WHERE NEXT FOR ARTICLE VI OF THE NUCLEAR NON-PROLIFERATION TREATY FOLLOWING THE MARSHALL ISLANDS' CASES?

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ABSTRACT

This article considers the future of adjudicating the obligations of the Treaty on the Non-Proliferation of Nuclear Weapons at the International Court of Justice. Of particular issue in the Marshall Islands' proceedings launched against the various nuclear powers was the obligation to negotiate in good faith under Article VI. Proceedings from *Marshall Islands v. UK* raise concerns for future adjudication of Article VI and good faith. First, the article summarizes the relevant issues in the cases brought by the Marshall Islands. Second, the article discusses whether Article VI imposes an obligation to conclude negotiations to disarm. Third, issues with the obligation to disarm are examined, such as where individual states are unable to conclude negotiations unilaterally and the application of the Monetary Gold principle. Finally, the situation of the UK is discussed to highlight to difficulty of determining whether a state has adhered to its good-faith obligation.

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INTRODUCTION

In 2016 the International Court of Justice (ICJ or "the Court") found it had no jurisdiction in the Marshall Islands' proceedings against India, Pakistan, and the United Kingdom (UK).[1] Since then, several academic discussions have examined the turn to formalism in the ICJ's jurisprudence regarding the existence of a dispute and, more generally, political issues before international courts.[2] However, there are other aspects of the judgment that deserve additional attention. For instance, Article VI of the Non-Proliferation Treaty (NPT) may be perceived as ineffective after the Marshall Islands' unsuccessful attempts to find international responsibility for the nuclear weapon states' failure to disarm and the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW) in 2017.[3] The entry into force of the TPNW on January 22, 2021 marks a new era for the international law surrounding nuclear weapons. The International Committee of the Red Cross stated in October 2020 that "[w]e banned the bomb! . . . nuclear weapons are about to become illegal."[4] However, the ICRC's statement is erroneous as nuclear weapons are only unlawful for those states which have chosen to ratify the TPNW. The *Marshall Islands* cases presented an opportunity for the ICJ to further discuss customary law on nuclear weapons, following its 1996 Advisory

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1 *See* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 256 (Oct. 5); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pakistan), Judgment, 2016 I.C.J. 552 (Oct. 5); *and* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. 833 (Oct. 5).

2 *See, e.g.,* Jonathan Black-Branch, *International Obligations Concerning Disarmament and the Cessation of the Nuclear Arms Race: Justiciability over Justice in the Marshall Islands Cases at the International Court of Justice*, 24 J. CONFLICT & SEC. L. 449 (2019); Vincent-Joël Proulx, *The World Court's Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30 LEIDEN J. INT'L L. 925 (2017); *Symposium on the Marshall Islands Case*, 111 AM. J. INT'L L. UNBOUND (2017); *and* Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J. L. CONTEXT 221 (2018).

3 Treaty on the Prohibition of Nuclear Weapons art. 6, July 7, 2017, 729 U.N.T.S. 161.

4 @ICRC, TWITTER (Oct. 24, 2020), https://twitter.com/ICRC/status/1320105568892321792?s=20 [https://perma.cc/8GY2-BBN4] (stating "[w]e banned the bomb! A rare piece of good news in 2020: nuclear weapons are about to become illegal, after the 50th State ratified the #NuclearBan").

Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, but with the cases failing to proceed to the merits, we do not know whether the ICJ would have advanced customary law in support of the TPNW.[5] As it stands, no nuclear weapons powers have signed or ratified the TPNW, and therefore the NPT remains the core treaty which holds nuclear weapons powers accountable for nuclear non-proliferation and disarmament, giving continued relevance to the obligations under Article VI.[6]

This article examines some important problems for Article VI, exacerbated by the *Marshall Islands'* cases. Thoughts are offered on the nature of good faith under Article VI and the UK's situation in an effort to guide future interpretation of the NPT. The point to be made by this article is simply that the ICJ has created an arguably irreconcilable problem with the good-faith requirement within Article VI that perpetuates nuclear deterrence. The ICJ's finding in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* has meant that Article VI cannot be successfully adjudicated without further clarification on the nature of the obligation under Article VI.[7] As a result, the ICJ has, perhaps inadvertently, put non-nuclear weapon states at a profound disadvantage because nuclear weapon states are able to retain nuclear deterrents knowing that they cannot be held to Article VI due to ICJ reluctance to adjudicate a multilateral obligation, despite its profound importance to international peace and security. For Professor Antony Anghie, "[w]e live in a world governed by the empire of nuclear weapons and the rules it prescribes."[8] If the ICJ is handed a future opportunity to address non-proliferation and fails to resolve these issues, Anghie's statement will be more true than ever.

I. THE MARSHALL ISLANDS' PROCEEDINGS AT THE ICJ

Several recent articles have thoroughly explored the submissions made by the Marshall Islands and the judgment of the ICJ. Therefore, it is not a prudent use of space to describe in detail the full proceedings and

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5 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

6 At the time of publication there are eighty-six signatories and fifty-four ratifications of the TPNW. *See Signature and Ratification Status*, ICANN 2017 NOBEL PEACE PRIZE, https://www.icanw.org/signature_and_ratification_status [https://perma.cc/RC46-CKHW] (last visited Mar. 29, 2021).

7 Legality of the Threat or Use of Nuclear Weapons, *supra* note 5.

8 Antony T. Anghie, *Politic, Cautious, and Meticulous: An Introduction to the Symposium on the Marshall Islands Case*, 111 AM. J. INT'L L. UNBOUND 62, 66 (2017).

various technicalities. In particular, this article does not discuss at length the ICJ's alleged formalistic interpretation of the existence of a dispute.[9] Instead, for context, this section briefly recounts the overall outcome of the cases and the relevant points from the proceedings regarding Article VI and the obligation to negotiate in good faith.[10]

In 2014, the Marshall Islands launched unprecedented litigation at the ICJ asking the Court to find nine nuclear states in breach of their obligations regarding the cessation of the nuclear arms race and nuclear disarmament under Article VI of the NPT and customary law.[11] The nine defendants included the five states recognized as nuclear weapon states (NWS) under the NPT (the US, Russia, the UK, France, and China), the three states who have declared possession of nuclear weapons (India, Pakistan, and North Korea), and Israel who is believed to have possessed nuclear weapons since approximately 1966.[12] Of the nine states in question, only three had recognized the compulsory jurisdiction of the ICJ: the UK, India, and Pakistan, and it was these cases which concluded in October 2016.[13]

The Marshall Islands made several claims in their applications instituting proceedings against the UK, India, and Pakistan.[14] In their *Application Instituting Proceedings Against the UK*, the Marshall Islands allege a breach of Article VI of the NPT in relation to nuclear disarmament because

> the United Kingdom clearly has not actively pursued "negotiations leading to nuclear disarmament in all its aspects under strict and

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[9] *See* Lorenzo Palestini, *Forget About Mavrommatis and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament*, 8 J. INT'L. DISP. SETTLEMENT 557 (2017).

[10] For a historical background on the Nuclear Non-proliferation Treaty, see Gro Nystuen and Torbjørn Graff Hugo, *The Nuclear Non-Proliferation Treaty*, in NUCLEAR WEAPONS UNDER INTERNATIONAL LAW 374 (Gro Nystuen, Stuart Casey-Maslen & Annie Golden Bersagel eds., 2014).

[11] *See, e.g.,* Application Instituting Proceedings Against the United Kingdom of Great Britain and Northern Ireland, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.) I.C.J. (April 24).

[12] Black-Branch, *supra* note 2, at 449.

[13] *See* cases cited *supra* note 1.

[14] *See* cases cited *supra* note 1. *See also* Application Instituting Proceedings Against the Republic of India, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India) I.C.J. (April 24); Application Instituting Proceedings Against the Islamic Republic of Pakistan, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pakistan) I.C.J. (Apr. 24).

> effective international control." On the contrary, it has opposed the efforts of the great majority of States to initiate such negotiations. Accordingly, the Respondent has breached and continues to breach its nuclear disarmament obligations under Article VI of the NPT.[15]

Furthermore, the Marshall Islands claim the UK has conducted itself in a similarly "negative and obstructive" manner regarding the cessation of the nuclear arms race because the UK is

> (i) continuing engagement in material efforts to qualitatively improve its nuclear weapons system; (ii) continuing efforts to maintain and extend that system indefinitely; and (iii) opposing negotiations on comprehensive nuclear disarmament or other measures in multilateral forums, including the Open-Ended Working Group and the UN General Assembly, [which] is clear evidence of the United Kingdom's ongoing breach of its Article VI obligation regarding the cessation of the nuclear arms race at an early date.[16]

The Marshall Islands suggest that Article VI constitutes a customary obligation and the UK continues to breach both the NPT and customary law by "failing to act in good faith as far as its performance of those obligations is concerned."[17] Further, the Marshall Islands claim the UK has opposed the initiation of negotiations and "instead is taking actions to improve its nuclear weapons system and to maintain it for the indefinite future."[18] The Application goes as far as to suggest the UK "may induce non-nuclear-weapon States to reconsider their non-nuclear posture."[19]

Because India and Pakistan are not parties to the NPT, the Marshall Islands rooted their claims in customary law suggesting the ICJ established a customary obligation to disarm by concluding in *Legality of the Threat or Use of Nuclear Weapons* that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[20] The Marshall Islands claim India and Pakistan breached customary law "by engaging in a course of conduct, the quantitative build-up and qualitative improvement of its nuclear forces,

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[15] Marsh. Is. v. U.K., I.C.J. (April 24), ¶ 104.
[16] *Id.* ¶ 106.
[17] *Id.* ¶ 109.
[18] *Id.* ¶ 16.
[19] *Id.* ¶ 111.
[20] Legality of the Threat or Use of Nuclear Weapons, *supra* note 5, ¶ 105(2)(f).

contrary to the objective of nuclear disarmament."[21] In relation to the cessation of the nuclear arms race the Marshall Islands argue:

> [t]he customary international law obligation of cessation of the nuclear arms race at an early date is rooted in Article VI of the NPT and resolutions of the General Assembly and the Security Council and is inherent in the obligation of nuclear disarmament enunciated by the Court.[22]

The Marshall Islands claim that by building up, diversifying, and improving their nuclear weapons arsenals, India and Pakistan are in breach of the customary obligation.[23]

The ICJ found the Court did not have jurisdiction in any of the cases and declined to hear the merits on the basis that no legal dispute existed between the parties.[24] To briefly explain why this was the case, for the ICJ to establish jurisdiction under Article 36 of the ICJ Statute, there must be a legal dispute between the parties.[25] A dispute has been defined as "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties.[26] To evidence a dispute, the Marshall Islands relied on several of their own statements made at multilateral conferences, the respondents' voting records on relevant General Assembly resolutions, and conduct which the applicant believed to represent non-compliance with the NPT.[27] However, the ICJ remained unpersuaded because the Marshall Islands had failed to evidence that any particulars of a dispute had been communicated to the respondents and that the respondents were thus expressly aware of the dispute.[28] Dr. Lorenzo Palestini has noted the irony of the ICJ's conclusion because the ICJ essentially "suggest[s] that

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[21] Application Instituting Proceedings Against the Republic of India, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India) I.C.J., ¶ 58 (April 24); Application Instituting Proceedings Against the Islamic Republic of Pakistan, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pakistan) I.C.J., ¶ 53 (Apr. 24).

[22] Marsh. Is. v. India, I.C.J., ¶ 59 (April 24); Marsh. Is. v. Pakistan I.C.J., ¶ 54 (Apr. 24).

[23] Marsh. Is. v. India, I.C.J., ¶ 62 (April 24); Marsh. Is. v. Pakistan I.C.J., ¶ 57 (Apr. 24).

[24] *See* cases cited *supra* note 1.

[25] U.N. Charter, annex, Statute of the International Court of Justice art. 36(2) (June 26, 1945).

[26] Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment 1924 P.C.I.J. (ser. A) No. 2., at 11 (Aug. 1924).

[27] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. 833, ¶ 46 (Oct. 5).

[28] *Id*. ¶¶ 52, 57; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 256, ¶ 48 (Oct. 5); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pakistan), Judgment, 2016 I.C.J. 552, ¶ 48 (Oct. 5).

the Marshall Islands should have engaged in more thorough negotiations with potential respondents that were indeed being accused of having failed to pursue good faith negotiations."[29]

This article mainly draws on the Marshall Islands' case against the UK, focusing on Article VI of the NPT, and not the suggested customary obligation primarily relied upon in the proceedings against India and Pakistan.[30] Consequently, a close analysis of Article VI of the NPT is best placed alongside the case brought against the UK. The NPT creates a regime that recognizes distinct categories of nuclear weapons states and non-nuclear weapons states.[31] It defines nuclear weapons states as those who "manufactured and exploded a nuclear weapon or other nuclear explosive device before 1 January 1967," including the United States, Soviet Union, UK, France, and China.[32] If a state possesses nuclear weapons and joins the NPT today, they can only join as non-nuclear weapons states.[33] The non-nuclear weapon states have expressly stated that India, Pakistan, and Israel should not be given nuclear weapon state status under an amended NPT.[34] The five nuclear weapons states under the NPT are also the five permanent members of the Security Council, creating an

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[29] Palestini, *supra* note 9, at 575.

[30] Other authors have debated the existence of the customary obligation to disarm, including in the case itself with the dissenting opinion of Judge Antônio Augusto Cançado Trindade discussing the issue. Yuan-Bing Mock has posed questions such as how should the parameters of the customary obligation be defined, and would the custom require complete nuclear disarmament or would an agreement to reduce the number of nuclear arms be sufficient. Mock concludes that "there remains a fairly convincing case that there is a customary international law towards disarmament, albeit in a more circumscribed fashion than the dual obligation argued for in the Marshall Islands Memorial." Yuan-Bing Mock, *The Legality of North Korea's Nuclear Position: Lessons Regarding the State of Nuclear Disarmament in International Law*, 50 N.Y.U. J. INT'L L. & POL. 1093 (2018); Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U. K.), 2016 I.C.J. 907, 991 (Oct. 5) (Trindade, J., dissenting).

[31] For instance, Articles II, III, IV, and V of the Non-Proliferation Treaty clearly delineate obligations for non-nuclear weapon states parties which are separate from the nuclear weapon states parties. Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 729 U.N.T.S. 161 (entered into force Mar. 5, 1970) [hereinafter NPT Treaty].

[32] *The IAEA and the Non-Proliferation Treaty*, INT'L ATOMIC ENERGY AGENCY, https://www.iaea.org/topics/non-proliferation-treaty [https://perma.cc/K466-8GJ4] (last visited Mar. 23, 2021).

[33] NPT Treaty, *supra* note 31, art. 9(3); Alessandra Pietrobon, *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*, 27 LEIDEN J. INT'L. L. 169, 176 (2014).

[34] Mario E. Carranza, *Can the NPT Survive? The Theory and Practice of US Nuclear Non-proliferation Policy after September 11*, 27 CONTEMP. SEC. POL. 489, 513 (2006) (quoting an NPT Preparatory Committee working paper from Japan).

unbalanced system where the five permanent members are in a privileged position within the treaty.[35]

The obligation in question, Article VI NPT, reads as follows:

> [E]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.[36]

As noted above, the Marshall Islands relied on the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, where the ICJ unanimously decided there exists an "obligation to pursue in good faith *and bring to a conclusion* negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[37] The Marshall Islands used the Advisory Opinion to support their claim that the UK had violated Article VI. The key substantive issue alleged by the Marshall Islands was that the UK was in violation of its obligations under the NPT by failing to negotiate in good faith to disarm and to ultimately conclude those negotiations as per the obligation stated by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons*.[38]

The Court did not address the Marshall Islands' substantive claim, and how the ICJ will approach good-faith arguments in relation to the NPT remains to be seen. Dr. Vincent-Joël Proulx highlights this case was a first in state-to-state dispute settlement where the claimant had failed to establish the existence of a dispute.[39] Importantly however, finding the Court had no jurisdiction meant the ICJ could neatly sidestep issues relating to nuclear disarmament, but the sidestepping has led to criticism that "[t]he decisions did not settle the disputes, and they utterly failed to clarify the international law, paramount among them, Article VI of the NPT."[40] Going further, Jonathan Black-Branch argues the case highlights "a widening division among judges and a growing frustration among states

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[35] Pietrobon, *supra* note 33, at 177.

[36] NPT Treaty, *supra* note 31, art. 6.

[37] Legality of the Threat or Use of Nuclear Weapons, *supra* note 5, ¶ 105(2)(f) (emphasis added).

[38] *See* Application Instituting Proceedings Against the United Kingdom of Great Britain and Northern Ireland, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.) I.C.J., ¶ 10 (April 24).

[39] Proulx, *supra* note 2, at 928.

[40] Alberto Alvarez-Jimenez, *The ICJ's Marshall Islands (Mis)judgments on Nuclear Disarmament*, 45 SYRACUSE J. INT'L L. & COM. 1, 33 (2017).

regarding inaction on NPT Article VI obligations."[41] Surabhi Ranganathan notes there is a "recession of the disarmament goal" with an increase in states declaring possession of nuclear weapons and the renewal of existing nuclear weapons systems such as the UK's Trident system.[42]

As such, the obligations under Article VI NPT are highly topical, and with nuclear weapons systems clearly remaining in play, future litigation may be in the minds of interested states. The following section highlights a number of concerns around the treatment of good faith under Article VI. It must be said though that in the UK's situation, the alteration of its declaration recognizing the compulsory jurisdiction of the ICJ means concerned parties may have missed their chance. The UK declaration now states that it does not accept jurisdiction for any claim connected to nuclear disarmament unless all other nuclear weapon states (as recognized by the NPT) consent to the jurisdiction of the Court and the dispute in question.[43] The UK believes, as we will see below, that the ICJ will not and cannot adjudicate nuclear disarmament without the presence of all nuclear weapon states. The next section continues the discussion on whether or not Article VI NPT includes an obligation to conclude negotiations to disarm.

II. IS ARTICLE VI TO BE INTERPRETED AS A *PACTUM DE CONTRAHENDO*?

In the *Application Instituting Proceedings Against the United Kingdom*, the Marshall Islands suggest the UK has breached Article VI by opposing efforts to disarm and that there exists an obligation to conclude such negotiations.[44] The Marshall Islands' authority for this claim is the unanimous finding of the Court in the 1996 Advisory Opinion that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict

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[41] Black-Branch, *supra* note 2, at 472.

[42] Surabhi Ranganathan, *Nuclear Weapons and the Court*, 111 AM. J. INT'L L. UNBOUND 88, 92–93 (2017). For more information about the UK's nuclear weapons system, known as Trident, and its recent renewal, see Claire Mills, *Replacing the UK's 'Trident' Nuclear Deterrent* (House of Commons Libr., Briefing Paper No. 7353, 2016) (*accessible at* http://researchbriefings.files.parliament.uk/documents/CBP-7353/CBP-7353.pdf [https://perma.cc/6GBC-3M22]).

[43] *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. OF JUST. (Feb. 22, 2017), https://www.icj-cij.org/en/declarations/gb [https://perma.cc/K2JJ-DSZ3].

[44] *See* Application Instituting Proceedings Against the United Kingdom of Great Britain and Northern Ireland, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.) I.C.J., ¶¶ 100–04 (April 24).

and effective international control."[45] Specifically in relation to Article VI the Court said

> [t]he legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result - nuclear disarmament in all its aspects - by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.[46]

Nevertheless, whether there exists such an obligation under the NPT alone is far from a settled area of law. Katherine Maddox Davis has described the NPT as having "murky" and "noncommittal" language creating an "uphill battle distinguishing compliance from non-compliance."[47] This section outlines some of the various arguments made in relation to the type of obligation found in Article VI.

At a basic level there are two contrasting types of obligation that could encapsulate Article VI. First, a *pactum de contrahendo* is the obligation to conclude negotiations.[48] Where there is a *pactum de contrahendo* the "final agreement must be carried out in good faith. . . . A subsequent refusal to make an agreement or an unreasonable delay in its conclusion could violate the *pactum* and constitute a breach of international law."[49] Conversely, a *pactum de negotiando* imposes less demanding obligations under international law where the parties are not bound to reach an agreement but are bound to conduct negotiations in good faith.[50] When a state agrees to a *pactum de negotiando*, it is not obliged to conclude those negotiations.[51] However, a *pactum de negotiando* still has

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[45] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, ¶ 105(2)(f).

[46] *Id.* ¶ 99.

[47] Katherine Maddox Davis, *Hurting More than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court*, 25 MINN. J. INT'L L. 79, 82, 84 (2016).

[48] Hisashi Owada, *Pactdum de Contrahendo, Pactum de Negotiando* ¶ *3*, MAX PLANK ENCYCLOPEDIAS OF PUB. INT'L L. https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1451?rskey=gpvWNt&result=1&prd=OPIL [https://perma.cc/R82J-RH9X] (last updated Apr. 2008).

[49] *Id.* ¶ 4.

[50] *Id.* ¶ 6.

[51] Railway Traffic Between Lithuania and Poland, Advisory Opinion 1931, P.C.I.J. (ser. A/B) No. 42, at 116 (Oct. 15).

legal consequences and requires the state to make serious efforts towards an agreement.[52]

Examples of the difference in language of a *pactum de contrahendo* and *negotiando* include, first, the Oslo Declaration from the 2007 Oslo Conference on Cluster Munitions which includes a time limit to "conclude by 2008 a legally binding instrument."[53] Second, in the 1979 Strategic Arms Limitation Talks (SALT II) Treaty between the US and Soviet Union, Article XIV includes the wording "as soon as possible" for achieving an agreement and a time limit of well in advance of 1985 for replacing the present treaty with a new agreement.[54] Both of these examples demonstrate the language needed for a *pactum de contrahendo*. In contrast, Article 283 of the UN Convention on the Law of the Sea (UNCLOS) sets out an example of a *pactum de negotiando*: "[w]hen a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."[55] The disputing state parties are not obliged to successfully settle their dispute, but must instead pursue negotiations which may, at a later date, be settled by other dispute resolution processes provided for in UNCLOS.[56]

For an analysis of Article VI, and any treaty obligation for that matter, language is key. Professor Robert F. Turner asserts "Article VI of the NPT does not, and cannot reasonably be interpreted to, obligate treaty parties to conclude anything. . . ."[57] Turner argues this is because the text of the *travaux preparatoires* of the NPT shows that the nuclear weapon states never intended to be bound to a commitment to conclude negotiations on complete disarmament.[58] During the drafting of the NPT, there were some states who advocated the need for "a clear and compelling

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[52] Case Concerning Claims Arising out of Decisions of the Mixed Graeco/German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (Greece v. Ger.) 19 R.I.A.A. 27, 56–7 (Perm. Ct. Arb. 1972).

[53] Oslo Conference on Cluster Munitions, *Oslo Declaration*, art. 1, (Feb. 23, 2007).

[54] Treaty on the Limitation of Strategic Offensive Arms, U.S.–U.S.S.R., art. XIV, *signed* June 18, 1979 (even though then-President Carter signed SALT II, it was not ratified by the U.S. Senate).

[55] United Nations Convention on the Law of the Sea, art. 283, Dec. 10, 1982, 1833 U.N.T.S. 397.

[56] *Id.* art. 287(1) (listing the choice of procedures that entail binding decisions).

[57] Robert F. Turner, *Nuclear Weapons and the World Court: The ICJ's Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, *in* THE LAW OF MILITARY OPERATIONS 309, 324 (Michael N. Schmitt ed., 1998).

[58] *Id*. at 330.

declaration of intent to embark on the process of nuclear arms control."[59] Mexico suggested states would negotiate in good faith but the NPT would include specific objectives.[60]

Conversely, the United States and Soviet Union believed during the drafting of the NPT that "tying the fate of the NPT to specific achievements in disarmament would 'hamper the conclusion of the former without reaching agreements on the latter.'"[61] The US and Soviet Union believed language that formally linked the Article to disarmament measures could put in jeopardy any future treaty.[62] Furthermore, the UK understood that there was not an agreement on a timetable for disarmament in the treaty or at the treaty negotiations since it would not be practical where many concessions would need to be made.[63] The issue was further discussed by the UK's Defence Select Committee in 2006 where a former Permanent Secretary to the Ministry of Defence supported the understanding that Article VI does not constitute a *pactum de contrahendo* since no speed of elimination is outlined in the Article.[64]

Turning to the preamble of the NPT, the parties declare "their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament."[65] The preamble also expresses a *desire* to ease tensions and strengthen trust to facilitate "the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control."[66] Dr. Christopher A. Ford, former US Assistant Secretary of State for International Security and Non-Proliferation, suggests the preamble supports Article VI's interpretation as a *pactum negotiando*. Ford explains that there cannot be noncompliance with Article

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[59] U.S. ARMS CONTROL & DISARMAMENT AGENCY, INTERNATIONAL NEGOTIATIONS ON THE TREATY ON THE NONPROLIFERATION OF NUCLEAR WEAPONS 75 (1969), *as quoted in* Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14 NONPROLIFERATION REV. 401, 406 (2007).

[60] Ford, *supra* note 59, at 406.

[61] Andrew J. Grotto, *Non-Proliferation Treaty (1968)*, MAX PLANK ENCYCLOPEDIAS OF PUB. INT'L L., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e969 [https://perma.cc/EB5Z-W9QA], at ¶ 38.

[62] Ford, *supra* note 59, at 407.

[63] HC (21 May 1975) (892) cols. 1381-82 (statement of David Ennals MP).

[64] U.K. DEFENCE SELECT COMM., THE FUTURE OF THE UK'S STRATEGIC NUCLEAR DETERRENT: THE STRATEGIC CONTEXT Ev 65 (2006).

[65] NPT Treaty, *supra* note 31, at pmbl.

[66] *Id.*

VI (where an agreement has not been reached) when the preamble states there is merely an intention or desire to move towards the elimination of nuclear weapons through separate obligations to be negotiated in a new treaty.[67] Therefore, for Ford, there cannot be noncompliance for not concluding such a treaty by a certain date.[68]

The above points raise the question of why non-nuclear weapon states, such as the Marshall Islands, regard the NPT as a disarmament treaty with an implicit timeline indicating a *pactum de contrahendo*. Professor Mario E. Carranza describes the main purpose of the NPT as preventing the spread of nuclear weapons to non-nuclear states but also suggests the NPT was to be a "stepping-stone to achieve the global elimination of nuclear weapons."[69] One could argue the review conferences have expanded the purpose of the NPT with the state parties agreeing to 13 Practical Steps in 2000 that included "an unequivocal undertaking by nuclear weapon states to *eliminate* their nuclear arsenals *leading* to nuclear disarmament."[70] However, the 13 Practical Steps can be contrasted with the 1995 NPT Review and Extension Conference where a majority of the parties agreed to an indefinite extension to the treaty.[71] The extension has been described as taking away non-nuclear weapon states' leverage in the disarmament debate, allowing nuclear weapon states to pursue disarmament in their own time, and suggesting there is no time limit attached to Article VI.[72]

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[67] Ford, *supra* note 59, at 404. At the time of the publication of Ford's article, he was the U.S. Special Representative for Nuclear Non-Proliferation and in charge of U.S. involvement with the NPT. *See Biography of Christopher A. Ford*, U.S. DEP'T OF STATE, https://www.uscc.gov/sites/default/files/Christopher%20A.%20Ford%20bio.pdf [https://perma.cc/Q6DP-E44S] (last viewed Feb. 27, 2021). That involvement included heading the US delegations to the 2007 and 2008 NPT Preparatory Committee meetings. *See, e.g., State at 2007 Preparatory Committee for the Treaty on the Non-Proliferation of Nuclear Weapons: Other Provisions of the Nuclear Nonproliferation Treaty, including Article X*, U.S. DEP'T OF STATE (May 11, 2007), https://2001-2009.state.gov/t/isn/rls/rm/85182.htm [https://perma.cc/6WHA-YBAM] *and Opening Remarks to the 2008 NPT Preparatory Committee*, U.S. DEP'T OF STATE (Apr. 28, 2008), https://2001-2009.state.gov/t/isn/rls/rm/111190.htm [https://perma.cc/Y6BR-PKJH].

[68] Ford, *supra* note 59, at 404.

[69] Carranza, *supra* note 34, at 515.

[70] 2000 Rev. Conf. of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, U.N. Doc. NPT/Conf. 2000/28 (Parts I and II), at 14–15 (2000) (emphasis added). The commitment was later renounced by the U.S. *See* Carranza, *supra* note 34, at 499.

[71] U.N. Off. for Disarmament Affs., Decision 3, annex, U.N. Doc. NPT/CONF. 1995/32 (1995).

[72] Randy Rydell, *Looking Back: The 1995 Nuclear Nonproliferation Treaty Review and Extension Conference*, ARMS CONTROL ASS'N, https://www.armscontrol.org/act/2005-04/looking-back-1995-nuclear-nonproliferation-treaty-review-extension-conference [https://perma.cc/D7AE-9R86] (last visited Mar. 23, 2021); Carranza, *supra* note 34, at 508–09.

Professor Marco Roscini has analyzed the obligation found in Article VI alongside the relevant provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT).[73] Article 31(1) of the VCLT says "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[74] In light of Article 31(1), Roscini concludes that the fact that Article VI says a party "undertakes to pursue negotiations in good faith" and the preamble uses "aspirational language," there is therefore no suggestion that the Article includes an obligation to bring negotiations to a *successful* conclusion.[75] Professor Daniel H. Joyner supports this finding where he says that the ICJ's interpretation in 1996 stretched the meaning of the terms in Article VI as it "does not impose an obligation to achieve [a precise] result."[76] Though, as noted above, Article VI does still have legal ramifications if it is to be a *pactum de negotiando*. Parties have made an *undertaking* to pursue meaningful negotiations in good faith, and compliance must be judged against whether the negotiations have in fact been meaningful.[77]

Whether negotiations can be *successfully* concluded is an important point. Article VI not only lacks a timeline for the conclusion of negotiations to suggest a *pactum de contrahendo*, but Article VI also fails

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[73] Marco Roscini, *The Case Against the Nuclear Weapons States,* 19 AM. SOC'Y INT'L L. 10 (2015). Although the Vienna Convention on the Law of Treaties was adopted after the NPT, the provisions relating to treaty interpretation are regularly considered to represent a codification of customary law. *See, e.g.,* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. Rep. 53, ¶ 48 (Nov. 12); Oliver Dörr, *Article 31*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY ¶ 6 (Oliver Dörr & Kirsten Schmalenbach, eds., 2012) (citing the example of the Guinea Bissau v. Senegal case as an example of the importance of the Vienna Convention).

[74] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S 331 (entered into force Jan. 27, 1980).

[75] Roscini, *supra* note 73; *see also* Marco Roscini, *On Certain Legal Issues Arising from Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, in* NUCLEAR WEAPONS: STRENGTHENING THE INTERNATIONAL LEGAL REGIME 15, 17 (Ida Caracciolo et al. eds., 2016) (arguing that there is nothing in Article VI that obligates parties to bring negotiations to a conclusion).

[76] Daniel H. Joyner, *The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty*, *in* NUCLEAR WEAPONS UNDER INTERNATIONAL LAW 397, 405 (Gro Nystuen et al., eds. 2014) [hereinafter *Joyner 2014*]. However, it should be noted Joyner believes that nevertheless, the nuclear weapon states are not in compliance with Article VI even where there is no obligation to achieve the precise result. *See generally* DANIEL H. JOYNER, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY (2011).

[77] Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 134 (Dec. 5); Treasa Dunworh, *Pursuing "Effective Measures" Relating to Disarmament: Ways of Making a Legal Obligation a Reality,* 97 INT'L REV. RED CROSS 601, 603 (2015).

to detail a framework for how such disarmament negotiations must take place.[78] Nuclear weapons states may argue that they have attended NPT review conferences and pursued various loose and informal negotiations in good faith for several decades, but there is an irreconcilable impasse preventing a conclusion resulting in disarmament. Other parties to the NPT may conversely take the view that if nuclear weapons states walk away from negotiations, even where there is not a formal structure in place, they are no longer acting in good faith.[79] An individual state party "may honestly try but fail–perhaps through no fault of its own" in the pursuit of an agreement on disarmament.[80] The resulting picture is much the same as the reality today. Talks on non-proliferation have stalled and NPT review conferences continue, but little progress is made in reaching a conclusion on disarmament.[81]

In contrast to Article VI, Article III has been used to demonstrate a clear *pactum de contrahendo* found in the NPT.[82] Article III(1) reads "[e]ach non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated *and concluded* with the International Atomic Energy Agency."[83] Ford sees it as curious that the drafters omitted the conclusion of an agreement in Article VI if in fact states were required to reach a conclusion. Likewise, when the Marshall Islands filed a case in the US domestic courts, the Court of Appeals for the Ninth Circuit stated "Article VI is also chock-full of vague terms that do not 'provide specific standards.'"[84] In relation to whether Article VI could be enforced in US domestic courts, the Ninth Circuit commented that "the state parties' meek agreement that they 'undertake[ ] to pursue' good-faith negotiations is at most a hortatory

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[78] NPT Treaty, *supra* note 31, art. 6.

[79] *See generally* Lac Lanoux Arbitration of 16 November 1957 (Fr. v. Spain), 12 R.I.A.A. 281 (Perm Ct. Arb. 1957) (the judgment finds that walking away from negotiations is not acting in good faith).

[80] Ford, *supra* note 59, at 403.

[81] Tariq Rauf, *The 2015 NPT Review Conference: Setting the Record Straight*, STOCKHOLM INT'L PEACE RSCH. INST. (Jun. 24, 2015), https://www.sipri.org/node/384 [https://perma.cc/ZQR7-MQQU]. The 2020 NPT Review Conference has been postponed due to COVID-19. *See* Letter from Gustavo Zlauvinen, President-designate, to Excellency (Oct. 28, 2020) (accessible at https://www.un.org/sites/un2.un.org/files/npt_president-designate_letter_28_oct_2020.pdf [https://perma.cc/U5NM-JEVZ]).

[82] Roscini, *supra* note 73.

[83] Treaty on the Prohibition of Nuclear Weapons, *supra* note 3 at art. 3(1) (emphasis added).

[84] Republic of the Marshall Islands v. United States, 865 F.3d 1187, 1196 (9th Cir. 2017).

directive."[85] Why then did the ICJ decide Article VI constitutes a *pactum de contrahendo*?

As mentioned above, in *Legality of the Threat or Use of Nuclear Weapons*, the ICJ unanimously found an obligation to bring to a conclusion negotiations leading to nuclear disarmament.[86] All three *Marshall Islands* cases confirmed the obligation.[87] Despite the obligation being proclaimed unanimously by the Court, Judge Stephen M. Schwebel had doubts because it had not been supported by authorities nor had it been tested by advocacy.[88] He also highlights how the Court's conclusion in paragraph 105 of the advisory opinion does not explicitly refer to the NPT and questions whether the obligation only applies to parties to the treaty or more generally. Schwebel concludes that the Court decided this matter obiter dictum because a question relating to this matter was not asked by the General Assembly. Nevertheless, the obligation has now been reiterated in the Court's judgments in the contentious *Marshall Islands* cases, as opposed to being found in an advisory opinion.

In their various applications instituting proceedings, the Marshall Islands also relied on President Mohammed Bedjaoui's appended declaration in *Legality of the Threat or Use of Nuclear Weapons* where he says

> the obligation to negotiate in good faith for nuclear disarmament concerns the 182 or so States parties to the Non- Proliferation Treaty. I think one can go beyond that conclusion and assert that there is in fact a twofold general obligation, opposable erga omnes, to negotiate in good faith and to achieve the desired result.[89]

Bedjaoui goes further than the rest of the Court by expressly suggesting the obligation to conclude negotiations is not only found in the

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[85] *Id.*

[86] Legality of the Threat or Use of Nuclear Weapons, *supra* note 5, ¶ 105(2)(f).

[87] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Judgment, 2016 I.C.J. 256, ¶ 19 (Oct. 5); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pakistan), Judgment, 2016 I.C.J. 552, ¶ 20 (Oct. 5); *and* Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections, 2016 I.C.J. 833, ¶ 19 (Oct. 5).

[88] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 311, ¶ 107 (July 8) (Schwebel, Vice-Pres., dissenting).

[89] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 268 ¶ 23 (July 8) (Bedjaoui, Pres., declaration).

NPT but is also *erga omnes* and part of customary law. Similarly, Bedjaoui's comments have been singled out as *obiter*.[90]

Arguably, sovereign states do not need to compromise their own negotiating positions to acquiesce to positions of others as long as they continue to negotiate in good faith with a view to concluding negotiations *at some point in the future*.[91] In 1996, the General Assembly affirmed the findings of the ICJ in its Advisory Opinion but said states must conclude a nuclear-weapons convention that provides for their elimination.[92] It could be the case that the obligation is still fulfilled where nuclear weapon states agree to a treaty that provides a future timeline for elimination as opposed to immediate disarmament. Pursuing negotiations toward nuclear disarmament necessitates the involvement of the nuclear weapon states, but the NPT also requires all other parties to negotiate a treaty on disarmament.[93] Professor Alessandra Pietrobon indicates that a persistent refusal "to start any negotiation towards the conclusion of the agreement" required by Article VI could be a material breach.[94] However, that would be difficult to reconcile with the regular review conferences every five years attended by nuclear weapon states and non-nuclear weapon states alike.

Even so, refusing to start a negotiation is very different from the ICJ's obligation to bring negotiations to a conclusion. The discussion above has found scant support for a reading which implies a conclusion of negotiations is needed. It is clear from both Article VI and the preamble of the NPT that all state parties must negotiate toward complete disarmament, preferably resulting in a treaty, but no reading in good faith under Article 31 VCLT can lead to the view that negotiations must be concluded or even that a conclusion must result in immediate disarmament. It has been suggested that the ICJ found a *pactum de contrahendo* on the basis that it is the only possible way to achieve disarmament.[95] However, the next section discusses how the Court's conclusion has in fact had the opposite effect, and created a situation perpetuating nuclear proliferation.

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[90] Davis, *supra* note 47, at 94.

[91] Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 434 (1997); *see, e.g.*, *Railway Traffic Between Lithuania and Poland*, Advisory Opinion 1931, P.C.I.J. (ser. A/B) No. 42, at ¶ 31 (Oct. 15).

[92] G.A. Res. 51/45, at 23 (Jan. 10, 1997).

[93] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 5, ¶ 100.

[94] Pietrobon, *supra* note 33, at 185.

[95] *Id*. at 179.

III. THE QUANDARY OF MULTILATERAL NEGOTIATIONS UNDER ARTICLE VI

A. THE ICJ'S RELUCTANCE TO ADJUDICATE NUCLEAR WEAPONS

The ICJ's interpretation of Article VI in *Legality of the Threat or Use of Nuclear Weapons* has created a quandary–one which could have been, but was not, resolved by the *Marshall Islands* cases. The quandary is that the *pactum de contrahendo* created by the ICJ in 1996 arguably cannot be successfully adjudicated without further clarification from the Court on the exact nature of Article VI. The potential negative consequences of interpreting Article VI as a *pactum de contrahendo* have not been fully expounded. Perhaps this stems from how Professor Andrea Bianchi suggests academics engage in a "professional ritual of analyzing the judgment as if it were a 'holy writ'."[96] Nevertheless, this section breaks down two major issues with the ICJ's interpretation of Article VI: where multilateral obligations can be adjudicated and the *Monetary Gold* principle.

We know from the above discussion that the obligation under Article VI to negotiate in good faith to disarm rests with all state parties to the NPT.[97] However, a result of the Court not adjudicating the merits has been the implication that the Court could only adjudicate nuclear disarmament if all nuclear weapon states are party to the proceedings.[98] Indeed, in the UK's preliminary objections, it was asserted to the Court that "[t]he Marshall Islands' allegations go beyond the generic, however, to a range of more specific contentions that directly and individually engage the essential interests of other States."[99] International lawyers know well the thorny nature of the ICJ's jurisdiction, and the possibility of all nuclear weapon states accepting jurisdiction either through recognizing the compulsory jurisdiction of the Court or through the doctrine of *forum prorogatum* are slim.[100] China, Russia, France, and the

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[96] Andrea Bianchi, *Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes Again in the Marshall Islands Case*, 111 AM. J. INT'L L. UNBOUND 81, 82 (2017).

[97] *See, e.g.,* Dunworth, *supra* note 77, at 604.

[98] Alvarez-Jimenez, *supra* note 40, at 6.

[99] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections of the United Kingdom, 2016 I.C.J. Rep 833, ¶ 22 (Oct. 16).

[100] *See, e.g.,* Shabtai Rosenne, *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*, MAX PLANICK ENCYCLOPEDIAS OF PUB. INT'L L.,

US have not made declarations accepting the compulsory jurisdiction of the Court and declined to accept the ICJ's jurisdiction for the proceedings instituted by the Marshall Islands in 2014. Adjudication of the NPT is not a new issue with Ford, who recognized in 2007 that the good faith of one state party cannot result in the success of negotiations, and therefore one state party cannot be held responsible for the failure of negotiations.[101]

What is most confusing about the ICJ's stance on Article VI is that it is simply illogical to conclude the Article implies an end result, but then for multiple judges, discussed below, to speculate the Court would be unable to adjudicate such a multilateral obligation without all nuclear weapons states present. Black-Branch recognizes that the true question of admissibility of *Marshall Islands* was whether the Court could consider only one state's conduct without assessing adherence to the good faith of other nuclear weapon states.[102] The UK suggested that the stance of other nuclear weapon states "bear no material difference" from the position of the UK, and the other nuclear weapon states are counterparties to the various agreements under which the Marshall Islands alleges violations of Article VI.[103] Therefore, the ICJ could not evaluate the UK's actions without passing judgment on the actions of other states.

The issue was discussed by Judge Peter Tomka in his separate opinion in the *Marshall Islands* case.[104] Tomka recognizes the reality that where nuclear weapons are concerned a state will not disarm unilaterally and place itself at risk.[105] Tomka was therefore "convinced that the Court cannot meaningfully engage in a consideration of the United Kingdom's conduct when other States – whose conduct would necessarily also be at issue – are not present before the Court to explain their positions and actions."[106] It may be true that the Marshall Islands appreciated this possible outcome by filing cases against all the nuclear weapons states, but that does not detract from the fact adjudication of Article VI is now placed in a difficult position.

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https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e56 [https://perma.cc/J2BW-9PT8] (last updated Mar. 2006) at ¶¶ 14–15.

[101] Ford, *supra* note 59, at 409.

[102] Black-Branch, *supra* note 2, at 467.

[103] UK Preliminary Objections, *supra* note 99, ¶ 84.

[104] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), 2016 I.C.J. Rep 885 (Oct. 5) (Tomka, J., separate opinion).

[105] *Id*. ¶ 35.

[106] *Id*. ¶ 39.

B. THE RELEVANCE OF MONETARY GOLD

The Court's reluctance to wade into multilateral obligations stems from the *Monetary Gold* principle. The principle prevents the ICJ from passing judgment on contentious cases where the interests of third parties, or states not party to the current contentious case, are engaged.[107] Under the principle, the Court cannot take a decision which would undertake "an evaluation of the lawfulness of the conduct of another State which is not a party to the case."[108] In *Phosphate Lands in Nauru,* Australia argued the Court could not adjudicate the responsibility of Australia without also passing judgment on the responsibility of the UK and New Zealand, who were jointly the designated administering authorities of Nauru, alongside Australia.[109] The ICJ rejected Australia's contention and found *Monetary Gold* did not prevent the Court from exercising jurisdiction as Nauru's claim was specifically about the responsibility of Australia, who was in actuality the state in control of the administration.[110]

In its preliminary objections, the UK relied heavily on *Monetary Gold* as a method of excluding the admissibility of the case on the basis that the other nuclear weapon states had not accepted the ICJ's jurisdiction.[111] The UK suggested the Court could distinguish from *Phosphate Lands in Nauru,* as the UK was "not, in any real sense, the only object of the Marshall Islands' claim."[112] Following the logic of *Monetary Gold*, the Court could not make an order requiring the UK (or India and Pakistan for that matter) to conclude negotiations to disarm as there would be no practical way for one nuclear weapon state to achieve this. The UK described the Marshall Islands' claim as not based on the relationship between the UK and Marshall Islands, but instead a claim concerning the UK and its relationship with the other nuclear weapon states.[113] The UK therefore set out its own practical limitations and suggested the Court would need to narrow any order made to fit squarely in the limitations of the UK's unilateral capabilities.[114]

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[107] Monetary Gold Removed from Rome in 1943 (It. v U.K., France & the U.S.A.), Judgment, 1954 I.C.J. 32 (June 15).

[108] East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep 90, ¶ 29 (June 30).

[109] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Judgment, 1992 I.C.J. Rep 240 (June 26).

[110] *Id*. ¶ 55.

[111] UK Preliminary Objections, *supra* note 99, ¶¶ 84, 87–88.

[112] *Id*. ¶ 95.

[113] *Id*. ¶ 93.

[114] *Id*. ¶ 111.

Judge James Crawford concluded in his dissenting opinion that the Court could determine a third state has breached an obligation, but of course, there would be no way of enforcing such a decision where the third state has not accepted jurisdiction.[115] Crawford also suggested the scope and application of Article VI would need to be addressed in further detail, in the merits, to see if such a decision could be taken against a third state.[116] Judges Xue Hanqin and Dalveer Bhandari also agreed with the respondents that the *Monetary Gold* principle applies to the case and should have been directly addressed by the Court.[117] In particular, Judge Bhandari explained:

> [t]he other countries, who possess the other more than 97 per cent of the nuclear weapons in the world, are not before the Court and consequently the Court is precluded from exercising its jurisdiction in this matter with respect to those States (the States possessing 97 per cent of the nuclear weapons). Therefore, it is indispensable to have the participation of the other countries who possess such a large quantity of the world's nuclear weapons.[118]

For Judge Bhandari, the UK's objections under Monetary Gold were substantial but the ICJ has potentially missed its opportunity to adjudicate the issue.

The Court has created a situation where nuclear proliferation may persist in perpetuity. Applicants wishing to find state responsibility for nuclear weapon states failing to comply with Article VI are at a double loss. First, if the ICJ persists with its finding that Article VI constitutes a *pactum de contrahendo*, then any future case that progresses to the merits would likely focus heavily on the *Monetary Gold* principle. The fact that one state cannot conclude negotiations unilaterally means a strong argument can be made that the respondent has not acted in bad faith due to the failures of all nuclear weapon states. Second, if Article VI is found to constitute a *pactum de negotiando*, an applicant would fail in a claim

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[115] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, 2016 I.C.J. Rep 1093, ¶ 33 (Oct. 5) (Crawford, J., dissent).

[116] *Id*.

[117] Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), 2016 I.C.J. Rep 1029, ¶ 9 (Mar. 17) (Xue, J., declaration); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), 2016 I.C.J. Rep 1057, ¶¶ 18-20 (Oct. 5) (Bhandari, J., separate opinion).

[118] Marsh. Is. v. U.K., 2016 I.C.J. Rep 1057, ¶ 18 (Oct. 5) (Bhandari, J., separate opinion).

that asserts Article VI requires the conclusion of an agreement to disarm. Instead, the applicant would need to prove the respondent had acted in bad faith during negotiations. The difficulty of finding the line between good and bad faith is discussed in the next section by examining the UK's actions in relation to disarmament.

With regards to the disputes between the Marshall Islands, India, Pakistan, and the UK, Dr. Alberto Alvarez-Jimenez makes clear the Court "took no measure to prevent this situation from becoming permanent."[119] It is also true that this article has referred to a number of additional opinions from various ICJ judges. The number of additional opinions can be problematic for dispute settlement in itself. Dr. Hemi Mistry has expounded on the issue of ICJ judges giving numerous additional opinions, discussing how judicial disagreement over the applicable law can lead to lessened legitimacy of the Court's output and consequently many questions will remain about Article VI.[120] The differing views of the individual judges do not lend well to any suggestion that Article VI is a settled area of international law, and it is difficult to see how any future cases concerning the Article can be brought. With such a contentious issue as nuclear proliferation, it is unwise for the Court to disagree in multiple additional opinions and then pass the buck to be pursued bilaterally among the different nuclear states.[121] Nevertheless, the obligation, whether it's a *pactum de negotiando* or *contrahendo*, is a "legal question for which there should be a legal answer" provided by the ICJ.[122] If the Court shies away from the issue of nuclear proliferation under the NPT, states may simply further stall negotiations, as proliferation is only a peripheral issue for some.[123] The difficulty with Article VI is not the complete fault of the Court, and partial blame could be attributed to the language of the NPT, but a resolution to adjudicating Article VI may be needed in the future and it will need to come from the ICJ.

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[119] Alvarez-Jimenez, *supra* note 40, at 19.

[120] Hemi Mistry, *'The different sets of ideas at the back of our heads': Dissent and Authority at the International Court of Justice*, 32 LEIDEN J. INT'L. L. 293 at 301 (2019).

[121] Proulx, *supra* note 2, at 940.

[122] Alvarez-Jimenez, *supra* note 40, at 22.

[123] Michal Onderco, *Why Nuclear Weapon Ban Treaty is Unlikely to Fulfil its Promise*, 3 GLOB. AFFS. 391, 398–99 (2017).

IV. HOW CAN COMPLIANCE WITH ARTICLE VI BE DETERMINED?

A. THE INDETERMINACY OF GOOD FAITH

In *Fisheries Jurisdiction*, the ICJ stated

> 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 for the provisions which the other party has already executed.[124]

Therefore, even if Article VI is in fact a *pactum de negotiando*, it must be read as a legally binding commitment despite other articles having clearer requirements for state parties to follow.[125] How then do we judge unilateral compliance with Article VI as a legally binding commitment? This section will briefly look at the legal obligation to negotiate in good faith, and the UK's position on disarmament, to assess whether Article VI has been complied with.

Good faith can be interpreted in a variety of ways, and it can be difficult to pinpoint where a state has acted in good or bad faith. Good faith is included in Article 26 VCLT where "every treaty in force is binding upon the parties to it and must be performed by them in good faith."[126] Good faith requires states to take into account the reasonable expectations of all members of the international community.[127] The ICJ has previously stated that the "principle of good faith obliges the Parties to apply [a treaty] in a *reasonable way* and in such a manner that its purpose can be realized."[128] Following this article's discussion of how Article VI constitutes a *pactum de negotiando*, negotiations cannot result in the "complete capitulation" of one side, for instance where one state is required to disarm in the absence of a multilateral agreement requiring other states to do the same, and instead negotiations in good faith naturally

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[124] Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1973 I.C.J. 3, ¶ 34 (Feb. 2).

[125] Pietrobon, *supra* note 33, at 182.

[126] Vienna Convention on the Law of Treaties, *supra* note 74.

[127] Markus Kotzur, *Good Faith (Bona fide)*, *in* MAX PLANCK ENCYCLOPAEDIA OF PUB. INT'L L., https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412 [https://perma.cc/2GDN-3L6H] (last accessed Apr. 4, 2021), ¶ 4.

[128] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 7, ¶ 142 (Sept. 25) (emphasis added).

mean states must come to acceptable terms.[129] In the *Nuclear Test Cases*, the ICJ said trust and confidence is a basic principle of the performance of legal obligations in good faith and is inherent in international co-operation.[130] The ICJ reiterated on multiple occasions that negotiations must be meaningful.[131] In 2011, the Court stated "[w]hether the obligation has been undertaken in good faith cannot be measured by the result obtained. Rather, the Court must consider whether the Parties conducted themselves in such a way that negotiations may be meaningful."[132] Parties must not simply go through the motions of negotiations and remain unwilling to contemplate the modification of their position.[133] Good faith can be determined by a state's regard for on-going procedures, its willingness to quickly consider proposals, and its demonstration of diligence in negotiations.[134] As this article mainly addresses the Marshall Islands' proceedings against the UK, it may be useful to note that the UK House of Lords has understood good faith to be present where "a state interprets a treaty as meaning what it says and declines to do anything significantly greater than or different from what it agreed to do."[135]

Dr. Treasa Dunworth previously suggested that the adoption of a complete disarmament treaty, such as the TPNW, by the nuclear weapon states would be the "gold standard" of achieving the good faith obligation found in Article VI.[136] However, as mentioned above, no nuclear weapon state has signed or ratified the treaty and the US, UK, and France have stated that they do not ever intend become a party to the treaty.[137] The

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[129] Greece v. Fed. Republic of Ger., 19 R.I.A.A. 27, ¶ 62 (Jan. 26, 1972).

[130] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20).

[131] North Sea Continental Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 7, ¶ 85 (Feb. 20); Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 134 (Dec. 5).

[132] Application of the Interim Accord of 13 September 1995, (Former Yugoslav Republic of Maced. v. Greece), 2011 I.C.J. 644, ¶ 134 (Dec. 5).

[133] North Sea Continental Shelf (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 7, ¶ 85 (Feb. 20).

[134] Owada, *supra* note 48, ¶ 38.

[135] R v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others [2004] UKHL 55 [¶ 19] (appeal taken from EWCA).

[136] Dunworth, *supra* note 77, at 606.

[137] *See* U.S. Mission to the United Nations, *Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption* (July 7, 2017), https://usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-united-nations-of-the-united-states-united-kingdom-and-france-following-the-adoption/ [https://perma.cc/C5DN-M3D4].

TPNW poses an interesting question in relation to Article VI and good faith. Article 4 TPNW states

> Each State Party that after 7 July 2017 owned, possessed or controlled nuclear weapons or other nuclear explosive devices and eliminated its nuclear-weapon programme, including the elimination or irreversible conversion of all nuclear-weapons-related facilities, prior to the entry into force of this Treaty for it, shall cooperate with the competent international authority designated pursuant to paragraph 6 of this Article for the purpose of verifying the irreversible elimination of its nuclear-weapon programme.[138]

Therefore, if existing nuclear weapon states joined the TPNW, they would need to embark on a program of elimination. But what if states withdraw before completing irreversible conversion or elimination? Article 17 TPNW allows parties to withdraw, and withdrawal would take effect twelve months after notification of withdrawal:

> Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to the Depositary. Such notice shall include a statement of the extraordinary events that it regards as having jeopardized its supreme interests.[139]

If a state was both party to the NPT and the TPNW, withdrawal from the latter could arguably result in a lack of good faith under the NPT. Withdrawal from the TPNW could mean the state effectively returns to possession of a nuclear deterrent, and non-nuclear states could argue that by submitting the notification of withdrawal, the state has acted in bad faith under the NPT.

B. DOES THE UK LACK GOOD FAITH IN RELATION TO ARTICLE VI?

In its application instituting proceedings, the Marshall Islands claimed disarmament was a long-term goal for the UK and not an immediate policy objective.[140] The Marshall Islands drew attention to a number of instances where it believed the UK had not acted in good faith,

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[138] Treaty on the Prohibition of Nuclear Weapons, *supra* note 3 at art. 4.

[139] *Id.* at art. 17.

[140] Application Instituting Proceedings Against the United Kingdom of Great Britain and Northern Ireland, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.) I.C.J. ¶ 65 (April 24).

such as voting against a General Assembly resolution to establish an Open-Ended Working Group to develop proposals for disarmament negotiations.[141] The UK has also consistently voted against the yearly General Assembly resolution titled "Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" since 1996.[142] The 2018 version of the resolution reiterated the commitment of states to Article VI and calls on states to negotiate in good faith including under the newly adopted TPNW.[143]

Looking at past instances of UK action on nuclear disarmament, it can be seen on numerous occasions since the 1970s that the UK has reiterated its commitment to negotiations under the remit of the NPT and has actively participated in negotiations.[144] At the 1978 UN General Assembly Special Session on Disarmament, the UK actively prepared a program of action which was negotiated with other states, NGOs, and an Advisory Panel on Disarmament.[145] Likewise, in 1982, the UK participated in the Second Special Session on Disarmament of the UN General Assembly where the UK supported ongoing negotiations between the US and Soviet Union.[146]

In 1995, the UK reaffirmed its position in relation to Article VI, saying that

> [w]e are committed to work towards nuclear disarmament in the context of general and complete disarmament, and have played and continue to play an active role in a wide range of non-proliferation and arms control negotiations. We have also reduced our holdings of nuclear weapons, eliminating our surface maritime and ground tactical capability and substantially reducing our stockpile of nuclear free-fall bombs.[147]

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[141] G.A. Res. 67/56, ¶ 1 (Jan. 4, 2013). U.N. GAOR, 67th Sess., 48th plen. mtg. at 20, R21.7.1 U.N. Doc. A/67/PV.48 (Dec. 3, 2012).

[142] Application Instituting Proceedings Against the United Kingdom of Great Britain and Northern Ireland, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.) I.C.J. ¶ 71 (April 24).

[143] Treaty on the Prohibition of Nuclear Weapons, *supra* note 3.

[144] HC Deb (27 Nov. 1974) (882) cols. 423–24.

[145] HC Deb (22 Feb. 1978) (944) cols. 1416–22 (full text of the Programme of Action is included in the Minister's written answers to the House).

[146] HL Deb (16 June 1982) (431) col. 636.

[147] HC Deb (17 Jan. 1995) (252) col. 454W.

Furthermore, the UK has consistently participated in preparatory committees and review conferences under the NPT.[148] For example, after the 1985 Review Conference of the NPT, the UK claimed to work with the Soviet Union to increase adherence and membership to the NPT.[149] This was whilst supporting the US-Soviet Union talks on disarmament via consultations and negotiations.[150] The Minister of State for Foreign and Commonwealth Affairs, David Mellor, stated that the fact the UK is not a direct participant in the US-Soviet talks does not mean the UK is acting in bad faith with regards to Article VI.[151] It would be particularly interesting in future adjudication to see whether the ICJ regards participation in NPT review conferences as the minimum threshold for good faith, or if additional steps are required.

In 2003, the Foreign Secretary, Jack Straw, claimed the UK had gone further than any other nuclear weapon state in achieving the aims of the 2000 NPT conference.[152] In support of this, he said that the UK's warhead stockpile had been reduced to fewer than 200, representing a 70 percent decrease in explosive power from the end of the Cold War.[153] Also, in a report submitted to the Conference on Disarmament in 2007, the Government outlined the fact that the UK takes a leading role in multilateral negotiations to support the NPT and has been increasingly reducing the size of the UK's nuclear deterrent.[154] In 2009, the UK hosted a conference of the nuclear weapon states to negotiate disarmament, and in the lead up to the conference, the UK indicated it would reconsider the size of its nuclear arsenal in light of Article VI obligations.[155] The nuclear

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[148] *See, e.g.*, HC Deb (12 May 1989) (152) col. 544W; HL Deb (18 May 2000) (613) cols. 355–57; HC Deb (12 May 2004) (421) col. 378W; HL Deb (14 Mar. 2005) (670) cols. 109–11WA; *Foreign Secretary Welcomes Nuclear Conference Outcome*, FOREIGN & COMMONWEALTH OFF. (May 28, 2010), https://www.gov.uk/government/news/foreign-secretary-welcomes-nuclear-conference-outcome [https://perma.cc/LRW7-JAW5].

[149] HC Deb (3 Feb. 1986) (91) cols. 62–63W.

[150] *Id*.

[151] HC Deb (24 July 1987) (120) cols. 570–71W.

[152] HC Deb (23 Oct. 2003) (411) cols. 718–19W.

[153] *Id*.

[154] U.N. Conference on Disarmament, *The Future of the United Kingdom's Nuclear Deterrent*, at 6, U.N. Doc. CD/1814 (Feb. 14, 2007).

[155] U.K. CABINET OFF., THE ROAD TO 2010: ADDRESSING THE NUCLEAR QUESTION IN THE TWENTY-FIRST CENTURY, 2009, Cm 7675, ¶¶ 5.34, 5.40, 5.41 (UK).

weapon states have met on a number of occasions since and reiterated their commitment to Article VI.[156]

Good faith is breached where a state breaks off discussions, delays them, disregards agreed procedures, or systematically refuses to take into account other proposals.[157]This brief discussion of the UK's compliance with good faith has shown a number of counterpoints to the Marshall Islands' claims that the UK has not complied with Article VI. The UK has taken part in a number of initiatives that support negotiations to disarm. The UK has stated that negotiations under the UN's disarmament machinery has the "full support" of nuclear weapon states.[158] The UK has consistently decreased its explosive capabilities since the end of the Cold War.[159] However, this article does not wish to blindly support the position of the UK government, and some readers will have valid arguments to demonstrate the UK has not drastically altered its position over the last few decades. The glaring example is the renewal of the UK's Trident weapon system as recently as 2016, which could arguably run counter to the UK's declarations that it is committed to negotiation and disarmament under Article VI.[160] As mentioned above, Joyner has concluded that where nuclear weapon states proffer evidence of their compliance with Article VI, they can nonetheless remain in non-compliance due to their state practice, of which the renewal of Trident would be an example.[161]

The purpose of this section is instead to show the reader the difficult situation presented when looking at the unilateral actions of one

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[156] *Nuclear Weapon States Discuss Nuclear Disarmament Obligations*, FOREIGN & COMMONWEALTH OFF., (July 6, 2011), https://www.gov.uk/government/news/nuclear-weapon-states-discuss-nuclear-disarmament-obligations [https://perma.cc/96TM-ET33]; *Nuclear Weapon States Discuss Nuclear Disarmament*, FOREIGN & COMMONWEALTH OFF., (June 29, 2012), https://www.gov.uk/government/news/nuclear-weapon-states-discuss-nuclear-disarmament [https://perma.cc/RFZ5-83VD]t; U.S. Dep't of State, Joint Statement from the Nuclear-Weapons States at the London P5 Conference (2015).

[157] France v. Spain, 12 R.I.A.A. 281, (Nov. 16, 1957). *See also* Railway Traffic between Lithuania and Poland (Lith. v. Pol.), Advisory Opinion, 1931 P.C.I.J. 42, ¶ 31 (Oct. 15).

[158] *London P5 Conference Statement* (Feb. 5, 2015), http://qna.files.parliament.uk/qna-attachments/178922/original/London%20P5%20Conference%20Joint%20Statement.pdf [https://perma.cc/B3BQ-BK8H], ¶ 8.

[159] *See, e.g.*, HL Deb (12 Feb. 1997) (578) cols. 240–42; HC Deb (23 Oct. 2003) (411) cols. 718–19W; *Main Committee I Statement by Mr. Guy Pollard MBE*, 2015 REVIEW CONFERENCE OF THE TREATY ON NON-PROLIFERATION OF NUCLEAR WEAPONS, https://www.un.org/en/conf/npt/2015/statements/pdf/main_uk.pdf [https://perma.cc/WBJ9-WEBB] (last visited Sept. 30, 2020).

[160] HC Deb (18 July 2016) (613) cols. 559–660.

[161] Joyner 2014, *supra* note 76, at 417.

state in relation to Article VI alongside the jurisprudence of the ICJ and PCIJ. It is not crystal clear that the UK has lacked good faith where Article VI is understood to be a less demanding *pactum de negotiando*, and Article VI as a *pactum de contrahendo* simply cannot be adjudicated. The UK has several strong examples to demonstrate it has gone beyond simply going through the motions of negotiations and has meaningfully engaged in the pursuit of disarmament, despite not reaching a conclusion with the other nuclear weapon states, as per the ICJ's understanding of good faith. Until the ICJ adjudicates the merits of such issues, we will not know whether these actions are enough for the UK to successfully posit that it has done all it possibly can unilaterally. However, we must not forget the TPNW. Prior to the adoption of the TPNW, Pietrobon suggested that where a nuclear weapon state persistently fails to ratify the Comprehensive Nuclear-Test-Ban Treaty (CTBT), there may be evidence of bad faith in relation to Article VI.[162] Now that the TPNW has been adopted, there may be an even stronger case that nuclear weapon states' refusal to join the TPNW constitutes a failure to negotiate in good faith. A future case concerning Article VI would need to investigate this point further.

IV. CONCLUDING REMARKS

The conundrum of how to adjudicate Article VI will persist for a number of years to come. Nuclear proliferation is a sensitive issue for various populations and a cause which garners attention from around the globe. In his dissenting opinion, Judge Antônio Augusto Cançado Trindade argued the Court "should have given its contribution to a matter which is a major concern of the vulnerable international community, and indeed of humankind as a whole."[163] A contribution from the Court may have led to "more complex duties" for nuclear weapon states as called for by Professor George R. B. Galindo.[164] Trindade's suggestion may impassion many, but as this article has highlighted, the Court would have faced a number of difficult questions if the *Marshall Islands* cases had

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[162] Pietrobon, *supra* note 33, at 186. The UK is one of three nuclear weapon states to have ratified the CTBT. *Comprehensive Nuclear-Test-Ban Treaty*, UNITED NATIONS TREATY COLLECTION https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-4&chapter=26 [https://perma.cc/6AJG-862H] (last viewed Apr. 6, 2021). G.A. Res. 50/245, Comprehensive Nuclear-Test-Ban Treaty (Sept. 10, 1996).

[163] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.) 2016 I.C.J. 907, ¶ 327 (Oct. 5) (Trindade, J., dissent).

[164] George R. B. Galindo, *On Form, Substance, And Equality Between States*, 111 AM. J. INT'L L. UNBOUND 75, 79 (2017).

proceeded to the merits. But these are difficult questions which will need answers. Holding only some of the world's nuclear powers responsible for failing to conclude negotiations would have produced similar negative critiques of the Court, as we have seen arising from the Court's formal approach to jurisdiction. As it stands, the requirement to conclude, imposed by the ICJ, is a hurdle it has sought to avoid addressing. Adjudicating what nuclear weapon states can achieve unilaterally is equally challenging. It can be difficult for commentators to conclusively argue the nuclear weapon states are in non-compliance with Article VI where the ICJ has not elaborated on its conclusions in *Legality of the Threat or Use of Nuclear Weapons*. Others can continue to suggest there is a strong basis to argue the UK, for instance, has contributed to progress under Article VI. Trindade is a staunch advocate of the humanization of international law, but the NPT is not geared toward such an assessment. The ICJ is limited in its ability to judge the negotiations of all nuclear weapon states. How then can the Court seek to act on the desires of peoples around the world when it is constrained by the very system in which it resides?