

1997

Arms Control and Development

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Recommended Citation

Bonnie Jenkins & Theodore M. Hirsch, *Arms Control and Development*, 31 INT'L L. 561 (1997)
<https://scholar.smu.edu/til/vol31/iss2/35>

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PUBLIC INTERNATIONAL LAW

Arms Control and Development

BONNIE JENKINS AND THEODORE M. HIRSCH

I. Nuclear Weapon-Free Zones

Significant progress has been made over the past year in establishing and supporting regional nuclear weapon-free zones (NWFZ). There are four existing NWFZ treaties covering populated areas: (1) the Treaty for the Prohibition of Nuclear Weapons in Latin American (the Treaty of Tlatelolco),¹ (2) the South Pacific Nuclear Free Zone Treaty (the Treaty of Rarotonga),² (3) the African NWFZ Treaty (the Treaty of Pelindaba),³ and (4) the Southeast Asia NWFZ Treaty.⁴ These treaties, which cover most of the territory in the Southern Hemisphere, prohibit States Parties, *inter alia*, from testing, manufacturing, or otherwise acquiring a nuclear explosive device. Coupled with security assurances to be provided by nuclear weapons states through adherence to treaty protocols, these treaties serve to reduce incentives for proliferation by providing regional states with a safer and more predictable security environment.

The more than 170 states that attended the Non-Proliferation Treaty (NPT)⁵ Review and Extension Conference in the spring of 1995 recognized the considerable security benefits of nuclear weapon-free zones. In a document adopted at the Conference without dissent, the NPT parties identified as a primary objective the establishment of internationally recognized nuclear weapon-free zones, and noted that adherence to the relevant protocols by the five declared nuclear weapon states (the United States, the United Kingdom, France, Russia, and China) is necessary for the zones to achieve their "maximum effectiveness."⁶ Assessing the

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1. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 6 I.L.M. 521 (1967) 521 (1967).

2. South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 24 I.L.M. 1440 (1985).

3. African Nuclear Weapon-Free Zone Treaty, June 1995, 35 I.L.M. 702 (1996).

4. Southeast Asia Nuclear Weapon-Free Zone Treaty, Dec. 1995, 35 I.L.M. 639 (1996).

5. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 7 I.L.M. 809 (1968).

6. 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, May 11, 1995, 34 I.L.M. 961 (1995).

progress made in meeting this objective will be on the agenda when the NPT parties reconvene in April 1997 to begin preparation for the 2000 NPT Review Conference.

A. SOUTH PACIFIC NUCLEAR FREE ZONE TREATY

In March 1996, the United States, the United Kingdom, and France signed the three protocols of the South Pacific Nuclear Free Zone Treaty (SPNFZ). Protocol I, which is open only to these three states, requires each of its parties to apply the key provisions of the SPNFZ Treaty to territories within the zone for which it is internationally responsible. Protocol II parties commit "not to use or threaten to use any nuclear explosive device" against the parties to the Treaty or the territories referred to in Protocol I. This commitment, which is contained in protocols to each of the four existing NWFZ treaties, is known as a "negative security assurance." Finally, Protocol III prohibits the testing of nuclear weapons by any of its members within the nuclear-free zone. Protocols II and III are open to all five nuclear weapon states, and were previously signed by Russia and China.

The United States maintained well before its signature that it was abiding by the terms of the 1985 SPNFZ Treaty and its protocols. Its delay in signing the protocols stemmed largely from its desire not to isolate France, which was still testing nuclear weapons within the zone and therefore unwilling to sign Protocol III. Early in 1996, France joined the United States, the United Kingdom, and Russia in observing a moratorium on further nuclear tests. With the barrier of French testing removed, and with negotiations for a Comprehensive Test Ban Treaty underway in Geneva, the United States, the United Kingdom, and France each signed the three protocols on March 25, 1996. The protocols are expected to be submitted early in 1997 to the Senate for its advice and consent to ratification.

B. THE AFRICAN NUCLEAR WEAPON-FREE ZONE TREATY

The African Nuclear Weapon-Free Zone Treaty, approved by members of the Organization of African Unity in 1995, was opened for signature in April 1996. It will enter into force upon deposit of the 28th instrument of ratification. The creation of a nuclear weapon-free zone in Africa became possible when South Africa dismantled its nuclear arsenal and joined the NPT as a non-nuclear weapon state in 1991. While closely resembling the South Pacific Nuclear Free Zone, the African NWFZ not only prohibits the manufacture, but also the research on and development of, nuclear weapons by states parties. As is the case with the NWFZ treaties, the African treaty also bans the stationing of nuclear weapons on the territory of a state party. The three protocols of the African NWFZ Treaty are essentially the same as those found in the SPNFZ accord, although in different order.

The United States signed Protocols I (the negative security assurance) and II (the testing restriction) on the day that the African NWFZ Treaty was opened for signature. They are likely to be transmitted for advice and consent by the Senate early this year. The United Kingdom, France, and China have also signed Protocols I and II. Protocol III, which requires each of its parties to apply the key provisions of the Treaty, including the stationing prohibition, to its territories within the zone, is open for signature only by France and Spain. The United Kingdom is not listed as eligible to sign Protocol III, despite the fact that the British Indian Ocean Territories (BIOT), which include Diego Garcia, appear on the map of the zone in Annex I. Accordingly, the Treaty's prohibition on nuclear stationing, which might otherwise have presented a problem for U.S. operations at the Diego Garcia naval base, does not apply to the base or the rest of the BIOT.

C. THE SOUTHEAST ASIA NUCLEAR WEAPON-FREE ZONE TREATY (SEANWFZ)

At a summit of the Association of Southeast Asian Nations (ASEAN) in December 1995, the Southeast Asia NWFZ Treaty (SEANWFZ) was signed by the ten states in the region.⁷ The Treaty will enter into force once it has been ratified by seven of these states. The Treaty has a single protocol, which is open for signature by the five nuclear weapon states. The Protocol omits any reference to nuclear testing but includes an expanded negative security assurance. Specifically, it prohibits Protocol parties from using or threatening to use nuclear weapons against not only the territory of Treaty parties, but anywhere within the zone. Consequently, a nuclear weapon state that adhered to the Protocol would be providing negative security assurances not only to states that had accepted the Treaty's obligations, but also to nonparty regional states and to the armed forces of extra-regional states situated within the zone. This departure from other NWFZ treaties, those which limit the scope of security assurances to treaty parties, is largely responsible for the failure of any nuclear weapon states to sign the SEANWFZ Protocol to date.

There are at least two ways that the ASEAN states could resolve the concerns of the nuclear weapon states on this matter. First, they could revise the Treaty to define the zone as limited to the territories of Treaty parties, as opposed to the territory of all the states in the region and their respective Exclusive Economic Zones and Continental Shelves.⁸ This would, however, involve either reopening a Treaty text that has already been approved by the region's heads of state, or amending the Treaty once it has entered into force. The members of ASEAN, including its present chairman Malaysia, have dismissed revision of the Treaty as a nonstarter. They have, however, suggested that there may be more room for flexibility with respect to the Protocol. Excision of the sentence prohibiting Protocol parties from using or threatening to use nuclear weapons "within the zone," while retaining the ban on such acts of aggression against Treaty parties, would bring the SEANWFZ Protocol into line with the other NWFZ treaties. As of this writing, ASEAN and the nuclear weapon states continue to explore changes to the Protocol that would resolve this problem.

II. Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons

On July 6, 1996, the International Court of Justice (ICJ) handed down an advisory opinion⁹ on whether the use, or threat of use, of nuclear weapons is legal under any circumstance. A split Court ruled that, while such a threat or use would "generally be contrary to the rules of law applicable in armed conflict," it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." The Court went on to declare

7. The ten regional states are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Burma, the Philippines, Singapore, Thailand, and Vietnam.

8. The "exclusive economic zone" and "continental shelf" of a coastal state, as defined in the U.N. Convention on the Law of Sea, extend well beyond that state's 12-mile territorial sea. The use of these terms in the security context of the SEANWFZ Treaty has raised separate concerns, since they are generally reserved for economic or natural resource-related matters. Removal of these terms from the Treaty would therefore kill two birds with one stone. The odds of revising the Treaty, however, are slim. As of this writing, the relevant states are engaged in an effort to draft a separate agreed statement related to the Treaty that would address this matter.

9. International Court of Justice: Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 814 (1996).

unanimously that “the most appropriate means” of resolving the legal status of nuclear weapons would be complete nuclear disarmament in accordance with Article VI of the NPT.

In reaching its conclusions, the Court focused on the three sources of international law that it found most relevant: (1) the United Nations Charter, (2) rules directly addressing nuclear weapons, and (3) the international law of armed conflict. Regarding the U.N. Charter, the Court found that the prohibition on “the threat or use of force against the territorial integrity or political independence of any state,” contained in Article 2(4), applies with equal force to aggression with any type of weapon, including nuclear. Similarly, it found that the inherent right of individual or collective self-defense, recognized in Article 51, does not exclude the use of nuclear weapons for this purpose. Any such use, however, would have to meet the tests of necessity and proportionality. While acknowledging that “the very nature of nuclear weapons” would pose problems of proportionality in most cases, the Court stopped short of declaring their use as inconsistent with the Charter in all circumstances.

The Court next turned to the rules of international law dealing directly with recourse to nuclear weapons. Of these, it found two treaties particularly significant: the Treaty of Tlatelolco and the Treaty of Rarotonga, establishing nuclear weapon-free zones (NWFZs) in Latin America and the South Pacific respectively. Each of these treaties contains a protocol, signed by the five recognized nuclear weapon states, barring the threat or use of nuclear weapons against Treaty parties. In addition, each of the nuclear weapon states has separately provided such a “negative security assurance to the more than 175 non-nuclear weapon state parties to the NPT. These assurances, however, are not unconditional. The Court notes that “the nuclear-weapon States have reserved the right to use nuclear weapons [against the recipient of the assurance] in certain circumstances,” *e.g.*, when the recipient engages in an armed attack against an ally with the support of a nuclear weapon state. Given these exceptions, as well as the less than global reach of existing NWFZs, the Court determined that there was no “universal conventional prohibition on the use, or the threat of use, of [nuclear weapons] as such.” Nor did it find that, despite the fifty-year hiatus in the use of nuclear weapons, such a prohibition had arisen under customary international law.

The ICJ opinion relies most heavily on the international laws of armed conflict, particularly as it relates to humanitarian law and the law of neutrality. International humanitarian law provides, *inter alia*, for the protection of civilians in armed conflict and for the prevention of unnecessary suffering by combatants. The principle of neutrality protects neutral states against collateral damage caused by a belligerent. While the Court found the use of nuclear weapons “scarcely reconcilable” with these principles, it recognized that these principles must be understood in the context of Article 51 of the U.N. Charter. Accordingly, it declined to rule out the legality of the threat or use of nuclear weapons “in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.”

As mentioned above, the Court unanimously called for complete nuclear disarmament, in accordance with Article VI of the NPT, as the “most appropriate means” to resolve the issue before it. Article VI states that:

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

The Court characterizes the Article VI obligation regarding nuclear disarmament as containing two components: the *pursuit* and the *conclusion* of this end. The obligation of NPT parties, it

declares, is not one of "mere" conduct but of achieving "a precise result." From a legal standpoint, the Court's opinion does not appear to add anything to the existing Article VI obligation that negotiations be carried out "in good faith." Moreover, its discussion of Article VI is dictum, as it follows the Court's main conclusion regarding the question before it, *i.e.*, whether the threat or use of nuclear weapons is legally permissible under any circumstance. Nonetheless, it is expected that the Court's opinion will fuel charges of nuclear weapon state noncompliance with Article VI at the NPT Preparatory Committee meeting in spring 1997, as well as in other arms control fora.

III. The Nuclear Nonproliferation Treaty

The Nuclear Nonproliferation Treaty was extended indefinitely by the 1995 Review Conference of States Parties. That same Conference adopted, without objection, decisions on "Principals and Objectives for Nuclear Non-Proliferation and Disarmament" and on "Strengthening the Review Process for the Treaty."¹⁰ The principals and objectives identified by the Conference include universal adherence to the NPT, establishment of further nuclear weapon-free zones, strengthening of nuclear safeguards, and the taking of steps toward nuclear disarmament, such as conclusion of a Comprehensive Test Ban Treaty and further arms reduction agreements among the nuclear weapon states. Under the strengthened review decision, NPT Review Conferences are to be held every five years, with at least three Preparatory Committee meetings convened prior to the 2000 Review Conference. In addition to serving their usual procedural function, these Committees are charged with evaluating progress on meeting the agreed principals and objectives, and making substantive recommendations to the upcoming Review Conference based on this evaluation. The first Preparatory Committee meeting is scheduled in New York for April 1997.

IV. Nonproliferation Developments in the United States–China Relationship

The United States held several high-level meetings with Chinese officials in 1996 to address, *inter alia*, China's apparent assistance to nuclear and missile programs in Pakistan and Iran. In particular, the U.S. Government expressed its concern that, in late 1995, Chinese entities had transferred to Pakistan specialized ring magnets useful in enriching uranium for weapons. This prompted a series of urgent meetings at which the possibility of U.S. sanctions was raised. The Clinton administration decided, ultimately, that the relevant sanctions law had not been triggered, but only after the Chinese Government denied knowledge of the transfer and issued a public statement that it would not provide assistance to unsafeguarded nuclear facilities in the future. In addition, China has committed to the United States that it will develop comprehensive export controls to prevent the unauthorized transfer of sensitive equipment in the future. Despite the overall warming of relations between the United States and China at the end of 1996, proliferation concerns regarding assistance to Pakistan and Iran persist.

10. Final Document, *supra* note 7, (1995) at 968, 969. The Conference also adopted that day a resolution calling for states in the Middle East to take practical steps toward establishing a Middle East Zone free of Weapons of Mass Destruction. *Id.* at 973. While talks continue among Middle East parties as part of the Arms Control and Regional Security (ACRS) dialogue, establishing such a zone remains a long-term objective.

V. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction (CWC)

The goal of the Chemical Weapons Convention (CWC)¹¹ is to completely eliminate the possibility of the use of chemical weapons. This goal is implemented through the provisions of the Convention. The CWC was signed on January 13, 1993, by President Bush and leaders from 129 other countries. Currently, 160 states have signed the Treaty, and sixty-seven states have ratified the Treaty, not including the United States or Russia. The CWC obligates States Parties to destroy all chemical weapons it owns or possesses (located any place under its jurisdiction or control), destroy all chemical weapons it abandoned on the territory of another State Party, destroy all chemical weapons production facilities it owns or possesses under its jurisdiction or control, and not use riot control agents as a method of warfare. In addition, States Parties to the Convention cannot develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer chemical weapons to anyone. States Parties cannot use chemical weapons, engage in any military preparation to use chemical weapons, and cannot assist, encourage, or induce anyone to engage in any activity prohibited to a State Party under the Convention.¹²

According to the entry into force provisions of the Treaty, the CWC shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification.¹³ The 65th ratification came when Hungary ratified the Treaty on October 31, 1996. The CWC will enter into force on April 29, 1997.

The administration submitted the CWC to the Senate Foreign Relations Committee for Senate advice and consent to ratification on November 23, 1993. After a series of hearings on the Treaty, the Senate Foreign Relations Committee approved a resolution of ratification by a bipartisan vote of thirteen to five. However, due to reservations expressed by some Senators prior to the Convention reaching the floor of the Senate as scheduled for September 11, 1996, the Convention was not voted on since it appeared that the required two-thirds Senate approval required for advice and consent to ratification was not likely at that time. The administration, however, remains committed to securing Senate advice and consent prior to April 29, 1997.

If the United States is not a Treaty party, allies and other trading partners that are parties to the Treaty are obligated to apply trade restrictions to chemicals that originate in the United States or are being shipped to the United States.¹⁴ The United States also cannot participate in the Organization for the Prohibition of Chemical Weapons (OPCW) in The Hague, which is the implementing body of the Treaty. However, it should be noted that the United States, by domestic law, is obligated to destroy the bulk of the United States chemical weapons stockpile by the year 2004.¹⁵ That process is well underway.

VI. The Comprehensive Test Ban Treaty

The goal of the Comprehensive Test Ban Treaty (CTBT)¹⁶ is the cessation of all nuclear weapon test explosions and all other nuclear explosions. The Treaty was negotiated at the

11. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 32 I.L.M. 800 (1993) [hereinafter CWC].

12. *Id.* at 804.

13. CWC, *supra* note 11, at 821.

14. *Id.* at 854, 859, and 862.

15. 22 U.S.C. § 2751 (1981).

16. 50 U.S.C. § 1521 (1985).

Conference on Disarmament (CD) in Geneva, Switzerland. There are sixty-one Member States in the CD, all of whom took part in the negotiation of the CTBT.

Intensive negotiations in the CD for over two years produced a generally agreed CTBT text. However, on August 16, 1996, the CD failed to reach consensus to forward the CTBT text to the United Nations for adoption due to objections by India. India's two main concerns which it continues to express are: (1) the preamble to the Treaty does not have a time-bound commitment by nuclear weapons states to nuclear disarmament, and (2) India's dissatisfaction with the entry into force article of the CTBT. The entry into force article provides that forty-four specific states must ratify the Treaty before the Treaty can enter into force. (These states include the United States, the Russian Federation, the United Kingdom, China, France, India, Israel, and Pakistan.) On this point, India objected to the inclusion of itself as one requiring ratification before the CTBT can enter into force. In addition, the Treaty provides that if the CTBT has not entered into force three years after the date of anniversary of opening of the Treaty for signature (September 24, 1996), the states that have ratified the CTBT can convene a Conference to decide what measures consistent with international law should be undertaken to accelerate ratification. India has asserted its fear that a decision would be made at this Conference that sanctions should be instituted against it if it has not yet ratified the Treaty by that time. It should be noted that the Treaty can enter into force no earlier than September 24, 1995.

After the inability to reach consensus at the CD to forward the Treaty to the United Nations for adoption, it was decided by some states in the CD that the CTBT should be taken to the United Nations where it could be endorsed by the General Assembly. The Australian Foreign Minister announced that Australia would sponsor a resolution seeking the endorsement from the United Nations General Assembly of the CTBT and for its opening for signature at the earliest possible date.

On September 10, the UNGA voted to adopt the CTBT and open it for signature at the earliest possible date. One hundred fifty-eight countries voted in favor of the CTBT and three against it, with five nations abstaining. India, Libya, and Bhutan opposed the CTBT while Cuba, Lebanon, Syria, Mauritius, and Tanzania abstained.

The CTBT was opened for signature on September 24, 1996. The Treaty was signed by President Clinton that day (the first world leader to sign the Treaty), along with leaders from more than sixty states. Presently, over 135 states have signed the CTBT, and it has been ratified by Fiji. Of the forty-four states that must ratify the CTBT before it can enter into force, only India, Pakistan, and North Korea have not signed the Treaty.

VII. The Treaty on Conventional Armed Forces in Europe

The Treaty on Conventional Armed Forces in Europe (CFE)¹⁷ was signed in 1990 and entered into force in 1992. The objective of this Treaty is to establish an equal level of conventional military equipment for the members of NATO and the former Warsaw Pact. These levels were to be reached mainly through the reduction, conversion, and reclassification of conventional armaments to prescribed levels that are to be held by each State Party. By the end of the forty-month reduction period prescribed by the Treaty (November 1995), the thirty States Parties completed and verified by inspection and destruction, conversion or reclassification, more than 50,000 battle tanks, armored combat vehicles, artillery, combat aircraft, and attack helicopters.

17. Treaty on Conventional Armed Forces in Europe, Nov. 19, 1990, 30 I.L.M. 1 (1991).

There are thirty States Parties to the Treaty, representing NATO, the ex-Warsaw Pact, and the Newly Independent States of the former Soviet Union. At the first CFE Treaty Review Conference in May 1996, the States Parties agreed to begin looking at ways to adapt the Treaty to the new security situation in Europe. Despite the continued viability of the Treaty, it was realized that parts of the Treaty must be adapted to changes in the geopolitical landscape in Europe. Adaptation negotiations will begin in January 1997 in Vienna, Austria, and will last approximately two years. Among the specific topics to be considered for Treaty adaptation are: adjustment of the Treaty's group structure, which currently divides the parties into a Western (NATO) group and an Eastern (former Warsaw Pact) group; and means to assure the full functioning of the Treaty in situations of crisis and conflict.

Until the entry into force of agreed adapted Treaty text, the current Treaty and its associated documents will remain in full force.

VIII. Annex 1-B of the General Framework Agreement

The four-year conflict in the former Yugoslavia finally culminated in the General Framework Agreement (GFA) for Peace in Bosnia and Herzegovina¹⁸ which entered into force on December 14, 1995. The goal of the GFA is to create and maintain stability in the region encompassed by the Republic of Bosnia and Herzegovina, the Republic of Croatia, and the Federal Republic of Yugoslavia.

Annex 1-B of the GFA is titled "Agreement on Regional Stabilization."¹⁹ It consists of five articles, three of which obligate the five Parties to establish arms control and confidence-building agreements to foster stability in the region.

Article II of Annex 1-B provides that the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Sprska shall negotiate an agreement to enhance mutual confidence and reduce the risk of conflict in their region. These three Parties began these negotiations in December 1995 and the negotiations resulted in the Agreement titled "Agreement on Confidence- and Security-Building Measures in Bosnia and Herzegovina," which was signed on January 26, 1996, by the three Parties.²⁰ It entered into force for the three Parties upon signature of the Agreement. This agreement encompasses many confidence-building measures. Confidence-building measures include verification of military activities through such things as intrusive inspections, information exchange of data on military forces, and monitoring weapons capabilities.

Article IV of Annex 1-B obligates all five Parties to negotiate an agreement that will limit the tanks, artillery, armored combat vehicles, combat aircraft, and attack helicopters of each Party. The negotiations on an Agreement pursuant to Article IV of Annex 1-B of the General Framework Agreement also began in December 1995. The negotiations resulted in the "Agreement on Sub-Regional Arms Control," which was signed on June 14, 1996, by all five Parties (the pace of negotiations for Article IV was in accordance with the schedule outlined in the GFA, which required that the Article II negotiations be completed first), and entered into force for the five Parties upon signature of the Agreement. The Agreement provides that

18. General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996) [hereinafter GFA].

19. *Id.* at 108.

20. Agreement on Confidence- and Security-Building Measures in Bosnia and Herzegovina, art. II, *adopted pursuant to GFA, supra* note 18, Annex 1-B, art II, 35 I.L.M. at 108.

any tanks, artillery, armored combat vehicles, combat aircraft, and attack helicopters that are held by each of the five Parties that are above the agreed numerical limit for each Party (as specified in the Agreement) would have to be reduced or destroyed. The agreement also provides for notifications and inspections to verify those reductions and destructions.

Article V of Annex 1-B provides that the five Parties shall conduct negotiations to establish a regional balance in and around the former Yugoslavia. The phrase "in and around the former Yugoslavia" has been interpreted to mean that states outside the former Yugoslavia may be asked to participate in these negotiations to promote stability in the area described in Article V of Annex 1-B. At the present time, it has not been decided what states will actually participate in these negotiations along with the five Parties to the GFA, nor when these negotiations will begin.

