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AMERICAN BAR ASSOCIATION
HOUSE OF DELEGATES

ADOPTED 8/6/2010

(REPORT & RECOMMENDATION OF THE SECTION OF INTERNATIONAL LAW)

RESOLVED, That the American Bar Association urges the United States to ratify the Comprehensive Nuclear Test Ban Treaty.

REPORT

Background on the Comprehensive Test Ban Treaty

This recommendation urges the United States to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT). It involves enhancing the application of the rule of law to the area of nuclear proliferation, U.S. fulfillment of commitments undertaken in previously ratified treaties, and is consistent with resolutions adopted by the House over many years. No issue could be more germane to the work of the House of Delegate and to the Legal Profession.

The CTBT is an international agreement designed to create a permanent, global, legally-binding and all-encompassing prohibition on any nuclear explosions. The CTBT would be the culmination of a sequence of test ban treaties, each of which has imposed partial constraints upon nuclear testing. These include the Limited Test Ban Treaty of 1963 (prohibiting nuclear explosions in the atmosphere, in outer space and under water – confining them to underground caverns); the Threshold Test Ban Treaty of 1974, the Peaceful Nuclear Explosions Treaty of 1976, and the 1990 Protocols to those two accords (which restricted the size of nuclear explosions, limiting them to 150 kilotons yield).

182 countries have signed the CTBT and 150 have ratified. Under its terms, the treaty will not enter into force until it has been ratified by 44 specified states, listed in Annex 2 to the treaty (essentially, all those states that participated in the treaty negotiations and have the capacity for developing nuclear power). Of those indispensable states, 41 have signed (excluding India, Pakistan and North Korea) and 35 have ratified. Notable among the ratifying states are Russia, France, the United Kingdom, and all the other members of NATO, except the United States. Countries that have signed but not ratified include the United States, China, Israel and Iran.

In order to secure the commitment of over 180 nations not to develop nuclear weapons the NPT contains a clear commitment to “pursue negotiations in good faith on effective measures” relating to nuclear disarmament and particularly to end nuclear weapons test explosions. Ending nuclear testing has been viewed by many states as a key stepping stone to control the spread of nuclear weapons since efforts to control nuclear weapons began. The Preamble to the Nuclear Non-Proliferation Treaty (NPT), which entered into force in 1970, noted in its preamble that the preamble to the Limited Test Ban Treaty expressed the intent “to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end.”

The NPT contained within its provisions an agreement that after twenty five years it would be reviewed and the parties would determine whether and for how long the Treaty would be extended indefinitely or for an additional fixed period or periods. This process, which of course included intense bargaining and negotiations, took place in 1995. The NPT parties reaffirmed their commitment to the indefinite extension of the Treaty and set out further steps for implementing its provisions in a set of “Principles and Objectives for Nuclear Non-Proliferation and Disarmament.” The “Principles and Objectives” document reaffirmed the nuclear weapon states’ NPT Article VI obligation under the Treaty and listed the Comprehensive Test Ban Treaty

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(CTBT) as first among measures “important in the full realization and effective implementation of Article VI.”¹

The CTBT was negotiated from 1994 to 1996 in the Conference on Disarmament, a United Nations-sponsored forum, and opened for signature on September 24th, 1996. President Clinton signed the treaty for the United States, and submitted it to the U.S. Senate for its advice and consent to ratification. In 1999, the United States Senate voted along partisan lines not to approve ratification of the CTBT. It is worth noting that Secretary of State Madeline Albright stated: “We simply do not need to test nuclear weapons to protect our security. On the other hand, would-be proliferators and modernizers must test if they are to develop the kind of advanced nuclear designs that are most threatening. *Thus, the CTBT would go far to lock in a technological status quo that is highly favorable to us.*”²

In 2000, all 187 NPT parties, including the United States, reiterated their commitment to progress on nuclear disarmament, agreeing to a set of “practical steps for the systematic and progressive efforts to implement article VI of the Treaty...” These steps, thirteen in all, included, once again, ratification of the CTBT. Section 15 of the Final Document of the 2000 Review Conference states in relevant part:

The Conference agrees on the following practical steps for the systematic and progressive efforts to implement Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4(c) of the 1995 Decision on "Principles and Objectives for Nuclear Non-Proliferation and Disarmament":

1. The importance and urgency of signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the [Comprehensive Nuclear Test Ban Treaty](#).
2. A [moratorium](#) on nuclear-weapon-test explosions or any other nuclear explosions pending entry into force of that Treaty.

At the recent UN Security Council Summit, the first Security Council session ever chaired by a U.S. President, The United States led in obtaining United Nations Security Council Resolution 1887, introduced by the United States and unanimously adopted on September 24, 2009, which

“*Calls upon* all States to refrain from conducting a nuclear test explosion and to sign and ratify the Comprehensive Nuclear Test Ban Treaty (CTBT), thereby bringing the treaty into force at an early date.”³

The Administration has made clear its intent to resubmit the CTBT to the Senate for ratification. In his April 5, 2009 Prague speech, President Obama stated, “clearly and with conviction America’s commitment to seek the peace and security of a world without nuclear weapons,” courageously recognizing that, “[A]s the only nuclear power to have used a nuclear weapon, the United States has a moral responsibility to act.” And he specifically pledged

“To achieve a global ban on nuclear testing, my administration will immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty.”⁴

The Preamble to the Comprehensive Test Ban Treaty expresses the intent of the treaty to curtail the further development of nuclear weapons as a meaningful disarmament measure, recognizing “that the cessation of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and non-proliferation in all its aspects,” and “that an end to all such nuclear explosions will thus constitute a meaningful step in the realization of a systematic process to achieve nuclear disarmament...”

The United States and 8 other nations (China, Egypt, India, Indonesia, Iran, Israel, North Korea and Pakistan) must ratify the CTBT before it can enter into force. Since it was opened for signature on Sept. 24, 1996, the importance of the CTBT to global security has only increased and international support has grown.

CTBT ratification would have numerous benefits. It would eliminate the testing that facilitates the emergence of new nuclear states. It would help prevent an escalating arms race by cutting off creation of newer, deadlier weapons developed through testing. It would help reduce the danger of damage to both our health and the environment. Ratification of the CTBT would help enhance U.S. authority in the non-proliferation regime.

In 1996 a Preparatory Commission for the Comprehensive Test Ban Treaty Organization (CTBTO) was set up with headquarters in Vienna. This interim organization has created a verification regime with over 320 active and effective monitoring stations worldwide in preparation for entry into force of the Treaty. U.S. failure to ratify the Treaty prevents its full participation in supporting this important organization. The CTBTO web site is a robust and highly informative source for factual background on the Treaty. www.ctbto.org Its section of frequently asked questions is an outstanding source for accurate information. <http://www.ctbto.org/faqs/>

The Nonproliferation Benefits

An unsophisticated nuclear weapon can be built without testing, but the likelihood of a nation attempting to do so is low because of the unreliability of such a device and the economic and political risks of creating one. Moreover, generals are loath to risk using an untested weapon. Testing is needed to develop boosted primaries, hydrogen bombs and compact warheads for missiles.

From a technical perspective a ban on nuclear test explosions makes it harder for nations already possessing nuclear weapons—like China, India, Pakistan, and Russia—to develop more sophisticated warheads. Russia already has an arsenal that is as large and sophisticated as the United States, but for all other states, nuclear testing would facilitate significant advances in their capabilities.

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Without nuclear weapon test explosions the dangers of states breaking out of the NPT and developing nuclear weapons are reduced. This applies particularly to a country such as Iran which would not be able to proof test the more advanced, smaller nuclear warhead designs that are needed in order to deliver such weapons using ballistic missiles.

U.S. ratification would strengthen U.S. leadership in nonproliferation efforts. Without U.S. ratification questions regarding its commitment to NPT promises and obligations remain subject to serious challenges.

Accelerating Entry Into Force

U.S. ratification will prompt other states to follow suit. For example, in June 2009, Indonesia's Foreign Minister Hassan Wirajuda declared that "We share [President Obama's] vision of a world in which nuclear weapons have been eradicated. We trust that he will succeed in getting the CTBT ratified—and we promise that when that happens, Indonesia will immediately follow suit."

Critiques of the CTBT

There are two main criticisms leveled against the treaty. First, compliance is not adequately verifiable. This challenge is met with the fact that in recent years the treaty has created a vast network of monitoring stations around the world provided for a robust regime of on-site inspections, to clarify any ambiguities or concerns. Second, the U.S. stockpile will need to be tested. This issue is met with numerous expert reports that prove we have programs in place to ensure the continuing viability of the deterrent force.

Detecting and Deterring Clandestine Testing

The CTBT extensive monitoring system includes an International Monitoring System (IMS), an International Data Center, on site inspections, and confidence building measures. The IMS will include four global regimes:

1. Seismological, with 50 primary stations and 120 auxiliary stations;
2. Radionuclide, with 80 stations monitoring particulates and with 40 of which are also capable of monitoring noble gases (with the potential for more to add such a capability);
3. Hydroacoustic (monitoring sound waves caused by a nuclear explosion in the ocean) with 11 stations;
4. Infrasound monitoring sound waves in the atmosphere with 60 stations.

The International Data Center (IDC), open to all States Parties, will receive, collect, analyze, archive, and report data gathered by the IMS. On-site inspections to determine the source of suspect data can include three aspects:

1. Overflight/visual observation, photography, radioactivity measurements, environmental sampling, and passive aftershock seismic monitoring;
2. Active seismic surveys, locating underground anomalies, plus magnetic and gravitational field mapping, radar surveys, and electrical conductivity measurements;

3. Drilling to obtain samples.

The United States' capability to detect and deter possible clandestine nuclear testing by other states will be significantly greater with the CTBT in force than without it. U.S. ratification of the CTBT is essential to making short-notice, on-site inspections possible and maintaining long-term political and financial support from other nations for the operation of the CTBT's International Monitoring System and International Data Center.

The CTBT allows the United States and other member states to monitor CTBT compliance with their own, highly-sophisticated satellites and other national intelligence means. New technologies, such as INSAR (Interferometric Synthetic Aperture Radar) can now provide detailed monitoring of vertical deformations caused by underground nuclear test explosions. Thousands of high-quality civilian seismic stations around the world provide further detection capabilities.

A 2002 National Academy of Sciences panel⁵ determined that "underground nuclear explosions can be reliably detected and can be identified as explosions, using IMS data down to a yield of 0.1 kilotons (100 tons) in hard rock if conducted anywhere in Europe, Asia, North Africa and North America." Advances in regional seismology have provided additional confidence. For some locations (such as Russia's former nuclear test site at Novaya Zemlya) the use of new seismic arrays and regionally located seismic stations has lowered the detection threshold to below 0.01 kilotons.

On June 9, 2009 U.S. Permanent Representative to International Organizations in Vienna, Ambassador Gregory Schulte, said to the Comprehensive Test Ban Treaty Organization Preparatory Commission:

Recent events have once again illustrated the true value of the CTBT. In 2006, the IMS and IDC played crucial roles in providing information that aided PrepCom members' assessment of the nature of a North Korean nuclear test. Acting in defiance of the United Nations Security Council, North Korea announced that it had conducted another nuclear test on May 25. On both occasions, the IMS demonstrated its effectiveness. More importantly, the United States believes the mutual sentiment of CTBT signatories against nuclear testing has helped galvanize world condemnation of North Korea's claimed nuclear tests. North Korea's actions are a matter of grave concern to all nations and constitute a threat to international peace and security. Such provocations will only serve to deepen North Korea's isolation.

In response to recent North Korean actions, the IMS and IDC are once again shouldering the responsibility of providing information to help us characterize what happened in North Korea. The ability of the IMS and IDC to carry out their work depends on the commitment of the PrepCom to provide the necessary resources. The United States remains committed to sustaining and improving the international monitoring system. We value the contributions the IMS and IDC make to the international community, and we look forward to learning the results of its analyses.

High Confidence

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Another argument leveled against the CTBT by some skeptics is that very low-yield nuclear explosions, including so-called hydronuclear tests, cannot be detected with absolute certainty. However, this argument misses the point on verification and implies that low-yield tests are militarily significant. Explosions below a few hundred tons in yield—potentially at a low enough yield to evade detection—are not very useful in assessing a new nuclear warhead design.

CTBT skeptics have also suggested that it may be possible for some states to use evasion techniques to try to hide full-scale nuclear tests. But according to the NAS panel report, “those countries that are best able to successfully conduct such clandestine testing already possess advanced nuclear weapons of a number of types and could add little, with additional testing, to the threats they already pose to the United States. Countries of lesser nuclear test experience and/or design sophistication would be unable to conceal tests in the numbers and yields required to master weapons more advanced than the ones they could develop and deploy without any testing at all.”

Zero Means Zero

Another misconception that is repeated by some CTBT critics is that some countries, such as Russia, consider hydronuclear experiments (which produce a low energy yield from a self-sustained chain reaction) to be a "permitted" activity under the Treaty. In reality, the Russian government made it clear when it ratified the CTBT in 2000 that: “Qualitative modernization of nuclear weapons is only possible through full-scale and hydronuclear tests with the emission of fissile energy, the carrying out of which directly contradicts the CTBT.”⁶ In other words, it is clear to all that the CTBT establishes a “zero-yield” prohibition on nuclear test explosions.

Effective Stockpile Stewardship Without Test Explosions

Maintaining the reliability of proven U.S. nuclear warhead designs does not depend on a program of further nuclear test explosions. Instead, the U.S. nuclear arsenal has and can continue to be maintained through non-nuclear tests and evaluations, combined with the replacement or remanufacture of key components to previous design specifications. Since 1994, each warhead type in the U.S. nuclear weapons arsenal has been determined to be safe and reliable through a rigorous certification process instituted following the end of U.S. nuclear testing.

For more than fifteen years, a nationwide infrastructure of nuclear weapons research, evaluation, and manufacturing sites and laboratories has been maintained and enhanced for this purpose under the Stockpile Stewardship Program. Currently, the United States spends more than \$6 billion annually on its Stockpile Stewardship Program, which includes nuclear weapons surveillance and maintenance, non-nuclear and subcritical nuclear experiments, sophisticated supercomputer modeling, and life-extension programs for the existing warhead types in the enduring U.S. nuclear stockpile.

The 2002 National Academy of Science panel, which included three former nuclear weapons lab directors, found that the current Stockpile Stewardship Program provides the technical capabilities that are necessary to maintain confidence in the safety and reliability of the existing

seven types of nuclear warheads in the stockpile, "provided that adequate resources are made available...and are properly focused on this task."

Indeed, the U.S. nuclear arsenal has been—and can continue to be—maintained with high confidence through non-nuclear tests and evaluations, and as necessary, the remanufacture of key components to previous design specifications. Independent technical experts have determined that the United States can maintain its existing arsenal through a conservative program of warhead refurbishment rather than through new design “replacement” warheads.

Though the U.S. nuclear arsenal is aging, more is known today about the U.S. nuclear weapons arsenal than ever before and confidence in the ability to maintain the warheads is increasing at a faster rate than the uncertainties. For example, in 2006 the Department of Energy announced that studies by Lawrence Livermore and Los Alamos National Laboratories show that the plutonium primaries, or pits, of most U.S. nuclear weapons “will have minimum lifetimes of at least 85 years,” which is about twice as long as previous official estimates. In recent years, the weapons labs have begun to increase the reliability of existing warheads by adding more boost gas to increase the explosive energy of the primary stage of the weapon well above the minimum needed to ignite the secondary, or main, stage of the warhead.

Existing ABA Policy

Non-Proliferation of Nuclear Weapons Treaty. In August 1994, the ABA House of Delegates approved a recommendation that encouraged the U.S. government, with the cooperation and agreement of other nations whenever possible, to take actions to maintain and strengthen the international regimes designed to control the proliferation of weapons of mass destruction; support the unconditional, indefinite extension of the Treaty on the Nonproliferation of Nuclear Weapons (NPT); work to satisfy the NPT obligation of the five declared nuclear weapons states to work towards nuclear disarmament through a number of measures, including the pursuit of a comprehensive ban on nuclear testing, the restriction of the production of fissile material, and the declaration that the U.S. will only use nuclear weapons as a means of deterrence or response; pursue efforts to resolve regional disputes implicating weapons of mass destruction before the NPT extension conference, and in the longer term, to work to strengthen the ability of the U.N. and relevant regional organizations to resolve disputes and to make and keep peace.

Conclusion

While it might be possible to sustain the unilateral moratoria undertaken by the major nuclear states for several years, uncertainties and the risk of a resumption of testing will only grow over time. Without the CTBT in force, concerns about clandestine nuclear testing might arise that could not be resolved in the absence of inspections provided for under the Treaty. Leaving the Treaty unratified would increase uncertainty, and reduce U.S. security.

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A world without nuclear testing is a safer world. There is no deterrent to the United States signing on to the treaty.

The American Bar Association stands strongly for advancing international peace and security through the rule of law. By taking steps to bring the CTBT into force, we will be advancing the principles we espouse based on legal norms and formal verification process. Failure to ratify raises doubts about U.S. sincerity in its nonproliferation and disarmament commitments, placing the integrity of the NPT at risk. Ratification of the CTBT will place the U.S. where it belongs – leading the world in the advance of security based on the rule of law.

Respectfully submitted,

Glenn Hendrix
Chair
Section of International Law

August 2010

¹ Article VI of the NPT obligates all Parties “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...” Article VI, Treaty on the Non-Proliferation of Nuclear Weapons, Signed at Washington, London, and Moscow July 1, 1968. Entered into force March 5, 1970.

² Secretary of State Madeleine K. Albright, Remarks at Chicago Council on Foreign Relations, November 10, 1999, Chicago, Illinois, as released by the Office of the Spokesman, U.S. Department of State. Emphasis added.

³ U.N. Security Council Resolution 1887, September 24, 2009, <http://www.america.gov/st/texttrans-english/2009/September/20090924173226ihcucor0.5509411.html>

⁴ Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic, April 5, 2009, http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/

⁵ “Technical Issues Related to the Comprehensive Nuclear Test Ban Treaty,” National Academies of Science, 2004.

⁶ Themes of the Address of Yuri S. Kapralov at the State Duma on the Question of Ratification of the CTBT, January 2000. Document obtained by the author from the Russian Foreign Ministry

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Glenn P. Hendrix, Chair
Section of International Law

1. Summary of Recommendation.

The recommendation urges the United States to ratify the Comprehensive Nuclear Test Ban Treaty.

2. Approval of Submitting Entity.

This Recommendation was approved by the Council of the Section of International Law at its meeting on April 17, 2010 in New York City, New York.

3. Has this or a similar recommendation been submitted to the House or Board previously?

Yes. This recommendation was narrowly defeated at the House meeting in Orlando in February. The opposition was based on concerns about germaneness. The report has been revised to more clearly address the germaneness issue.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Non-Proliferation of Nuclear Weapons Treaty. Recommend that the U.S. government, with the cooperation and agreement of other nations whenever possible, take actions to maintain and strengthen the international regimes designed to control the proliferation of weapons of mass destruction. Support the unconditional, indefinite extension of the Treaty on the Nonproliferation of Nuclear Weapons (NPT). Work to satisfy the NPT obligation of the five declared nuclear weapons states to work towards nuclear disarmament through a number of measures, including the pursuit of a comprehensive ban on nuclear testing, the restriction of the production of fissile material, and the declaration that the U.S. will only use nuclear weapons as a means of deterrence or response. Pursue efforts to resolve regional disputes implicating weapons of mass destruction before the NPT extension conference, and in the longer term, work to strengthen the ability of the U.N. and relevant regional organizations to resolve disputes and to make and keep peace. 8/94

5. What urgency exists which requires action at this meeting of the House?

On April 5, 2009, President Obama stated that, in order to achieve a global ban on nuclear testing, his administration will immediately and aggressively pursue U.S. ratification of the Comprehensive Test Ban Treaty. In addition, on September 24, 2009, at a UN Security

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Council Summit chaired by President Obama, the U.S. introduced a resolution calling upon all States to ratify the Treaty. Upon the unanimous adoption of the resolution, President Obama reiterated his intention to move forward with U.S. ratification of the treaty.

6. Status of Legislation.

The Comprehensive Nuclear Test Ban Treaty (Treaty Doc. 105-28) was submitted to the U.S. Senate on September 23, 1997 and is pending in the Senate Foreign Relations Committee.

7. Cost to the Association. (Both direct and indirect costs.)

None.

8. Disclosure of Interest. (If applicable.)

None.

9. Referrals.

This recommendation and report will be referred to all ABA entities.

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present to the House.)

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EXECUTIVE SUMMARY

(a) Summary of the Recommendation.

The recommendation urges the United States to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT).

(b) Summary of the issue(s) which the recommendation addresses.

The CTBT is an international agreement designed to create a permanent, global, legally-binding and all-encompassing prohibition on any nuclear explosions. 182 countries have signed the CTBT and 150 have signed but not ratified but not signed (including the United States).

(c) How the proposed policy position will address the issue.

The proposed policy position will enable the ABA to speak up supportively when Congress considers ratifying the CTBT.

(d) Summary of any minority views of opposition which have been identified:

None identified.