Variations on Non-Nuclear: May the "Final Four" Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapons States While Retaining Their Nuclear Weapons?

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I think the NPT can survive-has survived-without [India, Israel, and Pakistan]. But I think, ultimately, that the nonproliferation regime will not survive without them. The NPT is a part of the regime-global, universal, enduring-and if we talk about the regime, then it will not survive without the three. Until we manage to bring them into the regime, I think we need to continue to start a dialogue with them. I for one believe that, rather than just trying to continue treating them as pariahs, we need to see how we can engage them as partners in an arms control process, maybe not necessarily under or within the framework of the NPT but within the framework of a larger arms control process.

Introduction

The Nuclear Nonproliferation Treaty (NPT) is the cornerstone of the nuclear non-proliferation regime. It entered into force in 1970 and is the most widely subscribed and successful arms control treaty in history, with one hundred eighty-nine states parties. Today the NPT is at a crossroads, teetering between the paths of increased or decreased...
relevance and viability. Universality n4 of the NPT, attained when all states accede to the treaty, seems a quixotic goal, even though only the “Final Four” n5 remain outside the NPT regime: India, Israel, Pakistan and now North Korea, which recently withdrew [*419] from the NPT. n6 This article examines options for bringing the Final Four into the NPT.

Universality, as well as renewed commitments to the goals of the NPT, and new measures for preventing terrorists from acquiring nuclear weapons, materials and technologies would revitalize the NPT and invigorate states parties to truly hold the line on nuclear proliferation. n7

Meaningful universality should embrace notions of both adherence and compliance. Compliance is a vital aspect of any treaty or agreement and may be defined simply as observing the terms of a treaty to which a party has acceded. Due to remarkably serendipitous ambiguity in NPT Article II, n8 the Final Four may legally accede to the NPT while maintaining their nuclear weapons. Politically, their accession would likely require additional agreement to cooperate across the entire spectrum of the nuclear non-proliferation regime. This is conceivable, legally plausible, and attainable, albeit counterintuitive.

This article reviews the history and background of the NPT. Also discussed are the challenges facing the NPT, criticism of the Nuclear Weapon States (NWS) in the NPT context, and contentious issues in the NPT. This article presents five specific proposals for bringing the Final Four into the NPT, including amending the NPT by changing the definition of NWS or by creating a third category of member state exclusively for the Final Four. The [*420] most novel-and probably controversial-proposal is to obtain Final Four accession to the NPT as Non-Nuclear Weapon States (NNWS) while permitting them to retain their nuclear weapons. Issues of treaty interpretation and the politics bearing on the possible success of such a proposal are also considered. This article concludes with interviews of former U.S. arms control ambassadors who have served during NPT conferences, and are thus well-qualified to evaluate the proposals.

It is important to note at the outset that this article does not argue for universality at all costs. But universality is important because non-party states with nuclear weapons that do not pay a significant price for their status, encourage NPT NNWS to pursue nuclear weapons. n9 Many NPT NNWS might view anything but bringing the Final Four into the NPT without their nuclear weapons as something less than true universality-certainly it is not what they signed up for.

Unless there is a national security benefit to the U.S. and other NPT states parties, and unless Final Four accession would truly make nuclear weapon proliferation (and use) less likely, then, regardless of NPT theology, Final Four accession is unlikely. Nonetheless, the issue is certainly important enough to consider seriously as the NPT approaches a critical juncture in 2005. n10 It is time to at least open a dialogue on options for Final Four NPT accession.

I. The Nuclear Non-Proliferation Treaty

A. NPT Background

The NPT is the major international instrument implemented for the control of the spread of nuclear weapons. n11 It is an agreement as important as the UN Charter itself. n12 The NPT is perhaps the main reason why twenty to thirty countries do not currently possess nuclear weapons. n13 After all, the [*421]1963 U.S. Department of Defense estimated that fourteen more nations could possess nuclear weapons by the 1970s. n14

The NPT was initially effective for a period of twenty-five years n15 (unless extended indefinitely or for a fixed period or periods in 1995). n16 The 1995 Review and Extension Conference n17 extended the Treaty indefinitely, paradoxically granting it eternal life at the same moment that stress was becoming apparent in its foundation.

Many believe that the NPT regime is weakened due to the many problems it faces. n18 True to form, the 2000 Review Conference (RevCon), while generally viewing the NPT regime as a success, nonetheless highlighted continuing problems with the Treaty. n19 But the 2005 RevCon was a watershed event for the treaty in many respects. At subsequent RevCons, it is a virtual certainty that the parties will consider the status of the Final Four as long as they do not accede to the NPT. They must look past the traditional concept [*422] of accession and consider alternative methods that will allow the Final Four to sign the NPT.
The NPT was negotiated in 1968 during the Cold War—an era characterized by nuclear confrontation and potential conflict between the U.S. and the Soviet Union. The nuclear threat today is principally from terrorists and "rogue" states. As effective as the NPT has been, it is questionable whether it is sufficiently nimble and flexible to deal with the current radically changed circumstances, without significant alteration or interpretation of the NPT itself.

NPT commentators tend to concur on the importance of universality:

The importance of the universality of a treaty is that it consolidates the normative strength of the treaty and the regime that it anchors while the absence of universality weakens the strength of the norm. Universality also raises the costs of noncompliance by increasing the prospect of collective response to noncompliance and for enforcement of treaty and regime norms, rules, and principles.

While the NPT has had some recent successes, such as the accession of Brazil and more recently Cuba, bringing India, Israel, Pakistan, and now North Korea into the NPT fold remains elusive.

B. An Alternate View

Whether the world would be safer or whether the NPT would be a more effective treaty if all states acceded to it is, of course, open to debate. Some commentators view arms control treaties as of questionable value. The rationale for this view is that while Western democracies tend to honor their commitments, given the transparent nature of their governments, other states may sign arms control treaties never intending to observe them. Such NPT non-compliance has been an issue with Iraq, North Korea, and Iran.

Charles Krauthammer points to the example of the NPT and the first Gulf War. At that point, Iraq was viewed as fully compliant with the NPT, was serving on the International Atomic Energy Agency (IAEA) Board of Governors (BOG), and had withstood numerous IAEA safeguards inspections without arousing suspicion regarding their nuclear weapons program. If Iraq had not invaded Kuwait, resulting in U.S. intervention and the subsequent discovery of its clandestine nuclear weapons program, Iraq may have been able to assemble nuclear weapons within six months. "The Iraq example shows how universal treaties can actually decrease international security by creating a false sense of security. Inspectors, bureaucracies, governing boards, lofty goals and professed norms are supposed to protect us from the ambitions of unappeasable rogue states."

C. New Challenges to the NPT

Final Four accession to the NPT would assist in preventing terrorist access to nuclear weapons. That reason alone makes it an important goal. Recent events in Libya illustrate that corporate entities in states such as Malaysia can assist in nuclear proliferation without the endorsement, consent, or even knowledge of their host governments. That is why the UN Security Council recently passed a resolution requiring states to punish any "non-state actors" dealing in weapons of mass destruction (WMD) parts or technologies.

Nuclear terrorism was not part of the equation at the genesis of the NPT. NPT states parties have not, until recently, begun to consider the implications of terrorism and of nuclear materials in the hands of non-state actors or failed states. But it is states that exclusively control the nuclear technologies and the production of fissile material for nuclear weapons. States, therefore, are the entities that must secure nuclear material to prevent such use by terrorists.

Much depends on the good faith of member states. A very small minority of NPT member states, such as Iraq and Iran, have shown a willingness to circumvent the mandates of the Treaty by actively pursuing nuclear weapons programs even after accession to the Treaty. Brazil very recently blocked IAEA inspectors from viewing an uranium enrichment facility under construction near Rio de Janeiro. While there is no comparison between the conduct of Brazil and Iraq, the nuclear non-proliferation regime is not well served by any non-compliance with the NPT or evasion of IAEA inspections. Indeed, some commentators believe Iran and Brazil must be treated equally, as both have stated their intentions to enrich uranium. "If we give Brasilia a pass at the same time that we are bearing down on Tehran, it
not only will send exactly the wrong message to would-be proliferators but will sharply diminish any prospects for success with Iran." n37

The ability to pursue uranium enrichment while appearing to be in compliance with NPT obligations is why NPT states must address and prevent this scenario. n38 "The Iranian and North Korean situations have underlined [n425] several of [the NPT's] known deficiencies, in particular the ability of non-nuclear-weapon-states-parties to misuse Article IV to acquire weapons-relevant materials and technology, foil verification attempts, and then withdraw from the treaty by invoking Article X." n39 Thus, it is vital not only that all states join the NPT (adherence), but that all NPT states observe their obligations (compliance). With the confluence of NPT adherence and compliance, the treaty would truly be successful and the nuclear non-proliferation regime would be more effective.

What better time than now, as the NPT struggles with contentious issues n40 such as demands for faster NWS nuclear disarmament pursuant to Article VI, n41 the withdrawal of North Korea from the NPT, nuclear testing by India and Pakistan, extensive nuclear proliferation by Pakistani scientist A.Q. Khan, n42 and alleged NWS violations of the NPT by helping NNWS in their nuclear weapons programs n43 to seriously seek a means to make the Treaty universal? n44 The alternative could be the gradual dissolution of the NPT. n45

While non-NPT states could as easily and effectively comply with the NPT as member states, it is the legally enforceable nature of NPT membership; the nuclear weapons at issue; and the fact that with just four more members, true universality would be attained, that makes the goal of universality so important. Legally enforceable obligations are viewed by other nations as a more serious commitment to the aims of the Treaty. Otherwise, nations would simply make specific political commitments and not bother with treaties. Treaties have meaning, though, and in the case of the NPT, treaty obligations may be enforced by the UN Security Council. n45

D. NPT Areas of Contention

It is ironic that a treaty as successful as the NPT could simultaneously be in considerable jeopardy. The "Grand Bargain" of the NPT is that the NWS will work towards nuclear disarmament while sharing the benefits of the peaceful uses of nuclear energy with the NNWS, who in turn commit to forgo seeking nuclear weapons and to place their nuclear facilities under international safeguards. n46 These understandings are codified in Articles I, II, III, IV, and VI of the NPT.

Many commentators and NNWS view the NPT bargain as unbalanced with the greater obligations resting on the NNWS; these obligations equate to restrictions on their sovereignty. n47 An opposing and equally valid view is that the vast majority of NNWS are not required to do anything differently from what they were doing, or refraining from, before they joined the NPT. n48

At the NPT RevCons and other meetings, n49 the progress of the NWS towards nuclear disarmament pursuant to Article VI of the Treaty, along with any commitments made at prior RevCons, are major areas of contention. For example, at the 1995 Review and Extension Conference, the conference produced a decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament." n50 At the NPT 2000 RevCon, n51 held at the United Nations in New York, the parties agreed to thirteen practical steps toward implementation of Article VI of the NPT and included specific reference to paragraphs 3 and 4 of the 1995 Principles and Objectives document noted above. n52 The "Thirteen Steps" agreed to in that document included: early entry into force of the Comprehensive Test Ban Treaty (CTBT); n53 a continued moratorium on nuclear testing pending the entry into force of the CTBT; n54 moving the Conference on Disarmament (CD) n55 toward negotiations of a Fissile Material Cutoff Treaty (FMCT); n56 establishing a subsidiary body within the CD for negotiations regarding nuclear disarmament; applying the principle of irreversibility to nuclear disarmament; establishing an "unequivocal undertaking" by the NWS to eliminate their nuclear arsenals; entry into force of the Strategic Arms Reduction Treaty (START) II and III and a strengthened Anti-Ballistic Missile (ABM) Treaty; completion and implementation of the Trilateral Initiative between the U.S., Russia, and the IAEA; measures to reduce the operational status of nuclear weapons; n57 and advancing several other goals.

In the view of some commentators, many of these measures have already been abandoned. The New Agenda Coalition (NAC), comprised of the Foreign Ministers of Egypt, Ireland, Mexico, New Zealand, South Africa, Sweden and Brazil, have expressed their "deep concern at the lack of progress to date in the implementation of the thirteen steps on nuclear disarmament" agreed to by all states parties at the 2000 NPT RevCon. n58 [n428]
The United States, in particular, has been faulted for inadequate compliance with Article VI, n59 but the U.S. disagrees with that view. n60 Sverre Lodgaard notes that,

while Russia ratified the CTBT in April 2000, the Bush administration has distanced itself from the accord and ruled out resubmitting it to the Senate [for advice and consent to ratification]. n61 Indeed, the US Nuclear Posture Review (NPR) . . . studiously keeps open the possibility that the US testing moratorium may be lifted in coming years. Should this happen, China is likely to follow suit and, quite possibly, be followed by India and Pakistan. n62

Lodgaard views the Strategic Offensive Reductions Treaty (SORT), better known as the Moscow Treaty, as a sham, which he describes as "unilateralism in bilateral form." n63 While Moscow and the Bush Administration both consider SORT as a significant step in furtherance of their Article VI objectives, it has been widely criticized for having no verification mechanism and for its expiration on December 31, 2012, n64 after which date a return to the status quo ante appears to be permissible. [*429]

Ambassador Thomas Graham Jr. takes a more positive view of the events of the 2000 RevCon. n65 He points out that the NPT 2000 RevCon Final Document called for the immediate commencement of negotiations on a FMCT with a view to conclusion of such negotiations within five years. n66

This is the only obligation in the Final Document assigned a specific timetable for completion, as was the case with the CTBT in 1995, demonstrating a renewed commitment among the parties to negotiate such a Treaty. Since India and Pakistan are both members of the CD, which has been charged with negotiating the FMCT, meeting this deadline could be a challenge, n67 but the important point is that there is consensus on this objective among the NPT parties, virtually n68 the entire world. n69

FMCT negotiations have, even now, not begun. And once they do begin in earnest, should that occur, the negotiations could take several years to complete. n70

But in spite of the multiple pressures on the NPT, and the recognition that it is not a perfect treaty, for many reasons it is still with us. Since the NPT is currently so close to universality, departing from either its mandates, as Iran has done, or withdrawing from the Treaty itself, as North Korea has done, gives those states the appearance, if not the reality, of marginalization from the international community.

From the Cold War years, the so-called "Swedish lesson" remains sanely applicable: whatever the existing nuclear-weapons states are doing, it is not in the interests of non-nuclear-weapon states to acquire their own nuclear arms. The more time that passes without nuclear weapons being used, the stronger the norm of non-use becomes. n71

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Indeed, Lodgaard goes on to note that the NPT NWS as states parties are "under an international legal obligation to eliminate their arsenals. The other three-India, Israel and Pakistan-are under no such obligation." n72 For that reason alone, it is time to explore possible avenues for bringing these states under the NPT umbrella.

1. Criticism of the NWS in the NPT Context

The NWS received heavy criticism in the NPT context, both from a vocal group of the NNWS known as the Non-Aligned Movement (NAM) and also from the Non-Governmental Organization (NGO) community. NGOs are vocal opponents of nuclear weapons and the NAM states are advocates of faster NWS Article VI compliance. The U.S. received the brunt of the criticism. A basic summary of these complaints follow, and are applicable to, all NWS,
although they are normally directed at the U.S. Such complaints are relevant to this article because the Final Four, should they accede to the NPT, could have to deal with many of the same issues.

A visit to almost any NGO Web site which discusses nuclear matters will inevitably reveal criticism of the U.S. for its non-performance of NPT Article VI obligations. For example, The Women's International League for Peace and Freedom posts a speech by one of its members noting that "the United States is leading the backward charge away from the unequivocal undertaking to eliminate nuclear weapons." n73

Rebecca Johnson, an NGO NPT analyst and commentator, in the midst of otherwise dispassionate analysis, criticizes the U.S., and particularly the Bush administration. The administration, she claims, was:

more concerned with promoting their values and ensuring U.S. business and defence industry interests and profits than enhancing security . . . . According to the Bush understanding, it is not the acquisition and deployment of nuclear weapons that is the problem, but such capabilities in the hands of "evil folks." This flawed approach has done little to address, and much to exacerbate . . . specific and interrelated problems of fundamental concern to NPT parties[.] n74

While bold, critical, and loud assertions of dissatisfaction with U.S. progress and performance are always fashionable, it would assist readers if criticism was buttressed with facts. Johnson does not explain why the Bush administration approach is flawed. In fact, keeping nuclear weapons out of the hands of "evil folks" seems eminently sensible, responsible, and is exactly the right approach for today. After all, who is in favor of terrorists armed with nuclear weapons-except for the terrorists themselves? Johnson, of course, and nearly all other NGOs concerned with nuclear weapons, would like to keep such weapons out of everyone's hands. That is a laudable, albeit currently impractical, goal.

If the only states (other than the current NPT NWS) that possessed nuclear weapons were Switzerland, Denmark, Canada and Australia, it is likely that the Bush administration, not to mention the rest of the world, would be far less concerned, strictly from a national security standpoint. n75 The possession of nuclear weapons by India, Israel, and Pakistan n76 are currently not viewed as a threat by the U.S.; but North Korea is unstable, consorts with terrorists, is neither a democracy nor an ally, and is now viewed in need of restraint since it no longer even has the thin veneer of NPT membership to constrain its nuclear ambitions.

Johnson's criticism of the U.S. is illustrative of the views of many NGOs, which consider the U.S. leadership role in the non-proliferation context only, and ignores U.S. global military and security obligations, which are very different and more significant than those of any other state. For example, it is one matter for a NNWS such as Indonesia, a vocal member of the NAM, to sign the CTBT and rigorously observe its mandates. After all, they have neither the money nor the need for nuclear weapons. That is not the case, however, with the U.S.

As is so often the case with respect to arms-control agreements-the landmines movement comes to mind-the United States is simply not in the same position as other states, at least as long as it continues to assume global security responsibilities, and therefore should not be shamed by charges of hypocrisy when it fails to adopt regimes that it urges on others. n77

Of course, in this case, the U.S. is a NWS member of the NPT, n78 but, having relinquished its chemical and biological weapons, it cannot so quickly relegate its nuclear weapons to the dustbin as well. Johnson's criticism, characteristic of NGO arguments, fails to explain exactly why the Bush administration approach is wrong. The administration is right because it is concerned most about the nuclear weapons-capable states that are the least stable. After all, which responsible member of the international community is afraid of any of the current NWS using nuclear weapons against them?
The remaining "rogue" states-Iran and North Korea are a different matter. They are unpredictable because they are unaccountable. Anne-Marie Slaughter has proposed "a collective 'duty to prevent' nations run by rulers without internal checks on their power from acquiring or using WMD." Slaughter would likely agree with the "evil folks" approach here. Her view is based upon the results of an international law commission, which proposed a new doctrine called "The Responsibility to Protect." Their proposed "duty to prevent" is a corollary of that principle.

In fact, that principle represents in practice what appears to be the Bush administration's policy:

By contrast, the Bush administration shifted the focus from eliminating weapons to eliminating regimes. Whereas President Clinton spoke in 1998 of the "unusual and extraordinary threat to the national security of the United States posed by the proliferation of nuclear, biological, and chemical weapons and the means of delivering such weapons," President Bush, in his January 2003 State of the Union address, framed the issue differently: "the gravest danger facing America and the world, is outlaw regimes that seek and possess nuclear, chemical, and biological weapons." In effect, the Bush administration changed the focus from "what" to "who."

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2. Specific NPT Problems

Johnson reports five widely perceived problems that currently exist with the NPT:

The "D-3" (de facto) nuclear weapons possessors outside the NPT—India, Israel, and Pakistan. The issue here is non-adherence. These three states are nuclear "players" and, for the NPT to be meaningful globally, they must accede;

The "W-3" nuclear weapons developers—Iraq, North Korea, and Iran. The issue here is non-compliance. These three NPT states, including North Korea when it was a member, all pursued or are pursuing nuclear weapons programs in violation of the NPT;

Failure of the NWS to comply with their Article VI obligations. The CTBT was to have been a prerequisite for the indefinite extension of the NPT in 1995, and many fear that the U.S. will resume testing. Moreover, the potential development in the U.S. of new nuclear doctrines and/or weapons is viewed [by the NGOs] as inconsistent with a plan for nuclear disarmament;

Regional security considerations for states in the regions of the P-5 or D-3. When a state possesses nuclear weapons, it may pose a clear threat to states nearby. If it gains the ability to launch intercontinental missiles, it could place a nuclear warhead on the missile and pose a threat to all states, but that capability takes time to develop. South Korea and Japan, for example, are most concerned about North Korea (which recently launched a missile for satellite purposes but with clear weapon applications) in possession of nuclear weapons; and

The threat of "loose nukes" and inadequately safeguarded weapons material. Both nuclear weapons and materials, if not adequately guarded, are at risk of theft and sale to terrorists or other criminals.

E. The NPT Status Quo: A Recipe for Stalemate

Given these NPT problems and the current dangers posed by nuclear weapons, the NPT states parties must move boldly in a new direction in order to be better positioned to ensure that the aims of the Treaty are fulfilled.

The NPT, as currently configured, does not permit any new NWS because the NPT defines a NWS as a state that exploded a nuclear device prior to January 1, 1967. This definition eliminated an incentive for other states to attempt to develop nuclear weapons once the Treaty had entered into force. This state of affairs is problematic for India, Pakistan, and Israel; and it offers a probable explanation for why they have not joined the NPT, and why North Korea withdrew.
India and Pakistan tested their nuclear weapons in 1998, so their nuclear status and capability is well-known. Prior to that, those states and Israel were known as the "Threshold States," indicative of their undeclared nuclear status, yet hinting at their quest for nuclear weapons or the near certainty that they might already have them. Israel has preferred to maintain a status of ambiguity regarding its nuclear weapons program, although it is widely understood that they have had nuclear weapons for many years. 

At the time the NPT was signed in 1968, only five states had "manufactured and exploded a nuclear weapon or other nuclear explosive device." Those states were: China, France, UK, U.S., and USSR. All other states henceforth were able to join only as NNWS. Thus, the NPT is criticized as a "discriminatory" treaty due to its two unequal classes of members-NWS and NNWS. But no one would reasonably have expected the NWS to relinquish nuclear weapons at the height of the Cold War. Multilateral treaties often reflect the best agreement attainable at the time. In hindsight, the imperfections often seem glaring.

In the case of certain states, such as Cuba, the discriminatory aspect of the NPT was the reason that they did not sign the Treaty. Cuba has now finally acceded, even though the NPT remains unchanged. This illustrates the perceived value of NPT membership. Many states enter multilateral agreements that are imperfect in their view because they surmise correctly that they are more likely to have the ability to effect change as a member state.

States act in their own best interests, particularly in the realm of national security, and therefore perceive the benefits of the NPT to be greater than the burdens. The benefits include Negative Security Assurances, sharing in peaceful nuclear technology, and a very real perception of responsible statehood. Nuclear (commercial) power and technology in support of such power is not available to non-NPT states. Given the issues of global warming and fossil fuel shortages, nuclear power is an increasingly attractive option. Other benefits include the avoidance of adverse economic and diplomatic consequences, such as U.S. sanctions or even a U.S. preemptive attack, as recently witnessed in Iraq, or action by the UN Security Council.

II. The Five Options: NPT Accession of the Final Four

Given these factors, the history and text of the NPT, and the current international security and proliferation environment, Final Four accession to the NPT would breathe new life into the NPT, and the nuclear non-proliferation regime in general. It is important to reiterate that universality must not be viewed as an end in itself, but as a means to further nuclear non-proliferation and international peace and security. Five options exist to bring the Final Four into the NPT regime. This section will explore each option in detail:

1. Dismantle the Final Four's nuclear weapons/programs and join the NPT as NNWS; 

2. Retain the two existing categories of NPT states but amend the NPT to allow the Final Four states to join as NWS; 

3. Allow the Final Four to join the NPT as NNWS while retaining their nuclear weapons; 

4. Amend the NPT to create a third class of member states called "threshold states," "de facto states," "post-nuclear states" or some other suitable moniker, which refer to states that have manufactured or acquired nuclear weapons after 1967; or 

5. Negotiate separate treaties or agreements external to the NPT which would accomplish essentially the same results as the NPT.

It should be noted that the Final Four do not act as a cohesive group. In fact, there is little similarity among them except for their possession of nuclear weapons outside the NPT. It is entirely conceivable that one or two of the Final Four might accept one of these options while the others would not. It is worth considering which options would be more or less attractive if, for example, two of the Final Four agreed to it but the other two did not.

A. Option One: Join the NPT as NNWS, Dismantling Their Nuclear Weapons
The NPT states parties that have been clamoring for universality have always assumed in their arguments that India, Pakistan, Israel, and now North Korea would be required to dismantle their nuclear weapons programs (as did South Africa) and accede to the NPT as NNWS if they were ever to join at all. The general assumption, of course, is that a NNWS is a state without nuclear weapons, as is admittedly implicit in the term NNWS.

This option represents traditional thought on attaining universality. It is, and remains to this date, the only option realistically available to the Final Four, since that is how every other state has acceded to the NPT, including those which possessed nuclear weapons such as South Africa, Belarus, Kazakhstan, and Ukraine. No other options have been seriously considered. The Final Document of the 2000 NPT RevCon contains specific language urging India and Pakistan to accede to the NPT as NNWS. The Final Document also urges those states to observe UN Security Council Resolution 1172 which, in turn, urged them to accede to the CTBT without delay and, inter alia, urged cessation of nuclear weapons or ballistic missile development, and cessation of production of fissile material for nuclear weapons.

This assumption, which has translated into demands for the nuclear disarmament of those states, has had one very obvious result: failure. Precisely nothing has happened, or is happening, and those states are now arguably farther from NPT accession than they ever have been. Meanwhile, their nuclear weapons programs are proceeding apace. It is the failure of this option, and of the NPT states parties to consider alternatives that makes it critical to explore other possibilities, such as those presented in this article.

In considering alternatives, it is wise to keep in mind what is lost by having the Final Four outside the NPT. Nuclear weapons are in a class by themselves. Their destructive power is such that they have only been deployed by the U.S. in 1945 and have not been used since-in spite of the increased numbers of such weapons. Nuclear weapons are important enough to have international agreement regarding their status. Because meaningful international agreement would encompass all states, any state outside the NPT is a problem. States with nuclear weapons outside the NPT risk making the NPT irrelevant. Considerations of NPT theology, therefore, coincide with reality, since concerns about universality appear to have some validity. As more states acquire nuclear weapons, and nuclear weapons proliferate, the risk of nuclear weapon-use increases and NPT relevance decreases. All responsible states want to prevent the use of nuclear weapons.

Under option one, the NPT would be strengthened by the accession of any one of the Final Four, even without any of the others. In fact, accession by any one of the four arguably increases pressure on the remaining three to accede. Demands from the international community, however, seem to be of limited utility for the Final Four.

B. Option Two: Amend the NPT, Allowing the Final Four to Join as NWS

This option has significant legal and political hurdles, but offers a plausible method to attain universality. India, Israel, and Pakistan might demand no less than full NWS status, so this option could hold the most appeal to them. After all, those three states have likely been in possession of nuclear weapons for years. North Korea is another matter and this illustrates the differences among the Final Four and the difficulty of treating them as a group. Few NPT states parties would look favorably upon granting NWS status to North Korea, due to its withdrawal from the NPT, and the dangerous precedent that we set.

Options two through five would require NPT states parties to be very serious about exploring alternatives for attaining universality, as opposed to merely giving it lip service. These options may help NPT states parties decide just how important universality is, because it will not be a "free lunch." Only option one requires no concessions from NPT NNWS.

In the diplomatic context, this means that NNWS must be willing to give something in order to get something. They would provide some flexibility on their hitherto unmet demands on the Final Four regarding immediate and unconditional nuclear disarmament and joining the NPT as NNWS, sans nuclear weapons. A critic might view this not as flexibility but as a retreat from the NPT object and purpose of having fewer countries in possession of nuclear weapons. Some NNWS that were close to building a nuclear weapon when they acceded to the NPT might be outraged.
What NPT states parties would receive, potentially, with the Final Four under the NPT "tent," n109 is true universality. This approach would require an amendment to NPT Article IX(3) by adjusting the definition of NPT NWS. Under that definition, a NWS must have exploded a nuclear device prior to January 1, 1967. Amending the NPT to change that specific date would be one possible approach. One might select a date closer to the present, such as January 1, 2004, thus redefining NWS as states that have exploded or manufactured a nuclear device prior to that date. It is important that a nuclear explosion not be the only criteria for NWS since only India and Pakistan have already tested. n110 Without the concept of "manufacture" or "possession" of a nuclear weapon, Israel and North Korea would have an incentive to test, and that would be the worst conceivable result that the NPT could produce.

But amendment carries great risk and states such as Japan might threaten to withdraw from the Treaty should this amendment pass. Or they might demand other amendments that would be unacceptable to the existing NWS, such as nuclear disarmament in a time-bound framework. This is why amendments threaten the entire NPT structure, as discussed later in this article.

Additionally, state signatories to the CTBT n111 would undoubtedly demand that no nuclear tests take place. Therefore, some other more reasonable means may be devised to verify nuclear weapons capability. A state might prove such capability, for example, by allowing IAEA inspectors to certify that it possesses a functional nuclear weapon, or representatives of the current NPT NWS could do so. n112

Alternatively, NWS could be defined neither by date, possession or testing of nuclear weapons, but simply be identified by name. The NPT, after [*440] amendment, could thus state that the NWS are: U.S., UK, France, China, Russia, India, Pakistan, Israel, and North Korea. But even if this issue could be resolved, amending the NPT is, by design, no easy task.

Article VIII of the NPT requires that any amendment to the NPT be approved by a majority n113 of the votes of all parties, in addition to unanimity of the NWS and all states that are members of the Board of Governors (BOG) of the IAEA. n114 That may be very difficult to attain. While it is difficult to arrive at an exact figure, one may conclude conservatively that the agreement n115 of nearly 100 states would be required to amend the NPT, with true consensus of all parties requiring agreement of 189 states. The NWS, who also happen to be the five Permanent Members (P-5) of the UN Security Council, might be reluctant to share the NWS status, principally because the new NPT NWS might then have a better argument for demanding parity elsewhere, such as a seat on the UN Security Council. Such a demand, hardly a new one, would likely be as futile as it has been in the past.

Once the NPT is opened to amendment on one issue, such as this, any amendment would then be fair game. Many states may try to do away with the "discriminatory" (NWS versus NNWS) aspect of the Treaty. Some might like to see RevCons more or less frequently. Others might like to see nuclear disarmament of the NWS in a time-bound framework, giving the NWS, for example, twenty-five years (an arbitrary figure) to attain complete nuclear disarmament. n116 The risk of amendment, in other words, might be viewed as [*441] too great. n117 However, any existing NWS could veto any amendment it did not consider favorable.

Conceivably, several current NNWS, which might be seeking nuclear weapons in a clandestine manner (such as Iran), n118 might negotiate for a later cutoff date defining NWS in a manner that would allow it the time required to produce a nuclear weapon so that it would be included in the revised and expanded NWS group. Should that type of jockeying occur, the NPT would be in even greater peril. And it is surely a genuine risk that other NPT NNWS may conclude that they should now acquire nuclear weapons since the Final Four would be retaining their nuclear weapons. That could potentially result in a race of states to "build the bomb" prior to the new cutoff date defining a NWS.

Limiting new NWS status to the Final Four could prove problematic and might well serve to eviscerate the entire Treaty. For India, Israel, and Pakistan, who have never signed the NPT, NWS status seems at least arguably plausible, somewhat reasonable, and does not violate any objective standard of equity. For North Korea, though, which, as an NPT member, almost certainly violated its obligations, this could appear to be a reward for bad behavior. To a state like South Africa, which publicly relinquished its nuclear weapons in order to join the NPT, all options except for the first, traditional means of joining the NPT might be unacceptable. Nonetheless, South Africa should consider these options, because accession of the Final Four is in the best interests of both the NPT and the nuclear non-proliferation regime.
This option would not be appropriate unless all Final Four states acceded under its terms; otherwise it would not be worthwhile.

C. Option Three: Join the NPT as NNWS and Retain Their Nuclear Weapons

The Final Four could conceivably join the NPT as NNWS while retaining their existing nuclear weapons. This option, while perhaps the most controversial, probably provides the best opportunity for bringing about the universality of the NPT, as unsavory as it may seem to NPT purists. This [442] option has the immense advantage of requiring no amendment to the NPT. But Option Three would only be viable if all Final Four states acceded to the NPT under its terms. That is because such a major new direction for the NPT could likely only be taken once, if at all, and only for all states similarly situated.

Interestingly and surprisingly, nothing in the NPT explicitly prohibits a non-NPT NNWS from possessing nuclear weapons upon accession to the NPT. The only arguable prohibition against NNWS nuclear weapon possession, while not specifically stated, is the very term NNWS, which implies that a state in that category has no nuclear weapons. But implication falls far short of definition. By failing to define this critical term, the drafters of the Treaty-wittingly or unwittingly-granted significant leeway in application in a critical area.

Central to this proposition is that what the NPT prohibits is very important. In recently declassified U.S. Department of State telegrams from the NPT negotiations era, draft text was circulated and discussed. n119 The draft text of Article II in one cable remained unchanged in the final NPT text. One crucial bit of information emerges: "In talks with the Soviets, it has been clearly understood that NPT deals only with what is prohibited and not with what is permitted." n120 Insofar as this pertains to nuclear weapons or fissile material, it is true without exception in the NPT. n121 A similarly relevant U.S. Department of State cable n122 makes the following point: The principle on which the Treaty was constructed is that the NPT "deals only with what is prohibited; hence what is not prohibited is permitted." n123

Further (recently declassified) evidence in support of this proposition is that in a meeting of the U.S. Secretary of State and Director of the Arms Control and Disarmament Agency with the Italian Ambassador, the Secretary stated that:

The Russians understand as fundamental to the treaty that what it does not prohibit is permitted. Since the treaty does not prohibit a consolidation of states and does not require the destruction of any nuclear weapons, it must permit the creation

[*443]

of a federated European state which would succeed to the nuclear weapons of its constituent states. n124

The NPT defines NWS but not NNWS. n125 No differentiation is made between NPT NNWS and non-NPT NNWS. There is no prohibition of NNWS possessing nuclear weapons. The only other mention in the NPT of a prohibition on nuclear weapons is in Article VII, which states that nothing in the Treaty affects the right of any group of states to conclude regional treaties to "assure the total absence of nuclear weapons in their respective territories." n126 Even that definition, provided to further the negotiation of nuclear weapon free zones (NWFZ), does not specifically prohibit a NWFZ member state from possessing a nuclear weapon outside of the NWFZ territory. n127

1. Option Three and a Closer Look at NPT Article II

Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices. n128
The NNWS obligation, in essence, is not to receive, build, or otherwise obtain nuclear weapons. That legal obligation, like any other treaty obligation, begins on the date of accession to the treaty, and not before. On its face, the clear goal of NPT Article II is keeping nuclear weapons and nuclear explosive technology away from NNWS with the ultimate goal of preventing NNWS from acquiring a nuclear weapon. But in the case of the Final Four, nuclear weapons acquisition has already occurred.

Arguably implicit in the text of Article II is the assumption that a NNWS has no nuclear weapons. NNWS agree not to receive, from any source—NPT member or non-member—any nuclear weapons or devices, not to make or acquire them, and not to seek assistance in building or acquiring them. What it does not say is that NNWS will not possess nuclear weapons ab initio. Thus, the NPT logically and legally would not regulate or ban any nuclear weapons a state may have obtained or manufactured prior to accession. The Final Four already have them, and let us assume, arguendo, that the Final Four wish to join the NPT in good faith. Yet the facts and circumstances that led them to their decision to acquire nuclear weapons still exist. Therefore, their genuine security concerns must be addressed in order to ease their path into the NPT. However, the Final Four must also be prepared to compromise.

The fact that South Africa dismantled its nuclear weapons immediately prior to NPT accession was a political decision not mandated by the Treaty. Nor was the decision by Belarus, Kazakhstan, and Ukraine to return their nuclear weapons to Russia. The valid working assumption, from the dawn of the NPT to date, was that, other than the NWS, no other NPT state had nuclear weapons. But the NPT simply does not address, and therefore does not prohibit, non-NPT member states with nuclear weapons, from acceding to the NPT as NNWS. This approach simply has not been considered before.

Article II involves a promise by NNWS not to seek nuclear weapons technology or nuclear weapons, and not to receive them from others. The Final Four could honor that commitment while retaining the nuclear weapons they already possess. The NPT states parties apparently did not contemplate a future scenario where a nation that already possessed nuclear weapons seeks to join the NPT. If the original NPT negotiators had wished to nullify this option, they could simply have defined clearly the term NNWS, one of the most basic and vital terms in the Treaty, or clarified in Article II that NNWS may not possess nuclear weapons. The NPT does neither.

If the NPT contemplated such a circumstance, it is not clarified by the Treaty text or travaux preparatoires. In some ways, this is unsurprising. Multilateral treaties often entail significant compromise. Also, as treaty text is negotiated, state representatives or delegates are aware both that circumstances will change and that they cannot predict the future. This often results in intentional ambiguity since delegates do not want to unwittingly limit their options. Ambiguity in a treaty can often allow negotiators on opposing sides of an issue to claim victory. Article II may have been crafted ambiguously in order to preserve this option, but more likely, it was the result of multilateral compromise. If it was not intentional, then it is a significant oversight.

Creative negotiating may well be the answer to this dilemma. If NPT states parties are seriously committed politically to universality, then those states should be willing to make some hard choices in order to bring the Final Four into the NPT, regardless of whether option two, three or four is selected. If the Final Four desire to shed their pariah image in the arms control world, NPT membership would be a major step in that direction. But they too would have to make concessions in order to become NPT NNWS.

Negotiations with these states could possibly include nuclear disarmament in a time-bound framework—something the NNWS have always desired of the NWS. For example, the Final Four could accede to the NPT as NNWS and retain their nuclear weapons, which they would promise to relinquish, for example, before 2040, on which date they would become a "real" NNWS and would then fit the generally accepted meaning of the term. Such a provision would assure NNWS states parties who might otherwise not concur with their accession on these terms. Their nuclear weapons programs would essentially be frozen at the level that existed at entry into force.

This would be a function of Article II in that they could keep their existing stocks of nuclear weapons for a limited time, but could not manufacture additional weapons upon accession. The Final Four should declare their current holdings, immediately dismantle several weapons, and commit to graduated reductions during each five-year RevCon
period. This would illustrate to the current NNWS that the Final Four were indeed giving up something very real and were doing so during the period of transition. Of course, the Final Four might not be willing to meet this demand unless the other NWS did as well. But the current NWS may plausibly argue that their circumstance is different, since they are already NWS and have been so for many years. Whether this justification would be adequate is another matter.

Other aspects of a negotiated agreement might include: some type of minimally intrusive safeguards or other international inspections of the Final Four's weapons programs, an accounting or declaration of existing nuclear weapons, an agreement to seek a peace treaty with the state or states that the Final Four built the nuclear weapons to potentially defend against, an agreement to sign the CTBT, and an agreement to negotiate a FMCT. Similarly, any date of complete disarmament could be tied to specific events, such as a peace treaty with the state or states of concern to them, presumably with UN enforcement and/or monitoring. Admittedly, peace in the Middle East does not seem imminent. Nonetheless, the Arab states, which so frequently complain about Israel's non-adherence to the NPT and its nuclear weapons program, would now have the impetus to negotiate for real peace.

Perhaps the most significant risk of this option is that any NNWS party to the NPT could then withdraw from the treaty, build a nuclear arsenal, and then rejoin the NPT as a NNWS and retain their nuclear weapons. Negotiations would have to take this possibility into account and prevent it.

Other issues would surely be raised. For example, the U.S. has pushed forcefully for NPT compliance and adherence since entry into force. The U.S. could be seen as moving in a different direction unless this was portrayed plausibly as fully compliant with the object and purpose of the NPT. Arguably, this could also be viewed as creating a de facto new category of NPT states: nuclear weapons-possessing NNWS. This makes it vital to ensure that it is perceived as a temporary and transitional measure for the ultimate benefit of the NPT regime.

2. Option Three and Treaty Interpretation

The general rule of treaty interpretation, as set forth in the Vienna Convention on the Law of Treaties (VCLT), is that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." It is Article II of the NPT that requires this good faith analysis. This rule follows logically from the principle of pacta sunt servanda noted in VCLT Article 26. "Interpretation is part of the performance of the Treaty, and therefore the process of examining the relevant materials and assessing them must be done in good faith." As a practical matter, NPT states parties are free to interpret the Treaty in whatever manner they attain the requisite consensus to do so. However, some states, such as the U.S., may be constrained in their interpretations by conditions set forth in the Senate's hearings on the Treaty or reservations set forth in the Senate's advice and consent. Politically, the will must exist to vary the current interpretation.

In divining the interpretation of treaty text under VCLT Article 31, one is to apply the general rule of plain meaning first. Supplementary means, such as the travaux preparatoires, under Article 32, are relevant to confirm the meaning resulting from applying VCLT Article 31, or if that leads to a result "which is manifestly absurd or unreasonable." "Interpretation involves an elucidation of the meaning of the text, not a fresh investigation as to the supposed intentions of the parties." Additionally, the Final Document of the 2000 NPT RevCon noted that India and Pakistan do not have the "status of nuclear-weapon States" and urged them to accede to the NPT as NNWS, placing all of their nuclear facilities under comprehensive Agency safeguards. This also is not conclusive, but is certainly indicative of what the states parties desired at that time, for it was adopted by consensus.
Surprisingly, the UN Charter has no specified procedure for settling disputes about the Charter. The same may be said of the NPT. But, under Article 96 of the UN Charter, the International Court of Justice (ICJ) may issue advisory opinions on such matters. This issue would be an excellent matter to take to the ICJ. If the ICJ agreed that such a view of NPT Article II was permissible, it would make option three that much more likely to succeed.

Currently, all NPT states parties recognize universality as a worthy goal. Opponents of admitting the Final Four as NNWS while retaining nuclear weapons would argue that such an interpretation of the NPT would run afoul of VCLT Article 32(b), in that such an interpretation "leads to a result which is manifestly absurd or unreasonable." That absurd result, of course, being that NNWS would possess nuclear weapons in contravention of the object and purpose of the Treaty. Others would argue that allowing, condoning, and/or legalizing the possession of nuclear weapons by any additional states also runs afoul of the object and purpose of the NPT, which is ultimately nuclear disarmament.

Under VCLT Article 31, "it is important to give a term its ordinary meaning since it is reasonable to assume, at least until the contrary is established, that the ordinary meaning is most likely to reflect what the parties intended." It is difficult to perform a good faith assessment of the meaning of the NPT as applied to these questions, nearly thirty-five years after its entry into force. It is not so much that passage of time makes a difference, but that it can skew one's interpretation of treaty terms. The circumstances of the world and thus, the NPT itself, are vastly different. The framers of the NPT could likely never have envisioned the scenario we face today and the possible methods under consideration in this article, to attain universality. However, they did envision the possibility of a world with thirty states possessing nuclear weapons.

The VCLT instructs that we ensure that this new meaning of Article II is consistent with the "object and purpose" of the Treaty. For example, is it reasonable to state that there is now a way for more states to lawfully possess nuclear weapons by this reading of the Treaty? That is an argument that may well be invoked against this interpretation. But another reasonable interpretation is that universality is critical to the NPT, especially now, and that even though more countries lawfully in possession of nuclear weapons under the NPT would exist, those states would, for the first time, be under a legal obligation to disarm. That is fully consistent with the object and purpose of the NPT and arguable both ways.

Aust also notes that "the determination of the ordinary meaning cannot be done in the abstract, only in the context of the treaty and in the light of its object and purpose." The NPT, intentionally or accidentally, as a matter of strict treaty interpretation, would, on balance, permit this view of Article II.

It does seem eminently reasonable to posit that NPT NNWS should not possess nuclear weapons, but that was from the perspective of 1968. Given the desire for universality, is it better to be less "pure" about the Treaty and more realistic? Which is now more important-being doctrinaire or flexible? There are really only two paths ahead-continuing stalemate on the issue of the Final Four and their continued non-adherence to the NPT or negotiations that consider creative solutions to solve this vexing problem. Once the political will exists to do this, the legal path is clear. On balance, bringing the Final Four into the NPT would do far more good than harm, although this is not an argument for universality at any price.

Another example of ambiguity in the NPT is whether, for example, South Africa, having joined the NPT as a NNWS, but with nuclear weapons expertise, would be constrained by the following NPT language pertaining to NWS: "and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices." While one might argue that for South Africa to assist a non-NPT NNWS, such as Cuba before its accession, in building nuclear weapons, might violate the object and purpose of the NPT, it surely does not violate its letter, for that prohibition simply does not exist.

This is a highly significant issue. So long as "the State seeking or receiving the assistance is not a Party to the [NPT,]" there is nothing to prohibit a NNWS from furnishing any sort of assistance. But both the U.S. and Soviet Union were aware of this loophole and each refused to amend Article II to close it. They reasoned that assistance from a NNWS state to a NNWS non-party "would be regarded as a violation of the Treaty." Since the Article I prohibition on assisting other states only applies to the NWS, how is this to be viewed now? Would the Final Four, upon accession to the NPT, be bound by the Article I prohibition on such assistance, even though they would not
be NWS? The NPT prohibits only NWS from transferring nuclear weapons and technologies. The outdated presumption is that only NWS have such materials and technologies to transfer. It would seem that this would be an appropriate aspect of an agreement with the other NPT states.

The Final Four should agree, as they might agree to nuclear disarmament in a time-bound framework, not to assist other non-NPT parties or each other in the production of nuclear weapons. Pakistan has clearly made significant profits from providing nuclear assistance to other states. By foreswearing such conduct, they would be giving up a source of income. Furthermore, all NNWS which have acquired nuclear weapons knowledge should agree not to share this knowledge with any other state, or non-state entity, meaning NPT NWS, NNWS, non-NPT members, and terrorist groups.

D. Option Four: Amend the NPT to Create a Third Class of Member State

This option is problematic, since, like option two, it would require an amendment to the NPT, but it is also worthy of consideration. The NPT could be amended to take into account the special situations of the Final Four. A new class of NPT state would be created, by amendment, to accommodate the Final Four. The Final Four could be named "Threshold States," "De Facto Nuclear Weapon States," or some other suitable moniker. Such an option would depend once again on the desire of all NPT member states to attain universality, thus providing the impetus to devise a means to bring them into the NPT ambit.

The amendment could state that "there shall be a new class of NPT member state called De Facto Nuclear Weapon States (DNWS), which shall be defined as a state which manufactured or exploded a nuclear weapon or other nuclear explosive device between January 2, 1967 and December 31, 2003."

Politically, as a quid pro quo, and as in options two and three, other NNWS states parties to the NPT would likely demand significant legally binding commitments from these states in order to obtain their concurrence to an NPT amendment. The Final Four might respond by noting that they are already making a significant commitment by joining the NPT and that they should not have to do more. Other examples of what NPT states parties might seek could include a commitment that the Final Four would place all nuclear weapons and facilities under modified safeguards; a commitment to sign and ratify the Additional Protocol; and a pledge to abstain from the production of any new nuclear weapons and/or fissile material.

Each of the Final Four has different concerns and is perceived differently by NPT states parties. North Korea is widely viewed as a "rogue" state, and recent reporting concludes that North Korea now has at least eight nuclear weapons. North Korea has several options at this time. James Goodby writes that the state could: negotiate away its nuclear weapons and programs; retain its current ambiguous status; or move ahead to full production and testing. The last of Goodby’s options is precisely what all NPT states parties wish to avoid. The more likely this course of conduct appears, paradoxically, the more likely it is that NPT states parties may display the flexibility required for effective negotiations.

India and Pakistan, conversely, having already declared their nuclear weapon capability by testing nuclear devices in 1998, might wish to be treated differently than North Korea. They are not perceived as outlaw states like North Korea and have not been branded members of the "Axis of Evil" by the U.S. Both states enjoy relatively productive relations with the U.S. But surprisingly enough, since they each developed nuclear weapons principally to defend against each other, the UN and IAEA are well-positioned to assist in negotiations of a peace treaty between the two states, which could possibly be tied to NPT membership.

Israel, having consistently refused to confirm or deny the existence of its nuclear weapons program, may be the least likely to accede. Israel would probably not wish to grant access to sites, relinquish weapons, or place fissile material for weapons under safeguards. But even Israel might agree if it were tied to a genuine peace with its Arab neighbors.

An amendment of this sort would not seem worthwhile without the participation of all Final Four states.

E. Option Five: Separate Treaties/Agreements Outside the NPT
The Final Four and the NPT NWS could conceivably negotiate a new plurilateral instrument among the nine states which would essentially bring the Final Four within the NPT ambit by obligating those states to fulfill duties that NPT states must perform in large measure, while not technically acceding to the NPT.

Another option would be bilateral treaties between each of the Final Four and the IAEA which would accomplish approximately the same objectives. The clear advantage of each of these options is that it would not require amending the NPT or the resulting protracted negotiations requiring the consensus of all NPT states parties.

For example, these states would agree to observe all applicable articles of the NPT. Most importantly, they would take on the Article I obligations not to transfer to "any recipient whatsoever nuclear weapons or other nuclear explosive devices." n168 [*453]

Option five is viewed as the most realistic by two recent commentators. Echoing the view that amending the NPT to admit India, Israel, and Pakistan as NWS is a "political impossibility," the authors claim that none of those states can be expected to give up their nuclear weapons to be a NNWS party to the Treaty. n169 Therefore, the authors propose "a form of associate membership under a separate, freestanding agreement or protocol." n170

Some might argue that if the Final Four were not actually NPT states parties, true universality would not be attained. Technically, they would be correct. But as a practical matter, a legally binding treaty commitment, which is consistent with the object and purpose of the NPT, would exist. The Final Four would have a legal obligation to nuclear disarmament.

A less palatable but potentially workable solution would be non-legally binding agreements that would at least be a step in the right direction. For example, some have called for the G-8 "Global Partnership" Against the Spread of Weapons and Materials of Mass Destruction to be expanded to include Pakistan, India, and Israel. n171

The Carnegie Endowment for International Peace has recently proposed a strategy for "universal compliance" where all nations play a role regardless of whether they have signed the NPT. n172

Under the universal compliance strategy, the U.S. would stop demanding that India, Israel, and Pakistan give up their nuclear weapons and join the NPT as non-nuclear weapon states. Instead, the United States would lead a diplomatic initiative to persuade the three states to commit themselves politically to accepting the nonproliferation obligations accepted by China, France, Russia, the United Kingdom, and the United States. n173

Since this option is not technically within the ambit of the NPT, any of the Final Four willing to enter into such agreements would assist the nuclear non-proliferation regime.

F. Which Option to Pursue?

The anticipated criticism of Options two through four is that NPT states parties, including those who may have or are contemplating nuclear weapons [*454]programs, might feel cheated at seeing others who remained outside the NPT regime now being "rewarded" with the lawful possession of nuclear weapons. n174 For example, Iran, recently shown to have been cheating on its NPT obligations, might well wish to be included in this group. Gary Milhollin and Valerie Lincy n175 view Iran's current options as follows:

First, Iran could continue its policy of deception and concealment, which it has been following for the past two decades. Second, Iran could bring itself back into compliance with the NPT and give up its nuclear ambitions. Third, and somewhat paradoxically, Iran could bring itself into compliance with the NPT and still, thanks to loopholes in the treaty, try to develop nuclear weapons. n176
If Iran did withdraw from the NPT, these negotiations could potentially proceed as the "Final Five." But Iran is also currently in the "Axis of Evil," n177 which presents other complications.

All things considered, option three offers the best chance of success. It does not require NPT amendment, which the NWS will view as essential for their support. The risks of amendment are simply too great. With serious negotiations, the end result might be that the Final Four would join the NPT as NNWS and, ultimately, although it might take many years, be free of nuclear weapons, assuming of course, that they would do it at all. If they did accede to the NPT, however, and made the concessions necessary to gain the concurrence of the NPT states parties, this would be a major breakthrough.

III. The Views of U.S. Arms Control Ambassadors

Interviews were conducted to provide a context and evaluation of the above proposals by experienced diplomats intimately familiar with the NPT and its many permutations, both political and legal. Their views are vital in considering how the options would fare in the NPT arena. [*455]

In an interview with Ambassador Robert Grey, former U.S. Representative to the Conference on Disarmament, Ambassador Grey stated that he believes that if there was the "political will" among NPT states parties to bring the Final Four into the NPT, then it could be accomplished, even if it required an amendment. n178 If, on the other hand, the political will was not present, if anything out of the ordinary were required for these states to accede, such as amending the NPT, or even radically reinterpreting the NPT as is required by Option Three, then it simply could not happen. n179

Ambassador Grey also believes that the NPT is in a great deal of trouble right now. He cited the examples discussed earlier and particularly noted widespread dissatisfaction with the pace of nuclear disarmament by the NWS. n180 If that is indeed the case, from a U.S. perspective, it could not be a better time for the NPT to focus primarily on universality instead of Article VI concerns. n181

Ambassador Grey views option three as promising. n182 If the Final Four would agree to take on all of the obligations of the NPT NWS, to include nuclear disarmament and accept all other NPT related obligations, such as no nuclear testing and no production of fissile material, then many NPT states parties might find this attractive enough that their political will would materialize. n183 He saw the viability of option three principally in that it would avoid the need for amendment. n184

But in an interview with Ambassador Norman Wulf, formerly the President's Special Representative for Nuclear Non-Proliferation and U.S. Ambassador to the 2000 NPT Review Conference, he indicated that in his view it could be worse to have these nations in the NPT under any circumstances other than NNWS in the traditional sense. n185 He questioned what would really be gained if they acceded and retained their nuclear weapons. n186 India and Pakistan, for example, already have some safeguarded nuclear facilities, as members of the IAEA. The IAEA, therefore, already inspects some of their nuclear programs for peaceful purposes, but they do not inspect their weapons programs. NPT Article III only requires that peaceful [*456] nuclear activities be safeguarded, so it would provide no greater access for IAEA inspectors.

Ambassador Wulf also noted that the basic assumption of the NPT has been that if it were opened up to amendment, it would be very difficult to maintain the two current classes of member states, and that nuclear disarmament in a time-bound framework would be a very real possibility for the current NWS. n187 In his view, the most likely result would be to abolish the distinction between NWS and NNWS, thus eliminating the discriminatory aspect of the Treaty. n188 All NPT states would become NNWS under this scenario, with the current NWS given, for example, a stated number of five years to attain complete nuclear disarmament.

When reminded that, as a legal matter, such amendment to the NPT would require U.S. concurrence pursuant to NPT Article VIII (2), which requires the votes of all NPT NWS for any amendment, Ambassador Wulf agreed, but said that, politically, we have no such protection. n189 Rather, he argued, the U.S. would be presented with a counter-proposal that it would not be prepared to accept, and thus there would be no amendment. n190 He explained that we would be
presented with an option that we would not be prepared to accept and thus any amendment we sought would be lost.

Ambassador Wulf agreed with the author's interpretation of Article II. Given the NPT lack of specificity in defining NNWS, option three arguably might be legally available. Indeed, this would be legally permissible. Given that this is the practice of states parties, which is a means of treaty interpretation, he did not believe that most states would decline to interpret Article II this way. Practice has been, in the cases of South Africa, Belarus, Kazakhstan, and Ukraine, that in order to accede to the NPT as NNWS, those states either dismantled their nuclear weapons or, in the case of the latter[^457], returned them to Russia. Ambassador Wulf also cited language in the 2000 Review Conference Final Document that very explicitly states that the only way India and Pakistan can become parties to the NPT is by dismantling their nuclear weapons and joining as NNWS.

Given the views of Ambassadors Grey and Wulf, which diverge in some respects but essentially arrive at the same conclusions, the issue is demonstrably realistic and could therefore be resolved—if the political will existed—with option three or some variant thereof. This would not necessarily be easy to accomplish.

IV. The Final Four and the Other Provisions of the NPT

The balance of the NPT is far less problematic for the Final Four. The Final Four could observe NPT Article III, requiring them to accept IAEA safeguards on all aspects of their peaceful nuclear programs to ensure no diversion of nuclear material to the pursuit of additional weapons. Specific terms of these safeguards would have to be negotiated, but one can imagine a suitable agreement. They could agree not to provide source or special fissionable material to other nations, and, as a sweetener, might even agree to cease all production of fissile material for weapons.

The Final Four should also agree to sign and ratify the IAEA Additional Protocol, thus granting the IAEA the means to conduct intrusive inspections if there were suspicions that these nations had reneged on their promises not to produce additional fissile material and/or nuclear weapons. They should certainly proceed on course under Article IV, using nuclear power for peaceful purposes, as all NPT states may do. Article VI, which obliges NWS to work towards nuclear disarmament, would also constrain the Final Four.

The Final Four should work towards nuclear disarmament by declaring their current holdings, perhaps by agreeing to destroy several nuclear weapons upon accession, and agreeing to the destruction of the others in a time frame contingent upon the resolution of other matters. For example, India and Pakistan should both agree to complete nuclear disarmament upon the signing of a peace treaty between the two nations, or initially just resolution of the disputed Kashmir region—a perennial flashpoint. Similarly, Israel could[^458] agree to destroy several of its weapons upon accession to the NPT, with complete nuclear disarmament to follow when it concludes peace treaties with its Arab neighbors. That would then leave the next step in the hands of the Arab states that would have a real incentive for peace.

North Korea could agree to nuclear disarmament upon attaining a peace treaty with South Korea, although North Korea may claim that fear of a U.S. attack is its true justification for nuclear weapons. While these contingencies do not amount to "nuclear disarmament in a time-bound framework" (which the NAM has so often argued for the NWS to observe), once the specific contingencies have been met, thus removing the stated purposes for the development and maintenance of nuclear weapons, complete nuclear disarmament would have to occur within a stated period of time, such as ten years. That entire process, with the significant contingencies involved, could take twenty-five to fifty years or more. In fact, contingencies such as peace between Israel and the Arab states might well play out as an indefinite commitment, as Article VI now appears to be to many NNWS.

The remainder of the NPT, including Articles VII through XI, is primarily administrative, dealing with regional agreements, amendments and ratification/accession. There is no issue with the Final Four's ability to comply with those aspects of the NPT.

Conclusion
The approach that may attain universality will, of necessity, ultimately be one of consummate realism. That may well mean that only options one or five would be feasible. But to the extent that one argues that NNWS means "nuclear weapon free," and that the Final Four may not join the NPT until they relinquish their nuclear weapons, one ensures that the NPT is doomed to eternal stalemate with the Final Four outside the NPT. But the Final Four are important states in the nuclear weapons arena, and leaving them outside the NPT trivializes it to a significant extent.

Rational statesmen, if asked, will almost always reply that it is preferable to have a state of concern within a regime, thus ensuring at least a modicum of restraint, even if not playing completely by the rules, than to have it unfettered by any legal restraint, as is the current status quo. Realpolitik means hard choices rather than no choices. But in the NPT context, given [459] Ambassador Wulf's views (and he is clearly a rational statesman), there are no easy answers to this dilemma.

What really is important to NPT states is not universality itself, but gaining some international control over the nuclear weapons programs of the Final Four. This could mean a ban on unsafeguarded production of fissile material. That alone would place a cap on their nuclear weapons programs. Such controls could also include an obligation not to assist other state's nuclear programs, except for peaceful purposes.

If realism moves to the forefront, then the precise language of the NPT and the intent of the drafters becomes far less important. NPT states parties could simply acknowledge that the NPT did not contemplate current circumstances and may then act in a manner that will provide NPT states with the assurances they require. Other NPT states will see that with the Final Four in the NPT, even with a limited number of nuclear weapons, their national security would improve and the likelihood of nuclear weapon use would decrease. Realistically, then, how can NNWS argue that they would be worse off with the Final Four in the NPT-especially if they were to observe the NPT and all NPT related commitments than they are now? Universality of the NPT has been a longstanding goal of the regime for good reason. Now is the time to make aspirations a reality-or at a minimum, to give those aspirations a fighting chance.

FOOTNOTES:

n1 The NPT is only part, albeit perhaps the most significant part, of the broader "nuclear non-proliferation regime." The regime encompasses many other bilateral and multilateral agreements along with regional and individual state measures. Such measures include the Strategic Arms Reduction Treaties (START) I, II and III, the Comprehensive Test Ban Treaty, the Nuclear Suppliers Group, Zangger Committee, Nuclear Weapon Free Zones, national export controls, and other measures designed to prevent nuclear proliferation.

n2 Miles Pomper & Paul Kerr, Curbing Nuclear Proliferation: An Interview with Mohamed ElBaradei, ARMS CONTROL TODAY, Nov. 2003, at 6.


n4 Universality in the NPT context means all states acceding to the NPT. Non-adherence is the converse of that term used when discussing the concept of universality and the need to bring non-NPT members into the regime. The terms are essentially interchangeable, expressing two facets of the same problem.
n5 The author coined the term "Final Four" for use in the NPT context. It refers to India, Israel, Pakistan, and North Korea—the only states which have not acceded to the NPT. North Korea acceded but has since withdrawn.

n6 Much controversy surrounded North Korea's withdrawal from the NPT on January 10, 2003. In June, 1993, North Korea gave notice of withdrawal, which, pursuant to NPT, supra note 3, art. X, requires three months notice. After notice of withdrawal, it rescinded that action on the 89th day. The net effect was to keep it in the NPT at that time, but, in North Korea's view, allow it to withdraw with one day notice at any time in the future. Indeed, in its recent formal withdrawal from the NPT, North Korea claimed that its withdrawal was effective with one day notice since it had already allowed the other 89 days to lapse in 1993. That is surely a mistaken interpretation of the treaty. Article X requires notice of the extraordinary events related to the subject matter of the treaty it regards as having jeopardized its supreme interests. Whatever those reasons were in 1993, they must have changed a decade later, given the fluid nature of national security issues. Therefore, the three month withdrawal period should have begun to run anew. In the author's view, North Korea's withdrawal with one day notice was ineffective. See Text of North Korea's Statement on NPT Withdrawal, KCNA NEWS AGENCY, Jan. 10, 2003, at http://www.cns.miis.edu/research/korea/nptstate.htm.

n7 Universality of the NPT is not a new concept. In the NPT negotiations, Switzerland noted that "for the treaty to fulfill its aim, it should come near to universality." United Nations, Conference of the Eighteen Nation Committee on Disarmament, Working Paper submitted by Switzerland, U.N. Doc. ENDC/204 (1967). Now that the NPT is nearly universal, we see that only literal universality will suffice.

n8 NPT Article II is quoted in full later in this article. See infra Part II.C.1. Article II prohibits the transfer, manufacture, and acquisition of nuclear weapons, but does not prohibit the possession of such weapons. NPT, supra note 3, art. II.

n9 In other words, if the Final Four pay no apparent price for their possession of nuclear weapons, this encourages NPT NNWS to abandon the NPT and seek weapons for themselves.

n10 Review conferences are held every five years. The 2005 NPT Review Conference was held in May.

n11 Krateros Ioannou, Non-Proliferation Treaty, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 625 (1997).


n13 But Mohamed ElBaradei believes that:

if we continue on the road we are on right now, we will continue to have more countries acquiring nuclear weapons. The technology is becoming more available, the know-how is becoming more available, and if we reach the point [at
which] we will fulfill the prediction of President Kennedy that we will have 15 or 20 nuclear weapon states, I think we are then preparing a recipe for our own self-destruction.


n14 Bunn, supra note 12, at 9. This was, of course, in addition to the five states already in possession of nuclear weapons.

n15 NPT, supra note 3, art. X(2).

n16 Many nations disagreed about the correct course to take in this regard. For example, during the NPT negotiations at the Eighteen Nation Conference on Disarmament, Nigeria submitted a working paper which would have given the treaty "unlimited duration," but would have allowed withdrawal from the treaty not only based upon the "supreme interests" clause, but also if "the aims of the Treaty are being frustrated." United Nations, Conference of the Eighteen Nation Committee on Disarmament, Working Paper submitted by Nigeria, U.N. Doc. ENDC/202 (1967).


n18 Bunn, supra note 12, at 8. Bunn catalogs a host of problems including Iraq's hidden nuclear program, the issues with North Korea, Iran's failure to disclose experiments with plutonium separation and uranium enrichment, Brazilian and Argentinian experimentation with enrichment and reprocessing, and more. Id.; see also Sharon Riggle, Could the Non-Proliferation Treaty Collapse? The Uncertain Road Ahead, DISARMAMENT F., 2000:1, at 29, available at http://www.unidir.ch/bdd/fiche-article.php?refarticle=175. Riggle argues principally for a more convincing demonstration by the NWS of their commitment to Article VI. Id.

n19 NPT 2000 FINAL DOCUMENT, available at http://disarmament2.un.org/wmd/npt/2000FD.pdf [hereinafter NPT 2000 RevCon]. NPT Article VIII (3) basically portends review conferences every five years "in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized." NPT, supra note 3, art. VIII(3).

n20 The Cold War between the United States and Soviet Union stretched from 1945-1989.


n24 Id. Cuba acceded to the NPT in 2002 and is the newest member. See MONTEREY INSTITUTE OF INTERNATIONAL STUDIES, CUBA [hereinafter CUBA], at http://cns.miis.edu/pubs/week/020916s.htm.

n25 A final determination of North Korea's status has not yet been made regarding the circumstances of its withdrawal from the NPT. Miles A. Pomper, The Atomic Dilemma, ARMS CONTROL TODAY, Dec. 2003, at 3. It is not clear exactly when such a final determination would be made, or by whom, but presumably it would occur at an NPT RevCon or in the UN Security Council.

n26 See James Schlesinger, The Demise of Arms Control?, THE WASH. Q., Spring 2000, at 179-82. According to Schlesinger,

A Luxembourg or even a Germany may have no inclination to exploit an arms control agreement as a cover for cheating, but others will have that simple objective. A general agreement imposes no restraint on a North Korea or an Iraq. They will be constrained by direct pressure or by direct action, if they are to be constrained at all. For rather different reasons, an India or an Israel is not going to be constrained by a general agreement. To believe otherwise is to embrace the quixotic notions of the Kellogg-Briand Pact.

Id. at 180. The Kellogg-Briand Pact was the post-World War I treaty which purported to outlaw war.

n27 Certain states that clearly operate outside of international norms, such as North Korea, may only sign such treaties for any gain it may offer.


n29 Id. The IAEA inspection role is to verify compliance with the NPT. Belcher, supra note 13, at 29.

n30 Krauthammer, supra note 28, at 25.

n31 Id.
n32 Id.


n35 Of course, if Pakistan is to be believed, then A.Q. Khan, the Pakistani nuclear scientist who provided nuclear weapons secrets to other states, was in control and not the state. Pakistan should have maintained control.

n36 Peter Slevin, Brazil Shielding Uranium Facility, WASH. POST, Apr. 4, 2004, at A1.


n38 Pomper & Kerr, supra note 2, at 5. Here, ElBaradei suggests that a major problem with the NPT is that many countries are allowed to possess

the full gamut of fuel-cycle technologies, and that really is the problem. The concern is not that a country has a power reactor or a research reactor. The concern is that the country might have a reprocessing capability or an enrichment capability, which would enable it to develop nuclear weapon-usable material.

Id. Reprocessing produces plutonium and enrichment produces highly enriched uranium-the essential components of nuclear weapons.

n39 Miller & Scheinman, supra note 22, at 19. Article X (1) allows a state to withdraw from the NPT "if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country." NPT, supra note 3, art. X(1).

n41 NPT article VI is the most contentious article in the NPT. It states that "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." NPT, supra note 3, art. VI.

n42 Press reports indicate that Khan's network was vast and unparalleled. See, e.g., Stephen Fidler & Victoria Burnett, The Nuclear Entrepreneur: Khan's Network Shows Terrorists Have a Lot More Options than We Thought, FIN. TIMES, Apr. 7, 2004, at 13. "It was a multinational enterprise with a Pakistani headquarters that outsourced much of its manufacturing to plants round sic the world. His loosely linked black market organisation manufactured and delivered, under conditions of high secrecy, products and services so complicated and sensitive that only governments had previously produced them." Id.


n44 This is not to minimize the importance of solving existing problems between current NPT states parties. This article simply selects universality as one of the most salient problems and suggests ways of tackling it.

n45 The UN Security Council, under Article 39, has the authority to determine, on behalf of the UN, if there has been a "threat to the peace, breach of the peace, or act of aggression"; its decisions are binding on the member states. See PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 46 (5th ed. 2001).

n46 As noted earlier, a very recent criticism of the NPT has been that this "bargain" has allowed states such as Iran, Iraq, and North Korea to pursue nuclear weapons programs while remaining NPT members in good standing. This has led the Director General of the IAEA to call for modifications to the NPT to avoid this scenario. See Pomper & Kerr, supra note 2.

n47 See Ioannou, supra note 11, at 625.

n48 If a state had no nuclear weapons upon accession to the NPT, and no nuclear programs, NPT accession has no effect on it at all.

n49 Preparatory Committee (PrepCom) meetings are held several times between RevCons.

n50 See NPT 1995 RevCon, supra note 17.
n51 The author attended the 2000 NPT Review Conference as a member of the United States delegation. He was the representative of the Joint Chiefs of Staff. He served at the Pentagon for four years as the Joint Staff nuclear non-proliferation planner.

n52 As a general rule, any documents produced by a RevCon are indicative of a successful conference, since such documents require consensus, which is difficult to obtain given the many NPT states parties and their varying views.


n54 See id.

n55 The CD is the single forum for the multilateral negotiation of arms control agreements. It is located in Geneva, Switzerland.

n56 A FMCT would obligate signatories to produce no (or no more) fissile material for nuclear weapons, although it would likely exempt existing stocks. Such an agreement would be negotiated at the CD.

n57 See NPT 2000 RevCon, supra note 19.

n58 Declaration of the Ministers of the New Agenda Coalition (Sept. 23, 2003), available at http://www.wagingpeace.org/articles/2003/09/23ministerdeclaration.htm. The group is active in the NPT and seeks more progress in the nuclear disarmament area by the NWS.

n59 Many commentators have also considered whether the U.S. is in compliance with its Article VI obligations. See generally David A. Koplow, Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?, 1993 WIS. L. REV. 301.

n60 The author believes, based on attending several NPT PrepComs and the NPT 2000 RevCon, that many of the more vocal NNWS will not be happy with the NWS, the U.S. in particular, until the last nuclear weapon is destroyed. In this regard, one might view arms control as the only way the weak can effectively disarm the strong.

n61 No commentators ever seem to note that in spite of the U.S. non-ratification of the CTBT, the U.S. is still in full compliance with the letter and spirit of the CTBT, even though it has not yet entered into force. In fact, the U.S. spends
millions of dollars annually on its Stockpile Stewardship program to ensure that the U.S. will not need to resume nuclear weapons testing.


n63 Id. He means that both states are doing what is best for them, with minimal obligation and no enforcement provisions.

n64 SORT, a treaty between the U.S. and the Russian Federation, reduces strategic nuclear warheads to a level of 1700-2200 by December 31, 2012. Strategic Offensive Reductions Treaty, May 24, 2002, U.S.-Russ. Federation, S. TREATY DOC. NO. 107-8. Typical objections to the treaty include the fact that it "does not reduce nuclear forces . . . but merely requires a change in their operational status[,] . . . allowing an unlimited number of warheads [to remain] in storage," requires no destruction of any weapons or warheads, and has no verification mechanism. See, e.g., UNION OF CONCERNED SCIENTISTS, GLOBAL SECURITY, BACKGROUNDER, THE MOSCOW TREATY, at http://www.ucsusa.org/globalsecurity/ nuclearweapons/page.cfm?ageID=1134.


n66 Id.

n67 This statement, made in 2000, proved to be both prescient and a significant understatement.

n68 Actually, not quite the entire world-for if it was, there would be no need for the main point of this article, which is bringing the Final Four into the NPT.

n69 Graham Jr., supra note 65.

n70 FMCT negotiations began briefly at the Conference on Disarmament (CD) in 1998, but no substantive work was accomplished. Since the CD must agree to a new program of work when it begins each year, it has never again been able to reach consensus on FMCT negotiations.

n71 Lodgaard, supra note 62; see also CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD 155-250 (2000). The Advisory Opinion of the International Court of Justice leaves few circumstances where the use of nuclear weapons would likely be considered
lawful, but the legality of nuclear weapons use is an issue for another day. While a norm of non-use is not the same as a norm of non-possession, the NPT has made non-possession a genuine norm.

n72 Lodgaard, supra note 62.

n73 Rhianna Tyson, The NPT Under Siege (2003), at http://www.reachingcriticalwill.org/legal/npt/NGOpres2003/Intro.htm. The paper also criticizes the U.S. for "a stunning repudiation of the principle of irreversibility" Los Alamos national labs recently manufactured the first nuclear weapons pit (plutonium trigger) in fourteen years and a failure to diminish the role of nuclear weapons in national security policies. Id.


n75 The administration would surely be concerned about the damage done to the NPT, since if four responsible NNWS elected to withdraw from the NPT and acquire nuclear weapons, the treaty would appear to be irrelevant. The success of the NPT itself, though, is a separate issue from a consideration of precisely which states, if in possession of nuclear weapons, would be a threat to U.S. national security. Regardless, we must be concerned about keeping the current NPT NNWS within the NPT framework.

n76 There are some concerns about Pakistan—even though it is an ally—because it is not a democracy. These concerns center on the status of nuclear weapons in the event of a change in government.

n77 PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 691 (2002). This is not to say that the U.S. fails to observe NPT Article VI, but rather that a slower pace of nuclear disarmament is rational, and not hypocritical.

n78 See infra note 92.

n79 Occasional reports have surfaced indicating that North Korea may be willing to peacefully resolve their nuclear weapons issues. See, e.g., Selig Harrison, Inside North Korea: Leaders Open to Ending Nuclear Crisis, FIN. TIMES, May 4, 2004, at 9.

n80 Slaughter is a recent past President of the American Society of International Law and a well-known scholar in the field of international law.
n81 Admittedly, by that criteria, China, Pakistan, and Russia could all make the list.

n82 Lee Feinstein & Anne-Marie Slaughter, A Duty To Prevent, FOREIGN AFF., Jan./Feb. 2004, at 136, 137.

n83 Id. at 136.

n84 Slaughter and Feinstein also note that the NPT has not prevented a small group of states, operating within the scope of the NPT, from embarking on nuclear weapons programs.


n86 Johnson, supra note 74.

n87 Id.

n88 Id.

n89 Currently, the nuclear danger from Iraq has been substantially reduced, if not eliminated.

n90 The P-5 are the five permanent members of the UN Security Council who also happen to be the five NWS.

n91 Johnson, supra note 74.

n92 NPT, supra note 3, art. IX (3).

n93 India also tested a "peaceful nuclear explosive" in 1974. In 1968, during the NPT negotiations, Japan claimed that once "the distinction between military and peaceful nuclear explosive devices was rendered possible," that the treaty restrictions on such devices should be lifted. 1968 U.N.Y.B. 11, U.N. Sales No. E. 70.I.1. Sweden even proposed an international body to monitor peaceful nuclear explosions. Id. at 12. Peaceful nuclear explosions would not be looked upon with favor today. Article V of the NPT states, "now effectively obsolete, permits NNWS access to NWS research
and development on the benefits of explosions conducted for peaceful purposes . . . . It is now moot due to the restriction on all nuclear explosions mandated by the (CTBT) to which all five NWS are signatories. ARMS CONTROL ASSN, THE NUCLEAR NONPROLIFERATION TREATY AT A GLANCE (2005), at http://www.armscontrol.org/pdf/npt.pdf.

n94 The term "Threshold States" has been used in the NPT context to refer to India, Israel and Pakistan prior to India and Pakistan's nuclear weapon testing in 1998. See, e.g., M. Karem, Threshold States and Regional Non-proliferation-Middle East, in NUCLEAR DETERRANCE: PROBLEMS & PERSPECTIVES IN THE 1990'S 86-88 (1993).

n95 In the early 1990s, the term "threshold" was inaccurate. More precisely, India, Israel and Pakistan were "definite but undeclared" nuclear weapon possessors.

n96 The U.S. reached an understanding with Israel in 1969. The U.S. agreed to accept the Israeli nuclear program while Israel pledged not to test nuclear weapons or to otherwise publicly announce its nuclear capabilities. AVNER COHEN, ISRAEL AND THE BOMB 396-97 (1998).

n97 NPT, supra note 3, art. IX (3).

n98 The discriminatory aspect of the NPT was apparent to all parties in the negotiations. In the treaty drafting negotiations, Switzerland noted that "the Treaty will establish a lasting juridical discrimination between States according to whether they possess nuclear weapons or not. To consent to this would represent for the non-nuclear-weapon States a heavy sacrifice which is inconceivable unless something is given in return." United Nations, Conference of the Eighteen Nation Committee on Disarmament, Working Paper submitted by Switzerland, U.N. Doc. ENDC/204 (1967).

n99 See CUBA, supra note 24 (statement at UN by Felipe Roque, Sept. 14, 2002).

n100 See id.


n102 A Negative Security Assurance, from the U.S. perspective, is a guarantee not to use nuclear weapons against NNWS parties to the NPT except in the case of an invasion or other attack on the U.S., its territories, armed forces, allies or on a state toward which it has a security commitment, carried out or sustained by such NNWS in association with a NWS. Philipp C. Bleek, Bush Administration Reaffirms Negative Security Assurances, ARMS CONTROL TODAY, Mar. 2002, at 23. NSAs are not noted in the NPT, but the NWS have provided such assurances to NPT states parties.
n103 See NPT, supra note 3, art. IV. Article IV contains the right of member states to pursue peaceful uses of nuclear energy.

n104 It should be noted that, for all intents and purposes, this is currently the only option under consideration—it is not a new idea.

n105 South Africa dismantled its six nuclear weapons and signed the NPT as a NNWS. Roger C. Molander & Peter A. Wilson, On Dealing with the Prospect of Nuclear Chaos, THE WASH. Q., Summer 1994, at 16.

n106 "For India, Israel, and Pakistan, all known to possess or suspected of having nuclear weapons, joining the treaty as NNWS would require that they dismantle their nuclear weapons and place their nuclear materials under international safeguards. South Africa followed this path to accession in 1991." ARMS CONTROL ASS'N, supra note 93.

n107 See NPT 2000 Rev Con, supra note 19.

n108 The U.S. use of "Little Boy" and "Fat Man" on Hiroshima and Nagasaki in World War II (1945) remains the only military uses of nuclear weapons in history.

n109 Some might argue that if the Final Four keep their nuclear weapons, it is not "true" universality.


n111 The Final Four are not CTBT signatories.

n112 It is a bit tricky having the IAEA work with nuclear weapons since most of its staff come from NNWS. Therefore, allowing them access to nuclear weapons technology arguably violates NPT Article II. See NPT, supra note 3, art. II. The IAEA Statute, Article VIII (D), notes that, subject to the consideration of hiring staff, based upon technical competence and integrity, "due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible." Statute of the International Atomic Energy Agency, Oct. 26, 1956, art. VII (D), 8 U.S.T. 1093, 276 U.N.T.S. 3, available at http://www.iaea.org. The IAEA Web site notes that IAEA Secretariat comprises 2,200 people "from more than 90 countries." Since there are only five NWS, one may logically conclude that most of the IAEA staff are from NNWS. IAEA, IAEA Staff: Strength Through Diversity, at http://www.iaea.or.at/About/staff.htm.
n113 The NPT states parties, in practice, have tried to always operate by consensus, even where voting is authorized. Given the high stakes involved with this issue, which could lead some states such as Brazil, Japan, South Africa or Mexico to withdraw from the NPT, the author believes that every effort would be made to attain consensus.

n114 The IAEA Board of Governors comprises thirty-five IAEA member states which are highly diverse, including Cuba, Denmark, India, Nigeria, Sudan and Vietnam. See IAEA, Policy Bodies: Board of Governors, at http://www.iaea.org/About/Policy/Board/index.htm.

n115 The NPT states parties traditionally operate by consensus. That approach would likely be necessary here regardless of the fact that the NPT does not require it. The risk to the NPT is that some states might view this approach as so unsatisfactory that they would threaten withdrawal from the NPT regardless of their intent to produce nuclear weapons or refrain from doing so. No state would likely want a result in which the NPT gained the membership of the Final Four, while causing many others, or even one other state to withdraw. Either way, the ultimate goal of universality would not be realized.

n116 Currently, the NWS have a legal obligation to pursue nuclear disarmament in NPT Article VI. No timetable, however, is attached to this commitment.

n117 Much recent diplomacy concerns ElBaradei’s idea of strengthening the nuclear non-proliferation regime. Some commentators have considered amending the NPT to arrive at “a new unambiguous NPT interpretation of what is acceptable, one that provides a wider safety margin between permitted uses and possible bomb application.” This means that it should be clearer to all precisely what conduct is acceptable and what is unacceptable. NPT Should Not be Amended, NUCLEAR WEAPONS & MATERIALS MONITOR, Apr. 5, 2004, at 7.

n118 There is no doubt that Iran has a significant nuclear program-and little doubt that it is seeking a nuclear weapon. See Bolton Says Iran is Developing a Clandestine Nuclear Weapon, at http://newdelhi.usembassy.gov/wwwwhpr0605b.html.

n119 Telegram from U.S. Department of State to All NATO Capitals with Info to U.S. Embassy Moscow and U.S. Mission Geneva (Jan. 21, 1967) (on file with the U.S. National Archives, College Park, MD. Declassification authority NNO 969000). The author thanks Joshua Haid for his research assistance in obtaining this information, and that in notes 122 and 124.

n120 Id. (emphasis added).

n121 Id.

n123 Id. (emphasis added).


n125 See NPT, supra note 3, art. II, art. IX(3).

n126 Id. art. VIII.

n127 That is one of several significant NPT ambiguities discussed in this article.

n128 NPT, supra note 3, art. II (emphasis added).

n129 Id.

n130 The language of the NPT is ambiguous regarding the definition of NNWS. It could be a NPT state that does not possess nuclear weapons, or it could be a non-NPT state that does not possess nuclear weapons. That issue is no longer relevant to the debate now that the only four states outside the NPT ambit have such weapons.

n131 See NPT, supra note 3, art. II.

n132 South Africa dismantled their nuclear weapons and placed their nuclear materials under international safeguards prior to accession in 1991. ARMS CONTROL ASS'N, supra note 93.

n133 NPT, supra note 3, art. II.
The author conducted a thorough, but not exhaustive, review of the travaux préparatoires and was unable to find any working papers which dealt specifically with the ambiguity in Article II.

Indeed, Article VI of the NPT is ambiguous. For example, what is the "treaty on general and complete disarmament under strict and effective international control" about? NPT, supra note 3, art. VI. Would that entail only conventional arms, or would it include chemical and biological munitions? Does such general and complete disarmament apply to the NNWS or only to the NWS? On the other hand, the concept of general and complete disarmament was discussed in the 1950s, and people in that era might have had a better understanding of what it meant.

Currently, IAEA safeguards apply only to peaceful nuclear programs.


Id., art. 31(1).

The meaning (but not precise translation) of this term is that treaties in force are binding upon the parties and must be performed by them in good faith.

The U.S. has not ratified the VCLT but generally observes it, as do most other nations.


VCLT, supra note 137, art. 32(b).

AUST, supra note 141, at 187.

VCLT, supra note 137, art. 31(3)(a).

Id.
n146 NPT 2000 Rev Con, supra note 19, at 18. The parties noted that India and Pakistan should also "strengthen their non-proliferation export control measures over technologies, material and equipment that can be used for the production of nuclear weapons and their delivery systems." Id. at 19. The agency referred to is the IAEA.

n147 AUST, supra note 141, at 298.

n148 Id.

n149 VCLT, supra note 137, art. 32(b).

n150 AUST, supra note 141, at 188 (emphasis omitted).

n151 The author found no mention of any of these options under consideration in the travaux preparatoires.

n152 VCLT, supra note 137, art. 31.

n153 AUST, supra note 141, at 188 (emphasis omitted).

n154 NPT 2000 RevCon, supra note 19, at 2. There is a curious bifurcation in this article in that NWS undertakes not to transfer nuclear weapons to "any recipient," while agreeing not to assist "any non-nuclear weapon State" to manufacture or acquire such devices. NNWS are a subset of "any recipient." Id.

n155 This is yet another valid reason for universality since if the recipient of the nuclear technology is an NPT NNWS, then receiving such assistance would constitute a violation of NPT Article II.


n157 Id. at 263.

n158 Id.
n159 NPT, supra note 3, art. I.

n160 Or perhaps only A.Q. Khan has made significant profits.

n161 The Protocol Additional to the Agreement between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America. The U.S. Senate gave its advice and consent to ratification in March, 2004. The President will ratify the Additional Protocol once legislation required to implement it is passed. For an excellent discussion of the Additional Protocol see Theodore Hirsch, The IAEA Additional Protocol, What It Is and Why It Matters, NONPROLIFERATION REV. 140 (FALL/WINTER 2004). In the wake of the 1991 Gulf War, which resulted in the discovery of Iraq's clandestine nuclear weapons program, the IAEA determined that its safeguards system was woefully inadequate, since Iraq was, up to that point, a NPT member like any other. Thus, the IAEA designed a Model Protocol, which each state would negotiate bilaterally with the IAEA as the additional protocol, thus augmenting its safeguards agreement. What is "additional" about it is that it allows unannounced inspections anywhere in the territory of NNWS where the IAEA has reason to suspect a nuclear weapon program exists, thus expanding the IAEA's verification authority. In the case of NWS, it would permit inspections at sites which the NWS have offered for access, to which the IAEA has no access rights under the existing safeguards agreements.

n162 This last commitment would equate to a willingness to enter into good faith negotiations on a Fissile Material Cutoff Treaty, currently stalled at the Conference on Disarmament.

n163 Glenn Kessler, N. Korea Nuclear Estimate to Rise; U.S. Report to Say Country Has at Least 8 Bombs, WASH. POST, Apr. 28, 2004, at A1. According to two officials involved in the preparation of the report on North Korean nuclear capabilities, a new intelligence consensus has emerged indicating that North Korea now has up to eight nuclear weapons. That is consistent with other reporting. See, e.g., Playing with Plutonium, ECONOMIST, Jan. 24, 2004, at 37. This article assumes that North Korea has at least one such weapon.


n165 See supra note 110.

n166 President George W. Bush branded North Korea, Iran, and Iraq members of an "axis of evil" in his State of the Union address in 2002. The White House, President Delivers State of the Union Address, at http://www.whitehouse.gov.

n167 The author does not wish to imply that peace would come easily to the subcontinent that has been bedeviled by conflict for the past half century. India and Pakistan have recently taken steps to move away from the brink, but a peace treaty would be a major accomplishment.
n168 NPT, supra note 3, art. I.


n170 Id.

n171 Sam Nunn & Michele Flournoy, A Test of Leadership on Sea Island, WASH. POST, June 8, 2004, at A23.

n172 See PERKOVICH ET AL., supra note 85, at 18.

n173 Id.

n174 Some might argue that "customary international law" and the prevalence of the NPT makes nuclear weapons illegal for these states to possess. The author disagrees. These states have not signed the NPT, and as such, have made no commitment not to seek or possess nuclear weapons. Therefore, they are free under international law to have them. In that sense, NPT member states should not view it as legitimizing their possession of nuclear weapons since it was already lawful and legitimate. Of course, slavery was once legal, but evolving customary international law made it illegal, even for states that never signed any treaties, but continued owning slaves. See also MOXLEY, JR., supra note 71 (arguing the case for the illegality of nuclear weapons).


n176 Id.

n177 See supra note 166.

n178 Interview with Ambassador Robert Grey (May 28, 2004).

n179 Id.
Telephone interview with Ambassador Norman Wulf (May 28, 2004).
n194 See supra part C.1.

n195 Id.


n197 NPT, supra note 3, art. IV.

n198 Id. art. VI.

n199 The disputed region of Kashmir, situated between India and Pakistan, has been a "flashpoint" between the nations for years, and is always referred to as such. See Kashmir N-flashpoint, say Indian Naval Former Chief, PAKISTAN TIMES, at http://www.pakistantimes.net/2005/03/26/Kashmir3.htm.

n200 North Korea makes this clear in its NPT Withdrawal Statement. See KCNA NEWS AGENCY, supra note 6.

n201 See NPT, supra note 3, art. VI.