

## Background Briefing

### International law with respect to nuclear weapons

This background briefing is intended to provide reference to primary legal materials with regard to the regulation of nuclear weapons.

Since the explosion of the first atomic bomb on Hiroshima in 1945, the world has recognised that nuclear weapons constitute a potentially catastrophic threat to international peace and security. To address this danger, a number of initiatives have been adopted to maintain peace and security of the international community including economic sanctions, diplomatic conferences and international treaties.

### The Nuclear Non-Proliferation Treaty 1968

The Nuclear Non-Proliferation Treaty 1968 (NPT) (<http://disarmament.un.org/TreatyStatus.nsf>) which came into force on 5 March 1970, is the most important multilateral attempt to control the horizontal spread of nuclear weapons. To date, 189 parties have joined the NPT including the five nuclear-weapon States (see <http://disarmament.un.org/TreatyStatus.nsf>).

The core obligations adopted by the NPT are as follows:

- Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices. **(Article I)**
  
- Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices. **(Article II)**
  
- Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. **(Article III, 1.)**

■ Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this article. **(Article III, 2.)**

■ All the Parties to the Treaty undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world. **(Article IV)**

■ Each party to the Treaty undertakes to take appropriate measures to ensure that, in accordance with this Treaty, under appropriate international observation and through appropriate international procedures, potential benefits from any peaceful applications of nuclear explosions will be made available to non-nuclear-weapon States Party to the Treaty on a non-discriminatory basis and that the charge to such Parties for the explosive devices used will be as low as possible and exclude any charge for research and development. Non-nuclear-weapon States Party to the Treaty shall be able to obtain such benefits, pursuant to a special international agreement or agreements, through an appropriate international body with adequate representation of non-nuclear-weapon States. Negotiations on this subject shall commence as soon as possible after the Treaty enters into force. Non-nuclear-weapon States Party to the Treaty so desiring may also obtain such benefits pursuant to bilateral agreements. **(Article V)**

■ 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. **(Article VI)**

The 1968 Nuclear Non-Proliferation Treaty, together with the International Atomic Energy Agency (IAEA) safeguard system (<http://www.iaea.org>), constitute the central bargain of current non-proliferation in exchange for eventual nuclear disarmament. The IAEA's mission is guided by the interests and needs of Member States, strategic plans and the vision embodied in the IAEA Statute (<http://www.iaea.org/About/statute.html>). Three main pillars or areas of work underpin the IAEA's mission: safety and security; science and technology; and safeguards and verification. However, the NPT imposes no explicit penalty for non-compliance. Nuclear weapon States have all extended negative security assurance to non-nuclear weapon State Parties to the NPT.

## **The Comprehensive Nuclear Test-Ban Treaty 1996**

The Comprehensive Test Ban Treaty 1996 (CTBT) (<http://disarmament.un.org/TreatyStatus.nsf>), adopted on 10 September 1996 by the United Nations General Assembly in New York but not yet into force, is similarly important with regard to controlling the spread of nuclear weapons. The CTBT has now been signed by 177 States including the five nuclear-weapon States and ratified by 137 States (<http://www.ctbto.org/>).

The CTBT imposes the following international obligations:

- Each State Party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control. Each State Party undertakes, furthermore, to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion. **(Article I)**

- Each State Party shall, in accordance with its constitutional processes, take any necessary measures to implement its obligations under this Treaty. In particular, it shall take any necessary measures: (a) to prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Treaty; (b) to prohibit natural and legal persons from undertaking any such activity anywhere under its control; and (c) to prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any such activity anywhere. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1. Each State Party shall inform the Organization of the measures taken pursuant to this Article. In order to fulfil its obligations under the Treaty, each State Party shall designate or set up a National Authority and shall so inform the Organization upon entry into force of the Treaty for it. The National Authority shall serve as the national focal point for liaison with the Organization and with other States Parties. **(Article III)**

- Each State Party undertakes in accordance with this Treaty to cooperate through its National Authority established pursuant to Article III, paragraph 4, with the Organization and with other States Parties to facilitate the verification of compliance with this Treaty by, *inter alia*: (a) establishing the necessary facilities to participate in these verification measures and establishing the necessary communication; (b) providing data obtained from national stations that are part of the International Monitoring System; (c) participating, as appropriate, in a consultation and clarification process; (d) permitting the conduct of on-site inspections; and (e) participating, as appropriate, in confidence-building measures. **(Article IV, 3.)**

- States Parties may also separately establish cooperative arrangements with the Organization, in order to make available to the International Data Centre supplementary data from national monitoring stations that are not formally part of the International Monitoring System. **(Article IV, 27.)**

■ Without prejudice to the right of any State Party to request an on-site inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, among themselves or with or through the Organization, any matter which may cause concern about possible non-compliance with the basic obligations of this Treaty. **(Article IV, 29)**

■ A State Party that receives a request pursuant to paragraph 29 directly from another State Party shall provide the clarification to the requesting State Party as soon as possible, but in any case no later than 48 hours after the request. The requesting and requested States Parties may keep the Executive Council and the Director-General informed of the request and the response. **(Article IV, 30)**

■ A State Party shall have the right to request the Director-General to assist in clarifying any matter which may cause concern about possible non-compliance with the basic obligations of this Treaty. The Director-General shall provide appropriate information in the possession of the Technical Secretariat relevant to such a concern. The Director-General shall inform the Executive Council of the request and of the information provided in response, if so requested by the requesting State Party. **(Article IV, 31)**

■ A State Party shall have the right to request the Executive Council to obtain clarification from another State Party on any matter which may cause concern about possible non-compliance with the basic obligations of this Treaty. In such a case, the following shall apply: (a) the Executive Council shall forward the request for clarification to the requested State Party through the Director-General no later than 24 hours after its receipt; (b) the requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case no later than 48 hours after receipt of the request; (c) the Executive Council shall take note of the clarification and forward it to the requesting State Party no later than 24 hours after its receipt; (d) if the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain further clarification from the requested State Party. **(Article IV, 32)**

Given a specific time frame for achievement, the CTBT underscores the importance of the test ban to the health of the NPT regime. The relationship between the CTBT and the NPT is, therefore, explicit.

### **Advisory Opinion of the International Court of Justice on the Legality of the Threat or use of Nuclear Weapons**

The International Court of Justice (ICJ) (<http://www.icj-cij.org/>) states that –

"international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapons in general or in certain circumstances, in particular those of the exercise of legitimate self-defence."

The ICJ further adds it cannot be concluded that –

"the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons..."

In this respect it seems that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings.

"On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law."

The use of nuclear weapons would be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition:

"That view lay at the basis of the assertions by certain States before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict."

As the Court indicated, the principles and rules of law applicable in armed conflict, at the heart of which is the overriding consideration of "humanity" make the conduct of armed hostilities subject to a number of strict requirements.

In the long run, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament.

"The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith."

However, without a clear explanation on the legality of use in "extreme circumstances of self-defence in which the very survival of the State [was] at stake", it cannot be said that the ICJ has clarified the position in international law regarding the legality of nuclear weapons.

## **Current State Practice**

## China

Rather than following any normative set of internationally recognised standards, Chinese nuclear proliferation policies prior to the late 1990s were inconsistent. However, during the last decade China has signed the NPT on 9 March 1992, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (<http://disarmament.un.org/TreatyStatus.nsf>) on 13 January 1993 and the CTBT on 24 September 1996. In 1997, China joined the Zangger Committee under the NPT which committed to coordinate nuclear export policies.

Apart from international legal obligations, China also supports the negotiation of a ban on the production of fissile materials for nuclear weapons and other nuclear explosive devices. In 1995, China announced its decision not to sell two nuclear reactors to Iran, possibly in response to the Joint Statement of the United States of America and the People's Republic of China on Stopping the Production of Fissile Materials for Nuclear Weapons. (a word file save at D drive entitled U.S. and China: Curbing Missile and Nuclear Weapons Proliferation) One member of the US Congress in 1996 criticized the Chinese pledge as an "empty promise", though the Clinton administration insisted "there was no evidence that China was violating its May 11 1996 pledge not to supply illegal technology to Pakistan or Iran". There is no question that China's non-proliferation practices are significantly closer to US preferences than they were a decade ago.

## North Korea

North Korea acceded to the NPT on 12 December 1985. In 1994, US and North Korea signed an 'Agreed Framework' (<http://www.isis-online.org/publications/dprk/book/af.html>) bringing North Korea into full compliance with its non-proliferation obligations under the NPT. North Korea affirmed its NPT member status and committed to allow implementation of its IAEA safeguards agreement. However, in January 2003, North Korea announced its intention to withdraw immediately from the NPT and notified the Security Council to this effect. In September 2005, the fourth round of Six-Party Talks released a joint statement to the effect that North Korea had committed to 'abandoning all nuclear weapons and existing nuclear programs.' On 9 October 2006, North Korea conducted an underground nuclear weapon test, raising questions as to the legal validity of the test.

If North Korea were still a party to the NPT, its nuclear weapons testing would violate Article II of the NPT which states that a "non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices."

Article X (1) of the NPT states that three months' notice shall be given for withdrawal from the treaty. This requirement needs to be understood as a promise to give three months' notice rather than as a condition that would have to be met in order to make the withdrawal active. North Korea withdrawal from the NPT was likely to be legally effective after three months' notice period had passed. Therefore, legally, North Korea cannot be seen as a party to the NPT. Is North Korea bound by its commitment made in the fourth round of Six-Party Talks? The ICJ concluded [which case??] that under certain circumstances, a State's unilateral declaration could establish an obligation under international law. However, such a declaration should meet two prerequisites:

- to be made in public;
- to be made with the intention of being bound thereby.

The North Korean declaration was made in private negotiations and then released as part of the joint statement. Secondly, North Korea's declaration was not necessarily made in such a way as to indicate an intention to be bound. It is, therefore, arguable that the North Korean commitment does not constitute a legal obligation under international law.

The Security Council has the power to impose economic sanctions so long as the situation constitutes a threat to international peace and security. To this end the Security Council, invoking Chapter VII of the United Nations Charter, unanimously adopted Resolution 1718. The Security Council demanded that North Korea "return to the NPT and decided that North Korea must abandon its nuclear weapons and nuclear programs, as well as its ballistic missile programs and any other weapons of mass destruction." Nevertheless, the effects of these sanctions remain unclear.

## **Iran**

Iran signed the NPT on 1 July 1968 and the CTBT on 24 September 1996. Iran does not consider the CTBT to be meaningful, unless it is considered as a step towards a phased programme for nuclear disarmament with specific time frames through negotiations on a consecutive series of subsequent treaties. Iran further comments on "National Technical Means" under the CTBT which states that –

"based on the deliberations that took place on the issues in the relevant Ad Hoc Committee of the Conference on Disarmament in Geneva, we interpret the text as according a complementary role to them and reiterate that they should be phased out with further development of the International Monitoring System. National Technical Means should not be interpreted to include information received from espionage and human intelligence.' Iran also claims its position against the inclusion of Israel in the Middle East South Asia grouping from UN practice and Israel's signature of the CTBT. Iran expresses 'strong reservation on the matter and believe that it will impede the implementation of the Treaty, as the confrontation of the States in this regional group would make it tremendously difficult for the Executive Council to form. The Conference of the States Parties would eventually be compelled to find a way to redress this problem."