



Viewpoint

Legality of the threat or use of nuclear weapons

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ABSTRACT

This paper examines international treaties in relation to the threat or use of nuclear weapons including the 1968 Nuclear Non-Proliferation Treaty and the 1996 Comprehensive Test Ban Treaty. It can be concluded that the effect of the aforesaid international treaties is still in doubt without explicit enforcement mechanisms and penalty for non-compliance. This paper also reviews the International Court of Justice's *advisory opinion on the legality of the threat or use of nuclear weapons* and comments that a clear explanation on the legality of use of nuclear weapons in 'extreme circumstances of self-defence' is required. Examples from current state practice in relation to nuclear non-proliferation efforts are also provided, with special attention to China, North Korea and Iran. This paper suggests that China as a leader of developing countries should extend its efforts on nuclear non-proliferation and conduct communication between North Korea and Iran and other nuclear weapons states to reduce or prohibit nuclear weapons.

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1. Introduction

There are two types of nuclear weapons, namely, bombs and projectiles. The effects of the atomic bomb are caused by breaking up of the atom by fission, while in the hydrogen bomb the atoms are made to fuse to one another by fusion. Another form of nuclear weapon is using atomic projectiles. Missiles fitted with nuclear warheads are thought to be used in new large-scale wars. Similarly, nuclear power may be used in torpedo, sea mine as well as in arming spacecraft (Castren, 1971).

The culture of using nuclear weapons to solve problems is said to be the primary threat to international peace and security. Spending on nuclear weapons is also a threat to economic recovery and other goals that require funds, in particular following the recent global economic collapse. To address this danger, a number of instruments are considered to have been assembled to maintain peace and security of the international community, such as economic sanction, diplomatic conference and international treaties (Graham, 2000). Arguably, none of the aforementioned instruments is considered to be effective. Legal control on numbers of nuclear weapons is only one form of international legal instrument (Edwards, 1984; Brownlie, 1965). The other is international treaty to correct perverse economic incentives that encourage investments in nuclear weapons such as the proposed Gross Peaceful Product.

This paper examines two international treaties in relation to the threat or use of nuclear weapons such as the 1968 Nuclear Non-Proliferation Treaty (NPT) and the 1996 Comprehensive Test Ban Treaty (CTBT). It is not difficult to conclude that the effect of the aforementioned treaties is still in doubt without explicit enforcement mechanisms and penalty for non-compliance. This paper also reviews the International Court of Justice's *advisory opinion on the legality of the threat or use of nuclear weapons* and comments that a clear explanation on the legality of use of nuclear weapons in 'extreme circumstances of self-defence' is required. Examples from current State practice in relation to nuclear non-proliferation are also provided, with special attention to China, North Korea and Iran.

2. International law with respect to nuclear weapons

2.1. The 1968 Nuclear Non-Proliferation Treaty

There is a network of international treaties that further reduces the field of who may use nuclear weapons and where such nuclear weapons may be used. The 1968 Nuclear Non-Proliferation Treaty is considered the most important and viable multilateral attempt to control the spread of nuclear weapons (Meyrowitz, 2000). Pursuant to the NPT, nuclear weapon States should not provide nuclear weapons to or encourage weapon development by non-nuclear weapon States (Article I of the NPT). With the understanding that all States may freely develop nuclear energy for peaceful utilisation, States without nuclear weapons agree not to acquire the said weapons (Article II of the NPT).

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For the purposes of verification and compliance with the NPT, each non-nuclear weapon State undertakes to accept safeguards established through subsequent negotiations with the International Atomic Energy Agency (IAEA) (Article III, 1 of the NPT). State Party should not provide source or special fissionable material, or 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 is subject to the safeguards required by the NPT (Article III, 2 of the NPT). All Contracting Parties are entitled to participate in the fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy (Article IV of the NPT).

State Party should take appropriate measures to ensure that 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 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 (Article V of the NPT). The foundation upon the NPT is that negotiations should be based on 'good faith' in which the cessation of the nuclear arms race and disarmament should under strict and effective international control (Article VI of the NPT). Although this has been ignored by nuclear weapons States, this provides the vision that is needed for any treaty to be effective and is not omitted by academics.

To respect national sovereignty, each Party has the right to withdraw from the NPT if it decides that extraordinary events relate to the subject matter of the NPT. The NPT together with the IAEA safeguard system is the central bargain of current non-proliferation in exchange for eventual nuclear disarmament (Graham, 2000). While the NPT provides no explicit penalty for non-compliance, the effort of the NPT is still in doubt. In addition, nuclear weapon States have all extended negative security assurance to non-nuclear weapon State Parties to the NPT, many were concerned that the NPT would remove the incentive for these nuclear weapon States to reduce their arsenals (Weeramantry, 2000; Kawaguchi, 1999).

2.2. The 1996 Comprehensive Test Ban Treaty

The 1996 Comprehensive Test Ban Treaty is similarly important with regard to controlling the spread of nuclear weapons, upon its entry into force. The CTBT prohibits the following activities: carrying out any nuclear weapons test or any other nuclear explosion, causing, encouraging or in any way participating in the aforesaid activities (Article I of the CTBT). State Party shall take any necessary measures to prohibit any of the aforesaid activities and shall cooperate with other States Parties to implement the obligations illustrated by the CTBT. Each State Party shall also designate or set up a national authority as the national focal point for liaison with the CTBT Organisation and with other States Parties (Article III of the CTBT).

A verification regime is established under the CTBT encompassing the following elements, an international monitoring system; consultation and clarification; on-site inspection and confidence-building measures. National authority of each State Party in reflecting on the aforementioned regime shall establish the necessary facilities accordingly (Article IV, 3 of the CTBT). State Parties 'may' establish cooperative arrangements in order to

make available supplementary data to the International Data Centre, this is, however, not compulsory (Article IV, 27 of the CTBT).

While any State requests an on-site inspection, State Parties should make an effort to clarify and resolve any matter which may cause concerned possible non-compliance with the CTBT (Article IV, 29 of the CTBT). State Party shall provide the clarification to the requesting State Party no later than 48 h after the request and 'may' keep the Executive Council and the Director-General informed (Article IV, 30 of the CTBT). If a State Party requests the Director-General to assist in clarifying any matter concerning the compliance of the CTBT, the Director-General shall provide appropriate information relevant to such a concern. Upon the State Party's requests, the Director-General shall inform the Executive Council of the request and of the information provided in response (Article IV, 31 of the CTBT).

If a State Party suspects another State Party may breach the basic obligations of the CTBT, it should have the right to request clarification via the Executive Council. The Executive Council shall, subsequently, forward the request for clarification to the requested State Party via the Director-General no later than 24 h. The requested State Party shall provide the clarification to the Executive Council no later than 48 h after receipt of the request. Should the requesting State Party deem the clarification to be inadequate, a further clarification is permitted (Article IV, 32).

Based on the aforesaid, the CTBT must be analysed in light of the NPT as they work hand in hand in promoting nuclear non-proliferation efforts. Many States that participated in the 1995 NPT Review Conference urged that the CTBT must be implemented as soon as possible to strengthen the NPT. It is important to note that future nuclear powers could become members of the CTBT but not the NPT and, therefore, could still perform many nuclear activities banned by the NPT not covered in the CTBT. In addition, lack of strong enforcement mechanisms in both the NPT and the CTBT has diminished the nuclear non-proliferation regimes' capacity of providing a framework effective enough to advance nuclear non-proliferation.

2.3. Weakness of the NPT and the CTBT

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. The role of international law as a basis for enforcement is a weak precedent, however, there seems to be a growing perception that international law should be followed (Koh, 1997). Due to the State sovereignty, each State has the power to pursue its own interests. It is, therefore, difficult to impose any set of international principles upon a State's interests at any given time. An example of the failure of international law to restrict State from violating treaties such as the NPT, the CTBT, is Iraq's lack of cooperation with nuclear non-proliferation efforts in the 1990s. Since becoming a signatory to the NPT, Iraq has virtually ignored all of its obligations (French, 1993; Crossette, 1999). This can be perceived as the inability of international law to effectively force a State to abide by its obligations.

In light of nuclear non-proliferation, many States question why they should unilaterally obey their duties under the United Nations Charter, while some States may freely renounce their obligations (Bork, 1989; Kirkpatrick, 1984). To strengthen the efforts of the NPT and the CTBT, the language of both treaties has to be clearer, in particular, the enforcement mechanisms and the consequences of breach. For example, the CTBT states that the Conference is allowed to determine if the reason given by the accused State befits the treaty language of "an extraordinary

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