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# **NORTH KOREA AND THE LEGALITY OF NUCLEAR TESTS UNDER INTERNATIONAL LAW**

## **ABSTRACT**

*In its quest to determine how much is enough to guarantee deterrence and the security of its nation, North Korea is running a tight line between deterrence and escalation. Given the enormity of the threat posed by North Korea's nuclear tests to the peace and stability of the region, the situation is wrought with political, diplomatic and military dimensions. It also poses a significant legal aspect, that is, whether the nuclear tests are legal. This legal dimension, which is the focus of this article, will condition the actions taken by most of the players in the unfolding crisis. A critical analysis of the legal regimes governing nuclear tests will be done to discern their legality or otherwise.*

**Key words:** International Law- North Korea- Security Council- Nuclear Tests- Weapons of Mass Destruction.

## I INTRODUCTION

A nuclear weapon is an explosive device that derives its destructive force from nuclear reactions, either fission (fission bomb) or from a combination of fission and fusion reactions (thermonuclear bomb)<sup>1</sup>. Nuclear weapons have been used twice in war, both times by the United States against Japan near the end of World War II<sup>2</sup>. A missile is a self-propelled guided weapon system, as opposed to an unguided self-propelled munition, which is referred to, as just a rocket<sup>3</sup>. There are five types of missiles: surface to surface; air to air; surface to air; air to surface; and anti-satellite missiles<sup>4</sup>. Missiles have the potential to carry and deliver Weapon of Mass Destruction (WMDs), in particular, nuclear weapons payload quickly and accurately. Hence, missiles are currently the focus of increased international attention, discussion and activity on the ways to curb threats to international peace and security<sup>5</sup>.

Since the early 1990s North Korea has been developing long-range missile technology capable of delivering nuclear warheads. To date, North Korea has conducted six nuclear tests. Its first underground nuclear test was conducted on 9th October 2006, with the sixth test conducted on 3<sup>rd</sup> September 2017. The sixth test had an explosive yield in excess of 100 kilotons. These nuclear tests are a problem for the United States and its allies in the region because the Intercontinental Ballistic Missile (ICBM) North Korea tested on 28<sup>th</sup> July 2017 had a range of about 10,400km that put Los Angeles, Denver

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<sup>1</sup> BETA Dictionary.com, Nuclear Weapon. Available at:

<http://dictionary.reference.com/browse/nuclear+weapon>. Accessed 14 September 2017.

<sup>2</sup> Over the Japanese city of Hiroshima on 6<sup>th</sup> August 1945, and three days later on 9<sup>th</sup> August 1945, over the Japanese city of Nagasaki.

<sup>3</sup> Wikipedia: Missiles. Available at: <http://en.wikipedia.org/wiki/Missile>. Accessed 12 Aug 2012.

<sup>4</sup> For example, cruise, ballistic, anti-aircraft, anti-ship, and anti-tank missiles.

<sup>5</sup> United Nations Office for Disarmament Affairs. See, Disarmament. Available at the United Nations Website: <http://www.un.org/disarmament/WMD/Missiles/>.

and Chicago within range<sup>6</sup>. Despite a large number of sanctions imposed on their nation as a result of previous missile-launch, the North Korean government is not deterred from carrying out nuclear tests. On 29 November 2017, North Korea launched its highest ever missile which it claims can hit the entire USA<sup>7</sup>. These nuclear tests raise grave questions on the role of the United Nations in maintaining peace and security in the world. This article will analyze the current legal regimes governing nuclear tests to discern their legality or otherwise.

## **II SOURCES OF INTERNATIONAL LAW BANNING NUCLEAR TESTS**

International law is generally accepted as laws that govern relations between nations in order to provide stability to trans-boundary problems. It is a set of rules for maintaining harmony between nations. The starting point for considering whether a State has breached its obligations at international law is always the principle of territorial sovereignty. Territorial sovereignty has been a cornerstone principle of international law since the emergence of the modern State system in the seventeenth century. According to this principle, a State is free to do whatever it pleases within its own territory, subject only to specific limitations imposed by international law itself. Therefore, unless North Korea has violated some specific obligations binding on it under international law, it is free to develop, build and maintain nuclear weapons and missile delivery systems within its territory. Indeed, each permanent member of the United Nations Security Council<sup>8</sup> has long done precisely that. Several other States

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<sup>6</sup> Arms Control Association, Chronology of North Korean Nuclear and Missile Diplomacy. Available at: <http://www.armscontrol.org>.

<sup>7</sup> BBC News. Available at: [http://www.bbc.com/news/world-asia-42162462?intlink\\_from\\_url=http://www.bbc.com/news/topics/cywd23g0gz5t/north-korea&link\\_location=live-reporting-story](http://www.bbc.com/news/world-asia-42162462?intlink_from_url=http://www.bbc.com/news/topics/cywd23g0gz5t/north-korea&link_location=live-reporting-story). Accessed on 29 November 2017 at 12:25pm

<sup>8</sup> All the permanent members of the Security Council have nuclear weapons, that is, China, France, Russia, the United Kingdom, and the United States.

have followed their example, for example, India and Pakistan are confirmed nuclear powers and Israel has a long-standing policy of deliberate ambiguity<sup>9</sup>.

Pursuant to Article 38 of the Statute of the International Court of Justice, there are four sources of international law. In hierarchical order, they are: treaties, customary international law, general principles of law, and judicial decisions and publications of *cognoscenti*. The most obvious question that arises is whether there exists a treaty that proscribes the testing of nuclear bombs. Two treaties restrict nuclear testing as such: the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Partial Test Ban Treaty, or PTBT)<sup>10</sup>, and the Comprehensive Test Ban Treaty (CTBT)<sup>11</sup>, which has not yet entered into force. However, North Korea is not a party to either of these treaties and thus does not have any direct legal obligations thereunder.

Participation in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT)<sup>12</sup> provides a firm basis for concluding that a non-nuclear State has surrendered its legal freedom to develop and acquire nuclear weapons<sup>13</sup>. Only a small handful of States are

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<sup>9</sup> A policy of deliberate ambiguity or policy of strategic ambiguity is the practice by a country of being intentionally ambiguous on certain aspects of its foreign policy or whether it possesses certain weapons of mass destruction. For example, Israel practices deliberate ambiguity over the issue of targeted killings, never confirming or denying whether Israel is involved in the deaths of suspected terrorists on foreign soil. The United Kingdom is deliberately ambiguous about whether its ballistic missiles submarines would carry out a nuclear counter-attack in the event that the government were destroyed by a nuclear first strike. Upon taking office, the incoming Prime Minister issues sealed letters of last resort to the commanders of the submarines on what action to take in such circumstances and the United States is deliberately ambiguous on the issue of whether US surface ships, such as destroyers, carry nuclear weapons. This led to a New Zealand ban of US Navy ships from its ports, however, the US has many ballistic missiles submarines that it has acknowledged to be equipped with nuclear warheads.

<sup>10</sup> Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 480 U.N. Treaty Series (U.N.T.S.) 43.

<sup>11</sup> Comprehensive Nuclear Test-Ban Treaty, opened for signature Sept. 24, 1996, 35 International Legal Materials (I.L.M.) 1439 (1996).

<sup>12</sup> Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161; Treaty on the Non-Proliferation of Nuclear Weapons, 21 UST 483 (1970).

<sup>13</sup> This is because Articles I, II and III of the NPT provide that Non Nuclear Weapons States (NNWS) are not to receive nuclear weapons from any transferor, and are not to manufacture or acquire them and

not parties to the NPT. North Korea acceded to the NPT in 1985, but in January 2003 became the only State to withdraw immediately from the treaty citing US aggression<sup>14</sup> and notified the Security Council of its withdrawal. If North Korea were still a party to the NPT, its testing of nuclear weapons would constitute a clear violation of Article II of the treaty, which states that, 'each non-nuclear-weapon State Party to the Treaty undertakes... not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices'<sup>15</sup>.

Customary international law which is another source of international law, consists of both State practice, which is anything a State does or says, or omits to do or say; and *opinio juris*, which is the belief that something is law. Simply stated, customary international law is that about which there exists international consensus. This engenders the questions of whether there is international consensus proscribing the testing of nuclear bombs, and the duration that States need to run these nuclear tests for it to become custom. Upon cursory research of nuclear weapons tests by the Nuclear Weapon States (NWS), it is seen that the United States tested their last nuclear bomb in 1992; Russia, 1990; United Kingdom, 1991; France, 1996; China, 1996; India, 1998; and Pakistan, 1998. North Korea, on the other hand, has been testing nuclear bombs since 2006. From this summation, a logical inference can be drawn that there exists a lack of extensive and uniform State action to prohibit the testing of nuclear bombs

With reference to judicial decisions as another source of international law, in 1996 the International Court of Justice (ICJ) provided to the United Nations General Assembly an advisory opinion in response to the question: 'Is the threat or use of nuclear weapons

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must accept the International Atomic Energy Agency (IAEA) safeguards on all nuclear materials on their territories or under their control. Furthermore, Nuclear Weapons States (NWS) are not to transfer to any recipient whatsoever nuclear weapons and not to assist, encourage, or induce any NNWS to manufacture or otherwise acquire them

<sup>14</sup> Due to the adoption of Security Council *Resolution 2094* of 07 March 2013.

<sup>15</sup> *Op.cit.*, at note 12.

in any circumstances permitted under international law?<sup>16</sup> The ICJ replied that the threat or use of nuclear weapons ‘would generally be contrary to the rules of international law<sup>17</sup>’. However, it further went on to hold that, ‘the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of the State would be at stake’<sup>18</sup>. In other words, the ICJ accepted the possibility that there might be circumstances in which the threat or use of nuclear weapons (and by logical extension, their acquisition and possession) would be lawful. Surely, then, North Korea must be within its legal rights to follow the example of other nuclear-armed States. On the surface, this looks like a straightforward question of the rule of law: How can there be one law for some States, and a different law for others?

### **III SECURITY COUNCIL RESOLUTIONS ON NORTH KOREA’S NUCLEAR TESTS**

There are special powers conferred on the Security Council by the United Nations Charter (Charter)<sup>19</sup>. The Charter is, of course, an international treaty imposing legal obligations on all member States. North Korea became a party to the Charter, and thus a member of the United Nations, in 1991.

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<sup>16</sup> Advisory Opinion *Concerning the Legality of the Threat or Use of Nuclear Weapons*. Available at the International Court of Justice Case Docket at the United Nations Website: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&p3=4&case=95>; *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, 1996, 35 ILM 809.

<sup>17</sup> *Ibid*, at pg. 823

<sup>18</sup> *Ibid*, at pg. 826

<sup>19</sup> Adopted 26 June 1945 and entered into force 24 October 1945. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

Available at: <http://www.un.org/aboutun/charter/index.html>. In addition, the Charter of the United Nations is always reprinted in the most current Volume of the Yearbook of the United Nations.

The Charter imposes important obligations and confers extraordinary powers on the Security Council. Article 24(1) states that the Security Council has ‘primary responsibility for the maintenance of international peace and security’ and that it acts on behalf of all members of the United Nations<sup>20</sup>. Article 39 provides that the Security Council ‘shall determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and shall make ‘recommendations’ or decide upon certain ‘measures’ in order ‘to maintain or restore international peace and security’. Under Art 41, ‘measures’ may include those ‘not involving the use of armed force’, and are such as may be ‘employed to give effect to its decisions’<sup>21</sup>.

Article 25 of the Charter imposes an obligation on all United Nations members ‘to accept and carry out the decisions of the Security Council’. Driving the point home, Article 103 makes a claim of supremacy for the Charter by providing that Charter obligations prevail over any other treaty-based obligations.

It is to be noted that the Security Council is not a judicial body<sup>22</sup> but a political organ, which like a domestic legislature may make a policy assessment of a situation and adopt legally binding measures in response. It is therefore not necessary for the Security Council to find that there has already been a breach of international law before adopting measures under Chapter VII (any more than it is necessary for the Nigerian Houses of Assembly to find a breach of the law before enacting legislation). It is only necessary that the Security Council form the view, based on an all-round assessment including political factors, that a particular situation constitutes a ‘threat to the peace’. Having

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<sup>20</sup> *Ibid*, Chapter VII of the Charter (Articles 39-51) is of particular significance.

<sup>21</sup> For example, the air transport embargo imposed on Libya for refusing to hand over the accused Lockerbie bombers for trial.

<sup>22</sup> The International Court of Justice is the principal judicial organ of the United Nations.



formed that view, it may adopt measures under Chapter VII of the Charter engaging an obligation of compliance under Article 25.

North Korea is currently in breach of several Security Council Resolutions addressed specifically to it and made under Chapter VII of the Charter<sup>23</sup>. To this end, three main Resolutions will be discussed. The first is Resolution 1718<sup>24</sup>, which the Security Council unanimously adopted on October 14, 2006, by invoking Chapter VII of the Charter. Resolution 1718 contains three clauses warranting greater attention. The first is the clause in operative paragraph 3 in which the Security Council demanded that North Korea ‘...immediately retract its announcement of withdrawal from the Treaty on the Non-Proliferation of Nuclear Weapons’<sup>25</sup>. This demand could be because the Security Council considers the withdrawal legally invalid and simply demands that North Korea publicly accept the fact that it has not validly withdrawn. However, this demand is best understood in a political sense, especially if read together with the demand to rejoin the treaty contained in paragraph 4 of the resolution: the Security Council apparently intended to demand that North Korea return to the NPT. This is also in line with previous Security Council statements<sup>26</sup>. The second clause is found in paragraph 4, in which the Security Council demanded ‘...further that North Korea return to the NPT and International Atomic Energy Agency (IAEA) safeguards’<sup>27</sup>. The expression appears to be intended to supplement the demand that North Korea return to the NPT itself (and not only to the safeguards). If read in this way, the Security Council for the first time requests a State to join a particular multilateral treaty. In Resolution 687<sup>28</sup>, the Security Council had only noted the importance of Iraq ratifying the Biological Weapons Convention(BWC), but did not explicitly demand Iraq’s accession. The third clause is in paragraph 6, where the Security Council decided ‘...that North Korea shall abandon all nuclear weapons and existing nuclear programmes in a complete, verifiable and irreversible manner, shall act strictly in accordance with the obligations applicable to parties under the NPT and the terms and

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<sup>23</sup> Other relevant Security Council Resolutions are not here discussed for reasons of space.

<sup>24</sup> Security Council *Resolution 1718* of 14 October 2006, para. 4.

<sup>25</sup> *Ibid*, para. 3.

<sup>26</sup> Security Council *Resolution 1695* (2006) contained a clause strongly urging North Korea return to the NPT and to IAEA safeguards

<sup>27</sup> *Op.cit*, note 24. See para. 4.

<sup>28</sup> Security Council *Resolution 687*, Apr. 3, 1990

conditions of its IAEA Safeguards Agreement and shall provide the IAEA transparency measures extending beyond these requirements, including such access to individuals, documentation, equipments and facilities as may be required and deemed necessary by the IAEA'<sup>29</sup>. Thus, the wording in Resolution 1718 is more direct than in Resolution 687. In 1991, the Security Council couched the legal obligations in the language of consent (Iraq had to 'accept' to 'undertake' or to 'agree' to certain steps), while in 2006 it simply spells out what North Korea has to do. Although these differences seem to be purely linguistic, this direct language is of great interest when read together with the obligations to retract the announcement of withdrawal from the NPT and to act in accordance with the obligations applicable to non-nuclear NPT parties. The Security Council seems thus to be more willing today to directly establish legal obligations stemming from multilateral treaties although, the Security Council does not, by itself, return North Korea to the NPT regime. Rather, as in the case of Iraq, it is North Korea that is required to return to the NPT. The resolution merely creates a NPT-like regime that is based not on any obligation under the NPT or Safeguard Agreements, but on a Security Council resolution under Chapter VII of the Charter<sup>30</sup>. Thus, from a legal perspective, resolution 1718 is unique in going beyond the detailed obligations imposed on Iraq in resolution 687 (1991).

The second resolution is Resolution 1874<sup>31</sup> through which in 2009, the Security Council, unanimously condemned North Korea's nuclear tests of May 2009. While resolution 1718<sup>32</sup> simply and briefly provided that all UN member states are called upon to take 'cooperative action, including thorough inspection of cargo to and from North Korea', resolution 1874<sup>33</sup> introduced much more detailed procedures for inspection of cargo<sup>34</sup>, their seizure and disposal. Although inspection of cargo to and from North Korea is still only 'call[ed] upon' and not 'demanded' or 'decided' in the terms used in resolution 1874<sup>35</sup>, once prohibited items are discovered through inspection, their seizure

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<sup>29</sup> *Op.cit*, note 24. See para. 6.

<sup>30</sup> Andreas L. P. & Jorn M., "Security Council Resolution 1718 on North Korea's Nuclear Test' *ASIL Insights* Vol10. Issue 29, Nov.2006

<sup>31</sup> Security Council *Resolution 1874* of 12 June 2009.

<sup>32</sup> *Op.cit*, note 24.

<sup>33</sup> *Op.cit*, note 31.

<sup>34</sup> Inspection is usually conducted on the territory of the member states but can also be conducted on the high seas if the flag state gives consent; and if consent is not given, the flag state is obliged to direct the vessel to proceed to a convenient port for inspection.

<sup>35</sup> *Op.cit*, note 31.

and disposal are mandatory. Resolution 1874 further established the Panel of Experts on North Korea in order to revitalize the 1718 Committee<sup>36</sup> after its relative inaction during the years of 2007 and 2008. This opened a new horizon as the first such panel in the field of non-proliferation-related sanctions. The panel is composed of seven members, including from all permanent members of the Security Council – unlike most other panels for sanctions committees – as well as from Japan and the Republic of Korea.

The third resolution is Resolution 2094<sup>37</sup> which was adopted on 7 March 2013 by the Security Council. The Security Council unanimously condemned North Korea's most recent nuclear weapons test, re-affirmed the demands of earlier Resolutions including those concerning nuclear weapons, ballistic missiles and North Korea's return to the NPT. According to the U.S. Ambassador to the United Nations, Susan Rice, these sanctions are the 'toughest yet' on North Korea. Indeed, they further strengthened the regime of economic, commercial and financial sanctions against North Korea. They also further inhibit North Korea's access to cash, blacklist several North Korean diplomats and officials with connections to the North's nuclear and missile programs or money laundering activities, as well as explicitly ban several luxury items. North Korean diplomatic personnel are to be the subjects of 'enhanced vigilance', in order to 'prevent such individuals from contributing to North Korea's nuclear or ballistic missile programmes, or other activities prohibited by' earlier Resolutions. The Security Council also decided that 'all States shall inspect all cargo within or transiting through their territory that has originated in (North Korea), or that is destined for [North Korea], or has been brokered or facilitated by [North Korea] or its nationals, or by individuals or entities acting on their behalf, if the State concerned has credible information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by' earlier Resolutions all four rounds of sanctions against the North.

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<sup>36</sup> *Op.cit.*, note 24.

<sup>37</sup> Security Council *Resolution 2094* of 07 March 2013. This is the Resolution, which North Korea claims is justification for its 'invalidation' of the 1953 cease-fire agreement with South Korea.

#### IV CRITICAL ANALYSIS OF THE LEGALITY OF NORTH KOREAS NUCLEAR TESTS UNDER INTERNATIONAL LAW

The first issue is to ascertain whether North Korea could be in violation of its treaty obligations under the NPT, when it stated that its withdrawal from the NPT is effective immediately rather than giving 3 months notice. Political considerations have resulted in official ambiguity concerning the status of North Korea's treaty obligations under the NPT, and both the United States and the Security Council have taken inconsistent views of whether North Korea remains a party to the NPT<sup>38</sup>.

North Korea claimed that its announcement of withdrawal constituted an automatic and immediate effectuation of its withdrawal from the NPT. However, the crux of the legal issue is that although Article X(1) of the NPT allows states parties to withdraw from the treaty and gives them wide, self-judging discretion in doing so, it requires that three (3) months notice must be given when withdrawing from the NPT if 'extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country'<sup>39</sup>. Therefore, one must determine whether North Korea's statement that its withdrawal was effective immediately rendered the entire withdrawal ineffective. This must be answered in the negative. The requirement is couched in terms

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<sup>38</sup> Pronouncements by the US State Department have not been entirely consistent. *Compare* Sally Horn, 'NPT Article X', Statement to the 2005 Review Conference of the Treaty on the Nonproliferation of Nuclear Weapons, at <http://www.state.gov/t/vci/rls/rm/46644.htm> (Article X requires] three months notice before withdrawal is complete'), *with* State Department, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2006*, at 486, available at <http://www.state.gov/documents/organization/66288.pdf> (listing DPRK as party to the NPT). The Security Council has maintained a similar path of ambiguity. *Compare* Statement by the President of the Security Council, U.N. Doc. S/PRST/2006/41 (Oct. 6, 2006) (referring to North Korea's obligations under the NPT and its announcement of withdrawal' from the NPT rather than an actual, effective withdrawal); S.C. Res.1695, para. 10 (same), *with* S.C. Res. 1695, para. 6 (Security Council strongly urges the DPRK to ...return at an early date to the Treaty on Non-Proliferation of Nuclear Weapons'). (emphasis added). *Cf.* UN Dep't for Disarmament Affairs, 'Status of Multilateral Arms Regulation and Disarmament Agreements: NPT, at [http://disarmament.un.org/TreatyStatus.nsf/NPT%20\(in%20alphabetical%20order\)?OpenView&Start=1](http://disarmament.un.org/TreatyStatus.nsf/NPT%20(in%20alphabetical%20order)?OpenView&Start=1) (not listing North Korea as a party to the NPT).

<sup>39</sup> *Op.cit.*, note 12. See Article X.

of a promise to give three months notice, rather than as a condition that would have to be met in order to make the withdrawal effective<sup>40</sup>. Thus, noncompliance with the notice requirement does not necessarily mean that the withdrawal from the NPT is invalid. With this in mind, one can conclude that the North Korean withdrawal from the NPT likely was legally effective only after the three-month notice period had passed, but not that the failure to give three months notice made the entire North Korean withdrawal announcement ineffective.

On the issue of customary international law, even if the PTBT were considered customary international law<sup>41</sup>, that treaty permits the testing of nuclear weapons underground, so long as radioactive debris is not released outside the territorial limits of the testing state<sup>42</sup>. Thus, there exists no consensus that qualifies the prohibition of testing nuclear bombs as custom. In fact, this is the primary reason that the Security Council has strongly ‘condemned’ the tests, but has refrained from suggesting that it is in violation of international law. In juxtaposition, the Security Council had unanimously adopted Resolution 2118 in 2013, reproaching Syria's use of chemical weapons and stating that, ‘the use of chemical weapons constitutes a serious violation of international law’<sup>43</sup>.

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<sup>40</sup> Frederic L. Kirgis, ‘ASIL Insight: North Korea’s Withdrawal from the Nuclear Nonproliferation Treat’, at <http://www.asil.org/insights/insigh96.htm> (Jan. 2003).

<sup>41</sup> Vienna Convention on the Law of Treaties, Art. 38, May 23, 1969, 1155 U.N.T.S. 331 (noting the possibility that rules set forth in treaties may become binding on third states as rules of customary international law).

<sup>42</sup> *Op.cit* note 10, See Art. 1(b). Although, as noted above, North Korea is not a party to the PTBT, its assertion that no radioactive leakage had occurred from the testing site might be seen as evidence that it desires to be viewed as in compliance with this requirement of the PTBT.

<sup>43</sup> Security Council *Resolution 2118* of 27 September 2013,

Article 1(1) of the CTBT<sup>44</sup> prohibits the testing of nuclear weapons. However, as of September 17, 2017, the CTBT, with 183 signatory nations, has not entered into force, which means that it is not part of international law. Moreover, under Annex 2 of the said treaty, there are forty-four (44) nations that must sign and ratify the treaty for it to enter into force. Yet, of the forty-four (44) nations, eight (8), inclusive of the United States and North Korea are yet to ratify the CTBT. To further explain, treaties become binding upon the completion of two steps. First, a State must sign the treaty, and second, they must ratify it domestically. The process of ratification is variegated between nations. While the first step is simple, the second is where impediments present themselves. For example, in the United States, treaties are ratified when the Senate approves by a two-third vote. Thus, since the United States and seven other nations have not ratified the treaty, the CTBT has not entered into force *ad nunc*. This is tantamount to the nonexistence of a treaty prohibiting the testing of nuclear bombs. Therefore, North Korea's testing of nuclear bombs is not a transgression against a treaty, for there is none.

State's conduct in failing to ratify the CTBT can constitute insufficient consensus regarding the testing of nuclear bombs. Given the recentness of the CTBT and the indications that its drafters viewed the treaty as expanding the law rather than codifying it, its prohibitions on nuclear testing cannot be considered to have attained the status of customary international law. Moreover, several of those states possessing nuclear weapons programs, have not ratified the CTBT, thus weighing against a determination that the prohibition has developed into a rule of customary international law<sup>45</sup>. The

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<sup>44</sup> *Op.cit.*, at note 11.

<sup>45</sup> See *North Sea Continental Shelf (F.R.G./Denmark; F.R.G./Netherlands)*, 1969 I.C.J. 3, paras. 73-74 (Feb.20) ('With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of [customary] international law, it might be that,

moment to celebrate the twentieth anniversary of the adoption of the CTBT would have been in 2016. It is in the hands of a few states, especially the United States, to save the treaty, since it is generally considered that its ratification would trigger a circle pushing China and other states to ratify as well.

In arguing that North Korea's nuclear tests are illegal, much is said about its Nuclear Disarmament Declaration that arose as part of the fourth round of Six-Party Talks concerning North Korea's nuclear weapons program. A joint statement from all six countries involved<sup>46</sup> was released on September 19, 2015, stating in relevant part that as part of the negotiations, 'the DPRK committed to abandoning all nuclear weapons and existing nuclear programs'. The bone of contention here is whether North Korea's commitment to this course of action legally obligates North Korea to follow it to completion, and if so, could it be inferred that this commitment includes the obligation not to test nuclear weapons? In the ICJ's decision of the *Nuclear Tests* case<sup>47</sup>, the ICJ concluded that under certain circumstances, a state's unilateral declaration could establish an international legal obligation to abide by the terms of the declaration. The key to the ICJ's conclusion was the intention of the state making the declaration, 'when it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers upon the declaration the character of a

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even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected? Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved').

<sup>46</sup> China, Japan, North Korea, Russia, South Korea, and the United States

<sup>47</sup> *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec.20).

legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with the intent to be bound is binding<sup>48</sup>.

By the ICJs reasoning, the two prerequisites for a unilateral declaration to create a binding international obligation are that, the declaration be given publicly and be made with the intention of being bound thereby. The International Law Commission has echoed the ICJs emphasis of these two prerequisites<sup>49</sup>. On the first prerequisite, the North Korean declaration was not necessarily made as a public statement. Rather, the declaration was made in private negotiations with the other parties to the Six-Party Talks, and then released as part of the Joint Statement. This is more ambiguous than the public announcements by the president of France in the *Nuclear Tests* case<sup>50</sup>. On the second prerequisite, the North Korean statement was not necessarily made in such a way to indicate intent to be bound. The ICJ judgment in the *Nuclear Tests* case<sup>51</sup> addressed the determination of intention only briefly, stating that ‘the intention to be bound is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for<sup>52</sup>.

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<sup>48</sup> *Ibid*, Nuclear Tests, para. 46.

<sup>49</sup> International Law Commission, ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’, Guiding Principle 1, U.N. Doc. A/61/10, at 367, 368, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf) (‘Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations’).

<sup>50</sup> Cf. International Law Commission, ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto’, Guiding Principle 6, U.N. Doc. A/61/10, at 369, 376, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_9\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf) (noting a range of acceptable audiences depending on the context of the declaration).

<sup>51</sup> *Op.cit*, note 47. Nuclear Tests

<sup>52</sup> *Ibid*. Nuclear Tests, para. 47



In finding that the French declaration<sup>53</sup> at issue in the *Nuclear Tests*<sup>54</sup> case was made with the intention that France would be bound thereby, the ICJ looked to the fact that the statements made by France were unconditional. France's earlier statements had indicated that it would cease testing nuclear weapons 'in the normal course of events'; the ICJ reasoned that subsequent unconditional statements constituted a unilateral declaration from which a legal obligation could be derived<sup>55</sup>. The North Korean statement regarding disarmament does not seem to indicate a similar intention to be bound regardless of the actions of other states. Rather, the commitment was made in the course of negotiations, in which North Korea was expected to give up its nuclear weapons programs in exchange for recognition, an end to international isolation, and other benefits to be provided by the other five parties to talks<sup>56</sup>. This casts the North Korean commitment to disarm in a *quid pro quo* light, making it difficult to argue that this commitment constituted a legal obligation without regard to any action taken by another state<sup>57</sup>.

Nonetheless, even if the North Korean nuclear tests do not violate any positive international law, it would not be outside the scope of regulation by the international legal order. The Security Council has the power to determine whether a situation constitutes a threat to international peace and security, and has wide discretion in making such determinations. In making such a determination, the only Charter

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<sup>53</sup> The French Declaration stated that France would halt nuclear testing in the South Pacific.

<sup>54</sup> *Op.cit.*, note 47. Nuclear Tests.

<sup>55</sup> *Ibid.*, See para. 44.

<sup>56</sup> Cf. *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554, para. 40 (Dec. 22) (to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred').

<sup>57</sup> As an apagogical hypothetical, one can ask what would be the result if the other five parties chose to abandon the next round of talks, and withdrew their promised enticements. North Korea, having made its commitment in expectation of benefits to be provided by these countries, can hardly be thought to have had the intention to unilaterally oblige itself to abandon its nuclear weapons programs if such benefits were withdrawn.

limitation on the power of the Security Council is the obligation that it acts in accordance with the purposes and principles of the Organization, found in Articles 1 and 2 of the Charter<sup>58</sup>. If the Security Council determines that a given situation does constitute a threat to international peace and security, it has the power to order all UN Member States to take action<sup>59</sup>, including by imposing economic sanctions<sup>60</sup> or authorizing the use of force<sup>61</sup>. It seems clear that North Korea is in continuing breach of its obligations, under Art 25 of the Charter, to ‘accept and carry out the decisions of the Security Council’. Decisions made by the Security Council under Chapter VII of the Charter are among the most serious obligations in international law. The unanimity with which these Resolutions have been adopted testify to the gravity of the security situation created by North Korea’s on-going violations of its legal obligations. It is crucial, however, to note the paradox. That is, one of the most censorious countries against North Korea’s testing of nuclear bombs is one that has refused to ratify the CTBT—the United States. This engenders the following

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<sup>58</sup> See Christopher J. Le Mon & Rachel S. Taylor, ‘Security Council Action in the Name of Human Rights: From Rhodesia to the Congo’, 10 U.C. Davis J. Int.L. & Pol. 197, 206-08 (2004), available at <http://ssrn.com/abstract=757228> (in exercising its responsibilities under Chapter VII, the Security Council is bound only by the requirement found in Article 24(2) of the Charter that it act according to the purposes and principles of the United Nations, and by peremptory norms of international law); Christopher J. Le Mon & Rachel S. Taylor, ‘Security Council Action in the Name of Human Rights’, 11 African Y.B. Int.L. 263 (2003), available at <http://ssrn.com/abstract=757247> (same).

<sup>59</sup> *Op cit* note 19, See Art. 25 (‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’); cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 1971 I.C.J. 16, para. 116 (‘when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Security Council’).

<sup>60</sup> *Ibid*, See Art. 41 (‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations’).

<sup>61</sup> *Ibid*, See Art. 42 (‘Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations’).

overarching questions: Firstly, what is the best method through which a nuclear cataclysm can be avoided? Secondly, given that the United States has not ratified the CTBT, how much credibility does the nation hold when it seeks to prevent others from testing them?

## **V CONCLUSION**

The question of the legality of nuclear tests depends on the concrete circumstances of the test, in particular the environment—underground, atmospheric, outer space, under water, and trans boundary. Certain treaties establish a clear prohibition, but they are limited and contain withdrawal clauses. Moreover, in spite of the high number of ratifications and the fact that the CTBT's preparatory commission established its structure many years ago and has started its verification activities, the CTBT is still not in force and needs the ratification of several key states. In this situation, it is also uncertain whether Article 18 of the Vienna Convention on the Law of Treaties which provides for the obligation not to defeat the object and purpose of a treaty prior to its entry into force, is still pertinent. Furthermore, it cannot be asserted convincingly that a general prohibition of nuclear weapons testing derives from other sources of international law. In conclusion, the legality of nuclear tests is not certain under international law and the relevant sources of international law are incomplete and fragmentary thus, under international law nuclear tests cannot be said to be unambiguously illegal.