Leiden Journal of International Law (2014), 27, pp. 169–188
 doi:10.1017/S0922156513000587

Nuclear Powers' Disarmament Obligation under the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty: Interactions between Soft Law and Hard Law

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Abstract
The Comprehensive Nuclear Test Ban Treaty (CTBT) will not be effective until all the 44 states listed in its Annex 2 ratify it. A special link has been established between the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the CTBT. The disarmament obligation set by Article VI of the NPT, which has not yet been complied with, remains highly controversial. The relevant subsequent practice of the states parties to the NPT shows that the ratification of the CTBT is to be considered the first of the practical steps towards compliance with Article VI. However, as the practical steps do not set any legally binding norms, there is no legal obligation to ratify the CTBT, not even for the 44 states listed in Annex 2 whose ratification is essential. The paper deals with the position of nuclear powers party to the NPT that have not yet ratified the CTBT (most prominently the US and China) and demonstrates that these states should at least provide detailed motivation for their conduct. Otherwise, other states parties to the NPT could consider them as not complying in good faith with Article VI of the NPT and invoke the *inadimplenti non est ademplendum* rule to justify breaches of their own obligations under the same treaty.

Key words
disarmament; nuclear weapons; nuclear tests; law of treaties; soft law

1. Introduction

According to a report recently issued by its National Academy of Sciences, the United States is now able to evaluate its nuclear weapons' efficiency without detonating any nuclear explosion. Therefore, tests involving devastating explosions should no longer be necessary either for developing new nuclear weapons, or for assessing the old ones' capabilities.[1]

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1 National Research Council, Global Affairs, The Comprehensive Nuclear Test Ban Treaty: Technical Issues for the Unites States, 30 March 2012, available at www.nap.edu. The Committee of Experts states that 'the United States has the technical capabilities to maintain a safe, secure and reliable stockpile of nuclear weapons into the foreseeable future without nuclear-explosion testing'.

The aim of the present paper is to highlight some international law issues related to this matter. It will start by recalling how nuclear tests began, and how they continue to be a matter of concern for international security and for the safety of the environment. The international community is trying to put an end to nuclear testing, by means of some international law agreements, but the most important of them, the Comprehensive Nuclear Test Ban Treaty (CTBT), is not yet in force, lacking ratification by the US and a few other states. Indeed, there is no way to compel any state to ratify a treaty. Nevertheless, as the paper will try to demonstrate, a special link can be established between ratification of the CTBT and the disarmament obligation set out by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). This link, though grounded in some soft-law instruments, interacts with hard law and provides some meaningful legal effects, influencing the position of the nuclear powers that still have not ratified the CTBT.

2. The early age of nuclear testing in the atmosphere and the Partial Nuclear Test Ban Treaty (PTBT)

Since 1945, 2,052 nuclear explosions have been detonated in manufacturing or testing nuclear weapons.[2] Such experiments were conducted not only by each of the nuclear powers now acknowledged by the NPT, but also by some other states trying to build their nuclear arsenal 'outside' the NPT or notwithstanding its regime.[3]

The US was the first power to start testing nuclear, soon after the end of the Second World War. An intensive testing programme took place from 30 June 1946 to 18 August 1958 in the Marshall Islands, involving several atmospheric tests. The most powerful, known as the Bravo test, was conducted in the Bikini atoll and triggered a huge nuclear explosion, one thousand times bigger than the Hiroshima bomb.

Local people were removed from the islands, and were only allowed to return to their land years later. Once home, they still had to face harsh consequences, because of the catastrophic damages caused by radioactive contamination to human health, the environment, and properties in the area. Such contamination may well still linger. In 1983, by means of Section 177 of the Compact of Free Association with the Republic of the Marshall Islands, the US government declared that it was willing to 'accept responsibility' and to pay compensation for all the damage suffered by the population.[4]

After 1958, the phase of US testing activity in the atmosphere came to an end, while further experiments took place underground, in the desert areas of Nevada.

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2 For more details, see Arms Control Organization, The Nuclear Testing Tally, available at www.armscontrol.org/factsheets/nucleartesttally.

3 See *infra*, section 7.

4 According to the Compact, a further agreement was concluded, establishing the Marshall Islands Nuclear Claims Tribunal, with jurisdiction to 'render final determination upon all claims past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based on, arise out of, or are in any way related to the Nuclear Testing Program'. The Tribunal is still operating: more at www.nuclearclaimstribunal.com.

The latest tests, in the 1990s, were meant to develop new kinds of low yield devices and among those, in particular, the so-called nuclear 'bunker-busters'.[5]

The UK conducted an atmospheric test programme in Australia and off the Christmas Islands, from 1954 to 1958. After that, it ended experiments on its own, participating only in some joint test programmes with the US, in Nevada. The USSR and China started testing activity in the same period.[6]

At the end of this first stage of nuclear tests, the states involved were able to conclude the Partial Nuclear Test Ban Treaty (PTBT), an international agreement prohibiting nuclear weapons tests in the atmosphere, in outer space and underwater. States parties undertake 'not to carry out any nuclear weapon test explosion or any other nuclear explosion' in the said areas: underground testing is not included in the prohibition. The ban is binding on states parties in relation to 'any place under their jurisdiction or control' and, in addition, the parties undertake to avoid any nuclear explosions which could cause radioactive debris outside their territorial limits (Article 1). The PTBT, in force since 10 October 1963, has been joined by 123 states, including the original parties, the US, the UK, and the USSR.

3. French nuclear tests and the International Court of Justice

France chose not to join the PTBT. In fact, at the time when the US and other states were concluding their nuclear tests in the atmosphere, France was just starting its experiments, with a first explosion in the Algerian Sahara desert, in 1958. Later on, the main testing site was moved to French Polynesia, by the Mururoa atoll, where atmospheric tests took place for more than 30 years.

Deep concern over the situation grew in Australia and New Zealand, as they feared lest their own territory and environment be put at risk. These states eventually brought two similar cases in front of the International Court of Justice (ICJ), seeking for provisional measures to inhibit France from conducting further testing. As for the merits, they asked the Court to declare that nuclear testing by France in the Pacific Ocean was contrary to international law.[7]

As the PTBT was not binding for France – and in the absence of any general international law rule prohibiting nuclear tests – the applicants' claims were based on the wrongful character of the damages caused by radioactive fallout on their territory, causing extremely dangerous effects to human health, the environment, and biological safety.[8] As both Australia and New Zealand strongly underlined, France had undertaken its nuclear activities without their consent, thus violating

5 The Robust Near Earth Penetrators are a kind of new generation, remote-controlled nuclear device, to be used against subterranean targets. See A. J. Grotto, 'Nuclear Bunker-Busters and Article VI of the Non-Proliferation Treaty', (2005) *ASIL Insights*, available at www.asil.org/insight050217.cfm.

6 Altogether, the US conducted 1,031 nuclear tests, while 715 tests were carried out by the USSR/Russia, mostly in some nuclear plants in in Kazakhstan. As for the UK and China, they detonated 'only' 45 nuclear explosions each. France managed the third most intensive testing activity, detonating 210 explosions.

7 Although based on the same issues, the cases were not joined.

8 *Nuclear Tests Case (Australia v. France)*, Application Instituting Proceedings, 9 May 1973, [1974] ICJ Rep. 26, para. 48. According to France, on the other hand, the fallout had never reached any threshold level and, thus,

https://doi.org/10.1017/S0922156513000587 Published online by Cambridge University Press

their sovereignty and their rights to territorial integrity. In addition, the applicant states argued that France had been infringing the fundamental principle of freedom of the high seas, by imposing a no-fly and no-shipping zone in the area where the tests were taking place.

The arguments of the parties were based on the existing norms of international law setting the traditional rules on the mutual respect of sovereignty by states. No further discussion took place about the possibility of considering nuclear tests contrary to any new general principles, or related to, for example, an obligation to protect the environment and/or human health. The Court of Justice, in fact, decided not to rule on the merits, after the French government had declared that the nuclear tests programme in the atmosphere had come to an end and would not have been resumed.[9]

According to the Court, these unilateral declarations were considered binding on France and – being so – Australia and New Zealand had already reached their purpose. In other words, as the applicants were just asking the Court to state that tests were contrary to international law, they should have been satisfied – the Court held – once the binding character of the French declarations, under international law, had been established. Being so, the Court found that the case had become moot and that, for this reason, its jurisdiction failed.[10]

Several years later, the Court took the opportunity to address the issue of nuclear testing with a different perspective, mentioning 'obligations of States to respect and protect the environment': even in this latest case, however, the Court did not rule on the merits, thus avoiding applying any rules involving those obligations.[11]

4. Latest developments

By the end of the last century, the main nuclear powers had declared that they would put an end to nuclear experiments, as their testing programmes were concluded: thus declared the US, Russia, China, and France. To date, they have behaved accordingly,

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no damage could be claimed. As the Court did not rule on the merits (see below note 10), no indications were given on this issue.

9 This case is frequently considered to provide authoritative evidence on the admissibility of legally binding unilateral declarations in international law. Actually, the declarations by the French president and the French government were considered mere political statements by the counterparts, as the Australian Attorney General pointed out, in his oral arguments: 'The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests. It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests' (see *supra* note 8, at 261, para. 27). The judgment was recently revisited by C. Eckart, *Promises of States under International Law* (2012), 116.

10 The Court's reasoning took into consideration a preliminary question concerning the existence of a real dispute. Hence, having concluded that the case had become meaningless, the Court could avoid ruling not only on the merits, but also on other preliminary issues concerning its jurisdiction.

11 'Request for Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974' in the *Nuclear Tests (New Zealand v. France)* case, Order of 22 September 1995, [1995] ICJ Rep. 288. The new case was brought to the Court by New Zealand, requesting a re-examination of the situation as France was performing a new tests programme in the Pacific area. The possibility of such a re-examination had been provided for by the previous judgment of 1974. Nevertheless, the Court held that the relevant provision could not apply to the new case, because new tests had been conducted underground, while the 1974 judgment only referred to tests in the atmosphere.

and every unilateral moratorium on nuclear tests has been respected. However, the use of nuclear weapons is still considered to be an option by the national strategic security doctrine of each nuclear power.[12]

Meanwhile, the nuclear programmes of other states raise different concerns. On the one hand, India and Pakistan claim to be, and have always been, legally free in this regard, as they did not ever ratify or even sign the NPT, which they perceive as unequal.[13] They openly admit to possessing nuclear weapons and that they are willing to develop their nuclear capabilities. The same can be said about Israel, a state that never joined the NPT, but whose possession of nuclear weapons, though not officially admitted, is considered to be an 'open secret'.

On the other hand, North Korea (NK), a former party to the NPT, exercised the right of withdrawal from that treaty in 2003.[14] Since then, it has claimed to be free to pursue any nuclear project, being exempted from controls by the International Atomic Energy Agency (IAEA).[15] In 2006 and in 2009 some nuclear explosions in NK were detected and the situation until now has been challenging. The government in Pyongyang affirms that its nuclear activity is meant only to provide the energy supply the country needs. This affirmation is far from having the international community's confidence. In the aftermath of a Korean nuclear test in 2006, the UN Security Council declared that NK's continuing pursuit of nuclear weapons constitutes a threat to international peace and security.[16]

Iran is also suspected to be well on the way to manufacturing nuclear weapons, in violation of the NPT, to which it remains a party. The Iranian government, however, rejects any charge of breach of the treaty, affirming that its present uranium enrichment activity is meant only for peaceful civil purposes, and that Western powers – by means of the UN economic sanctions[17] – are willing to deprive Iran of its inalienable right to produce nuclear energy.[18] According to a UN report, issued

12 See E. Louka, *Nuclear Weapons, Justice and the Law* (2011), 38.

13 For the reasons explained *infra*, section 7; see Z. Moshaver, *Nuclear Weapons Proliferation in the Indian Subcontinent* (1991), 114. See also M. Krepon, 'Looking Back: The 1998 Indian and Pakistani Nuclear Tests', (2008) 38 *Arms Control Today*, available at www.armscontrol.org/act/2008_05/lookingback.

14 According to Art. IX of the NPT: 'Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country'. The same provision, in exactly the same wording, is included both in the PTBT (Art. IV) and the CTBT (Art. IX). For a deeper insight into the situation in the countries mentioned in this paragraph, see Louka, *supra* note 12, at 134.

15 See UN Security Council, Resolution 1718, UN Doc. S/RES/1718 (2006). In April 2012, NK launched a device said to be meant for civil purposes, but that was rather deemed, by the international observers, to be a ballistic missile capable of delivering nuclear weapons. The operation was indeed a complete failure, as the device fell into the sea soon after the launch. See BBC News, 'North Korea Rocket Launch Fails', 13 April 2012, available at www.bbc.co.uk/news/world-asia-17698438.

16 More at www.ctbto.org/the-treaty/developments-after-1996/2009-dprk-announced-nuclear-test.

17 UN Security Council, Resolution 1737, UN Doc. S/RES/1737 (2006).

18 According to Art. IV of the NPT: 'Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes'. On the position of Iran, see H. Mousavian, 'The Iranian Nuclear Dispute: Origin and Current Options', (2012) 42 *Arms Control Today*, available at www.armscontrol.org/epublish/1/159.

in August 2012, Iran has recently doubled its capacity to enrich uranium, by means of underground nuclear facilities.[19]

5. Nuclear weapon-free-zone treaties and the CTBT

In different areas of the world, some neighbouring states have adopted regional treaties banning nuclear weapons from their territories, so that their combined territories were considered nuclear weapon-free zones. Parties to such treaties undertake to renounce to 'manufacture, or otherwise acquire or possess nuclear weapons' and are also required to prevent the testing of any nuclear explosive device in their territories.[20] All kind of nuclear tests – even underground – become unlawful in the areas where such treaties apply.

But further efforts were needed to reach a worldwide applicable ban. The UN Conference on Disarmament adopted, in 1996, the text of a universal CTBT. Each state, becoming a party to the CTBT, will undertake to avoid any nuclear test explosion performed either for military or for civil purposes 'at any place under its jurisdiction or control' (Article I). The prohibition is said to be 'comprehensive', because it bans every kind of explosive nuclear test: underground tests, this time, are included.[21]

The CTBT provides for a highly sophisticated and efficient international monitoring system (IMS), capable of revealing nuclear explosions everywhere on Earth.[22] This system, meant to give immediate scientific evidence of any violation of the treaty, is already partially operating.[23] It was by means of this monitoring system

19 See B. Kajehpour, R. Marashi, and T. Parsi, 'Never Give In and Never Give Up: The Impact of Sanctions on Tehran's Nuclear Calculations', (2013) 10, available at www.niacouncil.org/site/News2?page=NewsArticle&id=9077.

20 The Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), was the first to be concluded, in 1967, and has been in force since 25 April 1969. This treaty served as a model to the next NWFZ treaties: second came the South Pacific Nuclear Weapon-Free-Zone Treaty (Treaty of Rarotonga, 6 August 1985, in force since 11 December 1986); then the Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Treaty of Bangkok, 15 December 1995, in force since 27 March 1997) and the Treaty on the Nuclear Weapon-Free Zone in Africa (Pelindaba Treaty, 11 April 1996, in force since 15 July 2009). The Central Asia Nuclear Weapon-Free-Zone Treaty, (8 September 2006, in force since 21 March 2009) encompasses some states that had nuclear weapons stationed on their territories by the former Soviet Union. So, the treaty provides also for fostering member states' cooperation in achieving the decontamination of the whole area. The 1995 NPT Extension and Review Conference endorsed the project of establishing a NWFZ in the Middle East: see M. Hamel-Green, 'Regional Initiatives on Nuclear and WMD-Free Zones: Cooperative Approaches to Arms Control and Non-proliferation', UN. Doc. UNIDIR 2005/19 (2005).

21 Underground nuclear explosions might seem less alarming, but actually they are no less dangerous than tests above the ground. Indeed, radioactivity can spread in the environment and it surely lingers in the soil: scientists seem to be still uncertain about how long contamination may last.

22 The International Monitoring System (IMS) consists of a large number of monitoring stations, located in the member states, that are all connected with each other, to provide global control. The IMS is based on infrasound and hydroacoustic monitors and functions with the help of seismological and radionucleide laboratories.

23 The IMS is currently managed by the Preparatory Commission for the CTBT Organization: more at www.ctbto.org. After the entry into force of the treaty, the organization will be in charge of the overall control system, being vested also with specific on-site inspection powers, to verify compliance by member states. The IMS can be used also for civil protection purposes, such as collecting and transmitting data related to natural disasters, with special regard to earthquakes and consequent possible tsunami.

that the international community was made aware of the nuclear tests conducted in NK.[24]

The CTBT is not yet in force. In order for it to come into force, it needs to be ratified by 44 states, as specifically identified in its Annex 2. As a result of this, when any one of the 44 states fails to ratify the treaty, it nullifies all the other states' efforts towards the total ban of any kind of nuclear tests and the full implementation of the IMS. France ratified the treaty after the conclusion of its testing programme in Polynesia, as had already Russia and the UK.

So far, only five states from the list in Annex 2 have failed to ratify the CTBT, namely China, India, Israel, Pakistan, and the US. India and Pakistan refuse not only to ratify the CTBT, but even to sign it, as a consequence of the approach they chose towards the NPT.[25]

As for the US, President Clinton was among the CTBT's major and genuine supporters.[26] Notwithstanding his personal efforts, in 1999 the Senate refused to ratify the treaty. President G. W. Bush took a position opposite to that of President Clinton, stating that the US would never join the treaty.[27] The programme of President Obama was to resume the ratification procedure, as Secretary of State H. Clinton assured at the 2010 NPT Review Conference, but this has not yet happened.[28]

China claims to fully support the CTBT, and analysts share the opinion that Beijing will probably ratify the CTBT, once the US has done so.[29]

6. The lack of relevant effects of signature of the CTBT, pending its entry into force

Given the paramount importance of this goal, it is worth investigating the possibility of attaching some legal effects to mere signature of the CTBT, pending its ratification, in the light of Article 18 of the 1969 Vienna Convention on the Law of Treaties. According to such an article, a signatory state is obligated to refrain from acts which would defeat the object and purpose of the treaty. When applied

24 See 2010 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons (hereinafter NPT Review Conference), The Capacity of the Comprehensive Nuclear-Test-Ban Treaty Verification Regime: Working Paper Presented by Spain on behalf of the European Union, UN Doc. NPT/CONF.2010/WP 55 (2010).

25 On India's objections to the CTBT, see M. K. Nawaz, 'Prospects for the Entry into Force of the CTBT', (1997) 37 *Indian Journal of International Law* 79. Both India and Pakistan had previously ratified the PTBT: see Moshaver, *supra* note 13, at 111 and 123.

26 President Clinton said he was honoured to be the first leader to sign the CTBT, and to have so done using the 'very same pen' President Kennedy had used, more than 30 years earlier, to sign the PTBT. See President Clinton's Remarks at the 51st UN General Assembly, 24 September 1996, at www.state.gov/www/global/arms/ctbtpage/president/excerpt.html#3. In his Letter of Transmittal of the Treaty to the Senate the president stated that the CTBT's conclusion was to mark 'the achievement of the highest priority item on the international arms control and non proliferation agenda'. Available at www.state.gov/www/global/arms/ctbtpage/treaty/ltr_tran.html.

27 For a deeper analysis, see D. H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (2011), 40.

28 *Remarks by Secretary of State Hillary Rodham Clinton to the 2010 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons*, 3 May 2010, available at www.state.gov/secretary/rm/2010/05/141424.htm. About the changes in US policy under the Obama administration, see D. H. Joyner, *Recent Developments in International Law Regarding Nuclear Weapons*, (2011) 60 ICLQ 209.

29 See K. Kubiak, CTBT Hold-Out States: Why Did 'the Longest Sought, Hardest Fought Prize in Arms Control History' Still Not Enter into Force?, IFAR Working Paper 16, available at www.ifsh.de/IFAR/serv_bp.htm.

to the CTBT, the norm might be understood as to prohibit the signatory states from performing any nuclear test, even before they ratify the treaty.[30]

Although it seems evident that carrying out any nuclear test would be in contrast with the purpose of the treaty, such an interpretation of Article 18 would probably lead too far: mere signing of the CTBT – as such – cannot give rise to the same comprehensive ban on nuclear tests that the contracting states clearly intended to become effective only upon ratification by the required 44 states. The agreement on the list of states included in Annex 2 shows that the treaty was meant to become binding to the same extent and at the same time for each (and all) of those listed states.[31]

Therefore, carrying out nuclear tests of any kind is not yet legally forbidden to any of the states which signed, or have already ratified, the CTBT (with only some kinds of tests being banned – as seen above – by means of different treaties, for states parties to them).[32]

7. The CTBT and the indefinite extension of the NPT

A meaningful legal connection between the NPT and the CTBT has been established by the consistent practice of the former treaty's parties, within the periodical Review Conferences, held every five years.

To clarify this point, it may be useful to recall some basic legal features of the NPT. As is widely known, this treaty does not provide for a total ban on nuclear weapons, since it rather 'crystallizes' the situation existing at the time of its signature. In fact, according to Article IX(3), states already possessing or developing at a fixed date some nuclear military capability could join the treaty under the status of nuclear weapon state (NWS).[33] These states were not required – in the short term – to take any specific measures to dismantle their nuclear arsenal, nor to put an end to activities aimed at manufacturing, improving, acquiring, or stockpiling nuclear weapons.[34]

In contrast, any other contracting state not entitled to claim the same position can currently join the NPT only under the status of non-nuclear weapon state (NNWS), thus accepting, without conditions, to be bound by Article II, which sets a radical prohibition to 'manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices'.

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30 This opinion is supported by G. Den Dekker, 'Forbearance Is Not Acquittance: The Legal Status of the Comprehensive Nuclear Tests Ban Treaty', (2000) 13 LJIL 669.

31 Otherwise, the same act of ratification would be meaningless. There is no practice showing positive application of Art. 18: see P. Palchetti, 'Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011), 25 at 29.

32 In particular, by means of the PTBT and of treaties establishing NWFZ. Specific norms banning nuclear explosions can be found also in the Antarctic Treaty (Art. V) and in the Treaty on the Outer Space (Art. IV).

33 For the purposes of the NPT 'a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967' (Art. IX(3)).

34 According to Art. I, NWS party to the treaty simply undertake 'not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices'.

In such a way, the NPT grants only five states the possibility of legally keeping nuclear weapons. States thus 'privileged' are actually the same five that enjoy a prominent position within the UN, being permanent members of the UN Security Council. This fairly unbalanced situation, however, was not meant to last forever. As a condition of their legally granted major position, nuclear powers undertake – by means of Article VI of the same NPT – 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.

A definitive nuclear disarmament should be pursued by all states parties to the NPT, eventually leaving in the past the difference between nuclear and non-nuclear states.

The NPT was not originally meant to be operative forever. According to Article X(2), a conference was to be held twenty-five years after its entering into force, to decide whether the treaty was to continue in force indefinitely, or to be extended for an additional period. This special Extension and Review Conference took place in 1995, and the decision was made in favour of an unlimited extension, so the NPT is still operating according to its original terms, but without any expiry.

The consent to such indefinite extension, therefore, implied that NNWS accepted not to change their status under the NPT and, so, to renounce for good any nuclear military option. On the other side, however, nuclear powers' prominent position cannot be considered as similarly granted without any time limit. Indeed, during the negotiations that led to the unlimited renewal, NNWS made it clear that their consent was conditional upon a renewed commitment of the NWS to the full implementation of Article VI, towards the achievement of the goal of 'a treaty on general and complete disarmament, under strict and effective international control'.

8. The 13 practical steps

The 2000 NPT Review Conference agreed, by consensus, upon the so-called '13 practical steps', a list of measures to be considered by each NWS party to the NPT as 'systematic and progressive efforts to implement Article VI'. The first step consists of 'signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear Test Ban Treaty'.[35]

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35 2000 NPT Review Conference, Final Document, UN Doc. NPT/CONF.2000/28 (Parts I and II) (2000), at 14, para. 15(1). The next 12 steps are set as follows: '2. A moratorium on nuclear-weapon-test explosions or any other nuclear explosions pending entry into force of that Treaty; 3. The necessity of negotiations in the Conference on Disarmament on a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices …; 4. The necessity of establishing in the Conference on Disarmament an appropriate subsidiary body with a mandate to deal with nuclear disarmament; 5. The principle of irreversibility to apply to nuclear disarmament, nuclear and other related arms control and reduction measures; 6. An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to total disarmament to which all States parties are committed under Article VI; 7. The early entry into force and full implementation of START II and the conclusion of START III as soon as possible; 8. The completion and implementation of the Trilateral Initiative between the United States of America, the Russian Federation

The Final Document issued by the 2010 NPT Review Conference – as well as several documents and working papers submitted by states parties to the same Conference[36] – underscores once more the 'essential role' of the CTBT not only as such, but also in relation to NPT's implementation, confirming the 13 practical steps set in 2000.[37] The Vienna Group of Ten recently reaffirmed that:

> the Comprehensive Nuclear-Test-Ban Treaty constitutes an effective measure of nuclear disarmament and nuclear non-proliferation in all its aspects and is vital to the Treaty on the Non-Proliferation of Nuclear Weapons. The Test-Ban Treaty *was an integral part* of the 1995 decision to indefinitely extend the Non-Proliferation Treaty.[38]

Between the NPT and the CTBT some special link has thus been established, whose legal meaning this article will now discuss. Final documents – including the one setting the 13 steps – cannot be considered as legally binding international law agreements.[39] Although adopted by consensus, they actually express no more than a political declaration of the common intent of the parties. Such documents belong to so-called soft law. That is why the ratification of CTBT cannot be seen as having become mandatory, for NPT parties, despite being mentioned as the 'first step' in the 2000 Final Document.

Nevertheless, soft-law documents agreed upon by consensus at the Review Conferences can be considered as 'subsequent practice' of the states parties to the NPT. According to Article 31(3) of the Vienna Convention (and/or the corresponding customary international law rules),[40] 'subsequent practice' can provide elements to be taken into account in treaty interpretation. The possibility for (some) soft law 'agreements' – adopted by consensus – to play such a specific role in treaty

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and the International Atomic Energy Agency; 9. Steps by all the nuclear-weapon States leading to nuclear disarmament in a way that promotes international stability, and based on the principle of undiminished security for all, further efforts by the nuclear-weapon States to reduce their nuclear arsenals unilaterally; 10. Arrangement by all nuclear weapon States to place, as soon as predictable, fissile material designated by each of them as no longer required for military purposes under IAEA or other relevant international verification ... to ensure that such material remains permanently outside of military programs; 11. Reaffirmation that the ultimate objective of States in the disarmament process is complete disarmament under effective international control; 12. Regular reports by all States parties on the implementation of art. VI; 13. The further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world'. See ibid., at 14–15, para. 15(2–13).

36 See, among others, 2010 NPT Review Conference, Elements for a Plan of Action for the Elimination of Nuclear Weapons: Working Paper submitted by the Group of the Non-Aligned States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, UN Doc. NPT/CONF/2010/WP.47 (2010), para. 2, calling for full implementation of the 13 steps 'in accordance with the principles of transparency, verifiability and irreversibility'; 2010 NPT Review Conference, Nuclear Disarmament: France's Firm Commitment –Implementation by France of the '13 Practical Steps' Contained in the Final Document 2000 Review Conference, UN Doc. NPT/CONF/2010/WP.44 (2010); see also the Working Paper by the EU, *supra* note 24.

37 2010 NPT Review Conference, Final Document, UN Doc. NPT/CONF.2010/50 (Part I) (2010), para. 83.

38 See Preparatory Committee for the 2015 NPT Review Conference, Comprehensive Nuclear-Test-Ban Treaty, Working Paper submitted by Australia, Austria, Canada, Denmark, Finland, Hungary, Ireland, the Netherlands, New Zealand, Norway and Sweden (the Vienna Group of Ten), UN Doc. NPT/CONF.2015/PC.I/WP.4 (2012), para. 1 (emphasis added).

39 The only binding resolution being the one on the indefinite extension of the NPT, in 1995. The different nature of such a decision is due to the same Art. X(2) of the NPT, by means of which NPT parties gave their advance consent to this procedure to be followed for the indefinite extension.

40 *Infra*, section 10.

interpretation can be ascertained from instruments encompassing a common understanding of all the parties to a treaty, as to the proper interpretation of it.[41]

In such a way, the 13 steps contained in the 2000 Final Document – although not legally binding – can nevertheless provide some elements to take into account in the interpretation of Article VI of the NPT. This assumption calls for a deeper analysis of the meaning of Article VI, whose interpretation is still highly controversial between the nuclear and non-nuclear parties.

9. From the obligation to 'pursue negotiations' to the obligation to 'conclude negotiations' towards a multilateral disarmament treaty, according to the 1996 ICJ Advisory Opinion on the Legality of Threat or Use of Nuclear Weapons

According to the wording of Article VI, states are under an obligation 'to pursue negotiations'. Assuming this wording involves an 'obligation to negotiate', it should be pointed out that such an obligation entails no more than a duty to pursue bona fide negotiations, not an obligation to conclude an agreement.[42] But some serious, meaningful negotiations, in any case, should at least be started, while no initiative of the kind has been taken towards the multilateral disarmament treaty envisaged by Article VI.

In the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the ICJ took the opportunity to emphasize the continuing 'vital importance' of the goals set by Article VI of the NPT, to the interests of the international community as a whole. The legal relevance of the obligation concerned, according to the Court, 'goes beyond that of a mere obligation of conduct', being 'an obligation to achieve a precise result: nuclear disarmament in all its aspects'.[43] The Court, finding that the conclusion of a multilateral treaty would actually be the only way to achieve complete mandatory disarmament, refers to Article VI as providing a 'twofold obligation to pursue and to *conclude negotiations*', concerning all the states parties to the NPT.[44] Substantially, it would be difficult not to consider that second

41 See ILC, First Report on Subsequent Agreements and Subsequent Practice in Relation to Traties, Report of the International Law Commission on the Work of Its Sixty-Fifth Session (Geneva, 6 May–7 June and 8 July–9 August 2013), UN Doc. A/CN.4/660, 27. See also J. T. Gathii, 'The Legal Status of Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties', (2002) 15 *Harvard Journal of Law & Technology* 291, at 310.

42 As the ICJ held, the obligation to negotiate bona fide implies that the parties 'are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation … they are under an obligation so to conduct themselves that the negotiations are meaningful'. See *North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 47, para. 85.

43 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at 264 para. 99.

44 The Court held it was necessary to address this issue, given the particular difficulty of applying the rules on the use of force and the law of armed conflicts to cases involving nuclear weapons: 'in the long run … international law, and with it the stability of the international order which it is intended to govern are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly

obligation as equivalent to an obligation to conclude an agreement, even if the Court avoids these terms.

The Advisory Opinion clearly suggests that the obligation related to the final disarmament treaty can now be considered much more demanding than the mere obligation 'to negotiate' literally resulting from Article VI.[45] The indefinite extension of the NPT, which came less than one year before the issuing of the Opinion, can actually provide an argument in favour of the interpretation given by the Court, as will be discussed below.

10. The continuing debate over Article VI of the NPT and its proper means of interpretation

Notwithstanding the authoritative and clear interpretation of the ICJ, the debate over Article VI is still lively, and even tough at times. According to some commentators, the Court's findings on Article VI – being just an *obiter dictum* and, even more so, being delivered within a non-binding decision – should not be overestimated.[46]

This opinion belongs to those who try to reduce to a minimum – or even to deny – the legally binding nature of Article VI. Evidence to support this assumption can be found in the negotiating history of the NPT. In such a way, the conclusion is reached that, while Article VI does require all states to pursue disarmament as a future ultimate goal, it was not meant to specify how and when such a goal has to be achieved.[47] Supporters of this opinion argue that NWS are required to move – sooner or later – towards disarmament, by means of their choice, while the treaty mentioned in Article VI would be just one of the possible measures to be taken, not even the object of an obligation to negotiate.[48]

Some critical remarks can be opposed. First of all, such an interpretation seems in itself irrespective of international law, being grounded only on the consideration of the preparatory work.[49]

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as nuclear weapons. It is consequently important to put an end to this state of affairs; the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result' (ibid.).

45 2010 NPT Review Conference, Follow-Up to the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*: Legal, Technical and Political Elements Required for the Establishment and Maintenance of a Nuclear-Weapon-Free World. Working Paper submitted by Costa Rica and Malaysia, UN Doc. NPT/CONF.2010/WP.72 (2010),

46 See M. J. Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons', (1997) 91 AJIL 417, at 434; C. A. Ford, 'Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons', (2007) 14 *Non-Proliferation Review* 401, at 409.

47 As the drafters of the article chose to avoid identifying any specific step to be taken towards disarmament, trying to do so – as the ICJ did in its opinion – would 'amount to a little more than historical revisionism'. See Ford, ibid.

48 According to C. A. Ford, the decision to mention in Art. VI 'merely the pursuit of negotiation in good faith acknowledges the reality that a party may honestly try, but fail – perhaps through no fault of its own, such as in the event of a failure of good faith by other parties – to bring about a meaningful negotiation or agreement'. See ibid., at 403. The interpretation thus inferred from the preparatory work is at least questionable, not to mention that other scholars reach totally different conclusions, on the basis of the same preparatory works. See H. I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation, 1959–1979* (1980), at 564.

49 Ford concludes: 'The negotiating record could hardly be clearer, therefore, that *specific disarmament steps are not required* by Article VI' (emphasis added). See ibid., at 407.

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According to the Vienna Convention on the Law of Treaties, the preparatory work provides only subsidiary means of interpretation, in case the recourse to primary means 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly obscure or unreasonable'.[50]

However, this convention applies only to treaties concluded after its entering into force, while the NPT actually preceded it. Moreover, the NPT encompasses some states that never joined the Vienna Convention, such as, precisely, the US. Because the interpretation needed is relevant to assess the US position towards Article VI, it is worth investigating the conformity of the rules of interpretation, set by the Vienna Convention, to customary international law.[51]

The International Law Commission provides enough evidence of how international jurisprudence, before the Vienna Convention, used to deal with the choice of the proper means for treaty interpretation. Even according to general practice prior to the Vienna Convention, the possibility of grounding a proper interpretation only on the *travaux preparatoires* has to be excluded. The meaning of a treaty provision must be understood from the context of the treaty as a whole and, if the text of a convention is sufficiently clear in itself, then there will be no occasion to resort to preparatory work.[52]

Can Article VI of the NPT be considered sufficiently clear in itself, as read in the context of the whole treaty? The issues to be considered, for the purpose of this paper, are the legally binding nature of the obligation set by Article VI, and the definition of its contents.

11. The legally binding nature and the contents of the obligation set by Article VI of the NPT

Even if the ICJ opinion could be set aside as some suggest, other arguments could fully support the view of Article VI as legally binding. According to the law of treaties, as applied by the ICJ

> in the case of a treaty which is in part executed and in part executory, in which one of the parties has already benefited from the executed provisions of the treaty, it would be particularly inadmissible to allow that party to put an end to obligations which were accepted under the treaty by way of quid pro quo obligations which the other party has already executed.[53]

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50 1969 VCLT, Art. 32.

51 According to the ICJ, Art. 31 of the VCLT codifies international law. See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment of 17 December 2002, [2002] ICJ Rep. 625, at 645, para. 37.

52 ILC Draft Articles on the Law of Treaties with Commentaries, 1966 YILC, Vol. 18 II, at 221.

53 *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Jurisdiction of the Court, Judgment of 2 February 1973, [1973] ICJ Rep. 3, at 18, para. 34. According to the Court, in that case, 'Iceland has derived benefits from the executed provisions of the agreement' and, being so, 'it then becomes incumbent on Iceland to comply with its side of the bargain'. In the *Temple* case the Court held that as Thailand, for more then fifty years, had enjoyed the benefits conferred on it by a treaty concluded in 1904 with France 'it is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it'. See *Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] ICJ Rep. 6, at 32.

When considering the NPT in the light of the abovementioned rule, any interpretation aimed at nullifying the obligation set by Article VI, by reading it as a non-legally binding commitment, would appear inconsistent with international law.

Nuclear powers have for decades been taking full advantage of compliance by their non-nuclear counterpart states, so that their military supremacy has not been gravely challenged since the NPT's entry into force. Moreover, by their consent to unlimited renewal of the treaty, NNWS agreed to remain under the obligation to avoid nuclear proliferation without any time limit. As some of those states point out, the commitment of NWS to progress towards disarmament was essential to their acceptance of the unlimited extension of the NPT, so that the early entry into force of the CTBT 'was an integral part of the indefinite extension of the Non-Proliferation Treaty'.[54]

This obligation can by no means be 'downgraded' to a general pledge or a mere political commitment.

Given the legally binding nature of the obligation set forth by Article VI, it is then necessary to consider its contents. The provision requires NPT parties to 'pursue negotiations' on three different issues: cessation of the nuclear arms race, nuclear disarmament, and a treaty on general and complete disarmament. While the first two topics were to be dealt with 'at an early date', no time limit was set for the beginning of the negotiations towards the disarmament treaty. Of course, only NWS are committed to pursue effective measures in the two first sectors, while the general disarmament treaty should be concluded among all states parties.[55]

According to the supporters of the interpretation tending to reduce Article VI to no more than a recommendation, disarmament is to be pursued, but not (necessarily) by the conclusion of a treaty, as NWS would be free to adopt any measure of their choice to reach the result. This interpretation is at variance with the text of Article VI, taking into account all its different authentic versions: suffice it to consider how in each language Article VI refers to a 'treaty' (as the ultimate goal of the due negotiations) using exactly the same word that is in the name of the NPT.[56] So, according to the text, the envisaged instrument of disarmament has to be a legally binding one, a 'treaty' of the same nature as the NPT. There is no case for enquiring into the negotiation history, on this point, as the text is clear.

The treaty to be negotiated has to be multilateral. The meaning and nature of this final achievement cannot be considered – by means of a reductive interpretation – as transposable into (a sum of) bilateral agreements, whose effects would actually be totally different and not adequate to pursue the final goal required by Article VI. According to international jurisprudence 'the process of interpretation is a judicial

54 See 2010 NPT Review Conference, Article V, Article VI and the Eighth to Twelfth Preambular Paragraphs of the Comprehensive Nuclear-Test-Ban Treaty, Working Paper submitted by Australia, Austria, Canada, Denmark, Finland, Hungary, Ireland, the Netherlands, New Zealand, Norway and Sweden ('the Vienna Group of Ten'), UN Doc. NPT/CONF.2010/WP.16 (2010) para. 1.

55 The areas of negotiation are separate with no conditionality or sequencing connecting them. See Joyner, *supra* note 27, at 102.

56 Such words – in French, Spanish, Russian, and Chinese – are, respectively: *traité*, *tratado*, договор and 條約.

https://doi.org/10.1017/S0922156513000587 Published online by Cambridge University Press

function, whose purpose is to determine the precise meaning of a provision, but which cannot change it'.[57]

Nothing in the text of this article suggests that the envisaged agreement on disarmament could be concluded and become effective only among nuclear powers, leaving all the NNWS, as third parties, in a sort of separate world, with no legal title to claim compliance with the agreement. The treaty provided for by Article VI is still to be considered as a totally new achievement, substantially different from existing bilateral agreements leading to limited nuclear disarmament. Treaties of this kind, such as the new START, deserve to be highly appreciated by the international community, as they aim at some reduction of nuclear weapons, but are still far from being the kind of agreement that Article VI requires.[58]

Moreover, as for their political and strategic outcome, bilateral agreements between the two major NWS can hardly be seen as genuine disarmament measures, in respect of Article VI, as they rather appear to be arms control agreements.[59] In order to assess the actual meaning of such agreements, some technical issues should also be considered, such as the type and age of the weapons to be destroyed. In fact, keeping and maintaining stocks of old nuclear weapons require expensive and technically sophisticated operations, so that destroying them might sometimes represent the most convenient solution.[60]

It is questionable, therefore, whether such bilateral agreements could actually pave the way for the final achievement that Article VI demands.

12. THE *INADIMPLENTI NON EST ADIMPLENDUM* RULE AS APPLIED TO THE NPT

Statements by the US and Russia, considering bilateral agreements to be evidence of full compliance with Article VI, sound as though they are, not grounded on good faith, while the two NWS fail to start any negotiations on a treaty on general and complete disarmament under strict and effective international control.[61] Many NNWS, especially non-aligned countries, have repeatedly stressed the need for full implementation of Article VI.[62]

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57 *Laguna del Desierto (Argentina/Chile)* case, (1994) 113 ILR 1. See M. N. Shaw, *International Law* (2008), 934.

58 On bilateral instruments for nuclear arms control see Louka, *supra* note 12, at 346. See also G. Den Dekker, *The Law of Arms Control* (2001), 49.

59 Arms control efforts are 'designed by policy to effect a limitation or reduction of their subject weapons technologies, but do not intend nor are designed by policy to achieve complete elimination of those weapons'. On the other hand, disarmament efforts 'are part of such a policy program … even if that program is to be implemented through multiple, progressive steps'. See Joyner, *supra* note 27, at 36.

60 The US spends more than $7 billion annually on its Stockpile Stewardship Program, which includes nuclear weapons surveillance and maintenance. See Project for the Comprehensive Nuclear Test Ban Treaty, Stockpile Stewardship under the CTBT, available at www.projectforthectbt.org/stockpile.

61 According to the Joint Statement by the Delegations of the Russian Federation and the United States of America on New START, by concluding the treaty 'Russia and the United States have once again demonstrated their unwavering commitment to fulfilling their obligations under article VI of the Treaty on the Non-Proliferation of Nuclear Weapons'. See 2010 NPT Review Conference, Note Verbale dated 13 May 2010 from the Delegations of the Russian Federation and the United States of America addressed to the President of the Conference, UN Doc. NPT/CONF.2010/WP.75 (2010).

62 See, for instance, the latest document submitted to the Preparatory Committee for the 2015 NPT Review Conference, Working Paper presented by the Group of Non-Aligned States Parties to the Treaty on the

Such a situation, after all, is weakening the position of nuclear states and the effectiveness of the NPT as a whole, when confronting alleged violations of the NPT by the non-nuclear states presumed to be planning the construction of nuclear weapons, such as North Korea and Iran. Obviously enough, these states would oppose any charge of non-compliance with Article II of the NPT by replying that even their nuclear counterparts are not respecting Article VI of the same treaty.

It would not be easy to challenge the consistency of this position with international law. The reciprocity principle, on which the general rule *inadimplenti non est adimplendum* is grounded, is applicable even in the relationships between states party to the NPT, as there is nothing in the text of the NPT allowing an interpretation aimed at excluding the operation of such a general rule.

According to well-established rules of general international law, as codified by Article 60 of the Vienna Convention, a 'material breach' of a multilateral treaty by one of the parties entitles the other parties – by unanimous agreement – to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. Moreover, a party especially affected by the breach could invoke it as a ground for suspending the treaty in whole or in part.[63] For the meanings of these provisions, any violation by NNWS of the prohibition set by Article II of the NPT (i.e. by manufacturing or otherwise acquiring nuclear weapons) could surely amount to a material breach.

Nothing in the NPT seems to 'rate' the importance of the obligations mutually undertaken by non-nuclear versus nuclear parties and vice versa. These reciprocal obligations are linked in such a way that the commitment to disarmament by NWS under Article VI is seen as the essential counterpart (quid pro quo) of the commitment to non-proliferation of the NNWS.[64]

In fact, by accepting Article II, NNWS relinquish the possibility of ever retaining a military power equivalent to that of the NWS. The consent to such a substantial waiver in the field of national security cannot be deemed to be given by any sovereign state – as a subject of international law – without a counterpart of adequate (if not equivalent) weight.[65]

Thus, according to a good-faith interpretation, no support could be found in the text of the treaty for the assumption that only violations of Article II by NNWS are to be considered as a material breach, giving ground for application of the rule *inadimplenti non est adimplendum*, while breaches of Article VI would be only minor

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Non-Proliferation of Nuclear Weapons, Security Assurances against the Use or Threat of Use of Nuclear Weapons, UN Doc. NPT/CONF.2015/PC.I/WP.23; see also 2010 NPT Review Conference, Working Paper submitted by Egypt on behalf of Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa and Sweden as Members of the New Agenda Coalition, UN Doc. NPT/CONF.2010/WP.8 (2010), para. 1.

63 *Case Concerning the Gabcicovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 38, para. 46.

64 See Shaker, *supra* note 48, at 564; Joyner, *supra* note 27, at 26). According to N. A. Wulf ('Misinterpreting the NPT', (2011) 41 *Arms Control Today*, available at http://www.armscontrol.org/2011_09/Misinterpreting_the_NPT), no quid pro quo connection can be established between obligations provided for in the NPT. The article harshly criticizes the views expressed by D. H. Joyner in his book.

65 The author devoted in-depth research to the issue. See A. Pietrobon, *Il sinallagma negli accordi internazionali* (1999), 177.

ones.[66] So, it would be difficult to deny that the persistent refusal of the nuclear powers even to start any negotiation towards the conclusion of the agreement required by Article VI could equally be considered a material breach.[67]

As a matter of law, non-compliance with Article VI, just as much as non-compliance with Article II of the NPT, amounts to a material violation of the NPT, no matter how much less serious or visible the first case might appear to public opinion.

As long as NWS do not even plan negotiations for a multilateral disarmament agreement, any NNWS charged with violation of Article II, in order to find some legal grounds for justifying its conduct, could legitimately oppose the violation of Article VI of the same treaty by nuclear powers. The present position of the government of Iran is grounded on a similar reasoning.[68]

13. An obligation incumbent on nuclear powers party to the NPT, but failing to ratify the CTBT as yet

As seen above, it cannot be assumed that nuclear powers parties to the NPT are legally bound to ratify the CTBT. Even if their refusal to ratify prevents the treaty from entering into force, they cannot be held responsible for any wrongful act. At the same time, however, it would be equally misleading to assume that NWS continue to be totally free not to ratify, without any consequences in the field of international law.

The present position of the US and China seems to lie somewhere between these two positions. This can be ascertained by taking into account the possibility of some interaction between soft law – the political agreement on the 13 steps – and a hard-law instrument, such as the NPT.

Relevant practice adopted by consensus, and confirmed by each review conference since 2000, has attached primary relevance to the CTBT's ratification, as evidence of good will in pursuing Article VI goals. Even NWS shared this view, as consensus was reached among all the parties to the NPT, nuclear powers included. Indeed, reaching a common definition of the 13 steps runs in favour of their own interests: while the final goal is strongly reaffirmed, the indicated pace in pursuing it is actually allowed to be gradual. The final multilateral agreement could even be delayed as long as states abide by the 13 steps (as this conduct would avoid charges of non-compliance with Article VI).

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66 Good faith is the essential requirement in the interpretation of treaties. See M. E. Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission', in Cannizzaro, *supra* note 31, 105 at 108.

67 According to Art. 60 of the Vienna Convention, this rule applies to multilateral treaties 'of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty'. Disarmament and non-proliferation treaties are included in such a category.

68 See the working papers submitted by the Islamic Republic of Iran: 2010 NPT Review Conference, Nuclear Disarmament, UN Doc. NPT/CONF.2010/WP.49 (2010); 2010 NPT Review Conference, The Issue of Non-Compliance with Articles I, III, IV and VI of the Treaty, UN Doc. NPT/CONF.2010/WP.62 (2010); Preparatory Committee for the 2015 NPT Review Conference, Nuclear Disarmament: Working Paper Submitted by the Islamic Republic of Iran, UN Doc. NPT/CONF.2015/PC I/WP.32 (2012).

In such a way, one may assume that ratification of the CTBT is the most significant step towards implementation of Article VI of the NPT. As a consequence, while ad hoc negotiations towards the envisaged multilateral disarmament treaty are lacking, it could nevertheless be assumed that states that do ratify the CTBT are – at least – acting in good faith and effectively towards the implementation of Article VI.

On the other hand, NWS that persist in refusing to join the CTBT are failing to offer such evidence of good faith in implementing Article VI, thus violating the general rule requiring states to behave in good faith during the execution of a treaty. In the long run, this could even amount to a breach of Article VI (as read in the light of the 13 steps), which is – as the ICJ puts it – 'to achieve a precise result'.[69]

In order to prevent such charges, NWS choosing not to ratify the CTBT should otherwise provide evidence of their good faith: this could be done by giving detailed reasons for their conduct, both to their non-nuclear counterparts in the NPT and to the nuclear powers that have already ratified the CTBT. This duty amounts to a legal, although 'minor', obligation. In order to implement it, nuclear powers should at least issue some statement, at an official international level, to justify their delay. Of course, there would be no way to assess whether or not the motivation provided is genuine. However, this obvious limit is not in contrast with the existence of the obligation. In fact such a duty to provide motivation, without any possibility of challenging the bona fide of states' allegations, is legally incumbent on states in cases of withdrawal from several disarmament agreements, including the NPT and the CTBT.[70]

Providing a clear explanation of a state's reasons for not ratifying the CTBT would demonstrate its commitment to Article VI of the NPT, for as long as it does not ratify it. However, it could be objected that this interpretation emphasizes the importance of the first step over the next 12. The opinion seems nevertheless consistent with the undiminished binding commitment to multilateral cooperation – based on equality between the parties and under effective international control – that Article VI requires. Among the 13 steps, only CTBT ratification implies acceptance of a treaty establishing multilateral cooperation, having the same basic legal features as the multilateral disarmament regime envisaged by Article VI. Hence, it can be assumed that this step – when compared to the next 12 – has a deeper meaning as evidence of goodwill in implementing Article VI.[71] And, indeed, it is not by chance that ratification of the CTBT is mentioned as the very first step to be taken.[72]

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69 *Supra*, note 43.

70 The same provision, in each treaty (see *supra* note 14), states that the withdrawal notice '*shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests*' (emphasis added).

71 According to the EU, 'CTBT forms an essential part of the nuclear disarmament and non-proliferation regime'. See 2010 NPT Review Conference, Council Decision 2010/212/CFSP of 29 March 2010 relating to the Position of the European Union for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Working Paper submitted by Spain on behalf of the European Union, UN Doc. NPT/CONF.2010/WP.31 (2010) 5.

72 Even before its negotiations started, the CTBT was eagerly anticipated as a most important non-proliferation measure 'parallel to the NPT' and that would 'readjust the deficit in the balance sheet' between NWS and NNWS, with respect to their obligations under Art. VI. See Shaker, *supra* note 48, at 632.

A unilateral moratorium on nuclear tests cannot be considered as equivalent to ratification of the CTBT for the purposes of Article VI, as interpreted taking the 13 steps into account. Unilateral measures fail to satisfy the rights of NNWS that – according to Article VI – are meant to become parties to the final disarmament agreement and, therefore, to be entitled to claim its respect under international law.[73] Their position, of course, would be quite weak as each NWS, though declaring a moratorium, would remain free to withdraw its promise and resume testing activity.[74]

14. Conclusion

Complete disarmament is an idealistic goal. Nevertheless, even if this ultimate goal seems far from being reached, the obligation set by Article VI of the NPT is still alive and cannot undergo any reduction. As the current practice of states shows, the process leading to nuclear disarmament is gradual and progressive. This means, on the one hand, that NWS are not required to give up their nuclear option in the short term, but, on the other hand, that they should assure continuity and genuineness of their efforts towards the goal. Ratification of the CTBT would be a most valuable step in this regard, and procedures required for it in each NWS should be started or resumed, in order to ratify the treaty or to provide, at the very least, a clear explanation of their reasons for refusing to do so.

The position of the US is crucial: to the European observer, it seems possible to argue that ratification of the CTBT would not be particularly demanding, once it has been made clear that no more explosive nuclear tests are required to maintain, or even improve, nuclear capabilities. The decision to ratify the CTBT could be viewed as a winning option for the US, if some traditional perspectives over national security could be revisited.[75]

Ratification of the CTBT by the US and China or – at least – a clear and detailed account of the motivation for their delay, could act as a productive

73 According the new 2010 START treaty, only the two parties will be entitled to claim respect for the reciprocal disarmament obligations and, so, to ask for inspections or other verification measures provided for by the agreement. As the UN General Assembly reiterates, 'bilateral negotiations can never replace multilateral negotiations' towards the nuclear disarmament goal. See UN General Assembly, Nuclear Disarmament, UN Doc. A/RES/66/51 (2012), 3; see also UN General Assembly, Promotion of Multilateralism in the Area of Disarmament and Non-Proliferation, UN Doc. A/RES/66/32 (2012). Several member states, inter alia the UK and the US, voted against the adoption of the second resolution.

74 Notwithstanding the precedent in favour of the binding character of unilateral declaration, unilateral negative security assurances are not considered to be 'as binding as a treaty'. See Eckart, *supra* note 9, at 161.

75 As President Clinton already pointed out in his Letter to the Senate in 1999 (*supra* note 26), joining the CTBT would not affect the national security level, nor the possibility of retaining strategic nuclear forces 'sufficient to deter any future hostile foreign leadership with access to strategic nuclear forces from acting against our vital interests and to convince it that seeking a nuclear advantage would be futile'. The president stressed that national security interests could find a valuable safeguard in the 'supreme interests' (withdrawal) clause, so that if 'the safety or reliability of a nuclear weapon type critical to the Nation's nuclear deterrent could no longer be certified without nuclear testing ... the President will be prepared to exercise our "supreme national interests" rights under the Treaty'.

https://doi.org/10.1017/S0922156513000587 Published online by Cambridge University Press

confidence-building measure, easing the currently strained relationships with some NNWS. Failure to resume the debate and the process toward CTBT ratification would instead undermine the international community's efforts to improve the non-proliferation regime. NWS need to exercise clearer conduct in order to strengthen international cooperation of the sort towards which states are being urged by the major threat of nuclear terrorism.[76]

76 See Louka, *supra* note 12, at 231.

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