



Introduction

Although the Comprehensive Test Ban Treaty has yet to enter into force, it holds an important relationship to the formation of a binding prohibition on nuclear testing through customary international law. Treaties like the CTBT create binding obligations on ratifying Member States once they enter into force, through the doctrine of *pacta sunt servanda*. However, under international law, rules of custom may also create binding obligations upon third party States, even if the State in question is not party to a given treaty. Thus, while the CTBT has yet to enter into force, the existence of consistent, generalized State practice in refraining from nuclear testing and indications that States refrain from testing out of a sense of obligation evidence the presence of a customary international law prohibition against nuclear testing that should bind even Annex II States that have yet to ratify the CTBT.

What are possible risks and impacts on this rule of customary law if entry into force of the CTBT is not timely achieved? If States choose to resume nuclear testing? And how can the activities of the provisional technical secretariat contribute to and safeguard customary international law against these risks? This presentation assesses the required elements of customary international law—state practice and *opinio juris*—based on research into standards employed by the International Court of Justice (ICJ) and other relevant authorities. Also considered are the role of women, minorities, and youth in contributing to the *opinio juris* element of customary international law as it relates to nuclear testing, as the CTBTO's inclusion of these groups paves the path for a more equitable understanding of who determines legal customs.

Definitions

- Customary International Law:** Under Chapter II, Art. 38 of the Statute of the ICJ, “international custom, as evidence of a general practice accepted as law” is one source of binding international law. Customary international law consists of two elements: State practice and *opinio juris*.
- State Practice:** The widespread, general practice of States on a given issue within international law.
- Opinio Juris:** The requirement that State practice be accompanied or motivated by a belief that it is a legal obligation under customary international law.
- Persistent Objector Rule:** If a State persistently and openly dissents from a rule of international law while that rule is in the process of formation, it is considered not to apply to the State.



Methods

According to the standards adopted by the ICJ in *North Sea Continental Shelf* (1969 I.C.J. 3, ¶¶ 71, 73–74 (Feb. 20)), in order to establish norms of customary international law, provisions of a treaty must meet the following characteristics: be of a fundamentally norm-creating character, such as could be regarded as forming the basis of a general rule of law; have passed into the general corpus of international law; and be accepted as such by the *opinio juris* as having become binding “even for countries which may never have become, and do not become parties to the Convention.”

Measuring State Practice and Norms

The practice of States must be both general and consistent to constitute a customary norm or general rule of law. In determining the general practice of States, international courts have at times assessed the general practice of only certain, “affected” States rather than assessing truly global practice (e.g. looking to seafaring states for customs relating to the law of the sea, historically looking to European legal practices in determining the practice of “civilized” nations). However, because nuclear testing is a practice that creates lasting environmental and humanitarian effects, all States may be considered equally affected because the citizens of every State have an equal interest in the right to life. (See, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, ICJ p. 226). Thus, for the purposes of this project, the following indicators of State practice were examined globally, rather than only as relating to Nuclear Weapon States (NWS):

- Instances of nuclear testing from July 1945 – June 2019, globally
- Possession of nuclear weapons without testing from July 1945 – June 2019, by State

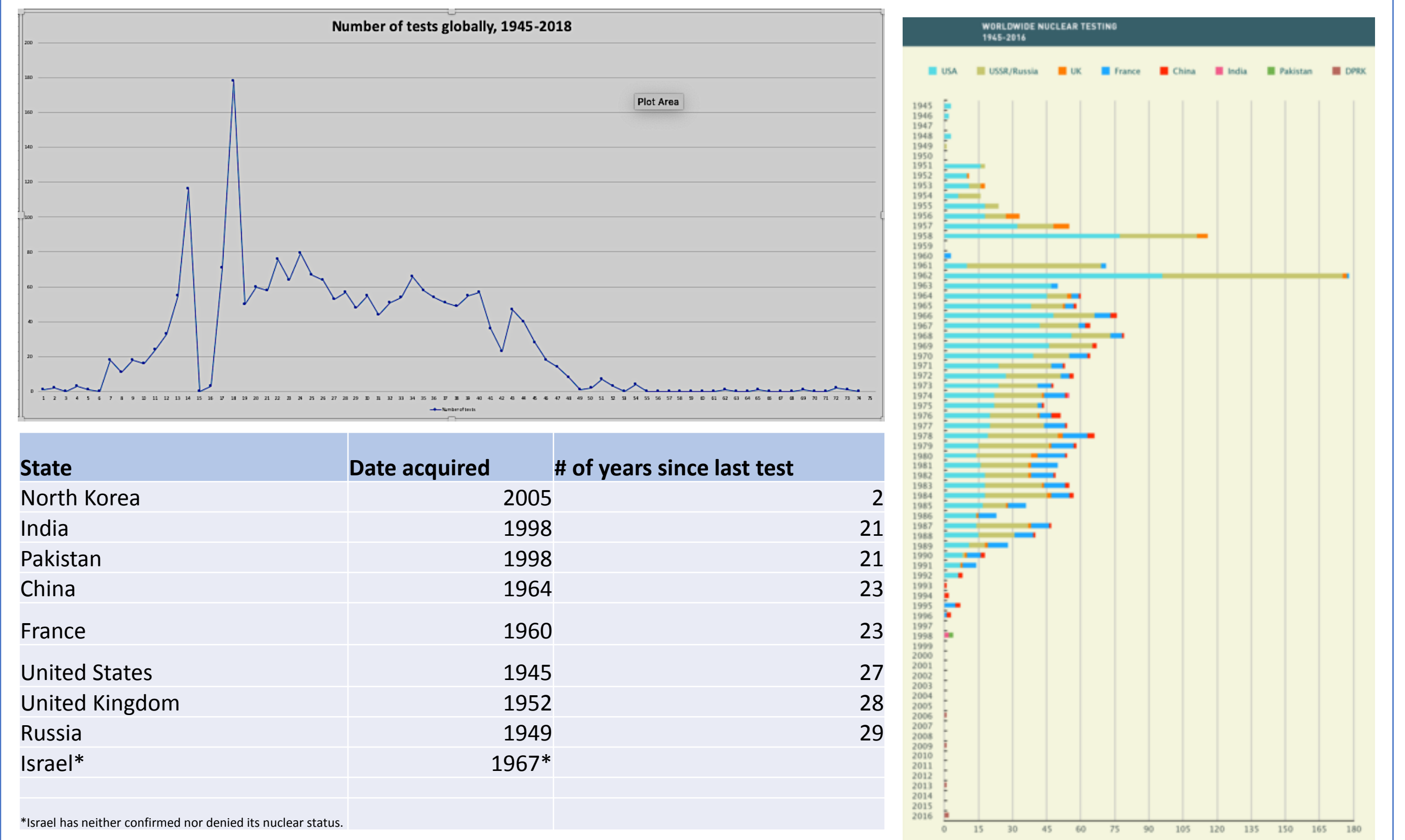
Determining Opinio Juris

Opinio Juris, a subjective “belief” by States that their practice arises out of legal obligation, may be measured through several objective indicators. The seven *opinio juris* indicators assessed for purposes of this project include those recommended by the International Law Commission Drafting Committee, the European Journal of International Law, and various international law scholars:

- Public statements made on behalf of States
- Statements made on behalf of public international organizations (PIOs)
- Decisions of national courts and tribunals
- Diplomatic correspondence
- Official governmental legal opinions
- Adherence to/support for provisional treaties, intergovernmental conferences
- Decisions of international tribunals
- Writings of jurists, scholars, and publicists

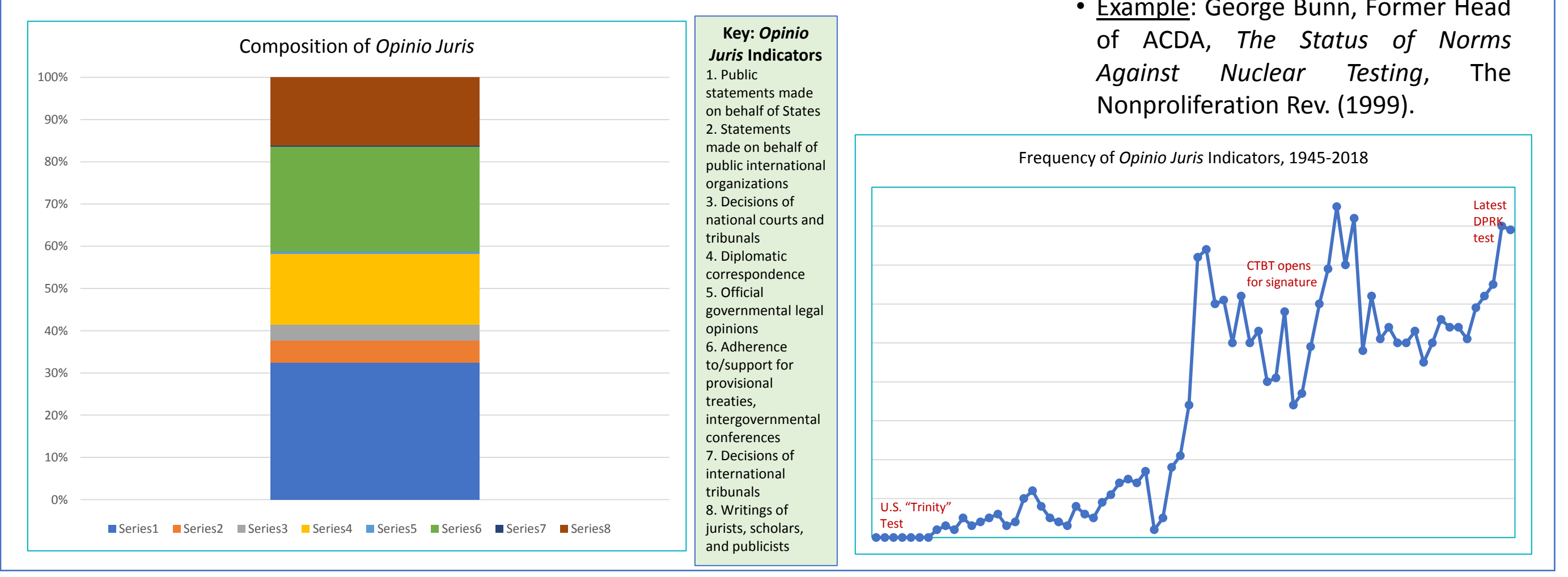
Results

State Practice: From the perspective of the “specially affected” States model, the past two decades have witnessed widespread, consistent State practice of abstaining from testing among NWS. Although 8 of 9 NWS have tested nuclear weapons, only 1 of 9 states have tested nuclear weapons within the past 20 years (11%). Looked at globally, only 8 of 195 States (4%) have ever tested nuclear weapons, with only 1 of 195 States having tested within the past 20 years. Historically, the formation of customary international law has been interpreted as a process that takes decades—even centuries—to crystallize, with the International Law Commission defining general State practice as one which takes place “over a considerable period of time” and various European legal systems requiring anywhere from twenty to thirty years of consistent practice. Thus, 20 years of consistent State practice, from both a global and “specially affected” model, likely qualifies as a “considerable” passage of time. Moreover, in 1969, the ICJ explicitly stated that “the passage of only a short period of time is not necessarily . . . a bar to the formation of a new rule of customary international law.” (see, 1969 I.C.J. 3, ¶¶ 71, 73–74 (Feb. 20)), further indicating that a bright line number of years requirement is not dispositive.



Opinio Juris: Manifestations of a subjective belief that nuclear testing violates legal obligation increased substantially in the 1980s to 1990s. These manifestations have maintained consistency into 2018, in the wake of the recent testing by North Korea. Below are examples of each indicator assessed:

- (Indicator 1) Public statements made on behalf of States:**
 - Example:** The United States Government issues public statements after a nuclear test conducted by China in 1992, declaring that the test violates “international non-proliferation standards.”
- (Indicator 2) Statements made on behalf of PIOs**
 - Example:** After nuclear tests by India and Pakistan, the United Nations (UN) Security Council declared a breach of the “*de facto* moratorium” on testing; In 2016, the UN Security Council adopted its first resolution specifically supporting the CTBT to reaffirm the “global norm” against nuclear testing.
- (Indicator 3) Decisions of national courts, tribunals**
 - Example:** *Sheff v. United States Department of Justice*, Civil Division, Radiation Exposure Compensation Program (2018) No. 17-2153C.
- (Indicator 4) Diplomatic correspondence**
 - Example:** Following the Pokhran-II nuclear tests in 1998, diplomatic letters exchanged between the United States, Pakistan, and India provided defenses of the tests on strategic, rather than legal, grounds.
- (Indicator 5) Official Government Legal Opinions**
 - Example:** Official legal opinion by the Government of France upon ratification of the CTBT includes the assessment “[T]he norm of [a] complete ban of nuclear testing is part of international law, and as such deserves to be supported.”
- Indicator 6: Treaties, Provisional Treaties, Intergovernmental Conferences**
 - Example:** Member States of the multilateral Conference on Disarmament (CD) condemn nuclear tests as “breaking [an] international norm” against test explosions. Other multilateral agreements reinforcing the illegality of nuclear testing include, including Nuclear Weapons Free Zone Treaties, the NPT, and the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water.
- Indicator 7: Decisions of International Tribunals**
 - Example:** International Court of Justice, *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253 (Dec. 20)**
- Indicator 8: Writings of Jurists, Scholars, Publicists**
 - Example:** George Bunn, Former Head of ACDA, *The Status of Norms Against Nuclear Testing*, The Nonproliferation Rev. (1999).

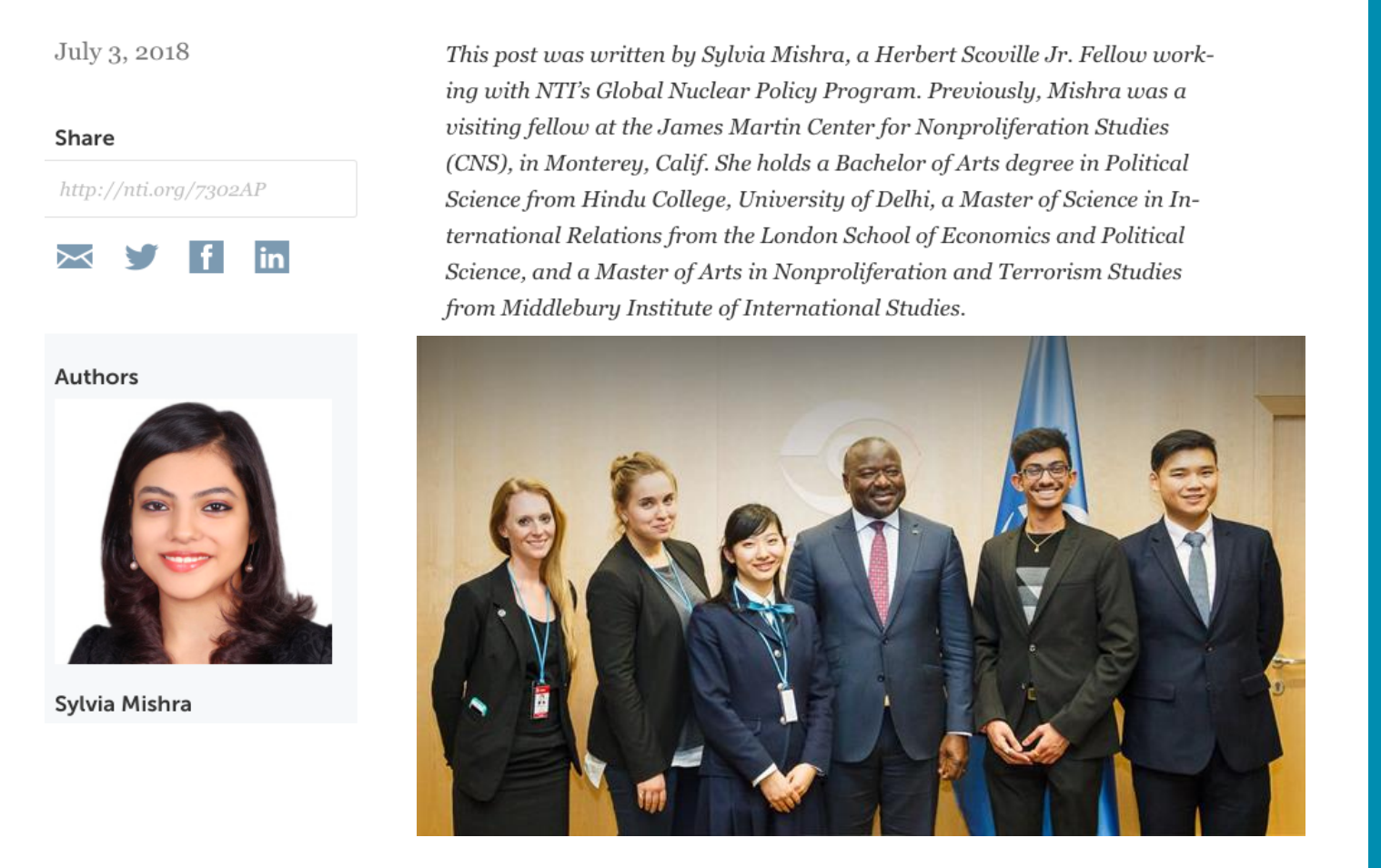


Spotlight: Role of Marginalized Actors in Customary International Law

As discussed in Methods, international courts have oftentimes looked to “specially affected” State practice, as opposed to assessing global practice, for purposes of determining customary international law. While acknowledging that the practice of those States that will be most directly affected by the law should be considered, the exclusion of other States—historically, those in the Global South—can create an unequal, racist, and classist perspective on custom. Moreover, measurements of *opinio juris* are frequently determined by the opinions of public officials who, in turn, generally are not representative of minority voices.

The CTBTO, through its promotion of gender inclusion and diversity, brings welcome intersectionality to the formation of customary international law. As a preparatory body, statements issued and advanced by the CTBTO regarding nuclear testing contribute to the current state of *opinio juris*. As the voices of women, ethnic minorities, and other marginalized actors are elevated within the organization, these perspectives have a direct role in influencing *opinio juris*, which in turn influences customary rules on an issue that disproportionately affects them, given the history of disparate nuclear testing health effects.. Additionally, the CTBTO Youth Group (CYG) elevates the voices of young people—another population that has been historically excluded from measurements of customary international law—to speak with authority on issues relating to nuclear testing. (see, Left).

The Importance of Creating Gender-Equitable Space in the Field of Nuclear Policy



Examples of historically marginalized actors participating in the development customary international law indicators.

(From L to R: Sylvia Mishra, CTBTO Youth Group member writes as a qualified expert on nuclear topics. Credit: <https://www.nti.org>; CYG Founding Members directly engage with CTBTO Executive Secretary. Credit: <https://www.ctbto.org/press-centre/highlights/2016/ctbto-youth-group-launched/>).

Possible threats to customary international law formation

Assuming that customary international law has not yet crystallized, the nuclear testing conducted by North Korea may exempt it from the customary rule against nuclear testing. According to the “Persistent Objector Rule” of international law, if a State persistently and openly dissents from a rule of international law while that rule is in the process of formation and before it has developed into a rule of customary international law, the forming rule is considered not to apply to that State. This allows a State to effectively “opt out” of from the operation of a new rule by nature of its objection. The possibility that certain States may be exempt from a customary international law rule against nuclear testing based on the Persistent Objector Rule cuts against the mission of the CTBT and may lead to other States making similar calculations.

Additionally, the CTBT’s current status as a legally binding document that has not yet entered into force creates risks for the development of customary international law. States do not have to officially denounce the CTBT or explicitly reject its provisions on nuclear testing in order to harm customary international law formation against nuclear testing. Instead, if more States (and NWS in particular) act in a manner contrary to the Treaty by engaging in nuclear testing, State practice will lose its consistency and pervasiveness. Moreover, advocacy for a return to nuclear testing, or even by manifesting a position that nuclear testing is a legally feasible option regardless of its strategic feasibility, may cripple the crystallization of *opinio juris*.

Conclusion

Article 38 of the ICJ Statute states “Nothing...precludes a rule set forth in a treaty from becoming binding upon a third State as a rule of customary international law.” On the issue of nuclear testing, although the CTBT has not yet entered into force, the basic obligations set forth in Article I (“*Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control*”) may thus be binding even upon Annex II States that have not ratified the CTBT.

Based upon an analysis of State practice and *opinio juris*, a widespread, de facto moratorium on nuclear testing has risen to the level of a binding customary international law obligation. International courts and bodies such as the ILC have defined the State practice necessary to demonstrate customary international law as consistent, widespread practice adopted over a “considerable period of time.” The passage of two decades witnessing every Nuclear Weapon State abstaining from nuclear testing, save North Korea, meets this temporal requirement. Regarding *opinio juris*, the high prevalence of public acknowledgments of the existence of a global “norm” or “standard” prohibiting nuclear testing—rather than merely a strategic or political calculation that testing is inadvisable—indicates a belief that the restraint from nuclear testing is a matter of obligation. Therefore, both State practice and *opinio juris* are present, meaning that customary international law precludes nuclear testing. However, this rule of custom will grow stronger as time passes without testing and as national governments and international courts and tribunals continue to decisively recognize the obligation against testing.

What does this mean for the CTBT and its prospects at ratification? Customary international law should not be seen as an alternative or threat to the prospects of the CTBT; as customary rules do not provide the precision and detail of a written document, they are subject to a range of potentially adverse interpretations and lack the provisions of the CTBT conferring technical benefits and stipulations. Additionally, customary international law is dynamic rather than static; its ability to change over time makes it less reliable than a signed Treaty. It is therefore in States’ best interests to ratify the CTBT irrespective of whether a customary rule prohibiting nuclear testing has already crystallized. **In fact, customary international law should be viewed as a tool for promotion of the CTBT.**

As discussed in the above section, if a State acts contrary to a customary international law before it has fully formed, the State essentially “opts out” of the law’s application under the Persistent Objector Rule. Thus, it becomes in the best interest of the international community to further strengthen the establishment of a customary rule to prevent rogue actors, under the theory that if the rule has already formed, the Persistent Objector Rule does not apply. Entry into force of the CTBT would solidify customary international law by establishing a clear obligation and thus further enhancing *opinio juris*. Moreover, short of entry into force, the CTBTO can also assist with the formation of customary international law through the following: due to its requirement of *opinio juris*, the more frequently international bodies such as the CTBTO, its Member States, GEM, and others affiliated with its mission articulate and act upon a position that the rule against nuclear testing serves as a customary norm, the more weight will be given to the presence of *opinio juris* on the issue. Importantly, traditionally marginalized actors play an important role in this process of law formation. Women, minorities, and young people within the CTBTO Youth Group, through their issuance of official statements and publications, may contribute to these *opinio juris* indicators and thus play an active role in shaping the legal foundation against nuclear testing.

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