Draft Resolution 5/2020 on Legal Issues of Nuclear Weapons, Nuclear Non-Proliferation and Peaceful Uses of Nuclear Energy

The 79th Kyoto Conference of the International Law Association, held online, 29 November-13 December 2020,

HAVING CONSIDERED the Reports of the Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law,

EMPHASIZING the importance of legal issues of nuclear security, nuclear non-proliferation and the use of nuclear energy for peaceful purposes, and considering the contribution the Association can make to the study and clarification of these issues,

RECOGNIZING the assessment of relevant law and best practices conducted by the Committee,

ACKNOWLEDGING in particular the interrelationship between the three pillars of the Treaty on the Non-Proliferation of Nuclear Weapons – i.e. non-proliferation of nuclear weapons; the right to develop research, production and use of nuclear energy for peaceful purposes; and nuclear disarmament – emphasized by the Committee,

CONCERNED about challenges for nuclear non-proliferation, international cooperation to ensure nuclear safety, and nuclear disarmament under strict and effective international control,

THANKING the Chair, the Rapporteur and all contributors for the valuable work done,

ENDORSES the Recommendations annexed to this Resolution,

COMMENDS these Recommendations to States, the United Nations, the International Atomic Energy Agency, and non-governmental organizations working in these fields,

ENCOURAGES the Committee to continue its work, focusing on emerging challenges, open issues and concerns identified in its Report.
Recommendations to Ensure Compliance with Legal Obligations concerning Nuclear Weapons, Nuclear Non-Proliferation and Peaceful Uses of Nuclear Energy with Commentary

A. Nuclear Non-Proliferation

(A 1) To effectively ensure non-proliferation of nuclear weapons and other nuclear explosive devices, both legally binding regulation and politically binding commitments are necessary.

Commentary

1. The Nuclear Non-Proliferation Treaty (NPT) and treaties on nuclear-weapons-free zones require the application of comprehensive safeguards by their States Parties.

2. With respect to implementation of safeguards agreements based on the NPT, the International Atomic Energy Agency (IAEA) is fully authorised to verify the correctness and completeness of declarations made by States.

3. Nuclear-test-ban verification, for which the IAEA is not mandated, is conducted by a special organization under the Comprehensive Nuclear Test Ban Treaty (CTBT). Whilst the entry into force of the CTBT still depends on ratification by another eight States, one of the Treaty requirements, stipulating that at entry into force of the Treaty the verification regime shall be capable of meeting the verification requirements of this Treaty, is already met. Verification activities conducted by the Preparatory Commission are based on a shared interest of participating States.

4. The CTBT in its Annex 2 lists 44 States that participated in the negotiations of the Treaty and possessed nuclear power or research reactors at the time. In accordance with Article XIV CTBT these 44 States must become Parties for the Treaty to enter into force. Three of these States (the Democratic People’s Republic of Korea, India, and Pakistan) have not yet signed the Treaty and an additional five States (China, Egypt, Iran, Israel, and the United States) have signed but not yet ratified it.

5. Even after the Treaty’s entry into force disputes on the assessment of certain activities may arise. Any successful dispute settlement will depend on international cooperation.

6. To assure the non-diversion of nuclear material from declared activities, cooperation between States and the IAEA is necessary (Art. 3 INFCIRC/153 and Art. 1 INFCIRC/540). Rights and obligations specifically agreed in

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1 Treaty on the Non-Proliferation of Nuclear Weapons (1 July 1968), 729 UNTS 161. The treaty has 191 State Parties, see https://www.un.org/disarmament/wmd/nuclear/npt/. The NPT is the world’s most widely adhered to international nuclear arms control and nuclear disarmament treaty, yet three nuclear-armed States, India, Israel and Pakistan, never became Parties, and North Korea had announced its withdrawal on 12 March 1993, suspended this declaration on 11 June 1993, but declared an immediate effectuation of its withdrawal on 10 January 2003, SC Res 1695 (2003) and various subsequent resolutions have requested North Korea to retract its withdrawal and abandon all nuclear weapons and weapons programs in a complete, verifiable and irreversible manner.


5 IAEA, The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, INFCIRC/153 (Corr.), June 1972. IAEA, Model Protocol Additional to the Agreement(s) Between State(s) and the International Atomic Energy Agency for the Application of Safeguards, INFCIRC/540 (Corr.), September 1997. See SC Res 1887 (2009), para. 15.
Comprehensive Safeguards Agreements and Additional Protocols require States Parties to cooperate with the IAEA. These treaties are not limiting the mandate of the Agency as confirmed in its Statute, in decisions taken by its Governing Bodies, and in consistent practice endorsed by the Security Council on numerous occasions. The ability of the IAEA to draw sound and independent conclusions about the correctness and completeness of States’ declarations and thereby provide all States credible assurance of the non-diversion of nuclear material and the absence of undeclared nuclear material or activity is an indispensable predicate of nuclear cooperation.

(7) Special and supplementary safeguards systems are in effect to ensure nuclear non-proliferation for the 28 Member States of the European Atomic Energy Community (EURATOM) and for the two States cooperating under the Brazilian-Argentine Agency for Accounting and Control of Nuclear Materials (ABACC).

(8) There are also bilateral safeguards which complement obligations of States Parties under the NPT and IAEA safeguards agreements.⁶

(9) To appropriately reduce proliferation risks associated with certain nuclear activities, civil use of nuclear-weapon usable nuclear material should be regulated and international control of uranium enrichment and reprocessing of spent fuel should be ensured. Relevant measures need to be harmonised, while assuring fuel supply for peaceful purposes and preventing unbalanced or discriminating interference with international trade.

(10) Cooperation on and control of dual-use technology transfers are complementary (and not conflicting) elements of effective non-proliferation.

(A 2) States ought to create a universal nuclear security regime.

Commentary

(1) Efforts for developing such a regime could be based on an endeavour to universalize existing legally binding instruments, such as the Convention on the Physical Protection of Nuclear Material (CPPNM),⁷ or the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT).⁸ They should also involve measures to reinforce existing mechanisms, such as the Global Initiative to Combat Nuclear Terrorism (GICNT),⁹ or the Nuclear Energy Agency of the OECD (NEA),¹⁰ aiming at making the nuclear security regime more transparent through further legally binding commitments. Industry bodies such as the World Institute of Nuclear Security (WINS) may be helpful to provide know-how and assistance. IAEA Nuclear Security Recommendations¹¹ need to be implemented in national responsibility.

(2) The CPPNM was amended on 8 July 2005.¹² There are 156 States Parties to the original CPPNM and 123 States Parties to the CPPNM Amendment.¹³ The ICSANT has 117 States Parties.¹⁴

(3) The challenge of nuclear terrorism requires cooperative responses by States implementing their non-proliferation obligations and ensuring law enforcement and criminal prosecution.

(4) Synergy effects between non-proliferation controls and measures to ensure nuclear safety and security should be used. In an environment of increasing terrorist activity nuclear safety and nuclear security must be treated together.

(A 3) Cooperation by States to implement and support the work of the 1540 Committee of the Security Council should be intensified.

Commentary

(1) Effective implementation by all States of their obligations under Security Council Resolutions 1540 (2004)

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¹² Amendment to the Convention on the Physical Protection of Nuclear Material (8 July 2005), INFCIRC/274/Rev.1/Mod.1, the amendment entered into force on 8 April 2016.
¹³ See https://www.legacy.iaea.org/Publications/Documents/Conventions/cppnm_amend_status.pdf.
and 2325 (2016) can make a significant contribution to strengthening the cause of nuclear non-proliferation, enhancing nuclear security world-wide, and reducing the risk of nuclear terrorism.

B. Use of Nuclear Energy for Peaceful Purposes

(B 1) The right to develop research, production and use of nuclear energy for peaceful purposes without discrimination entails a responsibility to ensure nuclear security and nuclear safety, including a safe radioactive waste management system.

Commentary

(1) The right to peaceful use of nuclear energy is subject to verification and control of compliance with nuclear security and non-proliferation obligations. Nuclear non-proliferation agreements and the relevant Security Council Resolutions 1540 (2004) and 2325 (2016) do not conflict with, or alter the rights and obligations of States Parties to the NPT.

(2) Clarifications are needed under what conditions enrichment and reprocessing may be considered peaceful use.

(3) The use of nuclear energy presents major challenges for the natural environment, which are caused by the discharge of radioactive materials into the environment in the course of the production process of uranium and plutonium, by accidents or malfunctioning of nuclear installations, by nuclear-propelled vehicles, during nuclear transports, and radioactive waste disposal. These challenges, coinciding with health risks for humans, are not fully met by applicable treaty law. The basic rule in customary law is the prohibition to cause significant transborder harm (no-harm rule), recognized in the Trail Smelter arbitration. Any of these challenges affect the fate of future generations and are prompting an enhanced responsibility for relevant decision-makers. This underlines the need for international standard setting procedures creating soft law in this field.

(4) The IAEA, as confirmed by its mandate, has a central role in supporting States in meeting their nuclear safety and security responsibilities. The IAEA’s functions in this area are clearly and inextricably linked to its work on non-proliferation of nuclear weapons and facilitating the peaceful uses of nuclear energy. While the term ‘security’ is not explicitly mentioned in the IAEA Statute, there are certain statutory functions of the IAEA to which the Agency’s role in nuclear security is attributable. These include inter alia provisions concerning training and technical advice, or provision of equipment or supplies, as well as the facilitation of information exchange and related services.

(5) Under the IAEA’s auspices, guidance for the establishment, development and maintenance of States’ nuclear security regimes has been and continues to be developed. While not legally binding, these guidance instruments, contained in the IAEA Nuclear Security Series, address a range of issues related to nuclear security – from laying out general goals of a State’s nuclear security regime, to presenting recommendations on measures that should be taken by States to achieve and maintain effective national nuclear security regimes. They provide technical guidance to assist States with implementing the measures contained in the recommendations, thereby elaborating on, for instance, technical aspects of border monitoring equipment or identifying vital areas at a nuclear facility.

(B 2) Storage and disposal of radioactive waste should be regulated by binding rules of universal application.

Commentary

(1) It should be mandatory to employ common standards and the most developed technologies to this effect.

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Determined efforts need to be made towards sustainable radioactive waste management, including through technological solutions based on future innovations that may help in addressing challenges, which may appear to be irresolvable at the present stage. A warning sign to protect and assist human beings in effectively identifying radioactive waste even after thousands of years should be considered.

(2) To ensure the good functioning of relevant treaty systems and assist States in effective implementation, mandatory international review mechanisms, as they already exist under the Convention on Nuclear Safety (CNS)\(^{19}\) and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management,\(^{20}\) are desirable.

(3) Multilateral arrangements could help to improve cooperation on safe and secure uses of nuclear energy for peaceful purposes. This applies to the handling of nuclear material and the operation of nuclear facilities as well as to enrichment activities.

(B 3) A global nuclear liability regime based on worldwide treaty relations would be desirable. Such regime should accurately reflect the physical environment. As long as it is not in force, regional harmonisation remains imperative.

**Commentary**

(1) Considering the likelihood of serious harm being caused by explosive devices combining radioactive material with conventional explosives, tighter regulation regarding access to radioactive materials is an important method in the prevention of nuclear terrorism.

(2) All Governments should address the issue of international nuclear liability and consider becoming party to one of the relevant conventions, i.e. the Paris Convention or the Vienna Convention.\(^{21}\) They should also adopt appropriate national legislation.\(^{22}\)

(3) Full support needs to be given to the IAEA’s incident and emergency system including its assessment and prognosis mandate.

C. Nuclear Disarmament

(C 1) The obligations recognised in Article VI NPT to reach

- the cessation of the nuclear arms race at an early date,
- nuclear disarmament, and
- general and complete disarmament.

require negotiations to be pursued in good faith and implementation measures under strict and effective international control.

**Commentary**

(1) Article VI NPT is far from conditioning nuclear disarmament on the achievement of general and complete

\(^{19}\) Convention on Nuclear Safety – CNS – (20 September 1994), 1963 UNTS 293, see INFCIRC/449.


\(^{22}\) The Paris Convention now covers 110 of the world’s 447 operable nuclear power plants; the Vienna Convention covers 75; the Convention on Supplementary Compensation covers 191; and the Joint Protocol covers 113. The 78 plants in China, Iran, South Korea, South Africa and Switzerland (the latter until it becomes party to the 2004 Paris Convention) are not covered by any Convention.

disarmament. Rather, it requires States Parties to take effective steps to end the nuclear arms race and to enhance international security at lower levels of armament.

(2) To reach these objectives the States Parties must pursue negotiations on effective measures in good faith. This obligation goes beyond a mere obligation of conduct in that it includes an obligation to achieve a precise result.24

(3) Subsequent practice during the last four decades has not weakened the aforementioned legal obligations, but confirmed a growing need for a legal instrument that will prohibit the use of nuclear weapons and lead to their elimination under strict and effective international control, even if that process takes time.

(C 2) All nuclear-armed States and non-nuclear-weapon States should increase cooperation to achieve nuclear security.

Commentary

(1) The Treaty on the Prohibition of Nuclear Weapons25 shows a concern by many States and civil societies to which the nuclear-armed States should respond.

(2) A development towards mutually verifiable nuclear disarmament requires

− confidence-building measures and a review of military doctrines, force structures and alert levels;
− joint action on interim steps including a comprehensive nuclear test ban and the termination of the production of weapons usable fissile material except under appropriate international control;
− cooperative approaches to anti-ballistic missile defence; and
− further limitations to the use of outer space for military purposes.

In this context it should be considered that (1) fissile material and other naval applications can be repurposed for weapons; and (2) existing stockpiles of fissionable material will have to be covered.

(3) Negative security assurances by nuclear-weapon States are to be reviewed and further developed, including by the establishment of further nuclear-weapon-free zones.

(4) A repository of information on measures taken by States in furtherance of nuclear disarmament and non-proliferation should be established. It should include information on the role of remaining nuclear weapons and their alert status.

(5) National headquarters of nuclear-weapon States might consider exchanging liaison officers with appropriate working conditions as a confidence-building measure.

(C 3) Until such time as stricter legal rules may be accepted by them, nuclear-armed States are under a legal obligation to review their relevant strategies and ensure that the threat or use of such weapons is a means of last resort in an extreme circumstance of self-defence in which the very survival of the State would be at stake.

Commentary

(1) This obligation flows from the ICJ Advisory Opinion on Nuclear Weapons.26 It applies to nuclear-weapon States under the NPT and other nuclear-armed States alike.

(2) States modernising their nuclear arsenals must be aware of their responsibility to maintain and strengthen nuclear safety in accordance with existing obligations under international humanitarian law, human rights law and environmental law.27

(C 4) States Parties to the NPT should cooperate with one another as well as with non-

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24 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (GA Request), 8 July 1996, ICJ Reports 1996, 226, paras. 99, 105 (2) F.
25 Treaty on the Prohibition of Nuclear Weapons, UN Doc A/CONF.229/2017/8 (7 July 2017); UNGARES 43/78 (12 December 2018). The Treaty will enter into force 90 days after the 50th instrument of ratification, acceptance, approval or accession has been deposited. This quorum has been fulfilled on 24 October 2020, see https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-9&chapter=26.
26 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (GA Request), 8 July 1996, ICJ Reports 1996, 226, paras. 67, 95-97, 105 (2) E.
Parties to implement these obligations.

Commentary

(1) The NPT is based on the requirement to achieve a political solution for problems arising from the existence of nuclear armament. It creates obligations for nuclear-weapon States and non-nuclear-weapon States alike.

(2) The ICJ has confirmed this obligation as an obligation that is not limited to the Parties of the NPT.  

D. Compliance with and Enforcement of Nuclear Non-Proliferation Obligations and Commitments

(D 1) Extensive international exchange and cooperation remains essential to ensure compliance with non-proliferation obligations.

Commentary

(1) Nuclear disarmament, deterrence, confidence-building, non-proliferation, security, and even the safe use of nuclear energy for peaceful purposes are interconnected. This remains essential for any convincing approach to effectively control nuclear armament. Similarly, nuclear safety, security and non-proliferation, albeit subject to different legal regimes, are directly and inextricably linked to each other. If these issues were dealt with separately, neither the cessation of the nuclear arms race nor substantive nuclear disarmament could be achieved, and neither safety nor security of the use of nuclear energy could be effectively ensured. The use of nuclear energy for peaceful purposes under sound non-proliferation conditions that do not involve sensitive nuclear activities can and should be supported regardless of progress in disarmament. Denial of such use, absent indications of non-compliance with non-proliferation obligations, may undermine nuclear non-proliferation.

(D 2) Treaty review conferences should serve the objective to review the implementation of the treaty and its adequacy as concerns the preamble, the operative part and any annexes in the light of the then prevailing situation.

Commentary

(1) This objective, confirmed in Article 16 of the amended CPPNM, likewise applies to review conferences of other treaties.

(2) Decisions adopted by treaty review conferences may constitute subsequent practice or subsidiary means of interpretation under Articles 31 (3) and 32 of the Vienna Convention on the Law of Treaties.  

(D 3) In the event of withdrawal from the NPT States Parties are bound to fully comply with their obligations under Article X (1) NPT.

Commentary

(1) Article X (1) NPT obliges the State declaring its intention to withdraw from the Treaty to fully state the extraordinary events it regards as having jeopardized its supreme interests, so that States parties could undertake consultations immediately, and the Security Council could take measures entrusted to it under the UN Charter.  

(2) To help ensure compliance with arms control and disarmament obligations States may utilise exploratory tasks, and negotiations, pursue long-term settlements, and cooperate, as appropriate. When the Security Council has

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28 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (GA Request), 8 July 1996, ICJ Reports 1996, 226, paras. 99-103, 105 (2) F.


taken measures under Chapter VII of the UN Charter to ensure compliance with arms control and disarmament obligations, States will still have to pursue long-term settlements that should endure daily pressure and co-operate towards this end. Specific cases need to be considered to discuss whether the pertinent obligations stem from treaties like the NPT or from Chapter VII decisions and whether this makes any difference.

(D 4) States must cooperate in the peaceful settlement of disputes related to nuclear non-proliferation, the use of nuclear energy for peaceful purposes, or nuclear disarmament.

Commentary

(1) States directly or indirectly involved in a nuclear dispute are under an obligation to cooperate in this context as required under Articles 2 (3) and 33 of the UN Charter. Non-compliance with pertinent obligations could affect much wider regions even beyond neighbouring States.

(D 5) Measures by the Security Council, including measures under Chapter VI and VII of the UN Charter, may help to ensure nuclear non-proliferation, support strict and effective export controls and provide transparent procedures for pertinent activities.

Commentary

(1) Security Council measures under Article 36 of the UN Charter remain necessary, even if measures under Chapter VII have proven to be less than effective.

(D 6) Implementation of General Assembly recommendations with regard to principles of cooperation in the maintenance of peace and security and principles governing disarmament and the regulation of armaments may add to transparency in nuclear-non-proliferation.

Commentary

(1) While the Security Council is responsible for formulating plans for the establishment of a system for the regulation of armaments (Article 26 of the UN Charter), the General Assembly with its permanent First Committee on disarmament and international security and its Special Sessions on Disarmament may discuss any questions relating to the maintenance of international peace and security and call the attention of the Security Council to situations which are likely to endanger international peace and security (Articles 10 and 11 of the UN Charter).

(2) The Disarmament Commission (UNDC), established in 1978, as a deliberative body mandated to recommend elements of a comprehensive programme for disarmament to the General Assembly and through it to the Conference on Disarmament (CD), is instrumental to support transparency and progressive development in arms control.

(3) The United Nations Office for Disarmament Affairs (UNODA), established in 1982 upon the recommendation of the General Assembly’s second Special Session on Disarmament (SSOD II), supports multilateral efforts deriving from the priorities established in General Assembly resolutions and decisions in the field of disarmament.

(D 7) Reporting activities by the UN Secretary-General and the exercise of his or her right of initiative may be essential for nuclear non-proliferation initiatives taken by the General Assembly, the Security Council, and by States.

31 UNGA Res S-10/2 (30 June 1978), para. 118.
Commentary

(1) To ensure compliance with existing rules and best practice, incentives may be more effective and more important than enforcement measures.

(2) Incentives should be developed through international cooperation. This may lead to a prioritisation of lawful means available and may entail the development of new legal principles and rules.

(D 8) Procedures and objectives of verification should be continuously scrutinised.

Commentary

(1) Cooperative action should be taken to reach nuclear balance at lower levels of nuclear armament, ensure non-proliferation of nuclear weapons and nuclear explosive devices, and abolish chemical and biological weapons.

(2) Incentives for compliance may be an important tool at all stages of peaceful dispute settlement. Different forms of cooperation may be required at different stages.

(3) The lack of judicial control of enforcement measures implemented on behalf of the United Nations remains an important issue for further legal development in this field.

(D 9) Whilst international organizations may take such measures as envisaged in the UN Charter and applicable constituent instruments, States retain the primary responsibility for taking appropriate action in accordance with international law to ensure compliance with the NPT and other relevant nuclear obligations.

Commentary


(D 10) Essential obligations of nuclear security, non-proliferation of nuclear weapons and nuclear disarmament have an erga omnes character.

Commentary

(1) As obligations concerning the basic rights of the human person these principles and rules are owed to the international community as a whole, rather than to individual States or groups of States party to a particular treaty. This follows from the trans-border effect of severe nuclear damage and the fact that the obligations so created go beyond a quid pro quo in that they are part of an international responsibility. In particular the three pillars of the NPT – non-proliferation of nuclear weapons, peaceful and secure use of nuclear energy, and nuclear disarmament – are interrelated, and they are creating rights and obligations for nuclear-weapon States and non-nuclear-weapons States alike. These fundamental rules definitely go beyond a mere quid pro quo; they are not just part of a deal between Parties to an international treaty, but are part of an international responsibility considering the trans-border effects of severe nuclear damage. The NPT cannot be reduced to a give-and-take between nuclear-weapon States and non-nuclear-weapon States. It is an expression of global security concerns that were central for the negotiating States and have not lost their relevance for our time.\(^33\)

(2) The aforementioned legal obligations are valid erga omnes, as are other obligations outlawing of acts of aggression and genocide, principles and rules concerning the basic rights of the human person, respect for the right to self-determination, and relevant obligations determined by international humanitarian law.\(^34\) They affect the international community as a whole rather than a particular State or group of States. As part of customary international law or at least evolving customary norms they are not limited to States Parties to the NPT.

\(^{33}\) See e.g. John Baylis and Yoko Iwama (eds), Joining the Non-Proliferation Treaty. Deterrence, Non-Proliferation and the American Alliance (Routledge, 2019).

\(^{34}\) See ICJ, Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (Second Phase), ICJ Reports 1970, 3, para. 34; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Reports 2005, para. 157; Jochen A. Frowein, ‘Obligations erga omnes’, MPEPIL (December 2008), paras. 3–4; James Crawford, Brownlie’s Principles of Public International Law, 8th edn (OUP, 2012), at 578.
(3) All States are to cooperate through lawful means to bring an end to violations of such obligations. Even if a State is not directly injured itself, it is entitled to invoke the responsibility of another State and may be eligible to take lawful measures against that State to ensure cessation of the breach and reparation (Arts. 48, 54 ARSIWA). Other consequences, including the possibility of the award of punitive damages, have been only sparse practice and remain de lege ferenda. As confirmed in the Commentary (para. 7) to Article 54 ARSIWA, this rule does not ‘prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest or those owed to the international community as a whole’. 

(4) Likewise, international organizations may have a right to take such measures subject to their constituent documents and existing principles and rules of international law (Arts. 22, 49, 51-57 DARIO).

(D 11) No State shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law, nor render aid or assistance in maintaining that situation. All States have a droit de regard to follow and invoke compliance with these obligations and a right to react in case of breaches. Appropriate action includes cooperative measures to ensure compliance, retorsions, and countermeasures.

Commentary

(1) This obligation is confirmed in Article 41 (2) ARSIWA. It applies to ‘serious breaches of obligations under peremptory norms of general international law’, as defined in Article 40 ARSIWA.

(2) As stated in the Commentary (para. 7) to Article 12 ARSIWA, a peremptory norm of general international law is defined in Article 53 of the Vienna Convention on the Law of Treaties as ‘one which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Article 53 recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as par excellence the holders of normative authority on behalf of the international community. Moreover, obligations imposed on States by peremptory norms necessarily affect the vital interests of the international community as a whole and may entail a stricter regime of responsibility than that applied to other internationally wrongful acts’.

(3) The International Law Commission (ILC), when introducing the concept of peremptory norms (jus cogens) in 1966, had acknowledged that the emergence of such rules was comparatively recent. The ILC decided against including any examples of rules of jus cogens in its Commentary to the Convention of the Law of Treaties, to avoid misunderstanding as to the position concerning other rules. It was aware that new peremptory norms could emerge in general international law, an idea that was addressed in draft Article 61 (now 64) of the Vienna Convention. The ILC has confirmed the basic rules of international humanitarian law and the prohibition of crimes against humanity as ‘norms previously referred to by the ILC as examples of peremptory norms’, emphasising that this is without prejudice to the existence or subsequent emergence of other such norms.

(4) Conventional and customary norms created to ensure nuclear security, non-proliferation of nuclear weapons and nuclear disarmament fulfil the requirements defined in Article 53 of the Vienna Convention. The fundamental rules which had been introduced for the first time in the NPT, as well as general obligations to ensure nuclear security, are fully comparable to the examples mentioned above. Accompanied by a wealth of technical provisions, they represent internationally accepted norms forming core principles of the law of nuclear non-proliferation. Successfully integrating political factors in the interest of survival of mankind, these norms form ‘a regime that is somehow more than the sum of its parts’. The peremptory character of those fundamental rules should not be disputed even despite the fact that four nuclear-armed States still abstain from the NPT. Rights and obligations under the NPT are those of the international community as a whole rather than certain groups of States. In fact, non-
nuclear-weapon States may draw a particular security benefit from the NPT system, as it contributes to a balance of power as long as nuclear weapons exist. And it is due to the fundamental rules underlying the NPT that all States are bound to cooperate, if nuclear security, peaceful uses of nuclear energy, and nuclear disarmament should be achieved.

(5) In case of breaches of these obligations, any injured State, a term not narrowly to be defined in the law of nuclear non-proliferation, is entitled to invoke the responsibility of another State and claim cessation of the wrongful act, assurances and guarantees of non-repetition and reparation in the interest of the injured State.

(D 12) Retorsions, i.e. lawful acts or omissions (such as export limitations, traffic controls, travel restrictions and criminal prosecution to ensure compliance with non-proliferation obligations), deserve more attention in current discussions on compliance with arms control obligations.

Commentary
(1) It is important for retorsions as for all other sanctions that they need to be proportionate to their intended outcome, continuously scrutinised and terminated as soon as they have fulfilled their purpose.

(D 13) Countermeasures may only be taken as a last resort.

Commentary
(1) Countermeasures must be in conformity with existing legal standards. The obligations in question must be clearly defined.\(^{40}\)
(2) Countermeasures are not meant to punish a State, but are aimed at bringing about compliance with an international obligation. They must be proportionate, temporary in nature, be based on a will to cooperate, need to be continuously scrutinised, and must be withdrawn when the act in question ceases.

(D 14) States and international organizations should consider the relationship between sanctions, countermeasures and the peaceful settlement of disputes.

Commentary
(1) Sanctions and countermeasures may facilitate, but cannot replace dispute settlement by cooperative means, as required under Article 2(3) and Chapter VI of the UN Charter.
(2) Under SC Res 1540 (2004) States are obliged to criminalise, establish appropriate penalties and prosecute actions by non-State actors that undermine the effectiveness of the nuclear non-proliferation regime.
(3) The Security Council has developed its own procedures for reviewing sanctions and delisting persons where individual repressions may not or no longer be justified.\(^{41}\) More specific legal standards may become necessary over time.
(4) The efforts declared by the EU to ensure transparency in this field require continuous monitoring of pertinent parameters and procedures in accordance with legal principles and rules.
(5) States adopting autonomous sanctions are responsible to review all measures taken in light of their obligations under international law.

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\(^{40}\) See Handbook on Nuclear Law. Part V of the Handbook specifically deals with Non-Proliferation and Physical Protection (Chapter 12 on Safeguards, Chapter 13 on Export and Import Controls and Chapter 14 on Physical Protection).