

## EXAM

### JUS5540 - Public International Law - Autumn 2016

Date: 7 December

Time: 10:00

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**Please read the background information and answer the questions by referring to the instruments provided in the annex. Good Luck!**

#### **Excerpts from reports addressing nuclear weapons:**

##### **North Korea**

We judge that North Korea conducted a nuclear test on 6 January 2016 that it claimed was a successful test of a “hydrogen bomb.” Although we are continuing to evaluate this event, the low yield of the test is not consistent with a successful test of a thermonuclear device. In 2013, following North Korea’s third nuclear test, Pyongyang announced its intention to “refurbish and restart” its nuclear facilities, to include the uranium enrichment facility at Yongbyon and its graphite-moderated plutonium production reactor, which was shut down in 2007. We assess that North Korea has followed through on its announcement by expanding its Yongbyon enrichment facility and restarting the plutonium production reactor. We further assess that North Korea has been operating the reactor long enough so that it could begin to recover plutonium from the reactor’s spent fuel within a matter of weeks to months.

North Korea has also expanded the size and sophistication of its ballistic missile forces—from close-range ballistic missiles to intercontinental ballistic missiles (ICBMs)—and continues to conduct test launches. In May 2015, North Korea claimed that it successfully tested a ballistic missile from a submarine. Pyongyang is also committed to developing a long-range, nuclear-armed missile that is capable of posing a direct threat to the United States; it has publicly displayed its KNo8 road-mobile ICBM on multiple occasions. We assess that North Korea has already taken initial steps toward fielding this system, although the system has not been flight-tested.

Although North Korea issues official statements that include its justification for building nuclear weapons and threats to use them as a defensive or retaliatory measure, we do not know the details of Pyongyang’s nuclear doctrine or employment concepts. We have long assessed that Pyongyang’s nuclear capabilities are intended for deterrence, international prestige, and coercive diplomacy.



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#### China

The Chinese People's Liberation Army's (PLA's) has established a Rocket Force—replacing the longstanding Second Artillery Corps—and continues to modernize its nuclear missile force by adding more survivable road-mobile systems and enhancing its silo-based systems. This new generation of missiles is intended to ensure the viability of China's strategic deterrent by providing a second-strike capability. In addition, the PLA Navy continues to develop the JL-2 submarine-launched ballistic missile (SLBM) and might produce additional JIN-class nuclear-powered ballistic missile submarines. The JIN-class submarines—armed with JL-2 SLBMs—will give the PLA Navy its first long-range, sea-based nuclear capability.

#### Russia

Russia has developed a ground-launched cruise missile that the United States has declared is in violation of the Intermediate-Range Nuclear Forces (INF) Treaty. Russia has denied it is violating the INF Treaty. In 2013, a senior Russian administration official stated publicly that the world had changed since the INF Treaty was signed in 1987 and noted that Russia was “developing appropriate weapons systems” in light of the proliferation of intermediate- and shorter-range ballistic missile technologies around the world, and Russian officials have made statements in the past regarding the unfairness of a Treaty that prohibits Russia, but not some of its neighbors, from developing and processing ground-launched missiles with ranges between 500 to 5,500 kilometers.

#### United Kingdom

According to a report by the International Panel on Fissile Materials, the United Kingdom “...is investing in modernizing its nuclear weapon complex. This includes the new Pegasus facility for manufacturing uranium components for weapons to be built at Aldermaston, and the Mensa plant for warhead assembly and disassembly to be located at Burghfield.” To ensure the safety and viability of their nuclear weapons stockpiles - while adhering to the Comprehensive Nuclear Test Ban Treaty - the UK and France signed a bilateral agreement in November 2010 allowing for cooperation in this area. Joint activities will involve the construction of a simulation facility in Valduc, France, where scientists will conduct work on the safety and security of their respective warheads. A joint Technology Development Center will also be established in Aldermaston, UK, to develop simulation technology for the center at Valduc.

#### The United States

The United States maintains an arsenal of about 1,750 strategic nuclear warheads deployed on Intercontinental Ballistic Missiles (ICBMs), Submarine-Launched Ballistic Missiles (SLBMs), and Strategic Bombers and some 180 tactical nuclear weapons at bomber bases in five European countries. Defense Secretary Ash Carter told the Senate and House armed services committees in March 2016 that he “expects the total cost of nuclear modernization to be in the range of \$350-\$450 billion.” The estimate includes the cost to modernize and replace all three legs of the triad, including the full cost of the strategic bomber force.



### Gro Nystuen & Kjølve Egeland “A ‘Legal Gap’? Nuclear Weapons Under International Law”

The NPT is a global disarmament treaty that *aims to prevent* or at least *limit the potential for use of nuclear weapons*. The NPT preamble reflects a key driving force behind the treaty’s negotiation by referring to “the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples.” Although certain scholars have questioned the importance of the NPT in curbing proliferation, there is *general agreement among most governments* that the NPT has been an *effective brake on the spread of nuclear weapons*.

The NPT has proven *less effective with regard to nuclear disarmament*. As Irish Foreign Minister Charles Flanagan pointed out at the 2015 review conference, “[N]ot a single nuclear weapon has been disarmed under the NPT or as part of any multilateral process.” Often presented as a “grand bargain” between nuclear- and non-nuclear-weapon states, the NPT prohibits states from possessing nuclear weapons, except for the five states that had them by January 1, 1967. In exchange for their special status, these five states, like every other state-party, agreed to “pursue negotiations in good faith on effective measures” for nuclear disarmament (Article VI) and to facilitate the development of nuclear energy for peaceful purposes in non-nuclear-weapon states (Article IV). Yet, in the negotiating history and the subsequent review process of the NPT, disarmament always has played second fiddle to nonproliferation. According to NATO official Michael Rühle, “At the time of the treaty’s signing..., article VI seemed of little significance. The treaty was widely understood as a freeze on the number of existing [nuclear-weapon states], not as a means of disarming them. To put it bluntly, the treaty was supposed to perpetuate nuclear inequality indefinitely (or at least until 1995), and article VI was a way of making this fact a little easier to bear.”

This can no longer be said to be the case. In its 1996 advisory opinion, the ICJ concluded that there exists “an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament.” An obligation to disarm, however, does not constitute a prohibition. Thus, although not uncontroversial, the statement of UK Prime Minister Tony Blair that the NPT “makes it absolutely clear” that the UK “has the right to possess nuclear weapons” is legally accurate. Comparing the NPT with the regimes on biological and chemical weapons, the most striking difference is that although the latter two contain categorical prohibitions against possession and use, the former does not. Given the horrific humanitarian consequences of nuclear weapons detonations, this may reasonably be called a legal gap.

On top of this legal gap in substantive law comes a possible compliance gap concerning the lack of nuclear disarmament as mandated by NPT Article VI. NPT nuclear-weapon states such as Russia and the United States argue that the stockpile reductions they have undertaken over the last couple of decades are more than enough in terms of Article VI implementation, but others argue that full implementation of Article VI requires negotiation of “effective measures” on nuclear disarmament. Article VI applies to all NPT states-parties, thus indicating that such negotiations of effective measures should be multilateral. At the 2015 NPT Review Conference, the Mexican delegation noted that “more than 40 years after the entry into force of the NPT and 20 years after its indefinite extension, the obligation to conduct multilateral negotiations in good faith to fulfil the goal of disarmament, as provided by Article VI of the NPT, is the only one of its provisions that has not been achieved yet.”

*Should prohibition precede elimination?* Should elimination come first when conditions allow, with prohibition then following? . . . *Four main approaches to nuclear disarmament* feature frequently in debates in the UN General Assembly First Committee and the NPT review cycle:



1. a comprehensive nuclear weapons convention in which a single legal instrument would provide for prohibition and elimination and in which elimination would precede a prohibition;
2. a framework agreement in which different prohibitions and other obligations would be pursued independently of each other but within the same broad frame;
3. a step-by-step or building-block approach in which elimination would precede prohibition; and
4. a stand-alone ban treaty in which prohibition would precede elimination.

**Question: You work as a legal adviser for an International NGO which seeks nuclear disarmament. In that capacity you have been asked to write a legal memo setting forth:**

1. **Whether or not States which are upgrading their nuclear weapons capabilities are in violation of their international law obligations, especially the duty to negotiate in good faith in the context of nuclear disarmament?**
2. **Which of the four approaches outlined above would be the best approach to nuclear disarmament? Provide arguments in support of your answer.**

**Please refer to the NPT treaty, the four UN General Assembly Resolutions, and the International Law Commission 2001 Articles on Responsibility of States for Internationally Wrongful Acts.**

#### ANNEX

1. **The Treaty on the Non-Proliferation of Nuclear Weapons:**

<https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf>

2. **General Assembly Resolution on Convention on the Prohibition of the Use of Nuclear Weapons**

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/62](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/62)



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3. General Assembly Universal Declaration on a Nuclear Free World:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/57](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/57)

4. General Assembly Resolution on Nuclear Disarmament:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/52](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/52)

5. General Assembly Follow Up to the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons:

[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/70/56](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/56)

6. International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts:

[http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)

