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Non-Proliferation Treaty and Nuclear Disarmament: Article VI of the NPT in Light of the ILC Draft Conclusions on Subsequent Agreements and Practice

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Abstract
A few final documents adopted by the Review Conferences of the Nuclear Non-Proliferation Treaty ('NPT') include important references to nuclear disarmament and to Article VI of the NPT. It is frequently assumed or claimed that these references amount to subsequent agreements as to the interpretation of Article VI. However, such a view is difficult to maintain. With the help of the 2018 Draft Conclusions on subsequent agreements and practice, this article seeks to establish two conditions that such final documents ought to satisfy if they are to be treated as subsequent agreements under Article 31 of the Vienna Convention on the Law of Treaties ('VCLT'). The analysis suggests that the final documents in question do not satisfy such conditions. Based on this evaluation, the article also explores other theoretical frameworks both within and without treaty interpretation rules, that can adequately take into account the final documents of the NPT Review Conferences in discussing nuclear disarmament in international law.

Keywords
Treaty interpretation; ILC Draft Conclusions on subsequent agreements and practice; Nuclear Non-Proliferation Treaty; Review Conferences; nuclear disarmament

1. Introduction

The Nuclear Non-Proliferation Treaty[1] ('NPT') is, as its name clearly suggests, a treaty whose aim is to prevent the proliferation of nuclear weapons. To achieve this aim, it imposes different obligations on five nuclear-weapon States ('NWSs')[2] and on the rest of the States Parties that are non-nuclear-weapon States ('NNWSs'). The main obligation for NWS is non-proliferation, namely, 'not to transfer to any recipient whatsoever (Art. I)' nuclear weapons, and 'not to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons … (Art. I).' The main obligation for NNWSs is a non-possession of nuclear weapons, namely, 'not to receive the transfer from any transferor whatsoever (Art. II)' of nuclear weapons and not to manufacture them. While it is clear that NPT States Parties are treated unequally when it comes to lawful possession of nuclear weapons, NNWSs are not prohibited from using of nuclear means for peaceful purposes (neither, of course, are NWSs) (Art. IV(1)). The same article also stipulates that 'Parties to the Treaty in a position to do so' (NWSs) shall cooperate in contributing to the development of peaceful use 'especially in the territories of non-nuclear-weapon States Party' (Art. IV(2)). This particular provision is seen as an element of compensation for NNWSs.[3] Another provision that also reflects a bargaining and the resulting compromise between NWSs and NNWSs is Article VI. It refers to nuclear disarmament, and is the object of examination of the present article:

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[1] Treaty on the Non-proliferation of Nuclear Weapons, 729 U.N.T.S. 161.
[2] A nuclear-weapon State in the NPT is defined as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967 (Art. IX(3))."
[3] Joseph S. Nye, Jr., "The Logic of Inequality", 59 *Foreign Policy* (1985), p. 125.

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

From the plain language of the provision, it is hard to tell what concrete actions are required of the States Parties in the area of nuclear disarmament. The phrase, 'effective measures relating to […] nuclear disarmament' to be negotiated, is not accompanied by any details in the provision, or anywhere else in the treaty. Similarly, 'negotiations in good faith' on these measures that the States must 'pursue' are also left without any details. In short, these were 'the vague and ambiguous terms finally consented to by the NWS,'[4] as a compromise as indicated above.

Against this backdrop, there are efforts to establish that some type of concrete action for nuclear disarmament is indeed required by Article VI of the NPT.[5] Three trends may, hitherto, be discerned in relation to such efforts: exploring the possibility to interpret Article VI as requiring not only a negotiation but also its conclusion;[6] exploring the meaning of negotiations 'in good faith' in particular, mainly by examining the case law on good faith, in order to flesh out concrete actions required under this term;[7] and exploring the implications of the final documents of the Review Conferences that refer to Article VI and nuclear disarmament. It is the last which is the object of the present article, for it involves a suggestion that certain sections of a number of final documents adopted by the NPT Review Conferences are 'subsequent agreements' within the meaning of Article 31 (3) (a) of the Vienna Convention on the Law of Treaties ('VCLT')[8] regarding the interpretation of Article VI of the NPT.[9]

It is a bold suggestion at first glance, because of the following theoretical framework in the VCLT. On the one hand, the VCLT does not dictate any particular form of agreement for

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[4] Daniel Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (2009) p. 57.

[5] At the other end of the spectrum, there is also a position that Article VI does not require any action except to negotiate, without a deadline. Christopher Ford, "Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons", *Nonproliferation Review* 14(3), 408 (2007).

[6] This is a position taken in the 1996 Advisory Opinion by the International Court of Justice ('ICJ' or 'the Court') in which the Court used this expression. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, para. 99. This position attracted significant criticism. E.g., Serge Sur, « Les armes nucléaires au miroir du droit », in SFDI (dir.), *Le droit international des armes nucléaires* 23 (1998). See *infra* Section 5.2 of the present article.

[7] The effort that focuses on the term "in good faith" in Article VI involves the examination of judicial cases that dealt with, and drew some conclusions out of, the same term in other contexts. The effort then focuses on how much analogy can be drawn from these cases for the interpretation of Article VI of the NPT. E.g., Mohammed Bedjaoui, « La bonne foi, le droit international et l'élimination des armes nucléaires », in Mohammed Bedjaoui *et al*. (eds.), V*ölkerrechtliche Pflicht zur nuklearen Abrüstung ?* (2009) pp. 105-109; Daniel Joyner, "The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty", in Gro Nystuen *et al*. (eds.), *Nuclear Weapons Under International Law* (2014) pp. 407-410; Marco Roscini, "On Certain Legal Issues Arising from Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons", in Ida Caracciolo *et al*. (eds.), *Nuclear Weapons: Strengthening the International Legal Regime* (2016) pp. 17-20. See also Robert Kolb, *Good Faith in International Law* (2017), pp. 195-203.

[8] Vienna Convention on the Law of Treaties, art. 4, May 23, 1969, 1155 U.N.T.S. 331.

[9] While there are NPT States Parties that have neither signed nor ratified the VCLT, the assumption is that there are identical norms in customary law for instances where the VCLT does not apply. In addition, the NPT precedes the entry into force of the VCLT in 1980, and yet for the same reason, this does not prevent its discussion in the light of the VCLT. On the pre-existence of customary international law corresponding to Articles 31 and 32 of the VCLT, Richard Gardiner, *Treaty Interpretation* (2nd ed., 2015) pp. 13-20.

subsequent agreements under Article 31 (3) (a). Thus, there is nothing to suggest that decisions adopted by the Conferences of States Parties in multilateral treaties are excluded from amounting to 'subsequent agreements' in relation to those treaties. On the contrary, this particular form is so common that it is also mentioned by the International Law Commission (the 'ILC') in its Draft Conclusions on Subsequent Agreements and Practice in Relation to the Interpretation of Treaties.[10] As one of the 'General Aspects' of such agreements and practice, it is stated that 'subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms,'[11] and that 'subsequent agreements can also be found in certain decisions of a conference of States parties.'[12] While the representative term adopted in the Draft Conclusions is the 'Conference of States Parties,' review conferences that perform tasks similar to those of a Conference of States Parties are included in, and addressed by, this term. The Review Conference of the NPT is in fact an explicit example of such a Conference of States Parties in the Draft Conclusions.[13]

On the other hand, the question whether a particular decision by a Conference of States Parties is a subsequent agreement for the interpretation under Article 31 (3) (a) of the VCLT remains a valid question. Very clearly, the Draft Conclusions do not propose an equation in which a decision of a Conference of States Parties automatically amounts to a subsequent agreement within the meaning of Article 31 (3) (a). All that the relevant Draft Conclusion confirms is that a decision by a Conference of States Parties '*may* embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a).'[14] Without any further information on the particular decision that is examined, there can be no definitive answer to any such question. In this regard, the Draft Conclusions themselves refer to three possibilities provided by the VCLT: such decisions may qualify as subsequent agreements under Article 31 (3) (a); they may give rise to subsequent practice under article 31 (3) (b); or they may form subsequent practice under article 32.[15] Since not all decisions by a Conference of States Parties are subsequent agreements under Article 31 (3) (a), there are two apparent tasks in establishing whether any particular decision of a Conference of States Parties amounts to such a subsequent agreement. First, specific decisions must be identified for examination in order to draw conclusions as to whether they amount to subsequent agreements. Second, conditions for them to qualify as 'subsequent agreements' within the meaning of Article 31 (3) (a) must be established.

This article will therefore first give a short summary of the three final documents adopted by the NPT Review Conferences, together with a position that treats these documents as subsequent agreements for the interpretation of Article VI of the NPT (Section 2). It will then identify conditions needed for this type of decision to be considered a subsequent agreement under Article 31 (3) (a), VCLT. It is submitted that with the help of the ILC Draft Conclusions, one can flesh out two cumulative conditions for this type of decision to be considered a subsequent agreement. The first condition is that any such decision must be a decision of all the States Parties to the treaty in order to be a subsequent agreement within the meaning of Article 31 (3) (a) (Section 3.1). In the NPT Review Conferences, this turns out to be a question of *form*, since there is a rather tricky issue concerning absent States that do not participate in these conferences and do not participate in the adoption of the final documents (Section 3.2).

[10] International Law Commission, Draft Conclusions on Subsequent Agreements and Practice in Relation to the Interpretation of Treaties (2018).
[11] Draft Conclusion 6(2).
[12] Commentary to Draft Conclusion 6, para. 23.
[13] Commentary to Draft Conclusion 11, para. 2.
[14] Draft Conclusion 11 (emphasis added).
[15] See both Draft Conclusions 6 and 11.

The second condition is that of *substance*. Adoption of texts by consensus in a Conference of States Parties can sometimes disguise an underlying lack of agreement in substance. However, that is what is needed in order for any text to be considered a subsequent agreement within the meaning of Article 31 (Section 4.1). In the case of Article VI and the NPT, it is this agreement in substance – an agreement regarding nuclear disarmament among NWSs and NNWSs – that is missing (Section 4.2). A conclusion of this analysis is that it is difficult to consider the final documents of the NPT Review Conferences as amounting to subsequent agreements for the interpretation of Article VI. While such a conclusion may be theoretically sound, it shows no way forward regarding the nuclear disarmament to which Article VI refers and its interpretation. Thus, the present article also briefly explores other theoretical possibilities that may take the final documents of the NPT Review Conferences into consideration in the determination of obligations regarding nuclear disarmament (Section 5).

2. NPT Review Conference Final Documents: Steps and Actions for Nuclear Disarmament

According to the NPT, its States Parties gather to 'review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised (Art. X(3)).' These Review Conferences take place, in principle, every five years. Numerous sessions of the preparatory committee take place in between, and numerous working papers are circulated. Successful NPT Review Conferences have produced final documents that contain more than just the organization of the conference and the list of delegations. Among such final documents, there are three that are frequently referred to as documents containing subsequent agreements for Article VI, according to the view that will be presented in more detail below.

(1) In 1995, the NPT Review Conference adopted a final document containing a decision on 'Principles and Objectives for Nuclear Non-Proliferation and Disarmament' (the '1995 Decision').[16] A particularly important passage for Article VI in this decision is the following:

'The achievement of the following measures is important in the full realization and effective implementation of article VI, including the programme of action as reflected below: … (c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons.'[17]

(2) In 2000, the NPT Review Conference, in its review of 'Article VI and eighth to twelfth preambular paragraphs,' agreed on 13 'practical steps for the systematic and progressive efforts to implement article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4 (c) of the 1995 Decision on 'Principles and Objectives for Nuclear Non-Proliferation and Disarmament'" ('13 Practical Steps').[18] The first of these 13 Practical Steps is 'the signatures and ratifications, without delay and without conditions and in accordance with constitutional processes, to achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty.'[19] The remaining steps included, *inter alia*, 'an unequivocal

[16] NPT/CONF.1995/32 (Part I), Annex, Decision 2.
[17] *Ibid.*, para. 4.
[18] NPT/CONF.2000/28 (Parts I and II), Part I ("Review of the operation of the Treaty, taking into account the decisions and the resolution adopted by the 1995 Review and Extension Conference: Improving the effectiveness of the strengthened review process for the Treaty").
[19] *Ibid.*, para. 15, in the section reviewing "Article VI and eighth to twelfth preambular paragraphs."

undertaking by the nuclear weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI' and 'the engagement as soon as appropriate of all the nuclear-weapon States in the process leading to the total elimination of their nuclear weapons.'[20]

(3) In 2010, the final document of the NPT Review Conference stated that 'in pursuit of the full, effective and urgent implementation of' Article VI and the 1995 Decision, and 'building upon' the 13 Practical Steps agreed to in 2000, 'the Conference agrees on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons' (the '2010 Action Plan').[21] This part of the final document again reaffirms 'the unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.'[22] According to the 2010 Action Plan, NWSs, *inter alia*, 'commit to undertake further efforts to reduce and ultimately eliminate all types of nuclear weapons, deployed and non-deployed, including through unilateral, bilateral, regional and multilateral measures (Action 3)', and 'commit to accelerate concrete progress on the steps leading to nuclear disarmament (Action 5).'[23] There are also more concrete actions described in the 2010 Action Plan, such as that '[a]ll nuclear-weapon States undertake to ratify the Comprehensive Nuclear-Test-Ban Treaty with all expediency (Action 10).'[24]

The details concerning nuclear disarmament in the final three documents of the NPT Review Conferences can certainly be useful as 'specific benchmarks for gauging progress on nuclear disarmament.'[25] The question arises as to the exact implications of these benchmarks for the interpretation of the terms 'effective measures … on nuclear disarmament' envisaged in Article VI. One view is that in light of Article 31 of the VCLT, they constitute either 'subsequent agreements' or 'subsequent practice' regarding the interpretation of Article VI of the NPT.[26] This view appears to receive a certain degree of support in the literature on arms control and disarmament treaties: documents adopted by consensus in review conferences of such treaties

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[20] *Ibid.*
[21] NPT/CONF.2010/50 (Part I), Vol. I, Part I, para. 79.
[22] *Ibid.*, "Conclusions and recommendations for follow-on actions" I(A)ii.
[23] *Ibid.*, "Conclusions and recommendations for follow-on actions" I(B).
[24] *Ibid*., "Conclusions and recommendations for follow-on actions" I(D).
[25] Andrew J. Grotto, "Non-Proliferation Treaty (1968)" (2009) para. 59, in *Max Planck Encyclopedia of Public International Law* available at http://opil.ouplaw.com/home/EPIL (last visited on 12 March 2019). The particular reference is made with regard to the thirteen steps in the final document of the 2000 Review Conference.
[26] The reference is to subsequent agreements, Article 31 (3) (a), in Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (2011), p. 105; Paul M. Kiernan, "'Disarmament' under the NPT: Article VI in The 21st Century", 20:2 *Michigan State International Law Review* (2012) pp. 393-396; Joyner, *supra* note 4, p. 59; and Joyner, *supra* note 7, pp. 411-412. The reference is to subsequent practice, Article 31 (3) (b), in Ida Caracciolo, "The Limitations of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons: International Law in Support of Nuclear Disarmament", in Ida Caracciolo *et al*. (eds.), *Nuclear Weapons: Strengthening the International Legal Regime* (2016) pp. 8-9; Daniel Rietiker, "The Meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Analysis Under the Rules of Treaty Interpretation", in Jonathan L. Black-Branch and Dieter Fleck (eds.), *Nuclear Non-Proliferation in International Law, Volume I* (2015), pp. 63-67; 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 Journal of International Law* (2013) pp. 178-179.

should be taken into account in treaty interpretation as subsequent practice under Article 31 of the VCLT.[27]

What is more, such a view is of practical importance and it is not only a group of academic writers who hold that the final documents listed above hold legal significance in terms of the interpretation of Article VI of the NPT. In the application in the case against the United Kingdom in the International Court of Justice (ICJ), the Marshall Islands expressly took the position that these final documents constituted either subsequent agreements or subsequent practice within the meaning of Article 31(3). [28]

Moreover, this view is also of theoretical interest in light of the VCLT and the Draft Conclusions regarding treaty interpretation. Were such a view to be accepted, the earlier observation of having 'specific benchmarks for gauging progress on nuclear disarmament' out of Review Conference final documents would no longer be a factual observation. It becomes a legal one regarding the interpretation of Article VI of the NPT. The observed benchmarks above would 'constitute requirements for compliance with the NPT.'[29] The measures indicated in these final documents, such as the 13 Practical Steps from the 2000 Review Conference or actions described in the 2010 Action Plan, would, in fact, be 'effective measures relating to … nuclear disarmament' provided in Article VI. The bottom line is that if they indeed provide the interpretation for these terms in the provision, there is much less discretion for NWSs concerning how and when nuclear disarmament should be realized than the original provision seems to suggest. Not surprisingly, those who consider these final documents as subsequent agreements with implications for the interpretation of the term 'effective measures relating to … nuclear disarmament' provided in Article VI, reach the conclusion that NWSs are in violation of Article VI.[30]

While these decisions are often assumed or claimed to be subsequent agreements or practice under Article 31 (3),[31] only a few authors make an extensive effort to analyze how they may constitute such subsequent agreements or practice.[32] It is against this backdrop that the matter is explored in the present article: can the 1995 Decision, the 13 Practical Steps of the 2000 Review Conference, and the 2010 Action Plan be treated as subsequent agreements[33] for the purposes of interpreting Article VI of the NPT?

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[27] Mirco Sossai, "Disarmament and Non-Proliferation", in Nigel D. White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law* (2013) p. 57. While the explanation provided is about a "Convention" because of the previous discussion on the Chemical Weapons Convention, it is clearly meant to be about review conferences of arms control and disarmament treaties in general. See also Guido den Dekker, *The Law of Arms Control: International Supervision and Enforcement* (2001) p. 141.

[28] See the Memorial submitted by the Marshall Islands (16 March 2015), para. 149. *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. U.K.)*, Preliminary objections, I.C.J.

[29] Caracciolo, *supra* note 26, p. 9. This sentence refers to the 13 Practical Steps in the final document of the 2000 Review Conference in particular.

[30] Daniel H. Joyner, *supra* note 26, p. 107; Roscini, *supra* note 7, p. 17.

[31] See authors cited in *supra* notes 26 and 27.

[32] Joyner, *supra* note 7, pp. 411-412; Joyner, *supra* note 26, p. 107; Nigel White, "Interpretation of Non-Proliferation Treaties", in Daniel H. Joyner and Marco Roscini (eds.), *Non-Proliferation Law as a Special Regime* (2012), pp. 87-118.

[33] Since all authors who attempt an extensive explanation, cited in note 32, do so with regard to subsequent agreements within the meaning of Art. 31 (3) (a), the remaining sections will confine their discussions to subsequent agreements.

3. Unanimous Support for Subsequent Agreements under Article 31

The first question that may be posed is whether a subsequent agreement within the meaning of Article 31(3) requires the agreement of all States Parties. The conventional reply is that it does. The ILC Draft Conclusions confirm this established view. Treaties are based on the consent of those who make, and adhere to, these instruments. Given this fundamentally consensualist character of treaties, a natural course of understanding is that any subsequent agreement that establishes a new interpretation must also be an agreement of all the parties that are bound by the treaty. 'Subparagraph (a) says "agreement between the parties", and the normal interpretation of "the parties" must be "all the parties" and not simply "some of the parties".'[34]

3.1 *Confirmation: Draft Conclusion 10*

There is no deviation from this established understanding in the ILC Draft Conclusions. Draft Conclusion 4 establishes a definition for a subsequent agreement for Article 31 (3) (a) as 'an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions.'[35] Its commentary affirms that in this definition, 'the term 'the parties' indicates that such an agreement must be reached between all the parties to the treaty.'[36] The commentary to the Draft Conclusion 10 also reaffirms that the agreement under article 31, paragraph 3 (a) and (b), must be that of all the parties to the treaty.[37] Whether there is agreement of all the parties or only among some parties is a crucial difference between subsequent agreements and practice under Article 31 (3) on the one hand, and any other agreement or practice of relevance under Article 32, on the other.[38]

Thus, according to the Draft Conclusions and the VCLT, a subsequent agreement within the meaning of Article 31 (3) (a) cannot be formed by a majority of States Parties if a minority opposes that agreement. It cannot be formed even by a vast majority. This is because admitting that some subsequent agreement on treaty interpretation could be formed without the agreement of all the States Parties would be a serious deviation from the established consensualist approach to treaties[39] and the, for the most part, voluntarist nature of international law.

3.2 *Question of Form for the Final Documents of the NPT Review Conferences*

As the final documents of the NPT Review Conferences are products of collective deliberation, the first thing to verify, in order to confirm unanimous support for these documents, is the physical participation of States Parties to collective deliberations. Whether States Parties were present when these documents were deliberated and adopted is a question of *form*.

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[34] James Crawford, "A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties", in Georg Nolte (ed.), *Treaties and Subsequent Practice* (2013) p. 30; Gardiner, *supra* note 9, pp. 266-267 (in a section discussing Article 31 (3) (b)).

[35] Draft Conclusion 4(1).

[36] Commentary to Draft Conclusion 4, para. 4.

[37] Commentary to Draft Conclusion 10, para. 2.

[38] *Ibid.* It is stressed that an agreement or practice of some, but not all, parties may be a supplementary means of interpretation that falls under Article 32. On Article 32, see infra Section 5.1.

[39] The Draft Conclusions discuss some margin of discretion for interpreters regarding Article 31 (3) (b) with the examples of treaty interpretation by the European Court of Human Rights, but do not draw any generalized conclusion from that discussion. *Ibid*., para. 6.

The key final documents pertaining to nuclear disarmament were adopted by the NPT Review Conferences in 1995, 2000, and 2010, which were attended by the vast majority of – but not all – NPT States Parties. The issue is eloquently expressed in a previous study on the interpretation of Article III of the NPT.[40]

> '… a possible agreement at a Review Conference on a new interpretation of Article III, paragraph 1, of the NPT would not qualify as a 'subsequent agreement', since it is next to impossible for a Review Conference to be attended by all the parties to the NPT.'[41]

For the purpose of the present article, the reference to 'Article III, paragraph 1' in the passage above should be replaced by Article VI. There were 175 States Parties[42] out of 179 that participated in the 1995 Review Conference. 158 States Parties[43] out of 187[44] participated in the 2000 Review Conference. 172 States Parties[45] out of 190[46] participated in the 2010 Review Conference. Clearly, none of the three Review Conferences had been attended by all States Parties. Accordingly, the final documents were adopted by consensus of those States Parties that were present at the Review Conferences, and not by all States Parties of the NPT *per se*. Of course, such absence does not necessarily indicate a disagreement or objection to what the Review Conferences had decided. It is also clear that the NWSs, whose views hold particular significance in the context, had attended all three Review Conferences listed above.[47] Nevertheless, the lack of universal attendance means that one condition of form required to establish a subsequent agreement is absent.

Under the circumstances, the next logical question is whether the States absent at the Review Conferences could nevertheless acquiesce to the decisions taken at those Review Conferences by not raising an objection within a reasonable period of time,[48] and, if so, whether such acquiescence could transform such decisions into subsequent agreements within the meaning of Article 31 (3) (a).[49] The Netherlands, during the work of the ILC on subsequent agreement and practice, observed that the work did 'not address the situation in which a Conference of States Parties adopts a decision by consensus or unanimous vote without all parties to the treaty being present and participating in decision-making in the meeting at which that decision is adopted.'[50] Its position regarding such a situation was that such a decision could also embody a subsequent agreement, or give rise to subsequent practice under Article 31 (3), provided the decision in question was taken in accordance with the provisions of the treaty and any applicable rules of procedure.[51]

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[40] Masahiko Asada, "The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol" 16 *Journal of Conflict and Security Law* (2011) p. 14.
[41] *Ibid.*
[42] NPT/CONF.1995/32 (Part I), para. 13.
[43] NPT/CONF.2000/28 (Part II), para. 18.
[44] NPT/CONF.2000/28 (Part I), para. 7.
[45] NPT/CONF.2010/50 (Part II), para. 19.
[46] NPT/CONF.2010/50 (Part I), para. 113.
[47] Both China and France acceded to the NPT in 1992, making the 1995 Review Conference the first Review Conference to be attended by all five NWSs.
[48] Joyner, *supra* note 4, (p. 59, footnote 148), appears to consider that the failure to attend an NPT Review Conference is in itself "an acquiescence in the consensus statements of those attending."
[49] Asada, *supra* note 40, p. 15.
[50] A/CN.4/712/Add.1 (1 June 2018), para. 6.
[51] *Ibid*.

However, in the concrete case of NPT Review Conference decisions, even if acquiescence on the part of the absent States regarding these decisions could reasonably be assumed, there is another aspect that must be examined in order to conclude that such decisions are indeed subsequent agreements in relation to Article VI. Even if the acquiescence discussed above could be seen as securing the unanimous support of Review Conference decisions in *form*, a question of *substance* remains.

4. Subsequent Agreement as an 'Agreement in Substance'

Under other circumstances, treating the question of substance independently of the question of form may not make much sense. In fact, the Draft Conclusions themselves do not set up the two questions as separate and independent when the 'General Aspects' of subsequent agreements are clarified. Draft Conclusion 10 reiterates the importance of both questions in a single sentence, namely, that 'an agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept.'[52] An understanding regarding treaty interpretation is a question of substance, and the question of form, previously discussed, regarding the unanimity in the acceptance of the understanding, is certainly assumed by the term 'common understanding.'

It is only in limited circumstances that the question of substance becomes an independent question, or an independent condition to be examined even when the question of form is settled. The Draft Conclusions themselves point out the possibility of such unique circumstances by allocating an independent Draft Conclusion to such circumstances: decisions and recommendations adopted by consensus in the Conferences of States Parties in multilateral treaties. The question of substance for these particular texts is thus treated as one of 'Specific Aspects' in the Draft Conclusions.

4.1 *Explanation in Draft Conclusion 11*

As it has been pointed out earlier, according to Draft Conclusion 11:

> 'Depending on the circumstances, such a decision [i.e., by a Conference of States Parties in a treaty] may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32.'[53]

Such decisions only *may*, and not *shall*/automatically, amount to a subsequent agreement. In order for such a decision to be treated as a subsequent agreement under Article 31, additional examinations are needed. It is in this light that a typical method of decision-making at Conferences of States Parties is explored in the Draft Conclusions: namely, that of *consensus*.

A decision by consensus, in the context of adopting a text in a multilateral forum, can be described as an adoption of a decision when '… no member, present at the meeting where the decision is taken, formally objects to the proposed decision.'[54] Consensus described this way

[52] Draft Conclusion 10(1).
[53] Draft Conclusion 11(2).
[54] This is an example taken from the WTO on how consensus functions – see Art. IX(1) Agreement Establishing the World Trade Organization. For other examples and further discussion on consensus as a

can in fact conceal a wide range of attitudes towards the decision in question. This makes a marked difference between a decision by voting and a decision by consensus. In case of a decision by voting, the attitudes of States towards the decision technically fall under one of the following three categories: in favor, against, or abstention. There is no other variety. In contrast, when a decision is made by consensus, the variety of subjective intentions appears infinite. States that may not particularly be in favor but that choose not to voice their reluctance or opposition are included in the group of States that appear to support a decision. States that enthusiastically support the decision are certainly included. States that do not support the decision at all but are simply indifferent may well be included. However, despite such variety of attitudes that are ultimately not expressed separately, there is only a single *chapeau* to describe the breadth of attitudes behind the decision eventually adopted: namely, *consensus*. Given this characteristic of decision-making by consensus, there is no guarantee that decisions by such means reflect an 'agreement' in substance of all the parties. It follows that for the purposes of treaty interpretation, a decision by consensus does not suffice to qualify it as a subsequent agreement within the meaning of Art. 31 (3) (a) of the VCLT.

Therefore, Draft Conclusion 11 goes on to provide:

> 'A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.'[55]

Prior to the adoption of the Draft Conclusions in 2018, when governments commented on this part of the Draft Conclusions, none opposed or contested the idea in any way. When a few governments asked for changes to previous texts, the only reason behind such requests had been to make certain there was no ambiguity regarding the position expressed.[56] An agreement in substance, described in the present article as a second condition for a collective document to amount to 'subsequent agreement' within the meaning and purposes of Art. 31 (3) (a), is not always present, even when such document is adopted by consensus.

4.2 *Question of Substance for the Final Documents of the NPT Review Conferences*

As seen above, *consensus* is a typical decision-making method in Conferences of States Parties. Against this backdrop, the ILC felt the need to make certain that an adoption by consensus is not sufficient to qualify a collective decision in such a forum as a 'subsequent agreement'. What is needed is an agreement in substance. Relating this position to the interpretation of Article VI of the NPT, there must be some common understanding on the substantive matter, i.e., nuclear disarmament and obligations pertaining to it, discussed in the 1995 Decision, the 13 Practical Steps in 2000, or the 2010 Action Plan. Otherwise, it is difficult to qualify these documents as subsequent agreements for the interpretation of Article VI, despite their adoption by consensus.

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means of institutional decision-making, see Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity,* 6th revised ed. (2018), § 770-773.

[55] Draft Conclusion 11(3).

[56] See the comments of governments cited in the Special Rapporteur's fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties. A/CN.4/715 (28 February 2018), para. 102.

In the case of the NPT, a sharp disagreement about nuclear disarmament policies and obligations exists between NWSs and NNWSs. How NWSs and NNWSs treat the three final documents of the NPT Review Conferences in relation to Article VI is also a point of disagreement. An examination of a few representative statements on Article VI in the Review Conferences or their Preparatory Committee meetings suffices to confirm this disparity of views. In short, NNWS tend to consider these parts of the final documents as indicators of core or necessary steps to implement Article VI. NWSs do not. If NWSs ever refer to the steps and actions identified in these documents, they merely treat them as options.

For example, according to the New Agenda Coalition consisting of six NNWSs,[57] '[however they have been phrased (including as actions or steps), the measures agreed upon in 1995, 2000 and 2010 represent clear indicators of what States parties to the Non-Proliferation Treaty have agreed as necessary for the implementation of the nuclear disarmament obligations in Article VI.'[58] The Group of Non-Aligned States Parties, another group among NNWSs, equally calls 'for the full compliance of the nuclear-weapon States with such undertakings towards fulfilling their legal obligations under article VI of the Treaty.'[59] The position of many NNWSs, as seen in these examples, indicates that there is no discretion afforded to States Parties as to whether to take such steps. It is assumed that they amount to core steps to be taken for the implementation of Article VI.

NWSs appear to disagree radically with such treatment of the content of the final documents. That said, NWSs certainly neither refute their obligations of nuclear disarmament under Article VI completely. Officially and publicly, they reiterate their commitment to the obligations under Article VI: France 'reaffirms its support for a gradual and pragmatic approach to nuclear disarmament pursuant to article VI of the Treaty';[60] the United Kingdom 'remains firmly committed to step-by-step disarmament and to its obligations under article VI of the Treaty';[61] the Russian Federation 'consistently implements all the provisions of the NPT, including Article VI';[62] and the United States 'is fully meeting its obligations under Article VI.'[63] Upon affirming their commitment to the obligations under Article VI, NWSs then often refer to the nuclear weapon reduction that has been realized, to reiterate this point. Just as an example, the above statement by the United Kingdom is followed by a declaration that 'in January 2015, [the] Government had announced that submarines on patrol would carry only 40 nuclear warheads and no more than eight operational missiles. That took the total number of operationally available warheads to no more than 120. The current Government remained committed to reducing the overall stockpile of nuclear weapons to no more than 180 warheads by the mid-2020s […].'[64] NWSs, by making this kind of statement repeatedly,[65] appear to

[57] Brazil, Egypt, Ireland, Mexico, New Zealand, and South Africa.
[58] NPT/CONF.2020/PC.II/AWP.13 (15 March 2018), para. 10.
[59] NPT/CONF.2020/PC.I/WP.24 (25 April 2017), para. 11. 'Such undertakings' in this sentence refers to the unequivocal undertaking of NWSs in the 2000 final document coupled with its reaffirmation in the 2010 final document (para. 10).
[60] NPT/CONF.2020/PC.I/SR.3 (2017), para. 11.
[61] NPT/CONF.2020/PC.I/SR.3 (2017), para. 94.
[62] Statement by Russia, NPT Review Conference 2015 (Geneva, 27 April - 22 May 2015), at http://www.un.org/en/conf/npt/2015/statements/pdf/RU_en.pdf (last visited 8 August 2019).
[63] Statement by J. Sherwood McGinnis, Deputy US Representative to the Conference on Disarmament, to the Second Session of the Preparatory Committee for the 2005 NPT Review Conference (1 May 2003), available at https://2001-2009.state.gov/t/isn/rls/rm/24919.htm (last visited 8 August 2019).
[64] Statement by the United Kingdom, *supra* note 61.
[65] The way these statements are constructed is so typical that an author has dubbed it the "NWS rhetorical template." Joyner, *supra* note 7, p. 401. It is also mentioned that China does not follow this template.

believe that 'any action taken to reduce a state's nuclear arsenal, however small, fulfils the requirements of Article VI.'[66] More importantly, these statements by NWSs 'neatly avoid identifying the precise content of the Article VI obligation.'[67] They also do not discuss the precise nature of the final documents of the Review Conferences in relation to Article VI. If the final documents are mentioned by NWSs in this context, it is to refute the idea that they represent any required steps. For example, in the discussion of the 13 Practical Steps in the 2000 final document, the United States expressed a clear view that 'it is a mistake to use strict adherence to the 13 steps as the only means by which NPT parties can fulfill their Article VI obligations.'[68] In other words, these steps may not be adopted by NWSs at all, if there are other ways to fulfil Article VI obligations. As it was previously observed, the NWS believe that there are indeed other ways to do so: unilateral reduction of any size at any time that is determined by NWSs themselves. Any steps and actions recommended can be discarded unilaterally.[69]

As it is clear from the previous discussions, the difference between NWSs and NNWSs regarding nuclear disarmament under Article VI is not that NWSs refute any obligation except to negotiate. It is that in the eyes of NWSs, the obligation or obligations relating to nuclear disarmament under Article VI only demands a gradual progress. The assumption is that this gradual progress is dictated by constantly changing international situations and the corresponding political considerations. Therefore, concrete steps of nuclear disarmament can only be determined by NWSs. How fast or slow the gradual progress and when exactly certain steps are to be taken are questions within the discretion of these States. There is no hint whatsoever, in the statements of NWSs in the Review Conferences and their preparatory committee meetings, that steps and actions in the final documents of the Review Conferences may place some limitations on this discretion.

Given this difference in understanding, and the treatment of the 1995, 2000, and 2010 final documents by NWSs and NNWSs, it is clear that in these documents, there is no agreement in *substance* regarding the interpretation of Article VI, despite the fact that these documents have been adopted by consensus. For many NNWSs, they are not merely options that can be discarded or replaced unilaterally. In that sense, they are seen to place limitations on the freedom and discretion of NWSs regarding the pace and methods of nuclear disarmament. In contrast, for NWSs, the 1995 Decision, the 13 Practical Steps, as well as the 2010 Action Plan contain, at the very most, non-exhaustive lists of practical options.

5. Explorations beyond Article 31 of the VCLT

In a treaty where the States Parties are so divided over an issue, in this case, nuclear disarmament, the adoption of a text that satisfies the two conditions examined above is extremely unlikely, if not impossible. A text, in order for it to be a subsequent agreement for treaty interpretation within the meaning of Art. 31 (3) (a), VCLT, has to (1) be an agreement of all the States Parties, and (2) contain an agreement in substance regarding that issue. Regarding the first condition, as the previous examination in Section 4 demonstrates, the NPT Review Conferences are hardly ever attended by all the States Parties. Regarding the second condition, the adoption of the steps and decisions by consensus in these NPT Review

[66] *Ibid.*, p. 400.
[67] *Ibid.*, p. 401.
[68] U.S. Statement in the Preparatory Committee for the 2005 NPT Review Conference, *supra* note 63.
[69] For example, by 2003, the United States openly and freely took the position that it "no longer support[ed] all 13 steps." See the U.S. Statement in the Preparatory Committee for the 2005 NPT Review Conference, *ibid*.

Conferences merely mask, but do not displace, the disagreement at play on substantive matters regarding nuclear disarmament.

It follows, therefore, that there is no (new) interpretation for Article VI of the NPT according to the general rule of interpretation under Article 31 of the VCLT, confirmed by the ILC Draft Conclusions. Even though there are steps and actions adopted by the Review Conferences for the implementation of Article VI, under the confirmed rule of treaty interpretation, there is no way to adequately take these final documents of the Review Conferences into consideration. A conclusion regarding nuclear disarmament and Article VI of the NPT is that as long as one remains strictly bound by the requirements of Article 31 of the VCLT as confirmed by the Draft Conclusions, there can be no way forward.

Given this conclusion, the last section of this article briefly explores the alternative ways forward, including the ways that divert from the discussion on the ILC Draft Conclusions. An apparent way forward indicated by the ILC Draft Conclusions themselves is to consider the final documents in question as subsequent practice in a broad sense under Article 32 (Section 5.1). Another, more substantive, way forward for the nuclear disarmament debate is to steer the discussion away from treaty interpretation altogether (Section 5.2). A theoretically more daring way forward is to continue addressing this issue as one of the interpretation of Article VI of the NPT, and challenge the two conditions discussed earlier in this article (Section 5.3).

5.1 *Subsequent practice in a broad sense, Article 32*

One of the innovations of the ILC Draft Conclusions is that 'subsequent practice' in a broad sense may be taken into account in treaty interpretation under Article 32 of the VCLT ('Supplementary means of interpretation').[70] It is an innovation in the sense that Article 32 itself does not make any explicit reference to subsequent practice.[71] Subsequent practice in a broad sense under Article 32, according to the Draft Conclusions, is different from 'subsequent agreements and practice under Article 31, in that it refers to subsequent practice 'which does not establish the agreement of all parties to the treaty, but only of one or more parties.'[72] Described this way, subsequent practice under Article 32 eliminates both the first condition and the second condition, discussed above. Thus, the 1995 Decision, the 13 Practical Steps, and the 2010 Action Plan adopted by the NPT Review Conferences may certainly be treated as such subsequent practice. In abstract, this neatly takes care of the question as to whether these documents, which do not constitute subsequent agreements under Article 31, may still be taken into account in the interpretation of Article VI of the NPT: yes, they can be.

A rather limited effect upon the interpretation of Article VI of this characterization is apparent. Article 31 describes 'authentic' means of interpretation, whereas Article 32 describes 'supplementary' means.[73] Recourse to supplementary means under Article 32 'may' be had – this should be juxtaposed against the fact that means under Article 31 'shall' be taken into account. To characterize the final documents of the NPT Review Conferences as a part of subsequent practice under Article 32 sheds some light on how, and to what extent, they should be taken into consideration. It must be a question best left to the interpreters in each specific

[70] Draft Conclusion 2(4).
[71] Commentary to Draft Conclusion 2, para. 8. Academic comments that this position has drawn are shown in Malgosia Fitzmaurice, "Subsequent Agreement and Subsequent Practice: Some Reflections on the International Law Commission's Draft Conclusions" in this issue, *International Community Law Review*.
[72] Commentary to Draft Conclusion 2, para. 9.
[73] Draft Conclusion 3 and its commentary, para. 12.

case. However, as it has been shown, the interpreters of the NPT – the States Parties to the NPT – are deeply divided in relation to their views (and interests).

5.2 *Customary-Law Approach*

Given that the ILC Draft Conclusions concern treaty interpretation, the way forward they can indicate remains within the realm of, and in connection to, treaty law. A very different approach as a way forward in the discussion of nuclear disarmament is to try to discuss it as a matter of the customary law in relation to other areas of international law; not just to treaty law. The approach is a conscious effort to steer the discussion away from strict treaty interpretation. It capitalizes on the 1996 advisory opinion by the ICJ. The obligation in Article VI of the NPT was described in that well-known advisory opinion as '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'[74] and 'a twofold obligation to pursue and to conclude negotiations.'[75] This obligation, in the view of the Court, was not an objective only for the States Parties of the NPT, but that the obligation expressed in Article VI 'remains without any doubt an objective of vital importance to the whole of the international community today.'[76] Based on these observations, the Court concluded that 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'[77] without limiting that obligation to the one under Article VI for the States Parties of the NPT. In short, the Court treated the obligation recognized in Article VI of the NPT as if it were also an obligation in customary law.[78] In this advisory opinion rendered in 1996, while the decision regarding nuclear disarmament in the final document of the 1995 Review Conference constituted an important background in the analysis,[79] there was no need to characterize the 1995 Decision as a subsequent agreement for the interpretation of Article VI. The need to do so arises only when the terms of Article VI have to be interpreted in relation to the norms of treaty interpretation. The Court, by adopting a customary-law approach, did not rely on the interpretation rule of the VCLT.

5.3 *Exceptions to the Interpretation Rule of the VCLT?*

Unlike the customary-law approach, the last approach to tackle the question of nuclear disarmament under Article VI of the NPT directly addresses the question of treaty interpretation. This approach is based on the idea that the VCLT is 'sufficiently flexible to accommodate interpretative approaches that reflect the differing nature of international treaties.'[80] This approach is not geared to produce a general rule of treaty interpretation that is different from what has been codified by the VCLT and confirmed by the Draft Conclusions. Rather, the unique effort in this approach is to depict certain treaties as special kinds of treaty

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[74] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6, para. 99.
[75] *Ibid*., para. 100.
[76] *Ibid*., para. 103.
[77] *Ibid*., para. 105(2)F.
[78] *E.g.,* Michael Bothe, "Nuclear Weapons Advisory Opinions" (2016) para. 21, in *Max Planck Encyclopedia of Public International Law,* available at http://opil.ouplaw.com/home/EPIL (last visited on 8 August 2019). However, there are also authors who do not see the position expressed by the Court as a customary-law approach. *E.g.*, Roscini, *supra* note 7, p. 21.
[79] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 6, para. 103.
[80] White, *supra* note 32, p. 117.

to which the confirmed, general rule of interpretation does not apply. It is, of course, an approach that can make sense only 'if we set ourselves free from the traditional notion that the instrument known as the treaty is governed by a single set of rules.'[81] The idea itself, to take into consideration the character or nature of treaties for the purpose of the law of treaties, is not entirely new. Eminent scholars have also accepted, and debated, this idea seriously.[82] The core idea is that there may be a category of treaties to which a part of the law of treaties may not apply in the way it does to other treaties. The name given to this category varies according to the authors: constitutional treaties,[83] law-making treaties, and *traités-loi*[84] are a few of the popular names given to the category of treaties thus contemplated.

It is in this light that the question of the final documents of the NPT Review Conferences is approached. In this approach, the NPT is distinguished from ordinary treaties. The treaty is so unique in its character that it makes the strict application of the confirmed rules of interpretation inappropriate. Concretely speaking, the *unanimous support* rule for a finding of a 'subsequent agreement' within the meaning of Article 31 should not be applied to the NPT.

To advance this argument, the NPT is compared to social contracts by one author. The NPT is more akin to 'those contracts that represent an agreement upon which a society is built,'[85] i.e., social contracts, than it is to other, ordinary synallagmatic treaties exchanging rights and obligations. The NPT, which practically codifies the military superiority of NWSs arguably in order to maintain the peace and security of the international community, is 'a social contract at the heart of the international legal and political order.'[86] Such a framework of constitutional character, in the sense that it constitutes the social order itself, should reflect an overall agreement of the members of that order. Changes or new interpretations should also reflect the overall agreement of the members. However, agreements in this sense do not always reflect the unanimous agreement of all members. At a domestic level, this is true: constitutional documents usually do not require rigorous unanimity when changes are called for, however, many domestic legal systems require higher majority thresholds for constitutional-type changes etc., than usual when compared to the adoption of more ordinary legislation. They would seek the overall agreement or support of the majority of the constituents. In the context of the NPT, the conclusion that this argument tries to draw is that a change, in the form of a new interpretation, should be possible without requiring the rigorous unanimity for that change, for a treaty of a constitutional character.

The difficulties of this approach are, of course, evident. This approach is simply unacceptable if one considers that what has been confirmed by the Draft Conclusions constitutes a single, rigid set of rules of treaty interpretation for all treaties. Even if there is some flexibility, the approach is still unacceptable as long as the NPT is not convincingly portrayed as a constitutional treaty.

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[81] Arnold McNair, "The Functions and Differing Legal Character of Treaties", 11 *British Year Book of International Law* 118 (1930).
[82] E.g., "Treaties creating constitutional international law" are discussed along the tendencies of these treaties to depart from a number of rules in the law of treaties by McNair, *supra* note 81, pp. 112-114. See also Humphrey Waldock, "General Course on Public International Law", 106 *Recueil des cours* (1962-II) pp. 78-81; Arnold McNair, *Law of Treaties* (1961) pp. 751-752.
[83] White, *supra* note 32, p. 106.
[84] Rietiker, *supra* note 26, pp. 62-63, discusses the NPT as a law-making treaty, albeit in a section regarding "Interpretation in the Light of the 'Object and Purpose' of the Treaty."
[85] *Ibid*. See also Nigel White, *Advanced Introduction to International Conflict and Security Law* (2014) p. 16.
[86] White, *supra* note 32, p. 108.

6. Concluding remarks

This article examined Article VI of the NPT in the light of the ILC Draft Conclusions on subsequent agreements and practice. In the context of the nuclear disarmament debate in the NPT, there are three final documents of the Review Conferences that are significant: the 1995 Decision, 13 Practical Steps, and the 2010 Action Plan. They are frequently taken for granted, or claimed, to be subsequent agreements or practice within the meaning of Article 31 (3), VCLT, for the interpretation of Article VI. When they are argued as such, there is usually heavy reliance on the fact that these texts were adopted by consensus.[87] This claim, however, is difficult to uphold. With the help of the Draft Conclusions, it was shown that such documents adopted by a Conference of States Parties or a Review Conference, in order for them to be treated as subsequent agreements under Article 31 of the VCLT, must satisfy certain conditions. There are two specific conditions that had been formulated with the help of the Draft Conclusions. On the question of *form* regarding a subsequent agreement under Article 31 (3) (a), the Draft Conclusions confirm that an agreement has to be that of all the States Parties if that agreement was to be considered a subsequent agreement under Article 31 (3) (a)). However, the NPT Review Conferences that produced the final documents were not attended by all States Parties. On the question of *substance* regarding decisions by Conferences of States Parties in particular, the Draft Conclusions underline that the notion that consensus equals agreement-in-substance is false. Though the final documents were adopted by consensus in the NPT Review Conferences in 1995, 2000, and 2010, adoption by consensus does not suffice to qualify such documents as subsequent agreements for the interpretation of Article VI.

Sound as it may be, the conclusion that the relevant final documents cannot be treated as subsequent agreements within the meaning of Article 31, VCLT, for treaty interpretation, leaves no evident way forward for the nuclear disarmament debate. Thus, the article also briefly explored possible ways forward outside the general rule of interpretation under Article 31 of the VCLT. Three approaches were explored as suggesting possible ways forward. Each of these approaches characterizes the final documents of the NPT Review Conferences differently. The first approach is a logical way forward in the ILC Draft Conclusions: to characterize these final documents as 'subsequent practice' in a broad sense under Article 32 of the VCLT. In contrast, the second approach shows an effort to steer the discussion away from the VCLT altogether, by characterizing the same documents as a material source for the formation of customary law. The third approach is to treat them as subsequent agreements despite the problems in light of the two conditions discussed in this article. It does so by explicitly deviating from the interpretation rule of the VCLT confirmed by the Draft Conclusions. Each approach has its strengths and its weaknesses. Regarding the NPT itself, the preparations for the next review conference in 2020 are now under way. Even though an agreement in substance on nuclear disarmament seems unlikely to be reached, it is to be hoped that this particular review conference will serve as an opportunity for earnest exchanges and consultations between NWSs and NNWSs.

[87] E.g., Pietrobon, *supra* note 26, pp. 177-178; Joyner, *supra* note 4, p. 59.