
CURRENT LEGAL DEVELOPMENTS

Forbearance is no Acquittance: the Legal Status of the Comprehensive Nuclear Test Ban Treaty

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Abstract: The difficulties surrounding the entry-into-force of the CTBT, which have become more pressing after the refusal of the American Senate to ratify the treaty, have their origin in divergent perceptions of different groups of states about the relationship between the NPT and the CTBT in terms of non-proliferation and nuclear disarmament. Still, preparations for the implementation of the treaty continue unabated. It can be upheld that given the current legal status of the CTBT there already exists a prohibition on the carrying out of nuclear test explosions anywhere for all States Signatories of the CTBT, at least as long as they have not indicated not to become a Party to the treaty.

1. INTRODUCTION

On 13 October 1999, the American Senate refused to ratify the Comprehensive Nuclear Test Ban Treaty (CTBT), thereby refusing to follow the path that had consistently been taken by the United States in the course of negotiations which eventually led to the adoption of the CTBT in 1996.¹ As is *mutatis mutandis* the case with international legal control over any class of weapons of mass destruction, the value of the CTBT-regime essentially depends on the participation of the nuclear capable states. For that reason, the entry-into-force of the CTBT has been made dependent on the ratification of 44 nuclear capable states specially identified in the treaty.² Since the United States is among these states and plays

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1. The General Assembly of the United Nations adopted the Comprehensive Nuclear Test Ban Treaty (CTBT) on 10 September 1996, by 158 votes in favour, three votes against and five abstentions. See UN Doc. A/50/L.78 (1996) and see 35 ILM 1439 (1996) for the text of the CTBT.
2. See Art. XIV and Annex 2 to the CTBT. In the Convention on the Prohibition of the Development, Production, Stockpiling, and the Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), 32 ILM 804 (1993), on which the CTBT has been modelled, this course has not been pursued. There was a lot of scepticism about the value of ratification for states having little

the leading role in the nuclear field, prospects for the rapid entry-into-force of the treaty have further diminished. Earlier, India and Pakistan, who are among the said 44 states as well, refused even to sign the CTBT and by their 1998 series of test explosions crossed the nuclear threshold to become *de facto* nuclear weapon-states. Other important obstructionists amid the group of 44 states are China, Israel (both only signed) and the DPRK (which has not even signed). It is clear that, given this state of affairs, it may well take years before the CTBT can enter into force even though the treaty has been signed by as many as 155 states and ratified by sixty.³

Potential difficulties surrounding the entry-into-force of the CTBT had been anticipated. On the basis of Article XIV(2), a Conference could be convened, three years after the opening for signature of the treaty, to consider and decide by consensus what measures consistent with international law might be undertaken to accelerate the ratification process in order to facilitate the early entry-into-force of the treaty. This 'Conference on Facilitating the Entry into Force of the CTBT' was held in Vienna from 6 to 8 October 1999, but unfortunately accomplished too little to really speed up the ratification process.⁴ It is remarkable, that whereas arms control law has received an immense impetus over the last couple of years,⁵ opportunities for a global nuclear test ban apparently remain poor. On entry-into-force the CTBT shall be the first global treaty to effectively

or no chemical industry, and the dilatory progress of the most important states in that respect, the United States and the Russian Federation, has negatively affected ratification in other states and this in turn has adversely affected the preparations for the entry into force of the CWC. See T. Dunworth, R. Sutherland & T. Stock, *The Work of the Preparatory Commission, the Provisional Technical Secretariat and Preparations for Entry Into Force of the Chemical Weapons Convention*, in M. Bothe *et al.* (Eds.), *The New Chemical Weapons Convention – Implementation and Prospects* 169 (1998).

3. Status as at 31 August 2000. The other states among the group of 44 mentioned in Art. XIV of the CTBT that have signed, but not yet ratified are Algeria, Colombia, Democratic Republic of the Congo, Egypt, Indonesia, Islamic Republic of Iran, Ukraine and Viet Nam.
4. States Signatories to the CTBT expressed serious concern at the negative development regarding ratification, despite the fact that eight new states ratified the treaty between October and November; see Report of the Tenth Session of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organisation, CTBT/PC-10/1, 24 November 1999, at 2-3. See for the Report and the Final Declaration adopted by the Conference on Facilitating the entry into force of the CTBT, http://www.ctbto.org/ctbto/article_xiv/conference_report.shtml.
5. Reference can be made to the entry into force of the Chemical Weapons Convention in 1997 (text in 32 ILM 804 (1993)), the Southeast Asia Nuclear Weapon Free Zone Treaty also in 1997 (35 ILM 635 (1996)) and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction in 1999 (36 ILM 1507 (1997)). Furthermore, other treaties which have been concluded are the African Nuclear Weapon Free Zone Treaty in 1996 (35 ILM 698 (1996)) and the Model Additional Protocol (INFCIRC/540) for the strengthening of the IAEA-safeguards system, in 1997 (36 ILM 1232 (1997)). Also, negotiations on a legally binding Protocol for the strengthening of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention, 1015 UNTS 163 (1972)) have been underway since 1995.

prohibit any nuclear test explosion anywhere.⁶ At present, the only global legal instrument prohibiting (atmospheric) nuclear tests was orchestrated by a very small number of powerful states and does not contain supervisory mechanisms for the control of compliance.⁷ The current pause in underground nuclear testing relies on testing-moratoria, which are unilateral pronouncements that can be withdrawn at will.⁸

For considerations of space, this paper will be confined to two topics. First, some legal and political background on nuclear arms control will be outlined by discussing the relationship between the CTBT and the nuclear non-proliferation regime. Second, given the large number of states that have signed the treaty, the current status of the legal regime laid down in the CTBT will be examined.

2. TEST BAN AND NUCLEAR NON-PROLIFERATION

All nuclear arms control law is conditioned by the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which has divided the community of states into two groups, *viz.* a limited group of declared Nuclear Weapon States (NWS) and a very large group of Non-Nuclear Weapon States (NNWS).⁹ On the basis of the NPT, the NWS possess their nuclear arsenals in accordance with international law and are (only) prohibited from transferring nuclear weapons or other nuclear explosive devices and the (in)direct control over them to NNWS, whereas the NNWS are prohibited from acquiring and receiving nuclear weapons and are obliged to allow their non-nuclear status to be verified by the safe-

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6. See Art. I(1) of the CTBT: "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". This provision covers nuclear test explosions both for military and so-called 'peaceful' purposes.
 7. This multilateral instrument is the Limited Test Ban Treaty (LTBT) of 1963 (text in 2 ILM 883 (1963)), which prohibits nuclear weapon test explosions or other nuclear explosions in the atmosphere, in outer space, or under water, *i.e.* in environments where detection from outside the territory of the testing State was possible at that time. See E. Schwelb, *The Nuclear Test Ban Treaty and International Law*, 58 AJIL 642-670 (1964). The LTBT has never been signed by France and China. Nuclear testing furthermore has *de facto* or *de jure* been prohibited in nuclear weapon-free zones; see the overview provided by the ICJ in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 66, para. 58. Finally, the United States and Russia have assumed a mutual obligation to restrict their underground nuclear test explosions to 150 kilotons, in the 1990 Threshold Test Ban Treaty (TTBT) and the Peaceful Nuclear Explosions Treaty (PNET) of the same date.
 8. Contrary to the statements examined in the case of the French nuclear tests of 1974, testing-moratoria do not entail a promise to end nuclear test explosions, but instead the carrying out of test explosions is deferred until the state concerned decides to resume testing. See *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, 1974 ICJ Rep. 253 and *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, 1974 ICJ Rep. 457.
 9. The legal status of NWS under the NPT is attached to those states that manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967 (Art. IX(3) of the NPT). The text of the NPT, 1 July 1968, entry-into-force 1970, appears in 7 ILM 809 (1968).

guards-system of the International Atomic Energy Agency (IAEA). Furthermore, a rather undetermined obligation exists for all parties to the NPT to “pursue negotiations” on nuclear disarmament.¹⁰ A course of action that so far has been aspired to half-heartedly by the NWS. The current non-cooperative attitude of some of the NWS towards the establishment of the CTBT might partially be explained by their strong reservation towards nuclear disarmament in general.

The law of arms control¹¹ is directly linked to the maintenance of international peace and security. Arms control has never been perceived as an end in itself, but rather as a means to increase security and to avoid large-scale armed conflict.¹² The prevention of the *use* of weapons therefore has priority. The prevention of the use of nuclear weapons has not only been endeavoured by way of international law, but also by the political concept of (strategic) deterrence. Pursuant to the nuclear deterrence paradigm, the NWS prevent the (first) use of nuclear weapons against themselves and their allies, by signalling the possession of nuclear weapons that will be used in retaliation. The deterrence-strategy thus rests upon the (lawful) defensive use of nuclear weapons. One important consequence has been that the NWS felt free to carry out large series of nuclear weapon tests in order to maintain a credible deterrent. From the point of view of the NWS, the bargain made in the NPT between the NWS and the NNWS is based upon a perceived shared interest in preventing nuclear proliferation and on mutually compatible but not identical national security interests; whereas the NWS have an interest in maintaining a system in which there are few nuclear capable actors, the NNWS are considered to benefit since they can act in an international system in which most potential adversaries do not have nuclear weapons.¹³ Still, the regime created by the NPT has split up the community of states into a ‘Western’ and an ‘Eastern’ group, respectively relying for their security on American (c.q. NATO) and Russian nuclear deterrence, and a large

10. See Art. VI of the NPT, which provides that each of the Parties to the treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

11. The law of arms control can be defined as that part of public international law which deals with the restrictions internationally placed upon the freedom of behaviour of states with regard to their national armaments, and with the applicable supervisory mechanisms. See my article *The Law of Arms Control and Sub-regional Arms Control in the Former Yugoslavia: ‘Hard’ Law in a ‘Soft’ Law Context*, 55 NILR 363-387, at 370 (1998) with further references.

12. In addition, political and historical circumstances as well as considerations of humanity have directly influenced the legal development with regard to the control of weapons, including chemical, biological and nuclear weapons. Especially the prohibition of use of chemical and biological weapons has had its primary incentive in humanitarian considerations as well as in the conviction of their rather limited utility in warfare, see R. Price, *A Geneology of the Chemical Weapons Taboo*, 49 International Organization 1, 73-103 (1995).

13. See R. Latter, *The Continuing Threat of Nuclear Proliferation, Summary of the Wilton Park Conference on the Threat of Nuclear Proliferation*, at 1 (1998) (on file with author).

'Non-Aligned' group, composed of NNWS, insisting on nuclear disarmament.¹⁴ The end of the Cold War has not fundamentally changed the basic attitudes of these groups of states towards nuclear arms control.

There is a close *quid pro quo* between the NPT-regime and a nuclear test ban, as once more turned out at the 1995 Review and Extension Conference of the NPT where the NNWS accepted the indefinite extension of the NPT-regime as a "trade-off" with the guarantee of the conclusion of a CTBT "no later than 1996".¹⁵ The precise relationship between the NPT and a test ban is, however, subject to debate. Both the NWS and the NNWS consider the CTBT to constitute a step towards nuclear disarmament. However, firm disagreement remains whether the CTBT is primarily meant to strengthen the non-proliferation element (with its emphasis on the distinction between NWS and NNWS) or the disarmament-part of the NPT. The CTBT is perceived by most Non-Aligned states as an instrument for vertical non-proliferation, *i.e.* to prohibit the qualitative development and further refinement of nuclear weapons by the NWS, and, thus, to form a concrete advance towards the attainment of the objectives stated in the NPT with regard to nuclear disarmament. The Eastern and Western groups, however, consider the CTBT primarily as an instrument of horizontal non-proliferation, *i.e.* to prevent the spread of nuclear weapons to NNWS. The NWS therefore considered it perfectly lawful to conduct series of nuclear test explosions to acquire enough technical insights and skills to be able to further refine their nuclear weapons by way of computer-simulations and sub-critical test explosions after becoming a party to the CTBT. The CTBT does not prohibit advanced testing by way of computer simulations (no explosions) and sub-critical tests (no nuclear explosions); a feature that has led many Non-Aligned states to argue that the scope of the CTBT is not really "comprehensive" as it will not ban all forms of nuclear-weapon testing.¹⁶

There can be no doubt that disagreement about the scope of the CTBT and about its relationship with the NPT in terms of non-proliferation and nuclear disarmament account for many of the difficulties surrounding the entry-into-force of the CTBT.

14. See generally D. Bourantonis, *The United Nations and the Quest for Nuclear Disarmament* (1993). India, that used to present itself as the leader of the Non-Aligned group of states, obviously lost much of its credibility by its series of nuclear test explosions in 1998.

15. See *Decisions and Principles of the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, 34 ILM 961 (1995). With regard to the CTBT-NPT debate, see *e.g.*, A. Wellmann, *Der Künftige Atomteststop-Vertrag, Seine Chancen und seine Grenzen*, 71 *Die Friedenswarte* 1, 46-61 (1996) and H. Llewellyn, *The Comprehensive Nuclear Test Ban Treaty*, 10 *LJIL* 269-274 (1997).

16. See UN Press Release, UN Doc. GA/9082, 10 September 1996. See also CD/1425, Report of the Ad Hoc Committee on a Nuclear Test Ban to the Conference on Disarmament, 16 August 1996, at 18, 23-25, 34-36.

3. THE CURRENT LEGAL STATUS OF THE CTBT-REGIME

3.1. The implementation of the supervisory mechanism of the CTBT

The CTBT is characterised by an extensive supervisory mechanism, consisting of procedures and methods to monitor and verify the States-Parties' compliance with the treaty, and will be administered by a specialised international organisation, the Comprehensive nuclear Test Ban Treaty Organisation (CTBTO), in order for the treaty to be 'internationally and effectively verifiable'.¹⁷ When the CTBT was being negotiated it was already clear that time would be required to develop the many procedures to implement the treaty, both on the national and the international level.¹⁸ The States Signatories to the CTBT have decided to establish a Preparatory Commission (PrepCom) to ensure the rapid and effective establishment of the CTBTO and to carry out the necessary preparations for the effective implementation of the CTBT.¹⁹ The PrepCom is composed of representatives of all states that sign the CTBT and has started functioning at the seat of the future CTBTO sixty days after the treaty was signed by fifty states.²⁰ The PrepCom has the standing of an international organisation, takes decisions by consensus, has the authority to negotiate and enter into agreements and has such other legal capacity as is necessary for the exercise of its functions and the fulfilment of its purposes, and shall, as an international organisation, be accorded such privileges and immunities as are necessary in that respect. The PrepCom established a Provisional Technical Secretariat (PTS) and has organised its work in two Working Groups and an Advisory Group, and has an Executive Secretary. The future CTBTO can be considered the legal successor of the PrepCom.²¹

The PrepCom and its organs have been operating to provide the necessary preconditions for the timely establishment of the CTBTO and to ensure the op-

17. The assignment of the CTBT-negotiators, united in the Ad Hoc Committee on a Nuclear Test Ban of the Conference on Disarmament, was to conclude an "internationally and effectively verifiable" treaty. See CD/1380, Decision on the Re-establishment of the Ad Hoc Committee on a Nuclear Test Ban, 30 January 1996. For a brief description of the supervisory mechanism of the CTBT see Llewellyn, *supra* note 15, at 274-280.

18. The CTBT was not to enter into force earlier than two years after its opening for signature so as to have the verification mechanisms operational by the time of entry-into-force of the treaty; see Art. XIV(1) of the treaty.

19. See Resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test-Ban Treaty Organisation, CTBT/MSS/RES/1, 19 November 1996, and its Annex, Art. 1.

20. See Arts. 3 and 4 of the Resolution establishing the PrepCom. Apparently, here the requirement of Art. XIV of the CTBT did not apply but instead 50 states sufficed, regardless of which states these were.

21. Compare Art. 20 of the Resolution establishing the PrepCom, which provides that rights and assets, financial and other obligations and functions of the PrepCom shall be transferred to the CTBTO at the first session of the Conference of the states parties of the CTBTO; pursuant to Art. 21, the PrepCom shall remain in existence until the conclusion of that first session.

erationalisation of the CTBT's verification regime.²² The legal basis for the establishment and functioning of PrepComs for the operation of international organisations such as the CTBTO is generally sought in the very adoption of the text of the treaty creating the international organisation, or in the obligation of negotiating Parties not to defeat with their conduct the object and purpose of the treaty prior to its entry into force.²³ With respect to the implementation of the CTBT's supervisory mechanism there is a direct legal basis in the Resolution establishing the PrepCom, which cannot but represent a legally binding document binding all States Signatories alike (i.e. the ones that voted in favour of the treaty at its adoption or signed it subsequently). The Resolution on the establishment of the PrepCom, however, is silent on the substantive obligations as laid down in Article I of the CTBT. This raises the question what is the legal effect of signature with respect to the substantive obligations of the CTBT.

3.2. The substantive obligations of the CTBT and the legal effect of signature

It goes without saying that a treaty only becomes binding on a state after it has become a party in accordance with the treaty's provisions and after the treaty has entered into force for it. Still, in order for states to arrange their international relations properly before entry-into-force, those states that have signed a treaty are no longer at liberty to behave as they like with regard to their future treaty-obligations, as is made clear by Article 18 of the Vienna Convention on the Law of Treaties.²⁴ Article 18 of the Vienna Convention obliges states to refrain from acts contrary to the object and purpose of a treaty in the period between signature and ratification as long as the intention not to become party to the treaty has not been made clear, and between the period of ratification and entry-into-force provided that such entry into is not unduly delayed. With 155 States Signatories to the CTBT, this begs the question how the current legal status of the CTBT should be qualified in terms of this Article.

22. See in particular the Report of Working Group A to the Tenth Session of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organisation, as amended by the Preparatory Commission, CTBT/PC-10/1/Annex I, 24 November 1999, which deals with many financial and organisational issues, provisional rules and draft model agreements and arrangements, and the Report of Working Group B to the Tenth Session of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organisation, as amended by the Preparatory Commission, CTBT/PC-10/1/Annex II, 24 November 1999, which deals with the review and assessment of the progress made by the PTS in its working programme and with the draft-verification related programme for the year 2000, including continuing work on the Operational Manual for the conduct of on-site inspections. See for specific tasks of the PrepCom with respect to verification, Art. 13 of the Resolution establishing the PrepCom and the Appendix "Indicative List of verification tasks of the Preparatory Commission" to the Resolution.

23. Cf. P. Gargiulo, *The Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons*, in Bothe *et al.* (Eds.), *supra* note 2, at 158.

24. See the 1969 Vienna Convention on the Law of Treaties, 8 ILM 679 (1969), which entered into force 27 January 1980.

The 'intention not to become party' so far has not been voiced by any of the states signatories to the CTBT. On the contrary: last year the 76 States Signatories participating in the tenth session of the PrepCom reaffirmed their commitment to the CTBT and its objectives and decided to extend the contracts of the Executive Secretary and the Directors of the PTS, while the build-up of the verification mechanism of the treaty continues.²⁵ This year, the preparations for the implementation of the treaty have continued unabated.²⁶ Apparently, these States Signatories, among which are all declared NWS, consider the CTBT to be a viable treaty with the current stagnation merely representing a situation of forbearance no acquittance. As mentioned, Article 18 of the Vienna Convention also covers the period between ratification and entry-into-force of a treaty, provided that such entry into is not unduly delayed. It might be a question of fact in each case whether the entry into force has been *unduly* delayed, but from the *travaux préparatoires* of the Vienna Convention it becomes clear that the expression 'unduly delayed' simply is meant to put a reasonable limit on the duration of the obligation not to defeat object and purpose should the treaty continue more or less indefinitely to lack the number of ratifications necessary to bring it into force. Having regard to the fact that the rule is intended to be of general application, it was tentatively suggested that a period of ten years after the date of a state's signature be reasonable in that regard.²⁷ It can be upheld that the entry-into-force of the CTBT has so far not been unduly delayed in the sense of Article 18 of the Vienna Convention.²⁸

Article 18 is an expression of an autonomous obligation imposed upon states by virtue of the principle of good faith, rather independently of the treaty and an essential legal factor in securing stability and security in international relations. There are strong indications, deriving from state practice and international jurisprudence prior to the codification of the law of treaties, as well as from the *travaux préparatoires* of the Vienna Convention, that the contents of Article 18 represent customary international law.²⁹ Therefore, the principles embodied in

25. See Report of the Tenth Session of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organisation, CTBT/PC-10/1, 24 November 1999, at 2, 6-7. 'States Signatories' denotes both the states that only signed the CTBT and those that also ratified it. Pakistan participated in this session as an observer, India was absent.

26. See Report of the Twelfth Session of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, CTBT/PC-12/1, 28 August 2000.

27. See R. Wetzel & D. Rauschnig (Eds.), *The Vienna Convention on the Law of Treaties – travaux préparatoires* 165-166 (1978). The period of ten years was even inserted as para. 2 of the Article in one of the drafts.

28. Compare also the case of the CWC, which was opened for signature on 13 January 1993 and entered into force more than four years later, on 29 April 1997, after the deposit of the 65th instrument of ratification.

29. See the Case Concerning Certain German Interests in Polish Upper Silesia, Judgment of 25 May, 1926 PCIJ (Ser. A) No. 7, at 30; B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* 109-111 (1987); and see K. Holloway, *Modern Trends in Treaty Law* 58-63 (1967). On the *travaux préparatoires* with respect to the drafts of Art. 18, see Wetzel & Rauschnig

Article 18 can also be upheld against states-non-parties to the Vienna Convention. Hence, it must be accepted that as long as the situation of forbearance no acquittance regarding the entry-into-force of the CTBT exists (and until the contrary has been made explicit), all States Signatories are bound by the provisions representing the object and purpose of the treaty.

3.3. The object and purpose of the CTBT

The next question is what provisions represent the object and purpose of the CTBT. It appears from international jurisprudence and legal doctrine that the object and purpose of a treaty are normally to be found in the intentions of the contracting parties and the general aim of the treaty in total, as expressed in the preamble to the treaty, its title, and, failing clarity on this, the aggregate of its provisions.³⁰ Originally, it was made clear that two objectives of the CTBT stood out, viz. the ending of the qualitative improvement and development of nuclear weapons and the ending of nuclear explosions *per se*.³¹ The preamble to the CTBT now declares that the purpose of the treaty is to 'contribute effectively to the prevention of the proliferation of nuclear weapons in all its aspects, to the process of nuclear disarmament and therefore to the enhancement of international peace and security'. Furthermore, the states-parties 'recognise' that the CTBT constitutes this effective measure of nuclear disarmament and non-proliferation because it entails the cessation of all nuclear weapon test explosions and all other nuclear explosions, which constrains (not: ends) the development and qualitative improvement of nuclear weapons and ends the development of advanced new types of nuclear weapons. In the treaty itself, it is made explicit that damage to the object and purpose may result from non-compliance with the basic obligations of the treaty.³² The fact that France and China con-

(Eds.), *supra* note 26, at 163-167, where for example the delegation of the United States declared that it regarded the provisions of the draft Art. 18 as "reflecting generally accepted norms of international law" (at 165). See also I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law*, 83 AJIL 513 (1989), who speaks (at 515) of the 'confirmation' of the interpretation of the good faith-rule by Art. 18 of the Vienna Convention. But see I. Sinclair, *The Vienna Convention on the Law of Treaties*, at 13 and 19 (1984) who seems to be inclined to consider Art. 18 as an example of progressive development of the law of treaties rather than a codification of existing law. Finally, see the discussion in the Committee on Arms Control and Disarmament Law, in *The International Law Association (Ed.), Report of the 68th Conference, held at Taipei, Taiwan, Republic of China, 24-30 May 1998*, at 172-178 (1998).

30. See the extensive overview provided by I. Buffard & K. Zemanek, *The 'Object and Purpose' of a Treaty: An Enigma?*, 3 *Austrian Journal of International and European Law* 3, 311-343 (1998).

31. See the draft treaty-text of the CTBT of 1 April 1996, CD/WP.325, Ad Hoc Committee on a Nuclear Test Ban: Rolling Text of the Treaty, preamble: "16. Emphasising that the principal objective of this Treaty is to end the qualitative improvement and development of nuclear weapon systems, 17. Affirming that this Treaty seeks to achieve the discontinuance of all nuclear weapon test [explosions] and all other nuclear explosions."

32. See Art. V(3). 'Basic Obligations' refers to the title of Art. I of the CTBT, which lays down the treaty's core substantive obligations prohibiting nuclear test explosions. See *supra*, note 6.

ducted series of nuclear test explosions prior to their signing of the CTBT in order to be able to become a party later on, indicates that the NWS themselves consider the carrying out of nuclear test explosions to be incompatible with the object and purpose of the CTBT, even though the treaty has not yet entered into force. It follows that, whether the CTBT is primarily seen as an instrument against vertical or against horizontal proliferation, the object and purpose of the CTBT comprises at least the prevention of the carrying out of nuclear test explosions anywhere. There are therefore strong arguments to support the conclusion that given the current legal status of the CTBT, the carrying out of nuclear test explosions is prohibited to the States Signatories of the CTBT, irrespective of whether or not they have also ratified the treaty.

The legal situation relative to compliance with the substantive obligations of the CTBT cannot be equated with the institutional obligations deriving from participation in the verification regime of the CTBT, the modalities of which have after all been laid down separately, in the Resolution establishing the PrepCom. A signatory state that has not ratified the treaty, e.g., cannot be held to accept on-site inspections on its territory as provided in Art. IV, paras. 34-38 of the treaty; to hold otherwise would push too far the scope of 'object and purpose' of the CTBT. The current absence of verification of compliance with the nuclear test ban because of the delay in ratifications does not by itself pose a danger to the object and purpose of the CTBT. In practice, the few states that are known to have sought the development of a nuclear weapons-capability (such as Iraq and the DPRK) are constantly being monitored by satellites of the NWS. Therefore, evidence of suspicious behaviour of non-participating states could even be revealed before the entry-into-force of the CTBT. Furthermore, the verification regime of the CTBT provides for the establishment of a world-wide International Monitoring System (IMS), which, once operative, conducts measurements across the borders of any state, be it a signatory to the CTBT or not.³³ This perfectly illustrates the advantage of verifying compliance with the CTBT as compared to other major arms control treaties: the CTBTO will not have to rely on inherently subjective declarations made by states as the basis for its verification activities, but instead is enabled to gather 'objective' data by routine off-site measurement.

3.4. The CTBT and 'third' states

The legal norms laid down in Article 18 of the Vienna Convention make clear that separate weight should be attached to signature. It cannot be upheld that a state that has only taken part in the negotiation of a treaty or in the drawing up

33. The IMS consists of networks of seismic, radionuclide, hydroacoustic and infrasound stations with an International Data Centre (IDC) collecting data on a routine basis. See Art. IV and the Protocol to the CTBT, Part I and Annex I and II.

of the text whilst dissociating itself from it, would also be bound not to defy the object and purpose of the treaty.³⁴ India, which even voted against the adoption of the CTBT by the General Assembly of the UN therefore cannot be considered to have violated international law at any point when conducting its nuclear tests in 1998, notwithstanding the fact that India was most actively involved in the negotiations on the CTBT. However, if a State Signatory to the CTBT resumed nuclear testing, it would necessarily violate the object and purpose of the CTBT, thereby breaching the legal norms codified in Article 18 of the Vienna Convention. Still, the conduct of non-signatories may seriously affect the position of the States Signatories to the CTBT. If states like India, Pakistan or the DPRK carried out (new) series of nuclear test explosions, serious doubts could be raised as to whether one could reasonably expect the NWS to refrain from resuming nuclear testing as well. In the CTBT account has been taken of this possibility in that the treaty allows, after it will have entered into force, all states-parties to withdraw from it when they consider their national security to be endangered by an event involving nuclear weapons (See Article IX(2)). The decision on whether such conditions exist is up to the consideration of each State Party, albeit that it should comply with the obligation in Article IX(2) to give advance notice of withdrawal.³⁵ The common escape route thus offered is both necessary and sufficient to arrange the legal relations between states parties and 'third' states in arms control law, since it enables states to enter into the arms control regime by ensuring them a lawful escape as soon as one important member would upset the strategic balance created by the treaty-regime. It cannot be upheld that the period between ratification and entry-into-force of a treaty would be legally more stringent than the situation after entry-into-force. Therefore, at present the States Signatories have the right to indicate no longer to be engaged in the CTBT, if they consider this to be necessary for reasons of national security.

34. See the comments by several states to an earlier draft of Art. 18 which did contain a provision to that effect, and the subsequent adaption of the draft text by the Special Rapporteur, in Wetzel & Rauschning, *supra* note 26, at 165, and see S. Rosenne, *Treaties, conclusion and entry into force*, in R. Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 7, at 467 (1984).

35. This time span should enable states parties either to try to convince the state party in question not to insist on its decision or to prepare individually or collectively for measures adequate to cope with an adverse situation resulting from such a withdrawal. Compare W. Krutzsch & R. Trapp, *A Commentary to the Chemical Weapons Convention 248* (1994), in commenting on Art. XVI(2) CWC which is identical to Art. IX(2) of the CTBT.

4. CONCLUDING REMARKS

Since the mid-1950s, a comprehensive nuclear test ban treaty has been one of the most profound aspirations of arms control protagonists.³⁶ The CTBT, which represents the outcome of decades of nuclear test ban negotiations, deserves to be supported both as an instrument of horizontal and vertical non-proliferation and as a prelude to nuclear disarmament. It will be the first global arms control treaty to effectively prohibit nuclear test explosions for any purpose anywhere. The current forbearance shown by some key-players in the nuclear field towards ratifying the CTBT does not mean they are acquitted, as States Signatories, from upholding the object and purpose of the treaty, neither *per se* nor in the period until the treaty's entry-into-force. Hopefully, many more states will ratify the CTBT over the next years, starting with the United States setting the right example after the presidential elections in November of this year.

36. See e.g., J. Goldblat, *The Nuclear Non-Proliferation Regime: Assessment and Prospects*, 256 RCADI, Vol. 1995, 9, at 53-74 (1997).