

## TOWARD A NUCLEAR RECOGNITION THRESHOLD

Rohan Mishra\*

*In early 2018, North Korea's Supreme Leader Kim Jong-un and U.S. President Donald Trump were not on the best of terms, publicly lashing out at each other and threatening the destruction of the other's state. And yet, within the year they were smiling and handshaking in Singapore, followed not long after by a second summit in Vietnam. These summits, focused on the prospect of North Korea's denuclearization, have in fact raised important questions concerning the legitimacy of North Korea's nuclear weapons program: Does the willingness of a sitting U.S. President to meet with the North Korean leader constitute de facto recognition of North Korea as a nuclear-weapon state? Has North Korea joined India, Pakistan, and Israel as a member of the "Final Four"—the nuclear-weapon states that exist outside of the framework promulgated by the Treaty on the Nonproliferation of Nuclear Weapons?*

*International law does not offer clear answers to these questions, but the importance of defining de facto nuclear-weapon state (DNWS) status is paramount, lest the United States or another member of the international community continues to engage with North Korea and unwittingly offers the legitimacy that it desires. Consequently, this Note sets out to identify a "nuclear recognition threshold"—the point at which a nuclear-armed state can accurately be considered a DNWS. In this respect, the law on diplomatic recognition serves as a valuable reference point in formulating a "working test" to identify states that have crossed (or are likely to cross) this threshold. By articulating a working test for DNWS status, this Note hopes to encourage members of the international community to be more cognizant of their relationships with would-be nuclear proliferants, as such relationships may lead to those states attaining this status, gaining unintended legal and diplomatic benefits, and threatening the long-term efficacy of the global nonproliferation regime.*

### INTRODUCTION

Following one year of saber-rattling between North Korea's Supreme Leader Kim Jong-un and U.S. President Donald Trump, the former's 2018 New Year's address began on a rather inauspicious note.<sup>1</sup> Heralding North Korea's attainment of nuclear weapons, he issued a grave warning:

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\* J.D. Candidate 2020, Columbia Law School.

1. See Daniel Wertz, Nat'l Committee on N. Kor., Issue Brief: The U.S., North Korea, and Nuclear Diplomacy 15–18 (2018), [https://www.ncnk.org/sites/default/files/issue-briefs/US\\_DPRK\\_Relations.pdf](https://www.ncnk.org/sites/default/files/issue-briefs/US_DPRK_Relations.pdf) [<https://perma.cc/G72K-6RNC>]. Perhaps President Trump's most infamous remark vis-à-vis Kim Jong-un was his promise that continued threats against the United States would be "met with fire and fury like the world has never seen." See Meghan

In no way would the United States dare to ignite a war against me and our country. The whole of its mainland is within the range of our nuclear strike and the nuclear button is on my office desk all the time; the United States needs to be clearly aware that this is not merely a threat but a reality.<sup>2</sup>

And yet, despite the foreboding nature of these remarks, Kim Jong-un's address—particularly his willingness for North Korea to participate in the 2018 Winter Olympics in South Korea—also sowed the seeds for his unprecedented summit with President Trump in Singapore in July 2018, followed not long after by a second summit in Hanoi.<sup>3</sup>

From an international law perspective, the Singapore and Hanoi Summits occurred at a critical juncture in North Korea's nuclear history, as the regime now asserts that it has joined India, Pakistan, and Israel as a member of the "Final Four"—the states that possess nuclear weapons without being formally recognized by the Treaty on the Nonproliferation of Nuclear Weapons (NPT).<sup>4</sup> North Korea today, however, exists in a legal grey area, as the status of its nuclear weapons program remains uncertain.<sup>5</sup> Consequently, the Singapore and Hanoi Summits present a timely opportunity to reflect on questions related to international recognition of nuclear weapons programs.<sup>6</sup> In particular, North Korea serves as a valuable

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Keneally, From 'Fire and Fury' to 'Rocket Man,' the Various Barbs Traded Between Trump and Kim Jong Un, ABC News (June 12, 2018), <https://abcnews.go.com/beta-story-container/International/fire-fury-rocket-man-barbs-traded-trump-kim/story?id=53634996> [<https://perma.cc/6Y83-MHLB>].

2. Kim Jong Un, Supreme Leader of N. Kor., 2018 New Year's Address (Jan. 1, 2018) (transcript available at <https://www.ncnk.org/node/1427> [<https://perma.cc/G7X4-P7ER>]).

3. See *id.* ("As for the Winter Olympic Games to be held soon in [S]outh Korea, it will serve as a good occasion for demonstrating our nation's prestige and we earnestly wish the Olympic Games a success. . . . [W]e are willing to dispatch our delegation and adopt other necessary measures. . . ."); see also Jeremy Diamond, Takeaways from the Trump–Kim Hanoi Summit, CNN (Feb. 28, 2019), <https://www.cnn.com/2019/02/28/politics/trump-kim-hanoi-summit-takeaways/index.html> [<https://perma.cc/P3QJ-4M3U>].

4. Wertz, *supra* note 1, at 17 ("[A]fter North Korea's Hwasong-15 test, with Washington discussing the prospect of military action, Kim Jong Un declared the country's nuclear program to be 'complete' . . ."); see also David S. Jonas, Variations on Non-Nuclear: May the "Final Four" Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?, 2005 Mich. St. L. Rev. 417, 418–19 ("[O]nly the 'Final Four' remain outside the NPT regime: India, Israel, Pakistan and now North Korea, which recently withdrew from the NPT.").

5. See *infra* section II.B.3.

6. Note that the Singapore and Hanoi Summits also raise several important questions concerning the prospects for North Korean compliance with the vague objectives agreed to by Kim Jong-un and President Trump, the meaning of "complete denuclearization of the Korean Peninsula," and the consequences for U.S. foreign policy in the region—particularly its security alliances with South Korea and Japan. See Press Release, White House, Joint Statement of President Donald J. Trump of the United States and Chairman Kim Jong Un of the Democratic People's Republic of Korea at the Singapore Summit (June 12, 2018), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit> [<https://perma.cc/KL2A-MVL3>] [hereinafter Press Release, Singapore Summit Joint

case study to evaluate the meaning of “de facto nuclear-weapon state” (DNWS), a phrase that is often used in reference to the Final Four, but which presently lacks legal coherence.<sup>7</sup>

This Note argues that this lack of coherence is problematic because it may enable a would-be nuclear proliferant such as North Korea to attain recognition despite widespread opposition from the international community. Therefore, it is important to work toward a concrete understanding of the “recognition threshold”—the point at which a nuclear-armed state would accurately be considered a DNWS.<sup>8</sup> In this respect, the law on diplomatic recognition serves as a valuable reference point in formulating a “working test” to identify states that have crossed (or are likely to cross) this threshold.<sup>9</sup> By articulating a working test for DNWS status, this Note hopes to encourage members of the international community to be more cognizant of their relationships with would-be proliferants, as such relationships may lead to those states attaining this status, gaining unintended legal and diplomatic benefits, and threatening the NPT’s long-term efficacy.

This Note proceeds in three parts: Part I introduces the origins of the NPT and its key structural weakness—the “Grand Bargain” between nuclear-weapon states (NWS) and nonnuclear-weapon states (NNWS)—

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Statement]; see also David Tweed, Isabel Reynolds & Jihye Lee, *Rift Grows Between U.S. Allies over North Korea’s Nuclear Threat*, Bloomberg (Aug. 28, 2018), <https://www.bloomberg.com/news/articles/2018-08-28/rift-grows-between-u-s-allies-over-north-korea-s-nuclear-threat> (on file with the *Columbia Law Review*); Mark Fitzpatrick, *Faint Praise for the Trump–Kim Singapore Summit Statement*, Int’l Inst. for Strategic Stud.: The Survival Editors’ Blog (July 12, 2018), <https://www.iiss.org/blogs/survival-blog/2018/06/faint-praise-for-trump-kim-summit> [<https://perma.cc/5AQH-V6KL>].

7. See Claire Mills, *House of Commons Library, Nuclear Weapons—Country Comparisons 57* (2017), <http://researchbriefings.files.parliament.uk/documents/CBP-7566/CBP-7566.pdf> (on file with the *Columbia Law Review*) (“Despite having conducted a number of nuclear tests . . . North Korea is not recognised by the international community as a nuclear weapons state. It is, however, regarded as nuclear capable and in the last few years . . . North Korea’s nuclear programme has been significantly accelerated.”). Mills raises an important distinction between North Korea and the three DNWS—India, Pakistan, and Israel—which is further discussed in section II.B.1, *infra*. This distinction rests on the fact that while all four states are understood to have technically acquired nuclear weapons outside of the NPT framework, North Korea is the only one of the four not effectively treated as an NWS.

8. An analogue to this sort of nuclear “recognition threshold” is found in the law on diplomatic recognition, which is discussed further in section I.B, *infra*. See Janis Grzybowski, *To Be or Not to Be: The Ontological Predicament of State Creation in International Law*, 28 *Eur. J. Int’l L.* 409, 421 (2017) (“[I]f recognitions ‘consolidate . . . effectiveness . . . [a]nd this consolidation in turn means reaching the legal threshold of statehood,’ the determination of when the threshold is crossed is still a question of either fact or recognition.” (second alteration in original) (quoting Anne Peters, *Statehood After 1989: ‘Effectivités’ Between Legality and Virtuality 5* (Dec. 7, 2010) (unpublished manuscript), [https://papers.ssrn.com/abstract\\_id=1720904](https://papers.ssrn.com/abstract_id=1720904) (on file with the *Columbia Law Review*))).

9. See *infra* section I.B.2.

before discussing the challenges and opportunities that inhere in formulating a clearer definition of DNWS status. Part II then introduces North Korea as a case study, beginning with an overview of the regime's pursuit of nuclear weapons before discussing why its attainment of DNWS status would likely undermine the Grand Bargain. Finally, Part III recommends a two-pronged course of action for addressing the challenge of North Korea or future proliferants: (1) conceptually, establish a "working test" that identifies the threshold conditions for DNWS recognition, and (2) in practice, encourage members of the international community to coordinate their efforts to avoid pushing a would-be proliferant past this threshold.

### I. THE TREATY'S FOUNDATIONS AND DE FACTO RECOGNITION

In order to assess why recognition of North Korea—or future proliferants—as a DNWS would undermine the NPT's Grand Bargain, it is worthwhile to situate the Treaty in a broader historical context. Section I.A provides a survey of the motivations underpinning the creation of the NPT and an overview of the Grand Bargain struck between NWS and NNWS in establishing the Treaty. Section I.B then evaluates the meaning of DNWS status, drawing lessons from the law on diplomatic recognition as well as India and Pakistan's nuclear weapons histories.

#### A. *The Historical Underpinnings of the Treaty on the Nonproliferation of Nuclear Weapons*

1. *Origins of the NPT.* — The NPT originated as an attempt by the international community to promote the nonproliferation of nuclear weapons and disarmament of existing nuclear arsenals while simultaneously encouraging the expansion of peaceful nuclear technologies.<sup>10</sup> The Treaty emerged as the culmination of nearly two decades of negotiations prompted by fears that the number of nuclear-weapon states would increase to anywhere from twenty-five to thirty.<sup>11</sup> It formally entered into force in 1970, and member states agreed to indefinitely extend the Treaty at the 1995 NPT Review Conference.<sup>12</sup>

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10. 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), United Nations, <http://www.un.org/en/conf/npt/2015> [<https://perma.cc/3BER-JFYT>] [hereinafter NPT Review Conference 2015] (last visited Oct. 28, 2019).

11. Thomas Graham, Jr., *South Asia and the Future of Nuclear Nonproliferation*, *Arms Control Today*, May 1998, at 3, 3 [hereinafter Graham, *South Asia*] ("In the 1960s, it was widely predicted that there would be 25–30 declared nuclear-weapon states in the world by the end of the 1970s . . . . In an effort to head off this possibility, the world agreed in the NPT to a bargain to put a halt to the proliferation of nuclear-weapon states.").

12. See NPT Review Conference 2015, *supra* note 10; Fact Sheet on DPRK Nuclear Safeguards, Int'l Atomic Energy Agency, <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards> [<https://perma.cc/93PS-ZCJ4>] [hereinafter IAEA Fact Sheet] (last visited Feb. 19, 2020); NPT Review Conferences, Int'l Atomic Energy Agency,

Today, the NPT is widely viewed as the cornerstone of the global non-proliferation regime.<sup>13</sup> In large part, this is due to the Treaty's legally binding nature; it is lauded for creating not only a legal framework for nuclear disarmament, but also a set of normative expectations that discourage proliferation.<sup>14</sup>

Three NPT articles are worth highlighting for the obligations that they impose on member states.<sup>15</sup> Article I prohibits NWS from engaging in the transfer, assistance, encouragement, or inducement of any NNWS "to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices."<sup>16</sup> Under Article II, NNWS undertake "not to receive the transfer [of, manufacture, or assistance in acquiring] . . . nuclear weapons or other nuclear explosive devices."<sup>17</sup> Article III commits NNWS to "accept[ing] safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency [(IAEA)]" in order to avoid the "diversion of nuclear energy from peaceful uses to nuclear weapons."<sup>18</sup>

Together, these articles constitute the three pillars of the NPT: (1) NNWS agree not to pursue their own nuclear weapons; (2) NWS agree not to assist other states in acquiring nuclear weapons and to move toward complete disarmament; and (3) NNWS maintain the right to access civilian nuclear technology and energy development.<sup>19</sup> This NWS–NNWS dichotomy is fundamental to the NPT and makes it unique among arms control agreements, as states on both sides agreed to certain conditions in order to achieve the Treaty's widespread ratification.<sup>20</sup>

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<https://www.iaea.org/newscenter/focus/npt/npt-review-conferences> [<https://perma.cc/8VEW-5T2H>] (last visited Feb. 19, 2020).

13. See NPT Review Conference 2015, *supra* note 10. For an overview of how the non-proliferation regime includes the treaties, international agreements, international organizations, and cooperative efforts established over the past fifty years to counter the spread of nuclear weapons, see generally Joseph Cirincione, *Bomb Scare: The History and Future of Nuclear Weapons* (2007).

14. See William Potter, *The NPT and the Sources of Nuclear Restraint*, *Daedalus*, Winter 2010, at 68, 72 ("From this vantage point, the NPT represents the embodiment of the international nonproliferation norm and has important symbolic value in addition to its promise of material benefits."). Presently, 190 countries have agreed to the NPT's terms and safeguards—giving the appearance of nearly universal coverage—and in the time since it has entered force, only one member state has withdrawn, North Korea. See NPT Review Conference 2015, *supra* note 10; IAEA Fact Sheet, *supra* note 12.

15. Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 729 U.N.T.S. 161.

16. *Id.* art. I.

17. *Id.* art. II.

18. *Id.* art. III.

19. *Id.* arts. I–III.

20. See Jozef Goldblat, *Ban on Nuclear-Weapon Proliferation in Light of International Law*, in *Nuclear Proliferation and International Security* 9, 9 (Morten Bremer Maerli & Sverre Lodgaard eds., 2007); Chris Peloso, *Crafting an Updated Nuclear Non-Proliferation Treaty: Applying the Lessons Learned from the Success of Similar Intentional Treaties to*

2. *The NPT's Grand Bargain.* — Along with the NPT's three pillars, the linchpin of the Treaty's Grand Bargain consists of a single sentence in Article VI: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."<sup>21</sup> Although the nominally evenhanded nature of this bargain was critical in attaining the NPT's near-universal ratification, reality belies the impartiality of the agreement.<sup>22</sup> Critics have noted that "the treaty provides no criteria by which the fulfilment of Article VI can be judged. Nor does Article VI specify any consequences should it be determined that parties to the treaty are not living up to its provisions."<sup>23</sup> Similarly, critics lambaste the fact that "[t]he main burden of non-proliferation undertakings is . . . carried by the non-nuclear-weapon states (NNWS)."<sup>24</sup> While the disarmament obligations imposed on NWS are subject to interpretation of the meaning of "good faith" and undefined in time, NNWS are flatly prohibited from pursuing nuclear weapons.<sup>25</sup> The fact that most NNWS depend on the assistance of NWS to expand their peaceful nuclear energy capabilities further accentuates this asymmetry.<sup>26</sup>

While NNWS view Article VI in light of NWS' systemic efforts to avoid taking concrete steps toward its effectuation, NWS view the provision from an entirely different vantage.<sup>27</sup> Given that the end result of complete nuclear disarmament runs directly counter to the foreign policies of all five NWS, Article VI, whatever it "may say or mean, [] has always coexisted

the Nuclear Arms Problem, 9 Santa Clara J. Int'l L. 309, 325 (2011) (comparing the NPT's bifurcation of the world between NWS and NNWS to other international arms control agreements that do not create a similar dichotomy); see also Graham, South Asia, *supra* note 11, at 3.

21. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 15, 729 U.N.T.S. at 173.

22. Goldblat, *supra* note 20, at 9 ("To make the asymmetry of rights and obligations under the NPT acceptable to as many countries as possible, the NWS have committed themselves to negotiating nuclear disarmament and to contributing to the development and use of nuclear energy for civilian ends in NNWS.").

23. Steven E. Miller, Proliferation, Disarmament and the Future of the Non-Proliferation Treaty, *in* Nuclear Proliferation and International Security 50, 51 (Morten Bremer Maerli & Sverre Lodgaard eds., 2007) [hereinafter Miller, Future of the Non-Proliferation Treaty].

24. Goldblat, *supra* note 20, at 9.

25. See *id.* at 19–20 (highlighting the "sharp controversies" surrounding Article VI and its lack of clarity with respect to NWS obligations). For an overview of the legal significance of Article VI's requirement that NWS undertake disarmament negotiations in "good faith," see generally David A. Koplow, Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?, 2 Wis. L. Rev. 301 (1993).

26. See Goldblat, *supra* note 20, at 9 ("The NNWS receive scant assistance in the development of nuclear energy for peaceful purposes."); see also Graham, South Asia, *supra* note 11, at 3.

27. See Miller, Future of the Non-Proliferation Treaty, *supra* note 23, at 53 (contrasting NNWS criticisms with the NWS' general view that Article VI is "ancillary and subordinate to the principle purposes of the NPT—that is, preventing the spread of nuclear weapons to" NNWS).

with a reality marked by large nuclear arsenals and [an] unshakable [NWS] belief in the unique value and importance of nuclear weapons.”<sup>28</sup>

A closer inspection of Article VI reveals that it was intentionally written to impose vague obligations on NWS.<sup>29</sup> Should NWS and NNWS have desired to establish clear mileposts for meeting achievable disarmament obligations, they could have included more explicit language in the Treaty.<sup>30</sup> As a result, Article VI’s language has “given rise to several decades of contentious disputes over the meaning of the provision and to several decades of friction over whether the nuclear-weapon states have fulfilled their obligations.”<sup>31</sup>

Thus far, the benefits of an effective NPT and membership in the global nonproliferation regime have largely outweighed the disadvantages most NNWS face from being party to the Grand Bargain.<sup>32</sup> However, prolonged inaction by NWS toward disarmament has led several NNWS to voice doubts about the Grand Bargain’s continued viability.<sup>33</sup> For instance, in 2015 a South Korean deputy foreign minister noted that in the face of limited progress toward disarmament, “[a] treaty was no longer a treaty without the commitment and compliance of the parties” and that this “principle was all the more valid when it came to the very foundation of international peace and security.”<sup>34</sup> If NNWS, particularly the thirty to fifty nuclear latent states that have the technical resources and capacity to go

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28. *Id.*

29. *Id.* at 52.

30. *Id.* This kind of language was deliberately omitted out of an understanding by both NWS and NNWS that ambiguity was necessary in order to have the maximum number of states ratify the Treaty. *Id.* For an argument that the NPT’s provisions may be so ambiguous as to be legally unenforceable, see Ronald J. Sievert, Working Toward a Legally Enforceable Nuclear Non-Proliferation Regime, 34 *Fordham Int’l L.J.* 93, 96–100 (2011).

31. Miller, *Future of the Non-Proliferation Treaty*, *supra* note 23, at 52.

32. See Jacek Durkalec, The Nuclear Non-Proliferation Treaty at Fifty: A Midlife Crisis, *NATO Rev.* (June 29, 2018), <https://www.nato.int/docu/review/2018/also-in-2018/the-nuclear-non-proliferation-treaty-at-fifty-a-midlife-crisis/en/index.htm> [<https://perma.cc/RN4M-GNKE>] (noting that “although the Treaty has helped curb the spread of nuclear weapons[,] . . . growing polarisation among the States Parties . . . [provides] reasons to expect that amid this crisis the durability of the NPT will” be significantly tested).

33. See Alexander Kmentt, How Divergent Views on Nuclear Disarmament Threaten the NPT, *Arms Control Today*, Dec. 2013, at 8, 8 (“Fundamentally different and even conflicting views . . . among the NPT membership on key aspects, such as the priority of nuclear disarmament, . . . threaten the integrity of the NPT.”); Durkalec, *supra* note 32.

34. Recalling Nuclear-Non-Proliferation Treaty’s ‘Grand Bargain’, Secretary-General Urges Leaders at Review Conference to ‘Abandon Short-Sighted Posturing’, United Nations (Apr. 27, 2015), <https://www.un.org/press/en/2015/dc3551.doc.htm> [<https://perma.cc/8UJG-LEM6>]. Additionally, in 2016 Japanese Prime Minister Shinzo Abe’s Administration noted that nothing in the country’s constitution prevented it from using or possessing nuclear weapons should it decide to withdraw from the NPT. Jake Adelstein, Is Japan About to Hit its Nuclear Tipping Point?, *Daily Beast* (Feb. 15, 2018), <https://www.thedailybeast.com/is-japan-about-to-hit-its-nuclear-tipping-point> [<https://perma.cc/GSF8-MEHA>].

nuclear,<sup>35</sup> continue to view NWS as taking advantage of an already lopsided deal, they may be inclined to develop their own nuclear arsenals, which could spark a domino effect and effectively unravel the global nonproliferation regime.<sup>36</sup>

Professor Steven E. Miller identifies several points of concern that NWS and NNWS must contend with in order to address this fragile “Article VI stalemate.”<sup>37</sup> First, Miller notes that regardless of the existence of any non-Article VI-related challenges to the NPT, many believe that “the bifurcation of the world into nuclear haves and have-nots is simply untenable . . . [given] the persistence of the Nuclear Five.”<sup>38</sup> This binary is amplified because NWS and NNWS fundamentally differ in their respective views of the centrality of Article VI to the Grand Bargain.<sup>39</sup> Miller also argues that in the long run it will be difficult for NWS to sustain their stance that NNWS must not pursue their own nuclear weapons, while NWS maintain their own arsenals and “routinely proclaim that such weapons are essential to their defence postures, that they provide unique and crucial security benefits and that they must be retained in the national arsenals indefinitely.”<sup>40</sup> Finally, Miller posits that the ability to hold NNWS accountable for their other NPT obligations will be significantly undercut if NWS continue to espouse foreign policies and nuclear postures that flout their own Article VI obligations.<sup>41</sup> This concern points to the indispensability of the Grand Bargain to the NPT. The numerous goals underpinning this regime require “extensive cooperation in a club with nearly 200 members . . . . Such cooperation is difficult to achieve in an

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35. See Matthew Fuhrmann & Benjamin Tkach, *Almost Nuclear: Introducing the Nuclear Latency Dataset*, 32 *Conflict Mgmt. & Peace Sci.* 443, 451 (2015).

36. Goldblat, *supra* note 20, at 9; see also William C. Potter & Gaukhar Mukhatzhanova, *Forecasting Proliferation: The Role of Theory, an Introduction*, in *Forecasting Nuclear Proliferation in the 21st Century* 1, 2 (William C. Potter & Gaukhar Mukhatzhanova eds., 2010) (“Although proliferation pessimism definitely is not a new refrain, there appears to be a growing consensus today that the world again is approaching a tipping point that could lead to a nuclear proliferation epidemic.”); William C. Potter & Gaukhar Mukhatzhanova, *Divining Nuclear Intentions: A Review Essay*, 33 *Int’l Security* 139, 139 (2008) [hereinafter Potter & Mukhatzhanova, *Divining Nuclear Intentions*] (“Today the proliferation metaphors of choice are ‘nuclear cascade’ and ‘tipping point,’ but the implication is the same—we are on the cusp of rapid, large-scale nuclear weapons spread.”).

37. Miller, *Future of the Non-Proliferation Treaty*, *supra* note 23, at 64.

38. *Id.*

39. *Id.* While NWS have viewed Article VI’s disarmament obligation as “token, or subsidiary, or as largely rhetorical,” most NNWS see the provision as the crux of the Grand Bargain, and indeed the NPT itself. *Id.*

40. *Id.* at 65. Relatedly, while the “ideal normative environment for promoting non-proliferation is one in which nuclear weapons are widely or even universally regarded to be illegal, illegitimate and immoral,” such an environment cannot flourish when NWS espouse the inherently contradictory position of demanding that NNWS forsake nuclear weapons and NWS continued possession of such weapons. *Id.*

41. *Id.* at 66–67.



environment marked by ill will, distrust and allegations of bad faith against the NWS over Article VI.<sup>42</sup>

These and other concerns stemming from the Article VI stalemate together affect the collective commitment of NNWS to the NPT, their respect for the nonproliferation regime's objectives, and their potential desire to develop nuclear weapons.<sup>43</sup> In a deck already stacked in favor of NWS, NPT-related developments that place NNWS on even shakier ground may induce states to forsake promises of nuclear abstention in favor of their own nuclear weapons programs.

B. *De Facto Recognition in the Nuclear Proliferation Context*

1. *Challenges.* — In the global nonproliferation context, a de jure–de facto dichotomy has long characterized recognition of states possessing nuclear weapons. While the NPT's version of international affairs only recognizes the five NWS that tested nuclear weapons prior to 1967—the United States, Russia, the United Kingdom, China, and France—as legally legitimate possessors of nuclear weapons, there has been an implicit recognition for several decades that India, Pakistan, and Israel also possess their own nuclear arsenals.<sup>44</sup> These DNWS' acquisition of nuclear weapons has, in turn, translated into political and legal benefits that initially only extended to formally recognized NWS.<sup>45</sup>

Given the legal significance that attaches to de facto recognition, there is considerable value in formulating a clear definition of this phrase.<sup>46</sup> International law presently lacks a coherent and actionable definition of de facto nuclear-weapon state. In both popular and academic discourse, phrases referring to the nuclear weapons possessors outside of the NPT framework—de facto nuclear-weapon states, nuclear capable states, the Final Four, and so on—are inconsistent and risk conflating the

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42. Id. at 67.

43. Id. at 68.

44. See *supra* notes 4–7 and accompanying text.

45. See *infra* section I.B.2; see also ASAN Inst. for Policy Studies, ASAN Nuclear Forum Session Sketch: De Facto Nuclear Weapons and the NPT Regime 2 (2013) [hereinafter ASAN Nuclear Forum Session Sketch], <http://en.asaninst.org/wp-content/themes/twentythirteen/action/dl.php?id=12952> [<https://perma.cc/QXF4-GWL5>] (noting that “there is a perception that nuclear weapons have gained greater legitimacy as tools for regime protection”); Sidra Hamidi, What's in a Name? North Korea and the Contested Politics of 'Nuclear Weapons States', War on the Rocks (Mar. 6, 2019), <https://warontherocks.com/2019/03/whats-in-a-name-north-korea-and-the-contested-politics-of-nuclear-weapons-states> [<https://perma.cc/7AC5-CX96>] (“Seeking de facto recognition outside of the NPT may be as important, if not more so, than seeking legal recognition because it may allow North Korea, like India, to eventually shift away from its rogue status.”).

46. The value of such a definition would extend both to would-be proliferants and to members of the international community wary of unwittingly extending DNWS status to a nuclear-armed state. See *infra* section III.B.

situations of an extraordinarily diverse set of states.<sup>47</sup> More troublingly, this inconsistency may lead policymakers to subscribe to a definition of DNWS status that either is misaligned with their views of the state in question or affords the state more legal benefits than intended.<sup>48</sup>

2. *Opportunities from the Law on Diplomatic Recognition.* — Despite these challenges, the absence of any attempt to develop a legally coherent understanding of DNWS status also presents an opportunity to rely on other areas of international law to formulate such a definition. A critical starting point, however, is to ask *why* this definition matters. The response derives from the amorphous nature of international law. Legal scholarship has long attributed state decisions to comply with international law to one of two conflicting views: (1) respect for power politics in an anarchic international system or (2) adherence to the rule of law.<sup>49</sup> The first view is premised on the notion that “within international law the law-maker—mainly States and international organizations—and the subjects of international law—again States and international organizations—are identical.”<sup>50</sup> The absence of a coherent distinction between the lawmaker and subject consequently implies that international law lacks the prerequisites for legitimacy:

Sources of [international] law are therefore neither identifiable nor authoritative. Hence the binding effect of international law for its subjects is doubted. Due to the lack of coercive authority, compliance with international law completely depends, so it is

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47. See, e.g., Mills, *supra* note 7, at 44, 57 (describing India, Israel, and Pakistan as “de facto nuclear weapon states” and North Korea as “nuclear capable”); Jonas, *supra* note 4, at 418 (referring to India, Israel, Pakistan, and North Korea as the “Final Four”); Hamidi, *supra* note 45 (“Not all nuclear countries are ‘nuclear’ in the same way.”); Nuclear Weapons Programs Worldwide: An Historical Overview, Inst. for Sci. & Int’l Sec., <http://isis-online.org/nuclear-weapons-programs> [<https://perma.cc/8TRW-TCUH>] (last visited Oct. 28, 2019) (listing North Korea among those countries with “successful, on-going nuclear weapons programs”).

48. For an illustration of the challenges that U.S. policymakers in particular face in accurately understanding and responding to North Korea’s nuclear weapons program, see Emma Chanlett-Avery, Mark E. Manyin, Mary Beth D. Nikitin, Caitlin Elizabeth Campbell & Wil Mackey, Cong. Research Serv., R41259, North Korea: U.S. Relations, Nuclear Diplomacy, and Internal Situation 2 (2018) (“Although North Korea has presented security challenges to U.S. interests for decades, recent tests have demonstrated that North Korea is nearly if not already capable of striking the continental United States with a nuclear-armed ballistic missile.”). For a reference to North Korea as a de facto nuclear-weapon state following the Singapore Summit, see Vipin Narang & Ankit Panda, North Korea is a Nuclear Power. Get Used to It., Carnegie Endowment for Int’l Peace (June 12, 2018), <https://carnegieendowment.org/2018/06/12/north-korea-is-nuclear-power-get-used-to-it-pub-76594> [<https://perma.cc/FGK3-T2XT>] (“North Korea has arrived as a nuclear power, and there is no going back. Once the reality-show theatrics of the Singapore summit meeting subside, we are left with the reality that North Korea was just recognized as a de facto nuclear weapons power.”).

49. See Rüdiger Wolfrum, International Law, *in* Max Planck Encyclopedia of Public International Law 13–19, 83–89 (2015) (separately paginated work).

50. *Id.* at 13.

argued, on the political will of the State concerned. Big and powerful States are favoured over small or less potent States.<sup>51</sup>

The second view is premised on the notion that states follow international law out of respect for the rule of law and notes that legitimacy “rests in the consent of the States Parties.”<sup>52</sup> This view, often referred to as the Grotian tradition,<sup>53</sup> argues that most states follow international norms, laws, and ethics in order to provide some semblance of structure to the international system.<sup>54</sup>

These two views bear relevance to de facto recognition because, depending on the view to which one subscribes, DNWS status derives from either a powerful state’s decision to recognize the state in question or, alternatively, a broader conviction that de facto recognition is consonant with international law.<sup>55</sup> In considering this binary, principles from the law on diplomatic recognition offer several lessons.<sup>56</sup> First, de facto and de jure recognition are both legal acts, meaning that recognizing a state as a DNWS extends beyond “informal intercourse.”<sup>57</sup> Second, both de jure and de facto recognition derive from the perspective of the recognizing state (or states).<sup>58</sup> Ultimately, a “state has no status among nations until it is recognized by other states.”<sup>59</sup> Consequently, the decision of a powerful state to recognize a would-be proliferant is significant because this recognition

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51. Id.

52. Id. at 83.

53. A. Claire Cutler, The ‘Grotian Tradition’ in International Relations, 17 Rev. Int’l Stud. 41, 41–45 (1991).

54. See Wolfrum, supra note 49, at 13–19. For an in-depth analysis of the reasons why states choose to voluntarily cede portions of their sovereignty to follow higher international legal norms, see generally Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L.J. 2599 (1997).

55. See Wolfrum, supra note 49, at 13–19, 83–89; see also Priyadarshi Nagda, A Study of the Concept of De Facto and De Jure Recognition of Government in Public International Law, Int’l J. Res. & Dev., May 2017, at 158 (“A state has no status among nations until it is recognized by other states.”); ASAN Nuclear Forum Session Sketch, supra note 45, at 2 (noting, among other things, the importance of disaggregating academic analysis of the reasons why states are considered to be de facto nuclear-weapon states).

56. In international law, recognition is a unilateral act whereby a state recognizes another state as a lawful entity and peer. This recognition may either take de jure or de facto form. See generally H. Lauterpacht, Recognition of States in International Law, 53 Yale L.J. 385 (1944) (providing a comprehensive overview of the law of recognition).

57. H. Lauterpacht, De Facto Recognition, Withdrawal of Recognition, and Conditional Recognition, 22 Brit. Y.B. Int’l L. 164, 164 (1945) [hereinafter Lauterpacht, De Facto Recognition]. This principle is best encapsulated in the legal maxim, *ex factis ius oritur*, “[L]aw arises from actions [or facts].” Aaron X. Fellmeth & Maurice Horwitz, Guide to Latin in International Law 93 (Oxford Univ. Press 2009).

58. Lauterpacht, De Facto Recognition, supra note 57, at 164; see also Nagda, supra note 55, at 159 (noting that both de jure and de facto recognition occur when, “according to the recognizing state, the state or government recognized formally [or effectively] fulfils the requirement laid down by international law” for participation in the international community).

59. Nagda, supra note 55, at 158.

has legal effect and the decision to recognize is itself one with legal consequence.<sup>60</sup>

Given the value of defining DNWS status in light of the law on diplomatic recognition, an important initial consideration is that a state's technological access to nuclear weapons alone is not sufficient to surpass the recognition threshold.<sup>61</sup> Beyond this technical consideration, however, the challenge in determining whether a state has attained DNWS status is that international law does not provide an authoritative definition of de facto recognition.<sup>62</sup> Indeed, "The exigencies of international life, especially those relating to the different aspects of recognition, do not admit of simple and categorical solutions."<sup>63</sup> The limited utility of the Statute of the International Court of Justice's (ICJ) first three bases of international law—treaties, customs, and general principles of law—illustrates this challenge.<sup>64</sup>

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60. See *id.*

61. An important point of clarification is that "de facto" should not be understood as recognizing the fact that the state in question has nuclear weapons, but rather that it is treated as one of the de jure NWS. See *id.* at 158–59. Consequently, de facto recognition does not involve sole consideration of whether North Korea has the technical capacity to produce nuclear weapons capable of serving as an adequate military deterrent—this much has been scientifically confirmed. See M 6.3 Nuclear-Explosion—21km ENE of Sungjibaegam North Korea, Earthquake Hazards Program, U.S. Geological Survey (Sep. 3, 2017), <https://earthquake.usgs.gov/earthquakes/eventpage/us2000aert/executive> [<https://perma.cc/7G5X-96RC>] [hereinafter U.S. Geological Survey]; The Nuclear Explosion in North Korea on 3 September 2017: A Revised Magnitude Assessment, NORSAR (Dec. 9, 2017), <https://www.norsar.no/press/latest-press-release/archive/the-nuclear-explosion-in-north-korea-on-3-september-2017-a-revised-magnitude-assessment-article1548-984.html> [<https://perma.cc/D2TJ-VF22>]. The significance of this yield is seen in comparison to Little Boy, the nuclear weapon dropped on Hiroshima during World War II, which yielded 15 kT. John Malik, Los Alamos Nat'l Lab., *The Yields of the Hiroshima and Nagasaki Nuclear Explosions 1* (1985), <http://atomicarchive.com/Docs/pdfs/00313791.pdf> (on file with the *Columbia Law Review*).

62. See *supra* notes 49–59 and accompanying text.

63. See Lauterpacht, *De Facto Recognition*, *supra* note 57, at 165.

64. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute]. Article 38 of the ICJ Statute is relevant to this analysis given its reputation as "an authoritative statement of the sources of international law." Sir Michael Wood, *Teachings of the Most Highly Qualified Publicists* (Art. 38 (1) ICJ Statute), in *Max Planck Encyclopedia of Public International Law 1* (2017) (separately paginated work). The first basis, international conventions, does not provide much guidance on the definition of de facto nuclear weapon-state status given that the authoritative international agreement on nuclear weapons possession—the NPT—only recognizes the five de jure NWS and does not provide a framework for identifying (or even acknowledging) nuclear weapons possessors outside of those five. See *Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* note 15, 729 U.N.T.S. 161. The second basis, customary international law, is likewise challenging to rely on, as it would be difficult to argue that a practice of de facto recognition has developed universally and over a long enough time so as to be incorporated into customary international law. Indeed, many commentators argue that even a nonproliferation norm has not yet been embedded into customary international law. See, e.g., James A. Green, *India's Status as a Nuclear Weapons Power Under Customary International Law*, 24 *Nat'l L. Sch. of India Rev.* 125, 132–33 (2012). Similar challenges also apply to the third

However, the statute's fourth basis—particularly “the teachings of the most highly qualified publicists of the various nations”—may be instructive “as a subsidiary means for the determination of rules of law.”<sup>65</sup> One noted publicist is Professor Hersch Lauterpacht, a former ICJ judge who is widely regarded as the father of the law on diplomatic recognition and who published the seminal book *Recognition in International Law*.<sup>66</sup> In defining de facto recognition in the diplomatic context, Professor Lauterpacht noted that aside from the foundational principle that such recognition is a legal act that derives from the recognizing state,<sup>67</sup> de facto recognition is intended to be a temporary status along the path to de jure recognition.<sup>68</sup> Despite its provisional nature, Professor Lauterpacht wrote that de facto status must involve “an act intended or calculated to give rise to legal rights and obligations.”<sup>69</sup>

Since the time of Professor Lauterpacht's writings, numerous recognition law scholars have argued that although his criteria for defining de facto recognition stand the test of time, they offer an incomplete view of the picture because they only identify de facto states ex post.<sup>70</sup> Consequently, these scholars have sought to develop a set of conditions that academics and policymakers can use to identify de facto states ex ante.<sup>71</sup> This

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basis, the “general principles of law recognized by civilized nations.” ICJ Statute, *supra*, art. 38(1)(c).

65. ICJ Statute, *supra* note 64, art. 38(1)(d). The fourth basis's first listed source of authority, judicial decisions, is of limited relevance in the de facto recognition context. This is because the only ICJ advisory opinion delving into the question of nuclear weapons possession did not seek to provide a definition of de facto nuclear-weapon state. See *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8). For more on the question of whether an on-point ICJ Advisory Opinion would hold authoritative value, see generally Edvard Hambro, *The Authority of the Advisory Opinions of the International Court of Justice*, 3 *Int'l & Comp. L.Q.* 2 (1954).

66. See Sir Hersch Lauterpacht, *Lauterpacht Ctr. for Int'l Law*, <https://www.lcil.cam.ac.uk/about-centrehistory/sir-hersch-lauterpacht> [<https://perma.cc/9GKJ-79YZ>] (last visited Oct. 28, 2019).

67. See *supra* notes 57–59 and accompanying text.

68. See Lauterpacht, *De Facto Recognition*, *supra* note 57, at 171 (“The result is—and this is the essential feature of *de facto* recognition—that for the time being recognition thus granted must be regarded as provisional and liable to withdrawal in case the prospect of the conditions being fulfilled should finally disappear.”).

69. *Id.* at 164.

70. See, e.g., Jose Serralvo, *Government Recognition and International Humanitarian Law Applicability in Post-Gaddafi Libya*, in *Yearbook of International Humanitarian Law* 3, 25 (T.D. Gill et al. eds., 2015) (framing Libya's National Transitional Council in “de facto” terms *after* its legitimacy had already been established following the 2011 ouster of Colonel Muammar Gaddafi); Charles L. Cochran, *De Facto and De Jure Recognition: Is There a Difference?*, 62 *Am. J. Int'l L.* 457, 459 (1968) (noting, in a discussion of the extension of de facto recognition to the state of Israel, that the “May 1948 ‘recognition’ had not been [retrospectively] described as ‘*de facto* recognition’” (internal quotation marks omitted) (quoting Letter from Marjorie Whiteman, Assistant Legal Advisor, U.S. Dep't of State, to Charles L. Cochran, Assistant Professor of Gov't, U.S. Naval Acad. (Apr. 6, 1966))).

71. See Janis Grzybowski, *The Paradox of State Identification: De Facto States, Recognition, and the (Re-)production of the International*, 11 *Int'l Theory* 241, 249 (2019)

scholarship has contributed toward the development of a “working test” for operationalizing de facto status.<sup>72</sup> The conditions that comprise this test include, among other factors: the existence of organized leadership, control of a territorial area, clearly indicated aspirations for independence, and temporal stability.<sup>73</sup> Importantly, the promulgation of this working test is based on historical analyses of quasi-states afforded de facto status, including the Soviet Union immediately following the Bolshevik Revolution,<sup>74</sup> Northern Cyprus,<sup>75</sup> and more recently, Libya following the Arab Spring.<sup>76</sup>

In defining DNWS status, two lessons emerge from those recognition law principles. First, the exigencies of international law counsel against attempting to craft a *decisive* definition of de facto recognition in the nuclear nonproliferation context; rather, a more promising route is to create a working test laying out conditions that identify a nuclear-armed state as a DNWS. Second, in constructing this test, the best source of information is the experiences of states that have already attained DNWS status. Section I.B.3 begins with the second lesson by highlighting the nuclear weapons histories of India and Pakistan. Later in this Note, section III.B returns to the first lesson and develops a working test for identifying DNWS.

3. *Lessons from India and Pakistan’s Nuclear Weapons Histories.* — Having established the importance of defining DNWS status, it is worthwhile to consider the cases of India and Pakistan, two states that possess nuclear weapons outright, without being formally recognized as NWS.<sup>77</sup> As previously discussed, Israel, unlike India and Pakistan, has preferred to maintain a status of ambiguity regarding its nuclear weapons program—nuclear opacity—although it is widely understood that it too possesses nuclear

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[hereinafter Grzybowski, *The Paradox of State Identification*] (canvassing the literature for potential elements of de facto status, including the presence of organized leadership and temporal stability).

72. See *id.*

73. See *id.* Interestingly, the half century of scholarship following Professor Lauterpacht’s writings has largely expounded his initial thoughts on what such a working test could comprise, including effectiveness of state power, a reasonable prospect of permanency, irrevocable defeat of the exiting government, ability to fulfill international obligations, and free acceptance of the new state by a majority of the population. See Lauterpacht, *De Facto Recognition*, *supra* note 57, at 172. Other scholarly works have also posited requisite conditions to be satisfied in order to achieve other levels of diplomatic recognition. See, e.g., *Implied Recognition*, 21 *Brit. Y.B. Int’l L.* 123, 123–38 (1944) (listing conditions such as the conclusion of treaties, participation in conferences, reception of diplomatic representatives, and appointment of consuls and agents).

74. See Lauterpacht, *De Facto Recognition*, *supra* note 57, at 168–69.

75. See Adrian Florea, *De Facto States: Survival and Disappearance (1945–2011)*, 61 *Int’l Stud. Q.* 337, 342 (2017).

76. See Serralvo, *supra* note 70, at 25.

77. See Jonas, *supra* note 4, at 418–19.

weapons.<sup>78</sup> Consequently, drawing lessons from recognition of Israel's nuclear weapons program would be challenging, largely because Israel itself has not outwardly recognized its program.<sup>79</sup> This Note therefore limits its discussion to India and Pakistan's experiences following their nuclear weapons tests in 1998.<sup>80</sup>

Although India and Pakistan's motivations for and methods of acquiring nuclear weapons differ in several important respects,<sup>81</sup> since their 1998 nuclear tests the two states have followed largely similar nuclear trajectories.<sup>82</sup> They have both been able to maintain their standing in the international community despite their status as non-NPT nuclear weapons possessors.<sup>83</sup> This status is illustrated by both states' "relatively productive relations" with the United States in various security, trade, and diplomatic endeavors.<sup>84</sup> In fact, in 2005 India and the United States reached a joint civil nuclear agreement wherein India separated its civil and military

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78. The Israeli government's intentional policy to not acknowledge its possession of nuclear weapons is referred to as "nuclear opacity." See Int'l Inst. for Strategic Studies, *Nuclear Programs in the Middle East: In the Shadow of Iran* 119 (Mark Fitzpatrick ed., 2011) [hereinafter *IISS Israel Report*]. See generally Avner Cohen, *Israel and the Bomb* (1998) (describing the historical development of Israel's policy of nuclear opacity); Avner Cohen, *The Worst-Kept Secret: Israel's Bargain with the Bomb* (2010) (analyzing Israel's nuclear ambiguity in light of nuclear proliferation norms).

79. See *IISS Israel Report*, supra note 78, at 119.

80. See Michael Krepon, *Looking Back: The 1998 Indian and Pakistani Nuclear Tests*, *Arms Control Today*, May 2008, at 51, 51.

81. Compare Pervaiz Iqbal Cheema, *Anatomizing Pakistan's Motivations for Nuclear Weapons*, 64 *Pak. Horizon* 5, 5 (2011) ("While India's interest in nuclear weapons gained coherence after China conducted its nuclear test, Pakistan's quest for nuclear weapon technology can be traced back to its dismemberment in 1971."), with Sumit Ganguly, *Behind India's Bomb: The Politics and Strategy of Nuclear Deterrence*, *Foreign Aff.*, Sept.–Oct. 2001, at 136, 137 (noting that both Pakistan and China were motivating forces behind India's pursuit of nuclear weapons technology). India acquired nuclear explosive capabilities over one decade before Pakistan. See *Pakistan Nuclear Weapons*, Fed'n Am. Scientists, <https://fas.org/nuke/guide/pakistan/nuke> [<https://perma.cc/X2ZU-UYZF>] (last modified Dec. 11, 2002). Pakistan's acquisition of nuclear weapons is also unique in the role played by A.Q. Khan, who later infamously coordinated nuclear smuggling networks to rogue states such as Iran, Libya, and North Korea. See Catherine Collins & Douglas Frantz, *The Long Shadow of A.Q. Khan: How One Scientist Helped the World Go Nuclear*, *Foreign Aff.* (Jan. 31, 2018), <https://www.foreignaffairs.com/articles/north-korea/2018-01-31/long-shadow-aq-khan> [<https://perma.cc/3WQZ-U5V3>].

82. See William Walker, *International Nuclear Relations After the Indian and Pakistani Test Explosions*, 74 *Int'l Aff.* 505, 505–06 (1998) (discussing the geopolitical implications of India and Pakistan's respective nuclear tests in May 1998). The countries also share several similarities in the development of their nuclear programs. See *id.* at 511.

83. See Jonas, supra note 4, at 418–19.

84. See *id.* at 452. In the immediate aftermath of both states' 1998 nuclear tests, however, there were international calls for sanctions and repeated urges to give up their nuclear weapons. See S.C. Res. 1172, pmb., ¶ 7 (June 6, 1998) (expressing grave concern "at the challenge that the nuclear tests conducted by India and then by Pakistan constitute to international efforts aimed at strengthening the global regime of non-proliferation of nuclear weapons"); U.S. Imposes Sanctions on India, *CNN* (May 13, 1998), <http://edition.cnn.com/WORLD/asiapcf/9805/13/india.us> [<https://perma.cc/JB2V-VYJL>].

nuclear facilities, placing the former under applicable IAEA safeguards, in exchange for full cooperation with the United States on civil nuclear matters.<sup>85</sup> This agreement, as well as the 2008 waiver allowing India to participate in the Nuclear Suppliers Group (NSG), was reached despite India not being a signatory to the NPT.<sup>86</sup> The five NWS have not yet reached a comparable nuclear agreement with Pakistan, but following the September 11, 2001 attacks, the United States provided financial and logistical assistance to the Pakistani government in safeguarding its nuclear materials.<sup>87</sup>

In recognizing India and Pakistan's nuclear weapons programs, most commentators agree that the U.S.–India nuclear deal firmly places India as a DNWS state, particularly given the Bush Administration's non-proliferation justifications in advancing the deal.<sup>88</sup> Then-Undersecretary of State for Political Affairs Nicholas Burns noted that “India's trust, its credibility, the fact that it has promised to create a state-of-the-art facility, monitored by the IAEA, to begin a new export control regime in place, [and that] it has not proliferated the nuclear technology” were all key considerations in reaching the agreement.<sup>89</sup>

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85. See Press Release, White House Office of the Press Sec'y, Joint Statement by President George W. Bush and Prime Minister Manmohan Singh (July 18, 2005), <https://2001-2009.state.gov/p/sca/rls/pr/2005/49763.htm> [<https://perma.cc/D45A-TKE8>] [hereinafter Press Release, U.S.–India Joint Statement]. Also referred to as the 123 Agreement, this bilateral treaty between India and the United States aimed “to enable full civil nuclear energy cooperation” between the two states. See *id.* The deal is termed the 123 Agreement after § 123 of the United States Atomic Energy Act, which requires the United States to promulgate an explicit agreement before cooperating on nuclear materials with another state. See Atomic Energy Act of 1954, Pub. L. No. 703, § 123, 68 Stat. 940 (codified as amended at 42 U.S.C. § 2153 (2018)).

86. See Wade Boese, NSG, Congress Approve Nuclear Trade with India, Arms Control Today, Oct. 2008, at 27, 27. Indeed, this waiver made India the first non-NPT state with nuclear weapons to be allowed to carry out international nuclear commerce. See India Energised by Nuclear Pacts, Daily Star (Oct. 5, 2008), <https://www.thedailystar.net/news-detail-57238> [<https://perma.cc/R8HJ-NBS8>].

87. See David E. Sanger & William J. Broad, U.S. Secretly Aids Pakistan in Guarding Nuclear Arms, N.Y. Times (Nov. 18, 2007), <https://www.nytimes.com/2007/11/18/washington/18nuke.html> (on file with the *Columbia Law Review*). For a comprehensive overview of bilateral security relations between the United States and Pakistan, see Greg Bruno & Jayshree Bajoria, U.S.–Pakistan Military Cooperation, Council on Foreign Relations (June 26, 2008), <https://www.cfr.org/backgrounder/us-pakistan-military-cooperation> [<https://perma.cc/M8B4-LXGX>].

88. See Jayshree Bajoria & Esther Pan, The U.S.–India Nuclear Deal, Council on Foreign Relations (Nov. 5, 2010), <https://www.cfr.org/backgrounder/us-india-nuclear-deal> [<https://perma.cc/Z5F9-HZBR>] (“If you look at the three countries outside the Nuclear Non-Proliferation Treaty (NPT)—Israel, India, and Pakistan—this stands to be a unique deal.” (quoting Charles D. Ferguson, then a science and technology fellow at the Council on Foreign Relations)); see also Press Release, U.S.–India Joint Statement, *supra* note 85 (“[Both states] [c]ommit to play a leading role in international efforts to prevent the proliferation of Weapons of Mass Destruction. The U.S. welcomed the adoption by India of legislation on WMD (Prevention of Unlawful Activities Bill).”).

89. See IAEA Board Backs Indian Nuclear Safeguards Agreement, Nuclear Threat Initiative (Aug. 1, 2008), <https://www.nti.org/gsn/article/iaea-board-backs-indian-nuclear-safeguards-agreement> [<https://perma.cc/X59S-A7TR>].



Pakistan has had to push harder for recognition as a DNWS. In 2010, the chairman of the Pakistani Joint Chiefs of Staff demanded that the world accept Pakistan as a nuclear power.<sup>90</sup> Nevertheless, Pakistan's continued engagement with the international community—including through continued security initiatives with the United States and significant economic and nuclear-related cooperation with China—suggests that it, too, is now recognized as a DNWS.<sup>91</sup>

In light of Professor Lauterpacht's criteria for *de facto* recognition, India and Pakistan can both be accurately considered DNWS.<sup>92</sup> From a legal perspective, recognition of India and Pakistan as DNWS has given rise to clear "legal rights and obligations" on the part of both states.<sup>93</sup> Both states are fully engaged in international affairs and are afforded nuclear-related rights and protections that, per the NPT, should not be extended to states other than the *de jure* NWS.<sup>94</sup> Relatedly, despite attempts to sanction India and Pakistan soon after the 1998 nuclear tests, the NWS-led international community has since adopted a course of diplomatic engagement and cooperation with both states.<sup>95</sup> Today, forsaking this course

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90. World Must Accept Pakistan as Nuclear Power: Gen Majid, Dawn (June 18, 2010), <https://www.dawn.com/news/846619/world-must-accept-pakistan-as-nuclear-power-gen-majid> [<https://perma.cc/8G9C-UTGZ>].

91. See *supra* note 84 and accompanying text; see also Jonas Schneider, A Nuclear Deal for Pakistan?, *CSS Analyses Security Pol'y*, Mar. 2016, at 1, 3–4 ("For already today (despite its nuclear arsenal, which violates the NPT), Pakistan receives nuclear power plants from China . . .").

92. See *supra* note 69 and accompanying text.

93. Lauterpacht, *De Facto Recognition*, *supra* note 57, at 164.

94. See *supra* notes 84–88 and accompanying text. These obligations include, among others, those listed in Article II preventing NNWS from manufacturing or acquiring nuclear weapons. See *supra* note 17 and accompanying text. Other rights include those stemming from India's participation in bilateral and multilateral nuclear-related commerce. See Schneider, *supra* note 91, at 1.

95. Along with the previously discussed anecdotal evidence pointing to India and Pakistan's engagement with the international community, a quantitative metric that demonstrates this point is their worldwide rankings in terms of net inflows of foreign direct investment (FDI). FDI refers to "direct investment equity flows in the reporting economy." Foreign Direct Investment, Net Inflows (BoP, Current US\$)—Country Ranking, Index Mundi, <https://www.indexmundi.com/facts/indicators/BX.KLT.DINV.CD.WD/rankings> [<https://perma.cc/T44Q-3XDV>] [hereinafter *Foreign Direct Investment Rankings*] (last visited Oct. 28, 2019). FDI is crucial in promoting economic growth and serves as a useful benchmark in gauging a country's level of economic engagement with regional and international counterparts. See V.N. Balasubramanyam, M. Salisu & David Sapsford, Foreign Direct Investment and Growth in EP and IS Countries, 106 *Econ. J.* 92, 93, 101 (1996) ("[A]n [export promoting] strategy is likely to both attract a higher volume of FDI and promote more efficient utilisation thereof than is an [import substituting] strategy."). In 2018, India and Pakistan ranked fourteenth and sixty-second in net FDI inflows, both in the top fifty percent of listed states. *Foreign Direct Investment Rankings*, *supra*.

would be almost as unimaginable as ostracizing any of the de jure NWS for their possession of nuclear weapons.<sup>96</sup>

## II. NORTH KOREA'S PURSUIT OF DNWS STATUS

This Part builds on the discussion of the NPT's systemic weaknesses and argues that recognition of North Korea as a DNWS would undermine the Grand Bargain and set the Treaty on a perilous course that, if unchanged, would likely culminate in its collapse. Section II.A begins with a review of North Korea's history in pursuit of nuclear weapons as well as the numerous international attempts at disarmament negotiation since the 1990s, the most recent iterations being the June 2018 Singapore Summit and the February 2019 Hanoi Summit. Section II.B then explains why de facto recognition of North Korea's nuclear weapons program would likely undermine the Grand Bargain.

### A. *North Korea's Pursuit of the Bomb*

1. *North Korea's Nuclear History.* — The origin of North Korea's nuclear weapons program can be traced to just after the Korean War, when the state signed a nuclear research agreement with the Soviet Union.<sup>97</sup> Relying on Soviet assistance, Supreme Leader Kim Il-sung steadily laid the groundwork for North Korea's nuclear weapons program and in 1980 began constructing an experimental nuclear reactor at Yongbyon.<sup>98</sup> In 1985, as North Korea neared completion of its reactor, it signed the NPT under joint Soviet and American pressure.<sup>99</sup>

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96. This is particularly so given that various NWS have separately cultivated strong relationships with India and Pakistan. See *supra* notes 88–91 and accompanying text.

97. Int'l Inst. for Strategic Studies, *North Korean Security Challenges: A Net Assessment* 94 (Mark Fitzpatrick ed., 2011) [hereinafter *IISS North Korea Report*]. This agreement provided North Korean nuclear scientists with relevant technical training and, importantly, a small-scale research reactor. The Soviet Union, however, insisted that North Korea place this reactor under applicable IAEA inspections, a requirement presaging later complications in North Korea's nuclear history. See Donald Oberdorfer & Robert Carlin, *The Two Koreas: A Contemporary History* 196 (3d ed. 2014).

98. *IISS North Korea Report*, *supra* note 97, at 94, 96.

99. *Id.* at 93 (“North Korea acceded to the Nuclear Non-Proliferation Treaty (NPT) in December 1985 . . .”); see also *Chronology of U.S.–North Korean Nuclear and Missile Diplomacy*, Arms Control Ass'n, <https://www.armscontrol.org/factsheets/dprkchron> [<https://perma.cc/9VQC-43KR>] [hereinafter *U.S.–North Korean Nuclear Chronology*] (last updated Mar. 2020) (noting that while North Korea acceded to the NPT in 1985, it did “not complete a safeguards agreement with the International Atomic Energy Agency”).

The end of the Cold War and consequent loss of Soviet support “led to a swift deterioration of North Korea’s strategic position” by the early 1990s.<sup>100</sup> Under these conditions, the North Korean leadership adopted the view that the advancement of its nuclear program was critical to leveraging its position internationally and establishing an adequate military deterrent.<sup>101</sup> In this fraught security context, the 1990s witnessed several attempts by the United States and the international community to open diplomatic channels with North Korea and bring the regime to the negotiating table.<sup>102</sup> These efforts included the 1991 Joint Declaration on the Denuclearization of the Korean Peninsula<sup>103</sup> and the 1994 Agreed Framework.<sup>104</sup> But “U.S. relations with North Korea remained highly uneasy during this period,” and implementation of both agreements was fraught with uncertainty throughout the 1990s.<sup>105</sup> Moreover, the Bush Administration’s foreign policy changes following the September 11, 2001 attacks led the United States to declare North Korea in violation of the Agreed Framework.<sup>106</sup> North Korea soon after invoked its right to withdraw from the NPT.<sup>107</sup>

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100. Wertz, *supra* note 1, at 6.

101. *Id.* at 6–7.

102. *Id.* at 7.

103. *Id.* This declaration involved joint commitments not to test, possess, or use nuclear weapons or enrichment facilities and was accompanied by a high-level diplomatic meeting between U.S. and North Korean officials in New York, after which the latter agreed to IAEA inspections of its nuclear facilities. *Id.*

104. Through the Agreed Framework and the Korean Peninsula Energy Development Organization (KEDO), an international consortium formed to implement the Framework, North Korea secured U.S. commitments to construct two light-water reactors (LWRs), deliver heavy-fuel oil, ease sanctions, and normalize relations in exchange for ceasing plutonium production and shutting down Yongbyon. See *The U.S.–North Korean Agreed Framework at a Glance*, Arms Control Ass’n, <https://www.armscontrol.org/factsheets/agreedframework> [<https://perma.cc/VB9Z-SDC9>] (last updated July 2018). The Agreed Framework alleviated the immediacy of the crisis surrounding North Korea’s nuclear program by freezing Yongbyon and prompting North Korea’s practical abandonment of its two other nascent reactors. See Wertz, *supra* note 1, at 8.

105. Wertz, *supra* note 1, at 8.

106. *Id.* at 9–10. Several structural shortcomings of the Agreed Framework contributed to its 2003 collapse and North Korea’s complete withdrawal from the NPT. These shortcomings include the fact that North Korea was never required to reveal more about its past plutonium production efforts, the Framework’s lack of technical specificity, and its limited response mechanisms if North Korea reneged on its commitments. See Leon V. Sigal, *The North Korean Nuclear Crisis: Understanding the Failure of the ‘Crime-and-Punishment’ Strategy*, *Arms Control Today*, May 1997, at 3, 5 (noting that due to North Korean efforts at concealment, the IAEA “reached no firm conclusion about the amount of plutonium extracted” by the regime); *Nuclear Blackmail: The 1994 U.S.–Democratic People’s Republic of Korea Agreed Framework on North Korea’s Nuclear Program*, Hoover Inst. (Apr. 1, 1997), <https://www.hoover.org/research/nuclear-blackmail-1994-us-democratic-peoples-republic-korea-agreed-framework-north-koreas> [<https://perma.cc/A7YP-NTAF>]; see also George Perkovich, *Why the Iran Nuclear Deal Is Not the North Korea Deal*, *Carnegie Endowment for Int’l Peace* (Apr. 28, 2015), <https://carnegieendowment.org/2015/04/28/why-iran-nuclear-deal-is-not-north-korea-deal-pub-59923> [<https://perma.cc/RB8G-7N3H>].

2. *The Singapore and Hanoi Summits.* — Since North Korea’s withdrawal from the NPT, several attempts have been made to reverse the advancement of the state’s nuclear weapons program. These attempts include six rounds of Six-Party Talks between North Korea, South Korea, the United States, Russia, China, and Japan throughout the 2000s.<sup>108</sup> Recent nuclear tests, however, confirm that these efforts have been largely in vain, as North Korea has acquired nuclear weapons with explosive capabilities.<sup>109</sup> Nevertheless, North Korea has again recently signaled its willingness to resume disarmament negotiations and bring itself back into the global nonproliferation fold,<sup>110</sup> most notably through its participation in the Singapore and Hanoi Summits. Although a summit between President Trump and Kim Jong-un did not seem to be a realistic possibility at the beginning of 2017,<sup>111</sup> a change in tone in early 2018 set the stage for a relatively quick turnaround and organization of the first summit.<sup>112</sup>

The Singapore Summit was met with mixed international reactions.<sup>113</sup> The text of the Joint Statement released at the conclusion of the summit stated four broad commitments by the United States and North Korea. First, the United States and North Korea “commit to establish new U.S.–

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107. U.S.–North Korean Nuclear Chronology, *supra* note 99.

108. See Leap of Faith, *Economist* (Mar. 1, 2012), <https://www.economist.com/banyan/2012/03/01/leap-of-faith> [<https://perma.cc/V5AA-8TG8>]. For a contemporaneous discussion of the prospects of the Six-Party Talks in the mid-2000s and recommendations to address potential weaknesses in the international community’s approach to disarmament negotiation with North Korea, see Assia Dosseva, North Korea and the Non-Proliferation Treaty, 31 *Yale J. Int’l L.* 265, 265–70 (2006) (“Although the joint statement of the fourth session of the six-party talks is a step in the right direction, there are several uncertainties in the future implementation and enforcement of its objectives.”).

109. See U.S. Geological Survey, *supra* note 61.

110. See Uri Friedman, How Kim Jong Un Seized Control of the Nuclear Crisis and Slowed Down Talk of War in Washington, *Atlantic* (Mar. 6, 2018), <https://www.theatlantic.com/international/archive/2018/03/kim-jong-un-south-korea/554888> [<https://perma.cc/9RHJ-FCUN>].

111. See *supra* note 1 and accompanying text.

112. See Wertz, *supra* note 1, at 17. The thawing of North and South Korean relations also accompanied enhanced communication between U.S. officials and their North Korean counterparts via diplomatic backchannels in early 2018. *Id.* Building on this modest progress, in March 2018 Kim Jong-un communicated his desire to hold a summit meeting with President Trump to discuss potential denuclearization. *Id.* Trump, marking a near instantaneous shift in policy from “maximum pressure” to “maximum engagement,” immediately accepted the offer, sending his then-CIA Director nominee Mike Pompeo to North Korea for a preliminary meeting. *Id.* at 17–18. Although plans for the summit were temporarily imperiled following President Trump’s then-national security adviser John Bolton’s haphazard advice that North Korea follow the “Libya model” in its denuclearization, an impromptu meeting between North Korean leadership and South Korean President Moon Jae-in righted the course and helped to finalize the agenda for the June 12th Singapore Summit. *Id.* at 18.

113. See Molly Hunter, The World Watched: Trump–Kim Summit Drew Global Reaction, with Many Expressing Cautious Hope, *ABC News* (June 12, 2018), <https://abcnews.go.com/beta-story-container/International/world-watched-trump-kim-summit-drew-global-reaction/story?id=55835926> [<https://perma.cc/AHY3-UXNQ>].

DPRK relations in accordance with the desire of the peoples of the two countries for peace and prosperity.”<sup>114</sup> Second, the United States and North Korea “will join their efforts to build a lasting and stable peace regime on the Korean Peninsula.”<sup>115</sup> Third, “Reaffirming the April 27, 2018 Panmunjom Declaration, the DPRK commits to work toward complete denuclearization of the Korean Peninsula.”<sup>116</sup> Fourth and finally, the United States and North Korea “commit to recovering POW/MIA remains, including the immediate repatriation of those already identified.”<sup>117</sup>

Despite this agreement, North Korea never signaled its willingness to unilaterally forsake its nuclear weapons arsenal.<sup>118</sup> Even a liberal interpretation of the (nonbinding) Joint Declaration would construe North Korea as conditioning its nuclear disarmament on U.S. disarmament.<sup>119</sup> Additionally, from the perspective of the United States, North Korean progress in meeting its summit commitments since June 2018 has been seriously lacking.<sup>120</sup> The Singapore Summit was followed seven months later by a second meeting in Hanoi, Vietnam.<sup>121</sup> This summit, however, was cut short without any agreement, and further efforts at denuclearization have since stalled.<sup>122</sup> For instance, the Hanoi Summit was followed four months later by a tripartite meeting between President Trump, Kim Jong-un, and South Korean President Moon Jae-in at the Korean Demilitarized Zone,<sup>123</sup> but this get-together lacked any substance beyond high-level promises to continue arranging such meetings moving forward.<sup>124</sup>

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114. See Press Release, Singapore Summit Joint Statement, *supra* note 6.

115. *Id.*

116. *Id.*

117. *Id.*

118. See *id.*

119. *Id.*; David E. Sanger, Pence Says U.S. Still Waiting on North Korea for “Concrete Steps” to Denuclearize, *N.Y. Times* (Jan. 16, 2019), <https://www.nytimes.com/2019/01/16/world/asia/pence-north-korea-nuclear.html> (on file with the *Columbia Law Review*) (“[North Korea] has argued for a step-by-step approach—including that the United States withdraw troops and weapons from the Korean Peninsula.”).

120. See Donna Borak & Zachary Cohen, John Bolton Says North Korea Failure to Meet Commitments Requires Second Trump–Kim Summit, *CNN* (Dec. 4, 2018), <https://www.cnn.com/2018/12/04/politics/bolton-north-korea-summit-commitments/index.html> [<https://perma.cc/G2AQ-AA7J>]; Sanger, *supra* note 119.

121. See Trump–Kim Summit: Leaders Have Dinner in Vietnam, *N.Y. Times* (Feb. 26, 2019), <https://www.nytimes.com/2019/02/26/world/asia/trump-kim-summit-vietnam.html> (on file with the *Columbia Law Review*).

122. See Wesley Dockery, North Korea News: Kim Jong Un Breaks Off Denuclearization Talks With US, *Int’l Bus. Times* (Oct. 5, 2019), <https://www.ibtimes.com/north-korea-news-kim-jong-un-breaks-denuclearization-talks-us-2840352> [<https://perma.cc/67GS-G8KE>].

123. Trump Meets North Korea’s Kim at DMZ in Landmark Visit, *Al Jazeera* (June 30, 2019), <https://www.aljazeera.com/news/2019/06/trump-confirms-meet-kim-dmz-190630050353219.html> [<https://perma.cc/86PX-3DGN>].

124. See Peter Baker & Michael Crowley, Trump Steps into North Korea and Agrees with Kim Jong-un to Resume Talks, *N.Y. Times* (June 30, 2019), <https://www.nytimes.com/2019/>

B. *North Korean Challenges to the Grand Bargain*

1. *Challenges Posed by Recognition of North Korea to the Grand Bargain.* — This section evaluates why recognition of North Korea as a DNWS would undermine the long-term viability of the NPT's Grand Bargain.<sup>125</sup> As discussed in section I.A.2, the Grand Bargain between NWS and NNWS was fundamental in achieving widespread ratification of the NPT and the Treaty's indefinite extension in 1995.<sup>126</sup> The Bargain, however, already undercut by significant NWS noncompliance, would be severely undermined if North Korea surpasses the recognition threshold.

a. *How Would De Facto Recognition Undermine the Grand Bargain?* — Three distinctions between the prospective recognition of North Korea's nuclear weapons program and the de facto recognition of India and Pakistan's programs illustrate why the former (or that of any comparable would-be proliferant) would present acute challenges to the Grand Bargain. These reasons evoke the previously discussed binary in international law between power politics and the rule of law in evaluating whether international obligations are legally binding.<sup>127</sup>

The first reason, firmly centered on the rule of law, is that most NNWS would view de facto recognition of North Korea as rewarding the regime for bad behavior—specifically its breach of its legal obligations under the NPT and its flouting of international procedures and norms.<sup>128</sup> Unlike India and Pakistan, which never acceded to the NPT,<sup>129</sup> North Korea joined the Treaty in 1985 and then spent the next two decades engaging

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06/30/world/asia/trump-north-korea-dmz.html (on file with the *Columbia Law Review*) (characterizing the meeting as a “symbolic moment of reconciliation” for Trump and Kim).

125. This section begins with the (contestable) assumption that disarmament negotiations with North Korea will ultimately not be fruitful. Assuming that North Korea's pursuit of nuclear weapons is guided by rational, deterrence-related motivations, the state likely would not part ways with its nuclear weapons unless it received adequate security guarantees for its independence and the Kim dynasty's safety. Wertz, *supra* note 1, at 3. Given that these guarantees include the requirement that the United States also remove its nuclear weapons from the Korean peninsula, it is safe to assume that most disarmament negotiations under the present state of affairs would reach a stalemate. Sanger, *supra* note 119. North Korea may also distrust any prospective deal with the Trump Administration given its handling of the Joint Comprehensive Plan of Action (JCPOA), also known as the Iran nuclear deal. See Alex Ward, *Why Killing the Iran Deal Makes Trump's North Korea Talks Much, Much Harder*, *Vox* (May 8, 2018), <https://www.vox.com/2018/3/26/17147604/iran-deal-trump-deadline-explained-north-korea> [<https://perma.cc/6W63-BQEP>].

126. See IAEA Fact Sheet, *supra* note 12.

127. See *supra* section I.B.2.

128. Jonas, *supra* note 4, at 453–54 (“[NNWS] might feel cheated at seeing others who remained outside the NPT regime now being ‘rewarded’ with the lawful possession of nuclear weapons.”).

129. See Tehmina Mahmood, *Nuclear Non-Proliferation Treaty (NPT): Pakistan and India*, *Pak. Horizon*, July 1995, at 81, 81 (“Western countries . . . are constantly pressurizing [Pakistan and India] to . . . join the non-proliferation regime by signing the NPT. However, Pakistan and India have refused to sign the NPT for different reasons.”).

in nuclear brinkmanship and illicit weapons development while remaining party to the Treaty on paper.<sup>130</sup> Even North Korea's method of withdrawal from the NPT in 2003 drew condemnation because of the problematic precedent that it set.<sup>131</sup>

Recognition of North Korea as a DNWS would therefore seriously erode the Grand Bargain in two ways. First, it might convince NNWS—particularly nuclear latent NNWS—that following a course of action similar to North Korea's would be met with limited international reproach and would eventually be accepted.<sup>132</sup> Second, for NNWS lacking the capacity to go nuclear, North Korea's de facto status might erode their trust in a deal already viewed as heavily lopsided.<sup>133</sup> Although these states would be unable to pursue their own nuclear programs, they might nonetheless consider ignoring their other NPT commitments, leading to a deterioration of the nonproliferation regime.<sup>134</sup>

The second reason de facto recognition of North Korea's program would undermine the Grand Bargain is that, unlike India and Pakistan, whose motivations for developing nuclear weapons are frequently perceived as narrower in nature (mutual deterrence against one another),<sup>135</sup> North Korea's motivations for and willingness to use its nuclear weapons are more uncertain to the broader international community, and in particular to neighboring Japan and South Korea.<sup>136</sup> Although North Korea's

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130. See ISS North Korea Report, *supra* note 97, at 94–103.

131. See Matthew Liles, Comment, Did Kim Jong-Il Break the Law? A Case Study on How North Korea Highlights the Flaws of the Non-Proliferation Regime, 33 N.C. J. Int'l L. & Com. Reg. 103, 116–17 (2007) (describing North Korea's withdrawal from the NPT and possible legal violations that accompanied that withdrawal); Raven Winters, Note, Preventing Repeat Offenders: North Korea's Withdrawal and the Need for Revisions to the Nuclear Non-Proliferation Treaty, 38 Vand. J. Transnat'l L. 1499, 1507–08 (2005).

132. See Goldblat, *supra* note 20, at 9. For a definition of nuclear latency, see Joseph F. Pilat, Woodrow Wilson Int'l Ctr. for Scholars, Report of a Workshop on Nuclear Latency I (2014), <https://www.wilsoncenter.org/publication/exploring-nuclear-latency> [<https://perma.cc/6G6N-XKMX>].

133. See Goldblat, *supra* note 20, at 9.

134. Paul Meyer, The Nuclear Nonproliferation Treaty: Fin de Regime?, *Arms Control Today*, Apr. 2017, at 16, 22 (“Reinvigorating the NPT will require a major change of policy and practice on the part of its leading states-parties. If this rescue effort is not mounted, there is a serious risk that the treaty will start to hemorrhage its authority and support.”).

135. See Ahmad Khan & Ali Ahsan, Deterrence in Indo-Pak Context: A Critical Appraisal, *Policy Perspectives*, no. 1, 2016, at 53, 53. For an alternative account questioning the similarities undergirding these states' motivations for acquiring nuclear weapons, see Marie Izuyama & Shinichi Ogawa, The Nuclear Policy of India and Pakistan, *in* NIDS Security Reports No. 4, at 59, 61 (2003) (describing India's primary motivation—the desire to be a major global player, particularly following China's 1964 nuclear test—and Pakistan's motivations related to India's progress toward nuclearization).

136. See *supra* section I.B.2. For insight on the North Korean threat as perceived by Japan and South Korea, even following the Singapore Summit, see Opinion, For Japan and South Korea, Nuclear Threat Far from Over, *S. China Morning Post* (June 17, 2018), <https://www.scmp.com/comment/insight-opinion/article/2151149/japan-and-south-korea-nuclear-threat-far-over> [<https://perma.cc/92U6-MGP7>] (“[E]ast Asians, especially South

motivations are likely guided by deterrence, the regime's actions and Kim Jong-un's bellicose rhetoric have led much of the international community to question elements of its nuclear decisionmaking.<sup>137</sup> This doubt is further accentuated by the concern of personality politics influencing North Korea's nuclear weapons apparatus as well as concerns over the state's ties to nuclear materials smuggling, the A.Q. Khan network, and state-sponsored terrorism.<sup>138</sup>

As a corollary to the earlier power politics discussion,<sup>139</sup> the lack of traditional enforcement mechanisms in international law means that state perceptions of potential threats significantly guide their decisionmaking.<sup>140</sup> Consequently, the salience of perceptions and the apparent lack of effective methods to punish North Korea for its nuclear weapons program explain why many NNWS fear de facto recognition of North Korea's nuclear weapons program. Not only would such recognition legitimize a regime they view as an irrational state actor, but it might also lead them to lose faith in the international powers and mechanisms they thought would prevent such a regime from attaining de facto status.<sup>141</sup> Similarly, they might also lose faith in the benefits they believed stemmed from the NPT: among others, "Negative Security Assurances, sharing in peaceful nuclear technology, and a very real perception of responsible statehood."<sup>142</sup>

The third reason recognizing North Korea as a DNWS would undermine the Grand Bargain is that, in line with the power politics value, there are no mitigating circumstances surrounding North Korea's program that

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Koreans and Japanese, know otherwise; the document the two leaders signed was vague and has done nothing to lessen the threat from Pyongyang's bombs and missiles.").

137. Eleanor Albert, *North Korea's Power Structure*, Council on Foreign Relations (July 19, 2018), <https://www.cfr.org/backgrounder/north-koreas-power-structure> [<https://perma.cc/QJX8-6U5Y>]. For the seminal work on the impact of personality politics in nuclear proliferation decisionmaking, see generally Jacques E.C. Hymans, *The Psychology of Nuclear Proliferation: Identity, Emotions, and Foreign Policy* (2006).

138. The A.Q. Khan network was an illicit worldwide nuclear proliferation network created by A.Q. Khan, widely regarded as the father of Pakistan's nuclear weapons program. See David Albright & Corey Hinderstein, *Unraveling the A.Q. Khan and Future Proliferation Networks*, 28 *Wash. Q.* 111, 113 (2005) ("[E]vidence strongly suggests that North Korea has at least received centrifuge designs, a few sample centrifuges, and lists of potential suppliers from the [A.Q. Khan] network.").

139. See *supra* notes 49–51 and accompanying text.

140. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *Yale L.J.* 252, 256 (2011) (noting the common criticism of international law that it "cannot be real law because real law must be capable of affecting behavior through the threat and exercise of" coercion). The nontraditional enforcement mechanisms present in international law are often based on state views on the structural balance of the international system and the security challenges they perceive other actors to pose. See Stephen A. Kocs, *Explaining the Strategic Behavior of States: International Law as System Structure*, 38 *Int'l Stud. Q.* 535, 550 (1994) ("In other words, states will balance most strongly against the states they perceive as posing the greatest threat to basic norms of international law.").

141. See Meyer, *supra* note 134, at 19–21.

142. Jonas, *supra* note 4, at 435 (footnote omitted).



would sufficiently placate most NNWS. While the international community has much to gain from the populous India and Pakistan's complete and normalized engagement in international affairs,<sup>143</sup> the international community does not derive as much utility from North Korea's involvement, as it is a far more economically and politically remote state.<sup>144</sup> This reason evokes the power politics value because while many NNWS might hesitate to challenge the DNWS status of a larger and more influential state, they would be less understanding of an international legal order that recognizes the illicit nuclear weapons program of a smaller and less geopolitically consequential state.

b. *How Would the Grand Bargain's Dissolution Occur?*—As discussed earlier, one way to understand the effect that recognition of North Korea as a DNWS would have on the Grand Bargain is to focus on the likely responses of two classes of NNWS—nuclear latent and nonlatent states.<sup>145</sup> In broad strokes, while loss of faith in the Grand Bargain might prompt the former to pursue their own nuclear weapons programs, the latter might decide to build up their own conventional arms or ignore their other NPT commitments, leading to the deterioration of the global nonproliferation regime.

However, some skepticism should be directed toward an argument contending that *de facto* recognition of North Korea's nuclear weapons program would simply “flip the switch” and convince states that have been party to the NPT for over fifty years to renege on their promises and normative commitments to nonproliferation.<sup>146</sup> In order to address this point, this subsection briefly outlines the main steps that would occur between Point A, *de facto* recognition of North Korea's program, and Point B, the collapse of the Grand Bargain.

*De facto* recognition of North Korea would likely occur through either a major nuclear or security deal analogous to the U.S.–India civil nuclear agreement, or, more plausibly, a series of continued meetings and initiatives between the North Korean leadership and the United States or

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143. See Walker, *supra* note 82, at 505.

144. See Peloso, *supra* note 20, at 315 (noting that the more advantageous geopolitical situations of India and Israel enable them to better manage the “international political costs to not being a Party to the NPT,” unlike North Korea). For further evidence of the situational gulf between North Korea and the DNWS, see Dominic Tierney, *North Korea Wants to End Up Like Pakistan, Not Libya*, *Atlantic* (May 26, 2018), <https://www.theatlantic.com/international/archive/2018/05/north-korea-pakistan-libya/561341> [<https://perma.cc/AQ3V-GBC5>].

145. See *supra* notes 132–134 and accompanying text.

146. See Sharon Riggle, *Could the Non-Proliferation Treaty Collapse? The Uncertain Road Ahead*, 1 *Disarmament Forum* 29, 29 (2000) (noting that despite the fact that the NPT “traditionally provided a respectable level of security to protect against the massive proliferation of nuclear weapons,” recent developments and doubts over the NPT have shaken some NNWS trust in the efficacy of the Treaty).

other NWS that gradually establish North Korea's international standing.<sup>147</sup> The development of a status quo in which North Korea is a de facto nuclear power has long been a concern of Japan and South Korea, two security allies of the United States that neighbor North Korea and are also nuclear latent NNWS.<sup>148</sup> In a global context where North Korea has superior conventional and nuclear forces and where Japan and South Korea have reason to doubt the United States' ability and willingness to provide security, they may choose to break out and build their nuclear arsenals to guarantee their own security.<sup>149</sup>

Many commentators would mark Japan and South Korea's decision to proliferate alone as the effective end of the Grand Bargain and dissolution of the NPT.<sup>150</sup> Even if this were not the case, the domino effect that would soon ensue following their decision to proliferate, potentially toppling nuclear latent NNWS such as Saudi Arabia and Iran, would decisively sound the death knell for the NPT framework.<sup>151</sup> Although several methods of abrogating the NPT are referenced in the Vienna Convention on

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147. See *supra* notes 77–86. For varying viewpoints on how de facto recognition may play out in the years following the Singapore Summit, see Bruce Jones, *Second Summit, Second Chance*, Brookings Inst. (Oct. 18, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/10/18/second-summit-second-chance> [<https://perma.cc/C4ZW-SKJ8>] (noting that continued unsuccessful follow-up meetings may lead to “North Korea as a de facto or even a recognized [nuclear-weapon] state”).

148. See *supra* note 136 and accompanying text; see also David E. Sanger, Choe Sang-Hun & Motoko Rich, *North Korea Rouses Neighbors to Reconsider Nuclear Weapons*, N.Y. Times (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/world/asia/north-korea-nuclear-weapons-japan-south-korea.html> (on file with the *Columbia Law Review*).

149. This concern was amplified by President Trump's surprise announcement soon after the Singapore Summit that the United States and South Korea would temporarily halt their joint military exercises. Choe Sang-Hun, *Pause in Military Drills, Ordered by Trump, Leaves South Koreans Uneasy*, N.Y. Times (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/world/asia/south-korea-trump-military-drills.html> (on file with the *Columbia Law Review*).

150. See Potter & Mukhatzhanova, *Divining Nuclear Intentions*, *supra* note 36, at 166 (“Examples of proliferation surprises include . . . the nature and scope of North Korea's nuclear weapons ambitions.”); John Gershman & Wade L. Huntley, *North Korea & the NPT*, Inst. for Policy Studies (Oct. 2, 2005), [https://ips-dc.org/north\\_korea\\_the\\_npt](https://ips-dc.org/north_korea_the_npt) [<https://perma.cc/6GW3-PS73>] (“[A]lthough there are impediments to the nuclear proliferation domino effect that North Korea might trigger in the region, the impending threat of proliferation is bad news for the NPT . . . [I]f the arms race impediments weaken, and East Asian nuclear dominos begin falling, that's even worse news for the NPT.”). But note that for most commentators, a key trigger behind these domino-effect scenarios is the belief that U.S. security assurances against a nuclear North Korea are no longer credible. See Christopher W. Hughes, *North Korea's Nuclear Weapons: Implications for the Nuclear Ambitions of Japan, South Korea, and Taiwan*, 3 *Asia Pol'y* 75, 89 (2007) (“Any loss of confidence in U.S. security guarantees and fear of abandonment might force Japan to fall back on its own national conventional and (possibly) nuclear resources.”).

151. Jasmine Khayami & Matt Sussis, *Kissinger: North Korea Setting off Nuclear Domino Effect*, Medill News Serv. (Jan. 26, 2018), <http://dc.medill.northwestern.edu/blog/2018/01/26/kissinger-north-korea-setting-off-nuclear-domino-effect/#sthash.qjPNId4L.dpbs>

Treaties—termination, denunciation, withdrawal, suspension of operation, or a finding of invalidity, among others—the end result would remain the same.<sup>152</sup>

2. *Why Keep the NPT?* — In light of the reasons why the NPT, as it is currently formulated, would not withstand recognition of North Korea as a de facto nuclear-weapon state, a valid question is whether the NPT is even necessary for the continued promotion of global nonproliferation efforts. Some analysts argue that due to the Grand Bargain's flaws as well as a host of other institutional and structural inadequacies, the NPT was never provided the tools it needed to succeed.<sup>153</sup> These analysts advocate for alternatives around which to center the global nonproliferation regime, including: (1) an agreement that would address the NPT's fundamental flaws (perhaps the 2017 Treaty on the Prohibition of Nuclear Weapons);<sup>154</sup> (2) a series of bilateral or regional nuclear weapons-related agreements, rather than a universal agreement; or (3) a non-treaty-based system that instead relies on other international structures (international tribunals or general principles of international law).<sup>155</sup>

Despite these valid criticisms of the NPT, there are compelling reasons why the Treaty must remain the pillar of the global nonproliferation regime moving forward. First, any sort of alternative agreement would be unlikely to materialize and, if it did, would not reach the number of states that the NPT presently does.<sup>156</sup> Second, most of the existing nonproliferation regime is directly based on the NPT, and to undo the Treaty would be to undo all of its ancillary structures and mechanisms, including the highly

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[<https://perma.cc/59X7-8Y7T>] (noting former Secretary of State Henry Kissinger's warning that lack of concerted action vis-à-vis North Korea's nuclear weapons program will "encourage other countries to develop their own atomic arsenals" and undermine the NPT).

152. Vienna Convention on the Law of Treaties, arts. 42–65, May 23, 1969, 1155 U.N.T.S. 331, 342–48.

153. See Meyer, *supra* note 134, at 20–22 (explaining that unlike modern arms control and disarmament agreements, the NPT's substandard support mechanism has led to organizational and implementation failures).

154. See United Nations, Treaty on the Prohibition of Nuclear Weapons: Signature and Ratification (2017), <https://www.un.org/disarmament/wp-content/uploads/2017/10/TPNW-info-kit.pdf> [<https://perma.cc/5VST-DTXH>] [hereinafter 2017 Nuclear Weapons Treaty: Signature and Ratification].

155. See, e.g., Jonas, *supra* note 4, at 452–53, 458–59; Sievert, *supra* note 30, at 106–23.

156. Using the 2017 Treaty on the Prohibition of Nuclear Weapons as an illustration of the unlikelihood of negotiating a new disarmament treaty that receives more support than the NPT, even a host of NNWS decided not to ratify this far more binding agreement. See 2017 Nuclear Weapons Treaty: Signature and Ratification, *supra* note 154; Ramesh Thakur, Japan and the Nuclear Weapons Prohibition Treaty: The Wrong Side of History, Geography, Legality, Morality, and Humanity, 1 J. Peace & Nuclear Disarmament 11, 12 (2018) (presenting a scathing review of Japan's decision not to accede to the 2017 Nuclear Weapons Prohibition Treaty); Treaty on the Prohibition of Nuclear Weapons: Status of the Treaty, United Nations Office for Disarmament Affairs, <http://disarmament.un.org/treaties/t/tpnw> [<https://perma.cc/UR6J-4NK4>] (last visited Mar. 13, 2020).

influential IAEA.<sup>157</sup> Third, the symbolic repercussions of discarding the previous core of the nonproliferation regime would permanently weaken the international nonproliferation norm. Despite the weaknesses of the NPT, at every Five-Year Review Conference member states have unanimously recognized the Treaty as essential to continued nonproliferation efforts.<sup>158</sup> To move away from a legal foundation perceived to be so important would irreparably damage international trust in broader nonproliferation efforts, regardless of the agreement or framework that followed.<sup>159</sup>

3. *Has North Korea Already Been Recognized?*—Following the conclusion of the Singapore and Hanoi Summits, several commentators contended that the meetings themselves may have constituted de facto recognition of North Korea’s nuclear weapons program.<sup>160</sup> The key argument that these commentators raised is that the summits represented the first meetings between a North Korean leader and a sitting U.S. President.<sup>161</sup> In the past, the United States has placed a high premium on such meetings, leading to the conclusion that President Trump’s conference with Kim Jong-un might have provided the latter with “de facto recognition of [North Korea’s] status and legitimacy as a nuclear-armed state, akin to other nuclear-armed states outside” the NPT.<sup>162</sup>

However, three observations related to Professor Lauterpacht’s de facto recognition criteria counsel against reaching this conclusion. First, neither President Trump nor any branch of the U.S. government has

157. See *supra* notes 13–14 and accompanying text.

158. See Riggie, *supra* note 146, at 38 (“While the NPT has performed well to-date, it is not a Treaty that can afford to remain complacent and indifferent to the external environment . . . . The norm that has been established by having so many countries invested in this important process must be maintained at all costs.”).

159. See Alistair Burt, *The Nuclear Non-Proliferation Treaty—At the Heart of the Global Nuclear Debate*, Carnegie Endowment for Int’l Peace (May 1, 2012), <https://carnegieendowment.org/2012/05/01/nuclear-non-proliferation-treaty-at-heart-of-global-nuclear-debate-pub-47993> [<https://perma.cc/SL38-XK4B>] (“[The 2010 NPT Review Conference] reflect[ed] the widespread belief that the NPT offers the best chance we have of getting the balance right on nuclear issues . . . . If [it] fail[s], we risk the uncontrolled spread of nuclear weapons to rogue states and terrorist groups.”).

160. See, e.g., Narang & Panda, *supra* note 48; Evans J.R. Revere & Mataka Kamiya, *Staying in Sync on North Korea’s Nuclear Program*, Carnegie Endowment for Int’l Peace (Oct. 10, 2019), <https://carnegieendowment.org/2019/10/10/staying-in-sync-on-north-korea-s-nuclear-program-pub-80022> [<https://perma.cc/BS39-Y5VM>]. The role of diplomatic conferences in leading to DNWS status is discussed further in section III.B, *infra*.

161. Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 112 Am. J. Int’l L. 734, 766 (2018) (“Trump[’s] immediate[] accept[ance] . . . [made] him the first sitting U.S. president to agree to meet with the leader of North Korea.”); see also Christian Caryl, *How Kim Jong Un Will Play Trump at Their Summit in Singapore*, Wash. Post (June 11, 2018), [https://www.washingtonpost.com/news/democracy-post/wp/2018/06/11/how-king-jong-un-will-play-trump-at-their-summit-in-singapore/?noredirect=on&utm\\_term=.a6aa6cfe7857](https://www.washingtonpost.com/news/democracy-post/wp/2018/06/11/how-king-jong-un-will-play-trump-at-their-summit-in-singapore/?noredirect=on&utm_term=.a6aa6cfe7857) (on file with the *Columbia Law Review*) (describing how Kim Jong-un would boost his “stature and legitimacy” by meeting with President Trump).

162. Wertz, *supra* note 1, at 3.

stated that the summits were intended to afford North Korea DNWS status—the fact that they centered on North Korea’s denuclearization strongly suggests otherwise.<sup>163</sup> Despite the unprecedented nature of the summits, the Administration likely realizes that “[r]ecognition or *de facto* acceptance of North Korea’s nuclear-armed status . . . would represent an embarrassing retreat from decades of U.S. policy and a blow to the global nonproliferation regime, without any guarantee that it would lead to a more peaceful or stable Korean Peninsula.”<sup>164</sup> Second and perhaps more importantly, the broader international community has not treated the summits as watershed moments after which North Korea should be recognized as a nuclear-weapon state, which counters the notion that the summits led to unqualified recognition.<sup>165</sup> Third, Kim Jong-un has not yet been able to use the legitimacy stemming from the summits as a launching pad for North Korea’s reintegration into international trade and geopolitical affairs, which would be a hallmark of the state attaining DNWS status.<sup>166</sup> The agreement resulting from the Singapore Summit is as vague and aspirational as the numerous agreements concluded in past negotiations between the international community and North Korea, making the parties’ progress toward their obligations difficult to ascertain.<sup>167</sup> Additionally, the

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163. See Press Release, Singapore Summit Joint Statement, *supra* note 6. Even skeptics of the Singapore Summit acknowledged that it likely did not constitute effective recognition by the United States of North Korea’s nuclear weapons program. See Adam Taylor, Why North Korean Nukes Are Still on the Table, Wash. Post (Aug. 13, 2018), [https://www.washingtonpost.com/world/2018/08/14/why-north-korean-nukes-are-still-table/?utm\\_term=.a4ebc4227a16](https://www.washingtonpost.com/world/2018/08/14/why-north-korean-nukes-are-still-table/?utm_term=.a4ebc4227a16) (on file with the *Columbia Law Review*) (contending that a follow-up meeting between Trump and Kim may end up being the watershed moment of recognition that the Singapore Summit was not).

164. Wertz, *supra* note 1, at 5. The argument that the summit was enough to afford North Korea *de facto* status is also undercut by the fact that former U.S. President Barack Obama regularly communicated with Iranian President Hassan Rouhani over the latter’s nuclear weapons efforts, without any such communication leading to *de facto* recognition. See, e.g., Caitlin Cruz, Did Obama Meet Iran’s President Rouhani? Trump Says He’d Talk with the Nation’s Leader “Anytime”, Bustle (July 30, 2018), <https://www.bustle.com/p/did-obama-meet-irans-president-rouhani-trump-says-hed-talk-with-the-nations-leader-anytime-9938856> [<https://perma.cc/5C2Q-TWHU>] (describing how an initial telephone conversation between Presidents Obama and Rouhani “opened the journey to Obama’s Iran Deal”).

165. For an overview of the various responses of key states in Asia to the Summit, see Joshua Berlinger, Singapore Summit: Asia Reacts to the Trump–Kim Meeting, CNN (June 12, 2018), <https://www.cnn.com/2018/06/12/asia/singapore-summit-intl/index.html> [<https://perma.cc/6VG8-MBES>].

166. See Geoff Brumfiel, North Korea Denuclearization Plan Has Gone Nowhere Since Trump–Kim Summit, NPR (Nov. 19, 2018), <https://www.npr.org/2018/11/19/668625273/north-korea-denuclearization-plan-has-gone-nowhere-since-trump-kim-summit> [<https://perma.cc/68MQ-CXXN?type=image>] (“Since the summit, North Korea has said normalization must start before denuclearization, while the U.S. maintains that the North must hand over its nuclear weapons before any normalization can begin.”); see also Motoko Rich, Unscripted Moments Steal the Show at Trump–Kim Singapore Summit, N.Y. Times (June 12, 2018), <https://www.nytimes.com/2018/06/12/world/asia/trump-kim-summit-theatrics.html> (on file with the *Columbia Law Review*).

167. See *supra* notes 114–124 and accompanying text.

summits have not resulted in any legal rights or obligations imposed on North Korea that are comparable to those imposed on NWS.<sup>168</sup>

While the Singapore and Hanoi Summits likely did not constitute the watershed moment of de facto recognition that North Korea might have hoped for, it is important to recall that the process of attaining de facto nuclear-weapon state status has never been instantaneous. Indeed, it took both India and Pakistan at least a decade after their 1998 nuclear tests to attain de facto nuclear weapon-state status.<sup>169</sup> Consequently, the summits remain significant because they may well constitute the first steps toward gradual de facto recognition of North Korea's nuclear weapons program.<sup>170</sup> This recognition would likely lead to the durability challenges to the Grand Bargain that section II.B.1 discusses.

### III. PRESERVING THE GRAND BARGAIN: A "WORKING TEST" FOR DNWS STATUS

Given the threat that de facto recognition poses to the NPT's Grand Bargain, this Part recommends a two-pronged course of action contending that the best way to preserve the Grand Bargain is to clarify the legal status of would-be proliferants attempting to attain DNWS status. Section III.A begins with a somewhat counterintuitive premise—that amending the NPT itself is neither a feasible nor likely successful method of addressing the impact that de facto recognition would have on the Grand Bargain. Therefore, as section III.B articulates, a more promising first step involves formulating a coherent and actionable definition of DNWS status. Building off this step, section III.C recommends a series of measures that the international community can adopt to ensure that North Korea or future proliferants do not surpass the recognition threshold.

#### A. *Amending the NPT Itself: Not the Way Forward*

NPT Article VIII describes the strict requirements for successful amendment to the Treaty's provisions. Paragraph two of this Article outlines that an amendment "must be approved by a majority of the votes of all the Parties to the Treaty, including the votes of all nuclear-weapon States Party to the Treaty and all other Parties [that] . . . are members of the Board of Governors of the International Atomic Energy Agency."<sup>171</sup>

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168. The fact that the summits and continued negotiations between the United States and North Korea revolve around the latter's nuclear disarmament suggests that its nuclear weapons program has not attained the level of respect or legitimacy commanded by the programs of the de jure NWS, India, or Pakistan. See Brumfiel, *supra* note 166 (comparing the relationship between the United States and North Korea with that of the Soviet Union during the Cold War).

169. See *supra* section I.B.3.

170. See *infra* section III.B.

171. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 15, 729 U.N.T.S. at 173–74.

Although “it is difficult to arrive at an exact figure, one may conclude conservatively that the agreement of nearly 100 states would be required to amend the NPT, with true consensus of all parties requiring agreement of 189 states.”<sup>172</sup>

The crafters of the NPT intentionally made the Treaty’s amendment process difficult in order to avoid a situation where a majority of NNWS decides to amend the legal obligations imposed on the five NWS down the road.<sup>173</sup> Beyond the difficulty of raising the numbers among member states, as a matter of internal politics, many signatories would only be able to ratify an amendment with the consent of their respective parliamentary bodies, thus “creating a second major hurdle to be surmounted before an amendment could take effect. It is virtually impossible to conceive of an amendment that could secure the approval of all such disparate countries and their parliaments.”<sup>174</sup>

Even if such amendments were feasible, they would still carry significant risk, as states unhappy with the results might threaten to withdraw from the Treaty or “demand other amendments that would be unacceptable to the existing NWS, such as nuclear disarmament in a time-bound framework.”<sup>175</sup> This opening of the amendment floodgates would also be undesirable from a practical standpoint as it could result “in an unworkable, splintered treaty regime under which the obligations of parties that ratified the amendment would be different from those that did not.”<sup>176</sup> Consequently, the near impossibility and impracticability of the amendment process suggest that measures intended to preserve the NPT framework must be effectuated through other means.

#### B. *Conceptual Clarity: Formulating the Working Test*

In lieu of formal amendment, this Note argues that a more promising means for preserving the Grand Bargain must begin with developing a

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172. Jonas, *supra* note 4, at 440.

173. See Henry D. Sokolski, *The Nuclear Nonproliferation Treaty’s Untapped Potential to Prevent Proliferation*, in *Reviewing the Nuclear Nonproliferation Treaty* 3, 4 (Sokolski ed., 2010), <https://publications.armywarcollege.edu/pubs/2071.pdf> [<https://perma.cc/T6PU-BF4U>] (“As for amending the treaty, it is nearly impossible . . . . Ultimately, any state that chooses not to so ratify is free to ignore the amendment, and the treaty is functionally unamendable.”).

174. See Charles N. Van Doren, *Avoiding Amendment of the NPT*, in *1995: A New Beginning for the NPT?* 179, 180 (Joseph F. Pilat & Robert E. Pendley eds., 1995). For other practical challenges that would accompany amendments to the NPT, see Peloso, *supra* note 20, at 339–40.

175. Jonas, *supra* note 4, at 439. For instance, “[S]tates may try to do away with the ‘discriminatory’ (NWS versus NNWS) aspect of the Treaty. Some might like to see [Review Conferences] more or less frequently. Others might like to see nuclear disarmament . . . , giving the NWS, for example, twenty-five years (an arbitrary figure) to attain complete nuclear disarmament.” *Id.* at 440–41.

176. Van Doren, *supra* note 174, at 180.

conceptually coherent definition of DNWS status. As section I.B.2 highlights, scholars and policymakers can analogize the law of recognition's "working test" for de facto status to the nuclear nonproliferation context.<sup>177</sup> Relying on the historical experiences of India and Pakistan in attaining DNWS status,<sup>178</sup> this section offers a heuristic that breaks down a potential DNWS working test into four steps.<sup>179</sup>

First, as a threshold matter, a prospective DNWS must satisfy certain nuclear weapons-related technical requirements. Although nonproliferation scholars have dedicated significant attention to formulating the criteria by which to evaluate a state's technical access to nuclear weapons,<sup>180</sup> most agree that this access involves the possession of a substantial and sustainable source of fissile materials<sup>181</sup> and the ability to weaponize these materials into a deliverable payload.<sup>182</sup>

Second, the nuclear-armed state should have a realistic prospect of survival. This involves, on the one hand, maintaining a second-strike capability—the assurance that the state would be able to withstand an enemy's nuclear strike and respond with countervailing force.<sup>183</sup> Although some

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177. See *supra* notes 72–76 and accompanying text.

178. See *supra* section I.B.3.

179. See *infra* Figure 1. The decision to proliferate is an interesting and important one that has received considerable scholarly coverage, both theoretical and empirical. See, e.g., Dong-Joon Jo & Erik Gartzke, Determinants of Nuclear Weapons Proliferation, 51 J. Conflict Resol. 167, 167–71 (2007); Peter R. Lavoy, Nuclear Myths and the Causes of Nuclear Proliferation, in *The Proliferation Puzzle: Why Nuclear Weapons Spread (and What Results)* 192, 192 (Zachary S. Davis & Benjamin Frankel eds., 1993). This working test, however, presupposes that the state's motivation to pursue nuclearization exists and consequently focuses on the steps related to (technical- and recognition-oriented) acquisition. For an explanation of possible state motivations, see Scott D. Sagan, Why Do States Build Nuclear Weapons? Three Models in Search of a Bomb, *Int'l Security*, Winter 1996–1997, at 54, 54–66; Sonali Singh & Christopher R. Way, The Correlates of Nuclear Proliferation: A Quantitative Test, 48 J. Conflict Resol. 859, 861 (2004); Etel Solingen, The Political Economy of Nuclear Restraint, *Int'l Security*, Fall 1994, at 126, 126.

180. See, e.g., Jacques E.C. Hymans, When Does a State Become a "Nuclear Weapon State"? An Exercise in Measurement Validation, 17 *Nonproliferation Rev.* 161, 161–63 (2010) (acknowledging nuclear testing as a traditional metric to determine nuclear weapon state status, and then suggesting a "theory-driven analysis of different states' incentives and disincentives to induct nuclear weapons without prior testing").

181. See Guy B. Roberts, Nuclear Weapons Grade Fissile Materials: The Most Serious Threat to U.S. National Security Today? (Inst. for Nat'l Sec. Studies, Working Paper No. 8, 1995), <https://fas.org/irp/threat/ocp8.htm> [<https://perma.cc/9LTE-W67D>].

182. Nuclear Weapons: Devices and Deliverable Warheads, *Stratfor* (June 17, 2008), <https://worldview.stratfor.com/article/nuclear-weapons-devices-and-deliverable-warheads> (on file with the *Columbia Law Review*).

183. Secure Second Strike, *Encyc. Britannica*, <https://www.britannica.com/topic/second-strike-capability> [<https://perma.cc/BZD8-C4R5>] (last visited Jan. 29, 2020).



argue that deployment of a nuclear triad is a requisite threshold for attaining second-strike capability,<sup>184</sup> others have argued that a state such as North Korea might already have this capability through the covert deployment of nuclear weapons.<sup>185</sup> The line to be drawn is far from clear—particularly given the discourse that advancements such as missile defense systems may neutralize already well-established nuclear arsenals—but the legitimacy conferred by a survivable nuclear arsenal arguably exists along a spectrum (rather than being an either-or proposition).<sup>186</sup> On the other hand, survivability may refer to the type of “temporal stability” referenced in the law of recognition—namely, that the regime should be able to maintain effective control of its nuclear weapons for a certain amount of time.<sup>187</sup>

The third step of this Note’s DNWS working test is “nonostracization,” meaning that the prospective DNWS should be able to withstand the international condemnation and sanctions that would inevitably follow its procurement of nuclear weapons. Considering the Indian and Pakistani historical experiences, surviving bilateral and international sanctions following their 1998 nuclear tests was an indispensable step along their paths toward DNWS status.<sup>188</sup> Another signal that a prospective DNWS has satisfied this condition is that international statements of condemnation have steadily wound down.<sup>189</sup>

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184. Fact Sheet: The Nuclear Triad, Ctr. for Arms Control & Non-Proliferation (July 28, 2017), <https://armscontrolcenter.org/factsheet-the-nuclear-triad> [<https://perma.cc/5HFC-JCMN>].

185. See, e.g., J.M. Phelps, We Could Have Shipping Containers Full of Foreign Nukes in Our Ports and Not Know It, Ctr. for Sec. Policy (Feb. 27, 2018), <https://www.centerforsecuritypolicy.org/2018/02/27/we-could-have-shipping-containers-full-of-foreign-nukes-in-our-ports-and-not-know-it> [<https://perma.cc/W77J-EZNX>] (expressing that it appears likely that North Korea has access to a “miniaturized nuclear weapon . . . [that] can easily fit inside the nosecone of an international ballistic missile (ICBM) and cause the kind of catastrophic damage the United States has never seen”).

186. See China’s Nuclear Arsenal Was Strikingly Modest, but That Is Changing, *Economist* (Nov. 21, 2019), <https://www.economist.com/china/2019/11/21/chinas-nuclear-arsenal-was-strikingly-modest-but-that-is-changing> (on file with the *Columbia Law Review*) (“As China makes its nuclear forces more credible—less vulnerable to pre-emption, and more likely to get through missile defences—America . . . might then ‘ramp up competition further’ . . . , spending yet more on missile-defence and offensive weapons to restore [its] advantage.” (quoting Caitlin Talmadge, Associate Professor at Georgetown University)). Missile defense systems, their dubious efficacy, and the severe threat that they pose to foundational principles of nuclear proliferation and deterrence are separate subjects that have been well-covered. See Boris Toucas, Ballistic Missile Defense: Proceed with Caution, *Arms Control Today*, Nov. 2017, at 13, 17 (referencing the need for hard to find communication between the United States, Russia, and China in order to mitigate the “potentially destabilizing consequences of missile defense development”).

187. See *supra* note 73 and accompanying text.

188. See *supra* note 84 and accompanying text.

189. For an example of the types of statements that a prospective DNWS would have to withstand, see Kamran Khan & Kevin Sullivan, Indian Blasts Bring World Condemnation, *Wash. Post* (May 13, 1998), <https://www.washingtonpost.com/archive/politics/1998/05/>

Fourth, a state well on its way to attaining DNWS status will experience gradual diplomatic recognition and engagement by members of the international community, particularly the influential NWS. This engagement may occur on several levels, including through: (1) the conclusion of international agreements (security or nuclear-related treaties, such as the U.S.–India nuclear deal, would be particularly indicative);<sup>190</sup> (2) the invitation to participate in international conferences;<sup>191</sup> (3) the reception of officials involved in the state’s nuclear bureaucracy;<sup>192</sup> or (4) acknowledgment of the state’s legitimate possession of nuclear weapons in multinational fora.<sup>193</sup> These developments are not all necessary in order to lead to the recognition of a nuclear-armed state as a DNWS. They are, however, each concerning in that they normalize the state’s acquisition of nuclear weapons and may trigger the legal and political benefits that accompany DNWS status.<sup>194</sup>

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13/indian-blasts-bring-world-condemnation/112e024f0c41-491c-89c8-5d5f54236fa1 (on file with the *Columbia Law Review*).

190. See Press Release, U.S.–India Joint Statement, *supra* note 85; see also *supra* notes 84–85 and accompanying text.

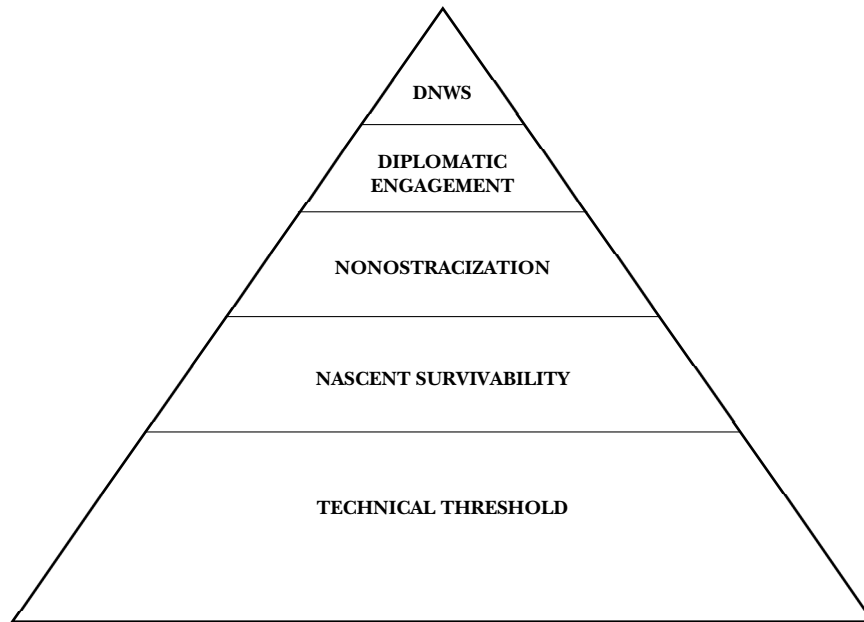
191. The significance of bilateral meetings such as the Singapore and Hanoi Summits in offering a would-be proliferant such as North Korea (legally protected) DNWS status illustrates why it is so essential that members of the international community coordinate efforts to avoid unwittingly offering a state such status. See *supra* notes 4, 159–161 and accompanying text.

192. This reception could extend to either formal diplomatic liaisons with nuclear or defense officials, or to civil society-type exchanges with the state’s foremost nuclear weapons experts. See, e.g., Prashant Hosur, *The Indo–US Civilian Nuclear Agreement: What’s the Big Deal?*, 65 *Int’l J.* 435, 447–48 (2010) (noting that while prior to the U.S.–India nuclear deal, “nuclear cooperation was impossible and many of India’s nuclear scientists were not allowed to travel to various countries,” experts in both states now cooperate in fields as varied as “agriculture, economic development, business, intelligence sharing, and joint military exercises”).

193. See, e.g., Meaghan Tobin, *Explained: How India and Pakistan Became Nuclear States*, *S. China Morning Post* (Mar. 7, 2019), <https://www.scmp.com/week-asia/explained/article/2188958/explained-how-india-and-pakistan-became-nuclear-states> [<https://perma.cc/TC9L-NY5Y>] (“India and Pakistan both have safeguard agreements with the International Atomic Energy Agency regarding their civilian nuclear plants.”).

194. See *supra* note 45 and accompanying text.

Figure 1: Working Test for Defining DNWS Status



The experiences of India and Pakistan show that states will not necessarily follow the same path to DNWS status. Nevertheless, this working test is meant to illustrate the potential steps that may culminate in DNWS status. These steps are not intended to be exhaustive and much work remains to operationalize and expand on their relative levels of significance.<sup>195</sup> But this exercise is valuable in that it encourages members of the international community to be more cognizant of exchanges with would-be proliferants that may enable them to surpass the recognition threshold. It is of paramount importance to avoid granting a state such as North Korea DNWS status resulting from a lack of international coordination, as this would pose a serious threat to the Grand Bargain and broader nonproliferation efforts.<sup>196</sup>

C. *Practical Coordination: Implementing the Working Test*

In international law, recognition is in the eye of the beholder.<sup>197</sup> In the nonproliferation context, the beholders that recognize a state as a DNWS are the five NWS, particularly the United States, China, and

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195. For an analogous form of operationalization in the law on diplomatic recognition, see generally Grzybowski, *The Paradox of State Identification*, supra note 71.

196. See supra section II.B.1.

197. See supra notes 55–58 and accompanying text.

Russia.<sup>198</sup> The actions of these states and their leaders—from President Trump’s desire to hold his latest summit with Kim Jong-un<sup>199</sup> to recent Russian and Chinese calls to ease economic sanctions on North Korea<sup>200</sup>—must be carefully coordinated in order to avoid further placing North Korea and future proliferants on the path toward DNWS status.<sup>201</sup>

Given the challenges inherent in the NPT’s amendment process, international measures should focus on the final two steps of the working test, nonostracization and diplomatic engagement.<sup>202</sup> The first two steps—technical access and nascent survivability—are less promising areas on which to focus coordinated efforts. This is because the nonproliferation regime already focuses on cutting off points to nuclear materials<sup>203</sup> and

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198. See *supra* section I.B.1. For an overview of why NWS would likely set the course for *de facto* recognition of North Korea as a nuclear-weapon state, see Andrew L. Ross, *The Role of Nuclear Weapons in International Politics: A Strategic Perspective*, Foreign Policy Res. Inst. (Mar. 30, 2009), <https://www.fpri.org/article/2009/03/the-role-of-nuclear-weapons-in-international-politics-a-strategic-perspective> [<https://perma.cc/CF7D-VJ9L>] (noting that “nuclear weapons clearly are a status symbol, an indicator or attribute of major power status” and allow the NWS to assert their will in international affairs). It is similarly not a coincidence that the five NWS are also the five permanent, veto-wielding members of the United Nations Security Council. *Id.*

199. See *supra* notes 122–124 and accompanying text.

200. See Lee Jeong-Ho, *China, Russia, North Korea Call for Adjusted Sanctions Ahead of Denuclearisation*, S. China Morning Post (Oct. 10, 2018), <https://www.scmp.com/news/china/diplomacy/article/2167931/china-russia-north-korea-call-adjusted-sanctions-ahead> [<https://perma.cc/K28M-JQ7K>].

201. For an indication of the obstacles to such coordination following the Singapore Summit, see Mercy A. Kuo, *China, Russia, and US Sanctions on North Korea*, *Diplomat* (Nov. 13, 2018), <https://thediplomat.com/2018/11/china-russia-and-us-sanctions-on-north-korea> [<https://perma.cc/683H-6Z4X>] (“The recent call on the part of Moscow and Beijing to relax sanctions on North Korea may signal that the initial international consensus on coordinating the multilateral response is breaking down. A unilateral approach . . . without the support of Russia and especially China holds little prospect for success.”). For a leading theoretical work on the importance of state coordination in the international system, see generally Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 *Int’l Org.* 299 (1982) (delineating the nature and workings of regimes and explaining under which conditions they arise).

202. The working test’s first two steps—technical access and survivability—are already quite comprehensively addressed by the global nonproliferation regime through agreements such as the Comprehensive Nuclear-Test Ban Treaty. *Comprehensive Nuclear Test Ban Treaty*, Sept. 24, 1996, S. Treaty Doc. No. 105-28, 35 I.L.M. 1439 (1997). Additionally, any sort of military action aimed at testing a prospective DNWS’s second-strike capability would be ill advised. But see generally Matthew Kroenig, *A Time to Attack: The Looming Iranian Nuclear Threat* (2014) (arguing that a limited military strike on Iran’s nuclear facilities is the most preferable option should diplomacy fail).

203. One such initiative aimed at closing off rogue regimes’ access to nuclear weapons technology—specifically fissile materials—is the Nunn–Lugar Cooperative Threat Reduction Program. See Justin Bresolin, *Fact Sheet: The Nunn–Lugar Cooperative Threat Reduction Program*, Ctr. for Arms Control & Non-Proliferation (June 1, 2014), <https://armscontrolcenter.org/fact-sheet-the-nunn-lugar-cooperative-threat-reduction-program> [<https://perma.cc/PWJ9-MFPW>]; Ashton Carter, *Comments on the Nunn–Lugar Program*,

there are geopolitical risks that arise from attempting to undermine a state's stability.<sup>204</sup>

First, in line with the nonostracization step, members of the international community should, to the greatest extent possible, coordinate sanctions regimes against nuclear proliferants.<sup>205</sup> Although their success depends on context, sanctions are often effective as supplemental actions that constrain undesirable state behavior.<sup>206</sup> However, the international community has long faced challenges in coordinating disparate sanctions regimes toward common objectives; the experiences of sanctioning India and Pakistan in the 1990s<sup>207</sup> and Iran and North Korea in the 2010s attest to this difficulty.<sup>208</sup>

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PBS: Frontline, <https://www.pbs.org/wgbh/pages/frontline/shows/russia/arsenal/lugar.html> [<https://perma.cc/FQ8T-T8HM>] (last visited Feb. 26, 2020).

204. For scholarship strongly advocating against external regime change in the North Korean context, see Mark Fitzpatrick, *North Korea: Is Regime Change the Answer?*, 55 *Survival* 7, 7, 11 (2013) (“Washington cannot give Pyongyang what it wants. The United States cannot offer a substitute for what DPRK leaders think nuclear weapons provide: a guarantee of regime survival and a path to dominance of the peninsula.”).

205. For an academic overview of the challenge of multilateral coordination in sanctions regimes and other contexts, see William H. Kaempfer & Anton D. Lowenberg, *Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective*, 43 *Int'l Stud. Q.* 37, 38 (1999) (“Hegemonic-stability theory, for example, argues that multilateral cooperation is a public good that can be provided only if a dominant state assumes a leadership role . . . . In the absence of hegemonic leadership, individual nations face incentives to defect from cooperative sanctions agreements.”).

206. See Jonathan Masters, *What Are Economic Sanctions?*, Council on Foreign Relations, <https://www.cfr.org/background/what-are-economic-sanctions> [<https://perma.cc/FHQ4-E7ZB>] (last updated Aug. 12, 2019) (“Sanctions that are effective in one setting may fail in another, depending on countless factors. Sanctions programs with relatively limited objectives are generally more likely to succeed than those with major political ambitions. Furthermore, sanctions may achieve their desired economic effect but fail to change behavior.”). Scholars remain divided on the overall effectiveness of sanctions. See generally Navin A. Bapat, Tobias Heinrich, Yoshiharu Kobayashi & T. Clifton Morgan, *Determinants of Sanctions Effectiveness: Sensitivity Analysis Using New Data*, 39 *Int'l Interactions* 79 (2013) (exploring the reasons for the lack of consistency in research around sanction effectiveness); Thomas Biersteker & Peter A.G. van Bergeijk, *How and When Do Sanctions Work? The Evidence*, in *On Target? EU Sanctions as Security Policy Tools* 17, 17 (Iana Dreyer & José Luengo-Cabrera eds., 2015) (“[S]anctions are a highly political issue, with both sides of the debate persuasively arguing their case.”).

207. See Clifford E. Singer, Jyotika Saksena & Milind Thakar, *Feasible Deals with India and Pakistan After the Nuclear Tests: The Glenn Sanctions and U.S. Negotiations*, 38 *Asian Surv.* 1161, 1161 (1998) (acknowledging the immediate “headache” that automatic sanctions on Pakistan and India presented for the United States because they hindered “both short-term commercial interests and development and cordial international relations with longer-term trade implications”).

208. See J. Berkshire Miller, *Sanctions Enforcement Remains Critical to North Korea Diplomacy*, *World Pol. Rev.* (Mar. 26, 2019), <https://www.worldpoliticsreview.com/articles/27696/sanctions-enforcement-remains-critical-to-north-korea-diplomacy> (on file with the *Columbia Law Review*); Henry Ridgwell, *Report: Poor Coordination Undercuts Sanctions Against Rogue States*, *VOA* (July 14, 2017), <https://www.voanews.com/europe/report-poor-coordination-undercuts-sanctions-against-rogue-states> [<https://perma.cc/TY27-PE6R>].

The coordination challenge stems from two sources: the idiosyncratic proclivities of states and structural challenges inherent to multilateral fora that inhibit long-term support for far-reaching sanctions.<sup>209</sup> These two sources go hand in hand, as the risk of overly ambitious sanctions regimes is that they are frequently unable to sustain support from a wide cross section of the international community.<sup>210</sup> This can lead to a situation in which a single state undermines a sanctions regime by withdrawing from it, thus contributing to a would-be proliferant's shift toward DNWS status.<sup>211</sup>

Consequently, for the purposes of this Note's working test, it is paramount to keep bad nuclear actors ostracized through measures that discourage states from reneging on their sanctions commitments. Three steps are proposed in this regard. First, for multilateral sanctions regimes, the international community should adopt sanctions that are relatively modest in scope and can gain the support of the "great powers" in international relations.<sup>212</sup> Second, although unilateral sanctions are generally less preferable than multilateral sanctions,<sup>213</sup> to the extent that states

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Members of the international community have even found it difficult to maintain their own internal stances on North Korean sanctions, further compounding the problem. See Alan Rappeport, *Trump Overrules Own Experts on Sanctions, in Favor to North Korea*, N.Y. Times (Mar. 22, 2019), <https://www.nytimes.com/2019/03/22/world/asia/north-korea-sanctions.html> (on file with the *Columbia Law Review*).

209. Cf. Press Release, United Nations, *Paralysis Constricts Security Council Action in 2018, As Divisions Among Permanent Membership Fuel Escalation of Global Tensions* (Jan. 10, 2019), <https://www.un.org/press/en/2019/sc13661.doc.htm> [<https://perma.cc/6VMR-Y88Z>].

210. See Bob Carbaugh, *Sanctions and Nuclear Proliferation*, Vox EU (Feb. 23, 2009), <https://voxeu.org/article/sanctions-and-nuclear-proliferation> [<https://perma.cc/Q3T4-7HSB>] ("Researchers have found that sanctions tend to be more successful in altering the behavior of a target country when their objective is not too ambitious and therefore does not require substantial coordination among countries imposing sanctions, which can be difficult to attain.").

211. See Simon Chesterman & Béatrice Pouligny, *Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations*, 9 *Global Governance* 503, 506 (2003) ("It is important to note, however, that even when there is agreement to impose sanctions . . . , this agreement may in fact stem from different reasons particular to the various states imposing the sanctions. This leads to problems when . . . evaluating whether sanctions should be modified or lifted."); Kaempfer & Lowenberg, *supra* note 205, at 39–40 ("The political impacts of multilateral sanctions . . . are weakened by the difficulties of enforcing cooperation within a multilateral alliance as well as the creation of sanctions rents within the target country.").

212. See, e.g., Carbaugh, *supra* note 210 (explaining that U.S. sanctions against Iran were less effective because Iran continued trading with other powerful nations). In international relations, "great powers" are states recognized as having the ability to exert their influence on a global scale. See Wesley B. O'Dell, *Great Power Leadership*, *Oxford Res. Encyc.: Int'l Stud.* (May 2019), <https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-507> [<https://perma.cc/7V6K-WUPE>].

213. See Lloyd J. Dumas, *Economic Relations and Global Security: The Economic Route to Enforcing Norms of International Behavior*, 13 *Scandinavian J. Dev. Alternatives* 87, 92–

impose their own sanctions on would-be proliferants, these sanctions should be effectuated through legislative rather than political processes. As illustrated by the Trump Administration's undoing of the Joint Comprehensive Plan of Action with Iran, political commitments are significantly easier to withdraw from than are legally binding obligations.<sup>214</sup> Third, regional bodies such as the EU and ASEAN should maintain a unified front in upholding their own financial and political sanctions against North Korea or other prospective proliferants, as this type of concerted action would likely prevent the establishment of the clear legal rights and obligations that would accompany DNWS status.<sup>215</sup>

Second, in line with the diplomatic engagement step, the international community should acknowledge that avoiding recognition of a state's nuclear weapons program is not equivalent to ignoring the risks posed by the program.<sup>216</sup> As such, NWS should avoid hosting bilateral summits or comparable negotiations with Kim Jong-un or other nuclear-determined leaders, as such meetings have the potential to alienate the other NWS and allow the nuclear-determined states to move in piecemeal fashion toward the legitimacy threshold that they desire.<sup>217</sup> These meetings also run the risk that a single NWS leader might decide to reverse their stance on a would-be proliferant and acknowledge its status as a DNWS, which might then establish a status quo of recognition.<sup>218</sup> Additionally and quite evidently, bilateral agreements signed with nuclear-armed states—

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93 (1994) (presenting an impassioned plea for multilateral sanctions over unilateral sanctions).

214. See Interview by Zachary Laub with John B. Bellinger III, Adjunct Senior Fellow, Council on Foreign Relations (July 23, 2015), <https://www.cfr.org/interview/how-binding-iran-deal> [<https://perma.cc/3LWR-26LZ>] (anticipating correctly that “[t]he next president will have the legal right under both domestic and international law to scrap the JCPOA and reimpose U.S. nuclear sanctions on Iran”); Zachary Laub & Kali Robinson, What Is the Status of the Iran Nuclear Agreement?, Council on Foreign Relations, <https://www.cfr.org/backgrounder/what-status-iran-nuclear-agreement> [<https://perma.cc/FFF7-M4W2>] (last updated Jan. 7, 2020).

215. See *supra* note 69 and accompanying text. This step suggests that states can enhance their ability to meet geopolitical objectives through collective and coordinated action. The sort of power dynamic that undergirds this suggestion is comparable to the one that undergirds the neorealist concept of “balancing.” See Stephen M. Walt, Who's Afraid of a Balance of Power, *Foreign Pol'y* (Dec. 8, 2017), <https://foreignpolicy.com/2017/12/08/whos-afraid-of-a-balance-of-power> [<https://perma.cc/7F69-2Q4Q>] (“When facing a powerful or threatening state, a worried country can mobilize more of its own resources or seek an alliance *with other states* that face the same danger, in order to shift the balance more in its favor.” (emphasis added)).

216. See Robert Jervis & Mira Rapp-Hooper, Perception and Misperception on the Korean Peninsula: How Unwanted Wars Begin, *Foreign Aff.*, May–June 2018, at 103, 116–17 (outlining several recommendations for U.S. policymakers to “sharpen their own perceptions” of North Korea and the potential threat its nuclear weapons program poses).

217. See *id.* at 105 (“[North Korea] appears to consider nuclear weapons to be a source of prestige and thus wants acceptance as a *de facto* nuclear state, much as Pakistan has.”).

218. See *supra* note 201 and accompanying text.

particularly agreements related to military and nuclear subjects—are ill-advised.<sup>219</sup>

As a final note on diplomatic engagement, it is important to conceptually disentangle liaisons with a would-be proliferant's diplomatic officials from liaisons with its nuclear officials.<sup>220</sup> Although both forms of engagement offer a modicum of legitimacy to a state seeking DNWS status, the latter may be more concerning in enabling a state to quickly reach the recognition threshold.<sup>221</sup> While the legitimacy conferred by purely diplomatic liaisons accrues more slowly, these types of exchanges are *in toto* worthwhile because they may lead to meaningful progress toward the state's disarmament.<sup>222</sup>

Of course, the cooperation needed to effectuate these international measures will be challenging to find given intra-NWS geopolitical rivalry and the penchant of leaders such as President Trump for alienating foreign adversaries and allies.<sup>223</sup> These challenges are further compounded by ineffective NWS coordination on other high-level nuclear proliferation issues.<sup>224</sup> Nevertheless, initial steps that may be taken to progress on this front include keeping diplomatic backchannels between the NWS open and relying on multilateral fora to ensure that states communicate their

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219. See *supra* notes 190–196 and accompanying text.

220. Acknowledging, of course, the possibility that a single official such as a defense minister might encompass both of these roles.

221. See Bajoria & Pan, *supra* note 88 (highlighting aspects of the U.S.–India Nuclear Deal, including the provision of “assistance to India’s civilian nuclear energy program” and the official “cooperation in energy and satellite technology,” which accompanied India’s rise to DNWS status); Audra Wolfe, When Scientists Do What Diplomats Can’t, *Atlantic* (Sept. 26, 2015), <https://www.theatlantic.com/science/archive/2015/09/science-diplomacy/407455> [<https://perma.cc/Q43M-EMXZ>] (discussing the critical role that formal and informal nuclear scientist communications between the United States and Iran played in keeping negotiations on track, supporting the idea “that the language of science can achieve what political negotiation cannot”).

222. Iran offers a useful example of how general diplomatic engagement can prompt negotiations geared toward nuclear disarmament. See Timeline of Nuclear Diplomacy with Iran, Arms Control Assoc., <https://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran> [<https://perma.cc/V3S8-Z9TP>] (last updated Mar. 2020) (including the Obama Administration’s April 8, 2009 announcement that it would participate in P5+1 negotiations with Iran instead of requiring Iran to meet preconditions first). For a call to return to similar engagement with Iran following the Trump Administration’s withdrawal from the JCPOA, see Carol Giacomo, Iran and the United States: Doomed to Be Forever Enemies?, *N.Y. Times* (Jan. 20, 2019), <https://www.nytimes.com/2019/01/20/opinion/iran-united-states-trump.html> (on file with the *Columbia Law Review*).

223. See Harold Hongju Koh, The Trump Administration and International Law 2 (2019) (“[F]ar more is at stake in today’s reality show of *Trump v. World* than the string of unending political scuffles we daily watch . . . [W]hat is really at stake is a much larger, deeply consequential struggle between competing visions of a future world order.”).

224. See, e.g., Fiona S. Cunningham & M. Taylor Fravel, Dangerous Overconfidence? Chinese Views on Nuclear Escalation, *Int’l Security*, Fall 2019, at 61, 104–09 (contrasting Chinese and U.S. views on nuclear strategy and confidence about their abilities to prevent or constrain a potential nuclear conflict in the event of escalation between them).



intentions vis-à-vis North Korea or would-be proliferants as clearly as possible.<sup>225</sup> In this respect, communication goes hand in hand with coordination.

#### CONCLUSION

Professor Louis Henkin once noted that “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”<sup>226</sup> At its essence, the fickle nature of international law provides both the source of and the potential solution to the challenges that *de facto* recognition poses to the Grand Bargain’s long-term viability. This Note argues that the international community should address these challenges by relying on a more coherent definition of DNWS status and by coordinating efforts to avoid pushing would-be proliferants past the recognition threshold. As noted earlier, the working test that this Note proposes is meant to be neither exhaustive nor conclusive. Rather, it is a first step intended to encourage states to be more aware of the types of interactions—political, legal, and economic—that may lead to a nuclear-armed state attaining legal recognition despite behavior that clearly violates international law. It is the author’s hope that this awareness not only helps to preserve the Grand Bargain, but also ensures the continued vitality of the global nonproliferation regime.

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225. For more on proposals related to the reinvigoration of multilateral fora such as the United Nations General Assembly, see Meyer, *supra* note 134, at 22 (“Reinvigorating the NPT will require a major change of policy and practice on the part of its leading states-parties. If this rescue effort is not mounted, there is a serious risk that the treaty will start to hemorrhage its authority and support.”).

226. Louis Henkin, *How Nations Behave* 47 (2d ed. 1979).

