CTBT: Legal questions arising from its non-entry-into-force revisited

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1. Introduction

Prohibition of the testing of nuclear weapons has been considered an effective measure for nuclear disarmament and non-proliferation because it constrains nuclear weapons’ development and qualitative improvement and ends in the development of tests for more advanced nuclear weapons.1 Therefore, the international community has prioritized prohibition as part of their agenda in the field of nuclear disarmament and non-proliferation. Because nuclear weapons development programmes have close relationships with national security, prohibition of nuclear weapons is a political problem rather than a legal one and legally binding prohibition has been very limited.2 This was quite obvious during the Cold War when a number of nuclear tests were conducted and only a few treaties, for example, the Antarctic Treaty, had been concluded.3 Because of concern for environmental damage caused by nuclear testing fallout,4 the Partial Test Ban Treaty (PTBT) was signed in 1963,5 and after 30 years, in 1996, the Comprehensive Nuclear-Test-Ban Treaty (CTBT) was adopted by the United Nations General Assembly (UNGA) and opened for signature.6

The CTBT’s importance as a nuclear disarmament and non-proliferation measure was mentioned in the treaty conference documents on the proliferation of nuclear weapons (NPT),7 which is the cornerstone of the nuclear disarmament and non-proliferation regime. For instance, they are ‘[the] principle and objective of the nuclear non-proliferation and disarmament’, which was adopted in 1995 at the NPT’s indefinite extension8 and the several final documents of the

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1 As for the significance of the prohibition of nuclear tests, the CTBT preamble, paragraph 5 reads: The cession of all nuclear weapon test explosions and all other nuclear explosions, by constraining the development and qualitative improvement of nuclear weapons and ending the development of testing advanced new types of nuclear weapons, constitutes an effective measure of nuclear disarmament and non-proliferation in all aspects.
2 Marie-Françoise Furet, *Expérimentation de l’arme nucléaire et droit international public* (Edition Pedone 1966) 67–68. Although her view was written in the 1960s, it is still valid because of the CTBT’s non-entry into force. See also Lisa Tabassi, ‘Nuclear Test Ban: Lex lata or de lege ferenda?’ *Journal of Conflict and Security Law* (OUP)309-352.
4 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (ICJ Reports 1996) 241, para. 29. This jurisprudence shows explicitly that ‘[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment’. Case concerning the Gabc~kovo-nagymaros project (Hungary v. Slovakia) also confirms the obligation to prevent transboundary environmental damage.
6 Comprehensive Nuclear-Test-Ban Treaty (CTBT), 35 ILM 1439 (adopted as UN Doc A/RES/50/245 (17 September 1996)).
7 Treaty on the Non-Proliferation of Nuclear Weapons, 729 UNTS 161 (entered into force 5 March 1970).
NPT Review Conferences. The former called for the early conclusion of the CTBT negotiation and the latter urged the necessity of the treaty’s early entry into force and, additionally, nuclear test moratoria before its entry. However, the CTBT’s entry into force cannot be expected in the near future because of the strict condition stipulated by its entry into force clause even 20 years after its adoption by the UNGA, despite its important role in nuclear disarmament and non-proliferation. Eight additional States (‘Annex 2 States’) must ratify the CTBT for its entry into force, but these States are reluctant to ratify and thus its entry into force is not foreseeable in the near future. As a result, the non-entry issue was a serious concern, especially when the United States Senate refused to ratify the CTBT because the United States has political influence on the international trend toward nuclear disarmament. For instance, Asada examined legal questions arising from the CTBT’s non-entry into force, that is, whether the obligation to prohibit nuclear testing that the treaty imposes has acquired customary law status and application of Article 18 of the Vienna Convention on the Law of the Treaty (VCLT), which obliges States Signatories not to defeat the object and the purpose of the Treaty. And then this article concludes, Should the United States or any other states whose ratification is necessary for entry into force of the CTBT make clear its intention never to become a party to the Treaty, what would become of PrepCom and IMS? This would be a legally interesting question but a


The final documents adopted by consensus in 2000 and 2015, the importance of early entry into force of the CTBT and moratoria pending entry into force are mentioned in the ‘practical 13 steps’ and ‘conclusion and recommendation on follow on’ respectively.

10 The CTBT Annex 2 lists the 44 States that must ratify the Treaty for it to enter into force. It designates the list of States pursuant to Article XIV, i.e. States members of the Conference on Disarmament on 18 June 1996, which formally participated in the work of the 1996 session of the Conference and which appear in Table 1 of the International Atomic Energy Agency’s April 1996 edition of ‘Nuclear Power Reactors in the World’ and of States members of the Conference on Disarmament on 18 June 1996, which formally participated in the work of the 1996 session of the Conference and which appear in Table 1 of the International Atomic Energy Agency’s December 1995 edition of ‘Nuclear Research Reactors in the World’.

11 The CTBT has 183 States Signatories and 166 States Parties as of 21 December 2016. However, Annex 2 States that have not ratified are China, Egypt, India, Iran, Israel, DPRK, Pakistan and the United States. <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-4&chapter=26&lang=en >accessed 21 December 2016.

12 UNGA verbatim record, UN Doc A/50/PV.125 (10 September 1996) 3.

When the General Assembly adopted the CTBT, the representative of India explained her negative vote: ‘I would like to declare on the floor of this Assembly that India will never sign this unequal treaty—not now, not later. As long as this text contains this article, that treaty will never enter into force’. Therefore, if the India will not fundamentally change its nuclear policy, there will be very small possibility that India, one of the Annex 2 States, will not ratify the CTBT and thus the CTBT will not enter into force. India also shows its view on the CTBT and its intention not to ratify the CTBT in the form of the explanation of its vote during the first committee.

13 U.S. Senate Roll Call Votes 106th Congress—1st session.

The United States Senate decisively rejected the Comprehensive Nuclear Test Ban Treaty ((Resolution of Ratification to Treaty Document No. 105-28 CTBT) on 13 October 1999, by a vote of 51–48, marking the first time that it has defeated a security-related treaty.


This question, raised almost 15 years ago, became serious because the CTBT’s entry into force continued to be very unlikely. Despite the international community’s concerted effort to promote the CTBT’s early entry into force, enshrined in a series of final documents of the Article XVI Conferences, strong momentum for its early entry could not be generated. Considering this situation, the present article examines the current legal status of the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO) Preparatory Commission (hereinafter referred to as ‘CTBTO PrepCom’) and the CTBT verification regime, including the International Monitoring System (IMS); the article seeks the possibility of fulfilling the CTBT’s object and purpose despite the high likelihood that its non-entry into force will continue.

2. Can the CTBTO Preparatory Commission be an international organisation?

Most international organisations are nowadays established by preparatory commissions. The same is true in the field of disarmament and non-proliferation. The preparatory commission for the International Atomic Energy Agency (IAEA) pursuant to the Annex of the IAEA Statute, which forms an integral part of the Statute, prepared for the IAEA’s establishment. Furthermore, the Preparatory Commission for the Organisation of Prohibition of Chemical Weapons (OPCW) prepared for establishment of the OPCW, according to the Paris Resolution adopted at the signing ceremony in Paris. As for the CTBTO, PrepCom was established pursuant to the Text in the Annex to the resolution of the Meeting of States Signatories in New York in November 1996 (hereinafter referred to as ‘PrepCom Text’). After the CTBT’s entry into force, the result of preparation by the CTBTO PrepCom will be transferred to the CTBTO according to the first-session decision of the Conference of States Parties.

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22 Art 2 paragraph 26(h) stipulates that the initial Conference of States Parties ‘[c]onsider and approve at its initial session any draft agreements, arrangements, provisions, procedures, operational manuals, guidelines and any other documents developed and recommended by the Preparatory Commission’. In concert with this provision, Art 20 of the resolution establishing the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty (CTBT) Organisation stipulates that ‘Rights and assets, financial and other obligations and the function of the commission shall be transferred to the Organisation at the first session of the Conference on States Parties’. Art 21 also stipulates
Although in general, resolutions are not legally binding, some categories of resolutions adopted by international organisations are legally binding. Such is the case with resolutions on new members’ admission, on the budget and other matters concerned with the organisation’s internal economy.\textsuperscript{23} In this connection, the PrepCom Text explicitly stipulates its legal status: ‘The Commission has standing as an international organisation, authority to negotiate and to enter into agreement and such other legal capacity as necessary for the exercise of its functions and the fulfilment of its purpose (Art 7)’. However, some countries seem doubtful about the PrepCom Text’s legal nature, in other words, whether the document is legally binding. For example, during its drafting stage, Japan argued that the word ‘shall’ was inappropriate because the Text had commonly been understood to be a political document,\textsuperscript{24} with the understanding that an international organisation shall be established by a treaty and that the PrepCom Text is not a treaty. Therefore, it is worth examining the PrepCom Text from the viewpoint of an international organisation’s definitions, legal capacity to conclude the treaty, international personality and so forth.

A. In relation to the definition of an international organisation

As for examples of definitions of international organisation, the Vienna Convention on Law of the Treaty (VCLT) states, ‘An international organisation is an intergovernmental organisation’ (Art 1 (C)) and the Vienna Convention on the Law of the International Organisation (VCLTIO) has a similar definition.\textsuperscript{25} Neither definition explicitly mentions a constituent document; however, it is understood that the expression ‘[i]nternational organisation’ means an intergovernmental organisation established among governments. This ‘minimalist’ definition clarifies that it does not include ‘non-governmental organizations’.\textsuperscript{26} Another example of definition comes from Draft Articles on the Responsibility of International Organisations (DARIO) by the International Law Commission in 2011. As DARIO Art 2-2 stipulates that ‘international organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality’,\textsuperscript{27} the requirement for establishing an international organisation is, first, to be established by a treaty or other instrument, second, to be governed by international law and third, to possess its own

\begin{itemize}
  \item \textsuperscript{23} Vaughan Lowe, \textit{International Law} (OUP 2007), 91.
  \item \textsuperscript{24} See n 14. Masahiko Asada, ‘CTBT: Legal questions arising from its non-entry-into-force,’ \textit{Journal of Conflict and Security Law}, 106.
  \item \textsuperscript{25} Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLTIO), 25 ILM 543(1986), (adopted 21 March 1986, not yet entered into force as of 31 May 2016).
  \item \textsuperscript{26} Olivier Corten and Pierre Klein, \textit{The Vienna Convention on the Law of treaties: A commentary vol. I} (OUP 2011) 52–53.
  \item \textsuperscript{27} UN Res 66/100 UN Doc A/RES/66/100 (27 February 2012) 2–17.
\end{itemize}
international legal personality (emphasis added). If we examine the CTBT according to the DARIO definition, the CTBTO, which will be established pursuant to Art 2-1 after the CTBT’s entry into force, is undeniably an international organisation that fulfils the aforementioned requirements. Therefore, it is necessary to examine whether the PrepCom Text falls into the category of ‘a treaty’ or ‘other instrument’ whose scope is intended to include instruments, such as resolutions adopted by an international organization or by a conference of States, and this depends on the PrepCom Text’s legal interpretation.

First, the broadest interpretation of the constituent document’s requirement for establishing an international organisation is that ‘other instrument’ may include non-legally binding documents, such as UNGA Resolutions. If this is the case, the PrepCom Text falls into the category of constituent document for an international organisation and thus the Preparatory Commission is an international organisation. At this juncture, Brownlie observes,

It may be noted also that, while an organization with legal personality is normally established by treaty, which is by no means necessary and the source could equally be the resolution of a conference of states or a uniform practice. The constitutional basis of the United Nations Conference on Trade and Development (UNCTAD) and of the United Nations Industrial Organization (UNIDO) must be found in resolutions of the General Assembly. This approach is consistent with the interpretation that the PrepCom Text is a non-legally binding document and is also exactly aligned with the DARIO definition’s requirement. In this connection, one view proposes the concept of a soft law organisation established by soft law instruments. However, this idea also lies within the sphere of Brownlie’s doctrine for international organisations.

Second, contrary to the broader approach, mentioned above, the strictest approach for the requirement of establishing an international organisation is that the constituent document should be limited to a treaty alone, taking the very nature of intergovernmental organisation as based on the agreement among governments. In this case, the scope of the constituent document for an international organisation is narrower than that of DARIO. If that is the case, the CTBTO’s Preparatory Commission is not an international organisation because the PrepCom Text is not a legally binding document. As mentioned, for example, during negotiation of the PrepCom Text, Japan requested deletion of the word ‘shall’, which implies a legally binding character: It seems that a preparatory commission is just an entity that will be transformed into a fully-fledged international organisation after the CTBT’s entry into force and thus the preparatory commission

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28 Olivier Corten and Pierre Klein (n 26) 52–53.
cannot be regarded as an international organisation. Similar views on this approach are also found in the discussion concerning INTERPOL’s legal status, in other words, whether it is an international organisation. In the 2000 INTERPOL General Assembly, Japan expressed the interpretation that INTERPOL is an international organisation of criminal police, not an international organisation *strict sensu*. Chile expressed a similar view, which the law of international organisation distinguishes between an international intergovernmental organisation and an international non-governmental organisation and that the former is established based on a treaty.

Third, between these two approaches lies the middle ground: the United Kingdom’s interpretation, which considers the PrepCom Text a special form of treaty termed ‘a Text’. In this case, the PrepCom is deemed an international organization in conformity with DARIO’s definition because the constituent document is legally binding. Austria interprets similarly, concluding that the headquarter agreement with CTBTO PrepCom at its establishment conferred international legal personality, privilege and immunity—*prima facie* evidence that the CTBTO PrepCom is an international organisation.

**B. Legal capacity to conclude the treaty and international legal personality**

First, as for legal capacity to conclude the treaty, the CTBT endows the organs of CTBTO, i.e. the Conference of States Parties and the Executive Council, the capacity to conclude treaties along with privilege and immunities. On the contrary, the PrepCom Text, Art 7 stipulates the authority to negotiate and enter into agreements and such other legal capacity as necessary for the exercise of its functions and the fulfilment of its purpose. Thus, if the CTBTO PrepCom is

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35 The CTBT foresees three types of agreements whose privilege and immunities clause contained therein are applicable: first, the agreement between the organisation and the States Parties; second, the agreement between the Organisation and Austria, the host country; and third, the CTBT itself (Art 2-57); furthermore Art 22 of the PrepCom Text, which stipulates privilege and immunity that correspond only to the host country agreement with Austria and thus its scope is limited to privilege and immunity ‘as an international standing’ and that are accorded to the delegation accredited to the CTBTO PrepCom.
regarded as an international organisation, it has legal capacity pursuant to Art 7 of the PrepCom Text. In fact, the CTBTO PrepCom concluded several relationship agreements with other international organisations, such as the United Nations.36

In this connexion, in the Advisory Opinion of the International Court of Justice (ICJ), the Legality of Use by a State of Nuclear Weapons in armed conflict shows that ‘[t]he powers conferred on international organizations are normally the subject of an express statement in their constituent instruments’.37 Thus the capacity conferred on an international organisation is based on an expressed statement in the constituent document. As for an international organisation’s capacity to conclude treaties, VCLTIO, Art 6 stipulates, ‘The capacity of an international organisation to conclude the treaties is governed by the rules of that organisation.38 Considering these facts, in the case that the CTBTO PrepCom is an international organisation, the Preparatory Commission is deemed to have legal capacity to conclude treaties within the scope conferred by the PrepCom Text.

Second, when it comes to an international organisation’s legal personality, the ICJ’s advisory opinion, Reparation for injuries suffered in the service of the United Nations (Folke Bernadotte case), mentions, ‘The court has come to the conclusion that [w]hat it does mean is that it is a subject of international law and is capable of possessing the international rights and duties and that it has capacity to maintain its rights by bringing international claims’.39 The litigation brought to the International Labour Organization (ILO) tribunal, in which staff of the Provisional Technical Secretariat brought suit and the PrepCom became a respondent, is prima facie evidence that the CTBTO PrepCom fulfils the requirement of having an international legal personality.

Furthermore, it is necessary to have facility agreement or arrangement to govern the legal aspect of IMS facilities located in the territory of States Parties, in conformity with provisions related to the CTBT’s verification regime.40 Similarly, one task for the PrepCom is to develop a model agreement or arrangement for International Monitoring Stations pursuant to PrepCom Text,

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36 Agreements concluded by the CTBTO; Agreements with other international organizations.
38 See n 26. VCLTIO, 25LIM (543).
Art 2–1(j) stipulates that the ‘rules of the organisation’ means, in particular, the constituent instruments, decisions and resolutions adopted in accordance with them and established practice of the organisation.
40 The CTBT Protocol, Art 4, part 1 stipulates that ‘[i]n accordance with appropriate agreements or arrangements and procedures, a State Party or other State hosting or otherwise taking responsibility for International Monitoring System facilities and the Technical Secretariat shall agree and cooperate in establishing, operating, upgrading, financing and maintaining monitoring facilities, related certified laboratories and respective means of communication within areas under its jurisdiction or control or elsewhere in conformity with international law. Such cooperation shall be in accordance with the security and authentication requirements and technical specifications contained in the relevant operational manuals … (the following part is omitted)’.
Art 12 (b), and it has already concluded facility agreements with 47 countries. Therefore, PrepCom’s practice as an international organisation with international legal personality has been accumulating over the years; so, the CTBTO PrepCom’s legal status should be interpreted as an international organisation with an international legal personality.

Moreover, the ILO Administrative Tribunal already decided that it can exercise its jurisdiction to the PrepCom as an international organisation. In fact, the PrepCom has already responded to lawsuit actions as a litigant party in several cases. The rationale for jurisdictional recognition by the ILO Administrative Tribunal was the constituent document for the CTBTO PrepCom, endowing it with attributes pertaining to intergovernmental organizations, including the necessary privileges and immunities, should be considered as constituting such an act, especially as it has been implemented in the host State by an agreement granting the Commission immunity from legal process.

Taking these elements into account, the CTBTO Preparatory Commission should be interpreted as at least a de facto international organisation because it has an international legal personality and is governed by international law, subsequent to practice pursuant to VCLT, Art 31-3(b) because it has a number of accumulated practices as an international organisation.

C. Financial obligation for the assessed contribution

Another issue arising from the CTBT’s non-entry into force is that of financial obligation for

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42 ‘Notes & quotes,’ CTBTO SPECTRUM 8 (July 2006) 4.

43 ILO Administrative Tribunal, Judgment No. 2524, Ms F.V. against the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization (CTBTO Preparatory Commission).

44 ILO Administrative Tribunal, Judgment No. 2524, Ms F.V. against the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization (CTBTO Preparatory Commission).

45 Gerhard Hafner, ‘Subsequent agreement and practice: Between interpretation, informal modification and formal amendment,’ Treaties and subsequent practice (OUP 2013) 118.

This article indicates, ‘In practice, however, states are free to change the interpretation at any time. This result is similar to the view that a state can make interpretative declaration at any time according to Guideline 2.4.8. of the ILC’s Guide to Practice according to which, unless the treaty provides otherwise, an interpretative declaration may be modified at any time’. Thus, the length of time to form a subsequent practice is not specified and the evidence of accumulation is more important.
assessed contributions. For example, Colombia and Guatemala made interpretative declarations at the time of their ratifications due to difficulties paying their assessed contributions. The Government of Colombia declares that financial obligations arising from the present instrument shall not become payable until the Treaty has entered into force and shall not have retroactive effect. The Government of Guatemala declares that the financial obligations arising from the present Treaty will become payable only from the Treaty’s date of entry into force and shall not have retroactive effect.\(^{46}\) Despite the fact that Columbia is one of the Annex 2 States whose ratification is necessary for the CTBT’s entry into force, Columbia could not ratify the CTBT because of certain constitutional impediments arising from the prohibition of paying retroactive assessments.\(^{47}\) It finally ratified the CTBT in 2008. These interpretative declarations imply that these countries do not recognise the financial obligation to pay assessed contributions on the basis of the PrepCom Text as a legal obligation before the CTBT’s entry into force. They refused payments as a financial obligation. As Columbia expressed in the UNGA and the Conference facilitating entry into force, although Columbia considers the CTBT an important measure for nuclear disarmament and non-proliferation, it was difficult for that country to consider the CTBTO PrepCom an international organisation due to the constitutional restraint.

Although Japan’s explanatory note on approval of the Diet’s ratification mentions the obligation to pay the assessed contribution after CTBT ratification, no obligation to pay the assessed contribution for the CTBTO PrepCom is mentioned.\(^{48}\) Even though internationally the source of authority for the obligation to pay the financial contribution is the PrepCom Text’s Art 5(a), Japan considers this document non-legally binding. But from the viewpoint of Japanese Municipal law, this assessed contribution is paid on the basis of the Ministry of Foreign Affairs Establishment Act, Art 4-3,\(^ {49}\) and this action seems contradictory.


\(^{48}\) ‘Explanatory note of the Comprehensive Nuclear Test Ban Treaty’, Japanese Ministry of Foreign Affairs (April 1997) 6. This explanatory note lists national implementation measures after the CTBT’s ratification as amendment to the amendment of the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors (Act No. 80/1997. This act will not be effective before the CTBT’s entry into force) and the obligation to pay the assessed contribution.

\(^{49}\) Administrative project review sheet for FY2014: financial contribution to the Preparatory Commission of CTBTO, Japanese Ministry of Foreign Affairs. This document indicates that the Act for Establishment of the Ministry of Foreign Affairs, Art 4-3 provides the authority to pay the assessed contribution for the CTBTO Preparatory Commission in Japan’s municipal legislation. It stipulates, as one of the tasks conferred to the Ministry, participation, representing the Government of Japan to the United Nations, other international organisations, international conferences and international frameworks (hereinafter referred to as ‘international organisations’ and its cooperation with international organisations). Thus, regardless of
As for the assessed contribution for the CTBTO, CTBT Art 2-9 stipulates:

The costs of the activities of the Organization shall be met annually by the States Parties in accordance with the United Nations scale of assessments adjusted to take into account differences in membership between the United Nations and the Organization.

Then PrepCom Text, Art 5-a stipulates:

The cost of the Commission and its activities, including those of Provisional Technical Secretariat, shall be met annually by all States Signatories, in accordance with United Nations Scale of assessment adjusted taking account of the differences between the United Nations membership and States Signatories and the timing of signature.

Although the obligation to pay the assessed contribution for the CTBTO and that of the CTBTO PrepCom differ, CTBT Art 2-10 also stipulates, ‘Financial contributions of States Parties to the Preparatory Commission shall be deducted in an appropriate way from their contributions to the regular budget respectively’. Thus, the decision of the first Conference of States Parties authorise to accept amounts paid during the period of the PrepCom as part of payment for the CTBTO’s regular budget after the CTBT’s entry into force. This means a sort of advance payment of the assessed contribution for the future CTBTO. Thus, in concert with CTBT, Art 2-10, the assessed contribution for the PrepCom will be an integral part of the financial contribution to the future CTBTO. Furthermore, the assessment scale is decided by the PrepCom pursuant to PrepCom Text, Art 5(a), and this aligns with the ICJ’s jurisprudence.

According to the ICJ’s advisory opinion, certain United Nations expenses (Article 17, paragraph 2 of the Charter) are apportioned by the UNGA: ‘[T]he General Assembly is also given the power to apportion the expenses among the Members and the exercise of the power of apportionment creates the obligation, specially stated in Article 17, paragraph 2 of each Member to bear that part of the expenses which is apportioned to it by the General Assembly’. This mandatory character of the obligation to pay the assessed contribution for the Preparatory Commission in conformity with Art 5-a of PrepCom Text, is evidence that the PrepCom Text has a legal effect. It also indicates that the CTBTO PrepCom has legal status as an international

whether the CTBTO PrepCom is an international organisation or not, this payment is regarded as international cooperation stipulated in this paragraph.

50 See n 22. CTBT Doc CTBT/MMS/RES/1(17 October 2015) para 5 (b).


For instance, the scale of assessment for the years 2016 and 2017(contained in document CTBT/PTS/INF.1336) is authorised by the PrepCom on the basis of the recommendation by Working Group A of the PrepCom, which is in charge of administrative and budgetary issues.

organisation despite the CTBT’s non-entry into force.

3. **Pursuit for effectiveness of the CTBT as a non-entry-into-force treaty**

A. **Possibility of provisional application**

Because of the CTBT’s long non-entry into force, some views are expressed in favour of its provisional application. For example, referring to the case of the Treaty on Conventional Armed Forces in Europe (CFE) and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Jonson proposed to submit a draft agreement to make the CTBT enter into force and to adopt it by vote so that its fundamental obligation can be imposed. Anastassov also proposed the idea of an operational protocol for the CTBT’s provisional application.

When it comes to cases of provisional application with regard to international organisations before their constituent instruments’ entry into force, the third report on treaties’ provisional application by Juan Manuel Gomez-Robledo, Special Rapporteur, cites many interesting cases. For example, provisional application of the International Civil Aviation Organisation (ICAO) and the World Health Organisation (WHO) was intended for quick operationalisation’s functional necessity of their treaty implementation regimes. Additionally, conventional disarmament treaties—the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction (Ottawa Convention), the Convention on Cluster-Munitions (CCM) and the Arms Trade Treaty (ATT)—contain especially dedicated provisions for provisional application. However, a distinctive feature of provisional application in non-proliferation treaties, in comparison to conventional arms disarmament treaties, is the limited number and scope of clauses provisionally applied. Core non-proliferation prohibitions and restrictions are not provisionally applied. The CTBT, however, has no provisional application clause, but the last sentence in Art 4-1 stipulates, ‘At entry into force of this Treaty, the verification regime shall be capable of meeting the verification requirements of this Treaty’.

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60 Arms Trade Treaty (ATT), 52 ILM 985 (2013), (entered into force 14 December 2014).
61 Andrew Michie, ‘Provisional application of non-proliferation treaties,’ _Non-proliferation Law as a Special Regime: A contribution to fragmentation theory in international law_ (CUP 2012) 84.
By interpretation then, that the CTBT verification regime should be established before the CTBT’s entry into force is crystal clear.

The VCLT provides two types of provisional application, i.e. (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed. However, the CTBT has no explicit provision for provisional application; and, therefore, seeking the possibility of agreement in some other manner pursuant to VCLT, Art 25-1(b) is necessary. Although both Jonson and Astanassov’s aforementioned proposals are theoretically feasible, they would risk lessening the Treaty’s support among some who have already ratified because both proposals would add another legally binding document to the CTBT. For the time being at least, the international community does not have the political will to support these proposals. This article thus proposes feasibility of the CTBT’s provisional application, even before its entry into force, in some other manner so agreed. Therefore, as far as the PrepCom Text can be regarded as evidence of ‘in some other manner so agreed,’ in conformity with the VCLT, the CTBT can provisionally be applied within the PrepCom Text’s scope.

B. Provisional operation of the verification regime

‘Provisional operation’ of the CTBT verification regime, which the Preparatory Commission has already considered and implemented on the basis of the PrepCom Text, is an example of provisional application of the CTBT. The verification regime is defined by CTBT, Art 4-1: ‘In order to verify compliance with this Treaty, a verification regime shall be established consisting of the following elements: (a) An International Monitoring System (IMS); (b) Consultation and clarification; (c) On-site inspections and (d) Confidence-building measures’. Indeed, this article perceives relationships with these four elements, so examining each element of the CTBT verification regime in relation to provisional application is worthwhile.

First, the IMS can be implemented within the competence of the Provisional Technical Secretariat conferred by the PrepCom Text. The PrepCom Text, Art 5(c) authorises the

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62 Art 25 of VCLT stipulates for provisional application as follows:‘1. A treaty or a part of a treaty is applied provisionally, pending its entry into force if:
(a) The treaty itself so provides; or
(b) The negotiating States have in some other manner so agreed.
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, provisional application of a treaty or part of a treaty with respect to a State shall be terminated if that State notifies the other States, between which the treaty is being applied provisionally, of its intention not to become a party to the treaty’.63 Sabine Bauer and Cormac O’Reilly, ‘The Comprehensive Nuclear Test Ban Treaty Organisation (CTBTO): Current and future role in the verification regime of the Nuclear Test Ban treaty,’ Nuclear Non-Proliferation in International Law, Vol II Verification and Compliance (Springer 2015) 140–141.
After 5 years of the CTBT being open for signature in 2001, the PrepCom began to examine provisional operation of the IMS network, based on the recommendation of the PrepCom task the PTS to implement recommendations regarding provisional operation and maintenance of IMS facilities. Even today, the possibility of the CTBT’s entry into force is not expected in the near future; thus it should be noted that provisional operation should be continued from now on.
65 See n 21. CTBT meeting of States Signatories resolution CTBT Doc CTBT/MMS/RES/1, para 5 (c).
PrepCom to use funds provided by States Signatories to meet necessary costs arising from its functions and purposes, including capital investments and operating and maintenance costs to establish and, pending their formal commissioning, to operate provisionally as necessary the International Data Centre (IDC) and the International Monitoring System networks provided for in the Treaty. This means that provisional IMS operation, including the IDC is also supported financially. Since the PrepCom Text was drafted carefully and precisely for IMS operation, it premises that the IMS will be operated provisionally before the CTBT’s entry into force.

Second, as for consultation and clarification, there is no real case that corresponds to the situation stipulated by CTBT provisions, Art 4, sub-paragraphs 29–33. However, before the CTBT’s entry into force, in case of doubtful events concerning nuclear test explosions, States Signatories can perform a clarification, similar to that defined in the aforementioned paragraphs for consultation and clarification, on the basis of mutual understanding. In this connection, although CTBT, Art 4–31 allows States parties to exercise the ‘the right to request the Director-General to assist in clarifying any matter, which may cause concern about possible non-compliance with the basic obligations of this Treaty’, the PrepCom Text that lists tasks of the Preparatory Commission refers only to ‘procedures for the conduct’. Thus, because it should be interpreted that only the exercise of this ‘right’ serves to develop the ‘procedure for the conduct’, in case of doubtful events concerning nuclear explosions, provisional application can be justified before the CTBT’s entry into force as agreed in the PrepCom Text. There would be a similar restraint on whether the Provisional Technical Secretariat can provide ‘appropriate information in the possession of the Technical Secretariat relevant to such a concern’ because what the Provisional Technical Secretariat can perform is within the competence conferred by the PrepCom Text.

Third, for on-site inspection (OSI), authorisation of the CTBTO Executive Council is prerequisite prior to commencement of OSI procedure, the details of which are stipulated in the CTBT Protocol, Part II. The CTBT confers such OSI-related competence on the Executive Council as ‘a decision on on-site inspection request no later than 96 hours after the receipt of the request from the requesting States Parties (Art 4-46)’, a decision on the extension request (Art 4-49), review the inspection report and any material provided pursuant to paragraph 64 (Art 4-65) and a decision on further action (Art 4-66). Conducting an on-site inspection is thus impossible because the competent decision making organ does not exist before the CTBT’s entry into force.

The PrepCom Text foresees the possibility of some components of the IMS to be operated provisionally because of the limit arising from the CTBT’s non-entry into force.

[(c) The Commission shall, between the time the Treaty is opened for signature and the conclusion of the initial session of the Conference of the States Parties, use funds provided by the States Signatories to meet the necessary costs arising from its functions and purposes, including the capital investments and operating and maintenance costs to establish and, pending their formal commissioning, to operate provisionally as necessary the International Data Centre and the International Monitoring System networks provided for in the Treaty … (emphasis added and the rest is omitted)].
Fourth, confidence building measures are designed to:

(a) [c]ontribute to the timely resolution of any compliance concerns arising from possible misinterpretation of verification data relating to chemical explosions and (b) assist in the calibration of the stations that are part of the component networks of the International Monitoring System.

It is an obligation to cooperate to ‘on a voluntary basis, provide the Technical Secretariat with notification of any chemical explosion using 300 tonnes or greater of TNT-equivalent blasting material detonated as a single explosion’ (emphasis added) pursuant to the CTBT Protocol, Part III. Therefore, even after the CTBT’s entry into force, the Confidence Building Measure is to be implemented voluntarily; thus, before entry into force, States Signatories can cooperate to provide information in conformity with these provisions66. In fact, there is already a useful example for the IMS network’s calibration.67

In conclusion, components of the CTBT verification regime, which can be implemented before its entry into force, are IMS including the IDC, Consultation and Clarification and the Confidence Building Measure. Especially the fact that the IMS can be operational even before the CTBT’s entry into force is critically important in order to ensure the CTBT’s effectiveness despite legal constraint arising from its non-entry into force. In contrast, OSI cannot be conducted before the CTBT’s entry into force and the PrepCom Text lists the PTS tasks only for OSI to develop the draft OSI operational manual and the list of inspectors. Preparation before entry into force is thus limited in comparison to other elements of the verification regime that ‘shall be capable of meeting the verification requirements of this Treaty’.

4. Conclusion

This article examined the legal status of the CTBTO PrepCom and the possibility of the provisional application of the CTBT by focusing on the verification regime to understand if the object and purpose of the CTBT can be achieved before the CTBT’s entry into force. Thus, this article concludes that, even before the CTBT’s entry into force, the provisional application of the CTBT is feasible as some part of the CTBT verification regime, which is operated provisionally by the CTBTO Preparatory Commission, within the competence conferred by the PrepCom Text. This seems the only option during the CTBT’s non-entry-into-force, which is expected to be long, without additional ‘agreement’ by States Signatories. Despite the CTBT’s non-entry-into-force,

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66 CTBTO Preparatory Commission report CTBT Doc CTBT/PC-9/1/Annex II., 30 August 1999, 26-32. Draft guidelines and reporting formats for the implementation of confidence-building measures and the establishment of a chemical explosion database was agreed and thus the provisions for confidence-building measures are expected to be conducted in accordance with the provision of the CTBT on the basis of this decision.

67 Yefim Gitterman et al., ‘Large scale controlled surface explosions at Sayarim, Israel at different weather patterns, for infrasound calibration of the international monitoring system’, Monitoring Research Review (Research Gate 2011) 766–777.
the IMS network’s detection capability was demonstrated through several nuclear tests, strongly condemned by the international community, conducted by India, Pakistan and the DPRK. Such detection capacity deters tempted States from conducting nuclear tests secretly. In other words, to some extent, provisional CTBT application enables it to achieve its objective and purpose. Facts show that the number of nuclear tests decreased drastically after the CTBT opened for signature in 1996.68

As a matter of fact, because the CTBT’s entry into force cannot be foreseen in the near future, it is thus imperative to enhance the CTBT’s normativity during its non-entry into force. At this juncture, it goes without saying that the international community should promote the CTBT’s signature and ratification by those states that have not yet done so, focusing in particular on Annex 2 States. However, we must also understand current international political reality: that the CTBT’s provisional operation of its verification regime should be entrusted to the CTBTO PrepCom for the time being because of the CTBT’s long non-entry into force. Therefore, it is important to support the CTBTO PrepCom in order to allow this international organisation to achieve the task entrusted to it by the PrepCom Text. The international community should support this not only with financial contributions, including prevention of accumulation of arrears, but also by facilitating conclusions of facility agreements or arrangements for the verification regime’s stable provisional operation.

Furthermore, because a nuclear test clearly constitutes a serious threat to international peace and security, it should be noted that the Security Council could play a supplementary but vital role in the CTBT’s effectiveness. When India, Pakistan and the DPRK conducted nuclear tests after the CTBT opened for signatures, they were strongly condemned by the Security Council’s resolution that imposed economic sanctions as coercive measures. Although the Security Council’s resolution is not a treaty, if certain conditions are met and this Security Council’s resolution becomes a legally binding document, then it can play an important role in the nuclear disarmament resolution.69 Although the CTBT is intrinsically hampered because of its non-entry into force, the Security Council adopted a resolution calling upon all States to refrain from conducting any nuclear-weapon test explosion or any other nuclear explosion and to maintain their moratoria70. Even though this resolution is a non-legally binding document, we can, in one way, enhance the CTBT’s effectiveness even before its entry into force.


For instance, operative paragraph 3 of the Security Council resolution (S/RES/1172) ‘[d]emands that India and Pakistan refrain from further nuclear tests and in this context calls upon all States not to carry out any nuclear weapon test explosion or any other nuclear explosion and to maintain their moratoria’. Even though this resolution is a non-legally binding document, we can, in one way, enhance the CTBT’s effectiveness even before its entry into force.