

Nuclear Non-Proliferation in International Law

Volume I

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Editors

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Foreword

The discovery of nuclear fission in 1939 and its subsequent use for deadly purposes in 1945 changed the world forever, and created immense challenges for the regulation of nuclear energy, minimizing and preventing its misuse for destructive military purposes while its peaceful uses were available for the benefit of humankind. How to establish nuclear governance continues as a challenge. As with other areas of human activity, nuclear governance is a mix of policy and legal considerations. To this end there exist universal, regional and bilateral treaties and agreements as well as the International Atomic Energy Agency (IAEA), regional organizations and the United Nations.

Over the past seven decades or so, a lot of good work has been accomplished in developing the legal frameworks for the peaceful uses of nuclear energy, including in the areas of nuclear safety, nuclear security and nuclear liability. And in the area of the legal framework for nuclear disarmament and non-proliferation there exists the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and its verification system, the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT), regional and bilateral treaties and the 1996 advisory opinion of the International Court of Justice (ICJ). However, the legal frameworks both for the peaceful use of nuclear energy as well as for the prohibition of its use for military purposes are far from comprehensive or universally accepted.

This book series identifies and explores various legal issues relating to the development of nuclear energy for military and peaceful purposes. In independent and peer-reviewed research essays, the series examines the status of international law regarding the development of nuclear capability and the legal obligations of States in this regard. It provides academic and practical analyses of legal issues within a contemporary global context through a combination of scholarly research articles and critical commentaries on relevant treaty law, customary practice and legal case developments. This first volume starts with a comprehensive audit of relevant legal issues and international concerns written by the editors, Jonathan L. Black-Branch and Dieter Fleck, followed by eight select contributions:

Kate Deere revisits the obligations of nuclear-weapon States (NWS) not to transfer nuclear weapons and devices to any recipient (Article I, NPT) and also discusses the role of States possessing nuclear weapons not party to the Treaty. She concludes, *inter alia*, that despite evidence of some actions potentially

amounting to breaches of Article I, there appears to be a general commitment by the five NPT nuclear-weapon States not to contribute directly to proliferation, nor to overtly accuse one another of breaches, but rather to focus on related proliferation concerns, particularly the potential for inadvertent transfer or misuse of nuclear or dual-use materials. The changed security environment after the end of the Cold War has also raised new proliferation concerns, with heightened attention being paid to the need to address the security of nuclear facilities and materials and prevent the potential for non-State actors to access nuclear weapons.

Daniel Rietiker offers an analysis of Article VI of the NPT under the rules of treaty interpretation and notes that this article is certainly one of its most controversial provisions; the views of scholars and practitioners differ considerably concerning the nature and scope of the rights and obligations of the States Parties, and it seems clear that none of the objectives has been met almost half-a-century after the adoption of the NPT. He explains that Article VI obliges the States Parties to pursue negotiations in good faith in view of three specific goals: (1) the ending of the nuclear arms race at an early date, (2) achieving nuclear disarmament and (3) the conclusion of a treaty on general and complete disarmament. Rietiker affirms that States can no longer, in good faith and in the light of the rule *pacta sunt servanda*, invoke military constraints or the allegedly vague wording of Article VI to delay serious steps towards nuclear disarmament, in particular taking into consideration that the international community has shown the will and capacity to find agreement to abolish entire categories of weapons and to denuclearise five inhabited regions entirely.

Kimberly Gilligan discusses the NPT's purpose, its historical context and content. She observes that technology alone will not stop the spread of nuclear weapons. Deterrence has not worked as well as some practitioners had hoped and keeping secrets is not a guarantee for success. Thus, international non-proliferation policies are necessary and several such policies have been developed over the decades taking the form of treaties. Treaties are important because they are the main mechanism for controlling proliferation and the NPT is central to the nuclear non-proliferation regime.

Susan Breau interprets the rule of distinction under international humanitarian law and its application to the use of nuclear weapons. She recalls the 1996 Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* that maintained that it is a cardinal principle that a State must never make civilians an object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. She notes that a counterargument has been advanced that it would be possible to use battlefield nuclear weapons that only target military personnel and equipment and thus, such use would not violate the rule of distinction in international humanitarian law. Breau concludes that the claim that use of low yield tactical nuclear weapons does not offend these rules is an impossibility, not only because of the risk of escalation to full-scale nuclear war but because of the very nature of nuclear weapons. Furthermore, the rule of distinction has to include consideration of future, not just immediate, consequences for a civilian population.

Gabriella Venturini discusses global efforts to prohibit nuclear test explosions, including the 1963 Partial Test Ban Treaty and the 1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT), neither of which has achieved universal adherence as yet. She maintains that international law concerning nuclear test explosions has developed slowly during the past 50 years and it is highly fragmented at the present time. Venturini considers options to bring about the implementation of the CTBT, such as provisional application of the Treaty, or an amendment instrument *de facto* bringing into effect the treaty immediately, or the UN Security Council enacting an *erga omnes* ban. She concludes that all options have drawbacks and none seems credible at the present time, but there may be a progressive emergence of a customary norm prohibiting all nuclear test explosions.

Angel Anastassov undertakes an overview of environmental issues related to peaceful uses of nuclear energy. He concludes that the peaceful nuclear option cannot be effectively exercised by one State alone; cooperation with other States on the bilateral, regional and global level is indispensable. The shift in the understanding of sovereignty from independence to cooperation is a part of the wider issue of resolving the environmental concerns of the modern contemporary world, and a specific way of implementing a cooperative approach in the regulation of the safe use of peaceful nuclear energy involving international organisations. Anastassov asserts that an essential part of the concept of sovereignty is cooperation between States and non-State actors to prevent and mitigate environmental damage caused by any nuclear accident, and to strengthen the existing legal regime for both civil and international liability.

Katja Göcke discusses international legal issues related to uranium mining on indigenous lands. In particular, she examines the potential impact of uranium mining on indigenous communities, national and international legal frameworks governing uranium mining on indigenous lands, and assesses the substantial and procedural rights of indigenous peoples under international law. Due to the many negative experiences of the past as well as the inevitable risks associated with uranium mining, exploitation of uranium on indigenous lands is a very sensitive issue. She notes that the rejection of uranium exploration and exploitation on its lands is an expression of an indigenous peoples' right to self-determination, which has to be respected by the respective home States—not only for moral reasons but also as a legal obligation under international law. This does not mean, however, that all uranium deposits on indigenous lands have to remain unexploited forever. Instead, it means that it should be up to indigenous peoples to decide on their path of development in accordance with democratic standards following a majority vote in a referendum.

Jana Hertwig reviews the European Union's (EU) 'Strategy Against the Proliferation of Weapons of Mass Destruction' with the ultimate objective 'to prevent, deter, halt and, where possible, eliminate proliferation programmes of concern worldwide', through effective multilateralism, stable environment and close cooperation. She notes that since the EU membership comprises nuclear-weapon States (France and United Kingdom) and non-nuclear-weapon States, as well as NATO members and non-NATO members, the EU has been challenged to find a

balanced and realistic approach towards nonproliferation and disarmament issues. For the EU to take any initiative on nuclear nonproliferation, it must first achieve internal consensus, thus the EU is not a unitary actor. Hertwig notes that the EU has an important role in strengthening international security and it is making a significant contribution towards preventing the spread of WMD as well as confronting the threat of terrorism. The EU WMD Strategy does not explicitly state under which conditions pursuant to the UN Charter and international law, the EU may act, and the use of force has not been clearly defined. She posits that the EU should explicitly state under which conditions pursuant to the UN Charter and international law, the EU may use force and which role is thereby left to the UN Security Council.

In subsequent volumes there will be further discussion on some of these and other related issues.

I am pleased to write this Foreword. Naturally the views expressed in the essays are those of the authors and do not necessarily reflect my own views. The compendium should provide interesting and thought-provoking reading for both legal experts and policy makers. It should hopefully serve as a stimulus for the completion of a comprehensive and universally accepted legal regime to govern such an important human activity that could have significant economic and social impacts but if misused could lead to self-destruction.

February 2014

Mohamed ElBaradei

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Abbreviations

ACommHPR	African Commission on Human and Peoples' Rights
ADRIP	American Declaration on the Rights of Indigenous Peoples
AJIL	American Journal of International Law
CFSP	Common Foreign and Security Policy of the EU
CTBT	Comprehensive Test Ban Treaty
CTBTO	Comprehensive Test Ban Treaty Organization
DPRK	Democratic People's Republic of Korea
ESS	European Security Strategy
EU	European Union
FMCT	Fissile Material Cut-off Treaty
FPIC	Free, Prior and Informed Consent
GTRI	Global Threat Reduction Initiative
GYIL	German Yearbook of International Law
HCoC	Hague Code of Conduct Against the Proliferation of Ballistic Missiles
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICLQ	International and Comparative Law Quarterly
LOAC	Law of Armed Conflict
MTCR	Missile Technology Control Regime
NATO	North Atlantic Treaty Organization
NNWS	Non-Nuclear-Weapon State[s]
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NSG	Nuclear Suppliers Group
NSS	Nuclear Security Summit
NTEs	Nuclear Test Explosions
NWFZs	Nuclear-Weapon-Free Zones
NWS	Nuclear-Weapon State[s]
NZYIL	New Zealand Yearbook of International Law
OPCW	Organization for the Prohibition of Chemical Weapons
PSI	Proliferation Security Initiative
PTBT	Partial Test Ban Treaty
RdC	Recueil des Cours de l' Académie de droit International de la Haye
RDGIP	Revue générale de droit International Public

TEU	Treaty on European Union
UK	United Kingdom
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNIDIR	United Nations Institute for Disarmament Research
US	United States
VCLT	Vienna Convention on the Law of Treaties
WMD	Weapons of Mass Destruction