

Non-Legally Binding Arrangements for Ballistic Missiles Control

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Abstract

The issue of Weapons of Mass Destruction (WMD) is not only an alarming concern, but appears to be a growing threat to the international peace and security. Ballistic missiles as prominent means of delivery for such weapons have compelled international community to seek arrangements for the control or supervision over WMD delivery systems. Construction of heretofore arrangements at the international level have not been conducive to binding compliance; they have proved less than effective in preventing non-compliance. The binding nature of controlling arrangements for WMD could be either legal or political. The question is then how a non-legally binding arrangement would contribute to non-proliferation of ballistic missiles. In pursuit of an answer for this question, this article compares the Missile Technology Control Regime; the Presidential Nuclear Initiatives; the Proliferation Security Initiative; and the Hague Code of Conduct so as to provide a detailed assessment of the effectiveness of political commitments among States. This article argues that States have increasingly demonstrated resistance to legally binding arrangements. In contrast, they have been more receptive to politically binding arrangements and more prone to what can be dubbed as soft law. While the effectiveness of political commitments in the community of States is a dubious debate, there, nonetheless, seems to be no alternative to a modicum of liability for achieving some kind of consented arrangement among States.

Keywords: ballistic missiles, Hague Code of Conduct (HCOC), political commitment, legally binding arrangements, non-proliferation, confidence building measures

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Introduction

In the late 1944, the Nazi Germany used the first generation of ballistic missiles against Paris, followed by an attack on London a few days later. Having observed the decisive impact of the new weapon, other States found this modern medium inexorable for the purpose of pursuing their strategic military objectives. Once the Second World War came to an end, the development of intercontinental ballistic missiles became a prominent subject matter of rivalry between the Soviet Union and the United States. During the Cold War, the superpowers of the time recurrently negotiated ballistic missiles both directly and indirectly. Other strategic negotiations were conducted at bilateral² and multilateral³ levels, which resulted in the conclusion of certain treaties and agreements⁴ between the parties. By the end of the Cold War, new arrangements had emerged mostly with binding language and strict provisions. Meanwhile, to supplement the legally binding treaties, States demonstrated inclination toward arrangements which would encourage voluntary compliance without the need to abide by any legally binding requirements.

Compared to other politically binding arrangements constructed by the international community in order to control, or at least supervise, ballistic missiles such as the Missile Technology Control Regime (“MTCR”), the Presidential Nuclear Initiatives (“PNIs”) and the Proliferation Security Initiative (“PSI”), The Hague Code of Conduct

² Strategic Arms Limitation Talks 1972 (SALT), Anti-Ballistic Missile Treaty 1972 (ABM), Intermediate-Range Nuclear Forces Treaty 1987, (INF) and Strategic Arms Reduction Treaty 1991 (START I).

³ Missile Technology Control Regime 1987 (MTCR) and Non-Proliferation Treaty 1968 (NPT).

⁴ Strategic Arms Reduction Treaty II 1993 (START II), Strategic Offensive Reduction Treaty 2002 (SORT), Hague Code of Conduct against ballistic missiles 2002 (HCOC) and New Strategic Arms Reduction Treaty 2010 (New START).

against ballistic missiles (“HCOC”) is a particular international arrangement which stands out in a number of ways. As a non-legally binding negotiated instrument, the HCOC is devised to provide some degree of confidence to the international community where there is a growing political intention to bring ballistic missiles and their related programs under a transparent controlling arrangement.

This article, comprehensively, elaborates the issue of ballistic missiles from the perspective of the existing non-legally binding arrangements. The core argument of this article regarding the promotion of politically binding agreement is the main contribution that it makes to the field, As the proposals and findings herein are novel and have never been discussed in the international legal scholarship. In this regard, it will begin by providing an in-depth analysis of the concept of the non-legally binding arrangements among States. It will then address Confidence Building Measures (CBMs) as consequential factors contributing to the construction and improvement of political arrangements for controlling ballistic missiles and curbing their proliferation. It will also compare the most prominent instances of politically binding arrangements with regard to ballistic missiles non-proliferation, demonstrating some advantages and shortcomings of each and paving the way for achieving more effective arrangements by the international community. This article will argue that legally non-binding arrangements, in particular the HCOC, are more appropriate instruments than binding treaties to be used in the current global ballistic missiles nonproliferation process.

I. Non-Legally Binding Arrangements

Legally non-binding international agreements are of course commonplace in the international diplomatic practice. Diplomats and

their governments in some cases⁵ prefer concluding multilateral non-legally binding instruments.⁶ There is a well-developed scholarly literature explicating why such politically binding, yet legally non-binding, agreements are often preferable to States over formal treaties, depending largely upon the issue area being addressed.⁷ Therefore, not every document that States negotiate and conclude in the course of their international relations constitutes a treaty, or is meant to be

⁵ The United States and Israel's regime oppose a resolution calling for the prevention of an arms race in outer space ("PAROS"). The United States is concerned with the binding nature of such proposals. It is especially concerned with the lack of transparency and enforcement that would enable irresponsible countries and actors to take advantage of those abiding by the treaties. This could result in responsible actors losing their relative advantage, their freedom of action in space, and their ability to defend their space assets. Therefore, the United States supports non-binding agreements which would serve as confidence building measures. Israel's regime also favorably views these legally non-binding efforts towards space sustainability. Not only in the arms control field but also in other situations, like environmental issues, the same thing has happened. President Obama's climate negotiators were devising what they called a "politically binding" deal that would "name and shame" countries into cutting their emissions. The deal is likely to face strong objections from Republicans on the Capitol Hill and from poor countries around the world.

⁶ Arif, Ahmed, Jahid, Mustofa. 2016. "Role of Soft Law in Environmental Protection: An Overview." *Global Journal of Politics and Law Research* Vol.4, No.2, pp.1-18; See also, Lipson, Charles . 1991. "Why are some international agreements informal?" *International Organization* 45: 495-538. doi:10.1017/S0020818300033191; See also, Kai-Uwe Schrogl, Peter L. Hays, Jana Robinson, Denis Moura, Christina Giannopapa. 2015. "*Handbook of Space Security: Policies, Applications and Programs.*" Springer New York.

⁷ Lipson, Charles. 1991. "Why are some international agreements informal?" *International Organization* 45: 495-538; George, Downs and et al. 1996. "Is the Good News About Compliance Good News About Cooperation?". *International Organization* 50: 354; Judith, Goldstein and Lisa, Martin. 2000. "Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note". *International Organization*. 54: 603; Joel, Trachtman. 1999. "Bananas, Direct Effect and Compliance". *European Journal of International Law*. 10: 655; Abbot, Kenneth. 2000. "The Concept of Legalization". *International Organization*. 54: 401; Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54: 421-456.

binding under international law. States may choose between committing themselves to certain legal norms while accepting other norms which merely serve as guiding principles for their behavior. In recent years, States have sought to give some weight to non-legally binding documents,⁸ e.g., by calling them norms of 'soft' law, or 'politically' binding measures.⁹

Terms and expressions such as 'soft law', and 'political commitments' appear to be used alternatively and interchangeably by scholars to address non-legally binding arrangements. In fact, these are all very specific terms that have nuanced differences in meaning which deserve further clarification.

"Soft law" is a relatively new concept with somewhat squishy meanings, whereas "political commitments" is a long-established term with a specific meaning widely agreed upon. The term "soft law" is defined differently by various scholars. Some refer to soft law as a medium that creates imprecise obligations under which a range of activities might be considered compliant.¹⁰ A number of authors, however, define it as an instrument that would impose merely hortatory, rather than legally binding, obligations.¹¹ They opine that it

⁸ On 5 June, 2012, the European Union presented a draft of a non-legally binding international code of conduct for outer space activities in Vienna.

⁹ Dekker, Guido D. . 2001. *The Law of Arms Control: International Supervision and Enforcement*. Boston: Martinus Nijhoff; See also, Johnson, Chris . 2014. *Draft International Code of Conduct for Outer Space Activities Fact Sheet*. February. Accessed 5/6/2019. https://swfound.org/media/166384/swf_draft_international_code_of_conduct_for_outer_space_activities_fact_sheet_february_2014.pdf.

¹⁰ Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54: 421-456. doi:10.1162/002081800551280. See also Cerone, John. 2016. "Tracing the Roles of Soft Law in Human Rights." Oxford University Press.

¹¹ Raustiala, Kal . 2005. "Form and Substance in International Agreements." *Am J Intl L* 58:1; See also, John J. Kirton, Michael J. Trebilcock. 2017. *Hard Choices*,

refers to quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law, often contrasted with soft law by being referred to as “hard law”.¹²

Soft law, however, has certain limitations and shortcomings when compared to hard law, although it has its own advantages. It is important to recognize how soft forms of multilateral arrangements between States could motivate and convince them to seek alternative and often more desirable means, instead of hard law, at much lower costs. Nonetheless, the choice between soft and hard law is not a binary one. In other words, States may decide, depending on the subject matters to which they are willing to commit, to take advantage of both hard and soft law simultaneously. In certain cases, States bind themselves to a combination of soft and hard law. Hence, thinking of a gray zone between hard and soft assurances would be more reasonable.

The meaning of the term “political commitments”, on the other hand, is highly elusive and subjective.¹³ Political commitments are as old as diplomacy. In the pre-international law era, most of commitments among States were political in nature. By gradual emergence of customary international law and codification of international norms, the scope of utilization of violent methods, in particular resorting to military options, in case of breaches of political assurances became limited. In the modern version, a politically binding undertaking alludes to political consequences which would flow from its breach and in the case of contravention, violators would

Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance. Taylor & Francis.

¹² Druzin, B. 2016. "Why does Soft Law have any Power anyway?" Asian Journal of International Law.

¹³ Flynn, Nick , and Nicola, Peart. 2010. *The Role of Political Agreement in a Legally Binding Outcome*. November. eurocapacity.org.

face certain non-violent reactions such as diplomatic pressure, public shaming, withholding discretionary funding, and the like.¹⁴ Political commitments and soft law are, thus, identical in terms of their goals and they could be considered as two faces of the same coin called “legally nonbinding instruments”.

In comparison to concluding a treaty under rigorous provisions of international law, it can be observed that a legally non-binding arrangement may be advantageous. It should be acknowledged that some of the politically binding instruments¹⁵, by laying down principles for the negotiation of future arms control agreements, have played an important role in the development of arms control law. They offer effective ways to deal with uncertainty in military affairs. In addition, they facilitate compromise, and thus, contribute to mutually beneficial cooperation between actors with different interests and values, and different degrees of power.¹⁶

In areas such as ballistic missiles control, where high levels of detail and specificity are required, concerns regarding political/military sensitivity and confidentiality of information are high, frequent emendation due to technological changes is needed, and other circumstantial dynamics are expected, non-legally binding forms

¹⁴ Desjardins, Marie-France. 2014. *Rethinking Confidence-Building Measures*. Routledge; See also, Werksman, Jacob . 2009. "Taking Note of the Copenhagen Accord: What It Means." December 20. www.wri.org/blog/2009/12/Taking-Note-of-the-Copenhagen-Accord-What-It-Means.

¹⁵ The success of a previous unilateral initiative - the 1991 US and Russian Presidential Nuclear Initiatives under which tactical nuclear weapons were withdrawn from Europe - enhances the attractiveness of such approaches to arms control. All of these reasons have been cited for renewed interest in either forgoing formal set-piece negotiations and lengthy complicated treaties in favor of more informal accords, or simply undertaking unilateral steps to reduce force levels.

¹⁶ Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54: 421-456. doi:10.1162/002081800551280.

of arrangements are likely to be more appropriate. In other words, non-legally binding arrangements help to avoid the difficulties embedded in adoption procedures where national legislative bodies may have negative interference.

Political commitments avoid constitutional or other domestic legal requirements that apply to treaties for entering into force in most States.¹⁷ Approval and ratification processes, typically involving legislative authorization, are more complex than what is necessary for purely political agreements, which only requires the consent of the executive branch. Although the Joint Comprehensive Plan of Action (“JCPOA”) is not regarded as a multilateral ballistic missiles arrangement, it is a recently agreed upon international arrangement on nuclear related issues which is explicitly declared legally non-binding.¹⁸ The JCPOA includes detailed and important political commitments undertaken by its parties. The United States and Iran, for instance, in spite of the high resistance from their legislative bodies, made international agreements on many topics that were not binding under international law.¹⁹ The lack of necessity for legislative authorization, however, does not mean that all assurances given by an executive through an international political arrangement will take place unconditionally; occasionally the scope of States’ political commitments may be restricted by their respective legislatures in a

¹⁷ Williamson, Richard L. 2003. "Hard Law , Soft Law , and Non-Law in Multilateral Arms Control?: Some Compliance Hypotheses." *Chicago Journal of International Law* 4 (1).

¹⁸ Although it is declared as a non-binding instrument, the JCPOA is attached as an annex to the Security Council Resolution 2231. The Resolution is adopted under Chapter VII of the UN Charter and seems to have a legally binding nature. Despite the fact that resolutions impose legally binding commitments on Member States, bearing the uniqueness of Resolution 2231 and the interpretation made by the JCPOA’s parties in mind, the nature of the commitments is still ambiguous.

¹⁹ Bradley, Curtis and Goldsmith, Jack. 2017. “*Foreign Relations Law: Cases and Materials*”. Wolters Kluwer Law & Business.

case by case manner. Nevertheless, even the partially restricted political commitments can be efficacious; the executive branch will have the opportunity, within the timeframe of a commitment, to convince domestic legislative authorities at the same time as it is implementing those legally non-binding promises that are still not restricted.

It is also undisputed that non-legal instruments produce political or moral obligations for the participating States to perform their mutual commitments. Even if an arrangement is not legally binding, it may still, as a diplomatic accord that provides a path forward for a peaceful resolution of the concerns of the various actors, carry force as political commitment. Not very different from treaties, the willingness to perform these voluntary non-legal commitments depends strongly on their reciprocal interest. States Parties to such arrangements are expected to perform their undertakings in good faith. However, contrary to treaties, the neglect of political commitment must not entail reprisals according to the law of State responsibility, but may yield unfriendly but lawful responses.²⁰

²⁰ Oliver, Dorr, and Kirsten, Schmalenbach. 2018. *Vienna Convention on the Law of Treaties: A Commentary*. Springer.

Saeid Baghban Kondori ——— Non-Legally Binding Arrangements for Ballistic...

Table I. Ballistic Missile Forces and States Membership Status of MTCR and HCOC by 2020

States	Intercontinental Ballistic Missile (ICBM)	Short-Range Ballistic Missile (SRBM)	Intermediate-Range Ballistic Missile (IRBM)	Medium-Range Ballistic Missile (MRBM)	Submarine-Launched Ballistic Missile (SLBM)	HCOC Member	MTCR Member
Afghanistan	*	+ 1 Launcher	*	*	*	Yes	No
Armenia	*	16 Launcher	*	*	*	Yes	No
Azerbaijan	*	6 Launcher	*	*	*	Yes	No
Bahrain	*	+ 1 Launcher	*	*	*	No	No
Belarus	*	1 Brigade 96 Launcher	*	*	*	Yes	No
China	10 Brigade 98 Launcher	3 Brigade 189 Launcher	4 Brigade 72 Launcher	174 Launcher	12	No	No
Egypt	*	2 Brigade + 42 Launcher	*	*	*	No	No
France	*	*	*	*	16	Yes	Yes
Greece	*	+ 1 Launcher	*	*	*	Yes	Yes

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India	1 Launcher	3 Group 42 Launcher	1 Group	1 Group 12 Launcher	1	Yes	Yes
Iran	*	130 Launcher	*	50 Launcher	*	No	No
Israel	*	7 Launcher	3 Squadron 24 Launcher	*	*	No	Unilateral adherent
Kazakhstan	*	12 Launcher	*	*	*	Yes	Unilateral adherent
Myanmar	*	+ 1 Launcher	*	*	*	No	No
Democratic People's Republic of Korea	+ 6 Launcher	+ 54 Launcher	1 Launcher	+10 Launcher	*	No	No
Pakistan	*	+ 135 Launcher	*	30 Launcher	*	No	No
Russia	39 Regiment 352 Launcher	13 Brigade 140 Launcher	*	*	68	Yes	Yes
Saudi Arabia	*	*	+ 10 Brigade	+ 1 Group	*	No	No
South Korea	*	30 Launcher	*	*	*	Yes	Yes
Syria	*	+ 6 Launcher	*	*	*	No	No

Saeid Baghban Kondori ——— Non-Legally Binding Arrangements for Ballistic...

Turkey	*	+ 3 Launcher	*	*	*	Yes	Yes
Turkmenistan	*	16 Launcher	*	*	*	Yes	No
Ukraine	*	90 Launcher	*	*	*	Yes	Yes
United Arab Emirate	*	7 Launcher	*	*	*	No	No
United Kingdom	*	*	*	*	64	Yes	Yes
United State	400 Launcher 9 Squadron	2 Launcher	*	*	14	Yes	Yes
Vietnam	*	1 Brigade	*	*	*	No	No
Yemen	*	7 Launcher	*	*	*	No	No

Note: The statistics jointly adapted from The International Institute of Strategic Studies, "The Military Balance 2020" and the HCOC portal at:

<http://www.hcoc.at/?tab=subscribing_states&page=subscribing_states> accessed 03/07/2020.

By 2021, almost one sixth of States in the world possess ballistic missiles which are either domestically produced or imported. Missiles continue to be the focus of increasing international attention,

discussion and competition. The potential capability of missiles to carry and deliver Weapons of Mass Destruction makes them a qualitatively significant political and military issue. The diversity of international views on matters related to missiles poses a particular challenge for efforts to address the issue.

So far, unlike other issues such as nuclear non-proliferation, governments have not been able to reach a multilateral legally binding instrument dealing exclusively with the issue of ballistic missiles. As the development of missile technologies occurs apace, flexible frameworks of a soft law nature are more likely to motivate and promote cooperation among States in comparison to rigid constraints of hard law. These include, notably, MTCR, PNIs, PSI, and HCOC, which are different in terms of their State parties, structure, and aims, although their common denominator is of their non-legally binding nature. It is worth noting that the success of these frameworks mainly depends on the quality of voluntary compliance; these frameworks are difficult to accede by any other means but confidence building measures.

II. The Issue of Compliance

The vibrant progress in negotiating new formal arms control agreements, and bringing already signed agreements into force, has contributed to a lack of confidence in using formal treaties to achieve key policy goals relating to non-proliferation and strategic arms reductions. In particular, the US withdrawal from ABM treaty in 2002; the difficulties regarding the implementation, protracted delays, and the stalemate encountered in trying to bring the START II Treaty into force; the [START III](#) Treaty for which negotiations were never concluded; the New START treaty which US President Donald Trump

has strongly criticized (though it entered into force in 2001),²¹ and the status of the Comprehensive Nuclear-Test-Ban Treaty (“CTBT”) which the US, China, Israel’s regime and Iran have not ratified and India has not signed have all contributed to this new interest in approaches to arms control that forgo extended negotiations and complicated treaties.

It is necessary to draw a distinction between the concept of compliance with formal legal obligations and the concept of compliance with legally non-binding political commitments. Although the former concerns the well-developed frameworks of State responsibility in international law, the latter does not. In theory, however, compliance with international norms, whether “hard” or “soft”, is better achieved in several subject matters through regulatory regimes that utilize a model relying on a cooperative problem-solving approach rather than regimes presenting an “enforcement model” with a coercive approach.²² For the realization of such a constructive

²¹ According to a Reuters report on February 9, 2017, in US President Donald Trump's first 60-minute telephone call with Russian President Vladimir Putin, Putin inquired about extending the New START which was concluded in 2010. President Trump attacked the Treaty, claiming that it favored Russia and was “one of several bad deals negotiated by the Obama administration”. Moreover, according to another Reuters report on 1 November 2019, Vladimir Leontyev, a Russian foreign ministry official, was quoted as saying he didn't believe there was enough time left for Moscow and Washington to draft a replacement to the New START nuclear arms control treaty before it expires in 2021. In mid-October 2020, Putin proposed to “extend the current agreement without any pre-conditions at least for one year”, but this offer was rejected by the White House. Subsequently, Russian officials agreed to a U.S. proposal to freeze nuclear warhead production for a year and to extend the treaty by a year. U.S. Department of State spokesperson Morgan Ortagus stated that “We appreciate the Russian Federation’s willingness to make progress on the issue of nuclear arms control. The United States is prepared to meet immediately to finalize a verifiable agreement.”

²² Chayes, Abram, and Antonia Handler Chayes. 1995. *Agreements, The New Sovereignty: Compliance with International Regulatory*. Cambridge: Mass: Harvard University Press; See also, Michiel A. Heldeweg, and Ramses A. Wessel. 2016.

cooperation, States need to demonstrate their intention to comply with the agreed-upon, but non-binding, provisions. The foundation for compliance is a set of developed norms and whether a normative consensus on an issue area exists, and much initial compliance may be motivated by consensus rather than by treaty compliance mechanisms.²³ But in practice, until there exists no strict mechanism for verification of States compliance, they consider themselves to be capable of any behavior.

In this respect, while politically binding instruments provide many opportunities for States, they involve some degree of risk in terms of compliance for weak States. It is noteworthy that the verification of observing voluntary standards of such commitments is challenging.²⁴ According to Daniel Joyner:

“Powerful states, [...] will vehemently oppose attempts by others to assert that they are bound by obligations to which they did not clearly consent. Nevertheless, in their relations with weaker, powerful states often manifest an extraordinary ability to forget the advisability of this state-sovereignist view of international legal obligation, and to quickly turn into legal realists, arguing that even if established legal sources do not clearly impose an obligation on a weaker state, normative and practical considerations, supplemented increasingly by the practice of international organizations over which powerful states

“The Appropriate Level of Enforcement in Multilevel Regulation.” *International Law Research*; Vol. 5, No. 1.

²³ Chayes, Abram, Antonia Handler Chayes, and Ronald B. Mitchell. 1998. *Managing compliance: a comparative perspective.* *Engaging countries: Strengthening compliance with international environmental accords.*

²⁴ Bryan H., Druzin. 2016. “Why does Soft Law have any Power anyway?”, *Asian Journal of International Law*, 7 (2017), pp. 361–378

have disproportionate influence, support an extension of legal obligation nevertheless".²⁵

Superpowers may disregard political arrangements with impunity. Powerful States have greater control over international outcomes, are less in need of protection, and face higher sovereignty costs. They have less need for legalization and more reason to resist it, even though their adherence is crucial to its success.²⁶ In this regard, there are very few performance bonds available for States to constrain the powerful from such transgressions and non-compliance. For this reason, it is hard law that advantages the weak, and with its rigor comes between the weak and the mighty to protect and deliver.²⁷

This situation would be exacerbated when, contrary to existing definition of politically binding arrangements, superpowers resort to sanctions in spite of persuasion. Verification of compliance with hard law arrangements may be an effective mechanism by imposing sanctions for non-compliance or non-adherence, yet such a punishment may affect the concept of non-legally binding instrument. The US sanctions, imposed unilaterally to impede other MTCR Member States' in-compliance, are an instance of punishments under non-binding arrangements.²⁸ Although sanctions are intended to

²⁵ Joiner, Daniel. 2016. *Iran's Nuclear Program and International Law: From Confrontation to Accord*, Oxford University Press.

²⁶ Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54: 421-456. doi:10.1162/002081800551280.

²⁷ Weil, Prosper. 1983. "Towards Relative Normativity in International Law?" *The American Journal of International Law* 77: 423; See also, Reisman, W. Michael. 1988. "A Hard Look at Soft Law." *Yale Law School Faculty Scholarship Series* 750; See also, Abbott, Kenneth W., and Duncan Snidal. 2000. "Hard and Soft Law in International Governance." *International Organization* 54:421-56.

²⁸ Joshi, Shashank . 2016. *What MTCR Membership Means for India, and What It Doesn't?* 06 09. Accessed 06/09/ 2019. <http://thewire.in/41725/what-the-mtcr-membership-means-for-india-and-what-it-doesnt/>.

overcome the deficiency of politically binding arrangements in terms of compliance, they fundamentally transform their persuasive nature, and weaker States observe this as an opportunity for the major powers to further their own interests.

Does this mean that achieving a pure politically binding arrangement is in a state of deadlock? A positive answer to this question is not appropriate. The tendency to create 'politically binding' documents is still alive. However, for having a politically binding arrangement, it is crucial to take its elements, namely confidence building measures, into account in order to reduce uncertainty over the compliance issue; this would increase the possibility of creation of a successful pure politically binding arrangement.²⁹

III. Confidence-Building Measures

The causes of mistrust on military affairs vary from region to region or even within the same region. Confidence arising from a dynamic process based on past experiences, present perceptions and future anticipations, is the product of a multitude of elements. The destabilization caused by insufficient knowledge about opposing military capabilities is often exacerbated by subjective misconceptions and lack of trust concerning the intentions of either weak or mighty States. Therefore, the main objective of Confidence-Building Measures ("CBMs") is to reduce the effects of fear elements and promote more accurate and reliable reciprocal assessment of military programs.

²⁹Klabbers, Jan . 1996. "The Concept of Treaty in International Law,." *International & Comparative Law Quarterly* (Kluwer Law International); See also, Williamson, Richard L. 2003. "Hard Law , Soft Law , and Non-Law in Multilateral Arms Control?: Some Compliance Hypotheses." *Chicago Journal of International Law* 4 (1); See also, SIPRI Yearbook. 2015. *Conventional arms control and military confidence building*. Oxford University Press.

Confidence-building could facilitate the processes of arms control and disarmament negotiations, as well as the settlement of international disputes and conflicts, and further strengthen the security of States, whether neighboring or not. The lack of clear and timely information is of special relevance. Therefore, military openness/transparency is seen as a central element of the concept of CBMs; this element could bring about the 'reduction of uncertainty' with regard to general military escalation, crisis escalation, surprise attacks, and low-level violence.³⁰

Undoubtedly, agreement on legally binding measures will be of greatest value for the building of confidence. Nevertheless, in the absence of the intention to create legally binding arrangements, States may agree on confidence-building measures of a less obligatory character. Therefore, non-legally binding measures containing political commitments are of significance for the confidence-building process. The measures could be observed as States' persistent will to implement certain pre-established norms.³¹

Non-legally binding confidence-building measures, however, can support the purpose of international law by providing for an internationally acceptable code of conduct. The consistent and uniform implementation of politically binding confidence-building measures over a substantial period of time may lead to the development of an obligation under customary international law. In this way, the process of confidence-building may gradually contribute to the formation of new norms of international law where the interests

³⁰ Evron, Yair. 1995. "Confidence- and security-building measures in the Arab-Israeli context." *Contemporary Security Policy* 16 (1): 152-172; See also, Seung-Ho Joo. 2016. *Peace Regime Building on the Korean Peninsula and Northeast Asian Security Cooperation*. Routledge.

³¹United Nations Secretary General. 1982. *Comprehensive Study on Confidence-building Measures*. New York: United Nations.

of both the weak and the mighty would be fulfilled in a constructive manner.³²

With regard to missile issues, except in rare cases³³, CBMs form the significant portion of activities conducted through political commitments. As Bernd Kubbig has pointed out, it is useful to distinguish between the two categories of missile-related CBMs. First, modest CBMs including declarations on the no-first-use of missiles, the exchange of information on missile projects and activities (especially in times of crisis) via hotlines or data exchange centers, and advance notification regarding flight tests and space rocket launches for civilian purposes. Second, far-reaching CBMs including the de-targeting and de-alerting of missiles, redeployment and non-deployment as well as restraints/moratoriums or bans on missile flight tests.³⁴ As the case studies of present article, MTCR and HCOC relate to the former category, while PSI suits the latter; Meanwhile, PNIs as non-legally binding instruments lack CBMs. Moreover, as will be discussed in Section V below, PSI, MTCR and HCOC, rely heavily on CBMs as a means of providing a ground for enabling State parties to assure other subscribers that they would comply with the arrangement's provisions.

IV. Case Studies

Pursuant to the evaluation of the impact of a non-legally/politically binding arrangements on the process of non-proliferation of ballistic

³² Joiner, Daniel. 2016. P.124.

³³ PNIs as legally non-binding arrangements do not use CBMs.

³⁴ Kubbig, Bernd W., and Christian Weidlich. 2015. *A WMD / DVs Free Zone For The Middle East Taking Stock: Moving Forward Towards Cooperative Security*. Frankfurt: Peace Research Institute.

missiles through exercising CBMs and transparency measures, this article considers four cases namely, MTCR, PNIs, PSI and HCOC.³⁵

a) Missile Technology Control Regime

Established in 1987, the MTCR was created in order to curb the spread of unmanned delivery systems for nuclear weapons, specifically delivery systems that could carry a payload of 500 kg for a distance of 300 km. The Regime is an informal and voluntary partnership that has grown to thirty-five nations by 2021.

³⁵ A relevant question here is whether the Joint Comprehensive Plan of Action (JCPOA) as a recent politically binding deal on Iran's nuclear program has to be listed among the other ballistic missile related arrangements. In response, it must be noted that the text of the JCPOA has not addressed the missile issue. However, while we can find nowhere the compromise of parties to the plan on ballistic missiles issues, it is possible to identify the latter in the subsequent United Nations Security Council Resolution 2231(2015) which contains a provision on Iranian (nuclear-capable) ballistic missile activities. Paragraph 3 of annex B to resolution 2231(2015) states "*Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology.*" The United States, Israel's regime, the United Kingdom, France and Germany believe the paragraph includes MTCR category I systems. On the contrary, Islamic republic of Iran opine that the addition of the phrase "designed to be" to the wording "capable of delivering nuclear weapons" used in the already terminated Security Council resolution 1929 (2010) was a deliberate modification following lengthy negotiations in order to exclude Iran's defensive missile program that is "designed" to be exclusively capable of delivering conventional warheads. Accordingly, the missile program of the Islamic Republic of Iran falls outside the purview or competence of the Security Council resolution and its annexes, as does its space program, including the launch of space launch vehicles. Moreover, Iran argue that the definitions of the MTCR – an exclusive "informal political understanding" among only 35 States – were invoked by the critics; There is no implicit or explicit reference in that paragraph either to the MTCR itself or to its definitions and, thus, any reference thereto is totally misleading; Moreover, while the MTCR criteria are not legally binding, even for its members, any attempt to portray them as the universally agreed definition is suspicious.

Since its commencement and despite the limited number of its members, the MTCR has been successful in assisting to decelerate several ballistic missile programs. According to the Arms Control Association:

“Argentina, Egypt, and Iraq abandoned their joint Condor II ballistic missile program. Brazil and South Africa also shelved or eliminated missile or space launch vehicle programs. Some Eastern European countries, such as Poland and the Czech Republic, destroyed their ballistic missiles, in part, to better their chances of joining MTCR.”³⁶

Nevertheless, the Regime has several limitations: it lacks the acceptance of some key global and regional players who have opted not to join the Regime, in spite of the fact that they possess a significant number of ballistic missiles. Thus, the Membership of only thirty-five States cannot be translated into the Regime’s universality. It must be noted that, in 2004, China applied to join the MTCR, but the members did not offer China membership due to the concerns they had about China's export control standards.³⁷ Israel’s regime, Democratic People’s Republic of Korea, Pakistan and Iran also remain outside the Regime. Some of these States continue to advance their missile programs with different degrees of foreign assistance and have deployed medium-range ballistic missiles with long range.

³⁶ Davenport, Kelsey. 2017. “The Missile Technology Control Regime at a Glance”. Arms Control Association. <<https://www.armscontrol.org/factsheets/mtrc>>. Accessed 26/09/2019.

³⁷ Boese, Wade. 2004. “Missile Regime Puts Off China”. Arms Control Association. <https://www.armscontrol.org/act/2004_11/MTCR>. Accessed 05/10/2019; See also, Ministry of Foreign Affairs, the People's Republic of China. 2010. “China and Multilateral Export Control Mechanisms.” <http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/jks_665232/kjlc_665236/fkswt_665240/t410728.shtml>. Accessed 02/10/2019.

It can be observed that the Regime was not able to convince these actors to subscribe, nor did it provide the ground for this aim. Israel's regime and China in particular have already deployed strategic nuclear SLCMs and ICBMs and satellite launch systems. Some non-members of the MTCR are also becoming sellers rather than simply buyers. The Democratic People's Republic of Korea, for example, is viewed as the primary source of ballistic missile proliferation in the world today. Although China has agreed to abide by the original 1987 Guidelines and Annex, it has provided Pakistan with ballistic missiles and its technology.³⁸ China also supplied IRBMs to Saudi Arabia in 1988.³⁹ In addition, since the MTCR has no regime-wide compliance or verification provisions, in case of any question, Partners consult bilaterally to promote a common understanding of the issue.

The Regime seems to be a non-legally binding treaty. However, given some non-soft approaches such as imposing sanctions which exists in its framework, it is reasonable to call it a "semi non-legally binding" rather than a pure "politically binding arrangement".⁴⁰ The US sanctions, imposed unilaterally to impede other MTCR member

³⁸ Fisher, Richard. 2004. "Pakistan's Long Range Ballistic Missiles: A View from IDEAS." <https://web.archive.org/web/20121229094132/http://www.strategycenter.net/research/pubID.47/pub_detail.as>. Accessed 13/09/2019; Spector, Leonard S. 2018. "The Missile Technology Control Regime and Shifting Proliferation Challenges" Arms Control Today.

³⁹ Meick, Ethan. 2014. "China's Reported Ballistic Missile Sale to Saudi Arabia: Background and Potential Implications." U.S. China Economic and Security Review Commission; Keck, Zachary. 2014. "China Secretly Sold Saudi Arabia DF-21 Missiles with CIA Approval". The Diplomat. <<https://thediplomat.com/2014/01/china-secretly-sold-saudi-arabia-df-21-missiles-with-cia-approval/>>. Accessed 29/10/2019.

⁴⁰ Joshi, Shashank . 2016. *What MTCR Membership Means for India, and What It Doesn't?* 06 09. Accessed 06/09/2019. <http://thewire.in/41725/what-the-mtcr-membership-means-for-india-and-what-it-doesnt/>.

States' in compliance, would negatively affect the non-binding nature of this Regime.⁴¹

b) The Presidential Nuclear Initiatives

There are two alternatives to the negotiation of formal or legally binding treaties. The first alternative includes informal agreements that are politically but not legally binding on their parties. The second alternative includes unilateral initiatives that may or may not be coordinated with other parties but are expected to be reciprocated and are politically binding.

In 1991, The US and the Soviet Union announced a series of policy initiatives declaring that they would reduce their arsenals of tactical nuclear weapons and delivery vehicles. These initiatives have become known as the Presidential Nuclear Initiatives ("PNI"). Tactical nuclear warheads were a particular apprehension, given that they were widely dispersed, smaller, and more convenient to transport in contrast to weapons associated with strategic systems. The PNIs were primarily unilateral—not to be negotiated, but instead implemented immediately. They were "reciprocal unilateral commitments," meaning that they are politically/non-legally binding and are non-verifiable.⁴²

The Presidential Nuclear Initiatives are important to arms control for two reasons. First, they remain the only tangible success in international efforts to reduce numbers of Tactical Nuclear Weapons ("TNW"). Second, the PNIs offer an alternative model to more traditional arms control treaties, such as SALT and START. Moreover, these initiatives were prepared with a speed and secrecy

⁴¹ Ibid.

⁴² Gorbachev, Mikhail. 2002. "Statement by Former President Mikhail Gorbachev." Tactical Nuclear Weapons: Time for Control, United Nations Institute for Disarmament Research.

that had never been seen before in arms reduction, and have yet to be duplicated. The PNIs were developed in three weeks and involved very few people. In contrast, most arms control measures, before and after the PNIs, required months and often years of interagency and international debate and negotiation by scores of military and civilian officials.

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The PNIs’ successful performance in the 1990s, under which TNWs were withdrawn from Europe, enhanced the attractiveness of such approaches to arms control. All these reasons have been cited for renewed interest in either forgoing formal set-piece negotiations and lengthy complicated treaties in favor of more informal accords, or simply undertaking unilateral steps to reduce force levels.

The PNIs were universally welcomed when they were announced, but their implementation proved disappointing to many. Serious concerns developed within just a year or two about the extent to which Russia was fulfilling its PNIs commitments. Both sides exchanged detailed implementation reports at the beginning. However, while the

⁴³ J. Koch, Susan. 2012. “The Presidential Nuclear Initiatives of 1991–1992.” Center for the Study of Weapons of Mass Destruction National Defense University.

Russian submissions grew progressively over a period of time, they gradually became less informative than they were at the outset and finally the report exchanges ceased. As a result, although in a certain period of time the initiatives led to a reduction in the number of ballistic missiles, this process was finally aborted.

The PNIs, moreover, suffer from some further deficiencies. First, the initiatives did not include verification or data exchange mechanisms. The lack of reliable verifiable information has consistently generated suspicions and, from time to time, accusations that the other side does not live up to its obligations.⁴⁴ Secondly, it would seem that, due to its unilateral format, such an initiative is ineffective as a model for today's ballistic missile control. Although the United States and Soviet Union/Russia were found to be the major ballistic missile possessors in the 1990s, today the number of ballistic missiles has increased significantly. This would suggest that PNIs as a unilateral, or at most bilateral, initiative hardly represents a functional instrument for *status quo*.

c) The Proliferation Security Initiative

The Proliferation Security Initiative ("PSI") is a global effort that aims to interdict illicit shipment of WMDs, their delivery systems including ballistic missiles, and related materials to and from States and non-State actors of proliferation concern.⁴⁵ Launched by the United States in 2003, the PSI, as a non-binding political pledge has, by 2021,

⁴⁴ Corin, Eli. 2004. "Presidential Nuclear Initiatives: An Alternative Paradigm for Arms Control." Nuclear Threat Initiative. <http://www.nti.org/analysis/articles/presidential-nuclear-initiatives>. Accessed 12/10/19.

⁴⁵ "Proliferation Security Initiative". 2016. <<https://www.state.gov/t/isn/c10390.htm>>. Accessed 15/09/2019.

grown to include the endorsement of 107 nations around the world.⁴⁶ It is a flexible arrangement of international cooperation and is consistent with domestic and international legal authorities. Endorsing States have sought a robust capacity to conduct interdictions that usually involve only two or three governments. In addition, as a non-binding arrangement, the PSI has attracted several States, while contributing to formation of norms with regards to WMDs and specifically ballistic missiles. PSI has also paved the way for conclusion of binding non-proliferation agreements.⁴⁷ Given the classified nature of the PSI's activities, it is difficult to assess the extent to which this initiative has been effective in reaching its non-proliferation objectives. However, it has been, as far as the available information suggests, partially effective. This level of effectiveness has been claimed according to several interdictions through which the proliferation of WMDs was disrupted.⁴⁸

Despite the support expressed by over half of the members of the United Nations, some countries have opposed the initiative. Moreover, the founding members stressed that PSI would be an activity and not an organization, and has no central body or secretariat.⁴⁹ Furthermore, in some cases, critics question PSI. They mainly submit their criticism in three areas; they question its legality by arguing that the declared intent of PSI members to stop ships on the high seas is a violation of international law guaranteeing freedom of the seas.⁵⁰ They further

⁴⁶ Proliferation Security Initiative (PSI), < <https://www.nti.org/learn/treaties-and-regimes/proliferation-security-initiative-psi/> >. Accessed 15/12/2020.

⁴⁷ For instance, the United States has concluded legally binding bilateral ship-boarding agreements.

⁴⁸ Jeffrey W. Knopf. 2016. "*International Cooperation on WMD Nonproliferation.*" University of Georgia Press.

⁴⁹"Proliferation Security Initiative: Chairman's Conclusions at Fourth Meeting" <www.state.gov/t/isn/115305.htm>. Accessed 07/05/2019.

⁵⁰ Article 23 of the United Nations Convention on the Law of the Sea states that Foreign nuclear-powered ships and ships carrying nuclear or other inherently

assert that the initiative gives states a license of "piracy" on the high seas.⁵¹ Moreover, the opponents of PSI assert that it is not only a multilateral process, but is pursuant to and in furtherance of unilateralism. Since it is a US-led initiative that in its early stages just included few members, other States have characterized it as a non-multilateral arrangement and similarly disputed its legitimacy.⁵² It is notable that the United States has responded to most of these and other questions concerning the credibility and legitimacy of the initiative.⁵³ However, this has not solved the problem and key protagonists, including China and India, still remain outside this initiative.

Generally, PSI is a widely accepted arrangement that contributed significantly to WMDs (in particular ballistic missiles) through a legally non-binding framework. The initiative, however, has not been placed under a UN resolution and accordingly, its legitimacy has an unstable status. The fact that some key players have not recognized this initiative would prevent it from becoming a fully successful model in the realm of non-proliferation including ballistic missiles.

d) The Hague Code of Conduct

Having held its 19th Regular Meeting in October 2020 under the chairmanship of Switzerland, The Hague Code of Conduct against ballistic missiles as a unique politically binding multilateral

dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.

⁵¹ Anti-imperialist News Service. 2003. U.S. Practicing Sea and Air Piracy. <http://www.anti-imperialist.org/korea-piracy_9-16-03.html>. Accessed 12/09/2019.

⁵² Mark J. Valencia, The Proliferation Security Initiative: A Glass Half-Full. Arms Control Today. <<https://www.armscontrol.org/act/2007-06/features/proliferation-security-initiative-glass-half-full>> Accessed 12/09/2019.

⁵³ Gabriella Venturini. 2016. The Proliferation Security Initiative: A Tentative Assessment. Nuclear Non-Proliferation in International Law, pages 213-233.

confidence building has played an important role in keeping the debate alive on missile proliferation and has succeeded in introducing some important CBMs during the past sixteen years.⁵⁴ The HCOC does not ban ballistic missiles, but it does call for restraint in their production, testing, and export. In 2002, although differences among Member States persisted in various disarmament forums, progress was made and in November of the same year, 101 States, including four nuclear-weapon States, established this voluntary and non-legally binding Code.⁵⁵ It is intended to supplement, not supplant, the Missile Technology Control Regime, and is administered collectively by all subscribing States. As of 2021, 143 States have subscribed to the Code.

Some States perceive the HCOC as a discriminatory instrument designed to reinforce their exclusion from ballistic technology rather than as a means of increasing confidence and security.⁵⁶ Taking into account that some States which possess ballistic missile are not members of the HCOC (see Table I), the Code's qualitative status of global representation of countries may be perceived as a sign of far greater acceptability; mainly because few important and responsible ballistic missile holder States are the members of this mechanism and many of the signatory States actually do not have the capability to design and develop ballistic missiles.

⁵⁴ Press Release by HCOC Subscribing States, 16th Regular Meeting of the Subscribing States to The Hague Code of Conduct Against Ballistic Missile Proliferation, <http://www.hcoc.at/documents/HCoC_16th_Regular_Meeting_press_release.pdf >, Accessed 05/10/2019.

⁵⁵ United Nations. 2002. *Yearbook of the United Nations*. New York: United Nations.

⁵⁶ Delory, Stephane. 2015. "The Dynamics of Missile Proliferation in the Middle East and North Africa." In *WMD Arms Control in the Middle East: Prospects, Obstacles and Options*, by Harrald Muller, 193. England: Ashgate.

In the Middle East, only Iraq, Jordan, Libya, Morocco, and Turkey have signed the 2002 Hague Code of Conduct; the code in the Middle East, where ballistic missiles have been used more than in other regions, has not been welcomed by protagonists. Israel's regime has, according to Table I, significant ballistic missiles capabilities in the region. Recognizing the immediate menace posed by Israel's non-transparent missile related activities, Egypt as a regional power has declared that its accession to a non-proliferation arrangement would be contingent on Israel's membership. However, Israel's regime has not become a subscriber to the Code. Meanwhile Iran, whose military power mainly relies on missiles, has been a persistent objector. The abstaining States also include China, Pakistan, and Democratic People's Republic of Korea, where the latter, from 2002 until 2021, has tested ballistic missiles more than a hundred times.⁵⁷

Some scholars opine that the Code has some deficiencies with regard to the issue of compliance. They consider the HCOC as a vibrant mechanism and argue that this mechanism has its own limits in respect of stopping the production, testing, or even proliferation of ballistic missile technology. Furthermore, the code only enumerates few general principles that States have to politically commit to. The conventional wisdom is that unless there are no international consensus on stopping the production of certain types of armaments, States would never bind themselves to do so.⁵⁸ Bearing in mind that the HCOC is merely an initiative for paving the way for norm building, its outcome expectations should not be overestimated.

⁵⁷ Berlinger, Joshua. 2017. North Korea's missile tests. September 18. Accessed 9/10/2019. <http://edition.cnn.com/2017/05/29/asia/north-korea-missile-tests/index.html>

⁵⁸ Lele, Ajey . 2013. *Special Report: The Hague Code of Conduct: Predicting the Future*. January 15. http://www.sspconline.org/opinion/HagueCodeofConduct_PredictingtheFuture_15012013.

Among other multilateral missile arrangements, the Code is mainly based on CBMs. The Code subscriber States have recognized that full compliance with non-proliferation and other norms of arms control would contribute to building confidence among them. Thereby, States have reaffirmed the necessity of transparency measures with the view to increasing confidence and promote non-proliferation of ballistic missiles. By subscribing to the code, members have voluntarily committed themselves politically to provide CBMs, including pre-launch notifications ("PLN"), on ballistic missile and space-launch vehicle launches ("SLV") and test flights. Member States have also committed themselves to submit an annual declaration ("AD") of their country's policies on ballistic missiles and space-launch vehicles.

According to the CBMs' categories, as mentioned in Section IV, transparent information, communication measures, and declarations constitute modest CBMs. In this regard, annual declaration of ballistic missile and space launch vehicle policies, inviting international observers to their launch sites, and pre-launch notification on ballistic missile and space launch vehicle launches and test flights, have all been recommended by the HCOC. These measures, if carried out successfully, would expand upon practical CBMs and generate the possibility of further improved trust and more comprehensive agreements on the related field. For instance, according to the Code, States might, on a voluntary basis, invite international observers to their launch sites. Such a constructive step can significantly contribute to the aim of the Code.

e) The Status of Compliance with the Code

There is no official data on the performance of the HCOC's Member States. However according to the available data, subscriber States'

compliance with the Code varies.⁵⁹ The officials worried that the US and Russia's non-participation would make it less likely for non-members to join.⁶⁰ Since 2002, the United States and Russia, which are regarded as the HCOC's most important members, have not fully implemented their obligations under the Code. Thus, based on the confidential documents leaked by WikiLeaks, the Dutch government was quoted as saying that "The Russians had 'half-heartedly' complied by submitting some PLNs for commercial space launches, but had ceased all PLNs as of January 2008 in response to United States noncompliance. Moscow and Washington noncompliance with PLN submissions could jeopardize the HCOC".⁶¹

In this respect, Russia identified two main reasons for the suspension of its PLNs. One was the refusal of other HCOC members to adopt a Russian proposal to make the annual reports and pre-launch notification requirements more optional rather than politically binding. The other, WikiLeaks documents revealed, was the watering down of the Code to make it more palatable to Iran, which was among Russia's proposals to "enhance" the HCOC.⁶² Moscow contends that such a move might make the Code's membership more attractive to non-members, which include growing missile and space technology powers such as Brazil, China, India, Iran, and Pakistan. It must be recalled that the Democratic People's Republic of Korea, considered to be a leading missile proliferator, is not a participant either. Russia's

⁵⁹ Boese, Wade. 2008. *Russia Halts Missile Launch Notices*. March 1. Accessed 9/10/2019. https://www.armscontrol.org/act/2008_03/RussiaHalts.

⁶⁰ Ibid.

⁶¹ Schofer, Andrew. 2008. *NETHERLANDS/HCOC: concerns over pre-launch notification compliance*. January 24. Accessed 11/11/2019. https://wikileaks.org/plusd/cables/08THEHAGUE68_a.html.

⁶² Mahley, Donald A. 2008. *HCOC: GUIDANCE FOR THE APRIL 23, 2008 INFORMAL MEETING*. April 22. Accessed 11/07/2019. https://wikileaks.org/plusd/cables/08STATE42285_a.html.

other rationale for its suspension was that some current members have not been issuing PLNs. Presumably, the key culprit in Russia's eyes is the United States, which has never supplied PLNs through the Code, although it has regularly provided HCOC with annual reports.⁶³

In 2009, the chair of the French "Foundation for Strategic Research" stressed that current HCOC's PLN reporting is poor. This is because some 80 percent of the (approx.) 60 ballistic missile launches reported in 2008 were from the US or Russia. However, neither State currently submits PLNs to the HCOC. Of the remaining twenty percent, only a few come from non-subscribing States. One of the reasons for this is that developing countries are finding it simpler to contract SLV business to another country than to create and maintain a national launch capability.⁶⁴

Despite the low level of compliance by few subscribers, the majority of them are committed to demonstrate their compliance with the Code. In 2008, about 70 percent of the subscribing countries submitted ADs, and this was seen as a positive confidence-building measure.⁶⁵ Other Code members providing advance launch notices would continue to do so despite the Russian suspension, which include France, Japan, Norway, Ukraine, and the United Kingdom.⁶⁶

The author inquired from the Executive Secretariat of HCOC immediate central contact about the current status of compliance with the Code. It was revealed that between 2015 and 2017 the average of

⁶³ Karp, Aaron . 2012. *Stemming the Spread of Missiles: Hits, Misses, and Hard Cases*. April 3. Accessed 13/1/2019. https://www.armscontrol.org/act/2012_04/Stemming_the_Spread_of_Missiles_Hits_Misses_and_Hard_Cases.

⁶⁴ Pyatt. 2009. *HCOC: EU Workshop on Strengthening the Hague Code Of Conduct*. July 15. Accessed 11/8/ 2019. https://wikileaks.org/plusd/cables/09UNVIEVIENNA335_a.html.

⁶⁵ Ibid.

⁶⁶ Boese, Wade. 2008. *Russia Halts Missile Launch Notices*. March 1. https://www.armscontrol.org/act/2008_03/RussiaHalts. Accessed 9/10/2019.

ADs and PLNs received was from 2/3 of all subscribing States.⁶⁷ Hereupon, most of the subscriber States are following its provisions with certain levels of compliance through CBMs and transparency measures in particular by submitting their annual declarations to the Secretariat.

In this regard Argentina, in response to a UN resolution on outer-space, emphasized the importance of utilizing available arrangements, specifically the mechanism for annual reporting under the HCOC. As a space power, Ukraine, expressed the view that it would provide the Executive Secretariat of HCOC with related notification of its launch vehicles in the context of the Sea Launch program and with annual statements on Ukraine's policies regarding the space launch vehicles and ballistic missiles. Ukraine also emphasized that annual statements should be used to prepare a consolidated annual report. In addition, increasing confidence and transparency through Member States adherence to provisions of multilateral regimes such as MTCR, was underscored by Ukraine. In line with Ukraine and Argentina, Austria, in response to Resolution 61/75, attached special importance to the Code. It is worth noting that following a major turning in its missile related policies, India joined MTCR in 2016 and subsequently subscribed to the HCOC. These are positive signs which are redolent of engagement of more States in this politically binding arrangement and subsequently the constructive atmosphere for norm building.⁶⁸

⁶⁷ Peitl, Julia, interview by the author. 2016. *Executive Secretariat, HCoC - Immediate Central Contact, e-mail correspondence*, (September 12).

⁶⁸ Although political commitment may not be legally binding, they can contribute to formulation of what is referred to as "soft law". Although soft law is nonbinding, it may lead to some compliance with its standards. It can also generate state practice that gives rise to new customary international law rules. See Barry E. Carter and Allen S. Weiner. 2014. *"International Law"*. Wolters Kluwer Law & Business. p.133.

Although, some responsible ballistic missile possessor States are still not the part of this mechanism, it is clear that the Code has gained widespread acceptance among States. Increasing the number of memberships to 160, and more regular and accurate annual declarations, are the likely possibilities in future. Annual conferences of subscribing States help take the Code forward and keep the debate alive.⁶⁹ The number and performance of the subscribed States may be taken as emergence of outstanding norms concerning ballistic missile proliferation. Although we are still far from a binding agreement on ballistic missile issue, HCOC provide an opportunity through CBMs to conclude a widely accepted binding arrangement in the upcoming years to which State parties can demonstrate more compliance with the assumed provisions.

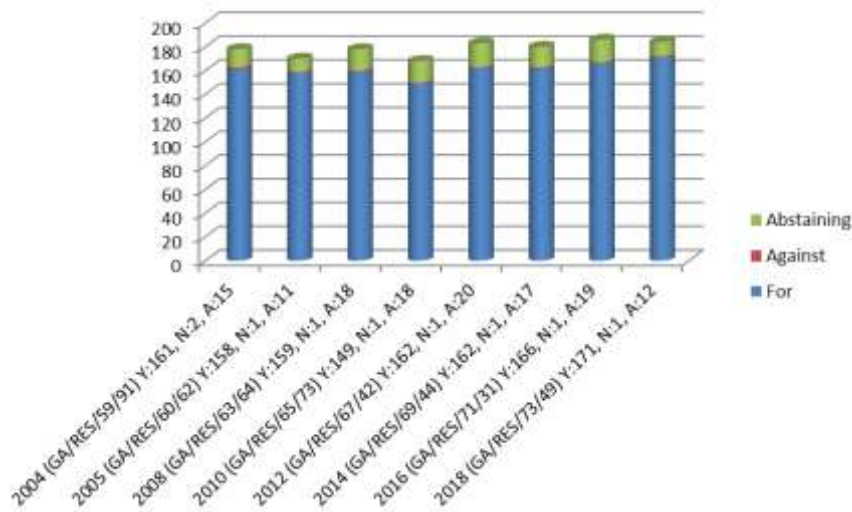
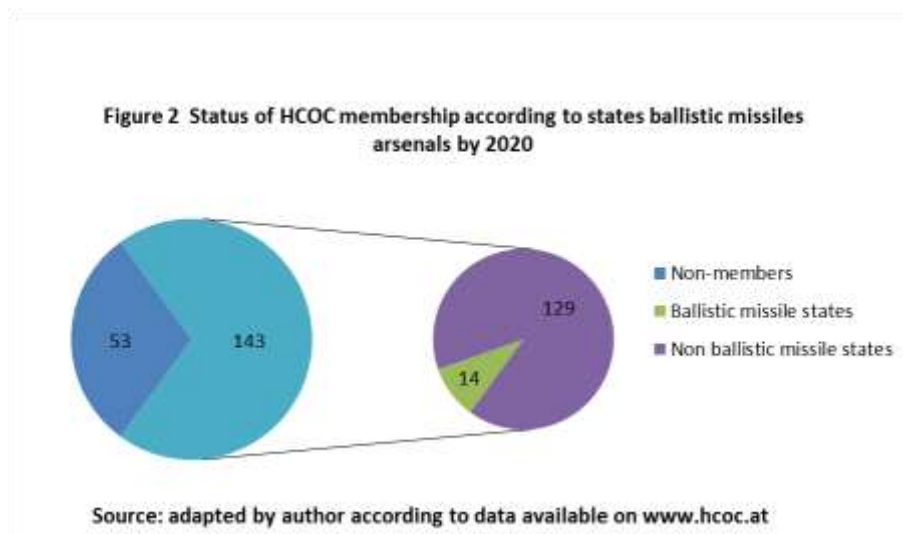


Figure 1 Recorded vote for United Nations Resolutions/Decisions on the issue of the HCOC 2004-2020. Source: www.UN.org

⁶⁹ Ibid

Since its establishment, the number of States who support the HCOC is almost unabated. According to the previous UN resolution on supporting the HCOC, as illustrated in Figure 1, the Code wins the support of ninety percent of voting States. Although abstaining States possess a significant portion of ballistic missile share, it is worth clarifying that the HCOC has been accepted by the majority of States. Though the universality of the code is not dependent on the number of missiles arsenals (see Figure 2), the international acceptability of the Code's provisions is a widely recognized matter. Through its politically binding framework, the code could further attract States who possess ballistic missile. Then, in case of sustainable compliance of the majority of subscribers with the Code, their practice would gradually turn into more acceptable norms, and as a result, the sense of mistrust between subscriber States on the issue of ballistic missiles should decrease.



Conclusion

As discussed earlier in the introduction, this article, for the first time, brought into consideration the issue of ballistic missiles into account from the perspective of non-legally binding arrangements. In this regard, the author strived to distinct soft law from hard law. Ignoring the gray area between the law and politics, and turning the legal vs. political debate into a rigid dichotomy of all-or-nothing or black-and-white issue, would ensue incongruous corollaries. While the law is clearly an important factor in ensuring compliance with multilateral arms control agreements, it is not a panacea for the problems that arms control seeks to address. The solution to the problems is not always in the form of hard law.⁷⁰ On the other hand, the soft approaches like political arrangements are not indefectible. However, this article argues that the significant potentials for the matrimony and coexistence of political commitments with soft law provisions are undeniable. The international community is becoming more interested in legally non-binding arrangements and their related methods, including Confidence-Building Measures.⁷¹

In the same vein, MTCR, PNIs, PSI and HCOC are purposefully designed to be politically binding. As delineated above, by the passage of time we observe the growth of maturity indicators of these legally non-binding regimes. In comparison to MTCR (1968) and PNIs (1991), the next generations of instruments have brought more countries around the table. States accession to PSI and HCOC has increased so that their membership has swelled to 143 by 2021. MTCR, PNIs and PSI have no regime-wide compliance or verification

⁷⁰ Shelton, Dinah . 2003. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System*. Oxford Scholarship Online. doi:10.1093/acprof:oso/9780199270989.001.0001.

⁷¹ Williamson, Richard L. 2003; See also, SIPRI Yearbook. 2015.

provisions, and in case of any questions, Partners consult bilaterally to promote a common understanding of the issue. The HCOC, the more-developed arrangement regarding global ballistic missiles, has now provided an arena for multilateral negotiations in spite of limited and less effective bilateral talks for problem solving. Since military openness/transparency is a central element of the concept of CBMs, another weakness that distinguishes the first three mechanisms from the HCOC, which rely on modest CBMs, is the lack of clear and timely information. Thereupon, HCOC has more chances to become a successful arrangement in the field of ballistic missiles nonproliferation. It seems that the HCOC could strengthen current disarmament arrangements in more convincing ways than other politically binding arrangements.

However, if this idealistic scenario is frustrated and some ballistic missiles have fail to comply, three more realistic scenarios will occur with regard to the contribution of multilateral legally nonbinding arrangements to nonproliferation. The first scenario is transformation of political commitments into a comprehensive treaty. This is also a complicated process that requires the willingness of States to conclude and ratify a treaty. If the treaty fails to reach universality, the danger of ineffectiveness would emerge. The second scenario would be that the UN Security Council (“UNSC”) adopts a resolution under Chapter VII, incorporating all or some of the principles laid down by agreements. An example of this is Resolution 1540 adopted in 2004, when it was declared that WMD proliferation poses a serious threat to international peace and security. This scenario is unattainable in short term, because a major power such as China, who even was not able to subscribe to MTCR, would probably not vote in favor of such a resolution. Finally, the third scenario is that the legally non-binding principles gradually translate into customary international law. Although this sort of process is possible, it is not facile. What is

lacking is the *opinion juris*, i.e. the conviction to abide by legal obligations when States implement provisions.

It thus appears that the realization of the aforementioned scenarios are impossible, because the ballistic missiles are considered as strategic weapons and directly relate to the security of States, and convincing all of the ballistic missiles haves to engage in a legally or semi-legally binding agreement like MTCR is not the easy in the near future. Nonetheless, it is more plausible to convince all States to observe the provisions of a politically binding arrangement. This would require main players to focus, in short term, on strengthening and developing the commitments through multilateral legally non-binding arrangements. Promoting the universality and the level of compliance with the provisions of these political instruments would significantly contribute to the process of ballistic missiles control.