for things like this might force some actual restraint on the conduct of US foreign policy.

So at least for the time being, we may be cursed to live in a world where international law continues to be selectively applied and mostly theoretical. And that’s a world where, unfortunately, countries have to depend on military deterrence in the absence of an actual system of justice, and great powers can feel free to launch illegal wars and commit various outrages, knowing they’re above whatever law exists. We might be able to create a different world. But first, we must at least try to imagine it.

#### Disengagement emboldens human rights violations and hamstrings US pushes for accountability.

Omar 4-13-2022, a Democrat, represents Minnesota’s 5th Congressional District in the U.S. House. (Ilhan, “Opinion: For Putin to face justice, we must join the International Criminal Court”, Washington Post, <https://www.washingtonpost.com/opinions/2022/04/13/icc-war-crimes-putin-russia-us-should-join/>)

Accountability is the key to prevention. If there are no consequences for committing these atrocities, we will find ourselves in the same place in the future. Putin must be charged and held fully accountable for his crimes against humanity by the International Criminal Court (ICC). And anyone responsible for this illegal war of aggression must face justice.

Thankfully, there are already bipartisan calls for accountability, and President Biden himself has labeled Putin a “war criminal.” But unfortunately, a glaring asterisk hangs over any calls for justice made by the United States. That’s because, more than two decades after its creation, we have yet to ratify the Rome Statute — the treaty establishing the ICC. We are in the company of countries such as Iran, Sudan, China, and, yes, Russia as one of several nations that have refused to sign onto this bedrock of international law.

In fact, the Trump administration went so far as to approve sanctions on the staff members of the court for carrying out their jobs.

Biden thankfully lifted these sanctions. But Secretary of State Antony Blinken reiterated our country’s “longstanding objection to the Court’s efforts to assert jurisdiction over personnel of non-States Parties” last year. In other words: We’re not joining, and don’t investigate us or anyone that is not a member.

Sadly, it’s this exact position that is now hamstringing the United States as we seek accountability for Putin. If we oppose investigations into countries, like our own, that haven’t joined the ICC, how can we support an investigation into Russia, another country that hasn’t joined the court?

There’s a simple solution to this: The United States must join the International Criminal Court.

Equality under the law is one of the core tenets of our legal system and the international legal system. If we truly believe in prioritizing human rights and enforcing international law, how can we not be part of the court that upholds that law?

Our absence also allows regimes to commit human rights abuses with impunity. If the most powerful country won’t hold itself accountable to the rule of law, other countries feel emboldened to violate it. And indeed, we have [ignored] turned a blind eye to wanton human rights violations by regimes in countries such as Saudi Arabia, Egypt, El Salvador and even India, in the name of political convenience. Even when war criminals are successfully convicted— as Malian terrorist Ahmad al-Faqi al-Mahdi was in 2016 — our absence only undermines the legitimacy of those verdicts.

It’s also important to remember that the ICC is a court of last resort. It doesn’t have jurisdiction over crimes unless the country in question — like Russia — is unable or unwilling to prosecute the perpetrators domestically. Because we aren’t members of the ICC, we can’t engage directly in the efforts to prosecute criminals. Imagine how much we could accomplish if we helped legitimize the ICC.

Many will argue that there are parts of the criminal court that need to be reformed. I agree. Let’s work as a member state to improve it and make sure it lives up to the highest standards of impartiality.

The United States once led the world on international justice. In response to the horrors of the Holocaust, we spearheaded the Nuremberg trials to hold Nazi war criminals accountable and, for the first time, establish international criminal law. We intentionally created an impartial judicial process modeled on our own judiciary, rather than simply executing Nazi war criminals without trial. The last living Nuremberg prosecutor, Benjamin Ferencz, boiled this philosophy down to a simple axiom: “Law not war.”

In this moment of horrifying violence, it’s time to reclaim the mantle of leadership we seized after World War II. It’s time to hold the perpetrators of crimes against humanity accountable for their actions and send a message to the whole world that true justice is ~~blind~~, that no targeting of civilians, no use of chemical weapons and no wars of aggression will ever be tolerated again. It’s time for the United States to join the International Criminal Court.

If we believe Putin should be held accountable for violating international law, then we have to support international law. This week, I will be introducing a resolution to join the court, and I hope other members of Congress will join me in supporting it.

#### The ICC is key.

Savage 4-11-2022, Washington correspondent for The New York Times. (Charlie, “U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities”, New York Times, <https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html>)

WASHINGTON — The Biden administration is vigorously debating how much the United States can or should assist an investigation into Russian atrocities in Ukraine by the International Criminal Court in The Hague, according to officials familiar with internal deliberations. The Biden team strongly wants to see President Vladimir V. Putin of Russia and others in his military chain of command held to account. And many are said to consider the court — which was created by a global treaty two decades ago as a venue for prosecuting war crimes, crimes against humanity and genocide — the body most capable of achieving that. But laws from 1999 and 2002, enacted by a Congress wary that the court might investigate Americans, limit the government’s ability to provide support. And the United States has long objected to any exercise of jurisdiction by the court over citizens of countries that are not part of the treaty that created it — like the United States, but also Russia. The internal debate, described by senior administration officials and others familiar with the matter on the condition of anonymity, has been partly shaped by a previously undisclosed 2010 memo by the Justice Department’s Office of Legal Counsel. Obtained by The New York Times, the memo interprets the scope and limits of permissible cooperation with the court. The discussions have also been marked by Pentagon opposition to softening the U.S. stance, even as congressional Republicans, long skeptics of the court, have signaled openness to finding a way to help it bring Russian officials to justice. For now, officials said, the primary focus has been on compiling evidence of apparent war crimes that are still unfolding — both the details of particular killings and intelligence that President Biden’s national security adviser, Jake Sullivan, asserted on Sunday indicates a high-level plan to brutalize the civilian population into terrorized subjugation. “This was something that was planned,” he said on ABC’s “This Week,” adding, “Make no mistake, the larger issue of broad-scale war crimes and atrocities in Ukraine lies at the feet of the Kremlin and lies at the feet of the Russian president.” But the unresolved deliberations about where to channel such intelligence explain why administration officials have been hazy about where efforts to prosecute Russian war crimes should center — even as evidence of large-scale atrocities has mounted, prompting Mr. Biden to label Mr. Putin a “war criminal” and to call for a “war crimes trial.” Mr. Sullivan was vague, for example, at a news briefing last week when a reporter asked whether the president envisioned such a prosecution playing out at the International Criminal Court or some other tribunal. “We have to consult with our allies and partners on what makes most sense as a mechanism moving forward,” he said. “Obviously, the I.C.C. is one venue where war crimes have been tried in the past, but there have been other examples in other conflicts of other mechanisms being set up.” But setting up other venues would raise its own obstacles. Among them, while the United Nations Security Council in the past helped establish special international courts to handle conflicts in places like Rwanda and the former Yugoslavia, Russia can veto any Council resolution seeking to establish a tribunal for Ukraine. There are reasons to doubt that Mr. Putin and other senior Kremlin officials responsible for the war may ever stand trial, so long as they remain in power and ensconced in Russia. Still, war-crimes indictments, human rights specialists say, serve a “naming and shaming” function even without trials — and can inhibit defendants’ ability to travel abroad. Another possibility is a nation’s court with jurisdiction over war crimes on Ukrainian soil. Germany, for example, has war-crimes and crimes-against-humanity laws that cover the world. Prosecutors there said in March that they had started gathering evidence of deliberate attacks on civilians and civilian infrastructure, and two former ministers filed a complaint there last week asking prosecutors to charge Russian officials. Ukraine’s own prosecutor general has asked for international help in gathering evidence. Attorney General Merrick B. Garland said in recent days that administration officials were working on a multinational effort to shore up Ukraine’s efforts, while also holding discussions with European counterparts. Still, with Ukraine under continuing assault, the capacity of its justice system may be limited. The International Criminal Court, by contrast, is already set up — and it specializes in conducting this very kind of investigation and prosecution.

### Neg---Rome Statute---ICC Bad

#### ICC involvement prolongs and escalates conflict.

Prorok 17, PhD, Assistant Professor in the Political Science department at the University of Illinois at Urbana-Champaign. (Alyssa K., Spring 2017, “The (In)Compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination,” International Organization 71, No. 2, 214-215, doi:10.1017/S0020818317000078)

To address these limitations in existing research, I examine the impact of active ICC involvement on conflict termination, seeking to answer whether the ICC’s pursuit of justice facilitates civil conflict termination or has the perverse effect of prolonging conflict, making peace more difficult to achieve. To answer this question, I focus on rebel and state leaders’ incentives to avoid punishment during and after civil war. Criminal prosecution at the ICC represents a potential source of punishment that leaders hope to avoid. Once the ICC becomes actively involved in a conflict, leaders’ incentives may favor conflict continuation as a way to avoid capture, extradition, and trial. Importantly, this effect is likely conditional upon the threat of domestic punishment. As the risk of punishment at home increases, the conflict-prolonging impact of ICC involvement is expected to decrease.

I test these expectations on a data set of civil conflict dyads between 2002 and 2013. Statistical results provide strong support for my expectations: ICC involvement significantly decreases the likelihood of conflict termination, particularly when the threat of domestic punishment is low. These results are robust to a variety of additional tests, including alternative specifications of key variables and tests to address potential selection effects and endogeneity. Overall, the findings indicate that when risks of domestic punishment are low the ICC’s pursuit of justice undermines peace by threatening leaders’ political survival and personal freedom.

#### ICC interventions undermine the norms that underpin UN peacekeeping

Buitelaar & Hirschmann 20, \*Tom, PhD, Assistant Professor in the War, Peace & Justice program of the Institute of Security and Global Affairs at Leiden University. \*\*Gisela, PhD, Assistant Professor of International Relations at the Institute of Political Science, Leiden University (11-27-2020, “Criminal accountability at what cost? Norm conflict, UN peace operations and the International Criminal Court,” European Journal of International Relations, Vol. 27(2), pg. 559-560, <https://doi.org/10.1177/1354066120972758>)

Norm conflict 2: International criminal accountability v. the ‘holy trinity’ of peacekeeping. The second norm conflict experienced by the UN peacekeeping bureaucracy relates to the ‘holy trinity’, a set of interrelated norms that are fundamental to the practice of UN peacekeeping. Developed in the early Cold War to frame UN peacekeeping as a novel tool for conflict management, it prescribes that UN peacekeepers should remain impartial, act with the consent of the parties, and use force only in self-defense. This introduces a threefold norm conflict. First, assistance to the ICC is likely to violate impartiality since ICC investigations always target at least (and often only) one side of the conflict (Rosenberg, 2017). By providing assistance to the ICC, a peace operation could be perceived as too close to the ICC and seen as contributing to the prosecution of particular conflict parties, negatively affecting the operation’s perceived impartiality.18 Second, assistance may violate the consent norm when the state in question opposes ICC involvement. This poses both audience costs and major pragmatic challenges: peace operations require parties’ consent not only to deploy in the first place, but also for such important activities as protecting civilians, maintaining ceasefires and conducting humanitarian operations (Sebastián and Gorur, 2018). Finally, consistently implementing the international criminal accountability norm means that peace operations should also execute ICC arrest warrants. This comes into conflict with the norm that peace operations should use minimum force in self-defense only, because arrest operations require considerable coercive force to detain ICC suspects who often retain significant political and military support.

The holy trinity norm set has been a key justification of UN peacekeeping since its establishment – with its components being endorsed as the ‘basic principles of peacekeeping’ (f.e. United Nations, 2008a: 31). Especially regarding impartiality and the non-use of force, there is strong support for the original concept of the holy trinity by Russia and China, as well as major TCCs like India and Bangladesh. At the same time, the increasing amount of references to ‘the protection of civilians’ in the Security Council’s peacekeeping mandates, particularly pushed for by Western member states, indicates that the traditional impartiality norm has lost some of its strength (Bode and Karlsrud, 2018; Howard and Dayal, 2018; Paddon Rhoads, 2016). When it comes to consent, however, the norm’s components have been strongly institutionalised and are supported by the majority of member states and UN actors (Sebastián and Gorur, 2018). Together, this leads to a mixed assessment of the strength of the ‘conservative’ holy trinity norm and we would conclude that while the impartiality and non-use of force norms can be classified as of more or less equal strength as the international criminal accountability norm, the consent norm can be classified as stronger than the international accountability norm.

## [2.0] Area: UNCLOS

### Uniqueness

#### UNCLOS absolutely will not happen.

Alvarez 20, Herbert and Rose Rubin Professor of International Law @ NYU (José, November 2020, “International Law in a Biden Administration,” Institute for International Law and Justice, pg. 5-6, <https://www.iilj.org/wp-content/uploads/2020/11/Alvarez-IILJ-Article.pdf>)

The UN Convention on the Law of the Sea (UNCLOS) is a case in point. The last time there was a serious effort to have the Senate consider this treaty—after the 2004 election—that effort failed despite the backing of every Chairman of the Joint Chiefs, every Chief of Naval Operations, every combatant commander of the US, every living legal adviser to the US Department of State, every President since Reagan, and a dizzying and politically diverse array of organizations that extended from environmental groups to the American Petroleum Institute. Today, US interests in defending the law of the sea and in interpreting it “correctly” over time—most particularly its interests in protecting its high seas freedoms and transit rights as a maritime power—are stronger than ever given the continuing threats to those rules (and possibly to international peace and security) posed by China’s actions in and around the South China Sea. Even Secretary of State Pompeo, who rarely addresses international law, acknowledged as much in July 2020 when he praised the UNCLOS (PCA) 2016 arbitration ruling in Philippines v. China and urged all parties to abide by that “legally binding” decision.10 It is clear today, no less than in 2004, that the US would clearly benefit from affirming that UNCLOS consists of binding treaty law to which it commits, along with that treaty’s duty to accept binding dispute settlement at least with respect to some issues. And yet, no DC insider predicts that the Biden administration will spend the political capital needed to secure US accession to UNCLOS. The best that anyone expects from a Biden administration is that it will use every occasion to voice support for UNCLOS, take seriously that convention’s rules with respect to its own actions, and continue to build support among relevant constituencies here and abroad to press for eventual US accession.

### Aff---UNCLOS

#### The US observes and cites the provisions of the United Nations Law of the Sea Convention (UNCLOS) BUT has not ratified them.

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Outside Looking In

Following nearly a decade of negotiations, c was completed on December 10, 1982 at Montego Bay, Jamaica. Even at that time, the United States refused to sign the treaty. The United States, along with other industrialized states, took issue with aspects of the treaty (Part XI), which dealt with deep seabed resources beyond national jurisdiction. Largely at Washington’s instigation, negotiations continued and resulted in the Agreement relating to Implementation of Part XI of the Convention (1994 Agreement), completed in New York, July 28, 1994.

Determining that the remaining deep seabed issues were resolved, on October 7, 1994, President Bill Clinton transmitted the Convention and the 1994 Agreement to the Senate for advice and consent. On November 16, 1994, UNCLOS entered into force, but without accession by the United States. The 1994 Agreement entered into force on July 28, 1996, also without U.S. ratification. To date, the treaty remains one of forty-five treaties (one dating back to 1945) awaiting Senate action – once referred to as the “world’s greatest deliberative body.”

As a result, the United States remains off the list of 168 state parties to UNCLOS, a list which includes all other major maritime powers such as Russia and China. In practice, the United States has accepted and complies with nearly all the treaty’s provisions. On March 10, 1983, President Ronald Reagan issued the United States Oceans Policy Statement, supported by National Security Decision Directive 83, which documents the U.S. view that UNCLOS reflects customary international law and fulfils U.S. interest in “a comprehensive legal framework relating to competing uses of the world’s oceans.” Successive presidential administrations – Republican and Democrat – have relied upon Reagan’s precedent to legitimize and guide the Freedom of Navigation (FON) Program in global hot spots like the South and East China Seas.

So even as the United States invokes UNCLOS to assert the freedom of navigation and challenge excessive maritime claims, Washington has no seat at the table in protecting U.S. rights and claims within the treaty’s institutional framework. As a non-party, Washington remains on the outside looking in as the international community moves forward in defining the legal landscape affecting over 70 percent of the world’s surface.

#### China and Russia are staking aggressive claims to the Arctic, but US officials can’t push back in relevant institutions.

Farrell 22, President of The Maritime Law Association of the United States. Its membership consists of 2,200 maritime lawyers and industry leaders. The association does not lobby because its members professionally represent a wide variety of interests, often conflicting. But on especially worthy public policies that would benefit from a legal solution with no downside, it adopts consensus resolutions, as it has done urging U.S. ratification of UNCLOS and the Rotterdam Rules (David J. Farrell, Jr, 1-28-2022, “Opinion: To Support U.S. Interests, Ratify UNCLOS and Rotterdam Rules”, Maritime Executive, <https://www.maritime-executive.com/editorials/opinion-to-support-u-s-interests-ratify-unclos-and-rotterdam-rules>)

China also needs to be closely watched in the Arctic -- another region where the U.S. is hamstrung without the force of UNCLOS behind us. China claims to be a “Near-Arctic State” and is conducting “scientific research” in the Arctic. To maintain its “Polar Silk Road” China is building its third Arctic icebreaker -- in contrast to the U.S. which now has only one old heavy icebreaker that splits its time between the Arctic and the Antarctic.

Russia of course is also a concern. Its aggressive claims in the Black Sea and to the Arctic continental shelf and international straits are contrary to UNCLOS, but again our protests are hollow since the U.S. is not a party to the treaty. As we all know, Arctic sea ice is melting quickly and just as quickly is opening up the Arctic to commercial shipping. Faster than using the Suez Canal, it is now viable in summer to sail from the Pacific through the Bering Strait west of Alaska and along the Northern Sea Route over the top of Russia to Europe.

In addition, cruise ships, commercial fishing, energy development, and mineral exploration are new and growing Arctic industries. These pose environmental risks including devastating cold water oil spills and other maritime casualties far, far, away from any nation’s Coast Guard and first responders. Circumpolar Inuit people and others face upheaval.

But without ratifying UNCLOS, the U.S. has limited sway over Arctic developments. Critically, unless we ratify UNCLOS, a U.S. representative cannot sit on the Commission on the Limits of the Continental Shelf to best protect the contours of our claim to a U.S. Exclusive Economic Zone north of Alaska.

The Arctic Ocean's resources are opening up, for good or bad, and so are geo-political claims to them -- but the U.S. is losing out on both.

With 161 other countries plus the European Union having already adopted UNCLOS, our failure to ratify the treaty gives credence to worldwide skepticism of U.S. leadership and declining respect for the U.S. in promoting the international rule of law. UNCLOS is recognized by the rest of the world as the international Law of the Sea -- and even the U.S. acknowledges that. International tribunals have rendered scores of Law of the Sea legal decisions. But because we are not an UNCLOS player, we have no influence on this emerging international jurisprudence and everything the U.S. argues on the world stage relating to maritime issues is taken with a grain of sea salt.

The U.S. should ratify UNCLOS now to derive our negotiated benefits from it.

There is no downside and only positives for the U.S. As a practical matter, we already closely adhere to UNCLOS standards, so the U.S. can ratify without any disruption to our military or commercial operations. Gaining seats at various UNCLOS tables, we will be able to influence evolving maritime developments and laws. And with our expanded oceanic access, U.S. maritime industries and workers will have more work.

It should also be recognized that any anti-U.N. sentiment opposed to UNCLOS not only lacks merit but would also have the U.S. miss the boat on an opportunity to best promote our maritime interests and sovereignty -- including the assertion of U.S. rights in the Arctic and elsewhere.

#### Accession gives the US a seat at the table in UNCLOS’s institutions---key to resolve undersea cable disputes, manage overfishing, and lock in the liberal order

Almond 17, Counsel @ the US Senate Committee on Commerce, Science, and Transportation, Partner & Vice-President of International Services @ The Wicks Group, and an adjunct professor of law @ Georgetown (Roncevert Ganan, 5-24-2017, “U.S. Ratification of the Law of the Sea Convention”, The Diplomat, <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>)

Ratification will give the United States a direct voice in UNCLOS bodies like the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf, and the International Seabed Authority. For instance, at a recent gathering at the American Society of International Law (ASIL), Douglas Burnett, a maritime attorney and advisor to the International Cable Protection Committee, explained that, in the current landscape, U.S. telecommunications companies are forced to seek foreign state sponsors to voice their concerns in UNCLOS disputes over undue interference by coastal states to the freedom to lay undersea cables. An estimated 98 percent of worldwide internet data is transmitted through the web of fiber optic cables lying on the ocean floor, which are the arteries of the global economy, and, therefore, a significant U.S. concern.

In addition, UNCLOS reflects current U.S. policy with respect to living marine resource management, conservation, and exploitation. For example, from within the treaty, the United States can more effectively exert its leadership in managing depleted fish stocks, which migrate internationally across maritime zones and the high seas. Organizations as disparate as the World Wildlife Fund and the U.S. Chamber of Commerce have strongly supported U.S. accession. According to John Norton Moore, director of the Center for Oceans Law and Policy at the University of Virginia, since the U.S. already follows the treaty, the costs of compliance are insignificant, particularly when weighed against the U.S. capacity to influence institutional development in global maritime policy.

More broadly, the UNCLOS regime is part of the bedrock of the U.S.-led liberal order. As G. John Ikenberry argued in After Victory, since the Congress of Vienna, leading states have employed institutional strategies as mechanisms to establish restraints on arbitrary state power and embed a favorable and resilient international system. In this instance, the Convention and 1994 Agreement were negotiated during a time of U.S. ascendance and Western unity in international affairs. At ASIL, Myron Nordquist, Associate Director of the Center for Oceans Law and Policy, expounded on how UNCLOS reflects important U.S. interests regarding restraints on economic exclusive zone, continental shelf resources, innocent passage across the territorial waters, the passage rules for transiting straits and archipelagic sea lanes, and, of course, the high seas freedoms. U.S. ratification will serve to “lock in” these advantages, negotiated by the United States from a position of primacy in world affairs.

#### Accession would be a huge signal that cuts through the noise of the international system. BUT, Senate inertia and populism make it unlikely.

Almond 17, Counsel @ the US Senate Committee on Commerce, Science, and Transportation, Partner & Vice-President of International Services @ The Wicks Group, and an adjunct professor of law @ Georgetown (Roncevert Ganan, 5-24-2017, “U.S. Ratification of the Law of the Sea Convention”, The Diplomat, <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>)

The Domestic Trump Card

For a White House under siege, UNCLOS ratification may present an opportunity for a specific foreign policy achievement. After all the United States is engaged in an unequal bargain: adhering to the terms of UNCLOS without enjoying the benefit of shaping the treaty’s rules or institutions. In contrast, if the Trump administration were to oppose UNCLOS ratification it would be a remarkable and deplorable break in bi-partisan presidential leadership.

Even assuming the Trump administration’s support, accession will not come easily. According to a Congressional report, in the course of U.S. history, only 1,100 treaties have been ratified in comparison to over 18,500 reported executive agreements. Senate inaction has proven to be a very effective veto. Even treaties that flow from American leadership, in areas like protecting rights for persons with disabilities, are rejected. As such, treaty ratification would be a monumental (and surprising) legacy-builder for Trump.

Global frameworks like UNCLOS are also exceptional events in international affairs. Advocates and opponents of U.S. accession both acknowledge that the terms of UNCLOS would be impossible to negotiate today. In my view, this reality demonstrates the wisdom of locking-in U.S. gains and the importance of establishing international institutions capable of maintaining validity in a changing geopolitical environment. Treaty-making and diplomacy require a certain “suppleness,” to borrow from Ruth Wedgwood, Professor of International Law and Policy at the John Hopkins School of Advanced International Studies. U.S. participation could strengthen UNCLOS by ensuring that new life is breathed into the document’s text, consistent with U.S. interests.

Unfortunately, America’s political environment is characterized by a rigidness and polarization that defy supple solutions for U.S. accession to UNCLOS. The current populist strain is characterized by a faith in strong leaders, a disdain of perceived limits on sovereignty and a distrust of powerful international institutions. Criticism of international law has taken on a religious fervor, become an emotional calling. The South China Sea case may only prove the ideological point of UNCLOS detractors, no matter how shortsighted.

Perhaps in this Trump era, only a figure like Donald Trump can lend legitimacy to a complex global undertaking that is in the U.S. national interest. In other words, a populist dealmaker may be required to overcome the trump card of domestic politics in this vital area of U.S. foreign policy. This scenario will require decisive presidential leadership (bigly) and a clear view of the national interest in Washington.

### Aff---UNCLOS---Territorial Disputes Advantage

#### UNCLOS resolves conflicting territorial disputes in the Arctic.

Almond 17, Counsel @ the US Senate Committee on Commerce, Science, and Transportation, Partner & Vice-President of International Services @ The Wicks Group, and an adjunct professor of law @ Georgetown (Roncevert Ganan, 5-24-2017, “U.S. Ratification of the Law of the Sea Convention”, The Diplomat, <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>)

As a sovereign state, the United States can object to overlapping claims and take action in the Arctic consistent with international law. Awkwardly, however, arguments against UNCLOS ratification must turn to support from the International Court of Justice, which has ruled (Nicaragua v. Columbia, 2012) that continental shelf rights exist as a matter of fact and do not need to be expressly claimed. Even if custom provides one remedy, a contract is better than a handshake – more so in a world of power and interdependence. Moreover, the Arctic coastal states, including the United States, have positively affirmed that the law of the sea provides the “legal framework” for resolving overlapping territorial claims. Intergovernmental bodies like the Arctic Council, while useful for multilateral cooperation, lack authority for resolving territorial conflicts. As the future secretary of State, Tillerson, wrote to the Senate: “UNCLOS can provide an efficient, comprehensive legal basis for the settlement of these conflicting claims, thus providing the stability necessary to support expensive exploration and development.”

#### Formally joining UNCLOS strengthens Washington’s hand in South China Sea disputes.

Almond 17, Counsel @ the US Senate Committee on Commerce, Science, and Transportation, Partner & Vice-President of International Services @ The Wicks Group, and an adjunct professor of law @ Georgetown (Roncevert Ganan, 5-24-2017, “U.S. Ratification of the Law of the Sea Convention”, The Diplomat, <https://thediplomat.com/2017/05/u-s-ratification-of-the-law-of-the-sea-convention/>)

The South China Sea is another area of heated contestation where UNCLOS serves as the guidepost for clarity. Of notable importance is the ruling from the South China Sea arbitration that UNCLOS comprehensively allocates rights to maritime areas thereby precluding historic claims like China’s “Nine-Dash Line.” From this principle, the arbitral tribunal systematically refuted China’s extensive claims and actions in the South China Sea beyond the treaty’s carefully crafted limitations. In the view of Washington, these limitations include undue attempts to curtail the freedoms of navigation and overflight in exclusive economic zones (EEZs). Notably, China takes an opposing view and asserts the ability to prohibit foreign military operations in its claimed EEZs. Thus, although the United States remains neutral on competing claims in the South China Sea, Washington has a compelling national security interest in upholding the substance of the arbitral tribunal’s ruling.

Like U.S. claims in the Arctic, the United States’ legal rights in the South China Sea are not academic. As reported by Ronald O’Rourke, a U.S. naval affairs analyst, the EEZ legal dispute between Washington and Beijing has led to significant confrontations between Chinese and U.S. ships and aircraft in and above international waters. For example, in August 2014, a Chinese J-11 fighter dangerously intercepted a U.S. P-8A Poseidon, a naval reconnaissance aircraft, operating in the South China Sea approximately 117 nautical miles east of Hainan Island. Thanks to the arbitral tribunal’s artful debunking of the nature of Chinese-claimed maritime features and related entitlements, there is greater legal clarity on U.S. operational rights in the South China Sea. By formally joining UNCLOS, the United States will be in a stronger position to support the ruling of the arbitral tribunal in the face of Chinese opposition.

More broadly, because substantial portions of the world’s oceans are claimable as EEZs, universal adoption of the Chinese position would significantly alter the U.S. military’s ability to sail and fly worldwide. These debates over high seas freedoms and EEZs are likely to continue. For example, as I wrote in the Harvard National Security Journal, the so-called “Castaneda formula” under UNCLOS (Article 59) opens the door for further articulation of EEZ functional jurisdiction and any potential limitation on the high seas freedoms. Defining “residual rights” requires interpreting what rights are included in the text as well as what rights are omitted. The United States can more effectively anticipate and shape these debates impacting U.S. national security as a state party to UNCLOS.

#### Keeping UNCLOS on the backburner undercuts US pushback to Chinese maritime expansionism.

Farrell 22, President of The Maritime Law Association of the United States. Its membership consists of 2,200 maritime lawyers and industry leaders. The association does not lobby because its members professionally represent a wide variety of interests, often conflicting. But on especially worthy public policies that would benefit from a legal solution with no downside, it adopts consensus resolutions, as it has done urging U.S. ratification of UNCLOS and the Rotterdam Rules (David J. Farrell, Jr, 1-28-2022, “Opinion: To Support U.S. Interests, Ratify UNCLOS and Rotterdam Rules”, Maritime Executive, <https://www.maritime-executive.com/editorials/opinion-to-support-u-s-interests-ratify-unclos-and-rotterdam-rules>)

UNCLOS

Second, recent maritime powerplays highlight the long overdue need for the Senate to ratify UNCLOS -- also without bickering. Because the U.S. advantageously negotiated its provisions back in the 1980s-90s, UNCLOS enshrines freedom of navigation on the high seas and if ratified by us will advance our interests as a global maritime power. Top U.S. military leaders -- not just the Navy and Coast Guard -- have consistently supported ratification. UNCLOS also advances U.S. interests as a coastal nation and our rights to the natural resources in our 200-mile offshore Exclusive Economic Zone. Further, UNCLOS promotes the environmental health of the world’s oceans.

Senate ratification of UNCLOS is now more urgent than ever so the U.S. can legally challenge China’s ongoing maritime expansionism, including China’s militaristic annexation of the Spratly Islands in the South China Sea and China’s bellicosity towards Taiwan, the Philippines, Australia, and Pacific trade routes used to transport U.S. cargo. China is also trying to restrict freedom of navigation and overflight on the high seas off its shores, contrary to UNCLOS.

Since the U.S. is not a party to UNCLOS, we are handcuffed and nothing but hypocritical when criticizing China for its UNCLOS transgressions. Troubling too, unless we ratify UNCLOS, the U.S. will be left ashore when China strikes paydirt following the issuance of deep-sea mining permits scheduled for 2023 by the UNCLOS-created International Seabed Authority.

Even with U.S. domestic political divisiveness, China’s maritime militarism and maneuvering is something Republicans and Democrats should agree to constrain by bilaterally mustering the two-thirds Senate vote needed under the U.S. Constitution to ratify this treaty.

### DA---UNCLOS---Mining/Lawsuits

#### Ratifying UNCLOS would penalize US companies and open the US up to political lawsuits that harm our interests

Ted R. Bromund et al. 18. Senior Research Fellow in Anglo-American Relations, Heritage Foundation, with James Jay Carafano and Brett D. Schaefer, 6/4/18. “7 Reasons U.S. Should Not Ratify UN Convention on the Law of the Sea.” https://www.heritage.org/global-politics/commentary/7-reasons-us-should-not-ratify-un-convention-the-law-the-sea

There are now sure to be renewed calls for the United States to accede to the United Nations’ Convention on the Law of the Sea—also known as the Law of the Sea Treaty—as a useful step in this process.

Finalized in 1982, the convention codifies long-standing rules of navigation, provides a dispute-settlement mechanism, and regularizes territorial boundaries at sea.

More controversially, the convention also establishes an International Seabed Authority, mandates royalties on deep-seabed resources, and transfers of revenues to landlocked and developing nations.

Advocates argue that joining the convention would enhance America’s ability to commercially utilize mineral, oil, and gas resources in the deep seabed and strengthen our ability to protect U.S. interests in the Arctic.

In reality, however, U.S. accession would provide no benefits not already available to the U.S., while creating unnecessary burdens and risks. Heritage Foundation research linked below addresses these points clearly and unequivocally:

U.S. membership in the convention would not confer any maritime right or freedom that the U.S. does not already enjoy. The U.S. can best protect its rights by maintaining a strong U.S. Navy, not by acceding to the convention.

For more than 30 years, through domestic law and bilateral agreements, the U.S. has established a legal framework for deep-seabed mining. U.S. accession would penalize U.S. companies by subjecting them to the whims of an unelected and unaccountable bureaucracy and would force them to pay excessive fees to the International Seabed Authority for redistribution to developing countries.

As a sovereign nation, the U.S. can—and has—secured title to oil and gas resources located on the U.S. extended continental shelf without acceding to the convention or seeking the approval of an international commission based at the United Nations.

If the U.S. accedes to the convention, it will be required to transfer a large portion of royalties generated on the U.S. extended continental shelf to the International Seabed Authority, and, through the authority, to corrupt and undemocratic nations. The U.S. should instead retain these royalties and use them for the benefit of the American people.

The U.S. does not need to join the convention in order to access oil and gas resources on its extended continental shelf, in the Arctic, or in the Gulf of Mexico. To the extent necessary, the U.S. can and should negotiate bilateral treaties with neighboring nations to demarcate the limits of its maritime and continental shelf boundaries.

If the U.S. accedes to the convention, it will be exposed to climate change lawsuits and other environmental actions brought against it by other members of the convention. The U.S. should not open the door to such politically motivated lawsuits that, if resulting in an adverse judgment against the U.S., would be domestically enforceable and harm our environmental, economic, and military interests.

The U.S. has successfully protected its interests in the Arctic since it acquired Alaska in 1867 and has done so during the more than 30 years that the convention has existed. The harm that would be caused by the convention’s controversial provisions far outweighs any intangible benefit that allegedly would result from U.S. accession.

#### Ratifying UNCLOS exposes the US to a flood of frivolous litigation.

Groves 21, LLM, JD, Margaret Thatcher Fellow @ the Heritage Foundation. (Steven, 3-19-2021, “This Senate May Smile on Faulty Law of the Sea Treaty”, Heritage Foundation, <https://www.heritage.org/defense/commentary/senate-may-smile-faulty-law-the-sea-treaty>)

In any event, proponents of U.S. ratification still have to overcome the main obstacle to joining the Law of the Sea Treaty: the fact that membership in the treaty provides no tangible benefits to the U.S. and carries several disqualifying costs.

One significant flaw of the treaty is that if the U.S. joins, it will be required to give away royalties generated from oil production on the nation’s “extended continental shelf” (the part of the continental shelf beyond 200 nautical miles).

Instead of going to the U.S. Treasury for the benefit of the American people, a portion of those royalties would go to the International Seabed Authority in Kingston, Jamaica, for redistribution to developing and landlocked countries.

Joining the Law of the Sea Treaty also would expose the U.S. to baseless international lawsuits. Other countries could sue the U.S. regarding virtually anything relating to maritime activity, such as alleged pollution of the marine environment.

Regardless of the lack of merits of such a case, the U.S. would be forced to defend itself against such lawsuits at taxpayers’ expense. Any judgment rendered by a U.N. tribunal against the U.S. would be final and could not be appealed.

Indeed, a steady drumbeat has developed for filing a lawsuit against the U.S. for climate change damages if it ever ratifies the Law of the Sea Treaty.

In 2006, William C.G. Burns published a paper titled “Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention,” in which the American University professor cited the treaty’s marine pollution provisions as a basis for a cause of action over rising sea levels and changes in ocean acidity.

Burns identified the U.S. as “the most logical state to bring an action against given its status as the leading producer of anthropogenic greenhouse gas emissions,” but noted regrettably that the U.S. “is not currently a party to the convention.”

### \*\*NEG\*\*

### Neg---UNCLOS

#### The US has protected its maritime interests for decades without ratification. Power projection, not tribunals, shape Russian and Chinese behavior.

Groves 21, LLM, JD, Margaret Thatcher Fellow @ the Heritage Foundation. (Steven, 3-19-2021, “This Senate May Smile on Faulty Law of the Sea Treaty”, Heritage Foundation, <https://www.heritage.org/defense/commentary/senate-may-smile-faulty-law-the-sea-treaty>)

But for almost 40 years, fans of the treaty have failed to produce a scintilla of evidence that the Navy actually needs the treaty. To the contrary, throughout history the U.S. has protected its maritime interests successfully despite not joining the Law of the Sea Treaty.

The reason is simple: Enjoyment of the treaty’s navigational provisions is not restricted to parties to the treaty. Those provisions represent customary international law, some of which has been recognized as such for centuries. Treaty members and non-members alike are bound by the treaty’s navigational provisions.

A fact-free assertion of the other side’s argument popped up in a Senate confirmation hearing last year for Gen. Glen VanHerck, commander of the North American Aerospace Defense Command, or NORAD.

VanHerck was asked in advance questions whether U.S. ratification of the Law of the Sea Treaty would help protect the nation’s interests in the Arctic.

VanHerck, parroting the Defense Department’s long-held views, answered that U.S. failure to join the Law of the Sea Treaty has allowed “revisionist powers China and Russia to exploit that absence in key diplomatic forums in order to advance their own interests.”

The problem with that position is that the U.S. is a member of the only key diplomatic forum relating to the Arctic. (It’s called the Arctic Council, and the U.S. is a founding member.) The U.S. has protected its interests in the Arctic and across the world’s oceans through diplomacy and—let’s be real—by having 11 carrier strike groups.

And yet we are supposed to believe that China and Russia somehow will be dissuaded from Arctic shenanigans only if the U.S. ratifies the Law of the Sea Treaty?

### K---UNCLOS---Capitalism

#### UNCLOS rewards settler conquest with expansive maritime jurisdiction and advances neoliberal privatization

Vanaik 17, writer and social activist, a former professor at the University of Delhi and Delhi-based Fellow of the Transnational Institute, Amsterdam. (Achin, 7-14-2017, “The UNCLOS Isn't Perfect, and it's Time We Acknowledge That”, *Wire*, <https://thewire.in/world/unclos-maritime-law-flaws>) \*abbreviation expanded in brackets for ease of reading

Problems and criticisms

The biggest beneficiaries of the introduction of EEZs are those countries with a huge coastline (Russia, Australia) and big archipelago island states (Indonesia, Japan), but above all the three premier colonial and imperialist powers of the 18th, 19th and early 20th centuries, namely the UK, France and then the US which through force conquered huge landmasses as well as scattered islands and long island chains establishing white settler regimes by massacring at least 80% of the indigenous non-white population. Besides the US itself, these are Australia, New Zealand, Canada and Brazil. The UK and France continue to retain many island groups.

According to UNCLOS, uninhabited islands are also entitled to 200-mile EEZs. In terms of overseas areas in their possession, the top ten in order are France (11.7 million square kilometres), the US (11.4 million sq km), Australia (8.5 million), Russia (7.5 million), UK (6.8 million), Indonesia (6.2 million), Canada (5.6 million), Japan (4.5 million), New Zealand (4.1 million) and Brazil (3.8 million). For the US, France and the UK, their overseas areas exceed that of their own landmasses.

The US has accepted the legal limit of 200 miles but nevertheless, unlike China, is not a member of UNCLOS. Membership requires the assent of a two-thirds majority in both houses which Republicans have so far prevented as there are strong voices which oppose any constraints on the US. For example, it can currently ignore the ISA when it comes to international seabed exploration and mining for commercial purposes. Given UNCLOS’s ruling against Chinese claims in the South China Sea, some American strategists feel US membership would materially strengthen the opposition to China pursuing its ambitions in this regard.

New Zealand, with a population of around five million has 4.1 million [square kilometers] sq km while China with a population of 1.3 billion has around 900,000 sq km. China’s Nine-Dash-Line is a demarcation that claims island groupings and thus more of the South China seas. Incidentally, this claim precedes the emergence of Communist China and continues to be held also by the current Taiwan regime. But after 1982 UNCLOS, the stakes in terms of areas to be acquired became much higher than ever before. This would now add a further two million sq km to China if conceded, which is still well short of New Zealand’s total. Of course the Nine-Dash-Line must not be accepted. But pointing the disparities between New Zealand and China is meant to highlight how the legacies of former colonial rule and aggrandisement continue to shape in highly iniquitous ways the current order; to which one can add the iniquity that has emerged from sanctioning the principle of EEZs themselves.

The establishment of such EEZs was effectively the inauguration of a process of substantial privatisation-nationalisation to shrink what has been called the “global commons”. As such, it is in keeping with the growing dominance of neoliberal capitalist thinking among the ruling classes of different nation-states even if the most powerful states and those aspiring to join the ‘Big Boys Club’ hold the biggest share of responsibility for having produced and endorsed this outcome. Before 1982 sovereign rights were over a 12-mile zone. After UNCLOS, some 36% of the world’s waters (by surface area, not volume) have been excluded from the “common heritage of humankind”.

The current “high seas” cover 64% area wise and volume wise amount to over 90%. But the workings of ocean currents lead to huge concentrations of phytoplankton – the crucial base of the fisheries food chain – being disproportionately deposited within EEZs so that 87 coastal states control over 95% of the world’s fisheries and because of over-fishing, replenishment rates are seriously threatened. The world high water mark for fish catch, never since repeated, was 90 million metric tonnes in 1989 with subsequent catches stagnant or declining. So much so, that at current rates it is estimated that that all the world’s fisheries can collapse by 2050 or even earlier as ocean acidification and habitat destruction are also taking their toll. Predatory fishing by the more powerful fishing companies of the richer and more prosperous states is a fact. Also 87% of known and estimated hydrocarbon reserves and many mineral deposits are to be found among EEZs.

When EEZs overlap it is left to the two countries involved to sort matters out. The region of greatest tension among neighbouring countries caused by such overlaps, by economic ambitions, by political tensions and above all by the geopolitical face-off between the US and China (which includes military preparations) is the Asia Pacific.

There is no proper Global Ocean Treaty that aims to seriously protect the “common heritage” of the High Seas. The ISA is more concerned to promote the eventual extraction of poly-metallic nodules containing valued mineral accretions from the seabed than with protecting the environment. No licence for exploratory mining has been turned down. Environmental Impact Assessments are done by the contracting company and are not independently verified. The ISA is dismissive of the concerns of environmental organisations like Greenpeace about protecting the seabed from such future mining or from the various powerfully negative environmental side effects that would be involved such as noxious plumes, noise and light pollution. Insofar as there are moves towards a Global Ocean Treaty, the ISA is not alone in wanting a soft treaty that gives priority to economic exploitation over environment concerns.

Summing up

The engine that keeps capitalist development running is the constant pursuit of profit, which necessarily requires the constant pursuit of economic growth through cumulative exploitation of resources; and that too within a framework of multiple nation-states where the strongest and most powerful want to set the rules of international order and management as much as possible in their own favour.

The ~~sane~~ alternative, for example, in the Asia Pacific (and elsewhere) would be the setting up of a genuinely impartial regional body whose number one priority would be the protection of the oceanic environment; the imposition of the most severe limits on the exploitation of the wealth of the seas and oceans; widening the domain of the “common heritage of humankind” by retracting these EEZs; and organising the distribution of whatever level of resource extraction that is allowed in the “global commons”, in proportion to the respective population sizes of the countries concerned.

Of course this is not going to happen. Instead, the process of privatising the seas via UNCLOS has been joined by the process of privatising the atmosphere through pollution permits and carbon trading. Outer Space in military and nuclear terms has for some time now already been privatised for the so-called security of some countries. We are not just going to cross the ‘two degree’ climate change barrier but are well on the way to racing beyond it, while other forms of grave ecological despoliation on land and on the seas are also guaranteed. Future generations will not forgive us for failing to sufficiently protect and preserve our global commons.

## [2.0] Area: Ban Treaty

### Aff---Ban Treaty---Colonialism Advantage

#### The dismissal of the ban treaty is the latest manifestation of the nuclear field’s intellectual racism.

Turner et al. 20, \*Katlyn M., research scientist in the Space Enabled Research Group at the MIT Media Lab. \*Lauren J. Borja, postdoctoral fellow at the Center for Global Affairs and Research at Lawrence Livermore National Laboratory. \*Denia Djokić, Postdoctoral Research Fellow at the Project on Managing the Atom at the Belfer Center for Science and International Affairs. \*Madicken Munk, postdoctoral scholar at the National Center for Supercomputing Applications at the University of Illinois at Urbana–Champaign. \*Aditi Verma, Stanton Nuclear Security Postdoctoral Fellow at the Belfer Center’s Project on Managing the Atom and the International Security Program (8-24-2020, "A call for antiracist action and accountability in the US nuclear community", Bulletin of the Atomic Scientists, <https://thebulletin.org/2020/08/a-call-for-antiracist-action-and-accountability-in-the-us-nuclear-community/>)

At the time of its inception, the nuclear field was not immune to these racist and colonial ideas; rather, such norms, politics, and attitudes were ingrained from the outset within its research practices, policies, legal frameworks, and culture. For example, the Manhattan Project—the largest united scientific undertaking of its time—created many of its production facilities by displacing vulnerable minority communities, often without compensation. Many such US nuclear facilities, particularly those for the weapons program, were built without consent on indigenous land, displacing or poisoning those who lived in the vicinity.

Racist policies and attitudes remained entrenched in the US nuclear weapons enterprise as it built, tested, and ultimately used nuclear weapons. The women who worked on uranium enrichment at what would become Oak Ridge National Lab were forced to keep the color line: Black women who were employed at the Y-12 National Security Complex lived in racially segregated facilities, and generally had lower paying jobs at the facility than whites. During the Trinity test, the United States detonated the world’s first weapon of mass destruction on land bordering the Mescalero Apache Reservation in New Mexico. The language and rhetoric around the nuclear detonations at Hiroshima and Nagasaki in Japan were steeped in racist and dehumanizing ideas about Japanese people and culture. These racist ideas were difficult to disentangle from the military threat of Japan as an enemy of the United States and the West and became entrenched in the institutionalized but false narrative that nuclear weapons helped win World War II.

After World War II, as the United States and other nations moved to expand their nuclear weapons capabilities and started to use nuclear technology for electricity production, colonial and racist policies continued to frame the field. Nuclear weapons relied on uranium mined from countries such as Congo, Niger, South Africa, Gabon, Madagascar, and Namibia. Nations with a thriving nuclear energy industry and weapons program such as France continually contested the “nuclearity”—the degree to which a country’s activities count as being nuclear—of these countries to justify denying them economic benefits or occupational protections in exchange for mined uranium. As a result, the health and environmental costs of uranium mining were excluded from calculations on the cost of nuclear power, and workers did not receive protections against radiological hazards.

To date, although nuclear weapons have only been used once in a hot war, weapons were detonated with abandon in colonial (or former) territories of the United States, United Kingdom, France, Russia, and China in the name of nuclear weapons testing. While these testing sites were considered “remote” by European and American standards, they were not at all so to the predominantly Indigenous and people of color living in the Pacific Islands, Algeria, and Australia. Even judging by the norms of the time, the actions of the nuclear-armed nations were dismissive of and dehumanizing to people of color around the world.

When the capabilities of nuclear technology expanded to include commercial electricity production, the majority of the countries that reaped the benefits of nuclear energy were in the Global North. While the ostensible goal of Eisenhower’s Atoms for Peace program launched in 1953 was to share and spread the benefits of nuclear technology globally, it was also to control its distribution. The program sought to supply nuclear technologies to developing nations and police their use in order to prevent nations from developing their own indigenous nuclear technology and the capability to build nuclear weapons. Eisenhower’s promise to help developing countries use nuclear energy for peaceful purposes therefore served as a premise for the United States to purposely structure the subsequent nuclear governing bodies, in particular the International Atomic Energy Agency and later treaties and conventions, to uphold its preferred global order, which was advantageous to Western nations.

Perhaps the most lasting legacy of global colonialist attitudes in the nuclear field is the policy and discourse surrounding the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). The nonproliferation regime of the NPT privileges “order” and security for the Western countries over justice, while leaving little space for considerations of race. The very notion of nuclear weapon and non-weapon states, and some of the language deployed to characterize this divide, perpetuates Western hegemony and dominance over the Global South. The existing nonproliferation regime lends credence and legitimacy to colonial attitudes about nuclear technology by legitimizing the possession of nuclear weapons by the United States, United Kingdom, France, Russia, and China while controlling the possession of both weapon and energy technology by other countries through a complex and intrusive international framework of safeguards and technology control. The NPT further gives nuclear weapon states a “big stick” over non-nuclear weapon states to lend legitimacy to military actions such as regime change against them. Finally, while the NPT calls for the weapon states to pursue “general and complete disarmament,” no nuclear weapon state has meaningfully complied with its treaty obligations to disarm—with the result that it indefinitely preserves an inequitable and unjust world order. (Despite early significant reductions in global nuclear warheads, progress has stalled and the rhetoric and policies of recent years have pointed toward nuclear modernization and arsenal expansion rather than disarmament.) Not only did the nonproliferation regime create an unjust and inequitable world order, it did so on the basis of a deeply flawed premise that proliferation could be prevented through supply-side technology controls.

The nuclear weapon states often minimize nuclear security causes championed by members of the Global South. At the 1955 Bandung Conference, representatives from 29 Asian and African countries called for disarmament and an end to the nuclear arms race, fully 15 years before the NPT came into effect. After France’s first nuclear test in 1960, widespread protests across the African continent condemned nuclear weapons testing in Algeria. Despite the outcry, the French government continued nuclear weapons testing at its Centre Saharien d’Expérimentations Militaires until 1966. To this day, France has not adequately compensated Algerian victims for the radioactive legacy of these tests. When South Africa’s apartheid government began to fray in the 1980s, it and the United States feared that its Western-aided nuclear program would fall into the hands of local liberation movements headed by African National Congress leaders. These fears played an important role in the apartheid government’s decision to unilaterally dismantle its weapons program and sign the NPT.

Most recently and notably, the United States dismissed and pressured its allies into dismissing the Treaty on the Prohibition of Nuclear Weapons, whose negotiation was presided over by Costa Rican Ambassador to the United Nations Elayne Whyte Gómez. Many established voices in the US nuclear community echoed the claim that the ban treaty would undermine the nuclear nonproliferation regime, despite the fact that it is fully in line with states’ NPT commitments to disarm. Additionally, the International Campaign to Abolish Nuclear Weapons received the 2017 Nobel Peace Prize for its “groundbreaking efforts” to establish the treaty, signaling the treaty’s gravity and importance and the statement it makes about peace and nuclear weapons. The minimization and delegitimization of the treaty’s early success—82 parties have signed on to date, all but five from the Global South—is part of a historic pattern of dismissing the united efforts and voices on nuclear policy from the Global South.

In the United States, the imprint of the norms and values of the dominant class that shaped the field at the dawn of the nuclear age are omnipresent, even though they often go unquestioned and unnoticed. For example, the radiological safety standards used today draw on knowledge produced from deliberately cruel human experiments, mostly carried out on Black, Indigenous, and people of color. The contributions of Black leaders and artists to anti-nuclear movements are often ignored or forgotten. Serious environmental contamination from US military nuclear activities affecting Indigenous communities such as the Yakama Nation near Hanford, Washington—which made plutonium for the bomb dropped on Nagasaki and the entire US nuclear weapons program through 1987—is barely mentioned in a footnote of a Congressional report. During the Cold War, the US Navy recruited Black laborers from the historically Black neighborhood of Bayview-Hunters Point in San Francisco, California to clean the radioactive contamination from its ships that were brought home from nuclear tests in the Pacific Ocean. Black and Indigenous communities in the United States have disproportionately borne the burden of pollution from nuclear fuel cycle facilities such as uranium mines and mills. Yucca Mountain Repository, the nation’s primary site for permanent commercial nuclear waste disposal, was chosen without the consent of the indigenous communities that would be affected (or even of the state of Nevada itself). Even when consent is given, a moral hazard persists when economically disadvantaged Indigenous communities are targeted with financial incentives, as in the case of siting a radioactive waste storage site on Goshute tribal land.

While most of the world’s commercial nuclear reactors are still situated in the Global North, the nuclear facilities that are found in the Global South are often legacy and waste-bearing facilities. Many position nuclear energy as a necessary technology in meaningfully reducing carbon emissions and mitigating climate change, yet most countries in the Global South—which are projected to disproportionately bear the impact of climate change—do not experience commensurate economic or infrastructural benefits from nuclear energy. The dominant narrative surrounding the future use of nuclear energy in these Global South nations is founded on the purported technological prowess and moral superiority of Western nations, the inevitability of the Global North as a technology supplier to vast potential markets in the Global South, and the industrial and institutional backwardness of the Global South nations. These perspectives are problematic because they undermine the institutional and legal infrastructure of and disregard the locally produced technology development and innovation practices of the Global South. Furthermore, claims that technological fixes will address climate injustices obscure the complex relationship of the nuclear fuel cycle with aspects of race, gender, and socioeconomic status.

Today it is widely accepted that colonialism was and is harmful, that racism is real and wrong, that climate change is real and imminent, and that equity is something policymakers at all levels should strive for. However, these values are not reflected in the nuclear field, obscuring the complicity of nuclear technology and policies in racial inequity. Rather, the homogeneity in the nuclear community ensures that the way the field is taught, produces research, and makes policy is constricted to a single frame of reference overwhelmingly informed by the experiences and perspectives of a historically dominant class. As a result, not only are certain forms of knowledge that acknowledge the racist history of the field not valued and therefore rarely produced, but, even when produced, they are erased from the intellectual canons of the nuclear community entirely.

### Aff---Ban Treaty---Stability Advantage

#### Nuclear modernization, accidents, and miscalc make a nuclear extinction inevitable. Only the Ban Treaty solves, AND it stops all future wars from going nuclear.

Fihn ’18 (Beatrice Fihn – Masters in Law @ the University of London, Executive Director of the International Campaign to Abolish Nuclear Weapons, winner of the 2017 Nobel Peace Prize, “Time to step off the nuclear tightrope,” 7 January 2018, https://www.ft.com/content/b0768482-e0da-11e7-a8a4-0a1e63a52f9c)

There is one good thing to come from the nuclear war of words between North Korea and the US: people are realising what they had largely forgotten since the end of the cold war, that our extinction could be one insult away. Quite rightly, they are compelled to change that.

We tend to think of nuclear weapons as historical relics. Grainy black and white footage of mushroom clouds, survivors of Hiroshima and Nagasaki combing through rubble, far flung test sites in Siberia and Nevada. Gone is the fear of instant Armageddon and the equilibrium between two blocs that was used as justification for deterrence. Gone are the fallout shelters.

But the thousands upon thousands of nuclear warheads that filled us with that fear remain. As do the political and military systems that keep them on standby, ready to be launched in minutes. Learning to live under these conditions in blissful acceptance has been a great mistake. Fear is rational. The threat is real. We have avoided nuclear war not through prudent leadership but good fortune. Sooner or later, if we fail to act, our luck will run out.

If you ask a mathematician, they will tell you the likelihood of nuclear weapons being used at any given time fluctuates — it is higher than it was last year thanks to North Korea and the US. But that chance is always greater than zero. That means, given enough time, it is certain they will be used. Bertrand Russell put it best in his anti-nuclear weapon manifesto, published jointly in 1955 with Albert Einstein, in which he wrote: “You may reasonably expect a man to walk a tightrope safely for ten minutes; it would be unreasonable to do so without accident for two hundred years.”

At dozens of locations around the world — in buried missile silos, on submarines, and aboard planes — lie 15,000 objects of humankind’s destruction.

They serve no military utility, they level entire cities and murder civilians indiscriminately. They are the opposite of today’s modern military needs and the laws of war.

They did not deter North Korea from developing their own nuclear weapons, and we should not rely on cool heads. If you are uncomfortable with Kim Jong Un or Donald Trump having the power to destroy us all, then you are uncomfortable with nuclear weapons.

They did not give us the strategic advantage with North Korea. Maintaining nuclear weapons has only fuelled nuclear ambitions for the country, not dampened them.

I have a solution to the North Korean situation. Luckily, it solves all these other problems too. We all ban nuclear weapons. Eliminate them. Unrealistic, you say? In July this year, 122 nations joined a new UN treaty to prohibit nuclear weapons. We have the framework to create a new international norm that casts these weapons not as a symbol of power but as a symbol of shame.

They said banning chemical weapons, biological weapons, landmines and cluster munitions was impossible. But we did. These examples show that it can be made a reality. Governments answer to people, and people know nuclear weapons no longer make sense.

The US, Russia and China did not join the landmines or cluster munitions treaties, but they changed their policies because the move made them unacceptable. We can change the nuclear equation too. And we must, because the option is to simply wait for nuclear weapons to be used

It is scary — even if North Korea did not have the bomb. A rogue government with its finger on the button is not the only threat. How will deterrence stop terrorists from stealing nukes or attacking bases? How will it stop hackers from hijacking nukes? As long as they exist, these weapons will be used. How much longer will we walk this tightrope before we fall?

#### The Ban Treaty is the walking the tightrope of ensuring verification and compliance, while also creating a moral requirement for nuclear weapons states to join.

Yoshida ’18 (Fumihiko Yoshida – PhD in International Public Policy @ Osaka University, served as a member of the Advisory Panel of Experts on Nuclear Disarmament and Non-Proliferation for Japan’s Minister of Foreign Affairs, nonresident scholar at the Carnegie Endowment for International Peace, trustee of the Sasakawa Peace Foundation and was previously a visiting professor at the International Christian University, “UN on Nuclear Disarmament and the Ban Treaty: An Interview with Izumi Nakamitsu,” 20 February 2018, https://www.tandfonline.com/doi/full/10.1080/25751654.2018.1436385)

Fumihiko Yoshida (FY):

Today, I would like to ask you some questions mainly about the Treaty on the Prohibition of Nuclear Weapons (TPNW).1 First of all, how do you evaluate the treaty, Ms. Nakamitsu?

Izumi Nakamitsu (IN): The TPNW is a historical step forward to a world free from nuclear weapons. It is the first multilateral nuclear disarmament treaty adopted at the UN in more than 20 years. In recent decades, there is a widespread perception that progress toward this goal has stalled. The pace of nuclear arms reductions has slowed. Nuclear weapon systems remain on high alert, available for launch within minutes. Nuclear-armed countries are modernizing and upgrading their arsenals. Several of these States are also continuing to build up the overall size and diversity of their warheads and delivery systems. Today, the annual global military expenditure amounts to $1.7 trillion. There are many self-described realists in the world who call disarmament a utopian dream, they consider disarmament can only be realized in ideal circumstances of world peace.

However, from my point of view, this cynical worldview turns our present situation on its head. To paraphrase Dag Hammarskjöld, the goal of disarmament is not to bring us to heaven, but rather it is to spare humanity from ever again suffering from horrors like those experienced by the Hibakusha.

FY:

The treaty text was adopted in a negotiation conference even though there was no political will on the part of Nuclear Weapon States (NWSs) to join in the treaty. How do you see this decision made by most of Non-Nuclear Weapon States (NNWSs)?

IN:

Even though NNWSs are not monolithic, they have a common understanding that there has been only a little progress in nuclear disarmament. This is how they see the situation – NWSs have committed under the Article 6 of the NPT to pursue multilateral negotiations on nuclear disarmament in good faith, but, for many NWSs, it seems they have forgotten the commitment. As long as we continue to have nothing to complement Article 6, nuclear disarmament will not progress. This is their interpretation.

NNWSs had expected that there would be more tangible progress on nuclear disarmament by the 2015 NPT Review Conference, based on the action plan agreed at the 2010 NPT Review Conference. I cannot say anything on this with certainty since I was not then in charge of disarmament affairs. But it seemed that many NNWSs had a position to wait until 2015 with some expectation that the NPT Review Conference would be able to produce positive results. After the NPT review conference failed to do so, NNWSs chose to rapidly move to the UN General Assembly (UNGA) as a negotiating forum.

The number of countries which voted yes for the TPNW was 122, and a similar number supported the UNGA resolution2 that mandated a negotiating conference leading to the treaty. This shows that frustration had mounted among many in the international community over the stalled pace of nuclear disarmament. And NWSs have failed to recognize this frustration.

It is said a “grand bargain” is embedded in the NPT related to nuclear disarmament and nonproliferation and the peaceful uses of nuclear energy. Part of this bargain requires NNWSs to undertake verifiable nuclear nonproliferation commitments. In exchange for this, NWSs are required to advance nuclear disarmament. It is because of this bargain that this treaty, though structured in an unequal manner, has survived. Nevertheless, NWSs stay focused mostly on nuclear nonproliferation, while the pace of nuclear disarmament has ground to a halt. This is why frustration has mounted among NNWSs.

FY:

Resolution L.41, adopted on 27 October 2016 at the First Committee of the UNGA, requested to convene a conference in 2017 to negotiate a “legally binding instrument to prohibit nuclear weapons and leading towards their total elimination.” Namely, the resolution did not necessarily call for an adoption of a comprehensive ban treaty, instead, it gave some flexibility to a negotiation conference about possible contents of a treaty. But the treaty eventually adopted by the conference was much more demanding as if it looked like a Nuclear Weapons Convention. How and why did advocates of the treaty choose this way?

IN:

There were various views among countries which promoted a ban treaty. Initially, some thought of a simple treaty which bans only the use of nuclear weapons. But more and more countries gradually came to support a treaty to comprehensively ban nuclear weapons. This is a result of diplomatic and political dynamism created by a group of core countries in the negotiation. So which country was most influential? I think Austria, Mexico, and South Africa were among them.

Having said that, I must also add there were various differences among these countries. Article 4 of the TPNW, which specifies paths towards the total elimination of nuclear weapons, became very lengthy throughout the negotiation. The advocates of the treaty tried not to make it an obstacle to the participation of NWSs. The final text is a product of such intention. Since a group of core countries, I think, intended to make the treaty more effective in the future, they sought to build in more flexibility in interpretations and implementation of articles.

FY:

Abolition of nuclear weapons is a hard work both politically and technically in the first place. We cannot write all the ideal requirements in a treaty. Nevertheless, the advocates of the ban treaty energetically sought more desirable clauses, and they have reached to the point where we are now.

However, I also have to say this. More deliberately a complex process towards the abolition of nuclear weapons is designed, more questions we come up with.

IN:

Since this is what UN Member States produced, I cannot make a detailed comment on this as the representative of UN Office for Disarmament Affairs (UNODA). I can only say they struck a delicate balance. By retaining clauses which could bring us to a world without nuclear weapons, they refused to abandon their ambition. At the same time, they tried to make it as practical and effective as possible by leaving the door open to everyone. This is how Article 4 in the final text was made. The emphasis is on getting ready for existing NWSs to join in the treaty sometime in the future.

Therefore, more details have to be worked out. For example, Article 4 stipulates that, if a NWS wishes to accede to the treaty, the country is required to cooperate with the “competent international authority” towards the removal of its nuclear arsenal. But, at this moment, it is impossible to identify such an organization that would be able to verify the destruction of nuclear weapons, or to determine what role the IAEA will be likely to play. As a result, the clause became rather ambiguous. Since it is not expected that any of nuclear armed states will join in the treaty for the time being, how a “competent international authority” is formed would be subject to future negotiations. In this way, the final text has changed substantially from the original draft.

FY:

When the resolution L.41 was adopted, did anybody in the UN expect a treaty which would prohibit nuclear weapons in such a comprehensive manner? Or did you expect some other variations?

IN:

As part of his 5 Point Plan on nuclear disarmament, former UN Secretary-General Ban Ki-moon promoted a comprehensive ban or a framework of separate, mutually reinforcing instruments as pathways to nuclear disarmament. But it is not likely that NWSs will soon become members of the ban treaty. Ban encouraged possible opponents of a ban treaty to at least take part in the negotiations. Many officials at the UNODA under the administration of Ban Ki-Moon preferred to think that even countries in the opposition camp should participate in the open-ended working group convened by the General Assembly to address concrete effective legal measures, legal provisions, and norms that will need to be concluded to attain and maintain a world without nuclear weapons.

However, from the convening of the open-ended working group onwards, NWS, along with allied nations, declared that they would not take part in discussions, let alone the negotiations. As far as I can see, such an attitude has backfired on them. Strong opposition from ambassadors of the US and some other countries was a sign of intensified antagonism between NWSs, Nuclear Umbrella States, and NNWSs.

FY:

I am just wondering if the TPNW is an international humanitarian instrument or a disarmament treaty. I heard there was a debate in this regard in the negotiation process.

IN:

At the first negotiating session in March, I was not in the current post. What I only heard is that, the three conferences convened between 2013 and 2014 on the humanitarian impact of nuclear weapons were a driving factor behind the movement to prohibit the use of the weapons.

The case of chemical weapon is relevant, but gives us a bitter lesson. The 1925 Geneva Protocol banned the use of these weapons but not their stockpiling. Consequently, they continued to be widely possessed until the 1990s. But the comprehensive ban on chemical weapons – the Chemical Weapons Convention – finally opened a path to the total elimination of these weapons.

In order to make a nuclear weapon ban treaty more effective, member states felt the prohibition of use was not enough. A comprehensive ban and the verifiable destruction of all nuclear weapons have to be stipulated in the treaty. I heard South Africa made a very strong case in this direction. South Africa, which actually abandoned its nuclear arsenal, was quite influential in realizing the TPNW.

The influence of non-governmental organizations which have called for a total ban was striking as well. Above all, the message from the survivors of atomic bombings in Hiroshima and Nagasaki could not go unnoticed.

FY:

I think some factors worked as a driving force to the TPNW. That is, the frustration over stalled nuclear disarmament in betrayal of many people’s wishes, the indignation at nuclear weapons on humanitarian grounds, and a sense of crisis that nuclear weapons might be used and bring about the extinction of humanity if this problem goes unaddressed.

### Aff---Ban Treaty---SDGs Advantage

#### The Ban Treaty solves global SDG progress, eliminates global inequality, stops mass biodiversity loss, and eliminates food insecurity

Hunt ’18 (Erin Hunt – Program Manager at Mines Action Canada, member of the civil society negotiating team during the 2017 process to negotiate the Treaty on the Prohibition of Nuclear Weapons with the Nobel Peace Laureate International Campaign to Abolish Nuclear Weapons, “SUSTAINING DESTRUCTION: NUCLEAR WEAPONS AND THE SUSTAINABLE DEVELOPMENT GOALS,” 25 June 2018, https://impakter.com/sustaining-destruction-nuclear-weapons-sustainable-development-goals/)

Even if nuclear weapons are never used again, their continued existence hinders the achievement of the SDGs. Currently, billions of dollars are being poured in the production, development and modernization of nuclear weapons. For example, it is estimated that the United States alone will spend approximately $348 billion on its nuclear arsenal over the next decade. That is about $35 billion a year or $95 million a day. The total estimated cost of deploying and modernising American nuclear arsenal is more than $1.2 trillion over the next 30 years not including environmental liabilities (currently, these are over half a trillion dollars). Meanwhile in, the United Kingdom, the modernization of their nuclear arsenal is estimated to cost at least £31 billion ($41.6 billion) in addition to the operating costs of the current systems which is thought to be around £2 billion a year.

There are varying estimates of how much China, the Democratic People’s Republic of Korea, France, India, Israel, Pakistan and Russia spend annually on their nuclear weapons all of which are in the billions of US dollars. Investment in nuclear weapons is not limited to the governments of nuclear armed states. Financial institutions in 24 different countries made more than $525 billion available to publicly held nuclear weapon producing companies between 2014 and 2017. Globally the amount of money expected to be spent on nuclear weapons over the next few decades should be counted in billions and trillions of US dollars.

In contrast to the vast sums of money being sunk into nuclear weapons, the amount of money spent on achieving the SDGs is quite modest. Net official development assistance by members of the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee was merely $146.6 billion in 2017. The OECD Development Assistance Committee includes 29 states compared to the 9 nuclear armed states.

The world needs more investment in sustainable development if we are going to reach the Sustainable Development GoalsSDGs. The World Health Organization reports that “achieving the SDG health targets would require new investments increasing over time from an initial US$ 134 billion annually to $371 billion by 2030.” All SDGs will require additional investments but some of those funds are currently being squandered on nuclear weapons. Even if they are not used again, nuclear weapons have a negative impact on global progress towards the SDGs by diverting much needed funding.

These threats to global progress have not gone unnoticed. The impact of nuclear weapons on sustainable development and humanity was one of the motivators of the Humanitarian Initiative on Nuclear Weapons meetings which eventually lead to the negotiation of the Treaty on the Prohibition of Nuclear Weapons in 2017.

The Treaty is grounded in humanitarian concerns about nuclear weapons and therefore is strongly related to the SDGs. As states begin to ratify and implement the Treaty, we expect to see progress towards the SDGs.

The General Obligations in Article 1 outline the core prohibitions of the treaty including prohibitions on production, transfer, stockpiling, testing and use. Since these prohibitions are aimed at preventing future nuclear weapons explosions and related casualties, humanitarian harm and environmental harm, a number of SDGs have direct connections. In particular:

SDG 3 “Ensure healthy lives and promote well-being for all at all ages,”

SDG 6 “Ensure availability and sustainable management of water and sanitation for all,”

SDG 14 “Conserve and sustainably use the oceans, seas and marine resources for sustainable development” and

SDG 15 “Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss” are especially relevant to the prohibition of the use or testing of nuclear weapons.

In addition, new international humanitarian law furthers SDG 16 “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

As explored previously, a reduction in spending on nuclear weapons could allow more funding and research to be devoted to the Sustainable Development Goals. It is possible that prohibiting the development, production and manufacturing of nuclear weapons will contribute to progress on a number of SDGs including SDG 1 “End poverty in all its forms everywhere”, SDG 2 “End hunger, achieve food security and improved nutrition and promote sustainable agriculture” and SDG 10 “Reduce inequality within and among countries” in particular.

The positive obligations outlined in Articles 6 and 7 of the Treaty when implemented will have the most direct impact on the realization of the SDGs. When implemented, Article 6(1) on assistance to individuals affected by nuclear weapons use or testing will have a direct impact on SDG 16 regarding Peace, Justice and Strong Institutions by filling the legal gap in regards to nuclear weapons and by promoting the rights of those affected. Obligations regarding assistance to individuals affected by nuclear weapons use and testing will further contribute to the achievement of SDG 3 on Good Health and Well-Being, especially due to the principle of non-discrimination in the text. The non-discrimination principle means that citizens with similar needs should receive similar services regardless of the cause so improving services to victims of nuclear weapons use and tests should improve services to all citizens with similar needs. Assistance that is implemented in an age- and gender-sensitive manner can contribute to SDG 5 “Achieve gender equality and empower all women and girls” by addressing the current health impacts of nuclear weapons detonations which disproportionately affect women and girls.

Article 6(2) regarding environmental remediation will contribute to the realization of a number of Sustainable Development Goals. The implementation of environmental remediation provisions in the prohibition treaty will have the greatest impact on SDGs 14 on Life below Water and 15 on Life on Land as attempts to clean up contamination on land and in the oceans may restore damaged ecosystems or at minimum mitigate the ongoing damage to these ecosystems. There is significant evidence that contamination from the use and testing of nuclear weapons has had an impact on land and marine flora and fauna in addition to rendering wide stretches of land inaccessible. If land can be made safe for sustainable use, environmental remediation may contribute to realizing the targets of SDG 2 on hunger, food security and sustainable agriculture. Environmental remediation will also have an impact on SDG 3 on Good Health and Well-Being as well as SDG 6 regarding Clean Water and Sanitation. Finally, Article 7’s provisions on international cooperation echo SDG 17 (Strengthen the means of implementation and revitalize the global partnership for sustainable development).

The continued existence of nuclear weapons threatens global progress toward the Sustainable Development Goals. Any new use of nuclear weapons would all but guarantee that the world will fail to meet the SDGs while the ongoing maintenance and modernization of nuclear arsenals continues to divert scare resources away from programs supporting the SDGs.

If the international community truly wants to make progress towards the SDGs, then nuclear weapons must be eliminated. Recent history has shown that the best way to eliminate a weapon is to prohibit if first. We cannot build a better world for all with the nuclear sword of Damocles hanging over our heads constantly. States that are truly committed to the SDGs should take meaningful steps towards the elimination of nuclear weapons starting with signing and ratifying the Treaty on the Prohibition of Nuclear Weapons.

### \*\*NEG\*\*

### Neg---Ban Treaty

#### It undermines the Additional Protocol, allows under the radar prolif, and makes the proponents appear hypocritical.

Highsmith and Stewart 18, \*former Deputy Legal Advisor at the US Department of State, adjunct professor at Georgetown Law \*\*Nonresident Fellow in the WMD, Nonproliferation and Security programme at the Stimson Center and an adjunct assistant professor at the Georgetown University School of Foreign Service (Newell and Mallory, 1-29-2018, “The Nuclear Ban Treaty: A Legal Analysis”, *Survival, Vol 60. Iss. 1*, <https://doi.org/10.1080/00396338.2018.1427371>, accessed 4/29/22)--js

One more verification issue severely undermines the credibility of the ban treaty: by making reference to verifying the absence of undeclared material or activities, it essentially requires states possessing nuclear weapons to adopt the Additional Protocol in addition to INFCIRC/153,15 but it does not require states without nuclear weapons to adopt the Additional Protocol. As a political matter, the treaty’s proponents appear hypocritical in imposing the best available standard of IAEA verification on the states possessing nuclear weapons while neglecting to impose it on themselves. This omission provides another easy basis for a to block ratification of the treaty. Most damning, it allows states that do not currently possess nuclear weapons a potential avenue for clandestine nuclear-weapons development of the kind pursued by Iraq, North Korea and Iran while they were parties to the NPT and subject to INFCIRC/153 safeguards. As a matter of national security, no state possessing nuclear weapons could countenance such an outcome.

To put it simply: the lesson of the 1990s was that basic safeguards might not be enough to stop a determined proliferator, and NPT states have spent 25 years promoting the Additional Protocol as a result. The ban treaty risks undoing that work.

#### 12-month wait period and endless wars mean that nuclear redeployment would be either late or impossible.

Highsmith and Stewart 18, \*former Deputy Legal Advisor at the US Department of State, adjunct professor at Georgetown Law \*\*Nonresident Fellow in the WMD, Nonproliferation and Security programme at the Stimson Center and an adjunct assistant professor at the Georgetown University School of Foreign Service (Newell and Mallory, 1-29-2018, “The Nuclear Ban Treaty: A Legal Analysis”, *Survival, Vol 60. Iss. 1*, <https://doi.org/10.1080/00396338.2018.1427371>, accessed 4/29/22)--js

The 12-month period is considerably longer than under the NPT (three months), the Chemical Weapons Convention (90 days) or New START (three months). An adversarial state’s nuclear-weapons programme could be significantly advanced in 12 months, particularly if that state had previously developed nuclear weapons (or meaningfully explored nuclear-weapons development). If that adversarial state was also a party to the ban treaty, a state formerly possessing nuclear weapons that had joined the ban treaty would have remedies under international law for the adversary’s treaty breach, but such remedies might not include reconstituting its own nuclear weapons programme.16 Even if the state formerly possessing nuclear weapons asserted that such a remedy was available, other parties to the treaty might well disagree, and charge it with breaching the treaty. If the adversarial state was not a party to the treaty, the state formerly possessing nuclear weapons would have no treaty-compliant recourse but to wait for the expiration of the 12-month period.

In other words, if it became party to the ban treaty, the United States could find itself in a situation where it discovered an adversarial state was developing nuclear weapons, yet it would have to wait a year – or longer – before it could legally begin rebuilding its own nuclear programme.

Equally problematic is the inability of a party to withdraw as long as it is involved in an armed conflict. Thus, long-running conflicts like those in Vietnam and Afghanistan could prevent withdrawal for far longer than the 12-month waiting period. Indeed, State A could take advantage of State B’s involvement in an intractable conflict to gain a lengthy nuclear-breakout advantage. This would be the case even if State B was defending itself from a third state’s aggression (and even if that third state was acting as a proxy for State A). This provision also raises knotty questions about the definition of ‘armed conflict’, the apparent inclusion of internal armed conflicts and who would be responsible for determining that a withdrawing state is in fact involved in an armed conflict.17 Finally, as drafted, this provision blocks withdrawal not only during an armed conflict that is ongoing when the 12 months expires, but even after that particular armed conflict ends, if the state has become involved in another armed conflict in the interim. This is a particular problem for the United States, which has been involved in one conflict or another for much of the post-Second World War period.

#### Allies explicitly believe it’s not CIL.

Highsmith and Stewart 18, \*former Deputy Legal Advisor at the US Department of State, adjunct professor at Georgetown Law \*\*Nonresident Fellow in the WMD, Nonproliferation and Security programme at the Stimson Center and an adjunct assistant professor at the Georgetown University School of Foreign Service (Newell and Mallory, 1-29-2018, “The Nuclear Ban Treaty: A Legal Analysis”, *Survival, Vol 60. Iss. 1*, <https://doi.org/10.1080/00396338.2018.1427371>, accessed 4/29/22)--js

Any argument for establishing customary international law would also fail on the element of opinio juris. The states possessing nuclear weapons – as well as many of their allies – steadfastly and vocally reject the notion that non-possession of nuclear weapons is ‘rendered obligatory by the existence of a rule of law requiring it’. And while the vast majority of states do not possess nuclear weapons, almost all have treaty obligations not to possess nuclear weapons (pursuant to the NPT, nuclear-weapon-free-zone (NWFZ) treaties or the ban treaty once it enters into force), so we cannot readily conclude that they refrain based on a belief that they are compelled by customary international law.21 In other words, the ban treaty – like the NPT and the NWFZ treaties – underscores the fact that prohibitions against nuclear weapons are treaty-based, not matters of customary international law, and therefore the prohibitions apply only to the treaty parties, not all states. Further, the NPT and NWFZ treaties are premised on the existence of states possessing nuclear weapons; they do not purport to make possession of nuclear weapons by those states unlawful; and, indeed, they expressly provide for the participation of those states in the treaty regimes (in one way or another).

Finally, the ICJ found in 1996 that the use of nuclear weapons was not absolutely proscribed by international law:

international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self-defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization.22 The same reasoning would of course apply equally to possession of nuclear weapons.23

While the ban treaty does not contribute to creating a norm of customary international law, some advocates have spoken of creating a ‘norm’ in the nonlegal sense of increasing pressure on the states possessing nuclear weapons:

By stigmatizing nuclear weapons – declaring them unacceptable and immoral for all – the international community can start demanding and pressuring the nuclear-armed states and their military alliances to deliver what they’ve actually promised: a world free of nuclear weapons.24

Whether or not the treaty will have this effect, the rhetoric of its advocates sometimes blurs the line between norms of customary international law and ‘norms’ in a non-legal sense.25 The nuclear-weapons states (and perhaps their allies) will undoubtedly be vigilant and persistent in rebutting any suggestion that customary international law has been (or is being) established through the ban treaty. The North Atlantic Council, for example, has stated that NATO allies ‘would not accept any argument that this treaty reflects or in any way contributes to the development of customary international law’.26

#### Causes loose nukes, jeopardizes deterrence, and creates asymmetric advantages.

Highsmith and Stewart 18, \*former Deputy Legal Advisor at the US Department of State, adjunct professor at Georgetown Law \*\*Nonresident Fellow in the WMD, Nonproliferation and Security programme at the Stimson Center and an adjunct assistant professor at the Georgetown University School of Foreign Service (Newell and Mallory, 1-29-2018, “The Nuclear Ban Treaty: A Legal Analysis”, *Survival, Vol 60. Iss. 1*, <https://doi.org/10.1080/00396338.2018.1427371>, accessed 4/29/22)--js

While there is no legitimate risk of the ban treaty becoming customary international law, there is a risk that it could be used to pressure entities or individuals that are important to nuclear safety, security and non-proliferation. If some or all ban-treaty parties concluded that their citizens and companies must be prohibited from doing business with any entity involved in a nuclear-weapons programme, the treaty could impair essential nuclear-weapons maintenance in a state possessing nuclear weapons. This could also happen without governmental involvement if civil society decided to pressure companies not to do business with nuclearweapons-possessing states. If such a campaign were effective in persuading nuclear-weapons contractors to cease engaging in such work, it could result in unsecured or unsafe nuclear weapons, increasing the very risk the treaty was intended to eliminate. And it could negatively affect the deterrent value of NATO nuclear weapons at a time when Russia is resuming aggressive, destabilising activities reminiscent of the Cold War.

This risk should not be overstated, as the governments of the states possessing nuclear weapons and their allies would have a range of options for avoiding such consequences, especially given the economic weight (in trade and banking) they could bring to bear. Nevertheless, democratic countries such as the NATO allies, Japan and South Korea – and their commercial institutions – are more vulnerable to pressure from civil society than the non-NATO states that possess nuclear weapons.

#### Causes unhealthy competition, decks the IAEA, and at best drains resources for no reason.

Highsmith and Stewart 18, \*former Deputy Legal Advisor at the US Department of State, adjunct professor at Georgetown Law \*\*Nonresident Fellow in the WMD, Nonproliferation and Security programme at the Stimson Center and an adjunct assistant professor at the Georgetown University School of Foreign Service (Newell and Mallory, 1-29-2018, “The Nuclear Ban Treaty: A Legal Analysis”, *Survival, Vol 60. Iss. 1*, <https://doi.org/10.1080/00396338.2018.1427371>, accessed 4/29/22)--js

The treaty mandate to designate a competent international authority to verify elimination of nuclear-weapons programmes presents potential risks to the IAEA. In a world of scarce resources and a reluctance in many nations to fund international organisations, creation of a competing organisation with similar duties could weaken the IAEA’s already strained financial base. In addition, the IAEA already struggles to find enough qualified nuclear analysts and inspectors, and the new organisation would be a natural competitor for the limited pool of talent. Given that there is no reasonable prospect of a nuclear-weapons-possessing state joining the treaty, this organisation would drain resources without having any actual mission to accomplish. Moreover, if the competent international authority ever carried out actual duties in one of the nuclear-weapons-possessing states, there could be uncertainty – and even unhealthy competition – regarding the two organisations’ respective areas of competence and responsibility (as the IAEA experienced with the UN inspection missions in Iraq in the 1990s). It would be no mean feat to separate cleanly the competent international authority’s role of verifying elimination of weapons activities and the IAEA’s current role of verifying non-diversion of declared nuclear material and the absence of undeclared nuclear material or activities. Finally, even if the competent international authority never carried out its duties in a state possessing nuclear weapons, its very existence could undermine the IAEA’s authority if the agency were called upon (as it has been in the past) to examine nuclear-weapons-related activities in a non-nuclear-weapons state.

## [2.0] Other Areas

### Aff---Rotterdam Rules

#### Ratify the Rotterdam Rules to expedite and harmonize cargo processing---that untangles supply chain snags

Farrell 22, President of The Maritime Law Association of the United States. Its membership consists of 2,200 maritime lawyers and industry leaders. The association does not lobby because its members professionally represent a wide variety of interests, often conflicting. But on especially worthy public policies that would benefit from a legal solution with no downside, it adopts consensus resolutions, as it has done urging U.S. ratification of UNCLOS and the Rotterdam Rules (David J. Farrell, Jr, 1-28-2022, “Opinion: To Support U.S. Interests, Ratify UNCLOS and Rotterdam Rules”, Maritime Executive, <https://www.maritime-executive.com/editorials/opinion-to-support-u-s-interests-ratify-unclos-and-rotterdam-rules>)

The Rotterdam Rules

First, the Rotterdam Rules’ very goal is to encourage worldwide e-commerce to replace slow paper transactions dating from the earliest days of sail. Much of the world’s shipping industry is stuck in this archaic stamping, signing, sending, re-stamping, re-signing, copying, forwarding, and delivering of hard copy bills of lading and other shipping documents at each transportation link. This is due to outdated, sometimes conflicting shipping treaties. One, the Hague Rules, goes back to 1924, implemented in the U.S. by the 1936 Carriage of Goods by Sea Act. A lot has changed since then with multi-modal shipping of containers by ship, train, and truck.

Because shipping is so international, legal uniformity, commercial predictability, and worldwide harmonization with modern containerization and e-commerce is essential to reducing cargo processing time and errors which result in supply chain snags.

The Rotterdam Rules provide the needed international legal regime to support containerized e-commerce and reductions in transportation time resulting from more efficiently moving cargo on its ocean leg, as well as its prior and subsequent land legs in multi-national transportation transactions.

Because the U.S. role as cargo importer and cargo exporter occupies such a major segment of the world’s sea trade, the Rotterdam Rules will need to be adopted by the U.S. before the rest of the world’s maritime countries sign on -- and they will. The U.S. has to make the first move -- and we should.

The Rotterdam Rules will not only speed things up; they’re also good for the U.S. Most Americans are unaware that there are almost no commercial ships operated internationally by U.S. companies: Virtually all of our outgoing and incoming cargo is carried on foreign ships. Because the Rotterdam Rules level the liability playing field for U.S. cargo interests vis-à-vis foreign ships and incentivize onboard cargo safety, ratification of the treaty will benefit exporting American cargo growers, producers, and manufacturers as well as importing American consumers.

Certainly much of the supply chain crisis was brought on by the pandemic’s stay-at-home online shopping, which may or may not subside in the future. And while there will continue to be supply chain challenges in overcoming a shortage of truck drivers, chassis, and warehouse space at U.S. ports and in modernizing port infrastructure, speeding up millions upon millions of routine cargo transportation legs with e-commerce supported by uniform international law governing worldwide transactions is a no-brainer.

The Rotterdam Rules will accomplish that. Supported worldwide by ocean carriers, shippers, receivers, and insurers, the Rotterdam Rules will take advantage of e-commerce technology and smooth cargo discharge through our ports. The Senate should ratify the Rotterdam Rules now without any partisan bickering.

### Aff---ICERD

#### Solvency advocate for formally ratifying the ICERD and implementing it domestically. Congress is key to making the treaty self-executing.

Maya Watson 20. Director of the Maywood Medical-Legal Partnership, an interdisciplinary partnership among Loyola University Chicago School of Law’s Health Justice Project, Loyola Medicine, and Stritch School of Medicine. “The United States' Hollow Commitment to Eradicating Global Racial Discrimination.” 1/6/20. <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/the-united-states--hollow-commitment-to-eradicating-global-racia/>

The goal of eradicating global racial discrimination is one tailored toward U.S. involvement. The United States signed ICERD in 1966, but did not ratify it for nearly three decades—until October 21, 1994. A 1994 Senate report spoke of the United States using its position to lead the world in bringing an end to racial discrimination. But 25 years of evidence shows little appreciable U.S. effort to use its position to end racial and ethnic discrimination globally or domestically.

Instead, the United States has failed to materially adhere to its ICERD obligations by (1) submitting reservations that nullify the treaty’s effect, (2) failing to enact implementing legislation, (3) preventing citizens from bringing claims under ICERD, and (4) failing to deliver timely reports of measures it has taken to address racial discrimination. These failures constitute a watered-down commitment, at best, toward ICERD’s goal of eliminating global racial discrimination, and it makes the United States a treaty party in name only, and not in spirit.

The United States’ ICERD Reservations

State parties may attach reservations, understandings, and declarations (RUDs) to a treaty at the time of ratification. RUDs modify or clarify a treaty’s text or alter its legal effect for that ratifying State. But RUDs that are incompatible with a treaty’s object and purpose are deemed impermissible.

The United States ratified ICERD subject to several RUDs. In ratifying ICERD, the United States said it would not accept any obligation under ICERD to restrict U.S. freedom of speech, expression, and association. The United States further asserted that, to the extent ICERD seeks to regulate private conduct in a stricter manner than what already exists under U.S. law, the United States would not be obliged to take any such measures. These RUDs reflect a posture that U.S. laws prevail over multilateral, negotiated international human rights treaties, even if the treaty in question provides broader protections against racial discrimination.

This sentiment is emphasized in the United States’ final ICERD RUD, which provides that the treaty is non-self- executing. This final RUD prevents litigants from bringing independent ICERD claims into U.S. courts. A U.S. citizen cannot bring a claim into a U.S. court solely alleging that ICERD provisions have been violated, unless that claim also implicates a U.S. law. While self-executing treaties are equal to domestic law and enforceable in U.S. courts, non-self-executing RUDs often are perceived as the biggest obstacle to a treaty’s effectiveness in the United States because the provisions of that treaty cannot be enforced, on its own terms, domestically.

Of course, international human rights law must be balanced with sovereignty principles. ICERD provisions impact State Parties’ authority over their domestic affairs. ICERD Article 4 mandates, for example, that State Parties make hate speech and the dissemination of racist materials illegal. Free speech is a well-settled U.S. constitutional principle and considered one of the country’s most prized civil liberties. However, racism, hatred, racial superiority, and state-sponsored racial subjugation are also among the country’s well-settled practices. The U.S. RUD stating it does not accept any obligation under Article 4 to restrict freedom of speech plainly confirms which side of the balance the United States values more. Protecting speech—namely hate speech—is more sacred to the United States than abolishing the evils of racism. This does not reflect a sincere commitment to uphold ICERD’s primary purpose of eliminating racial discrimination.

If a country aims to enforce only its own laws, why join ICERD at all? Reservations that reasonably modify a treaty’s text are one thing, but completely usurping the law of a treaty for a State’s own domestic laws, arguably, defeats the purpose of ratifying an international treaty.

Implementing Legislation

The nullifying effect of the United States’ RUDs could be mitigated by fully implementing ICERD into the United States’ domestic legal framework. Implementing legislation will give ICERD legal effect in the United States and provide for domestic enforcement of the treaty. ICERD parties agree to end racial discrimination, through all appropriate means, including legislation. So, ICERD parties are encouraged to enact legislation implementing the treaty domestically. ICERD requires that State Parties review their national and local policies and revise or repeal laws that have the effect of advancing racial discrimination.

Despite repeated requests, the United States has still not enacted legislation allowing for ICERD to have legal effect in the United States. The United States claimed that its laws already provide comprehensive protections against discriminatory conduct. The United States further explained that racial discrimination can be addressed both by U.S. constitutional and statutory law, including the Equal Protection Clause and the Civil Rights Act of 1964.

But one reason for the ICERD Committee’s insistence that the United States enact legislation implementing ICERD lies in how racial discrimination is defined. Racial discrimination under ICERD does not require proof of discriminatory intent; if a policy’s impact is disparate, then it is discrimination under ICERD. Unlike ICERD, U.S. law, generally, requires that racial discrimination claims prove discriminatory intent. Disparate impact often will not suffice. Consequently, the burden of proof for legal claims of discrimination in the United States is difficult to satisfy, making remedies for racial discrimination rare.

Given that ICERD offers broader protections against racial discrimination, the U.S. government should enact legislation to fully implement the treaty domestically.

Protecting speech— namely hate speech—is more sacred to the United States than abolishing the evils of racism.

## III. NEG GROUND

## DA: Populism

### DA---Populism

#### New treaty obligations incite public backlash, reanimating populist movements.

Danchin et al. 20, Associate Dean for Research and Faculty Development, Jacob A. France Professor of Law, and Co-Director of the International and Comparative Law Program at the University of Maryland Carey School of Law. (Peter G., Jeremy Farrall, Jolyon Ford, Shruti Rana, Imogen Saunders, and Daan Verhoeven, “Navigating the Backlash Against Global Law and Institutions,” University of Maryland Faculty Scholarship, 1638, <https://digitalcommons.law.umaryland.edu/fac_pubs/1638>)

I. Framing the Backlash: Contours and Consequences

In this article, we explore the concept of a Backlash as one way of understanding the sustained challenge that populist movements in countries around the world have posed to global norms and institutions. We seek to trace the causes, contours and consequences of this Backlash, as well as what responses are being made in support of global law and institutions. According to a Backlash narrative, the challenge to global law and institutions can be interpreted as a kneejerk reaction against and away from the global, and in particular globalisation, towards the local and the national. Many populists view globalisation and global norms and institutions as having changed the world in a negative way, leaving them and their societies disempowered economically and politically.6

These populists, whom we might call Trumpian, Dutertian or Boslonaroan populists, tend to yearn for a bygone era when borders were watertight and events in faraway places had a much less direct effect on events in their own countries. They blame globalisation for a range of social and economic ills, such as slowing GDP, decreasing employment opportunities, and stagnating wages. They view globalisation, once welcomed as a ‘rising tide that would lift all boats’,7 as decreasing, rather than increasing, national and personal prosperity.

Contours

The concept of Backlash tends to beg as many questions as it answers. What action constitutes a Backlash? What motivates such action and who participates in in it? Is the concept value-neutral or does it imply a positive or negative view of those taking Backlash action and the forces that motivate them? What are the implications of the term for the actors, institutions or forces against which Backlash action is taken? Does Backlash connote (or is it confined to) a particular moment in time, or can it relate to or comprise a more long-term phenomenon?

Some scholars see Backlash as an inevitability of the international system itself.8 Others question its utility as a tool of analysis, describing it as ‘a common language of recoil’ rather than an analytical concept.9 Yet others caution against rushing to the gloomy conclusion that this is the end of the internationalist era, arguing in Wildean terms that the reports of international law’s death are exaggerated.10

Despite these different perspectives on the utility and ramifications of framing as a ‘Backlash’ the current challenge posed by populism to globalism, it is clear that the notion of Backlash resonates with twenty-first century international legal scholars. Some of these observe a rising number of national governments retreating from longstanding commitments to international norms and institutions in a variety of contexts, such as investment law,11 human rights,12 and the activities of international courts.13

These international legal scholars do not share a commonly agreed or accepted definition of Backlash, and indeed acts described as a ‘Backlash’ can take many forms. Yet some commentators have identified central ingredients that tend to feature in most descriptions addressing Backlash contexts. Here we take our lead from Caron and Shirlow, who draw on Sunstein to define Backlash as “intense and sustained public disapproval of a system accompanied by aggressive steps to resist the system and to remove its legal force”.14 It is thus more than simple critique or discontent. It represents a fundamental resistance to and rejection of a system or institution of law.15

Our project centres on actions taken in opposition to the global legal system and the institutions within it: a Backlash against the international legal order itself. In the initial stages of our project we have targeted four key areas where the phenomenon of Backlash can be identified: peace and security, human rights, environmental concerns and international economic law. Madsen et al have suggested that Backlash contains ‘a reaction to a development with the goal of reversing that development’.16 In one sense, the development that leads to resistance against the international legal order is shared across all these areas: increasing globalism.17 This resistance may take the form of political interdependence and fears of loss of identity – as seen in the Brexit debate; new treaty obligations leading to fears of loss of sovereignty – as seen in the US withdrawal from the Paris Agreement; or more general concerns stemming from increased economic interdependence and the domestic consequences of movements of labour and industry as a consequence of free trade. Whatever manifestation, the central core is the same: a rebuff of integration and internationalisation, leading to acts of resistance against the system of international law and its institutions.

#### Acceding to international law ignites backlash against global institutions and the establishment that supports them

Posner 17, Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School. (Eric, “Liberal Internationalism and the Populist Backlash,” 49 Arizona State Law Journal 795, pg. 814-816)

In the United States, the debate took place in a lower key. The United States is not bound by any international institutions whose strength and authority is comparable to that of the European institutions. Indeed, the United States has disproportionate influence over most major international institutions, and nearly always can protect itself with veto rights. However, from time to time, a relatively minor question of international law erupted into public consciousness. The possibility that the International Criminal Court could have jurisdiction over American soldiers provoked Congress to pass a law in 2002 that appeared to authorize a military invasion of the Netherlands if an American was ever held for trial.72 Roper and related cases caused a public outcry, leading some state legislatures to pass statutes that blocked courts from relying on “foreign law.”73 The American political system is suspicious of human rights treaties, and the Senate has become increasingly reluctant to give its consent to any treaty at all—although this is partly an artifact of a 2/3 majority rule and the disproportionate influence of rural populations in that body.

The academic debate in the United States also received little attention. In the 1990s, no one thought in terms of a democratic deficit. The dominant view was that international law was good, and therefore judges, bureaucrats, and other officials should use it as much as possible to bind the United States.74 Yet dissenting views were aired from time to time. In 2003, Robert Bork argued that incorporation of international law into domestic constitutional law by the courts violates the “rule of law” by depriving the people of influence over policy through legislation.75 In 2005, Jeremy Rabkin argued that this style of “global governance” violated Westphalian sovereignty as well as democratic principles.76 In a 2007 article, John McGinnis and Ilya Somin argued that international law lacks a democratic pedigree because it reflects compromises with foreign states, most of them authoritarian, and therefore American courts should not incorporate it into domestic law unless Congress and the president has authorized them to.77 And in 2012, Julian Ku and John Yoo argued that this style of judicial activism violated the U.S. Constitution.78

McGinnis and Somin see international law as the work of global elites.79 They argue that elites across the world create, interpret, and enforce international law, and that their incentives are not to create international law that benefits everyone or reflects the values of the global population, but to create international law that benefits themselves and reflects their own values.80 However, in allowing that international law should be enforceable if incorporated by Congress and the president, McGinnis and Somin missed an important feature of the political landscape. The president and members of Congress are members of the elites themselves. The populist backlash against international law encompasses international law with impeccable democratic credentials like NAFTA and the WTO system, both of which were incorporated into domestic law by the president and Congress.81

Still, in their normative argument we see a germ of a positive theory of international backlash. Any type of international cooperation involves centralization. A greater distance is opened up between the ordinary people and the decisionmakers with effective power. As centralization occurs, more valuable public goods can be created, but agency costs increase as well. Since ordinary people cannot observe whether the decisionmakers act for the public interest, they can only accept on faith the assurances of their national leaders. When people’s ordinary experience contradicts the assurances of those leaders, they lose faith in them. This is what happened as a result of the financial crisis and the ensuing global recession—especially as ordinary people learned that only the very wealthy in western countries have benefited from globalization, while most people have been harmed or unaffected.82 This last fact seems to confirm the suspicion that global and national decisionmakers act in the interests of the elites, not of the ordinary people. While this idea is a simplification, it has enough basis in fact to produce significant political resonance, igniting the global populist backlash.

Thus, in Europe and the United States, international institutions have provided a convenient target for populists, as have the national leaders who have supported them. The populists have been able to blame globalization and international law for insecurity and economic dislocation as a way to undermine the establishment elites who constructed them. The populists can make a powerful argument, supported by scholarly research, that the international institutions—or the process of globalization they have facilitated—have benefited the elites while leaving behind ordinary people.83

#### Fears of sovereignty infringement drive backlash to new treaty obligations

Anya Wahal 22. Intern for the International Institutions and Global Governance program, 1/7/22. “On International Treaties, the United States Refuses to Play Ball.” https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball

The United States enters into more than two-hundred treaties each year on a range of international issues, including peace, defense, human rights, and the environment. Despite this seemingly impressive figure, the United States constantly fails to sign or ratify treaties the rest of the world supports. It has failed to ratify treaties that tackle biodiversity and greenhouse gas emissions, protect the rights of children and women, and govern international waters. For a country frequently looked to as a global leader, the United States has consistently failed to step up in international partnerships. In fact, the United States has one of the worst records of any country in ratifying human rights and environmental treaties.

Why hasn’t the United States stepped up to the plate? According to scholars and policymakers, one major reason is the fear of treaties infringing on national sovereignty. The United States shuns treaties that appear to subordinate its governing authority to that of an international body like the United Nations. The United States consistently prioritizes its perceived national interests over international cooperation, opting not to ratify to protect the rights of U.S. businesses or safeguard the government’s freedom to act on national security. Politics also poses a significant barrier to ratification. While presidents can sign treaties, ratification requires the approval of two-thirds of the Senate. Oftentimes, the power of special interest groups and the desire of politicians to maintain party power, on top of existing concerns of sovereignty, almost assures U.S. opposition to treaty ratification.

#### New treaty obligations trigger backlash.

Peter G. Danchin et al. 20. University of Maryland Francis King Carey School of Law, with Jeremy Farral,l Jolyon Ford, Shruti Rana, Imogen Saunders. “Navigating the Backlash Against Global Law and Institutions.” https://digitalcommons.law.umaryland.edu/fac\_pubs/1638

Our project centres on actions taken in opposition to the global legal system and the institutions within it: a Backlash against the international legal order itself. In the initial stages of our project we have targeted four key areas where the phenomenon of Backlash can be identiﬁed: peace and security, human rights, environmental concerns and international economic law. Madsen et al have suggested that Backlash contains ‘a reaction to a development with the goal of reversing that development’.16 In one sense, the development that leads to resistance against the international legal order is shared across all these areas: increasing globalism.17 This resistance may take the form of political interdependence and fears of loss of identity — as seen in the Brexit debate; new treaty obligations leading to fears of loss of sovereignty — as seen in the US withdrawal from the Paris Agreement; or more general concerns stemming from increased economic interdependence and the domestic consequences of movements of labour and industry as a consequence of free trade. Whatever manifestation, the central core is the same: a rebuff of integration and internationalisation, leading to acts of resistance against the system of international law and its institutions.

#### Treaty commitments spark backlash.

Oona A. Hathaway ‘8. Associate Professor of Law, Yale Law School. “International Delegation and State Sovereignty.” Law and Contemporary Problems, Winter, 2008, Vol. 71, No. 1, The Law and Politics of International Delegation (Winter, 2008), pp. 115-149. JSTOR.

This revolution in international law has brought with it many challenges. Perhaps the greatest is the increasingly salient tension between ideal of state sovereignty and the notion of international order based on law. State sovereignty requires that states have ultimate and independent authority to govern themselves and those within their territory. Yet states now routinely make legal promises that are perceived to lie in direct conflict with this conception of sovereignty, including delegating to international institutions authority that has traditionally been held exclusively by states.

This progression has not been without controversy or resistance. Indeed, it has given rise to a powerful backlash in the United States and elsewhere. Critics of international law fear that its ever-expanding scope will encroach domestic law and authority, taking power from local authorities and delegating it to international actors that are far removed—physically, culturally, and politically—from those they seek to govern.

### DA---Populism---UQ

#### Populism declines globally now, BUT a resurgence would irreparably damage democracy.

Meyer 22, PhD, research fellow at the Tony Blair Institute for Global Change. (Brett, 1-6-2022, “A Playbook Against Populism? Populist Leadership in Decline in 2021”, Institute for Global Change, <https://institute.global/policy/playbook-against-populism-populist-leadership-decline-2021>)

Executive Summary

In our annual update to our Populists in Power database, we find that the number of populist leaders in power at the beginning of 2022 is down from 17 at the beginning of 2021 to 13 – the lowest since 2004. Three of the four populist leaders who lost power were less ideological anti-establishment populists, meaning that the remaining populists are almost all culturally right wing.

Two common factors appear to have contributed to this significant fall in the number of populist leaders. First, the pandemic may have reminded the public of the importance of seriousness and expertise in policymaking. Countries with populist leaders around the world had higher Covid-19 case and death rates than those without populist leaders, and populist leaders in Europe have seen a sustained dip in their polling popularity relative to more conventional parties throughout the pandemic.

Second, unusually broad opposition coalitions have emerged to depose populist incumbents. Historically divided opposition parties adopted a narrow focus in their election campaigns to remove the populist leader. This happened in three out of four populist losses in 2021. We also see evidence of opposition parties following this “playbook” in countries where populist leaders are facing elections in 2022.

The danger posed by populism lies in the damage leaders can do to the norms and institutions of liberal democracy. However, we find that, in most of the cases where populist leaders lost power last year, there is limited evidence that key norms such as a free press, an independent judiciary and the peaceful transfer of power have been obviously weakened. That said, elections in the coming years in countries where populist governments have invoked more radical reform to entrench their positions give less cause for optimism.

Finally, if the formation of broad coalitions provides an emerging playbook for fighting populism, it’s important to examine how stable these coalitions are once in power. The danger is that, because the opposition parties have such substantive policy disagreements, they will prove unable to hold power for long, potentially threatening a reversal. To avoid instability, these coalitions should focus on a limited programme of reforms targeted at shoring up institutions against future populist threats.

The experience of the past four years shows that countries with populist leaders aren’t sentenced to autocracy. But while the wave of early 21st-century populism appears to have peaked, it will be some time before we can conclude that liberal democracy is no longer under threat.

### DA---Populism---Sovereignty Link

#### New treaty obligations violate US sovereignty.

Steven Groves 21. Margaret Thatcher Fellow in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation, 1/28/21. “Key Treaties That Threaten American Sovereignty, Which the Senate Must Oppose During the Biden Presidency.” https://www.heritage.org/global-politics/report/key-treaties-threaten-american-sovereignty-which-the-senate-must-oppose

The Trump Administration was rightfully skeptical of treaties and other international agreements that would result in the loss of American sovereignty. The new Biden Administration will likely seek to revive several treaties or agreements that failed to gain congressional approval in the past.

Over the next four years, particularly the first two while Democrats have certain control of Congress, the Biden Administration can be expected to push for U.S. ratification of a number of international agreements, including human rights conventions, environmental agreements, arms control treaties, and the U.N. Convention on the Law of the Sea. The U.S. Congress must fulfill its constitutional role by scrutinizing such treaties and rejecting any that undermine the interests and national sovereignty of the American people.

Human Rights Conventions

Prior Democratic Administrations have tried and failed to push through various human rights conventions. In 2009, President Barack Obama signed the Convention on the Rights of Persons with Disabilities (CRPD) and submitted it to the Senate, then controlled by his own party, for advice and consent. The convention ultimately failed on the Senate floor by a vote of 61 to 38. Since the CRPD was signed when he served as Vice President, President Joe Biden may feel obligated to make another push for ratification.

Other human rights conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC),1

The CRC was signed during the Clinton Administration in 1995, but has never been transmitted to the Senate for its advice and consent.

have never enjoyed broad, bipartisan support, but that does not necessarily mean that the Biden Administration will not advocate for the Senate to consent to ratification.

These conventions would threaten U.S. sovereignty by subjecting U.S. domestic law to international rules, restricting American freedom of action on the battlefield and in the international commons, and imposing international norms on the American people.

The U.N. Convention on the Law of the Sea (UNCLOS)

When he was Chairman of the Senate Foreign Relations Committee in 2007, Joe Biden (D–DE) supported U.S. ratification of UNCLOS. Senator Biden successfully moved UNCLOS out of committee, but the convention never received a vote on the Senate floor.

The Obama Administration made a serious effort in 2012 to join UNCLOS. The Obama effort was a full-court press. High-level witnesses who testified before Congress in favor of ratification included Secretary of State Hillary Clinton, Secretary of Defense Leon Panetta, Joint Chiefs Chairman Martin Dempsey, as well as other high-ranking military officers and business leaders.

But despite Democratic control of the Senate, UNCLOS failed to garner enough support and did not even receive a vote in the Foreign Relations Committee, then chaired by Senator John Kerry (D–MA).

UNCLOS would threaten U.S. sovereignty by, among other things, forcing the United States to pay royalties on oil extracted from the U.S. outer continental shelf.2

See, for examplev, Steven Groves, “The Law of the Sea: Costs of U.S. Accession to UNCLOS,” testimony before the Committee on Foreign Relations, U.S. Senate, June 14, 2012, https://www.heritage.org/testimony/the-law-the-sea-costs-us-accession-unclos.

International Environmental Agreements

During his presidential campaign, candidate Biden committed to “re-join” the deeply flawed Paris Agreement on climate change, which he will consider an “executive agreement” rather than a treaty. But there are other environmental agreements that may also be on his Administration’s radar.

The Convention on Biological Diversity, signed and submitted to the Senate in 1993 by the Clinton Administration, requires inter alia the “fair and equitable sharing” of the benefits arising from the use of genetic resources, especially those destined for commercial use.

Other environmental treaties are in the works within the international community, such as a legally binding instrument under UNCLOS on the conservation and use of marine biological diversity in the high seas, and an as yet undrafted U.N. treaty on eliminating plastic pollution.

Candidate Biden made clear that he has a highly ambitious, almost all-encompassing domestic climate change agenda. Congress and the American public can expect the Biden Administration to do all it can to advance the cause of reducing climate change on the international stage.

Such sweeping environmental treaties harm the U.S. and its population through higher energy costs, with virtually no change in global temperatures, while allowing other nations, such as China, to bypass the strict carbon limits.3

See, for example, Nicolas D. Loris, “Good Riddance to the Paris Accord,” Akron Beacon Journal, June 9, 2017, https://www.beaconjournal.com/article/20170609/OPINION/306099530 (accessed June 26, 2021).

Arms Trade or Control Agreements

From conventional to nuclear weapons, the Biden Administration can be expected to push for international agreements that ban or regulate American trade in, or possession of, armaments.

The Arms Trade Treaty (ATT) was signed under the Obama Administration in 2013 and submitted to the Senate in late 2016, but the Senate took no action on the treaty. President Donald Trump wisely “un-signed” the ATT in April 2019, but the Biden Administration may seek to revive the agreement.

The supposed purpose of the ATT is to control irresponsible international arms sales, but the agreement will have no impact on the exports of arms-producing nations that have no intention of following the rules. Its only effect will be to reduce the ability of the U.S. to arm its allies.

President Biden has also long been a supporter of the Comprehensive Nuclear-Test-Ban Treaty (CTBT), an agreement requiring countries not to carry out nuclear weapons tests at any place under its jurisdiction. The CTBT was defeated on the Senate floor in 1999 by a vote of 51 to 48. The Biden Administration may pursue ratification of the CTBT as part of its nuclear weapons policy, which will include an extension of the 2010 New Strategic Arms Reduction Treaty (New START), set to expire in February 2021.

The CTBT would harm U.S. national security by restricting the ability of the United States to test and modernize its nuclear stockpile.4

See, for example, Baker Spring, “CTBT: New Study Fails to Resolve Differences over Risks to U.S. Nuclear Arsenal,” Heritage Foundation Issue Brief No. 3556, March 31, 2021, https://www.heritage.org/arms-control/report/ctbt-new-study-fails-resolve-differences-over-risks-us-nuclear-arsenal.

Recommendations for the Senate and the Administration

The Senate should reject any revival of the above-mentioned international agreements, all of which threaten the sovereignty of the United States. Their failure thus far to attain broad, bipartisan support is an indication that they do not enjoy the backing of the American people, nor are they likely to gain this backing.

The Biden White House should not negotiate or sign international agreements that have little or no chance of receiving the advice and consent of the Senate. The Biden Administration should consult with the Senate on its “advice” prior to, as well as during, the negotiation of new treaties.

#### Treaty commitments violate sovereignty.

Oona A. Hathaway ‘8. Associate Professor of Law, Yale Law School. “International Delegation and State Sovereignty.” Law and Contemporary Problems, Winter, 2008, Vol. 71, No. 1, The Law and Politics of International Delegation (Winter, 2008), pp. 115-149. JSTOR.

This revolution in international law has brought with it many challenges. Perhaps the greatest is the increasingly salient tension between ideal of state sovereignty and the notion of international order based on law. State sovereignty requires that states have ultimate and independent authority to govern themselves and those within their territory. Yet states now routinely make legal promises that are perceived to lie in direct conflict with this conception of sovereignty, including delegating to international institutions authority that has traditionally been held exclusively by states.

### DA---Populism---International Courts Link

#### Submitting to foreign courts mobilizes populist movements---each ruling stokes more discontent

Voeten 20, the Peter F. Krogh Professor of Geopolitics and Justice in World Affairs at Georgetown University’s Edmund A. Walsh School of Foreign Service and Government Department and is a Visiting Professor at PluriCourts, University of Oslo. (Erik, June 2020, “Populism and Backlashes against International Courts”, *Perspectives on Politics*, Volume 18 , Issue 2, Cambridge Core, <https://www.cambridge.org/core/journals/perspectives-on-politics/article/populism-and-backlashes-against-international-courts/22D6468FD3316BB74A63BAD7BBAE8E5C>)

I argue that many, though not all, backlashes against international courts have taken place in countries where governments rely on populist support and over court judgments that reinforce local populist mobilization. Populism comes in many varieties. Yet a commonality among populists is that politics should be an expression of the will of the “pure people” as opposed to “corrupt elites” (e.g., Canovan Reference Canovan1999; Mudde Reference Mudde2004). Moreover, populists typically distinguish the pure people from specific others, which can be immigrants, ethnic or racial minorities, criminals, or some other group that is singled out as undeserving in a specific national context.

The rulings of international courts with liberal mandates sometimes protect the groups who are the targets of populist ire. Investment tribunals, regional economic courts, and even human rights courts protect property rights, which often favor ruling elites or foreign investors. Human rights courts evaluate large numbers of claims from prisoners, immigrants, and other minority groups who may be the target of populist identity politics. International courts become salient when they deliver judgments that protect elites or minorities against whom there is a pre-existing populist mobilization. In other words, international court judgments can provide kindling to already burning populist fires. Yet this tells us only that international courts may become controversial in countries with strong populist movements. Populism also offers an ideology for why these international courts should not have authority in the first place. International courts, like domestic courts, are countermajoritarian institutions. Moreover, they are located outside the homeland. Strong populist movements or populist presidents make it more likely that governments opt for challenging the authority of courts over alternative strategies such as acceptance, non-compliance, or avoidance.

This argument implies that backlashes against international courts are not just about sovereignty. Populist attacks on international courts often closely track efforts to curb domestic courts. Moreover, leaders may instigate backlashes to attract popular support. By contrast, much of the literature assumes that the public constrains leaders from violating international law and that international courts serve as substitutes for poorly functioning domestic courts. Some political parties, media, and civil society groups do not see international courts as tools to protect them from the illiberal tendencies of elites but as tools for liberal elites to cement their preferred policies against the “will of the people.”

#### That spills over---specific court interventions become lightning rods for broader populist movements

Alter & Madsen 21, \*Karen J., Norman Dwight Harris Professor of International Relations and Professor of Political Science and Law at Northwestern University, \*\*Mikael Rask, Professor of Law at the University of Copenhagen and the Director of iCourts Center for Excellence for International Courts at the Danish National Research Foundation. (“The International Adjudication of Mega-Politics,” Law and Contemporary Problems, Vol. 84:1, pg. 16-18, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5019&context=lcp>)

E. Do These Categories Predict IC Involvement in Mega-Politics or Backlash Against ICs?

Table 1 categorization considers whether the structure of the dispute, as primarily inter-state or domestic in nature, shaped whether international adjudication became more or less contested. One might imagine, for example, that an IC’s jurisdiction over an inter-state dispute might be less contested either because the two parties consented to international adjudication or because domestic courts would not be able to rule on the case themselves. A similar logic would lead us to expect that sovereignty-driven disputes might be especially polemical precisely because, absent international law, the contested action might be fully legal or national courts would be left alone to resolve the dispute. Indeed national-populist backlash against ICs seems to be largely inspired by the sovereignty category.39 And the “nationalist” part of national-populism could generate controversy around inter-state disputes. This Article’s suppositions that the source of the conflict might generate insight about the likelihood of megapolitics or backlash, however, quickly broke down once applied to concrete cases. In particular, contributors to this special issue found that disputes often involve more than one of these categories.

The blurring of categories may be intentional and part of political strategies. Even if an analyst can firmly locate a dispute in one specific category (for example, the WTO example of a zeroing dispute is an inter-state dispute), partisans may frame a dispute as falling within various categories in an effort to mobilize political support. For example, Zimbabwe’s attack on the Southern African Development Community Tribunal (SADCT) seemingly derived from sovereignty-driven mega-politics. Indeed, Zimbabwe’s President’s immediate reaction was to dismiss the ruling by arguing that “Some farmers went to the SADC [T]ribunal in Namibia, but that’s nonsense, absolute nonsense, no one will follow that . . . We have courts here in this country, that can determine the rights of people. Our land issues are not subject to the SADC [T]ribunal.”40 Tendayi Achiume would challenge the definition of this dispute as sovereignty-driven. Achiume argues that the farmer’s case was also a social cleavage driven case that pitted landless Zimbabweans against white landowners, and that reanimated nationalist freedom fighters in their desire to challenge the post-colonial settlement.41 Recognizing that other Southern African governments could have their own concerns, as the mega-politics unfolded, Zimbabwe’s President Mugabe’s attacks on the Tribunal were wide ranging. His government’s claims involved international legal sovereignty complaints contesting the validity of the SADCT, inter-state complaints about a European-funded SADCT imposing colonial legacies, and diplomatic appeals where Zimbabwe’s Minister of Justice warned other SADC countries that the Tribunal might also intervene in their domestic land dispute cases.42

The point is that politicization may make the root classification analytically irrelevant as the dispute evolves. Or it may well be that issues become more politically divisive when an issue can be framed as involving more than one of the categories identified. This uniting of the three frames can help to build a coalition of opposition to IC involvement, and IC involvement may in turn be used to mobilize support against a larger set of institutions and actors. In other words, the backlash politics may well be larger than the dispute or the legal issue in question, in which case international judges may find that no matter what they do, the ruling will become a lightning rod of political contestation.43

These three categories nevertheless help us understand why compared to the past, ICs today are increasingly involved in adjudicating mega-politics. The categories also help to define a set of issues that scholars might investigate. The categories could even have predictive value. If one, for example, studied the range of issues that ICs adjudicate, one could well find that state parties are more likely to seek a political settlement for cases that fall into these three categories, regardless of the clarity of an international law violation, because all involved want to avoid a potentially explosive or precedential ruling on the merits of the case. For the purpose of this study, what matters is that the categories help identify the basic contours of the disputes we are studying. The categories moreover help to explain why it is difficult for ICs to avoid entering into megapolitical cases. The framing plasticity of the sovereignty category, in particular, further helps us understand why IC authority may be affected and backlash sentiments provoked even if the IC never ends up ruling on the merits of a megapolitics dispute.

## DA: Bargaining

### DA---Bargaining---Generic

#### Unifying Democrats around any international agreement requires side-payments

Friedrichs 21, postdoctoral researcher at the Chair for Multi-Level Governance at the Department of Political Science at Freiburg University. (Gordon M., 8-2-2021, “Polarized we trade? Intraparty polarization and US trade policy”, International Politics, https://doi.org/10.1057/s41311-021-00344-x)

Groenendyk et al. (2020) find that moderate Democrats and Republicans have, over time, developed less positive feelings toward their party. In addition, the authors find the partisan ideological mean has become affectively polarized, yet the modal partisan has not. In other words, voter preferences have diverged between parties, yet they have not converged within them to a similar extent.2 Instead, parties are becoming increasingly divided internally. Affective polarization has metastasized from being a key component of interparty contestation, warfare, and obstructionism, to fueling intraparty contestation and factionalism. As a result, intraparty polarization opens the political space for new realignments around anti-establishment and third-party candidates (Groenendyk et al. 2020: 1620).

Research on party factions in American politics has contributed to our understanding of patterns of cross-party cooperation in Congress (Rubin 2017; Koger et al. 2009), parties’ decision-making and political strategy toward organizing the legislative (diSalvo 2009; 2012), as well as drivers of institutional powershifts within parties (Clarke 2020; Blum 2020). Intraparty polarization holds three potential implications in the foreign policy realm: First, instead of manifesting a decline in bipartisanship, intraparty polarization suggests that new foreign policy crosscutting coalitions become possible. If the parties become intrinsically divided between moderate and ideologically more extreme partisans, we would assume that this affects the distribution of foreign policy preferences within the parties as well. A dispersion of foreign policy preferences within the parties would not only imply a potentially larger range of issues becoming more salient, but also that cross-party alignments around certain preferences become more feasible. Hence, it is assumed that intraparty polarization causes diversion between two or more salient policy preferences in contrast to party unity, which in turn increases the possibility for crosscutting coalitions along alternative policy cleavages.

Second, the emergence of new cleavages can open the space for new foreign policy entrepreneurs and factions to promote alternative policy preferences with the goal of shifting their party’s ideological disposition. While it certainly is true that party ideological means have become more polarized (McCarty et al. 2016: 19), new foreign policy entrepreneurs can cause gravitation toward certain ideological modes and thus contribute to the dispersion of party unity (cf. Marsh and Lantis 2016; Rubin 2017). In contrast to preference-based intraparty polarization, ideology-based intraparty polarization is driven by the intention to shift the party’s position instead of preventing success of the opposition through strong party unity.

Third, congruence and incongruence of preference-based and ideology-based intraparty polarization can influence the execution of US foreign policy. It is assumed that intraparty polarization is prevalent when trade preferences diverge within the parties and the respective ideological means are more dispersed within the parties than between them. It is hypothesized that ideology-based interparty polarization prohibits crosscutting coalitions on trade preferences.

With preferences more dispersed across parties, the executive is expected to choose a foreign policy strategy that entails more issue-linkages and side-payments. Issue-linkages are a common tool in negotiations to package deals by discussing two or more issues for joint settlement (Poast 2012). Side-payments are a tool to encourage concessions on a given issue through monetary payments or concessions on other issues (Frieman 1993). The more dominant these strategies are toward accommodating intraparty preferences for the outcome of negotiations, the more prominent intraparty polarization is in the eyes of the executive, shaping international negotiation strategies and outcomes. However, the ultimate success of such negotiation strategies (i.e., congressional support through ratification) is influenced by the degree of congruence of preference-based and ideology-based intraparty polarization.

### DA---Bargaining---Arms Control

#### Meeting the ratification requirement forces Biden to pay off Senate hawks with defense spending hikes

Kreps 18, \*Sarah E., PhD, Professor in the Department of Government, Adjunct Professor of Law, and the Director of the Cornell Tech Policy Lab at Cornell University, \*\*Elizabeth N. Saunders, PhD, Associate Professor in the School of Foreign Service and a core faculty member in the Security Studies Program at Georgetown, \*\*\*Kenneth A. Schultz, PhD, professor of political science at Stanford University. (“The Ratification Premium: Hawks, Doves, and Arms Control,” *World Politics* 70, No. 4, pg. 493-494, https://doi.org/10.1017/S0043887118000102) **\*variables**: L = pivotal legislator, E = legislator and potential endorser who specializes in foreign affairs, γ = hawkishness, κ = level of cuts by each state in a potential treaty

This leads to the second implication: the desire of dovish presidents for an agreement gives bargaining power to legislative specialists who can credibly endorse the deal. When the informed endorser is more hawkish than the pivotal legislator, the endorser can extract concessions in exchange for the endorsement. Once side payments are introduced, they eliminate the risk of mistakes due to uncertainty, at least when they are used. Thus, even if L does not directly benefit from the transfers, they make the pivotal legislator better off.

The model is silent with respect to the nature of these transfers, but we can imagine two possibilities. One is a targeted benefit or a concession on some unrelated issue. But since the endorser needs to credibly argue that the package is safe from a national security perspective, being bought off by concessions unrelated to defense is both unseemly and likely to undermine that argument. Alternatively, E could demand increased military effort in an area not covered by the treaty so that the net cut to military effort is no more than κE. Since arms control agreements regulate a specific activity (for example, testing) or weapon system, states are generally free to increase other military effort. We sidestep the question of why arms control agreements have limited agendas and take as given that states tolerate some increases in other military effort. The model shows that a dovish president’s ratification premium magnifies any such effect.

The model also speaks to the effect of increasing political polarization in the American political system.30 Polarization affects two parameters: first, the distance in hawkishness between a Democratic president and the pivotal member of the Senate and, second, the partisan bias parameter, π. Interestingly, partisan bias and hawkishness are substitutes: for each actor with hawkishness γ and partisan bias π, there is an actor with hawkishness γ′ > γ and no partisan bias whose preferences and behavior are identical. Thus, hawkishness and partisan bias are empirically difficult to distinguish. What is clear is that increasing polarization worsens the prospects for arms control, particularly for Democratic presidents. We can see this by holding the president’s hawkishness, γP, constant and increasing either γL or π. Referring to Figure 1, the cut points κE and κL, as well as the unlabeled cut point separating moderate doves from doves, all move lower with those changes. Thus, polarization leads to (1) a larger range of presidents who are moderate doves and thus constrained by L’s preferences, (2) a larger range of presidents who are effectively doves and thus face the credibility problem identified here, (3) larger minimum side payments to ensure that a proposal from a dovish P is endorsed, and (4) lower levels of cuts that can be achieved. As a result, Democratic presidents will encounter higher ratification premiums, which they may choose not to pay, and they will have incentives to craft deals in a way that avoids ratification requirements, such as by resorting to executive agreements.31

#### Modernization is the price and prerequisite to an arms control treaty.

Lissner 21, PhD, assistant professor in the strategic and operational research department at the U.S. Naval War College and nonresident scholar at Georgetown University’s Center for Security Studies. (Rebecca, April 2021, “The Future of Strategic Arms Control,” Discussion Paper Series on Managing Global Disorder No. 4, pg. 13, <https://cdn.cfr.org/sites/default/files/report_pdf/lissner-dp_final.pdf>)

The first trend is sharpening partisan polarization in the United States—not only among the mass public, but also evident among policy elites—as Democrats and Republicans have sorted into two opposing political camps.51 Partisan polarization hampers U.S. foreign policy in many respects, including by presenting barriers to treaty ratification, which requires a two-thirds vote by the U.S. Senate. Over the last two decades, the number of new international agreements concluded by the United States has plummeted. Treaty ratification has experienced an especially sharp downward turn.52 Although not solely attributable to partisan polarization, this trend does reflect fundamental divergence on the nature of U.S. interests and the best methods to achieve national security objectives, especially as concerns about the encroachments of international law on U.S. sovereignty have become a particular stalking horse of some on the ideological right.53 Diminished congressional interest in arms control issues makes reflexive partisanship even likelier, as members decline to consider the merits of an agreement substantively and instead vote along party lines or weaponize arms control politically.54

Polarization could also be eroding the consensus that undergirded the last remaining arms control agreement between the United States and Russia. New START rested upon a bipartisan compromise initially articulated by the Perry-Schlesinger Commission on the Strategic Posture of the United States, which stated: “The United States should continue to pursue an approach to reducing nuclear dangers that balances deterrence, arms control, and nonproliferation. Singular emphasis on one or the other element would reduce the nuclear security of the United States.”55 In effect, hawkish Republicans accepted arms control as the prerequisite for nuclear modernization and more dovish Democrats accepted modernization as the price for arms control.56 Democratic Senator Robert Menendez put it plainly in 2018: “bipartisan support for nuclear modernization is tied to maintaining an arms control process that controls and seeks to reduce Russian nuclear forces.”57 As partisan animosity has increased and bipartisan compromises have become more difficult, Democrats could rethink their support for robust nuclear modernization, further jeopardizing future prospects for arms control.

#### The plan only passes if it’s linked to funding for nuclear modernization. It’s unique, budget pressures limit arsenal upgrades now.

Maurer 21, professor at the School of Advanced Air and Space Studies at Air University and a visiting scholar at the American Enterprise Institute. (John D., 4-14-2021, “Restoring Nuclear Bipartisanship: Force Modernization and Arms Control”, War on the Rocks, <https://warontherocks.com/2021/04/restoring-nuclear-bipartisanship-force-modernization-and-arms-control/>)

Defeating Domestic Spoilers

While critics claim that nuclear modernization and arms control have little in common, the two policies face similar domestic political challenges. Both require long-term commitments across multiple administrations and Congresses to bear fruit, and both face periodic controversies that would threaten their continuation. Linking the two together provides greater durability to ride out these controversies and achieve long-term successes.

The American nuclear arsenal is a vast system painstakingly assembled and reassembled over many decades. Successfully replacing the older components of the nuclear arsenal will take decades, if not the remainder of the century. And while nuclear modernization is not a major cost driver when compared to other financial liabilities and represents only a small fraction of the total defense budget, it does require consistent funding across those decades. As such, nuclear modernization will always be a target for those seeking to trim costs while avoiding difficult conversations about foreign policy priorities and domestic entitlements.

American leaders repeatedly delayed modernization in the 1990s and 2000s to focus on force reduction or long-running counter-insurgencies. Most of these decisions seemed reasonable under the circumstances. It would be difficult to argue, for example, that nuclear modernization was more pressing than procuring mine-resistant vehicles for immediate use in Afghanistan and Iraq. However, decades of deferral demonstrates that the long-term value of modernization the nuclear arsenal will struggle to attract political support when set against the opportunity or crisis of the day. Even as the United States returns to great-power competition with an increasingly decrepit arsenal, the ravages of the pandemic and growing concern about climate change create strong pressures to delay or abandon nuclear modernization efforts.

Strategic arms control is similar to nuclear force modernization in its long-term orientation and vulnerability to disruption. Arms control is vulnerable because it can be reversed. Most arms control agreements place limits on specific weapons systems — how many can be built, where they can be deployed, or how they can be used. Some also place limits on the material capability to build weapons — for example, treaties which limit not just the number of missiles or warheads, but the number of missile factories or nuclear enrichment facilities. Yet, few if any agreements eliminate the technological basis for building weapons in the future, since the basic technology often has important civilian uses. Rocket boosters can be used on intercontinental ballistic missiles or for a country’s civilian space programs. As a result, there is rarely any barrier to rolling back an arms control agreement and rebuilding the dismantled forces later, if the parties of the agreement decide to do so. Arms control’s political volatility compounds its reversibility. As relations with adversaries worsen, so too does the temptation grows to tear up arms control agreements in frustration.

Sustaining arms control and nonproliferation efforts has proven challenging in recent years. The Trump administration quickly scrapped one of the signature nonproliferation achievements of the Obama administration, the 2015 Joint Comprehensive Plan of Action (or Iran nuclear deal). Trump also abandoned Obama’s attempts to bring Russia back into compliance with the 1987 Intermediate-Range Nuclear Forces Treaty and the 1992 Open Skies Treaty, in favor of withdrawing from both agreements. The point is not to apportion blame but merely to note how ineffective a tool of foreign policy arms control becomes when successive administrations reverse their predecessors’ policies.

Given their similar requirements and vulnerabilities, we should not be surprised that proponents of nuclear force modernization and strategic arms limitation have historically banded together to pursue nuclear bipartisanship. Lyndon Johnson linked specific arms control objectives to modernizing American forces in the late 1960s. His Republican successor, Richard Nixon did likewise, setting a pattern that would continue for the remainder of the Cold War. Nuclear bipartisanship did not end debates about either force modernization or arms control, which remained fierce throughout the 1970s and 1980s. But pursuing force modernization and arms control at the same time enabled decades of gradual, but steady, improvement of American nuclear forces and long periods of successful arms control observance, including the 1972 Antiballistic Missile Treaty, which lasted 29 years; the 1991 Strategic Arms Reduction Treaty, which lasted 18; and the 1968 Non-Proliferation Treaty, which has lasted 53 years and counting. Neither policy is likely to be as successful politically on its own.

### DA---Bargaining---Arms Control CEA

#### Even reaching a simple majority require concessions. Arms control is a tough sell, and the most influential legislators are hawks

Kreps 18, \*Sarah E., PhD, Professor in the Department of Government, Adjunct Professor of Law, and the Director of the Cornell Tech Policy Lab at Cornell University, \*\*Elizabeth N. Saunders, PhD, Associate Professor in the School of Foreign Service and a core faculty member in the Security Studies Program at Georgetown, \*\*\*Kenneth A. Schultz, PhD, professor of political science at Stanford University. (“The Ratification Premium: Hawks, Doves, and Arms Control,” *World Politics* 70, No. 4, pg. 482-483, https://doi.org/10.1017/S0043887118000102)

Second, information asymmetries—between the president and both the public and most members of Congress—are likely to be severe in the arms control context, given the technical and military-strategic complexity of weapons systems and verification methods. However, some members of Congress are specialists who have an information advantage over their colleagues, either because of their defense expertise or because they serve on congressional armed services or foreign relations committees.15

Our model therefore distinguishes between two kinds of legislators. One is the pivotal legislator whose vote is needed to ratify a treaty. In the United States, a formal treaty requires approval from two-thirds of the Senate, and even international agreements that do not undergo formal ratification may still need legislative majorities to implement their terms.16 The other is a potential endorser, a legislator who has information about the desirability of the treaty. This legislator’s endorsement or lack thereof is likely to influence other members of Congress, giving the endorser leverage to extract concessions from the president. Critical endorsers may be members of either the leader’s own party or the opposition party, but one common feature is that they tend to be more hawkish than their colleagues.17

**[BEGIN FOOTNOTE 17]**

17 The literature has found mixed results on whether committee members tend to be preference outliers; see, e.g., Krehbiel 1990. However, even studies that reject this hypothesis have found that members of the Armed Services Committee in both chambers are significantly more hawkish than their colleagues; see Ray 1980.

**[END FOOTNOTE 17]**

## DA: Politics

### DA---Politics---Generic

#### See: Inherency. Also:

#### Treaty approval expends finite PC and agenda space.

Kelley 15, \*Judith G., PhD, the Kevin D. Gorter Professor of Public Policy and Political Science @ the Duke Sanford School of Public Policy. \*\*Jon C.W. Pevehouse, PhD, Professor of Political Science @ the University of Wisconsin-Madison “An Opportunity Cost Theory of US Treaty Behavior”, International Studies Quarterly, pg. 531)

This study argues that the answer sometimes lies in the idea of opportunity costs. The Senate and President sometimes push treaties to the side because they prefer to spend their resources and time on other, usually domestic, legislation that they value more. This opportunity cost—the foregone uses of political capital and Senate floor time (Koger 2010:22)—receives little attention in the study of ratifications, but it can prove quite critical to the fate of treaties. Because the political capital and agenda space in Washington is finite, a treaty must both have sufficient support on substantive grounds to pass through the institutional process and its value to politicians must outweigh the opportunity cost of their scarce political resources.

#### Ratification requires presidential capital and crowds out other legislative priorities

Kelley 15, \*Judith G., PhD, the Kevin D. Gorter Professor of Public Policy and Political Science @ the Duke Sanford School of Public Policy. \*\*Jon C.W. Pevehouse, PhD, Professor of Political Science @ the University of Wisconsin-Madison. (“An Opportunity Cost Theory of US Treaty Behavior,” International Studies Quarterly, pg. 533)

An Opportunity Costs Theory

Although existing theories about veto players and political ideology explain the fate of some treaties, they leave some questions open. To complement these theories, we draw on economic theory to offer an opportunity cost theory of treaty ratification. In economics, the opportunity cost of a resource refers to the value of the next-highest-valued alternative use of that resource. Scholars of domestic legislation have applied this concept to the time and resources of individual policymakers (Schiller 1995) but also to the fixed chamber time. For example, Koger refers to “[T]he foregone uses of the same [chamber] time for legislators as individuals as well as for the chamber collectively” (Koger 2010:22). Indeed, the Senate’s chamber time is not only fixed, but also scarce. A vast portion of its time goes to required routine business. This leaves little opportunity for discretionary activities (Walker 1977). Given that international policy matters have to draw on exactly the same remaining discretionary floor time as domestic policy, we argue that the United States sometimes delays or derails treaty ratification simply because political capital and Senate floor time are fixed and entail opportunity costs (Heitshusen 2013:4). As Koger (2010:33) argues more generally for legislation, “The expected gains from making a proposal must exceed the time and effort legislators invest in preparing it, organizing and coalition to support it, and taking the time of the chamber to debate and pass it.”

For a treaty to progress, the opportunity cost logic thus would mean that the net gains of the treaty must outweigh the opportunity costs of the advice and consent process. Thus, if the President or some Senators assign only low political value to a particular treaty or if they believe that passage of the treaty will take a lot of Senate floor time, they may decide that they would rather spend their political capital on other matters. If they think they have to fight a war of attrition to overcome opposition, this cost in terms of time and resources may tip the scales against moving the treaty forward. Under these conditions, the opportunity cost of processing the treaty may be too high for the treaty to gain attention, even if the President or more than the required two-thirds of the Senators think the treaty yields some benefits. As a result, whether or how fast a treaty makes it through the process depends on whether it has sufficient support to pass the constitutional process and on whether its value to politicians outweighs the opportunity cost of their political resources: legislative floor time and political capital.

The Fixed Political Agenda Space and Policy Priorities

Why do treaties incur these opportunity costs? Opportunity costs arise when resources are fixed and fully employed. Political agenda space is such a resource; there are only so many policy priorities a President can promote, and only so much Senate floor time to consider them. The media will pay attention to only so many issues on the Washington agenda. Both the President and the Senate must protect their legislative opportunities. They each face opportunity costs.

For the President, the transmittal process is not simple. If the United States signs an international agreement that falls under Article II of the Constitution, the President must transmit it to the Senate for advice and consent before the United States can ratify it. This process entails an analysis of the implications of the treaty including possible implementation legislation required, and the writing of a transmittal letter that serves as a report to the Senate Foreign Relations Committee (SFRC). Because of these requirements, usually there has to be some push from the White House (Halloran 2011), and this can take precious time away from domestic legislative priorities. Thus, transmittals can be costly, especially in the face of expected opposition. Indeed, in 1995 when President Clinton wanted to transmit the UN Convention on the Rights of the Child to the Senate, Jessie Helms, who chaired the SFRC, and 26 cosponsors introduced a resolution urging him to not transmit the Convention. Such opposition can be distracting or politically harmful for the President. Furthermore, because the President usually endorses the treaty in the transmittal letter, he may incur a reputational cost by transmitting treaties that stall (Krutz and Peake 2009:140). Dealing with treaties thus involves political costs, and withholding transmittal can conserve political capital.

## DA: Dip Cap

### DA---Dip Cap---Generic

#### The plan drains negotiating resources and time

Frank A. Rose 18. Senior fellow for security and strategy in the Foreign Policy program at the Brookings Institution Safeguarding The Heavens: The United States And The Future Of Norms Of Behavior In Outer Space https://www.brookings.edu/wp-content/uploads/2018/06/FP\_20180614\_safeguarding\_the\_heavens.pdf

First, non-legally binding approaches appear to be the most practical method for developing norms of behavior for outer space. Looking back, the most successful norm-building initiatives over the last decade have been non-legally binding measures. Even though these norms aren’t legally binding, that has not prohibited nations from incorporating them into their domestic laws and regulations. Let’s be honest: it is extremely difficult and time-consuming to negotiate and ratify legally binding instruments. With the rapidly changing nature of the space environment, it’s unlikely that the international community has the luxury of time on its side to wait for the negotiation and ratification of new legally binding agreements.

#### New treaties trade off with existing negotiations---cost diplomatic capital.

Time 19 W.J. Hennigan and John Walcott MAY 30, 2019 The U.S. Expects China Will Quickly Double Its Nuclear Stockpile <https://time.com/5597955/china-nuclear-weapons-intelligence/>

In response to the slow erosion of agreements, President Donald Trump has declared his desire to reach a post-Cold War détente with both China and Russia under an all-encompassing arms treaty. Yet that petition has been met by disinterest in Beijing and indifference in Moscow.

The grand bargain approach, critics say, is too time-consuming and unlikely to garner results within the remaining 19 months in Trump’s term. More likely, they say, it’s a stalling tactic for national security hawks in the Administration, such as Secretary of State Mike Pompeo and National Security Adviser John Bolton, who are known to be hostile toward international agreements.

“Pursuit of broader nuclear arms control deal with Russia and China is a worthwhile objective — but not at the expense of, or as a condition for, the extension of New START,” said Kingston Reif, director for disarmament and threat reduction policy at the Arms Control Association, a think tank. “So far the Trump Administration does not appear to have a plan or the capacity to negotiate a more far-reaching deal, which would likely take years. Which suggests that the real goal of this gambit is to run out the clock on New START.”

### DA---Dip Cap---Arms Control

#### Arms control is diplomatically taxing.

Lissner 21, PhD, assistant professor in the strategic and operational research department at the U.S. Naval War College and nonresident scholar at Georgetown University’s Center for Security Studies. (Rebecca, April 2021, “The Future of Strategic Arms Control,” Discussion Paper Series on Managing Global Disorder No. 4, pg. 25-26, <https://cdn.cfr.org/sites/default/files/report_pdf/lissner-dp_final.pdf>)

Arms control is a limited, but useful, tool of U.S. strategy. The Biden administration inherits a near tabula rasa, which is dangerous but also replete with opportunity. Rather than restricting strategic arms control only to what is achievable within legacy frameworks, the United States will find greater success by allowing function to dictate form. Constructing a regime of reciprocal restraints will be diplomatically taxing, but it has the potential to regulate strategic competition between the United States and its major power rivals while also restoring some measure of strategic stability for a new age of domestic and international politics. Given the specter of nuclear Armageddon that could accompany failure, this moment demands nothing less.

## DA: Presidential Power

### DA---Pres Powers

#### Treaties constrain presidential war powers

Brian Finucane 20. Attorney-adviser at the U.S. Department of State, November 2020. “ARTICLE: PRESIDENTIAL WAR POWERS, THE TAKE CARE CLAUSE, AND ARTICLE 2(4) OF THE U.N. CHARTER,” 105 Cornell L. Rev. 1809, 1816-1817

This Article proceeds as follows. Part I provides a descriptive account of the Executive Branch's current position regarding the President's constitutional authority to direct the use of force in the absence of congressional authorization. Although this position is contested in some key respects, my purpose in this Part is to describe that position rather than critically examine it. Part II examines the Override Opinion's analysis of the relationship between Article 2(4) and the President's authority under Article II. Part III analyzes the Take Care Clause. Relying upon multiple forms of evidence, this Part presents the case that treaties generally, and the U.N. Charter in particular, are "Laws" within the meaning of the Take Care Clause that the President has a duty to faithfully execute. Although many of the authorities cited in this Article refer expansively to both treaties and customary international law (i.e., the law of nations) as "Laws", the focus of this piece is Article II treaties, not customary international law (the status of the latter as "Law" would raise additional questions). Nor do I examine whether any of the various species of executive agreements are "Laws" (though the argument seems strongest for congressional-executive agreements.) Part IV engages with potential counterarguments, including the non-self-execution and political question doctrines. Part V outlines the proper framework for the exercise of war powers in light of the constraints imposed by Article 2(4). This Part again provides a descriptive account of the Executive Branch views, in this case of the use of force under Article 2(4). Crucially, it argues that the jus ad bellum framework under Article 2(4) provides not only the international rules regarding the use of force, but also binding rules under U.S. domestic law. Consequently, before the United States uses force in the absence of congressional authorization, it must affirmatively determine that such force is permissible under the U.N. Charter. This Part then explains that pursuant to the last-in-time rule, it is Congress, not the President, who may override Article 2(4) by authorizing the use of force.

#### Treaties operate as checks on presidential powers

Curtis A. Bradley 13. William Van Alstyne Professor of Law, Duke Law School, with Trevor W. Morrison. ESSAY: PRESIDENTIAL POWER, HISTORICAL PRACTICE, AND LEGAL CONSTRAINT, 113 Colum. L. Rev. 1097, 1139-1140. Nexis.

Moreover, even if Madisonian checks and balances do not work systematically, in at least some instances Congress (or a particular house of Congress) is likely to use its institutional authority to resist what it perceives to be unlawful presidential behavior. For example, consider the phenomenon of "congressional-executive agreements," which are international agreements concluded by the United States with the support of a majority of both houses of Congress rather than the two-thirds advice and consent of the Senate that Article II of the Constitution specifies for treaties. A large percentage of the international agreements entered into by the United States since the 1930s have taken the form of congressional-executive agreements, 144 but there is substantial debate and uncertainty about the extent to which the congressional-executive agreement process is constitutionally interchangeable with the Article II treaty process. 145 For some subject areas, bipartisan leadership in the Senate has insisted that the Constitution requires resort to the Article II process, and in these instances Presidents have generally acceded to the Senate's position. This is particularly evident in the area of arms control, 146 although it seems likely that there would be similar senatorial resistance to congressional-executive agreements in certain other subject areas such as human rights. 147 In at least some instances, in other words, institutional checks will operate to facilitate the constraining effect of law.

#### Treaties have immense separation-of-powers implications

Ted Cruz 14. U.S. Senator, J.D. from Harvard Law School, 1/8/14. “Limits on the Treaty Power.” https://harvardlawreview.org/2014/01/limits-on-the-treaty-power/

Yet just as the President retains a veto power over Congress’s legislative power,35 the Senate retains a veto over the President’s treaty power by preventing adoption of a treaty unless two thirds of the Senate approves. Note, however, that Senators were originally chosen by state legislatures rather than through direct election. John Jay saw this as an advantage: those “who best understand our national interests” would be the ones voting on treaties.36 In contrast, Jay warned against involving the “popular assembly” in the treaty power,37 and Hamilton explicitly argued that the House of Representatives should not be included in the treaty-making process.38

The Senate’s veto over the President’s power to make treaties shows that the treaty power was so substantial that it required further dilution among the branches. As Jay remarked:

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.39

Hamilton, too, did not trust the President alone to wield the hefty treaty power, as he feared that one could “betray the interests of the state to the acquisition of wealth.”40

At the same time, the Framers realized it was impractical to expect a collective body, like Congress or the Senate, to negotiate the minutiae of treaties. Jay understood that sometimes treaties must be made in secret, and the executive is the branch best positioned to keep “negotiation of treaties” secret.41 The President was therefore allowed “to manage the business of intelligence in such manner as prudence may suggest” by negotiating treaties, “although the President must, in forming them, act by the advice and consent of the Senate.”42 This, Jay realized, “provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.”43 Hamilton, too, noted the comparative advantage that the President had over Congress in this regard: “The qualities elsewhere detailed as indispensable in the management of foreign negotiations point out the executive as the most fit agent in those transactions . . . .”44

The treaty power is a carefully devised mechanism for the federal government to enter into agreements with foreign nations. And it needed to be precisely calibrated because treaties would constitute the supreme law of the land in the United States.45 By dividing the treaty power — first by reserving unenumerated powers to the states, and then by housing the federal treaty power in the executive branch with a Senate veto — the Framers sought to check the use of this significant lawmaking tool.

## CP: CIL

### CP---CIL

#### Promoting a norm as customary international law solves and is mutually exclusive.

Helfer & Wuerth 16, \*JD, Professor of Law at Duke, co-director of Duke Law's Center for International and Comparative Law \*\*JD, director of the International Legal Studies Program, Helen Strong Curry Chair in International Law, and associate dean for research at Vanderbilt (Laurence R. and Ingrid B., Summer 2016, "Customary International Law: An Instrument Choice Perspective," Michigan Journal of International Law 37, No. 4, pg. 596-599, <https://heinonline.org/HOL/P?h=hein.journals/mjil37&i=583>)

IV. THE FUTURE OF CUSTOM IN AN AGE OF SOFT LAW AND TREATIES

Having described custom's unique features and mapped its domains, we turn to a discussion of custom's relationship to treaties and soft law. This relationship might be understood as complementary: custom can be seen as a fungible form of “soft” hard law or “hard” soft law that exists on a continuum between soft law and treaties. Such a framing suggests that custom may be rendered obsolete as unwritten international norms are codified and soft law grows in scope and complexity.172

**[BEGIN FOOTNOTE 172]**

172. See Trachtman, The Growing Obsolescence of Customary International Law, supra note 4, at 174 (“CIL is largely superseded by treaty law and other codification; that is, only in very few circumstances are there CIL rules of law that have not been reflected in treaty or other codification.”); VILLIGER, supra note 19, at 151 (citation omitted) (discussing the view that “multilateral conventions tend to drive out customary law”).

**[END FOOTNOTE 172]**

We recognize that custom sometimes functions as a complement to treaties or soft law, as the literatures on legalization and instrument choice at times suggest. But, the distinctive (and less malleable) characteristics of custom, as compared to soft law and treaties, create continuing incentives for states to choose custom over the other legal instruments if doing so advances their respective national interests or shapes the content, scope, or application of international rules in ways that favor them. If this account is correct, the demand for custom will not be affected by whether a particular subject area becomes more heavily populated by treaties and/or soft law.

We argue that there are two overarching rationales for states to choose custom over treaties and/or soft law: preferable substantive norms or preferable design features. States dissatisfied with the content of nonbinding norms or treaty provisions might, for example, attempt to develop alternative customary rules with different substantive obligations. Or states might agree with the substance of a treaty or soft law, but turn to custom because of its distinctive design features, such as its preclusion of the ability to “opt-out” by non-ratifications, treaty withdrawals, or reservations.

We represent the two dimensions of the choice between custom on the one hand and treaties and soft law in Figure 1 below. The legal instruments that are alternatives to custom appear on the x-axis, and the two rationales for states to choose custom are listed on the y-axis. The diagram depicts custom that arises later in time than treaties or soft law.173 We focus on this temporal relationship because we view it as a more significant challenge to custom's continuing relevance to international cooperation. To be sure, as Tim Meyer has shown, custom that develops first may lead states that prefer codified legal norms to advocate, for example, for ILC-generated conventions or draft articles.174 Yet if states continue to prefer custom—even in areas replete with treaties or nonbinding norms—such a choice casts doubt on predictions of custom's demise in an age of soft law and treaties, and on commentators who discount CIL's role in international cooperation.

**[FIGURE 1 OMITTED]**

A. Custom's Advantages over Treaties: Design Features

The top left box illustrates situations in which states turn to custom to modify or obviate the design features of preexisting international agreements. A prominent illustration of custom that competes with treaty design features is the protection of civilians in CIL and also in the 1949 Geneva Conventions for the Protection of Victims of War. Theodor Meron has argued that the protection of civilians in customary law is important in part because custom, unlike the Geneva Conventions, does not permit unilateral withdrawal and because “reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions.”175 Meron also notes that “as customary law, the norms expressed in the Conventions might be subject to a process of interpretation different from that which applies to treaties”176—a further indication of custom's continuing relevance.

The protection of civilians is a hard case for our theory because the Geneva Conventions have been universally ratified, which some might claim renders custom irrelevant. More common but still supportive examples are multilateral agreements—such as the Convention on the International Sale of Goods and the Vienna Convention on the Law of Treaties—at least some provisions of which are accepted as having attained the status of CIL, thus permitting their application to countries that have refrained from ratifying those instruments.177

**[BEGIN FOOTNOTE 177]**

177. See LARRY A. DIMATTEO, LUCIEN J. DHOOGE, STEPHANIE GREENE, VIRGINIA G. MAURER & MARISA ANNE PAGNATTARO, INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 13-18 (2005). For example, the United States is a non-party to the VCLT but accepts many of its core provisions as customary international law. See U.S. DEP'T OF STATE, Vienna Convention on the Law of the Treaties: Frequently Asked Questions (last visited Aug. 15, 2016), http://www.state.gov/s/l/treaty/faqs/70139.htm ("The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.").

**[END FOOTNOTE 177]**

#### CIL is more likely to secure shared rules than treaties

Campbell 18, General Counsel (International Law) and head of the Office of International Law in the Australian Attorney-General’s Department from 1996-2018 (Bill, November 2018, "The Dynamic Evolution of International Law – The Case for the More Purposeful Development of Customary International Law," Victoria University of Wellington Law Review 49, No. 4, pg. 562-563)

However, there are impediments to the state-based system of international law-making particularly with regards to treaties. Without wishing to be comprehensive they include: a dogged adherence to the status quo; national interest (some would say national self-interest); the absence of a perceived or recognised common interest or problem to be addressed; and ideological differences.

That is not to deny that there are examples of treaties negotiated in relatively recent times which have a high state membership - instances being various human rights treaties such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities, the United Nations Convention on the Law of the Sea, the Arms Trade Treaty and the various climate related treaties and protocols.1

However, it is getting harder to negotiate truly effective treaties particularly in what are perceived to be contentious or urgent subject areas such as counter-terrorism, cyber and new issues of the use of force including in outer space. Moreover, there is reluctance on the part of many states to revisit important elements of existing treaties in need of change either by way of amendment or the adoption of a replacement instrument. This, in part, is because of the perceived prospect of a lengthy and fruitless negotiation and also because of the fears of opening a Pandora's box in terms of content or the unravelling of a delicate package underpinning the original treaty.

So what is the solution to developing international law in such areas? The solution could be the development of customary international law by states in a more purposeful and coordinated manner. 2

It might be said that the development of customary international law is not something that can be organised and that any attempts to do so would amount to a manipulation of the international system and inherently involve breaches of existing law. 3 On the first point, the two elements of customary international law as described by Professor (now Judge) Crawford - "is there a general practice" and "is it accepted as international law?" - by definition guard against manipulation.4 Indeed, these two elements and associated principles that currently are under consideration by the International Law Commission (LC) may well act as a brake on the rapid development of customary international law in many areas. 5 Responding to the second point concerning breach, state practice has to start somewhere. There are many examples of initial state practice that were regarded as going beyond international law and which subsequently expanded to form the basis of a rule of customary international law - one example being the development of fishing zones beyond the territorial sea.

### CP---CIL---NB

#### The CP alone hardens into a global norm and paves the way for flexible responses to transnational threats.

Crootof 16, JD, PhD, Executive Director of the Information Society Project, ISP Research Scholar, and Lecturer in Law at Yale Law School (Rebecca, Summer 2016, "Change without Consent: How Customary International Law Modifies Treaties," Yale Journal of International Law 41, No. 2, pg. 244-246)

Constitutive multilateral treaties are difficult to modify, and thus may not reflect new needs of their constituents. 34 As traditionally understood, treaties can be modified only with the consent of the states parties. Thus, as the number of parties to a treaty increases, the likelihood of substantively altering its text by mutual consent decreases exponentially. Additionally, many bilateral strategies of inducing treaty modification are either ineffective or inapplicable in the multilateral context. 35 The enduring quality of constitutive multilateral treaties can be seen as a benefit: it underscores the binding strength of the treaty and justifies states' high initial investments during the drafting process. However, as time passes and new customs and norms develop, these static texts risk becoming outdated.

To some extent, careful crafting may lessen this problem. During the treaty negotiations, states may employ a number of techniques to introduce flexibility into the treaty regime, including building in procedures or routes by which the treaty may be updated without threatening its overarching structure.36 Drafters might also designate an authoritative interpreter of the treaty to resolve future disputes regarding the text's meaning. 37 After the treaty has taken effect, states may engage in other forms of lawmaking: they may propose gap-filling adaptive interpretations,38 conclude related bilateral agreements, 3 or employ a variety of soft law mechanisms to clarify their treaty rights or obligations. 40 But these coping mechanisms do not solve the problem of subsequent state conduct that directly contradicts treaty law—conduct that may swiftly develop into contradictory customary international law.

2. Contemporary Customary International Law

Due both to a need for new regulations and technological and political developments that allow customary international law to develop swiftly, new customary international law is now forming at an unprecedented rate. First, technological and ideological advances have led to an escalating need for international regulation over new areas, objects, practices, and ideas—and the need for regulation is spurring the creation of new customary international law.41 New technology has opened previously inaccessible regions—outer space, inhospitable deserts, and the deep sea bed—to exploitation. Drones, cyber capabilities, and autonomous weapons systems are challenging fundamental precepts of the law of armed conflict.42 Entire new fields of international law—international trade law, international human rights law, and international criminal law—have sprung up, and legal fields once deemed to be matters of domestic law—intellectual property, investment, and environmental law—are increasingly seen as appropriately regulated by international law.

In the absence of directly relevant treaty law, and in need of reliable guiding principles, states are developing practices standardizing their rights and duties in these new spheres. In most cases, states will justify their actions as lawful under adaptive interpretations of broadly related treaty text. However, existing treaty regimes may not address or anticipate the full range of situations. For example, the majority of cyberattacks do not rise to the level of an "armed attack" and are not governed by the law of armed conflict,43 and other treaty regimes only partially regulate their many possible forms and uses." As state action in these ungoverned areas evolves and comes to be understood as obligatory, it will harden into new customary international law that might clarify or contradict existing treaty language. In some situations, state action may emerge that is practically appropriate to the situation but might appear to be in conflict with the relevant treaties. Such practice may initially be considered unlawful, but as it is accepted by more and more states, it can harden into subsequently developed customary international law.

Additionally, customary law may now form at a far faster rate. Whereas information once traveled between states by foot, horse, or sail, the Internet and other improved communication technologies now allow states to receive news and react almost instantaneously to other states' actions. The greater dissemination of information also makes it easier for policymakers to identify evidence of state practice or opinion juris sive necessitatis and thereby argue that a given approach comports with an existing or developing custom.45 Growing global interdependence and mushrooming international institutions, which foster information sharing and cooperation, have encouraged additional state interactions—which, in turn, results in more evidence of state practice and opinio juris sive necessitatis.46 Furthermore, states are no longer the only international lawmakers: thanks in large part to technological developments,47 both intrastate and nonstate actors are playing an increasingly influential role in the creation of customary international law.48

## CP: Sole Executive

### CP---Sole Executive

#### Sole executive agreements enable international commitments to become law with zero Congressional input.

Kirgis 97, Law School Alumni Professor at Washington and Lee University School of Law, in Lexington, Virginia. (Frederic L., 5-27-1997, “International Agreements and U.S. Law”, ASIL Volume 2 Issue 5, <https://www.asil.org/insights/volume/2/issue/5/international-agreements-and-us-law>)

Not all international agreements negotiated by the United States are submitted to the Senate for its consent. Sometimes the Executive Branch negotiates an agreement that is intended to be binding only if sent to the Senate, but the President for political reasons decides not to seek its consent. Often, however, the Executive Branch negotiates agreements that are intended to be binding without the consent of two-thirds of the Senate. Sometimes these agreements are entered into with the concurrence of a simple majority of both houses of Congress (“Congressional-Executive agreements”); in these cases the concurrence may be given either before or after the Executive Branch negotiates the agreement. On other occasions the President simply enters into an agreement without the intended or actual participation of either house of Congress (a “Presidential,” or “Sole Executive” agreement). The extent of the President's authority to enter into Sole Executive agreements is controversial, as will be noted below.

## CP: Soft Law

### CP---Soft Law

#### Soft law solves---written clarity and delegated authority encourage implementation.

Hollis 20, Laura H Carnell Professor of Law at Temple University’s James E Beasley School of Law and a non-resident Fellow at the Carnegie Endowment for International Peace, formerly served in the US State Department Legal Adviser’s Office, including several years as the Attorney-Adviser for Treaty Affairs. (Duncan B., “1. Defining Treaties,” *The Oxford Guide to Treaties*, Oxford University Press, pg. 17-18)

At the same time, questions have arisen about using treaties as a discrete category of international commitment. International relations scholars often think of international commitments in terms of legalization, a concept that can be disaggregated along three independent dimensions: (i) obligation, which asks the extent to which a commitment is legally binding; (ii) precision, which involves the clarity of the commitment and expected means of performance; and (iii) delegation, which entails the extent to which third parties (eg courts and administrative organs) are designated to implement the commitment.44 Although the legalization perspective does not redefine the treaty, this approach to international coordination and cooperation impacts the treaty concept in two key ways.45

First, evaluating the extent of a commitment’s ‘obligation’ suggests that its ‘bindingness’ exists along a continuum of possibilities. Thus, unlike the traditional binary approach to defining treaties (where a commitment is either a legally binding treaty or it is not), this view highlights the possibility that negotiators may vary how strongly (or weakly) a commitment legally binds its participants. The existence of a legal obligation thus shifts from a black-or-white issue to one encompassing various shades of grey. Second, by emphasizing variables other than obligation—precision and delegation—the essentiality of legal obligations is called into question. A commitment may be fully binding but of little practical use if its content is imprecise or there are no external checks on implementation. Conversely, a non-binding or ‘soft’ obligation might effectively achieve cooperation or coordination if it is stated in highly precise terms and/or delegates responsibility for implementation to third parties.46 Taken together, a graduated view of bindingness and an emphasis on precision and delegation suggest that the treaty may not be an optimal (let alone essential) vehicle for achieving international cooperation and coordination.

On the other hand, whatever explanatory value legalization may have for analysing cooperation and coordination, it remains contested. Some scholars deny any ‘spectrum of legality’, insisting that the legal quality of a commitment cannot be differentiated, rejecting any concept of ‘soft law’ in the process.47 For them, the treaty remains a highly relevant category. States, moreover, appear to agree: they regularly and consciously employ the treaty concept in a binary fashion, choosing it as the label for those commitments they intend to create legal obligations and using other labels (eg political commitment) for other forms of agreement.48 Nor are these labels merely international rhetoric. At the domestic level especially, the treaty concept implicates domestic law in ways distinct from the impact (if any) of other international commitments. Those impacts, moreover, may be precisely what give the treaty commitment its credibility and hence its utility in facilitating international cooperation and coordination.49

### CP---Soft Law---Cyber

#### Informal norms and unilateral restraint solve and are far more feasible than a treaty.

Nye 22, University Distinguished Service Professor Emeritus at and former Dean of the Harvard Kennedy School. (Joseph S. Nye, Jr., January/February, “The End of Cyber-Anarchy?”, Foreign Affairs, <https://www.foreignaffairs.com/articles/russian-federation/2021-12-14/end-cyber-anarchy>)

Treaties regarding cyberspace may be unworkable, but it might be possible to set limits on certain types of behavior and negotiate rough rules of the road. During the Cold War, informal norms governed the treatment of each side’s spies; expulsion, rather than execution, became the norm. In 1972, the Soviet Union and the United States negotiated the Incidents at Sea Agreement to limit naval behavior that might lead to escalation. Today, China, Russia, and the United States might negotiate limits on their behavior regarding the extent and type of cyber-espionage they carry out, as Xi and Obama did in 2015. Or they might agree to set limits on their interventions in one another’s domestic political processes. Although such pledges would lack the precise language of formal treaties, the three countries could independently make unilateral statements about areas of self-restraint and establish a consultative process to contain conflict. Ideological differences would make a detailed agreement difficult, but even greater ideological differences did not prevent agreements that helped avoid escalation during the Cold War. Prudence can sometimes be more important than ideology.

#### Norms solve: coordination, prudence, reputation, and external pressure.

Nye 22, University Distinguished Service Professor Emeritus at and former Dean of the Harvard Kennedy School. (Joseph S. Nye, Jr., January/February, “The End of Cyber-Anarchy?”, Foreign Affairs, <https://www.foreignaffairs.com/articles/russian-federation/2021-12-14/end-cyber-anarchy>)

THE NEW PRIVATEERS

Norms are not effective until they become common state practice, and that can take time. It took many decades for norms against slavery to develop in Europe and the United States in the nineteenth century. The key question is why states ever let norms constrain their behavior. There are at least four main reasons: coordination, prudence, reputational costs, and domestic pressures, including public opinion and economic changes.

Common expectations inscribed in laws, norms, and principles help states coordinate their efforts. For example, although some states (including the United States) have not ratified the UN Convention on the Law of the Sea, all states treat a 12-mile limit as customary international law when it comes to disputes about territorial waters. The benefits of coordination—and the risks posed by its absence—have been evident in cyberspace on the few occasions when targets have been hacked through abuse of the Internet’s domain name system, which is sometimes called “the telephone book of the Internet” and is run by the nonprofit Internet Corporation for Assigned Names and Numbers, or ICANN. By corrupting the phone book, such attacks put the basic stability of the Internet at risk. Unless states refrain from interfering with the structure that makes it possible for private networks to connect, there is no Internet. And so, for the most part, states eschew these tactics.

Prudence results from the fear of creating unintended consequences in unpredictable systems and can develop into a norm of nonuse or limited use of certain weapons or a norm of limiting targets. Something like this happened with nuclear weapons when the superpowers came close to the brink of nuclear war in 1962, during the Cuban missile crisis. The Limited Test Ban Treaty followed a year later. A more distant but historical example of how prudence produced a norm against using certain tactics is the fate of privateering. In the eighteenth century, national navies routinely employed private individuals or private ships to augment their power at sea. But in the following century, states turned away from privateers because their extracurricular pillaging became too costly. As governments struggled to control privateers, attitudes changed, and new norms of prudence and restraint developed. One could imagine something similar occurring in the domain of cyberspace as governments discover that using proxies and private actors to carry out cyberattacks produces negative economic effects and increases the risk of escalation. A number of states have outlawed “hacking back.”

Concerns about damage to a country’s reputation and soft power can also produce voluntary restraint. Taboos develop over time and increase the costs of using or even possessing a weapon that can inflict massive damage. Take, for example, the Biological Weapons Convention, which came into force in 1975. Any country that wishes to develop biological weapons has to do so secretly and illegally and faces widespread international condemnation if evidence of its activities leaks, as the Iraqi leader Saddam Hussein discovered.

It is hard to imagine the emergence of a similar blanket taboo against the use of cyberweapons. For one thing, it is difficult to determine whether any particular line of code is a weapon or not. A more likely taboo is one that would prohibit the use of cyberweapons against particular targets, such as hospitals or health-care systems. Such prohibitions would have the benefit of piggybacking on the existing taboo against using conventional weapons on civilians. During the COVID-19 pandemic, public revulsion against ransomware attacks on hospitals has helped reinforce that taboo and suggested how it might apply to other areas in the realm of cyberspace. Something similar might evolve if hackers were to cause an increase in fatal accidents from the use of electric vehicles.

PEER PRESSURE

Some scholars have argued that norms have a natural life cycle. They often begin with “norm entrepreneurs”: individuals, organizations, social groups, and official commissions that enjoy an outsize influence on public opinion. After a certain gestation period, some norms reach a tipping point, when cascades of acceptance translate into a widespread belief and leaders find that they would pay a steep price for rejecting it.

Embryonic norms can arise from changing social attitudes, or they can be imported. Take, for example, the spread of concern for universal human rights after 1945. Western countries took the lead in promoting the Universal Declaration of Human Rights in 1948, but many other states felt obliged to sign on because of public opinion and subsequently found themselves constrained by external pressure and by concern about their reputations. One might expect such constraints to be stronger in democracies than in authoritarian states. But the Helsinki process, a series of meetings between the Soviet Union and Western countries in the early 1970s, successfully included human rights in discussions about political and economic issues during the Cold War.

## K: Capitalism

### Link---International Law

#### I-Law is a predatory system built to ruthlessly exploit the Global South

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In the past, international law was used by the Westerners to legitimise or justify all their acts of exploitation and subjugation in the developing countries; for example, it is documented that international law was used by the Westerners to justify slavery, colonialism and exploitation or to drain the resources of the areas, particularly Third-World countries subject to colonialism. Thus, Mutua is right to comment that ‘the regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West’.9 In the modern period, international law is predominantly used to protect, project, promote (3Ps) or to safeguard the interest of the Westerners; for example their multinational businesses10 scattered all over the world and, as a protectionist edifice against terrorist attacks that not until recently are more directed to the Western countries.

This article examines the view by some scholars who perceive international law as a ‘global law made by the West’, by concentrating on two crucial issues: one, international law as an object used to nurture and maintain colonial and neo-colonial domination of the countries of third world; and two, international law as an instrument for maintaining the austerity and economic conditions of underdevelopment of third-world countries through policies of international financial institutions that the West controls. This paper by concentrating on these two salient issues highlights various areas of international law11 in order to provide a general understanding of how its construction and reconstruction affect the third-world people. 3. International Law as an Object used to Nurture and Maintain Colonial and Neo-Colonial Domination of the Third World 3.1. Definition of the Term ‘Third World’ It will make sense to start by defining what the term ‘Third World’ means. One, this refers to a group of countries with certain common features. Whereas, the developed capitalist countries constitute the first world, the socialist countries are called the second world. The underdeveloped countries in Africa, Asia and Latin American that were subjected to colonial domination are called the third world. Two, and alternately, the superpowers are categorised as the first world, other developed countries including United Kingdom, Germany, Australia and Canada are classified together as the second world. The third world consists of underdeveloped countries of Latin America, Africa and Asia.12 The two different meanings given above have a few things in common, the attributes of the third world are the same. The meaning of third world as given in both of the classifications is in relation to the developed countries. The third-world countries are economically poor (though it should be noted that some of the third-world countries, such as the states in the Arab Gulf, are rich) and they have a colonial past. While some of these countries operate with democratic institutions, others have been undemocratically ruled by military regimes. There are also differences that exist among the third-world countries in terms of social formations ranging from tribal societies to capitalist societies. In spite of these remarkable differences, the category ‘third world’ is not a meaningless one, since it helps in grouping together countries that came into being by fighting against the colonial domination. In fact, they all encounter similar problems because of their background. Thus, there are general characteristics that the States in the Third World have, which may largely be attributed to the fact that they have been colonised and that colonialism has introduced certain fundamental changes in their societies.13 Mutua, in providing the meaning of Third World, captures the view of Julius Nyerere concerning the domineering and exploitative nature of international legal and economic order on the defenceless Third World: The Third World consists of the victims and the powerless in the international economy. . . . Together we constitute a majority of the world’s population, and possess the largest part of certain important raw materials, but we have no control and hardly in influence over the manner in which the nations of the world arrange their economic affairs. In international rule making, we are recipients and not participants.14

3.2. International Law and Colonialism

International law is the major legal edifice that has been used in nurturing and maintaining colonial and neo-colonial domination of the third world. This is in line with the view of scholars like Anghie that the rules of international law in important areas, such as laws relating to the acquisition of territory, recognition, state responsibility and state succession, were constructed to suit the indispensability of colonialism.15 With the domineering instrument of international law, the third-world people and their countries were compelled (without consent) to become the subject of international law. In this context, the third-world States as sovereign entities and virtually all the rights of the people in these States were surrendered to the colonial overlords. It is against this backdrop that recent postcolonial scholarships have emphasised the extent to which colonialism was not only a matter of sovereignty, but as well, that affecting the rights of the citizens. This is understandable when it is appreciated that the major import or raison d’etre of colonial governance was the racial and cultural incapacity of the colonised to govern themselves. Colonial rulers regarded native conditions as uncivilised and as requiring improvement, while forbidding citizenship and the attendant rights of self-improvement to colonial subjects.16

3.3. International Law and Estrangement of the People of the Third World

The kind of relationship that existed between the third-world people and international law (an edifice of the Westerners) is such that it is directly or indirectly concerned with the estrangement of international law from the people of third world, based on strings that strongly, but inextricably connect or bond them with the past, current and the future international law. The term estrangement here means a kind of alienated, but complex relationship that exists between the individuals, society and nature of international law under global capitalism; and the slow transformation of international law into internal law.17 This isolation of the people of third world from international law manifests on the relegated place assigned to third-world people in the history of international law. This is because during the early stage of international law, they were seen as backward, crude, barbaric and uncivilised, and therefore incapable of participating in the international legal order. For example, argument is put forward that African states lacked the power to sign legal treaties to transfer their sovereignty to a European power.18 The beginning and the emergence of a Global State, was marked through greater application of cleverness and subtleness in the use of international law to secure the interest of the powerful Westerners than in the past when legitimacy is derived by the employment of force. The colonial period is a clear demonstration of how the notions of justice from the context of international law has been subverted in order to ensure not only the appropriation of the rights of the people of the third world, but as well, the enslavement of the larger part of humanity and the use of division to maintain control of the colonies. In some parts of the third-world colonies, the colonialists employed the policies of divide and rule to co-opt, but this system of indirect rule destabilised the third-world nations.19 The colonial rule did not promote the values necessitating good governance in third-world countries, despite the fact that the main colonial powers in third-world colonies were themselves democratic countries. In the first place, the institutions they created were apparatuses of domination. By control over vast areas with distinct populations, they stressed functional utility, law and order, but not participation and reciprocity. Also access to the colonial order was generally blocked and distanced from the scrutiny or inspection of the people it claimed or purported to govern. There was a remote, bureaucratic and patrimonial form of politics which flourished under a state that violated as a matter of practice or routine the domestic legal norms, the values of democratic tenets and the normative facet of governance.20 3.4. International Law and the Mandate System The mandate system that existed during the colonial rule was a subtle application of the international law of acquisition that gave authority to colonial masters to take control of the administration of the colonies. It is a calculated method to maintain the prolongation of European rule of subjugation over the people of third world. The Mandate form of rule, which Sornarajah describes as “the sacred trust of humanity” is a technique for justifying the continuation of European rule over other people.21 Extension of the ‘Mandate of Sacred Trust’ or ‘Sacred Trust of Civilisation’ shows how the Westerners contradict the norms and principles of international law, such as the Principles of Free Choice of Economic System (i.e., the right of every State to freely choose its economic system) in their deliberate attempt to constructing and reconstructing international law in their favour. This right of States to freely choose its economic system, which introduced the Declaration of Principles of International Law concerning friendly relations and cooperation among States as a component of sovereign equality; has been reiterated restated and, further elaborated in several important international legal instruments. For example, the Charter of Economic Rights and Duties of States (General Assembly Resolution 3281 (XXIX) 1974), in its Article 1 provides inter alia: Every State has the sovereign and inalienable right to choose its economic system, as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever.22

However, for centuries, beginning with the slave trade, the West continuously has ruthlessly exploited the third-world people. The turning of most of third world into a commercial warren for the hunting of black skins was one of the chief sources of ‘primitive accumulation’ that signalled the rosy dawn of the era of capitalist production. Sadly, the abduction and enslavement of millions of Africans was only the start because in the late nineteenth century, in what became known as the ‘scramble for the colonies’ especially Africa, was arbitrarily carved up into colonies by the leading European powers. They then violently subjugated its people and plundered the continent of its rich natural resources. In the post-independence eras, third world states became weak pawns in the world economy, their path to development largely blocked by their weakening past colonial legacies.23 Thus, the continuous manipulations of virtually all aspects of the principles of State sovereignty through the dogmatic instrumentalism of international law under the machinations of the Global North and the international institutions (they dictate), show that international law from ab initio is nothing, but a global law made by the Westerners in order to control the third world.

4. The Use of International Law Through the Policies and Actions of International Financial Institutions to Control Economic Relations with Third World

4.1. International Law and Economic Liberalisation of the Third World

There has never been a time when economic progress in the third-world countries through the much popular international economic liberal movement has been taken seriously; rather international economic law regime is control by the Western countries through international financial institutions, which initiate and implement policies and actions that continue to foster underdevelopment the third world. Since the third world States were assumed not to have personality in international law, their interest have from the get go continued to suffer because they did not have a role to play in shaping the norms of the earlier international legal order. This, to a great extent, has influenced the present international legal order, particularly in the realm of economic liberalisation of the third world states. In this context, international law has been used to construct and reconstruct the meaning of sovereign States by re-allocating the hitherto sovereign economic powers of the third world States to international financial institutions. This to a large extent limits the possibilities of third world States to pursue independent, meaningful and self-reliant development.24 As Sornarajah argues, ‘the espousal of economic liberalism by the World Bank, the IMF and the WTO ensure that these institutions will not favour collective rights such as the right to development’.25

The international economic liberalism is one of the major powerful tools of international economic law agenda pursued by the Westerners through the auspices of the international financial institutions, in order to continue maintaining the subjugation and control of the third-world countries. The Western justification for the international democratic and economic liberalisation agenda is that it will help: to reduce the resource gap in the Less Developed Countries (LDCs) of the third world, by improving the trade balance and encouraging a net capital inflow,26 and to eradicate poverty and improve economic development of underdeveloped states.27 Thus, the growing importance of international organisations such as the G7, IMF and World Bank is indicative of the influence of liberal economic internationalism in the post-Cold War period.28 Hence, the granting of aid and loan to the poorer communities, as a means for the elimination of hunger and disease in the Third World become the primary aim which these institutions based their activities.

However, the argument has been put-forward that, events in the developing world provide us with some critical reasons why attempts made in redressing the situation (of transparent inequality between the Westerners and Third World as a result of exploitations and injustices by the later) through the encouragement of increased foreign borrowing have contributed to the problem of debt crisis in the third world by increasing the resource gap even further.29

These powerful transnational bodies which embody free trade liberalism as their governing ideology, however, impose free market strictures on developing societies. Since they are the primary organisations which formalise and institutionalise market relationships, including the international legal norms guiding States; they lock peripheral states into involuntary agreements which force them to lower their protective barriers (GATT and NAFTA for instance), thereby preventing third world nations from developing trade profiles which diverge from the model dictated by their supposed ‘comparative advantage’.30

Good evidence is the nature of obligation accorded to the adoption of the agreements comprising the Final Act of the Uruguay Round of Trade Negotiations that lacked transparency. There is a clear suggestion that third-world countries gained little from the Uruguay Round agreements.31 The IMF and the World Bank make the provision of finance (or more accurately ‘debt’) to third world developing societies conditional on their unilateral acceptance of free market rules for their economies, the conditionality of the so called—structural adjustment programme ‘SAP’ in many third-world countries.32 For example, in Africa, SAP failed the majority of Nigeria; particularly it brought mass unemployment.33 Kenya also continues to express its displeasure at the IMF and the World Bank for forcing these policy changes on it.34 In the early 1980s, Uganda was rocked by weeks of demonstrations, as industrial workers and students took to the streets to denounce President Miton Obote’s IMF-imposed economic programme and in 1990, Matthew Kerokou of the Benin Republic in West Africa was removed from power following a wave of anti-SAP riots.35 It is therefore not surprising that notable scholars, such as Sachs, criticize the IMF and World Bank for imposing draconian budgets to support SAP. In his view, the approach had ‘little scientific merit and produced even fewer results’.36 It could rightly be argued that it is no coincidence that the governments that continued to operate quite well (e.g. Botswana) never had to subject themselves to the painful cure of SAP.37 The poor countries are, therefore, constantly de-capitalised and their economies remain largely upon decision made by Westerners in New York, London, Paris and other metropolitan centres, and implemented through the international institutions they dictate.38 As Chimni has submitted, ‘the economic and political independence of the third world is being undermined by policies and laws dictated by the first world and the international institutions it controls’.39 The activities of these financial institutions guided by the norms of international economic law were more or less to maintain the nature of neo-colonialism in the third-world countries.40 This contention becomes glaring when it is appreciated that the IMF was initially a pure European establishment. During the first period of its existence, the IMF gave the impression of certain efficiency as it helped to re-establish the convertibility of European Currencies (1948–1957); then helped European economies adjust (1958–1966). From 1967 onwards, however, the fund failed to maintain stability despite the creation of Special Drawing Rights (SDRS); parity adjustments were numerous after this date: devaluation of the Pound and the Franc, revaluation of the German Mark and the Japanese Yen, floating of the price of gold, etc. The adoption of the General system of floating currencies in 1973 may be considered to have marked the end of the Breton Wood’s mandate. At a point, the continued existence of the IMF was called into question. The institution survived by taking new functions: Management of unilateral structural adjustment in developing countries of the third world, and, from the end of the 1980s, intervention in many third-world countries with the goal of ensuring the re-incorporation of these countries into the international monetary system.41 Imperatively, and drawing from the above revelations, one might be tempted to ask why an institution (IMF) which once failed to deliver in Europe was drafted to take the lead in the economic recovery of Africa and other developing world. Surprisingly, and as if oblivious of the question of incompetence on the part of the IMF, the Western governments moved to implement the recommendations of the institution by granting of loans/aids to any third-world countries that follow the IMF’s economic liberalization policies. International Development Forum informs us that the annual expenditure on health in the poorest countries average less than $5 per person. In wealthier countries such as USA, Canada, etc. health expenditure average $400 per person.42 This is because the poor are either entirely unemployed or underemployed. The situation is contrary to the decades before economic reforms were introduced, and as the 1997 IMF Report has confirmed. According to it, in the decade prior to 1985, many third-world countries in East Asia, South Asia and sub-Saharan Africa experienced annual growth rates of employment in excess of 5 percent with some as high as 10 percent per annum.43 Again, the loans and aid administration from the developed to underdeveloped third world States remain economically retrospective. In this perspective, it can be pointedly contended that, one of the biggest stumbling blocks to third world development in modern times was the external debt crisis that accrue as a result of the manipulation of the global economic system by the international financial institutions. This is clear in a forward on Anighie’s work:

The newly independent states . . . fought to develop new rules, even a new international economic order. But in the event the Bretton Woods Institutions triumphed, imposing their own view of development and a certain set of structures of governance on half the world’s population and a majority of its governments. The outcome has been, on the whole, increased indebtedness and new forms of dependence.44

4.2. International Environmental Law and Exploitation of the Third World The international environmental law has done little in the protection of the third-world people, in relation to the exploitative activities being perpetrated by Multinational Corporations. International environmental law as part of the construct of the Westerners rather is today subordinated to corporate powers, which dictate both the dwindling economic consumption patterns and environmental depletion in the third world States as against the high consumption patterns and environmental protection in the rich countries. For example, in the Democratic Republic of Congo (DRC), Anglo American Gold, a US company has allegedly continued illegal exploitations and consequential environmental hazards. Also recently, the US companies including IBM, Intel, Motorola, Apple and Hewlett-Packard were asked to disclose whether they use DRC’s minerals and other resources being (illegally) exploited to supply multinationals in their need of raw materials, particularly in Rwanda, Uganda and Burundi.45 It is in this context that the Catholic Agency for Overseas Development (CAFOD), in reaction to the exploitative activities of some multinational companies (and the suffering of the people of DRC and other third world States) calls both the international community, and national government of resource-rich third-world countries – ‘to ensure that there is a balanced legal framework in place that recognises the interests of the broader population . . .’46 The Niger Delta is another good case study. Niger Delta’s potential for sustainable development remains unfulfilled, and is now increasingly threatened by environmental devastation and worsening economic conditions. In spite of the enormous wealth accrued from their land by oil companies, the people continue to live in unfavourable conditions without electricity, pipe borne water, hospitals, housing and schools.47 The Ecumenical Council for Corporate Responsibility (ECCR) considers how the operations of Shell’s Nigerian subsidiary, the Shell Petroleum Development Company (SPDC), affect the human rights and living conditions of Niger Delta communities. Based on case studies researched and written by five civil society organisations working in the Niger Delta, there are concerns about Shell’s operations in relation to international social and environmental standards, pollution levels, communities’ health and livelihoods, and the right of local people to a say in decisions that affect their lives.48 Human rights and corporate responsibility advocates concur that activities of Shell negate the provisions in the International Covenant on Civil and Political Rights and the Covenant on the Economic, Social and Cultural Rights of the United Nations, both of which Nigeria is a signatory.49 The case is not the same in the rich countries where international environmental law works effectively to protect the people. For example, the environmental pollution of Oil-spill in the Deepwater Horizon of the Gulf of Mexico, which killed 11 workers because of the oil-pipe line spill of the Shell British Petroleum (the same oil company that has been doing environmental havoc and killing hundreds of people in the third-world countries) made headlines around the world, since it is described as the worst environmental disaster in US history.50 The US even went ahead to sue the Shell B.P. and eight other subsidiaries alleging that the cause of the 20 April oil explosion in the US was due to violations of safety and operational regulations.51 This is one of such cases where national environmental law is effectively working and protecting the people in the Western countries. It provides a good illustration as to the use of such norms which have crept into international environmental law, as perceived by the third world, is nothing but a global law made by the Westerners for the purpose of directing and controlling global undertakings.52 International law merely exists in principles in the third-world countries and therefore provides little or no protection to human rights (political, economic, social and cultural) of the people, while in the Western countries international law apparently effectively works to protect the human rights of the people. Mutua in this perspective reaffirms that ‘the international human rights regime is merely a Western contrivance, a new form of imperialism – this time of a moral dimension – used to export a cultural package of the West’53 4.3. International Development Law and Third World Law and development provides another crucial aspect of international law that has been used by the Westerners, and that is being implemented by the international institutions to continue to maintain the domination and estrangement of the third-world people. The law and development movement started in the 1960s to reform the judicial systems and existing laws of countries in third world (Asia, Africa and Latin America). However, within a short period of its inception, both the academic participants54 and the then Ford Foundation officer heading the project55 acknowledged the law and development regime as a failure. One strong reason adduced by international development legal pundits for the failure of the law and development movement is that the norms of international law as packaged in the Western rich countries are in most cases in disharmony with the interests of the third world, most of which are poor developing countries. This forms the point of concern or reprimand by Head, I simply caution that some of the applications of legal principles, designed as they often were in the industrialized countries, are not always equitable to the interests of the developing countries. It should not be surprising that the goals of the developing countries, newly independent as many of them are, are not identical to those of the industrialized countries, colonial powers as many of them were.56 Another primary reason which scholars have not put into consideration for the woeful failure of (international) law and development movement at its inception is that the package or the programme included no development scholar, expertise nor professionals from the third world; rather as a complete package of the West, it was executed only by the Western scholars and agencies.57 Currently law and development, both as a movement and practice have been facing serious challenges because, there is no agreement or uniformity between the development goals as projected by the leaders of third-world countries and those of the Western developed countries. More so, the Westerners have through the International Financial Institutions (IFIs) and other international institutions that they control, continued to harness international development affairs in ways that contradict the development and other domestic interests of the third world. Their approach to international law and development in the third world is more or less based on the situations or experience in the Western and developed world, which is either distinct from those of the third world or ‘chews more than it can swallow’ by attempting to fulfill too many broad-range of development goals. As Head asserts, The development goals of political leaders North and South have proved in the short period Since World War II often to be widely divergent. Development, in the sense that dominates discussions at UNCTAD or the World Bank or OECD, consists of a number of dimensions of which the economic, sadly, has too often, in too many fora, been non-uniformly defined. When that happens, one of two quite distinct processes ensues. Either development efforts endeavour to satisfy an impossibly wide range of goals and constituencies, or they become so narrow and tightly focused as to diminish greatly any likelihood of their harmonious inter-action with other events.58 Though scholars, particularly those from the Western world argue that the inability of international development to salvage the third-world countries is not based on master-minded scheming of the Westerners and the international institutions. Neocosmos for example argue, ‘the failure of development to emancipate the people of Africa was not the result of a betrayal or a con trick, it was rather the effect of a hegemonic worldwide conception in the twentieth century, a view according to which human emancipation could only be achieved through one form or other state of politics’.59 However, there are good reasons why failure to salvage third world out of their development backwardness should be seen as a deliberate manipulation by the West. One of such reasons is the approach to international security and humanitarian regime (security being an aspect of international development). International security regime, shows gaps between a more developed and prosperous Global North as opposed to miserable realities of violent conflict and chronic poverty experienced by a significant proportion of the world’s population, particularly those of the third world. These gaps and inequality, which not only reflect failures – of understanding, conflicts of interest, resource constraints and poor implementation; but also – a collaborative kind of plot with a high degree of subtleness between the Westerners and the international institutions against the third world. It is in this line that Luckham reasons, Security, (like development), is all too often seen as something the North delivers through its policy interventions and aid programmes, rather than as the product of obtaining positive changes in the developing South.60 This agrees with the views of some TWAIL scholars that the international security legal order has been constructed by the developed states of the North at the detriment of those of developing South.61 The welfare and development of the third world is in principle the primary concern or priority in the international development project, but practically, this is not in the priority zone. According to Christian Aid, about 1 billion dollars that supposedly went to development aid were diverted from the war on poverty, and was instead channelled towards the war on terrorism. The US Congress reduced its aid package to development from 1.6 billion to 650 million globally. The United Kingdom redirected 150 million pounds of British development aid to the rebuilding of Iraq. The UK also pledged to provide £600 000 to remove the minefields that were scattered by Gaddafi loyalists for the purposes of protection, and £60 000 for security purposes.62 This is money that would have been provided for sustainable development project in Africa. Additionally, SIPRI statistics show that in 2001, the combined military spending of OECD countries was ten times higher than their combined levels of official development assistance.63 It is very conspicuous now that the West has decided to concentrate and invest more heavily on military, rather than on social and economic development, which is wrongly understood as a way to reduce poverty and underdevelopment. It is ultimately perceived as a better means to reduce the global threat to peace, security and stability. In other words, the route or option taken to invest ‘more heavily’ on militarisation instead on socio-economic development is making things more difficult globally, including the efforts towards global peace and security.64 McCormack argues in this perspective ‘the level of material and strategic engagement with the developing world has fallen since the end of the Cold War (this has worsened post-9/11). The broader intervention context is one in which the developing world is less of a security concern to the developed than was the case during the cold war’.65 This equally forms the note of caution in the study carried by the NSI: Lack of development in the poor countries, and unbalanced development in the middle – or high — income countries, is often manifested in the violation of basic human rights, political and social repression, as well as widespread economic deprivation. Moreover, inadequate or unbalanced development is a threat not only to the security of individuals, but increasingly to local and international peace as well.66 5. Suggestions This paper’s argument has been thus: When international law was initially drafted, it was developed only by the Western countries. Though this paper acknowledges that certain reviews and changes have been made in order to reflect the changes in the global events that affect the development of international law and the dynamism of the international system. It is suggested that international conventions need to be conveyed in different continents around the globe. There should be two representatives (political and legal experts) from each State in the globe (as major actor) in the international law. In these conventions international law should be re-drafted to reflect the legal and political voices of the States in the international system. It is the opinion of this author that a birth of a new international law that emerges from these global conventions with full representatives and participation from the big, small, rich and poor countries will be a key way to reduce global tension, and to achieving global peace and security. As (founding fathers) of each State and continent will understand and accept the weight of international law, and can rightly say to themselves and tell their future generations – ‘yes, it is our international law, we participated in drafting it’, rather than presently conceived by the third word category as ‘a global law made by the Westerners’.

6. Conclusion

This paper, while adopting the Third World Approach to International Law, has assessed the general claim that international law is ‘a global law made by the Westerners’ for the purpose of directing and controlling global undertakings. This paper has suggested as follows: that international law is an object used to nurture and maintain colonial and neo-colonial inequality and domination of the third world. By the instrumentality of international law, the Westerners were able to compel the third-world people and their countries, without obtaining their consent to become the subject of international law. In this connection, the States as sovereign entity and virtually all the rights of the people in these states were surrendered to the colonial overlords. The colonial period demonstrates how the notions of equality and justice from the context of international law became subverted in order to ensure not only the appropriation of the rights of the people of the third world, but as well the enslavement of the larger part of humanity and the use of division to maintain control of the colonies.

This paper also finds that the Westerners use international law to control economic relations with third world through the policies and actions of international financial institutions they dictate. This was seen through how poor countries are constantly de-capitalised and their economies remain hugely dependent upon decisions made by Westerners in New York, London, Paris and other metropolitan centres, and being implemented through the international institutions. The article also finds that law and development both as a movement and practice has been facing serious challenges because of pronounced inequality and no uniformity between the development goals as projected by the leaders of Global South and those of the Global North.

The claim of this paper is that all these issues emanate from the manipulation of the international law by the West, and concludes that this is the key instrument that perpetuates severe inequality between the global-North and global-South. This in turn hampers efforts toward global peace and security. The paper calls for a complete re-drafting of international law which States in the global south will participate.

**International law is a blood-stained policing apparatus which cloaks its domination through a myth of neutrality and universalism – the aff’s upholding of global norms preserves colonialism**

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Drawing boundaries is the inaugural gesture of the law, while policing boundaries is its routine function. The genesis of law signals that "[t]he primordial scene of the nomos opens with a drawing of a line in the soil ... to mark the space of one's own."28 Modem law's insistent claims of its universality notwithstanding, lines of demarcation that separate legality from illegality often create zones where bodies and spaces are placed on the other side of universality, a "moral and legal no man 's land, where universality finds its spatial limit." 29 Material and discursive orders that enjoy hegemony in any setting, fashion and enable instruments to draw these lines and carve out such zones. The story of the Durand Line testifies to this phenomenon.

The Durand Line was drawn by a colonial power in the nineteenth century, which was a defining phase in the consolidation of modem regimes of knowledge, along with the suturing of epistemology with the state.30 Therefore, it is critical to identify the conceptual ensemble that furnished the scaffolding for such a venture. It is the Author's position that the conceptual and discursive apparatus of international law, modem geography, geopolitics, and borders are interwoven in the enabling frame that made the drawing of this conflict-ridden dividing line possible.

A. International Law and Differentiated Sovereignty

No sooner was a new world "discovered," than a line, patition del mar oceano, was drawn by the Treaty of Tordesillas on June 7, 1494." This line divided the world beyond Europe between Portugal and Spain, and supplemented Pope Alexander VI's edict Inter caetera divinae of May 4, 1494, with an agreement between sovereigns. 32 The right of two royal houses of Europe over the division of the non-European world as "lords with full, free, and every kind of power, authority and jurisdiction"33 now stood grounded both in divine sanction and sovereign will and consent.34 This inaugural act of the incipient global order injected colonialism into the genetic code of modem international law.35 The "amity lines," initiated by a secret clause of the Treaty of Cateau-Cambresis of 1559, institutionalized a differentiation between the European "sphere of peace and the law of nations from an overseas sphere in which there was neither peace nor law." 36 These "amity lines," which mandated peaceful cooperation in the region within their bounds and gave license to unbridled conflict without, gave rise to the maxim: "Beyond the equator there are no sins."37 In the new global order, "[e]verything that occurred 'beyond the line' remained outside the legal, moral, and political values recognized on this side of the line."38 In this zone, "beyond the line" and "beyond the equator," doctrines of "discovery," "terra nullius," and "anima nullius" flourished.39 The career of modem international law is the story of making, maintaining, and managing this enduring line.

In the nineteenth century, colonialism animated a decisive turn in the evolution of modem international law, even though "international law consistently attempts to obscure its colonial origins, [and] its connections with the inequalities and exploitation inherent in the colonial encounter." 40 The unquestioned universality of international law "was principally a consequence of the imperial expansion.”41 The development of modem conceptions of sovereignty and the international subject, which are bedrock constructs of modem international law, has little to do with the professed foundational concern of international law, i.e., stability of the relations between sovereign states.42 Rather, these constructs were fashioned to manage the colonial relations of domination and racial difference. 43

Expansion of colonialism triggered a search for a legal framework that could legitimize the securing of a range of rights and privileges from colonized and dominated polities. Recognition of some measure of sovereignty of the dominated polities was warranted by the need to ensure that the terms of colonial treaties would be honored, even though the terms of these treaties betrayed a lack of sovereignty and equality.44 This tension raised anew the question of what entities were eligible to be regarded as proper subjects of international law. 45 In response, international law jettisoned classical natural law constructs of sovereign equality, now considered "pseudo-metaphysical notions of what the essential qualities of Statehood ought to be,"46 and turned to positivism based on actual practice of states. Frames of jus gentium, or principles of law common to all peoples, yielded to positivist ontology of law and sovereignty. 47 This sharp turn yielded quick results. By the mid-nineteenth century, a new construct of differential sovereignty was entrenched in international law-sovereigns and international subjects were not alike in terms of rights, eligibilities, and competencies. Sovereignty was now to be seen as a differentially distributed bundle of rights.48 Several classes of sovereign states were constituted-some fully sovereign, others partly so; some part of the "family of nations," some outside it; some entitled to domination, others with minimal legal competence. 49 A sliding-scale of "layers of sovereignty"50 emerged, stretching from "Great Powers" to colonies, with suzerains, protected states, and protectorates positioned in be- tween.51 Given that "the founding conception of late nineteenth-century international law was not sovereignty but a collective (European) conscience,” 52 it is no surprise that this sliding scale of sovereignty mirrored the Eurocentric scale of "civilization" attendant to colonialism.53 "[P]ositivism's triumphant suppression of the non-European world"54 rested on the premise that "of uncivilized natives international law t[ook] no account."55 No wonder then that "[t]o characterize any conduct whatever towards a barbarous people as a violation of the laws of nations, only shows that he who so speaks has never considered the subject." 56 This muscular and positive international law at the service of states "with good breeding"57 categorized a confluence of people and territory as "backward" and legitimated colonial acquisition of "backward territory." 58 Note that in yet another deployment of the enduring civilized/ uncivilized binary, the constituent statute of the International Court of Justice ("ICJ") mandates that judges be selected with due regard to "the main forms of civilizations . . . of the world," and the Court is required to apply "the general principles of law recognized by civilized nations." 59 The ICJ has lived up to this mandate by, for example, reaching out to "geographical Hegelianism" to resolve territorial disputes in Africa.60

While imperatives of colonialism shaped positivist doctrines of modern international law, by the late nineteenth century they also ushered in a new global order where mutual rivalries among colonial powers gave way when concerted action in the service of maintaining colonial domination was warranted. The first concrete step in this direction was containment of the "scramble for Africa" at the Berlin Conference on the Congo (1884-85), which aimed "to bring the natives of Africa within the pale of civilization by opening up the interior of the continent to commerce." 61 This Conference, from which Africans were completely excluded, institutionalized the "right" of "Great Powers" to colonial dominion. 62 It was determined that when faced with assertions of sovereignty over colonized territories, "it is only the recognition of such sovereignty by the members of the international society which concerns us, [of] that of uncivilised natives international law takes no account." 63 The logic of nineteenth century international law could not have had it any other way:

International law has to treat such natives as uncivilised. It regulates, for the mutual benefit of the civilised states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded. 64

Consider that the Berlin Conference took place in the midst of Europe's agrarian crisis and the Great Depression of 1873-86, which had "shaken confidence in economic self-healing" and gave colonial expansion further impetus. This was also the time when a "specter of 'overcivilization' was breeding "militarism" and a longing for "imperial adventure" in the U.S. 66 With the Great Powers' right to colonize now secure, collective military interventions to protect colonial orders were the next step in this progression. The coordinated military action in China by Western powers to put down the Boxer Uprising of 1900 was "the dramatic beginning of the contemporary phase of international history." 67 It was also in 1885, the year of the Berlin Conference, that British foreign policy and intelligence officials first developed blueprints for a "pan- Islamic alliance [between] Egypt, Turkey, Persia, and Afghanistan against czarist Russia."68 This sowed a poison seed, the bitter fruits of which sour many a palate today. The Durand Line was drawn in this milieu.

This global framework animated instrumental deployment of the law to reorder colonized spaces and bodies.69 Law in the colony aimed to "re- duce them to civility," those who had "no skill of submission."70 Violence was deemed a vital instrument of colonial progress,71 with law furnishing "the cutting edge of colonialism."72 Violence, in general, and the violence of law, in particular, played "the leading part in the creation of civilization."73 Colonial rule deemed "[o]ur law . .. a compulsory gospel which admits of no dissent and no disobedience." 74 This overt concert of law and violence has been aptly characterized "lawfare[:] the effort to conquer and control indigenous peoples by the coercive use of legal means."75 The geo-legal space of colonialism brings into sharp relief "the blood that has dried on the codes of law."76

In the colony, law congealed epistemic, structural, and physical violence. The colonized other, deemed an error of arrested evolution, was prescribed corrective norms of a higher rational order. This "soul making" 77 colonial project entailed entrenchment of a layered legal order. First, the colony was inserted into the global legal system of hierarchically differentiated sovereignties.78 Second, metropolitan law was transplanted in the colony supplemented by exceptions that ensured that coercion displaced hegemony as its animating force, thereby ordering a "rule of difference" that mandated performance of nonidentity between the colonizer and the colonized.80 Third, through selective recognition, malleable norms of the colonized were truncated and reconstituted as fixed "customary law."81 In the career of the Durand Line all these legal machinations of the colonial project came into play

### Link---LIO

#### The LIO only serves the interests of Western elites---war and extraction are its only intrinsic qualities.

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The key point is that the LIO is a class-based, elitist hegemony—strongly imbued with explicit and implicit racial and colonial/imperial assumptions—in both US domestic and foreign relations. At home, this analysis helps to explain in part the phenomenon of the ‘left behind’ white working/middle class, including the affluent but economically anxious voters whose salience on the right has transformed US politics since the Reagan revolution of the 1980s.2 Responding to the (minorities’) rights revolution of the 1960s, and the loss of economic opportunity and decline in living standards due to technological change and the global redistribution of industry,3 white working- and middle-class voters drifted towards the Republicans as the party of low taxes and fiscal conservatism.4 This delivered little in material terms, however; and, as inequality increased with market freedom and real wages stagnated, workers in the ‘rust belt’ and other areas grew increasingly dissatisfied with the status quo of establishment politics, their frustration exacerbated by anxieties about ethno-racial diversity and American identity as the United States moves towards a society in which whites are a minority.5 The result was the election as president in 2016 of Donald Trump on an overtly anti-conservative and barely concealed white identity platform at home and a programme of protectionism and non-interventionism—America First—abroad.6

Yet political dissatisfaction or disaffection was not confined to the political right.7 ‘Occupy Wall Street’ and other movements and groups vented their anger at the inequalities of power, wealth and income, particularly in the wake of the Iraq War and the 2008 financial crisis.8

In external policy, the analysis helps to explain the difficulty, perhaps the impossibility, of the US readily embracing a more diverse international order, as well as the character of that very embrace.9 Accepting nations of the global South on an equal footing may become a strategic necessity, but the process remains problematic given the racialized discourses of western power over the past several centuries, fortified in the United States by the experience of the slave trade, slavery, the ‘Jim Crow’ era, Orientalist views of Asians, and other factors.10 Class power helps to explain the strategic embrace of foreign elites as the sources of change and the agents of American influence, however diluted it may have been due to target states’ national interest considerations. Those at the apex of America’s hierarchies sought to forge alliances with and incorporate their foreign elite counterparts— with their full cooperation—in South Korea and China.11 Hence, the liberal internationalist ‘successes’ in the cases of South Korea and China must be qualified by considering the repercussions of developing market-oriented societies marked by economic inequality, rising social unrest and varying degrees of political repression. In ‘successful’ China and South Korea, as in India and other emerging powers, there remain major challenges underpinned by profound inequalities in power, wealth and income, associated with a politics that is frequently class-based but also heavily racialized and xenophobic.12

Why choose South Korea and China as key cases? Although these are two very different states, varying in global significance, and analysed at different periods of historical time, they do allow us to test out important claims made by liberal internationalists. South Korea is considered as a key test at the very birth of the US-led order—at a time when we might expect the new principles embodied in the UN, such as the rule of law, the lessons of the Nuremberg and Tokyo war crimes trials, the Geneva Conventions and the rights of civilians in combat zones, to be pursued with some determination if not fully achieved. Given the fervour of anti-colonialism at the time, and US claims to champion that cause, we might also expect the behaviour of the international system’s leading power to differ sharply from that of colonial rulers in what became known as the Third World. The case of South Korea tells us a great deal about the practical application of a new international system developed by US power within an international system of rules, applicable to hegemon and others alike, a key liberal internationalist claim.

China’s integration into the US-led international system from the late 1970s also tells us a great deal about the character of the international order, especially about how significant change is managed within it and what the embrace of diversity means in practical terms. By the 1970s, the US-led order was facing challenges, of course—from West Germany and Japan, for example, and the oil-producing states—not to mention demands from the G77 for a New International Economic Order (NIEO), and was also recovering from defeat in Vietnam and the legitimacy crisis following the Watergate scandal. For liberal internationalists, the integration of China is claimed as a success story both for the liberal order and for China. Yet, without denying the country’s dramatic increase in economic power, I question the character of China’s success, given the high levels of internal turmoil and the extremes of inequality that are giving rise to major political and economic instability. China, then, is a test of the claim that the liberal order rewards societies as a whole; a Gramscian–Kautskyian counter-argument would suggest that it is largely the Chinese ruling elite and its business allies, not the mass of ordinary Chinese, who have been accommodated in the US-led international system.

Liberal internationalism: theory, ideology, practice

Liberal internationalism is an ambiguous, multifaceted approach to understanding, explaining, justifying and practising international politics. One aspect of it is as a positive theory taught in academic International Relations (IR), derived from liberalism as applied to international affairs, explaining how the foreign policies of leading states, especially the United States and Britain, work. It is also a normative world-view, used by some of its proponents to indicate what the world ought to look like and how it might, and frequently does, work. Liberal internationalism, therefore, is also a set of policies, institutions and established practices.13

As an IR theory, the key pillars of liberalism, as embodied in liberal societies, are limited government, individual freedom, private property, pluralism and tolerance, progress, institutions and cooperation for peace, and interdependence. As a theory of US foreign policy, which is the object of analysis here, it encompasses democratic values, economic interdependence, international institutions as a framework for cooperation in addressing global crises and problems, and the broad promotion of general welfare. Emerging historically from the era of rising anti-colonialism and anti-imperialism, with the United States and Britain in the lead, the US-led order laid claims to being opposed to colonial rule, and in favour of national and human rights, within a system of international power undergirded by rules binding hegemon and others alike. It was promoted not as a continuation of empire by other means, but as a new system based on universalistic principles applicable to all regardless of race, colour or history.

For my immediate purposes, it is unnecessary to disentangle the positive from the normative, the theoretical from the practical, because this framework of thought emerges both from deep principles and also as a set of solutions to international problems, especially world wars. Hence, liberal internationalism is frequently referred to as Wilsonianism, after the internationalist programme promulgated by US President Woodrow Wilson after the First World War that included the formation of the League of Nations, the forerunner of the longer-lasting post-1945 United Nations system.

I argue here that, as a theory, it operates as ideological legitimation even when its proponents offer reform; it justifies the status quo. In that regard it differs little overall from other theories like Marxism, for example, or realism. But because it is the principal system of ideas and practices, and ideals, that are used to explain, implement and defend the present international status quo, I would suggest that it elides too much to be fully validated beyond the circle of its proponents. Of course, it explains aspects of the world’s functioning; but its interpretation tends to be benign: crises and challenges are explained as resolvable within the system’s governing principles through socialization, integration and assimilation.

I use the term liberal internationalism, then, as an amalgam to suggest that, while it is all of the above, upon reflection it serves within academia and in IR as a positive theory of how things actually are—that is, as the opposite of an ideology. It purports to be able to explain the world, at the same time as its adherents are normative supporters of the theory. I show that it is actually ideological, because it elides key factors of how the liberal world order actually works, and that other theories suggest better ways of explaining the world.

In the next section of the article, I analyse liberal internationalist ideas and claims in more depth and more critically, with a view to identifying key elements of a more viable framework to explain the LIO—a critical theory influenced by the work of Antonio Gramsci and to some extent synthesized with the work of Karl Kautsky. The principal aim of this article is to identify the weaknesses of liberal internationalism in practice with the purpose of opening space for subsequent theorizing. In sum, what appears to be missing from liberal internationalism is any recognition of domestic power inequalities—such as those based on class and race—its broad attachment to (democratic) elitism, and its hierarchical approach to other powers, especially in the global South.

While Wilsonian liberal internationalism is widely recognized as privileging a belief in the free movement of people, capital, goods and services, less attention has been given to its origins in a time when ‘international relations’ was overtly understood as ‘race relations’, and its consequent implication in managing overtly racialized imperial power after the First World War.14 The Wilson administration’s role in racially segregating the US federal government had its foreign policy counterpart in a belief in an eventual, but far distant, self-government of the colonies and opposition to a Japanese proposal for a racial equality clause in the charter of the fledgling League of Nations.15 The development of liberal internationalism, then, was symbiotically bound to Wilson’s conviction that US intervention in world affairs was essential, and to what were effectively parastatal organizations created both by the federal executive and by private foundations—the Carnegie Endowment for International Peace, among others. Wilsonian ‘theory’ was practical, idealistic and ideological from the very beginning. It is also the case that, long after overt racial discourses became politically damaging, subliminal racial thinking remained—and (unconsciously) remains—a significant element of liberal internationalism, affecting its analyses of the politics of domestic and global demographic power shifts.16

Nevertheless, liberal internationalists are cosmopolitans—opposed to narrow nationalism and trade protectionism, within a US-led international system. But its core ideas—rule of law, superiority of the western idea (however lightly worn), a rules-based institutional order open to all, in principle—are deeply embedded in US political-intellectual elite think-tanks, university public policy schools, corporate media and the leaderships of both main political parties,17 the core of the white Anglo-Saxon Protestant establishment.18 Importantly, however, there are influential voices in the emerging powers and regions that support the liberal international order by calling for internal reform to take account of the changing distribution of global power away from the West and towards the ‘rest’.19

The upshot is a broad consensus around certain core ideas: that the post-1945 rules-based world order, whatever its weaknesses, serves the world well by spreading prosperity and maintaining peace; and that, although it cannot continue unreformed, the US-led system draws on deep resources—economic, military, systemic and ‘soft’—that bestow upon it continuing strengths to contain, engage, manage and socialize emerging powers. Charles Kupchan lists a range of problems requiring US leadership, even if only within a suitably reformed international system reflecting ‘the real distribution of power’.20

John Ikenberry of Princeton University, the leading proponent of this school of thought, makes significant claims as well as several unquestioned assumptions, undeveloped allusions to core powers’ violent and other connections with the periphery, and a number of significant silences. He claims, for example, that the United States is a fully functioning democracy, yet fails to acknowledge evidence of the power of racialized, class-based elites. For critical theorists, such as Robert Cox, Stephen Gill and Craig Murphy,21 the international relations of elites across states and societies operate to reproduce extant patterns of power and manage or engineer change to the benefit of elites in a generally zero-sum game in which broad masses and lower classes lose out. This is clearly a far cry from liberal internationalist claims associated with the benefits of globalization, notwithstanding proposed ameliorative remedies against the harshest effects. Likewise, claims about the centrality of the rule of law occlude consideration of significant violations in practice. The question of imperial power is hardly addressed, and there is a general Eurocentric neglect of the significance of global areas beyond the core to the ‘welfare’ and cohesion of the core itself. There is a clear link between Ikenberry’s overt theory of American democracy and its liberal-hegemonic world role. The United States, and the western order it built, is characterized as a pluralistic liberal market democracy that is broadly inclusive and tolerant of ethnic diversity. The US-built security community exhibits its leading state’s internal character as a plural one and, very significantly, one in which the United States is bound by rules.22 Yet liberal internationalists’ underlying assumptions effectively deny the findings of numerous well-researched studies challenging American democracy’s principal claims.23

As far as Ikenberry and Deudney (and many others) are concerned, the ‘western idea’ is a significant part of the strength of the US-led order.24 The West, a spectacularly successful ‘civilizational heritage’, was underpinned by America’s New Deal liberalism, and extended globally via Bretton Woods, the Marshall Plan and NATO. In effect, this vision and programme aimed to defuse domestic class conflict and the threat of war through ‘activist government, political democracy, and international alliance’. That system is in principle capable of assimilating emerging powers, given the universalism of its values and its tolerance of ethnic differences, although others joining this privileged grouping are expected to conform to its rules and accept US leadership. Western order is exclusive also because special rules apply within its zone of peace. Beyond it, conversely, other rules apply—cruder, neo-imperial and violent, although the implications of this contrast are left unaddressed.25 By drawing a line around the West, Ikenberry cuts off the rest of the world while addressing questions about the sources of world order which, empirically, lie in a symbiotic relationship between core and periphery. Yet, even within the ‘greater’ West, Japan and South Korea were not accorded the same treatment as western Europe.26 The LIO really was conceived and developed as a system of the West and the rest, in a zero-sum game. As Donald Tusk, President of the European Council, noted on Twitter in May 2017, the whole point of ‘Euro-Atlanticism’ was to ‘prevent post-West world order’.27

Yet the claim persists that this is no empire, despite America’s privileged place at the top of the ‘hierarchical political order’, because its hegemony is built on ‘consent’ and bounded by law. Power, which was necessary at the creation, faded away as consensual hegemony developed. This interpretation, of course, elides America’s overwhelming military superiority, including in and over Europe. Beyond Europe, however, Ikenberry concedes that American hegemony remained hierarchical, ‘with much fainter liberal characteristics’,28 again closing off an avenue of analytical and empirical analysis that might threaten the intellectual edifice of the LIO.

The (unconsciously) racialized world-view of Ikenberry’s Eurocentrism is subtly buttressed by Walter Russell Mead’s exploration of the significance of superior Anglo-Saxons who win wars, build world structures, and govern efficiently owing to ethno-cultural, not biological, characteristics.29 Mead’s interpretation of Anglo-Saxonism makes it appear benign, assimilative and universal— a scaffolding to support Ikenberry’s more overtly institutional analysis.

Assimilating minorities, however, is not embracing diversity—learning from other cultures and creating something new; it is maintaining conformity to the cultures of the powerful, dominant group.30 Looking to the future, as new global powers emerge, Mead advises America to both embrace and contain them, retaining military superiority should ‘rising’ powers become ‘opponents’.31 Mead complements the prescriptions of other liberal-realist internationalists, all seeking to incorporate, assimilate and mobilize emerging powers to absorb difference and produce conformity.

The liberal view is challenged by scholars who argue that the New Deal order effectively represented a political compromise, made in order to attain class peace and greater productivity, that mainly benefited major corporations while incorporating organized labour and thereby drawing its teeth. The postwar settlement was a narrow one—excluding racial minorities, unskilled and unorganized labour, and women—and relied on war and a heavily militarized economy that arose with the war in Korea and led directly to that in Vietnam.32 Liberal internationalists’ accounts elide the class, gendered and racial bases of the order, both at home and abroad. Ikenberry paints an appealing picture of a liberal order that delivered material benefits and security to all, while also raising some doubts about the operation of the system, especially with regard to the inequality of rewards generated by globalization and its potential political consequences. Those consequences are regarded by Ikenberry as posing the greatest threats to the stability of the liberal order, laying bare a central mechanism and dynamic of the system itself: market-driven class inequality, exacerbated in a society in which racialized class politics is salient.33 Yet Ikenberry never mentions class, race or gender—an omission central to critical theories of the making of the LIO.34

The other key omission is the role played in building the order by violence and outright war—not just the Second World War but also the Korean War, the ‘hot’ war at the birth of the order that propelled the formation of NATO, the rearmament of Germany, the security alliance with Japan and indeed the US military–industrial complex.35 Accordingly, a key focus of consideration here is wartime planning for a new world order and the manner of its foundation as a direct result of military violence that violated the UN Charter, international law, the lessons of the Nuremberg and Tokyo war crimes trials, and the 1949 Geneva Conventions. Wars ‘out there’ secured the core ‘over here’.36

And, of course, what is referred to as benign ‘liberal internationalism’ is what Mark Mazower refers to as ‘imperial internationalism’—trying to maintain a global hierarchy established by centuries of colonial and semi-colonial rule over what is now called the global South.37

Finally, the construction of the postwar western order was constitutive of a political, social, economic and ideological ‘vital center’, as Schlesinger terms it38—opposed to both right-wing nationalists and left-wing anti-imperialists. This entailed the acceptance by core forces of the ‘New Deal order’ that the price of class harmony, stability and mobility at home was the export and continuation of inequality,39 and therefore military violence, on the periphery; and that the removal of vast quantities of raw materials required a global military basing strategy, both to protect allied trade and to deny it to adversaries.40 Ikenberry accurately notes that the internal character of the leading state in the liberal order has an impact on the international system it built; but I diverge from his presentation of this impact as the externalization of a democratic regime. He elides the racial, class and gendered character of American historical, economic and political development—including that of Wilsonianism itself.41 His conclusion, however, is accurate, even if he fails to recognize its significance in the building and maintenance of the liberal order: ‘Access to resources and markets, socioeconomic stability, political pluralism, and American security interests—all were inextricably linked.’42

The framework that may best fit the actual underlying engine of liberal orderbuilding and maintenance, however, must also incorporate understanding of the ‘soft’ processes of socialization or incorporation. Violence is a powerful tool, but always and everywhere it is connected with the processes of non-violent elite socialization and alliance-building. It is one of the great strengths of Ikenberry’s analysis of international order that elite socialization is considered so significant.43 Yet a critical view of elite socialization in the building and perpetuation of hegemony views it not as a reflection of a democratic and benign foreign policy, but as incorporation into hegemonic agendas or ‘domestication’.44 In the Gramscian perspective, capitalist Great Powers, including the United States, are deeply unequal at home and imperialistic abroad, ultimately pursuing the interests of their ruling classes and elites, whether embedded in private, public or state– private realms.45 Their hegemony is a combination of persuasion and coercion involving a ‘state–society complex’.46 Admittedly, liberalism gives an account of elite socialization processes that overlaps with Gramscian approaches. However, liberal approaches see it as relatively benign, politically neutral or representative of democracy/popular sovereignty.

### Link---Economic Legalism

#### Neoliberal approaches to international legalism directly further imperialist exportation of neoliberalism---that locks the Global South into cycles of debt and austerity, trapping billions in abject poverty.

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Who Is Global Economic Governance For?

From 1981 to 2017, the number of the world’s poor rose by one billion people. This rise in global poverty has been discussed by scholars such as Sanjay Reddy, Camelia Minoiu, Arjun Jayadev, and Rahul Lahoti, in addition to being thoroughly documented in Jason Hickel’s compelling new book The Divide. But it is not a fact that we would never even learn if we relied on numbers produced by the UN or other global bodies. This is because the very same institutions which want to claim the end of poverty have long been responsible for reproducing it. While claiming to prioritize development aid to the Global South, global economic institutions have engineered a world where the net flow of money is from poor to rich countries. For every dollar of aid poor countries receive, they send $24 back to rich countries in net outflows. Poor countries have been “developing” rich ones year after year, not the other way around.

The World Bank and IMF, both of which turned 75 in 2019, are tremendously important to this story. The Bank alone has a staff of 10,587 people. In 2017, it made loans and investments of $59 billion across the world. Since its founding it has lent about $1 trillion. Any debt is always the establishment of a power relationship and this is the case with the Bank as well. Its loans buy it influence over the economic policy of debtor countries, especially since no country is able to borrow from the World Bank without becoming susceptible to IMF conditions on and management of its economic performance. With the Bank as “good cop” and IMF as “bad cop,” we have reached a situation where, according to the UN, the richest fifth of the world’s population earned some 80 times more than the poorest.

One way to understand the power of the Bretton Woods institutions is to juxtapose an early case of their lending with a later one to understand how their power has grown since they were established in July 1944. In 1947, the Bank’s second president, John McCloy, approved a post-war reconstruction loan to France on the condition that it balance its budget, increase taxes, and cut luxury imports under U.S. supervision. France protested this as an infringement of sovereignty but acceded to all the conditions, including implicit ones like the removal of Communist leaders from Cabinet under the orders of the U.S. State Department. By contrast, in 1989 Jordan stopped making payments on its bilateral loans and approached the Bretton Woods institutions to reschedule its debt payments. In return for a five year plan to cut subsidies and privatize public goods, the IMF gave Jordan $125 million and the World Bank gave it $100 million. The price of fuel, bread, rice, milk, and sugar skyrocketed and protests broke out which cost many lives.

We can note four salient changes between 1947 and 1989. First, when the U.S. government and its key allies gathered at the Bretton Woods conference in New Hampshire, their aim was the economic restoration of war-torn Europe. The IMF provided short-term loans to offset balance of payments deficits and the Bank provided long term, lower-interest loans for rebuilding destroyed infrastructure. As a 1979 Senate Committee report readily acknowledges: “No arguments were made that these agencies would have a beneficial impact on economic development and growth in poor countries, and indeed [they] were not originally designed for that purpose.”

Second, in the early years Bretton Woods institutions were very cautious and risk-averse about lending and only lent when they felt assured of full and timely repayment. In contrast, by the 1980s their lending practices were rather profligate. This was because investors’ profits no longer came from the total repayment of debt but rather from the interest accrued during endless debt refinancing.

Third, the early history of Bretton Woods institutions had nothing to do with the thing for which they are now best known: poverty alleviation. Until the 1960s, lending went almost exclusively to capital projects – white elephants like dams and highways which were sure to yield safe returns. By contrast, since the1980s, an increasingly risk-immune World Bank and IMF have lent freely toward (privatizing) social sectors like health and education in addition to more profitable sectors like energy.

Finally, the early Bretton Woods institutions were concerned with keeping government spending up so as to avoid a depression, an agenda which has been totally reversed as the push to reduce all government spending took over in the 1980s.

All these significant changes in how they profit must be understood in context of the Bretton Woods institutions’ remarkable consistency in who they profit and whose interests they serve. As the third president of the World Bank (and former Chase bank executive) Eugene Black openly acknowledged:

Our foreign aid programs constitute a distinct benefit to American business…foreign aid provides a substantial and immediate market for United States goods and services… [it] orients national economies toward a free enterprise system in which United States’ firms can prosper.

The importance of these goals hasn’t changed, only intensified. Today’s Bretton Woods institutions remain committed to opening markets for big U.S. business and to defending U.S. lenders and investors abroad. They also remain tied to U.S. military and strategic interests, rewarding allies and punishing detractors.

The Silent Subprime Crisis: 1968-2020

Profiting off of Third World debt is a relatively new phase in the operations of the World Bank and IMF, and one that merits a closer look. The roots of this crisis, like the roots of the global neoliberal turn, lie in the 1970s. In the U.S., that decade opened in with falling rates of corporate profit, a Treasury strained by an unwinnable war in Vietnam, and intense social upheaval at home. When the OPEC cartel’s oil price hike was added to this explosive mix, things escalated very quickly. As Damien Millet and Eric Toussaint explain in their book Who Owes Who, “From 1973, the increase in oil prices…brought in comfortable revenues to the oil-producing countries which in turn placed them in Western banks. The banks offered to lend these ‘petrodollars’ to the countries of the South, with the incentive of low rates of interest.” Western banks’ investment motives dovetailed with Western governments’ desire to export more of their overproduced goods to the developing world, which it could only afford to buy with debt. Thus began the era of “go go banking,” where banks like Citibank and Chase would fly agents around the world to push loans onto Third World leaders, increasingly without much regard to their ability to repay.

The architect of this early subprime debt market was none other than Robert McNamara, former Ford Motor executive and the Secretary of Defense responsible for the U.S. invasion of Vietnam. Once appointed World Bank president from 1968 to 1981, McNamara was no less war-like in his approach to development lending. As Michael Goldman has shown, in his book Imperial Nature, McNamara was the president responsible for aggressively expanding the Bank’s lending portfolio. He did so ingeniously. McNamara turned to financial markets (e.g. European pension funds) to fund all new lending without requiring any paid-in capital from the U.S. and other economic powers. He managed to do this thanks to the rising hunger of investors for new venues of assured profit, thus insulating the World Bank from U.S. government funding and associated critics who worried about the viability of the Bank’s new “soft” portfolio of Third World poverty alleviation loans. Lending now became less cautious and less restricted to capital heavy projects, spreading to “risky” sectors like agriculture. McNamara expanded the Bank’s personnel by 120% and assessed his staff for promotions based solely on the size and turnover rate of their loan portfolio. As a result of his extraordinary efforts, the Bank granted more loans in his first year term than during its first 22 years combined. Right alongside their private go-go banker counterparts, World Bank staff got busy inventing, justifying, and selling new projects to poor countries.

A deeply indebted Third World thus came into being by the beginning of 1980. While interest rates were low, loan repayment continued. But in the early 1980s the Volcker shock changed everything. Paul Volcker’s tight-fisted monetary policy aimed at reducing inflation at all costs, causing interest rates in the U.S. to soar from 4-5% in 1970s to over 19% in 1981. This not only caused a severe recession at home but had devastating effects abroad. The low-interest loans that McNamara and his banker friends had pushed onto the Global South ballooned to unpayable proportions. Between 1968 and 1982, debts multiplied by a factor of 12, going from $50 billion to $612 billion. Debt stocks quadrupled, going from $400 billion in 1970 to more than $1.6 trillion in 1982. In many developing countries, debt levels rose to over 50% of GDP and to over 80% of tax revenues. In August 1982, Mexico reached the brink of default, precipitating the next and perhaps most deadly phase of the debt crisis.

“If we go back to the 1820s, the 1870s, and the 1930s,” Patrick Bond points out, “it is obvious that the periodic build-up of foreign debt required mass defaults, typically involving a third of all borrowing countries.” Against this backdrop, what happened in the debt crisis of the 1980s was truly extraordinary, as Bond explains:

The World Bank and the IMF have effectively centralized creditor power since the early 1980s. During earlier mass defaults, no such centralizing device existed, so individual sovereign debt-bondholders in London, Paris and New York took the hit. During the 1980s-90s, in contrast, Washington ensured the creditors were repaid, no matter how odious or foolish their loans, and the hit was taken by the people of developing nations.

The IMF did indeed launch a full-blown creditor advocacy campaign. It gave out new loans with which debtor countries could repay their private creditors, always insisting upon continual interest payments. Even speculative private investors, who were often the cause of economic volatility in developing countries, were to be repaid in full. Loans taken out by private entities in developing countries likewise had to be repaid, either by private borrowers or, incredibly, by their governments. Not only did the IMF refinance odious private loans to developing countries, it paved the way for new ones. IMF loans given to defaulting countries often did not cover the entire amount needed, thus merely acting as a “seal of approval,” a sort of insurance policy for additional private loans which were guaranteed repayment at all costs. Twenty-one of the largest U.S. banks took advantage of the free insurance, lending over $5 billion to Brazil and Mexico each to hedge against prior defaults. The World Bank soon joined in the fun of funneling more odious loans into developing countries while extracting interest payments for Western bondholders. Against all this collective action on the part of creditors, it was made very clear that debtors’ demands (or more appropriately, entreaties) would only be entertained on a case by case basis.

But this was not all. Not only did the Bank and IMF bail out private lenders and perpetuate a debt cycle, they also began the draconian Structural Adjustment Programs (SAPs) under which loan refinancing could only be obtained in exchange for market-fundamentalist reforms. A non-exhaustive list of such reforms includes privatizing basic services & introducing user fees for them; removing subsidies on everyday foodstuffs; removing tariff and customs protections; freezing government employee salaries and cutting down public sector jobs; devaluing currency; creating an export-oriented economy dependent on volatile markets; increasing foreign corporations’ market-shares; liberalizing banking, insurance & even defense sectors; removing labor protections; taxing the poor and middle class, not the rich; keeping high interest rates to attract private capital, impoverish local borrowers, and maintain the value of foreign debt, and more. Additionally, all of these measures were to be adopted without any input from citizens of borrower countries, which amounted to the Bretton Woods institutions undemocratically rewriting legislation, restructuring agencies, and reforming national budgets, all so they could pump out new loans used to repay already-unjust old loans.

Despite all these “adjustments,” which were ostensibly meant to reduce sovereign indebtedness, the debt crisis only got worse. As of 2006, Third World debt stands at $3.2 trillion. By most estimations, the debt has already been repaid several times over. For every $1 owed in 1980, poor countries have repaid $7.5 and still owe $4. Global South countries have paid $4.2 trillion in interest payments since 1980. By 1997, daily debt-service payments reached $717 million. In most indebted countries, up to a third of GDP has been sent off to service debts.

Meanwhile, citizens in over a hundred countries have faced devastating human consequences. The economist Robert Pollin estimates that Global South countries lost some $480 billion in GDP per year from 1980- to 2000 thanks to SAPs. Agrarian studies scholar Raj Patel and sociologist Philip McMichael point out that 146 food riots took place between 1976 and 1982, peaking between 1983 and 1985 as a result of SAPs. As sociologist Sarah Babb notes, between 1988 and 1994 the governments of the poorest countries transferred more than 3000 entities from public to private hands. Anthropologist Jason Hickel points out that the World Bank alone privatized more than $2 trillion of assets in developing countries between 1984 and 2012.

What this means is that many countries now spend more on debt servicing than on providing basic services to citizens. The historian Vijay Prashad notes in his book The Darker Nations that sub-Saharan African nations spent four times more on interest payments than on healthcare, and the New Economy Foundation observes that countries like Lebanon are spending more of their government budgets on debt service than on health and education combined. As a result of this SAPed world, universal basic services have withered away; small farmers and unorganized workers have lost assets, wages, jobs, and access to food and shelter; and already precarious groups like women and minorities are faring worse than ever. While national elites enrich themselves with commissions from selling off state services and corporations get rich from new profit streams, the poor barely survive. From time to time, everyday people rise up in fury and overthrow governments, but the international austerity machine behind it all, and the loans it continues to use as weapons, remain untouched.

What Global Justice Needs to Mean if it’s to be Global

Why does all this matter to a U.S. socialists today? It matters because the Bretton Woods institutions are a machinery of war on the world’s poor and working classes run by U.S. elites. The World Bank and IMF are headquartered in Washington, DC. Their membership includes 189 countries but they practice a “one dollar, one vote” model so the U.S., with the biggest GDP and 15% of votes, retains effective veto power over all decisions. Presidents of the World Bank are always American and Presidents of the IMF are always from Western Europe. The World Bank presidency is a prime example of the revolving door between Bretton Woods institutions and big banks, corporations, and the U.S. military, with presidents almost always coming from long careers in big business, Wall Street, and U.S. security services. As if this were not enough, until 2018 the Bretton Woods institutions enjoyed immunity from all lawsuits under the 1945 International Organizations Act. In 2018 the U.S. Supreme Court ruled that the World Bank’s private sector arm was not subject to this immunity, but the ramifications for the rest of the Bank and for the IMF are not clear.

By far the most important form of immunity that the World Bank and IMF enjoy is from U.S. voters, on whose behalf they supposedly “develop” poor countries. No Congress or Senate votes are necessary to approve loans backed by these institutions, nor are any votes necessary for imposing austerity measures on other countries. As an arm of the U.S. Treasury Department, Bretton Woods institutions sit safely in the executive branch, insulated from all democratic scrutiny and accountability. Indeed, the Bank’s habit of never having its power questioned is starkly visible in the anecdote below, told by the authors of the book Reinventing the World Bank:

When we contacted the Bank to invite the people we felt could best engage the issues we wanted to examine, we were referred to the Public Relations office, which expressed considerable surprise and dismay that a conference had been organized on the Bank without involving the institution from the start. “It’s like having all your neighbors gather to talk about what’s going on in your house,” a senior staff member in the office complained. “Perhaps so,” we responded, “with the small difference that all your neighbors pay your mortgage.”

No fight for socialism is complete without fighting this shadow government apparatus which has determined the fates of the majority of the world’s people for generations. Nor is this an abstract struggle -many practical measures can be implemented to rein in their power. The U.S. Left must demand that the government bring these institutions under the scrutiny of democratically elected, and especially local, officials in the U.S., and eventually in Global South countries. The institutions, if they are to continue existing, must be thoroughly democratized, with representatives voted in especially by vulnerable constituents from all member countries. All structural adjustment conditionalities must be suspended with immediate effect. All sovereign debts must be taken off bond markets, made untradeable and non-interest bearing, and then cancelled in their entirety.

### Link---Prolif

#### Arms control measures like the NPT legitimize existing arsenals and entrench absolute state sovereignty

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But how would such a summit be climbed? Most of these proposals have their origins in the period when the new anti-nuclear activists were politicians and when their main concern was to reduce the risks of the nuclear arms race while preserving the capabilities of existing nuclear powers. This was the essence of what were then known as ‘arms control' rather than disarmament measures. Reductions of American and Russian nuclear warheads will still leave both countries with enough nuclear capacity to destroy the world several times over. The NPT and the CTBT are designed to constrain the development of nuclear weapons by new powers but, in effect, legitimise existing arsenals. Indeed, it could even be argued that by implicitly endorsing the nuclear status of great powers, they represent an incentive for emerging powers like Iran or North Korea to acquire nuclear weapons. The proposals for securing and limiting nuclear stockpiles are likewise designed to prevent nuclear capacity getting into the wrong hands while protecting the stockpiles of existing nuclear powers. But they cannot, of themselves, prevent the manufacture of weapons grade materials by Iran, say, or, a further example, the export of nuclear know-how by rogue elements in Pakistan.

Arms control proposals are based on a geo-political statist understanding of the world. The possession and implicit threat to use nuclear weapons is associated with an absolutist view of state sovereignty. The possession of nuclear weapons implies an absolutist prerogative on the part of states to risk the lives of its own citizens on a massive scale not to mention citizens in other countries without any prior public debate or discussion. The use of nuclear weapons would constitute an unimaginable violation of human rights and hence the implication of their possession is that states have the right to inflict such an unimaginable violation. In Europe, where most nuclear weapons are still American, it is not even European states that have this absolutist character, it is the American President alone who is allowed to risk the lives of European citizens. The problem with arms control proposals is that they treat nuclear weapons as thought they were part of the normal armoury of states - they naturalise nuclear weapons. And yet we cannot ascend to the top of the mountain without changing those fundamental assumptions and without rethinking the implications of possessing nuclear weapons in to-day's globalised world.

#### Modern discourse of nuclear proliferation is inherently racialized and used to legitimize expansion of the US military project

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Nuclear Orientalism According to the anthropological literature on risk, shared fears often reveal as much about the identities and solidarities of the fearful as about the actual dangers that are feared. The immoderate reactions in the West to the nuclear tests conducted in 1998 by India and Pakistan, and to Iraq’s nuclear weapons program earlier, are examples of an entrenched discourse on nuclear proliferation that has played an important role in structuring the Third World, and our relation to it, in the Western imagination. This discourse, dividing the world into nations that can be trusted with nuclear weapons and those that cannot, dates back, at least, to the Non-Proliferation Treaty of 1970. The Non-Proliferation Treaty embodied a bargain between the five countries that had nuclear weapons in 1970 and those countries that did not. According to the bargain, the five official nuclear states (the United States, the Soviet Union, the United Kingdom, France, and China) promised to assist other signatories to the treaty in acquiring nuclear energy technology as long as they did not use that technology to produce nuclear weapons, submitting to international inspections when necessary to prove their compliance. Further, in Article 6 of the treaty, the five nuclear powers agreed 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.” One hundred eighty-seven countries have signed the treaty. Saying it enshrines a system of global ‘nuclear apartheid,’ Israel, India, and Pakistan have refused. North Korea has withdrawn from the treaty. The Non-Proliferation Treaty has become the legal anchor for a global nuclear regime that is increasingly legitimated in Western public discourse in racialized terms. In view of recent developments in global politics—the collapse of the Soviet Union, two wars against Iraq, and international crises over the nuclear weapons programs of North Korea and Iran—the importance of this discourse in organizing Western geopolitical understandings is only growing. It has become an increasingly important way of legitimating U.S. military programs in the post-cold war world, where “rogue states” have supplanted the old evil empire in the imaginations of American war planners. The dominant discourse that stabilizes this system of nuclear apartheid in Western ideology was labeled “Orientalism” (albeit in a different context) by Edward Said. According to Said, orientalist discourse constructs the world in terms of a series of binary oppositions that produce the Orient as the mirror image of the West: where “we” are rational and disciplined, “they” are impulsive and emotional; where “we” are modern and flexible, “they” are slaves to ancient passions and routines; where “we” are honest and compassionate, “they” are treacherous and uncultivated.6 While the blatantly racist orientalism of the high colonial period has softened, more subtle orientalist ideologies endure in contemporary politics and are applicable here.

### Link---Arms Control

#### Arms control depoliticizes war as an apolitical, technical problem amenable to expert manipulation---that draws on a Western paradigm of mastery that fuels global warfare.

Bourne 12, Lecturer in International Security Studies at Queen's University Belfast (Mike, “Guns don't kill people, cyborgs do: a Latourian provocation for transformatory arms control and disarmament,” Global Change, Peace & Security, 24:1, pg. 150-151, DOI: 10.1080/14781158.2012.641279)

Arms control practice

A foundational instrumentalism can be seen in what Krause and Latham have called ‘Non-proliferation, arms control and disarmament (NACD) culture’ that produces a ‘matrix of beliefs and dispositions’ that shapes arms control. This draws upon a particular western ‘manipulative approach to negotiation and a commitment to a step-by-step process that was in some sense supposed to be “technical” or “apolitical”’ that could be traced to:

a belief, common to very few cultures, that ‘man can freely manipulate his environment for his own purposes … set his objective, develop a plan designed to reach that objective, and then act to change the environment in accordance with that plan’. 66

This approach accords with the dominant technique of treating arms control as an incremental process that operates by parsing issues into constituent technical problems amenable to manipulation by experts,67 something that can be seen as related to underlying modern instrumentalist assumptions about human mastery of nature and technology.

This instrumentalism and incrementalism is reflected in arms control theory and practice, being a ‘problem-solving’ rather than transformative project. This has evolved from initially seeking to add stability to deterrence to later seeking to engage in ‘global counter-insurgency’ in an asymmetric system of arms limitation aimed at pariah states, terrorists and at controlling pariah weapons that have no place in ‘civilized warfare’. 68 Indeed, much arms control, and particularly prohibitions and disarmament commitments for ‘indiscriminate’ or ‘inhumane’ weapons, reflects the self-identification of the West as civilised military powers engaged in the civilising of warfare.69 This characterises the broad process of arms control as one of achieving instrumentalism of warfare, through what Walker has described as an ‘enlightenment’ project to master politically science and technology’s mastery over nature.70 The notion of arms control as an enlightenment project of establishing instrumental control over weapons and technology, rather than instrumentalism as an a priori assumption of socio-material relations, may be reflected in the variation of forms of substantivist and instrumentalist characterisations of different categories of weapons in arms control practice.

## K: Settler Colonialism

### K---Settler Colonialism

#### The modern treaty process recentralizes the sovereign authority of Settler laws by dictating the terms of negotiation and excluding indigenous nations.

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Indeed, the state sets the terms of treaty negotiations unilaterally, deciding what issues are on the table and what sorts of results are possible (Christie 2013, at note 11). Unsurprisingly, Settler governments have chosen to define the scope of the treaties so that they do not meaningfully challenge Crown sovereignty, private property, or capital accumulation. For example, where modern treaties recognize Indigenous jurisdiction, they often include paramountcy clauses, under which Settler legislation prevails in the case of conflict. In other cases, modern treaties include equivalency provisions, where Indigenous law is only valid where it is essentially equivalent to existing Settler laws. Even where Indigenous jurisdiction is not so fettered, Indigenous governments must still operate within the confines of the Canadian Charter, and their decisions are reviewable in Settler courts.

In all these ways, modern treaties continue to position Indigenous peoples as a sub-component of the Canadian state, and therefore subject to Canadian sovereignty, rather than recognizing them as independent authorities with a right to negotiate all aspects of their relationship multilaterally20. Indeed, the fact that Settlers continue to exercise unilateral authority and deny Indigenous jurisdiction where no treaties exist shows that the state is only willing to countenance Indigenous authority within the framework of the Canadian state.

Andrew Woolford’s thorough analysis of the BC Treaty Process provides a helpful diagnosis (Woolford 2004; See also Woolford 2001, 2006). Woolford draws on Nancy Fraser’s distinction between two types of transitional justice—transformative repair, which seeks to transform the underlying structures of inequality, and affirmative repair, which seeks to redress historical wrongs without actually transforming the ongoing underlying structures that produce them. Insofar as the BCTC, and the modern treaty process in general, seek to maintain Settler sovereignty and re-present Indigenous authority as a subordinate sub-component of the Settler state, they represent an exercise in affirmative repair.

2.4. UNDRIP as State-Managed Pluralism

In part because of the perceived shortcomings of domestic jurisprudence and policy, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is becoming an increasingly prominent part of discussions on Indigenous-Settler relations. In many ways, UNDRIP brings important attention to, and provides potential resources against, the ongoing effects of colonization. However, UNDRIP is the product of an international system which recognizes the sovereignty of Settler states, and which denies Indigenous peoples membership in the international community (Barsh 1983).

Indigenous nations are not represented in the UN’s General Assembly or Security Council, and they do not cast votes within the UN system21. In order for UNDRIP to be legally binding, it must be voluntarily ratified and implemented by Settler states. Thus, it is Settler states who were in the position to determine the content of UNDRIP, and they are in a position to sign it or not, and to implement it or not, according to their own pleasure. It is not surprising then, that UNDRIP unequivocally affirms the sovereignty and territorial integrity of Settler states. What UNDRIP does is codify a series of voluntary commitments by the sovereign about how they will treat their Indigenous subjects.

Notably, UNDRIP does not require the consent of Indigenous peoples to become binding law. It is emphatically not a multilateral document. Rather, like Aboriginal rights and the modern treaty process, it represents a voluntary auto-limitation by the Settler state. In this way, it serves to retrench and legitimize a unilateral relationship between Settler and Indigenous authorities.

### Aff---Settler Colonialism---Perm

#### The treaty process is good for everyone---creates mutually beneficial policies that recognize equality and validity of various needs and interests.

Reibold 22, Post-doctoral Fellow @ Universität Potsdam (Kerstin, “Settler Colonialism, Decolonization, and Climate Change”. *Journal of Applied Philosophy*, <https://doi.org/10.1111/japp.12573>. Accessed 4/28/2022)—js

The two pitfalls must be taken seriously. Still, they do not foreclose the possibility of using treaties as a tool for furthering decolonization in times of climate change. There are several reasons why they might be a helpful starting point for thinking about land rights and decolonization. Although treaty interpretation so far has mostly ignored Indigenous understandings, these understandings are nevertheless well-established through decades of treaty making between Indigenous peoples, and they have been proven a successful tool of negotiating shared resources and changing environments. In many North American Indigenous cultures, treaties have been used to regulate how land and its resources were shared.48 While Indigenous territories were bounded, they often also overlapped which made sharing agreements necessary. Even more importantly, Noble highlights how treaties allowed territorial boundaries to shift when species that are key to the subsistence and culture of one Indigenous group start to move into what before was considered the territory of another group.49 Treaties thus were ‘agreements to share’ which both set boundaries and rights and at the same time allowed a certain flexibility and fluidity in determining these boundaries.50

‘Instead of specifying concrete or specific terms in a time-limited way, these agreements established mutually beneficial and agreed-upon principles that were intended to last for many generations. Each party had a responsibility to make sure that its actions conformed to the principles established in the Treaty. As a result, they were flexible agreements intended to maintain a spirit, rather than a strict set of rules that could not adapt to changing circumstances’.51

This understanding of treaties is uniquely suited to the current situation of rapidly changing environments due to climate change. If treaties are seen as agreements to live together in such a way that each community as well as nature have their basic interests satisfied, it naturally follows that ‘[a]s new dynamics or unforeseen conflicts emerge, they have to be negotiated by the Treaty partners in order to have them incorporated into the relationship’.52 This emphasis on the need to renegotiate and reinterpret the founding principles of treaties open a door for land-restitution processes that give Indigenous peoples those rights and that land which are needed to reestablish or maintain their own ways of life and to live in accordance with their own ontologies of land even if climate change alters their historic lands.

Moreover, treaties rely on an understanding of both the interconnectedness and difference of both treaty partners. The interconnectedness comes about through the shared land and resources which both parties need and which the treaty regulates. The difference is acknowledged in that both parties are seen as nations with their own customs, laws, and social systems which they want to maintain. The treaty is not meant to regulate these internal affairs of each group but only those aspects of behavior that impact the shared environment and thereby the other party.53 This dual recognition of interdependence and independence makes the concept of treaties suited for structuring relationships between groups that share land, yet not an ethnogeography, on the basis of equality and respect.54 Thus, a return to the initial understanding and goal of treaties might be promising in the current situation in which settler societies and Indigenous groups inevitably share the same lands and this land is undergoing rapid changes.

Returning to the original spirit of treaties would address different colonial wrongs that stand in the way of decolonization. First, by viewing treaties as agreements about upholding reciprocal and equal relations between two or more nations, a form of equality is reestablished between settler states and Indigenous peoples. The colonial relation of warden to child would become a more equal relation of brothers or sisters as initially envisioned by Indigenous peoples.55 Second, by returning to the initial spirit of the treaties, the epistemic injustice Townsend and Townsend identified in current court rulings would be overcome. Indigenous relational understandings of land, treaties, and the basis of agreements would find their way into resolution processes and norms for land conflicts. Third, this incorporation of Indigenous understandings would lead to land agreements that reflect the needs and interests of Indigenous peoples in land. In the context of climate change, it allows a renegotiation of the territories that Indigenous peoples can use and thereby ensures that they have access to the land that is crucial for them to decolonize themselves. Additionally, it makes it possible to renegotiate land agreements in the future when the climate, and with it the land, changes even further.

## K: Fem IR

### K---Fem IR

#### The form of their policy negotiations reifies existing power relations---non-traditional advocacies are necessary to challenge nuclear weapons policy.

Acheson 21, a visiting researcher from the Women’s International League for Peace and Freedom, MA in Politics from the New School for Social Research (Ray. "Abolish Nuclear Weapons: Feminist, Queer, and Indigenous Knowledge for Ending Nuclear Weapons” in *Feminist Solutions for Ending War*. p106-109. Accessed: 4/28/22)—js

Similarly, some Indigenous activists maintain that it is not sufficient for Indigenous communities to be granted certain rights on certain land by the very settler colonial governments that conducted campaigns of genocide against them. They fight for environmental protections and rights as citizens of First Nations, not of the states that continue to steal, rape, murder and destroy their bodies, land and water with which they live (Driskill et al. 2011; Estes 2019). Indigenous activists and scholars recognise that systems set up by the heteropatriarchal settler colonial state are not systems in which those seeking protection from the violence inherent to those systems will receive it. Within these parameters and spaces, the settler colonial state will always dominate interactions with Indigenous populations. As Simpson (2017, 45) writes:

The state sets up different controlled points of interaction through its practices … and uses its asymmetric power to ensure it always controls the processes as a mechanism for managing Indigenous sorrow, anger, and resistance, and this ensures the outcome remains consistent with its goal of maintaining dispossession.

Nuclear-armed states utilise similar processes in order to maintain control of and dominance over issues related to nuclear weapons. Diplomats and activists alike get excited about a rare UN Security Council meeting on nuclear weapons, but the traditional spaces in which international interactions on nuclear weapons occur – such as within Non-proliferation Treaty meetings and the Conference on Disarmament – are regulated by and do not challenge the power of those that possess the bomb. Similarly, the ways that a settler colonial state may try to promote Indigenous culture in a narrative about the ‘multicultural mosaic’ of the country, without challenging the dispossession upon which the state is based, is reminiscent of how the nuclear-armed states and their allies call for ‘bridge building’ and ‘dialogue’, fundamentally arguing that the radicals opposed to nuclear weapons need to calm down and get back in line.

Thus, opposing these systems requires creativity about how and where change is made. Consider how nuclear activists turned to the UN General Assembly to prohibit nuclear weapons. The international diplomatic forum in which nuclear disarmament negotiations are ‘supposed’ to take place – the Conference on Disarmament, based at the UN in Geneva – is closed to activists and to the majority of UN member states. It has only 65 states as members, and each is given an absolute veto over every decision the forum can take, including the establishment of its agenda. No substantive work has taken place in this forum since 1996, yet the nuclear-armed governments maintain that it is the only forum in which questions of nuclear weapons can be credibly discussed. By taking the issue to the General Assembly, the rest of the world’s governments rejected the structure of oppression imposed upon them by the nuclear-armed, forging a new path outside of ‘credible’ channels in order to allow the voices and interests of those not in control of massive world-destroying arsenals not only to be heard, but to hold court.

This change in location was also imperative in terms of how diplomats worked to change their own government’s policies. In the early years of working towards the nuclear ban treaty, diplomats and activists gathered outside of established institutions to discuss, think, and learn. In these small-group discussions at various sites in the world, the individuals involved could work with each other to develop arguments and strategies to take back to their own national institutions in order to bring their government on board with pursuing and even leading the way for a new treaty. If this initial work had taken place within pre-existing processes or institutions, the objective to ban nuclear weapons might have been shut down before it had a chance to crystallise into a credible policy goal. It allowed people to come together to discuss ‘radical’ or ‘unrealistic’ ideas in novel spaces, and resulted in a solution to a seemingly intractable problem. Consciously or not, the decision to turn to alternative forums allowed marginal positions on nuclear weapons to inform progressive change by queering the process. These alternative spaces permitted ‘a political agenda that seeks to change values, definitions, and laws which make these institutions and relationships oppressive’ (Cohen 1997, 444–5).

Essential to the task of challenging what is considered normative and from where challenges can be mounted is to consider who is included in the conversation – by diversifying participation. In dissenting from normative frameworks of heteropatriarchy and colonialism, for example, some Indigenous queer and feminist scholars and activists work to interrogate and challenge what or who is a subject, what or who is considered credible and legitimate, what or who can be a source of knowledge and intellectualism. In this work, they critique the intellectual frameworks colonial regimes employ in order to suppress identities and opposition, and ‘hold heteropatriarchal legacies accountable to change’ (Driskill et al. 2011, 19).

In the context of nuclear weapons, the dominant voices are men representing government or academic institutions in nuclear-armed states – people who directly benefit from the production of theories and perspectives that justify the possession and continued development and modernisation of nuclear arsenals. These ‘authorities’ often deny and dismiss anti-nuclear activists, often ignoring those who have suffered from the development, testing, and use of these bombs.

Presently, there has been a concerted push to include women in nuclear weapons-related dialogue and negotiations. The Treaty on the Prohibition of Nuclear Weapons, for example, recognises that the ‘equal, full and effective participation of both women and men is an essential factor for the promotion and attainment of sustainable peace and security’, and expresses the commitment of its states parties to ‘supporting and strengthening the effective participation of women in nuclear disarmament’. Such calls for ‘women’s participation’ in the fields of nuclear weapon policy and other militaristic pursuits are often premised on a legitimate concern at the lack of gender diversity in these discussions or institutions. But ‘adding women’ is not only insufficient, it also risks further legitimising the institutions, practices, and policies that many seeking ‘gender equality’ would arguably like to change.

The nuclear policy field is dominated by cisgender heterosexual white men who compose a self-described ‘nuclear priesthood’ that espouses normative masculinised perspectives on security and weapons. A recent study published by New America (Hurlburt et al. 2019) paints a portrait of the sexism and gendered stereotypes, and noted that there were high levels of attrition of women in the field. Women (mostly white, cisgender women) who did successfully participate in nuclear policy institutions were often forced to prove their competency by ‘mastering the orthodoxy’ and having to ‘master the technical details before you could have an opinion’ (Hurlburt et al. 2019). The very few women who succeed in this sector are celebrated as crossing the divide from ‘feminine’ arms control to ‘masculine’ nuclear war planning. Former Deputy Assistant Secretary of Defense for Nuclear and Missile Defense Policy Elaine Bunn explained, ‘There was the soft, fuzzy arms control side and then there was the real military side, the deployment side, and I felt like I had to prove my bonafides on the other side.’ She remembered a mentor telling her if she was going to stay in the Defense Department, she needed to ‘do the targeting, the hard side of this, not just the arms control side’, or she would not be taken seriously.

### Aff---Fem IR---Perm

#### Nuclear disarmament is a feminist and anti-colonial goal---policy elites gaslight advocates for change through patriarchal tropes.

---also AT: Security, AT: Realism

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The history of nuclear weapons is a history of colonial exploitation. Nuclear-armed states have tested bombs outside of their territories, often in colonies or lands they deemed inferior (Hawkins 2018). When nuclear-armed governments have conducted tests on their own territories, it has primarily been on Indigenous lands. For example, the Western Shoshone Nation in the south-western United States is the most bombed nation on Earth (Johnson 2018). In a statement to the negotiations of the United Nations (UN) Treaty on the Prohibition of Nuclear Weapons (TPNW) in July 2017, 35 Indigenous groups declared, ‘Governments and colonial forces exploded nuclear bombs on our sacred lands – upon which we depend for our lives and livelihoods, and which contain places of critical cultural and spiritual significance – believing they were worthless’ (Indigenous Statement 2017). Delivered by Karina Lester, a Yankunytjatjara-Anangu woman from South Australia, the statement highlighted that Indigenous people ‘never asked for, and never gave permission to poison our soil, food, rivers and oceans. We continue to resist inhumane acts of radioactive racism.’

Activists in the United States have long recognised the racism inherent in the practice of nuclear weapon policy: ‘The atomic bombings of Hiroshima and Nagasaki were inextricably linked to colonialism and racial equality’ (Intondi 2015, 22). Coretta Scott King, Dr Martin Luther King Jr, W.E.B. Du Bois and others elaborated the inseparability of nuclear disarmament, the end of colonial empires and civil rights (Intondi 2015).

Similarly, feminist scholars have mapped the connections between militarised masculinities, the quest for dominance in international relations, and nuclear weapons. Carol Cohn’s (1987a, 1987b) examination of the gendered discourse on nuclear weapons provided the foundations for a feminist analysis of nuclear war, nuclear strategy and nuclear weapons themselves. Drawing upon a Hindu nationalist leader who, after India’s 1998 nuclear weapon tests, explained, ‘we had to prove that we are not eunuchs’, Cohn et al. (2006) argued that statements like this are meant to ‘elicit admiration for the wrathful manliness of the speaker’ and to imply that being willing to employ nuclear weapons is to be ‘man enough’ to ‘defend’ your country. They also examined how disarmament is ‘feminised’ and linked to disempowerment, weakness and irrationality, while militarism and attaining nuclear weapons are celebrated as signs of strength, power and rationality (Cohn et al. 2006).

Feminists also observe how masculinised expectations for political leaders may be coupled with anxieties about sexual performance and reproduction, emphasising that ‘technostrategic speak’ is enforced to signal elite ‘expertise’ (Eschle 2012). In discourses that defend nuclear weapons as necessary for security, ‘the protector’ is coded as masculine and ‘the protected’ as feminine. These discourses reinforce, and play into, fantasies of ‘real men’ and masculinity as defined by ‘invulnerability, invincibility, and impregnability’ (Eschle 2012). Feminists criticise a masculinised approach to security, specifically in realist International Relations theory that accords status to nuclear weapons as both markers of masculine domination (capable of inflicting violence) and masculine protector (capable of deterring violence) (Duncanson and Eschle 2008).

Nuclear-armed states seek to discredit those who demand the abolition of nuclear weapons. Proponents of nuclear weapons seek to use a logic of rationalism and power to defend their possession of these weapons while seeking to ‘feminise’ opponents of nuclear weapons by claiming they are emotional and irrational. In the development of the UN Treaty on the Prohibition of Nuclear Weapons negotiations, the representatives from nuclear-armed states berated governments and activists pushing to ban the bomb. In one case, a Russian ambassador suggested that those wanting to prohibit nuclear weapons are ‘radical dreamers’ who have ‘shot off to some other planet or outer space’. In another, a UK ambassador said the security interests of ban proponents were either irrelevant or non-existent. A US ambassador asserted that banning nuclear weapons might undermine international security so much it could even result in the use of nuclear weapons (Acheson 2019a). These assertions exemplify patriarchal techniques – including victim-blaming and gaslighting. The message is clear: if you try to take away our toys of massive nuclear violence, we will have no choice but to use them, and it will be your fault. This discourse that presents anti-bomb activists as ‘emotional’, ignores the effects that nuclear weapons inflict on people and denies individuals the space to express their concerns about these genocidal tools. This is a form of gaslighting – insisting that these weapons are a source of security and accusing anyone who thinks otherwise of being emotional, overwrought, irrational, or impractical (Acheson 2018).

Those who determine what is considered realistic, practical and feasible are men and women of incredible privilege; elites of their own societies and in the global community – such as politicians, government personnel, military commanders, and ‘national security’ practitioners and academics. This field often ignores people affected by nuclear weapons development, testing, stockpiling, use, or threatened use. The common narrative is that nuclear weapons are required in a world where there will always be those who want to retain or develop the capacity to wield massive, unfathomable levels of violence over others. Elites who possess nuclear weapons argue they are ‘rational’ actors who must retain nuclear weapons for protection against irrational others.

For example, in 2018, the US government asserted that past commitments to nuclear disarmament were out of date and out of step with today’s ‘international security environment’ – ignoring that the international security environment is heavily affected by the US government’s own actions, including its build-up of its nuclear arsenal. The Trump administration articulated a new approach to nuclear weapons policy, focused not on what the US can do for nuclear disarmament but what the rest of the world can do so the US – the most heavily militarised country in the world – can feel ‘safer’ (Acheson 2019b).

This logic insists upon the notion that states are always at odds with one another, rather than collectively pursuing a world in which mutual interdependence and cooperation could guide behaviour through an integrated set of common interests, needs and obligations (Acheson 2019a). Feminists dispute that security can be ‘possessed or guaranteed by the state … It is a process, immanent in our relationships with others and always partial, elusive, and contested’ (Duncanson and Eschle 2008, 15). Security is not an object or an achievement, it is a process that depends on the interactions of many moving parts. Security cannot be reached through weaponisation but through our relationships to one another and with our environment – and these are always changing, as are we. ‘How we live, how we organize, how we engage in the world – the process – not only frames the outcome, it is the transformation’, writes Michi Saagiig Nishnaabeg scholar and activist Leanne Betasamosake Simpson (Simpson 2017, 19).

## K: Afropessimism

### K---Afropessimism---Treaties

#### Treaties require a mutual capacity for sovereign recognition that’s predicated on anti-blackness. Prefer a politics of abolition that refuses any move toward cartographic coherence

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Abolishing Sovereignty

There is by now a literature on the historical relations between black and native peoples in the Americas, including, in the US context, the award-winning work of Tiya Miles (2006, 2010) and the signal contributions of Barbara Krauthamer (2013).18 But Frank B. Wilderson, III’s Red, White and Black may be the first sustained attempt to theorize, at the highest level of abstraction, the structural positions of European colonists, Indigenous peoples, and African slaves in the ‘New World’ encounter and to think about how the conflicts and antagonisms that give rise to those positions in the historic instance establish the contemporary parameters of our political ontology. At this writing, Wilderson’s text has not been taken up in the field of Native Studies, despite dedicating fully 100 pages to addressing directly the machinations of settler colonialism and the history of genocide and to critically reading a range of indigenous thinking on politics, cosmology, and sovereignty. This is not a brief in favor of Wilderson’s project as resolution or answer. The upshot of Red, White and Black is a provocation to new critical discourse and just such an invitation is offered midway, even as it acknowledges the grand impediment: ‘What, we might ask, inhibits this analytic and political dream of a “Savage”/Slave encounter? Is it a matter of the Native theorist’s need to preserve the constituent elements of sovereignty, or is there such a thing as “Savage” Negrophobia? Are the two related’ (Wilderson, 2010: 182)?

We might understand something else about the historical relations between black and native peoples if we bear in mind that the dynamics of Negrophobia are animated, in part, by a preoccupation with sovereignty. We have learned already that settler colonialism is governed by a genocidal commandment and that, as a direct result, survival becomes central to indigenous movements for settler decolonization. We have also learned that sovereignty, even disarticulated from the state-form, is the heading for thinking about this survival as a matter of politics.19 Yet, in its struggle against settler colonialism, the claim of native sovereignty – emerging in contradiction to the imposition of the imperial sovereignty of Euro-American polities20 – ‘fortifies and extends the interlocutory life of America [or Canada or …] as a coherent (albeit genocidal) idea, because treaties are forms of articulation, discussions brokered between two groups presumed to possess the same kind of historical currency: sovereignty’ (Wilderson, 2003: 236).

This point is not mitigated by the fact that native sovereignty is qualitatively different from, not simply rival to, the sovereignty of nation-states. What links these statements discursively is an ‘ethico-onto-epistemological’ (Barad, 2007) point of contact: ‘At every scale – the soul, the body, the group, the land, and the universe – they can both practice cartography, and although at every scale their maps are radically incompatible, their respective “mapness” is never in question’ (Wilderson, 2010: 181).21 Capacity for coherence makes more than likely a commitment ‘to preserve the constituent elements of sovereignty’ (2010: 182) and a pursuit of the concept of ‘freedom as self-determination’.22 The political de-escalation of antagonism to the level of conflict is mirrored by a conceptual domestication at work in the field of Native Studies, namely, that settler colonialism is something already known and understood by its practitioners. The political-intellectual challenge on this count is to refine this knowledge and to impart it. The intervention of Native Studies involves bringing into general awareness a critical knowledge of settler colonialism.

We might contrast the unsuspecting theoretical status of the concept of settler colonialism in Native Studies with its counterpart in Black Studies: racial slavery. I remarked above that any politics of resurgence or recovery is bound to regard the slave as the position of the unthought. This does not suggest, however, that Black Studies is the field in which slavery is, finally, thought in an adequate way. The field of Black Studies is as susceptible to a politics of resurgence or recovery as any other mode of critical inquiry. Which is to say that the figure of the slave and the history of the emergence of the relational field called racial slavery remains the unthought ground of thought within Black Studies as well. The difference, provisionally, between these enterprises is that whereas Native Studies sets out to be the alternative to a history of settler colonialism and to pronounce the decolonial intervention, Black Studies dwells within an un-inheritable, in-escapable history and muses upon how that history intervenes upon its own field, providing a sort of untranscendable horizon for its discourse and imagination. The latter is an endeavor that teaches less through pedagogical instruction than through exemplary transmission: rather than initiation into a form of living, emulation of a process of learning through the posing of a question, a procedure for study, for black study, or black studies, wherever they may lead.

Native Studies scholars are right to insist upon a synthetic gesture that attempts to shift the terms of engagement. The problem lies at the level of thought at which the gesture is presented. The settler colonial studies critique of colonial studies must be repeated, this time with respect to settler colonialism itself, in a move that returns us to the body in relation to land, labor, language, lineage – and the capture and commodification of each – in order to ask the most pertinent questions about capacity, commitment, and concept. This might help not only to break down false dichotomies, and perhaps pose a truer one, but also to reveal the ways that the study of slavery is already and of necessity the study of capitalism, colonialism and settler colonialism, among other things; and that the struggle for abolition is already and of necessity the struggle for the promise of communism, decolonization, and settler decolonization, among other things. Slavery is the threshold of the political world, abolition the interminable radicalization of every radical movement. Slavery, as it were, precedes and prepares the way for colonialism, its forebear or fundament or support. Colonialism, as it were, the issue or heir of slavery, its outgrowth or edifice or monument. This is as true of the historic colonization of the Third World as it is the prior and ongoing settler colonization of the Fourth.23

‘The modern world owes its very existence to slavery’ (Grandin, 2014a).24 What could this impossible debt possibly entail? Not only the infrastructure of its global economy but also the architecture of its theological and philosophical discourses, its legal and political institutions, its scientific and technological practices, indeed, the whole of its semantic field (Wilderson, 2010: 58). A politics of abolition could never finally be a politics of resurgence, recovery, or recuperation. It could only ever begin with degeneration, decline, or dissolution. Abolition is the interminable radicalization of every radical movement, but a radicalization through the perverse affirmation of deracination, an uprooting of the natal, the nation, and the notion, preventing any order of determination from taking root, a politics without claim, without demand even, or a politics whose demand is ‘too radical to be formulated in advance of its deeds’ (Trouillot, 2012: 88).25

The field of Black Studies consists in ‘tracking the figure of the unsovereign’ (Chandler, 2013: 163) in order to meditate upon the paramount question: ‘What if the problem is sovereignty as such’ (Moten, 2013)? Abolition, the political dream of Black Studies, its unconscious thinking, consists in the affirmation of the unsovereign slave – the affectable, the derelict, the monstrous, the wretched26 – figures of an order altogether different from (even when they coincide or cohabit with) the colonized native – the occupied, the undocumented, the unprotected, the oppressed. Abolition is beyond (the restoration of) sovereignty. Beyond the restoration of a lost commons through radical redistribution (everything for everyone), there is the unimaginable loss of that all too imaginable loss itself (nothing for no one).27 If the indigenous relation to land precedes and exceeds any regime of property, then the slave’s inhabitation of the earth precedes and exceeds any prior relation to land – landlessness. And selflessness is the correlate. No ground for identity, no ground to stand (on). Everyone has a claim to everything until no one has a claim to anything. No claim. This is not a politics of despair brought about by a failure to lament a loss, because it is not rooted in hope of winning. The flesh of the earth demands it: the landless inhabitation of selfless existence.