

Letter dated 20 June 1995 from the Ambassador of India, together with  
Written Statement of the Government of India



MOST URGENT

TELETYPE  
THE HAGUE

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June 20, 1995

Your Excellency,

As you are aware, the UN General Assembly Resolution No. 49/75.K requested the International Court of Justice for an advisory opinion on the legality of the threat or use of nuclear weapons.

2. I am enclosing with this letter a 7-pages submission by India relating to this subject.

3. Furthermore, I also enclose herewith a counter-memorial on the WHO resolution relating to the request for an advisory opinion of the International Court of Justice on the legality of nuclear weapons.

4. I understand that the last date for the submission of these documents is 20th June 1995 and accordingly these are being sent to Your Excellency on a most urgent basis.

Please accept, Excellency, the assurances of my highest consideration.

with refs →

Yours sincerely,

( I.P. Khosla )

H.E. Mr. Eduardo Valencia-Ospina  
Registrar  
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Status of Nuclear Weapons in International Law:  
Request for advisory opinion of the  
International Court of Justice.

The question whether nuclear weapons could be lawfully used in an armed conflict is regulated by international law, and in particular the law of armed conflicts and by principles of international humanitarian law. Under international law, use of force is prohibited in international relations. The prohibition contained in Article 2(4) of the UN Charter is so comprehensive and fundamental as to be regarded as a *jus cogens* or an obligation of an absolute character. On the basis of this principle it appears clear that any use of nuclear weapons as a measure of use of force to promote national policy objectives would be unlawful.

Most proponents of use of force, without denying the absolute character of the obligation contained in Article 2(4), contend that use of force by way of exercise of an inherent right of self-defence, which is preserved and protected under Article 51 of the UN Charter is admissible. However, the content and the circumstances under which the right of self-defence could be exercised is specified in the UN Charter itself and is related specifically only to an "armed attack" in the first instance. The same has to be reported soon thereafter to the Security Council and is subject to its right to take appropriate steps under Chapter VII upon a determination of the existence of a threat to peace, breach of peace, or an act of aggression.

It is further agreed that any use of force in self-defence has to be proportional to the means and ends involved or to the original wrongful use of force. Moreover, the right of self-defence is to be regarded as a provisional measure or a remedy and hence as soon as other means or measures became available, the resort to self-defence through use of force has to cease.

Even though an opinion is expressed that the reference to inherent right of self-defence in Article 51 provides the basis for States to undertake a preventive action in self-defence in the form of self-preservation this, according to a more prevalent view, is not supportable. According to the prevailing view that the qualification of the right of self-defence by the word "inherent" in Article 51 serves only to emphasise that the right is available to every State regardless of whether it is a UN member or not. Further, according to this view, the fundamental purpose of the UN Charter is to restrict the use of force by States to the utmost extent necessary, keeping in view Article 1(1) and Para

7 of the Preamble of the UN Charter. ( See Encyclopaedia of Public International Law, Max Planck Institute, Vol.4(N-2), North Holland Pub. Co., p.272. ).

It is even suggested that where one State preannounces an armed attack against another State, a hardly conceivable practice, preventive self-defence would be lawful!

In view of the above and given the strict limitations on the non-use of force and the right of self-defence, it is our view that use of nuclear weapons in any armed conflict as a first attack would be unlawful under international law.

The question then for consideration is whether the use of nuclear weapons would be lawful as a measure of reprisal or retaliation if the same is used by an adversary in the first instance. Reprisals or retaliation under international law are also governed by certain specific principles. First, reprisals to be valid and admissible could only be taken in response to a prior delict or wrongful act by a State. Second, such reprisals must remain within reasonable bounds of proportionality to the effect created by the original wrongful act. However, reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *jus cogens*, that is to say obligations of an absolute character compliance with which is not dependent on corresponding compliance by others but is requisite in all circumstances unless under stress of *literal vis major* (see G. Fitzmaurice, *General Principles of International Law, Volume 92 Hague Recueil Des Cours (1957-II)*, Pages 119-120).

In other words, a nuclear weapon could not be used by way of reprisal against another State if that State did not commit any wrongful act or delict involving use of force. Second, when a State commits such a wrongful act or delict, the use of force by way of reprisal would have to be proportionate and as such if the wrongful act did not involve the use of a nuclear weapon, the reprisal could also not involve the use of a nuclear weapon. Third, even where a wrongful act involved the use of a nuclear weapon the reprisal action cannot involve use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances.

In view of the above, use of nuclear weapons even by way

of reprisal or retaliation, appears to be unlawful.

In any case, if the wrongful use of force in the first instance did not involve the use of nuclear weapons, it is beyond doubt that even in response by way of retaliation States do not have the right to use nuclear weapons because of their special quality as weapons of mass destruction. It is also clear further that any wrongful act not involving use of force at all under international law could not be redressed or attempted to be met with any use of force with or without involving nuclear weapons.

This brings us to the question as to the legality of the use of nuclear weapons in an armed conflict on the ground that it is open as a measure of last resort under limited conditions as a matter of military necessity. A basic principle of the law of armed conflict and particularly the international humanitarian law, which is contained in Article 22 of the Hague Convention IV(1907) states that "the right of belligerents to adopt means of injuring the enemy is not unlimited". Their right in particular is conditioned by Article 23 of the Hague Regulations prohibiting the use of poison or poisoned weapons; the 1925 Geneva Protocol prohibiting projectiles, asphyxiating, poisonous and other gases which incidentally prohibits also the use of weapons which could cause genetic disorders and illness which is likely to prolong for a considerable amount of time; and by the basic principle enshrined in the Declaration of St. Petersburg of 1868 prohibiting any weapon "which uselessly aggravates the sufferings of disabled men or render their death inevitable".

Moreover, the very purpose of international humanitarian law is to forbid "indiscriminate attacks" and demand protection of civilians. "Indiscriminate attacks" are generally defined as those that are not directed at any single military objective, those which employ methods or means of combat which cannot be directed at a specific military objective and those with effects which cannot be limited. In other words, indiscriminate attacks are those of a nature to strike a military object and civilians and civilian objects without distinction.

In addition to the above, the relationship between military advantage and the collateral damage involved also determines the legality of use of a weapon or a method of warfare employed. If the collateral damage is excessive in relation to the military advantage, the attack is forbidden.

Keeping the above considerations in view, it is easy to come to the conclusion that the use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law because such a use cannot distinguish between the combatants and non-combatants on the one hand and could cause excessive injuries to the combatants making their death inevitable and could even cause widespread and long-term damage which in some cases could even result in what is called as a "nuclear winter".

However an opposite view was expressed by some that the law of war or the humanitarian law could not be deemed to prohibit the use of nuclear weapons as that law grew up mostly only touching the old and more marginal weapons. They claimed that nuclear weapons being weapons of modern warfare are outside the scope of such a law. It is also their view that recent attempts to outlaw some newer method of warfare by implications did not outlaw the use of nuclear weapons in an armed conflict. Citing that almost all States are urging the conclusion of a convention to outlaw the use of nuclear weapons in an armed conflict, it is also argued that in the absence of any such convention their use is not prohibited. In the same connection the use of such nuclear weapons on Hiroshima and Nagasaki is also cited as an example of such legitimate use.

On the basis of above arguments, it is contended that international law does not provide for any blanket prohibition against the use of nuclear weapons and the legality of any specific use could however be appraised only in the total context of such specific use.

The above arguments in favour of the legality of use of nuclear weapons are convincingly contested. First it was pointed out that the development of humanitarian law and the specific principles indicated above which have the status of customary international law do not distinguish between major or minor methods of warfare or between major or marginal weapons. Second, some of the earlier opinions regarding the legality of nuclear weapons were not based on information and knowledge now available about the devastating effects of the use of nuclear weapons and their incompatibility with the fundamental norms of humanitarian law. Third, more recent efforts which reiterated the customary law developed on the basis of the earlier declarations or conventions also did not make any distinction between various weapons or methods of warfare. Fourth, the international community often engaged in further clarification, codification and progressive development of the law even when the principles

involved in such an exercise are already regarded as well-established in international law. Examples of this kind of exercise are many and by way of illustration the 1982 UN Convention on the Law of the Sea, various declarations and treaties concluded reiterating the UN Charter principles and the international humanitarian law itself could be mentioned. Fifth, the use of nuclear weapons over Hiroshima and Nagasaki does not make that use lawful if their use is otherwise prohibited in law. On the contrary, the use of chemical weapons in World War I led to the negotiation of the Geneva Protocol outlawing their further use. The same should apply to nuclear weapons. Violations of international law like any law would only highlight the importance of complying with such law and do not make legal what is otherwise illegal.

The use of nuclear weapons in response to attack by a conventional weapon would patently violate the principle of proportionality but also a nuclear response to nuclear attack, would violate the principle of discrimination, humanity, environmental security and probably the principle of neutrality as such an attack would not distinguish between combatants and non-combatants- causing civilian casualties, ravaging the natural environment and contaminating the territory of neighboring and distant neutral countries. Nuclear deterrence had been considered to be abhorrent to human sentiment since it implies that a state if required to defend its own existence will act with pitiless disregard for the consequences to its own and adversary's people.

Another question which arises in relation to the theory of deterrence is whether the keeping of peace or the prevention of war is to be made dependent on the threat of horrific indiscriminate destruction which justifies the stockpiling of such weapons at an enormous expense, in the hope that they will merely act as a deterrent but will not in fact be used. However those who do not have such weapons would all the time be racing to build them and those who already have nuclear weapons would continue to develop even more destructive weapons to maintain the superiority necessary for deterrence and this would keep humanity in the perpetual fear of total destruction. A better and saner way to secure everlasting peace would be to ensure that only are such weapons never used but also not made. The security of all nations would best be safeguarded by a nuclear weapon free world. If peace is the ultimate objective there can be no doubt that disarmament must be given priority and has to take precedence over deterrence.

The consideration of question of legality of use of

nuclear weapons is incomplete without consideration of the manufacture, production and stockpiling of nuclear weapons.

Since the production and manufacture of nuclear weapons can only be with the objective of their use, it must follow that if the use of such weapons itself is illegal under international law, then their production and manufacture cannot under any circumstances be considered as permitted. Besides, the manufacture and stockpiling of nuclear weapons would constitute as a threat of their eventual use.

In this connection, reference may be made to the Conventions on Biological Weapons and on Chemical Weapons which recognising the need to exclude completely the possibility of the use of such weapons, prohibit States parties to develop, produce, stockpile or otherwise acquire or retain the prohibited weapons. These Conventions clearly recognise and provide that the only effective way to prevent under any circumstances the use of a prohibited weapon is to ensure that no State undertakes the production or manufacture or retains such weapons. Accordingly, where States are in possession of chemical or biological weapons they are required to dismantle or destroy them under an elaborate procedure specified therein with built-in safeguards of international inspection. The need for these Conventions was felt because a number of States had made declarations/reservations to the 1925 Geneva Protocol to the effect that they could use, the prohibited gases, poisons etc in case they were subjected to an attack by such weapons.

The Chemical Weapons Convention and the Biological Weapons Convention by prohibiting the production, manufacture etc., of such weapons under any circumstances preclude their use even by way of retaliation in cases where they have been used by one party to a conflict.

Thus the use of nuclear weapons which is otherwise contrary to international law could only be effectively prevented by eliminating completely their production, manufacture and by ensuring the dismantling of existing nuclear weapons.

The production of weapons which have the capacity to destroy all mankind cannot in any manner be considered to be justified or permitted under international law.

It is also argued that declaring the threat or use of



nuclear weapons as illegal or unlawful would be a greater deterrent against any irresponsible use than treating such a use as legal; and further where such illegal use is still resorted to, the international community would at least have at its disposal the right to condemn the user and demand cessation of the wrongful act and attach such other legal consequences as are prescribed in the law of state responsibility.

In view of the above, it is submitted that the threat or use of nuclear weapons in any circumstance, whether as a means or method of warfare or otherwise, is illegal or unlawful under international law.