

The Binding Force of the Nuclear Disarmament Obligation upon North Korea and Its Legal Implication under International Law

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Abstract

Article VI of the 1968 Nuclear Non-Proliferation Treaty (NPT) requires all state parties to disarm nuclear weapon. Following its official withdrawal from NPT in 2003, North Korea maintains to develop its nuclear weapon and conducts several nuclear tests. Moreover, it even proudly declared as a nuclear state in its Constitution's preamble. It also argues that the nuclear weapon developments and tests were conducted within their territory and, currently, North Korea is not bound by any treaty prohibiting such developments and tests. The statement is strongly opposed by the international community, particularly their neighboring states: Japan and South Korea. This article argues that the obligation to disarm nuclear weapon deriving from the NPT still binds North Korea since such obligation has reached the status of customary international law and consequently binds every state unless such state persistently objects the rule from the beginning of its formation. In this case, North Korea has failed to prove itself as a persistent objector due to the fact it used to be a party to the NPT. This article also argues that, according to 2001 ILC Articles, Japan and South Korea still have a proper legal basis to claim for reparation against North Korea despite the fact that they are not specifically affected by North Korea's conducts.

Keywords: customary international law, North Korea, nuclear disarmament

Kekuatan Mengikat dari Kewajiban untuk Melucuti Senjata Nuklir bagi Korea Utara dan Implikasi Hukumnya berdasarkan Hukum Internasional

Abstrak

Pasal VI Perjanjian Non-Proliferasi Nuklir (NPT) 1968 mewajibkan semua negara peserta untuk melucuti senjata nuklir. Setelah secara resmi menarik diri dari NPT pada tahun 2003, Korea Utara tetap mengembangkan senjata nuklirnya dan melakukan beberapa uji coba nuklir, bahkan mendeklarasikan dirinya sebagai negara nuklir yang juga termaktub dalam Pembukaan Konstitusinya. Korea Utara juga menyatakan bahwa tindakan pengembangan senjata nuklirnya dilakukan di wilayahnya sendiri dan saat ini Korea Utara berpandangan

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bahwa dirinya tidak terikat oleh perjanjian internasional manapun yang melarang tindakan tersebut. Hal tersebut tentunya sangat ditentang oleh masyarakat internasional termasuk Jepang dan Korea Selatan sebagai negara tetangga Korea Utara. Artikel ini menyimpulkan bahwa kewajiban untuk melucuti senjata nuklir masih mengikat Korea Utara karena kewajiban tersebut telah berstatus hukum kebiasaan internasional. Akibatnya, kewajiban ini mengikat semua negara kecuali bagi negara yang terus-menerus menolak aturan tersebut sejak awal pembentukannya. Korea Utara gagal memenuhi unsur sebagai sebuah negara yang dikecualikan dari kewajiban ini karena pernah menjadi negara pihak dari NPT tersebut. Selanjutnya, artikel ini menyatakan bahwa, berdasarkan ICL Articles 2001, Jepang dan Korea Selatan, memiliki dasar hukum yang memadai untuk menuntut pertanggungjawaban Korea Utara atas perbuatan salah yang dilakukannya sekalipun kedua negara tersebut bukan merupakan pihak yang secara langsung dirugikan oleh tindakan Korea Utara.

Kata Kunci: hukum kebiasaan internasional, Korea Utara, perlucutan senjata nuklir

A. Introduction

Following the aftermath of the Korean War (1950-1953), the Democratic People's Republic of Korea (hereafter North Korea) has tenaciously sought to develop nuclear capabilities despite harsh external pressure and sanctions. The actions have triggered international community condemnation considering that nuclear weapon development may lead to a serious threat to the international community.¹ North Korea has been developing nuclear weapons until now, making them the most controversial state in the nuclear non-proliferation regime.² They have conducted six nuclear weapons tests at the Punggye-ri underground nuclear test site in October 2006, May 2009, February 2013, January and September 2016, and September 2017.³ They tested their missiles.⁴ North Korea is aware that their actions are against the norms under NPT. However, they argue that after 2003 they are no longer a state party to the NPT.⁵ As a ground of their withdrawal, North Korea refers to Article X of the NPT that provides a right of each party to withdraw from the treaty as a form of exercising their national sovereignty. It is possible as long as the decision is due to extraordinary events that are related to the subject matter of the treaty have jeopardized their supreme interests.⁶

¹ Yangmo Ku, "A Treasured Sword of Justice? Explaining the Key Reasons behind North Korea's Nuclear Development and US Policy Implications", *Journal of Peace and War Studies Inaugural Issue*, March 2019, p. 47.

² Fu Yi, "The Korean Nuclear Issue: Past, Present, and Future", *Strategy Paper*, Vol. 3, 2017, p. 15.

³ CNN, "North Korea Nuclear Timeline Fast Facts", <https://edition.cnn.com/2013/10/29/world/asia/north-korea-nuclear-timeline---fast-facts/index.html>, accessed on 30th of March 2019.

⁴ Sung Chull Kim, *North Korea and Nuclear Weapons: Entering the New Era of Deterrence*, Washington: Georgetown University Press, 2017, p. 33.

⁵ Kyung-Ae Park, "North Korea in 2003: Pendulum Swing between Crisis and Diplomacy", *Asian Survey*, Vol. 44, Issue 1, 2004, p. 3.

⁶ Article X Paragraph (1) of the Treaty on the Non-Proliferation of Nuclear Weapons 1968.

Furthermore, the practices of international law are also unclear with regard to the nuclear weapon disarmament. In 1996, the International Court of Justice (ICJ) Advisory Opinion provide controversial response regarding the issue of whether the threat or use of nuclear weapon in any circumstances permitted under international law. The Court replies that such threats or uses is generally contrary to the rules of the international law but the Court cannot conclude definitively whether the threat or the use of nuclear weapons is lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of the State is at stake.⁷ This statement implies that the Court accepts the possibility of nuclear weapon use can be lawful. Therefore, North Korea argues that they have legal rights to follow the steps of other nuclear-armed states based on the statement.

Based on the phenomenon, it is necessary to analyze the status of the obligation to disarm nuclear weapon. It is to determine the binding force of such obligation upon North Korea. This article begins with the elaboration of North Korea's nuclear development and tests as well as its past and current relation with the NPT. It further identifies the status of obligation to disarm nuclear weapon based on international law and to what extent North Korea shall comply with this obligation after no longer a state party to the NPT. This article will be closed with the view on the existence of an international wrongful act (IWA) committed by North Korea and the determination of Japan's and South Korea's legal standing to put claim against North Korea based on international law.

B. Nuclear Weapon and North Korea

1. Nuclear Development of North Korea

The Korean Peninsula nuclear crisis involves the US, Soviet Union, and East Asian states. It began after North Korea invaded South Korea in 1953.⁸ North Korea's nuclear program has been started in 1956 following the agreement of cooperation with the Soviet Union on peaceful use of nuclear energy. Under the agreement, the Soviet Union provided extensive assistance to North Korea to establish a research center in Yongbyon.⁹ The combination of the Soviet Union knowledge and North Korean scientists has increased North Korea's nuclear program significantly. The program is becoming increasingly independent.¹⁰ It strengthened North Korea's military with its *Juche* ideology.¹¹ In the 1980s, North Korea began constructing

⁷ The International Court of Justice [ICJ] Reports, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996, p. 226.

⁸ William J. Perry, "Proliferation on the Peninsula: Five North Korean Nuclear Crises," *Annals of the American Academy of Political Science*, Volume 607, Issue 1, 2006, p. 80.

⁹ Joseph S. Bermudez, Jr., "A History of Ballistic Missile Development in the DPRK", *James Martin Center for Non-Proliferation Studies*, Issue 2, 1999, p. 2.

¹⁰ Sverre Lodgaard, *Nuclear Disarmament and Non-Proliferation Towards a nuclear-weapon-free World?*, New York: Routledge, 2011, p. 154.

¹¹ *Juche* is an ideology that emphasizes North Korea as a state 'free to determine their own destiny and do not depend on other states'. According to Charles Armstrong, *Juche* is "a general world view that sets the parameters, the outer boundaries, of engagement with the outside world."

nuclear reactors, producing plutonium and converting uranium, which started to be operated in 1986. After three years of North Korea's nuclear reactor operation, in 1989, the international community successfully closed the reactor.¹²

South Korea has ratified the NPT since 1985 to maintain the stability of the Korean Peninsula. North Korea followed them in 1985. The South Korea's ratification was a result of the US' persuasion, and North Korea by the Soviet Union.¹³ As a Non-Nuclear Weapon State (NNWS), North Korea also has signed the IAEA Safeguards in 1992.¹⁴ However, on January 10, 2003, North Korea withdrew from the NPT and stated that they had no intention to develop further nuclear weapons and limited its nuclear activities only for electricity production purpose.¹⁵ On the contrary, five months later, North Korea has been re-processing its plutonium reserves in Yongbyon. It is capable of producing 20-28 kg of nuclear weapon.¹⁶ As an impact of North Korea's withdrawal from the NPT, China, Japan, Russia, South Korea, and the US held a meeting in Six-Party Talks. However, the Talks had ended in 2009 and failed to take further steps to reduce the proliferation of North Korean nuclear weapons until 2018.¹⁷

North Korea's intention to develop nuclear weapons is supported by their deterrence policy. The policy is of possessing nuclear weapons to prevent an attack. Under the Kim Jong-un's administration, North Korea has self-declared a "nuclear state" in their Constitution's Preamble.¹⁸ As a further step, on April 1, 2013, few months after its third nuclear test, North Korea adopted a Nuclear Weapon State Law. The legislation reinforces North Korea's deterrence policy on nuclear weapons ownership. Several UN Security Council (UNSC) Resolutions have been issued against the Law. The North Korea's observance of NPT is also compelled. However, North Korea consistently increases the development of weapons of mass destruction and ignores the Resolutions. Furthermore, since the withdrawal, North Korea have not joined, signed, or ratified any agreements or treaties concerning nuclear weapons disarmament.¹⁹

¹² Siegfried S. Hecker, "Lessons Learned from the North Korea Nuclear Crises", *Daedalus*, Vol. 139, Issue 1, 2010, p. 45.

¹³ Sverre Lodgaard, *op.cit.*, p. 144.

¹⁴ Article III Paragraph 4 of Treaty on the Non-Proliferation of Nuclear Weapons 1968, NNWS obliged to sign IAEA *Safeguards*.

¹⁵ Korean Central News Agency [KCNA], "The DPRK Government Statement: Withdrawal from the Nuclear Nonproliferation Treaty", <https://kcna.watch.org>, accessed on September 2019.

¹⁶ Sung Chull Kim, *op.cit.*, p. 4.

¹⁷ Austin Ramzy dan Emily Cochrane, "Road to Talks between the U.S. and North Korea Has Been Bumpy", www.nytimes.com, accessed on September 2019.

¹⁸ Sung Chull Kim, *loc.cit.*

¹⁹ Arms Control Association, "Arms Control and Proliferation Profile: North Korea", <https://www.armscontrol.org/factsheets/northkoreaprofile>, accessed on September 2019.

2. The Nuclear Weapon Test

The nuclear proliferation by North Korea led to the six times nuclear test. The last test resulted in an earthquake of 5.7 to 6.3 magnitude centered on the territory of North Korea, precisely at the Punggye-ri test site, the same location as the previous five tests.²⁰ North Korea also did not negotiate with other states in good faith to take effective steps to stop the nuclear race and disarmament as required by Article VI of the NPT. North Korean officials confirmed that the type of weapon being tested was a hydrogen bomb launched with intercontinental ballistic missiles.²¹

Japanese and South Korean earthquake detectors identify the strength and radioactive impact of nuclear weapons tested by North Korea. It is estimated to be five times greater than the 1945 bomb on Nagasaki. Consequently, as neighboring states, Japan and South Korea strongly protested the nuclear tests. Japanese Prime Minister Shinzo Abe says that North Korea's actions were highly unacceptable and contradicted with international peace and security.²² South Korea's President, Moon Jae In, claims that North Korea's actions were very unsettling and endangering the people of South Korea.²³ Additionally, South Korea has mobilized its nuclear crisis response team.²⁴ The destructive and political effects of the nuclear crisis can really trigger a nuclear war that threatens the lives of all humanity.²⁵

C. The Obligation of Nuclear Weapon Disarmament: Does it Bind North Korea?

1. North Korea and the NPT

The NPT is a main treaty that prohibits nuclear-weapon state parties (NWS) to transfer nuclear weapon or nuclear explosive devices to any non-nuclear-weapon states (NNWS).²⁶ The NPT has been available for signature since 1968. It enters into

²⁰ Eric Talmadge, "World Nations Condemn North Korea for Sixth Nuclear Test", <https://www.chiangraitimes.com/world-nations-condemn-north-korea-for-sixth-nuclear-test.html>, accessed on May 2019.

²¹ Tripti Lahiri, "North Korea "Earthquake" Was Its Most Powerful Nuclear Test Yet", <https://qz.com/1068659/north-korea-hydrogen-bomb-its-latest-claims/>, accessed on December 2019.

²² Anna Fifield dan Dan Lamothe, "North Korea fires another missile over Japan, Triggering Warnings and Condemnation", <https://www.washingtonpost.com/world/north-korea-fires-another-missile-from-near-pyongyang-reportedly-over-japan/2017/09/14/html>, accessed on May 2019.

²³ McKirdy, E., dan Novak, K., North, "South Korea Hold Talks amid Tensions", <https://edition.cnn.com/2015/08/23/asia/koreastensions/index.htm>, accessed on May 2019.

²⁴ SBS News, "North Korea earthquake confirmed as Nuclear Test: Japan, South Korea", <https://www.sbs.com.au/news/north-korea-earthquake-confirmed-as-nuclear-test-japan-south-korea>, accessed on December 2019.

²⁵ The Second and Third NPT Preamble Paragraph state "*Considering 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 war and to take measures to safeguard the security of people*" and "*Believing that the proliferation of nuclear weapon would seriously enhance the danger of nuclear war*"

²⁶ Article 1 of the NPT: "*Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-*

force since 1970. In 2019, there are 191 state parties to the NPT. The NPT aims to prevent the spread of nuclear weapons and weapons technology, to promote cooperation in peaceful uses of nuclear energy, and to further the goal of achieving nuclear disarmament and general and complete disarmament.²⁷

Based on their nuclear-weapon ownership, there are two categories of state parties under the NPT. First, NWS that are states which have possessed, produced and used nuclear weapons before the NPT was concluded (January 1, 1967). There are only five NWS, including China, France, US, UK, and Russia. The NWS are obliged to end the proliferation of nuclear weapons in the world. The NNWS that do not produce nuclear weapon may conduct any peace nuclear activities under IAEA supervision. Therefore, North Korea is classified as NNWS, which is only allowed to develop nuclear energy for peaceful purposes.

Article VI of the NPT reads, *"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."* There are at least two obligations under Article VI for the state parties:

- (1) negotiation between state parties to cease nuclear arm race and nuclear disarmament; and
- (2) complete nuclear weapon disarmament under the control of international community.

The nuclear weapon development by North Korea has violated the article unequivocally. Nevertheless, since its official withdrawal from the NPT in 2003, North Korea argues that the NPT no longer valid for them according to the principle of *pacta tertiis nec nocent nec prosunt* stipulated in Article 34 of the 1969 Vienna Convention on the Law of Treaties (VCLT). Furthermore, North Korea is neither a party to other treaties that prohibit nuclear weapons development and test. Therefore, North Korea's asserted that their nuclear weapon development is not prohibited by any disarmament treaty regimes.

2. The Obligation of Nuclear Weapon Disarmament as Customary International Law

The fact that North Korea is no longer a party to the NPT since 2003 does not necessarily mean that the NPT does not apply to them. The provisions regarding third states in the VCLT provide several exceptions, one of which is a treaty provision that binds a third country as customary international law.²⁸ Article 38 of the VCLT explains that a treaty can be binding on a third state if the specific

weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control 38 over such weapons or explosive devices."

²⁷ UN, "Treaty of the Non-Proliferation of Nuclear Weapons (the NPT)", <https://www.un.org/disarmament/wmd/nuclear/npt/>, accessed on December 2019.

²⁸ Article 38 of the Vienna Convention on the Law of Treaties (VCLT) 1969.

provisions in the treaty become customary international law. Customary international law is recognized as international law since it is a legal base of the Judges of International Court of Justice (ICJ). According to Article 38 of the ICJ Statute, two elements must be satisfied for norms to reach the status of customary international law: (1) objective elements of “general practice”, which can be seen from state practices; and (2) subjective elements of “accepted as law” or better known as *opinio juris*.²⁹

The following discusses the status of obligation of nuclear weapon disarmament as customary international law; and the position of North Korea based on the obligation.

a. General Practice

The objective elements of customary international law can be found in the general practice of states that contribute to the formation and implementation of customary international law.³⁰ *General practice* can be identified from the number of state parties, or ratifications of an international treaty.³¹ Currently, there are 191 state parties of the NPT, which reflect the majority of states of the world with the obligations under NPT, including the obligation of nuclear disarmament provided in Article VI.³²

In addition, to strengthen the customary character of nuclear weapon disarmament obligation, it is necessary to observe the practice of third states' compliance to the similar obligation. For example, India and Pakistan are also the third states of the NPT that develop nuclear weapons. However, they still comply with the obligation to disarm their nuclear weapons by making or joining agreements with other states or organizations that are in line with the NPT. India tested its first nuclear weapon in 1974. It was followed by five tests of Operation Shakti in 1998.³³ According to the 2018 SIPRI Annual Book, India's nuclear power reached 130 to 140 nuclear warheads.³⁴ Nevertheless, India remains committed to carrying out the aims and objectives of the NPT to uphold non-proliferation and disarmament.³⁵ In fact, in 2008, India and US signed 123 nuclear cooperation

²⁹ Article 38 of the ICJ Statute. See also Peter Malanczuk, *Modern Introduction to International Law*, New York: Routledge, 1997, p. 39.

³⁰ United Nations General Assembly [UNGA], “Second Report on Identification of Customary International Law, Michael Wood”, UN Doc. A/CN.4/672, 2014, p. 16.

³¹ The NPT has reached the status of obligations toward the international community as whole (*erga omnes*). International Court of Justice [ICJ] Reports, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, p. 257.

³² Paragraph 23 of the Declaration of President Bedjaoui on the Legality of the Threat or Use of Nuclear Weapons.

³³ Leonard Weiss, “Atoms for Peace”, *Bulletin of the Atomic Scientists*, Vol. 59, Issue 6, 2003, p. 44.

³⁴ Dan Smith, *SIPRI Yearbook 2018: Armaments, Disarmament and International Security*, Oxford: Oxford University Press, 2018, pp. 267-272.

³⁵ The Hindu Business Line, “India Rules out Joining NPT as Non-Nuclear Weapon State”, <https://www.thehindubusinessline.com/news/world/india-rules-out-joining-npt-as-nonnuclear-weapon-state/article9902021.ece>, accessed on September 2019.

agreements.³⁶ In the same year, India negotiated a safeguards agreement with the IAEA, which was finally ratified in 2014.³⁷ India also ratified the Partial Test Ban Treaty. It prohibits nuclear weapons testing in the atmosphere, space, and under the sea.³⁸

Likewise, Pakistan first nuclear weapons test was in 1974. It was followed by other five tests in 1998.³⁹ Recently, Pakistan is estimated to have 140 to 150 nuclear warheads stored in South Pakistan.⁴⁰ Pakistan continues to produce fuel and plutonium for their nuclear weapons.⁴¹ Nevertheless, Pakistan ratified the Non-Attack Agreement with India in 1991. The agreement prohibits the use nuclear weapons against each other.⁴² Pakistan also suspends their nuclear weapon test since May 1998. It was followed by India in August 2016.⁴³ In addition, Pakistan signed the 1999 Lahore Agreement with India to reduce the risk of using nuclear weapons.⁴⁴ Since 2000, Pakistan has ratified the Convention on the Physical Protection of Nuclear Materials.⁴⁵ Pakistan is committed to always being open in making nuclear disarmament agreements despite their NPT third state status.⁴⁶

The number of NPT state parties describes the widespread and uniform practices of such obligations by the international community. In addition, third parties' observance to the NPT also strengthens its status as an international customary law. For instance, the US was not a state party to the 1982 Law of the Sea Convention (UNCLOS). However, they also participate in the implementation of provisions of maritime zones.⁴⁷ Indonesia is not a party to the 1969 VCLT but shows consent by applying rules under VCLT in treaty practice.⁴⁸ The facts that India and Pakistan, as third states, have also complied with Article VI of the NPT by

³⁶ International Atomic Energy Agency [IAEA], "Nuclear Verification: The Conclusion of Safeguards Agreements and Additional Protocols", www.iais-online.org, accessed on September 2019.

³⁷ Robert Kelley and Karl Dewey, "India Ratifies Nuclear Inspections Protocol after Five-Year Delay", www.janes.ihs.com, accessed on September 2019.

³⁸ George Perkovich, *India's Nuclear Bomb: The Impact on Global Proliferation*, Berkley: University of California Press, 1999, pp. 17-18.

³⁹ Michael Tkacik, "Pakistan's Nuclear Program", *Conference Papers: Southern Political Science Association 2008 Annual Meeting*, 2008, p. 1

⁴⁰ Hans M. Kristensen, "Pakistani Nuclear Forces, 2018", *Bulletin of the Atomic Scientists*, Vol. 74, Issue 5, 2018, p. 2.

⁴¹ *International Panel on Fissile Materials*, "Countries: Pakistan", <https://fissilematerials.org>, accessed on September 2019.

⁴² Nuclear Threat Initiative, "India Pakistan Non-Attack Agreement", www.nti.org, accessed on September 2019.

⁴³ Inam Ul Haque, "Pakistan Offers India Moratorium on Nuclear Tests", www.tribune.com.pk, accessed on September 2019.

⁴⁴ Nuclear Threat Initiative, "Lahore Agreement", www.nti.org, accessed on September 2019.

⁴⁵ Arms Control Association, "Arms Control and Proliferation Profile: Pakistan", <https://www.armscontrol.org/factsheets/pakistanprofile>, accessed on September 2019.

⁴⁶ UNGA Resolution A/RES/68/42, Follow-up to the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 5 December 2013.

⁴⁷ Stephen Vasciannie, "Part XI of the Law of the Sea Convention and Third States: Some General Observations", *the Cambridge Law Journal*, Vol. 38, Issue 1, 1989, p. 88.

⁴⁸ Sigit Riyanto, "Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations", *Indonesian Journal of International Law*, Vol. 3, Issue 1, 2005, p. 110.

making agreements to disarm their nuclear weapon is an evidence of the status of the obligations as customary international law. Thus, the element of general practice of nuclear disarmament obligations in Article VI of NPT has been fulfilled.

b. *Opinio Juris*

Opinio juris is the second element of customary international law, a proof that the habit is a practice that is considered as an obligation.⁴⁹ The ICJ in the Nuclear Weapons Advisory Opinion states that the UN General Assembly Resolutions can prove the existence of an *opinio juris* which focuses on the context and conditions at the time the resolution was issued and the attitude of states towards the resolution.⁵⁰

In the implementation of NPT, many UN General Assembly and UN Security Council Resolutions, as well as the ICJ Judgments, give the emergence of *opinio juris* for nuclear weapon disarmament obligation. There are more than 50 UN General Assembly Resolutions that urge, reaffirm, and recall the importance of implementing Article VI of the NPT to make agreements that are in line with disarmament, non-proliferation, and the use of nuclear weapons for peaceful purposes. Thirty-three of them have been adopted since the formation of the NPT and the rest have been adopted since 1996 until now. The UN also specifically holds conferences regularly to review the implementation of the NPT. The conference is held once every five years since the NPT came into force in 1970. Until now, eight NPT Review Conferences have been held, the most recently in 2015. Therefore, the UN, as well as the international community, recognize and consider the obligation of nuclear disarmament as a norm of international law.

In addition to the practices of UN General Assembly (UNGA), UN Security Council (UNSC) also has issued resolutions that address nuclear disarmament obligations.⁵¹ Some important resolutions are Resolution 1540 and 1810, which condemn the proliferation of weapons of mass destruction posing a threat to world peace and security. In fact, Resolution 1540 of 2004 has established a committee called the 1540 Committee as a monitoring procedure for the non-proliferation

⁴⁹ Noora Arajärvi, *The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, New York: Routledge, 2014, p. 23.

⁵⁰ ICJ Reports, *Legality of the Threat or Use of Nuclear Weapons*, p. 33.

⁵¹ UNGA Resolution A/RES/37/100C, 9 December 1982; A/ RES/38/73G, 15 December 1983; A/RES/39/63H, 12 December 1984; A/RES/40/151F, 16 December 1985; A/RES/41/60F, 3 December 1986; A/RES/42/39C, 30 November 1987; A/RES/43/76E, 7 December 1988; A/RES/44/117C, 15 December 1989; A/RES/45/59B, 4 December 1990; A/RES/46/37D, 6 December 1991; A/RES/47/53C, 9 December 1992; A/RES/48/76B, 16 December 1993; A/RES/49/76E, 15 December 1994; A/RES/50/71E, 12 December 1995; A/RES/51/46D, 10 December 1996; A/RES/52/39C, 9 December 1997; A/RES/53/78D, 4 December 1998; A/RES/54/55D, 1 December 1999; A/RES/55/34G, 20 November 2000; A/RES/56/25B, 29 November 2001; A/RES/57/94, 22 November 2002; A/RES/58/64, 8 December 2003; A/RES/59/102, 3 December 2004; A/RES/60/88, 8 December 2005; A/RES/61/97, 6 December 2006; A/RES/62/51, 5 December 2007; A/RES/63/75, 2 December 2008; A/RES/64/59, 2 December 2009; A/RES/65/80, 8 December 2010; A/RES/66/57, 2 December 2011; A/RES/67/64, 3 December 2012; A/RES/68/58, 5 December 2013; A/RES/69/69, 2 December 2014; dan A/RES/70/62, 7 December 2015.

implementation of weapons of mass destruction.⁵² In the issue of North Korea, the UNSC has adopted Resolution 1718 five days after North Korea tested a one kiloton nuclear power in 2006.⁵³ Further, Resolution 1887 in 2009 reiterates the commitment to Article VI of the NPT for state parties, which would be achieved if the third state (in this case, North Korea) also comply the obligation to disarm nuclear weapons.⁵⁴

The ICJ ruling also has an important role in the development of jurisprudential opinion on nuclear disarmament obligations. The ICJ reiterates that the goal of global nuclear disarmament requires the cooperation of all states.⁵⁵ The ICJ also stipulates that Article VI of the NPT is customary international law.⁵⁶ Finally, one of the ICJ Judges concludes that the NPT is a joint consensus on nuclear disarmament with international legislation that was part of international law and international customary law for all states, including the non-parties.⁵⁷

To conclude, the international community recognizes the importance of Article VI of the NPT as customary international law through the political bodies of the UN (UNGA and UNSC) as well as its judicial body (ICJ). Therefore, the elements of *opinio juris* are fulfilled. The international community consistently improves the practices in complying with the nuclear disarmament regime. Therefore, it binds third states of the NPT.

3. North Korea and the Persistent Objector Doctrine

Persistent objector is a state that is not bound by customary international law since it persistently refuses the practices of a rule. This doctrine is stated in two of the ICJ Judgments. The first is in the *Asylum Case* that even if it is proven to be a customary international law, a state cannot be bound because they have never ratified the convention related to customary international law.⁵⁸ Second, in the *Fisheries Case* that under any conditions a norm of practice cannot be bound to a

⁵² UNSC Resolution S/RES/984, 11 April 1995; S/RES/1172, 6 Juni 1998; S/RES/1209, 19 November 1998; S/RES/1441, 8 November 2002; S/RES/1467, 18 Maret 2003; S/RES/1540, 28 April 2004; S/RES/1810, 25 April 2008; S/RES/1874, 12 Juni 2009; S/RES/1887, 24 September 2009; S/RES/1977, 20 April 2011; S/RES/2117, 26 September; S/RES/2118, 27 September 2013; S/RES/2220, 22 Mei 2015; S/RES/2231, 20 Juli 2015; S/RES/2310, 23 September 2016; S/RES/2325, 15 December 2016.

⁵³ David E. Sanger, "North Korea Says It Tested a Nuclear Device Underground", <https://www.nytimes.com/2006/10/09/world/asia/09korea.html>, accessed on September of 2019.

⁵⁴ UN Security Council Resolution S/RES/1887 Preamble, "pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measures relating to nuclear arms reduction and disarmament"; continue to be added, "it calls upon all other States to join in this endeavor."

⁵⁵ ICJ Reports, *Legality of the Threat or Use of Nuclear Weapons*, p. 100.

⁵⁶ Application, *Marshall Islands v Pakistan*, (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*), International Court of Justice, 24 April 2014, p. 53; Application, *Marshall Islands v. Inggris*, (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*), International Court of Justice, 24 April 2014, p. 100.

⁵⁷ Antônio Augusto Cançado Trindade, *the Universal Obligation of Nuclear Disarmament*, Brazil: FUNAG, 2017, p. 33.

⁵⁸ ICJ Written Proceedings, *Case Concerning the Asylum*, (Colombia/Peru), November 20, 1950, p. 15.

state that has never practiced the norm.⁵⁹ Thus, a state is considered as a persistent objector and consequently is not bound by such customary rule if (1) the state rejects the formation of such customary rule before it is formed and (2) consistently rejects the norm continuously.⁶⁰

In the case of North Korea, it is problematic to consider their status as a persistent objector. When North Korea was committed to the NPT in 1985, the norms of the NPT had not yet been customary international law. The North Korea signature of the NPT in 1985 means an agreement to fulfill the NPT. The signing of the IAEA Safeguards in 1992 also reinforces it. Therefore, North Korea took part in the formation of the customary international law character of the obligation to disarm nuclear weapon. Indeed, North Korea consistently rejects the NPT norms after their withdrawal from the NPT and ignores the sanctions from the UNSC after their nuclear weapons tests. However, their actions cannot be seen as persistently objecting the obligation. The North Korean series of actions based on the compliance of the NPT is an evidence that they have never persistently objected the obligation. The state will be deemed as consistently or continuously refuse the rule when there is an absence of a form of consent to be bound from the very beginning of the formation of such customary rule.

Failing to meet the first and second conditions as a persistent objector, North Korea therefore remains bound by the NPT's obligation of nuclear disarmament as customary international law.

D. North Korea's International Responsibility

1. International Wrongful Act (IWA) of North Korea

The further issue needs to be analyzed is related to the responsibility of North Korea. Article 1 of the ILC Articles on State Responsibility (ILC Articles 2001) is the general provision. It is supported by extensive practice that every breach of international obligation raises state responsibility.⁶¹ The IWA arises when two requirements are fulfilled.⁶² First, an action can be attributed to the state based on international law. Second, actions must cause breach of international obligations, which binds the state.⁶³

To satisfy the first requirement, Article 4 (1) of the 2001 ILC Articles emphasizes that any act of state organ is attributed to the state. State organs include all individuals or collective bodies that are part of state organizations and act on

⁵⁹ ICJ Written Proceedings, Case Concerning Fisheries Jurisdiction (Inggris v. Norwegia), Desember 18, 1951, p. 19.

⁶⁰ Peter Malanczuk, *op.cit.*, p. 43.

⁶¹ Huala Adolf, *Aspek-Aspek Negara dalam Hukum Internasional*, Jakarta: PT. Raja Grafindo Persada, 1991, p. 255.

⁶² Article 2 of ILC Articles on State Responsibility 2001

⁶³ Malcolm Shaw, *International Law 6th Edition*, New York: Cambridge University Press, 2008, p. 781.

behalf of the state.⁶⁴ In September 2001, when North Korea conducted its sixth nuclear test, it was clear that the action was attributed to the state. North Korea acknowledges that they tested hydrogen bombs that can be paired with intercontinental ballistic missiles.⁶⁵ North Korean government representatives also issued a statement that they could carry out a very strong EMP attack through the Korean Central News Agency, the North Korean government's television news service.⁶⁶

The second requirement for international wrongful act is that the action must cause a breach of international obligations. The obligation must be an international obligation that is applicable to the state at that time.⁶⁷ This is regulated comprehensively in Article 12 of the 2001 ILC Articles, which essentially limits violations of international obligations as a contradiction between international obligations and the actions attributed to a state.⁶⁸ International obligations may arise from the provisions stipulated in treaties (decisions of international organizations, the International Court of Justice, or other courts) or customary international law.⁶⁹

In this case, there is a breach of international obligations by North Korea, namely nuclear weapon disarmament. The previous part has shown that obligation to disarm nuclear weapon, stipulated in Article VI of the NPT, has reached the status of customary international law. Therefore, North Korea cannot avoid the obligation despite the fact that they are no longer bound by the NPT. Through the status of customary international law, North Korea still has to comply the obligation to disarm nuclear weapon since they are not a persistent objector. The fact that they were once a party to the NPT is an evidence that North Korea did not persistently refuse the obligation. Therefore, North Korea fails to fulfill the position of a persistent objector.

It can be concluded that North Korea has breached the customary obligation to disarm nuclear weapon by several nuclear weapon tests. The facts fulfill the elements of international wrongful act that gives rise to international responsibility of state under ILC Article 2001.

⁶⁴ ICJ Reports, In Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 29 April 1999, p. 87.

⁶⁵ Jeff Mason, "Trump says U.S. not 'putting up with' North Korea's actions", <https://www.reuters.com/article/us-northkorea-nuclear/trump-says-u-s-not-putting-up-with-north-koreas-actionsidUSKCN1BD0VW>, accessed on October 2019.

⁶⁶ KCNA, "Kim Jong Un Gives Guidance to Nuclear Weaponization", <https://kcnawatch.org/newstream/1504389746-780050885/kim-jong-un-gives-guidance-to-nuclear-weaponization/>, accessed on October 2019.

⁶⁷ ICJ Written Proceedings, Case Concerning the United States Diplomatic and Consular Staff in Tehran (Amerika Serikat v. Iran), Mei 24, 1980, p. 3.

⁶⁸ Article 12 ILC Articles.

⁶⁹ United Nations Legislative Series, Materials on the Responsibility of States for Internationally Wrongful Acts, New York: United Nations, 2012, p. 99.

2. Can Japan and South Korea Claim the IWA?

The concept of state responsibility also regulates the legal consequences of actions or omissions that violate an international obligation, including the right to invoke. According to Article 42 of the ILC Articles 2001, a state can invoke international responsibility of another state for violating international obligation if the obligation is owed to the state individually, a group of states including that state, and the international community as a whole and the breach of the obligation (1) specifically affects that state; or (2) such a character radically change the position of all other states to the obligation with respect to the further performance of the obligation. This provision is intended to the implementation of certain international obligations originating from multilateral treaties or customary international law.⁷⁰ A claim for damages requires a causal link between the alleged breach of an international obligation and the damage suffered by the injured states. According to the ICJ in the 2007 Genocide Case, the “sufficiently direct and certain causal nexus test” must be established by injured state from the case as a whole and with a sufficient degree of certainty.⁷¹

The ILC Articles 2001 gives the impression that an injured state enjoys stronger position to invoke the responsible state.⁷² This is because the nature of majority international obligations provided in treaties is reciprocal between states. Although Article 48 of the ILC Articles also provides rights of non-injured states to invoke international responsibility of responsible state, such rights to claim reparation are very limited to the interest of the injured states only, or of the beneficiaries of the obligation breached.

The development of nuclear weapon and the nuclear weapon tests in North Korea’s own territory does not necessarily mean other states has no right to put forward claim against North Korea. It has been proven that North Korea has failed to comply with customary obligation to disarm nuclear weapon since they held six nuclear tests. The tests do not create direct actual damage against other states. However, according to Article 42 of the 2001 ILC Articles, Japan and South Korea fall within the definition of injured states since they are also parties to the NPT which share the same customary obligation to disarm nuclear weapon. Under Article 42(b)(ii), injured states may include:

“(b) a group of states including that state, and the international community as a whole and the breach of the obligation ...(ii) if of such a character as radically to change the position of all other States to the

⁷⁰ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, UN. Doc. A/56/10, 2008, p. 118.

⁷¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, pp. 462.

⁷² Article 48 ARSIWA where states cannot seek reparation in their own name but in the interest of injured state or of the beneficiaries of the obligation breached.

obligation is owed with respect to the further performance of the obligation.”

According to Crawford, examples to this provision include “disarmament treaty, a nuclear free zone treaty, or any other treaty where each parties’ performance is effectively conditioned upon and requires the performance of both sides.”⁷³ The fact that Japan and South Korea do not specifically suffer from earthquake caused by the nuclear weapon tests does not necessarily mean that they do not fall within the definition of injured states. It is appropriate to consider them as injured states by satisfying the element of the obligation breached that is also owed to Japan and North Korea through customary international law and the nature of the obligation requiring the performance of all.

In addition, Japan and South Korea may also put forward claim as non-injured states according to Article 48(1)(a) since the obligation breached is owed to a group of states and is established for the protection of a collective interest of a group, that is also known as *erga omnes partes/contractes*. The fact that North Korea, Japan, and South Korea are bound by the same obligation under customary international law is sufficient for Japan and South Korea, as parties to the NPT, to demand North Korea’s responsibility. However, as non-injured states, Japan and South Korea have limited right to invoke North Korea responsibility. According to Article 48 (2a), both states may claim cessation and assurances as well as guarantees of non-repetition. In the case of reparation, both states may only act in the interest of injured state only.

Therefore, this article is in the position to suggest Japan and South Korea, as injured states, putting forward claim against North Korea since both states fulfill the definition under Article 42(b)(ii).

To conclude, Japan and South Korea have a legal capacity under the theory of state responsibility to claim for reparation against North Korea for the following legal reasons.

1. There is an international wrongful act (IWA).
2. The IWA is attributed to North Korea as a state.
3. The states claiming reparation are injured states.

E. Conclusion

North Korea has violated its customary international obligation to disarm nuclear weapon by developing nuclear weapon. Article VI of the NPT precisely prohibits such conduct. The argument of North Korea that they are no longer bound by the NPT following their withdrawal in 2003 is not acceptable because the NPT, particularly the obligation to disarm nuclear weapon stipulated in Article VI, has

⁷³ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, UK, 2002, p. 259, pp. 13.

reached the status of customary international law. This obligation has satisfied both elements of customary international law: the general practices and the *opinio juris cive necessitatis*.

This condition enables third parties to be compelled to the customary rules unless they persistently practice otherwise since before such norms formed into the customary nature. The fact that North Korea used to be a party to the NPT is a strong evidence that they have never persistently objected the nuclear weapon disarmament rule. Since North Korea fails to prove itself as a persistent objector, the obligation to disarm nuclear weapon remains binding upon them.

Japan and South Korea may invoke North Korea's international responsibility for failing to comply with Article VI, although Japan and South Korea are not directly affected by the North Korean nuclear weapon development and tests. Both states fail to prove that they suffer from North Korea's misconduct. However, Japan and South Korea can maintain their status as injured states since they are also parties to the NPT and sharing the same obligation, as NNSW, not to develop nuclear weapon in their own region. In addition, North Korea also failed to conduct negotiations and agreements to completely disarm their nuclear weapons as one of the obligations shared by Japan and South Korea as parties to the NPT. Therefore, North Korea have committed international wrongful act according to the 2001 ILC Articles. It provides the rights of Japan and South Korea, as injured states, to put forward claim against North Korea.

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