

Written Statement of the Government of Malaysia

A SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE
ON
THE LEGAL STATUS OF THE USE OF NUCLEAR WEAPONS

INTRODUCTION

The World Health Organisation (WHO), of which Malaysia is a member state, has posed the following question to the International Court of Justice (or World Court):

"In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law, including the WHO Constitution?"

Malaysia welcomes an advisory opinion on the legal status of the use of nuclear weapons, as it desires world order and legal clarity on the question of the use of nuclear weapons.

Such clarification will help WHO and the international community to promote the changes which must be brought about to effect primary prevention of health and environmental hazards arising out of the use of nuclear weapons.

Although the rule of international law and the knowledge of the law may appear unimportant to the nuclear powers, it is indispensable to the community of smaller nations, who feel insecure and vulnerable in a world in which stated threats of nuclear annihilation are apparently allowed to exist in a legal no-man's land.

The Government of Malaysia believes that no plague, no epidemic, no environmental or health hazard in human history can be compared with the consequences of a nuclear war.

An understanding of the catastrophic levels of destruction, death and irremediable suffering that would result from an explosion of a single nuclear warhead near a populated area compels only one conclusion - no such explosion must ever happen, whether by accident, through a terrorist act, or in war.

Although the end of the Cold War has considerably reduced the chances of a global nuclear war, the nuclear weapons states still subscribe to the strategy of *nuclear deterrence*. In the present post-Cold War climate, the legal opinion of the International Court of Justice could make an important contribution to the realisation of a nuclear weapons-free world.

They could not replace nuclear disarmament initiatives but they could provide the legal and moral parameters within which such initiatives could succeed.

THE LAWS OF WAR

From the beginnings of recorded history, there has been a common imperative in diverse cultures and religions to place some limitations on the permissible instrumentalities of warfare. Long before the laws of war were codified in such instruments as the Hague and Geneva Conventions and the Geneva Protocols, certain types of weapons were prohibited in many parts of the world.

For example, the Declaration of St. Petersburg in 1868 intended "to reconcile the necessities of war with the laws of humanity", forbade the use "of any projectile of less weight than four hundred grammes, which is explosive, or is charged with fulminating or inflammable substances".

The fundamental principle of the laws of war is that the right to adopt means of injuring the enemy is not unlimited and can be summarised in six basic rules, which involve a balancing of military necessity and humanity:

Rule 1: It is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation or suffering.

Rule 2: It is prohibited to use weapons or tactics that cause indiscriminate harm as between combatants and non-combatants, military and civilian personnel.

Rule 3: It is prohibited to use weapons or tactics which violate the neutral jurisdiction of non-participating states.

Rule 4: It is prohibited to use asphyxiating, poisonous or other gas, and all analogous liquids, materials or devices, including bacteriological methods of warfare.

Rule 5: It is prohibited to use weapons or tactics that cause widespread, long-term and severe damage to the natural environment.

Rule 6: It is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or disrespectful of persons, institutions, or resources otherwise protected by the laws of war.

It is clear therefore that the laws of war (*ius in bello*) consist of a number of well established and universally recognised principles, each of which individually and collectively prohibit the use of nuclear weapons in warfare.

These principles are:

- * the principle of moderation
- * the principle of discrimination
- * the principle of proportionality
- * the principle of necessity
- * the principle of humanity
- * the principle of neutrality
- * the principle of environmental safety
- * the principle of non-toxicity

THE PRINCIPLE OF MODERATION

From medieval times, man has defined and placed humanitarian limitations on the conduct of warfare.

In 1863, during the American Civil War, the Lieber Code was adopted and it declared that military necessity does not admit of cruelty, nor the use of poison, or "the wanton devastation of a district" (Article XVI).

In 1868, the Declaration of St Petersburg, in trying to reconcile the necessities of war with the laws of humanity, banned a particular weapons because its cruelty was out of proportion to its destructive potential. It declared that "the progress of civilisation should have the effect of alleviating, as much as possible, the calamities of war".

The Hague Convention of 1907 went considerably beyond the Declaration of St. Petersburg in the specificity of their proscriptions, the salient features of which are:-

Article XXII: The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article XXIII: It is especially forbidden

- (a) to employ poison weapons;
- (b) to kill or wound treacherously individuals belonging to the hostile nations or army;
- (c) to declare that no quarter will be given;
- (d) to employ arms, projectiles, or materials calculated to cause unnecessary suffering;
- (e) to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.

Article XXV: The attack or bombardment, by whatever means, of towns, villages, dwellings or buildings, which are undefended, is prohibited.

THE PRINCIPLE OF DISCRIMINATION

It is prohibited to use weapons that fail to discriminate between military and civilian personnel.

This is the most fundamental principle to be observed in modern warfare.

In 1923, a Commission of Jurists adopted the Hague Rules of Air Warfare, Article 22 of which provides that:

Aerial bombardment for the purpose of terrorising the civilian population, or of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

In 1925, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases, and of Bacteriological Methods of Warfare was adopted, prohibiting "the use of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".

This protocol, also known as the Geneva Gas Protocol, declared that such use "has been justly condemned by the general opinion of the civilised world" and that the purpose of the Protocol is that "this prohibition shall be universally accepted as a part of international law, binding alike the conscience and the practice of nations".

Most nuclear weapons, certainly all strategic weapons, are many thousands of times more destructive than even the largest conventional weapons. Unlike conventional weapons, nuclear weapons risk putting an end to civilisation as we know it. The chief characteristic of conventional weapons is their potential for blast or shock damage, accompanied by some thermal effects. By contrast, nuclear weapons produce blast and shock damage and, in addition, extended thermal radiation, electromagnetic pulse effects, and invisible but highly-penetrating and harmful radiation across great distances and over extended periods of times.

In other words, the deadly effects of nuclear weapons are suffered indiscriminately, by military forces and civilian populations alike.

Any use of nuclear weapons would therefore ipso facto be a violation of the principle of discrimination. It is one of the great paradoxes of the nuclear age that a soldier running a bayonet through a civilian would be considered guilty of violating the laws of war, whereas a general who incinerates a million civilians with a single nuclear bomb is not.

THE PRINCIPLE OF PROPORTIONALITY

It is prohibited to effect reprisals which are disproportionate to their antecedent provocations or to legitimate military objectives, or disrespectful of persons, institutions and resources otherwise protected by the laws of war.

It follows from the discussion in the preceding section that any use of nuclear weapons in response to conventional weapons violates the principle of proportionality.

However, this does not dispose of the more difficult question of the legitimacy vel non of a nuclear response to a nuclear attack. Here, the overriding norm is that reprisals "must conform in all cases to the laws of humanity and morality". i.e. the infliction of reprisals is subject to all the other principles of humanitarian law.

Therefore, civilian populations, civilian and cultural objects, such as utility installations and places of worship, and the environment, should not be the targets of reprisal.

The concept of 'Assured Destruction', when deliberately applied to policies for the acquisition of and use of nuclear weapons, appears to be directly opposed to the most fundamental principles found in the international law of armed conflict. Even as a form of reprisal, the concept of 'Assured Destruction' is prohibited if it includes deliberate attacks on the civilian population.

It is highly questionable whether the use of force as a means of reprisal, rather than self-defence, is lawful under the regime of the United Nations Charter, Article 2(4) of which commands all members to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."

The principle purpose of the United Nations, which is "to save succeeding generations from the scourge of war" would be defeated if a country, subjected to a nuclear attack, were to retaliate in kind, since the likely outcome of such a nuclear exchange would be the massive destruction of life in both countries, their neighbours and indeed the rest of the planet, depending on the size of the exchange.

It follows that the doctrine of nuclear deterrence; which is the current justification for the stockpiling and potential use of nuclear weapons, is entirely contrary to the accepted norms of humanitarian law.

The prohibition of a second "defensive" use of nuclear weapons is absolute. It is a rule of jus cogens, analogous to the rule of human rights law which makes torture a malum in se and therefore does not allow for the use of torture in response to torture.

THE PRINCIPLE OF NECESSITY

It is prohibited to use weapons whose effect is greater than that required to achieve a legitimate military objective.

The principle of necessity is sometimes cited to justify the only two occasions on which nuclear weapons have been used—the atomic bombings of Hiroshima and Nagasaki.

It has been argued that the killing of a few hundred thousand civilians saved the lives of millions of Americans and Japanese, who would have been killed in an invasion of Japan. This theory of military necessity argues that military necessity overrides all other principles and that whatever means are chosen to achieve the ends of victory are justified.

However, military necessity, like reprisal, is not an absolute. If necessity could be used to justify prohibited weapons or tactics, it would make a mockery of such prohibitions and military commanders could always invoke necessity to justify whatever weapons or tactics they chose to use, no matter how brutal or inhumane.

As early as 1863, the Lieber Code spelled out the restrictions on the principle of necessity:

Article 14: Military necessity, as understood by modern civilised nations, consists of the necessity of those measures which are indispensable for securing the ends of war, and which are lawful according to the modern law and usages of war.

The laws of war distinguish between norms which are subject to being overridden by military necessity and those which are not.

For example, Article 58 of the Hague Rules of Air Warfare (1922/1923) provides that a neutral private aircraft must not be destroyed "except in the gravest military emergency".

No such exceptions are written into the conventional or customary laws of war with respect to the principles applicable to the use of nuclear weapons as weapons of mass destruction. On the contrary, Article 1 of the Geneva Conventions (1949) enjoins the parties to respect their provisions "in all circumstances", while Article 3 provides that persons taking no part in the hostilities shall "in all circumstances" be treated humanely and protected from violence to life and person" at any time and in any place whatsoever."

From the foregoing, it is clear that "military necessity", while often claimed as a justification by states and military commanders who have violated the laws of war, is powerless to justify the use of nuclear weapons when the entire body of that law is taken into consideration.

THE PRINCIPLE OF HUMANITY

It is prohibited to use weapons which cause unnecessary or aggravated suffering.

This principle is the military counterpart of the rule against cruel, unusual and inhuman punishment in a civilian context. While it is aimed primarily at reducing the suffering of combatants, it also applies to the use of weapons against civilians.

The ban on excessively cruel weapons dates back to the earliest records of humanitarian law and is a major theme running throughout the gradual evolution of the laws of war. It is embodied in the two overarching principles that the right of the parties to an armed conflict to adopt means of injuring the enemy is not unlimited and that, in the words of the de Martens Clause, "the laws of humanity" and "the dictates of the public conscience" are to govern the rules of warfare.

It is indisputable that the cruelty and inhumanity of nuclear weapons is of an order of magnitude far greater than any conventional weapon of mass destruction.

Testimonies by survivors of the bombing of Hiroshima and Nagasaki record the immediate burn and blast effects of nuclear weapons and their long-range consequences, placing nuclear weapons in the category of weapons that cause unnecessary and aggravated devastation and suffering. If it cannot be said of nuclear weapons that they violate the laws of humanity and the dictates of public conscience, then this cannot be said of any weapons in the world's military arsenals, past or present.

THE PRINCIPLE OF NEUTRALITY

It is forbidden to use weapons that violate the neutral jurisdiction of non-participating states.

The principle of neutrality was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on neutral persons or ships:

Hague V, Article 1: "The territory of neutral powers is inviolable".

Hague XIII, Article 1: "Belligerents are bound to respect the sovereign rights of neutral powers..."

It is clear that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral state by the use of a weapon in a belligerent state. In this sense, nuclear weapons, given their uncontrollable effects, are neutrality-violating weapons par excellence.

The classic study of "Consequences of Radioactive Fallout" by Patricia Lindop and J Rotblat in 1981 showed how the radioactivity in the fallout after a nuclear explosion can expose populations to external and internal radiation with deleterious health effects.

Just as nuclear weapons are unable to discriminate between combatants and non-combatants, so they are unable to discriminate between belligerent states and neutrals.

THE PRINCIPLE OF ENVIRONMENTAL SAFETY

It is forbidden to use weapons that cause widespread, long-term and severe damage to the environment.

The right to a safe, clean and livable environment is sometimes referred to as a "third generation right". This may be so to the extent that it transcends the laws of war and concerns itself with protection against environmental degradation from whatever source.

The principal of environmental safety is now recognised as part of international humanitarian law: "Respect for the environment is therefore one of the foremost obligations of the international community, which cannot and must not sit by and idly witness the destruction - all too often deliberate - of the collective heritage of mankind".

There are in existence numerous treaties and instruments of customary international law which prohibit the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment, as laid down in Protocol I (1977).

For example: Part III, Section I: Methods and Means of Warfare, Article 35 (3): "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the environment."

Chapter III, Article 55(I): "Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

Stockholm Declaration on the Human Environment (1972): Principle 26: "Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons."

The environmental effects of a major nuclear exchange of the order of 10,000 megatons between the United States and the then Soviet Unions, based on mathematical models, were vividly described as a "nuclear winter" by a group of distinguished scientists about ten years ago.

Although the nuclear winter scenario is now extremely unlikely, nevertheless those projections convey some idea of the severity and duration of the effects of nuclear war on the environment.

THE PRINCIPLE OF NON-TOXICITY

It is prohibited to use asphyxiating, poisonous and other gases, and all analogous liquids, materials or substances.

The premier treaty in this field is the Geneva Gas Protocol (1925).

In 1956, Article 14 of the International Committee of the Red Cross Draft Rules expanded on the Geneva Gas Protocol in the following terms:

"...the use is prohibited of weapons whose harmful effects - resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents - could spread to an unforeseen degree or escape, either in space or time, from the control of those who employ them"

Radioactive fallout is in effect a poison that can be absorbed through the skin, breathed in, or eaten. It is accumulative and can give rise to radiation sickness, cancers and death, depending on the dose received.

The prohibition in the Gas Protocol is unequivocal and its application by analogy to nuclear weapons so clear, that it is impossible not to reach the conclusion that the use of nuclear weapons is illegal.

THE USE OF NUCLEAR WEAPONS VIOLATES THE RIGHT TO LIFE

Although it is not easy to arrive at a consensus on the hierarchy of human rights, it is clear that the one right transcending all others is the right to life.

The simplest and strongest formulation of this right is found in Article 3 of the Universal Declaration of Human Rights: "Everyone has the right to life, liberty and security of person."

As postulated above, the use of nuclear weapons would in most if not all circumstances result in the deaths of several thousands, if not millions, of innocent civilians, in violation of several principles of humanitarian law. Such an event, however, would also violate the right to life.

This point has been recognised by the Human Rights Committee of the United Nations in its general comment (1984) under Article 40(4) of the International Covenant on Civil and Political Rights:

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction.....

4. The committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today.

RESOLUTIONS OF THE UNITED NATIONS

The United Nations General Assembly Resolution 1653- (XV) reads, in part, as follows:-

- (a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations.
- (b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilisation and, as such, is contrary to the rules of international law and to the laws of humanity;
- (c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not in such a war will be subjected to all the evils generated by the use of such weapons;
- (d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilisation.

CONCLUSION

When human survival is threatened by the use of nuclear weapons, it is vital that mankind has an authoritative legal opinion by the highest international authority, the International Court of Justice, on the illegality or otherwise of nuclear weapons. The censure of declared illegality, reinforced by the weight of academic juristic opinion and writing heavily in favour of illegality, will halt proliferation and advance the process of nuclear disarmament.

The question of the illegality of nuclear weapons has never been tested in international law. The opinion of the International Court of Justice would be advisory only but would have great authority and weight. It would have a powerful influence on world opinion and be a law that carries its own inherent sanctions. Governments usually find it harder to justify or defend state policy that is obviously illegal than in situations, as at present, when the law can be denied.

Our contention is that any action that makes it harder for a state to acquire, use or threaten to use nuclear weapons must be a good action.

The illegality of nuclear weapons under international law appears clear. Since 1967, the United Nations General Assembly has repeatedly declared by resolution that any use of nuclear weapons would be both a violation of the United Nations Charter and a crime against humanity. The General Assembly has on several occasions called for a Convention on the Prohibition of the Use of Nuclear Weapons.

Legal scholars, including some present and former judges of the International Court of Justice, have made a strong case against nuclear weapons, for they offend against established Principles, Treaties and Conventions by not discriminating between civilian and military targets, belligerents and neutrals, enemy and friendly territory, enemy property and the environment, and even between the generation involved in the conflict and generations of neutral nations, not yet born.

Nuclear disarmament efforts by people from all walks of life to protect mankind and the environment from the use of nuclear weapons have for too long been rejected by the powerful military-industrial-political complexes of the nuclear weapons states, that rely on nuclear weapons as potent instruments of political and military power.

The present struggle against the further spread of nuclear weapons requires that the nuclear powers recognise the inherent contradictions and double standards in their non-proliferation policies. They cannot expect other nations to forgo nuclear weapons when they themselves rely on nuclear weapons for their own security.

A ruling by the International Court of Justice that clarifies the legal status of nuclear weapons is fundamental to the world's nuclear non-proliferation and disarmament efforts.

For fifty years, the people of the world have yearned for peace and a nuclear weapons-free world, in which nuclear weapons would be banned because they are illegal. A ruling from the International Court of Justice could provide a way.

For all the reasons stated above, this honourable court is requested to advise the World Health Organisation that the use of nuclear weapons by a State in war or other armed conflict is a breach of its obligations under international law including the WHO Constitution.