

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



MOST URGENT

EUROPEAN COURT OF JUSTICE
THE HAGUE

NO: HAG/POL/443/2/95

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 regards

Yours sincerely,

(I.P. Khosla)

H.E. Mr. Eduardo Valencia-Ospina
Registrar
International Court of Justice
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2517 KJ THE HAGUE

WHO'S REQUEST FOR AN ADVISORY OPINION OF
THE INTERNATIONAL COURT OF JUSTICE
ON LEGALITY OF NUCLEAR WEAPONS

Counter Memorial of the Government of the Republic of India

I. Can WHO request an opinion from ICJ ?

(a) WHO has previously exercised this right

In accordance with Article 96(2) of the Charter of the United Nations, Article 76 of its Constitution and Article 10(ii) of its agreement with the United Nations, the WHO may request an Advisory Opinion from the Court on any legal question within the scope of its activities. The WHO has previously exercised this right in 1980 when it requested an Advisory Opinion on certain questions relating to the transfer of a regional WHO office. The present matter similarly lies within the scope of its activities and the Court's opinion would assist it in the future conduct of its activities.

(b) Request is within the scope of WHO activities

The opinion requested by WHO clearly relies to a question arising within the scope of its activities. It is a "legal question" concerning international legal aspects of the use of nuclear weapons which would, no matter how cautiously employed, affect human health and the environment in an irretrievable way. Any political character which the question might also have could not and need not prevent the Court from giving an opinion. The WHO request invites the Court to contribute through the exercise of its advisory role to the effective functioning of the UN system and the activities of one of its specialised agencies. The opinion requested is of real importance for the WHO in the conduct of its activities relating to the effects of the use of nuclear materials and weapons on human health and the environment. The World Health Assembly has declared that the primary objective of prevention of the health hazards posed by nuclear weapons requires clarity about their status in international law since "over the last 48 years marked difference of opinion have been expressed by member States about the lawfulness of the use of nuclear weapons". (WHA Resolution 46.40 of 14 May, 1985). Any advisory opinion rendered would clarify the international legal context in which the WHO conducts its activities.

The WHO's objective is "the attainment by all peoples of the highest possible level of health" (Article 1). To that end the Organisation has a number of specified functions set out in Article 2 of its Constitution. It is in the application of these functions that the WHO has undertaken its activities for many years on the health and environmental consequences of the use of nuclear energy and materials, including weapons.

The WHO's legal mandate to promote and protect human health characterised by a preventive approach is directly threatened by risks posed by the use of nuclear energy for civil and military purposes. In its practice, the WHO has long addressed questions related to the consequences of the use of nuclear weapons on human health and the environment. Any argument that the subject of the human health and environmental effects of the use of nuclear weapons fell outside the scope of WHO's activities would be contrary to the evolution of its practice. It is a subject that no other specialised agency has the competence or the expertise to address.

Since 1981, the WHA has adopted a number of important resolutions addressing the effects of nuclear weapons on human health and the environment. The WHA has been assisted in this by a series of expert specialised reports. Its Resolutions WHA 34.38, WHA 36.28 and WHA 40.24 on the effects of nuclear war, each adopted by large majorities, recalled that it had been established and recognised that no human health service in the world had a capacity to respond adequately to the consequences for human health resulting from the use of even a single nuclear weapon. It was also recalled that the impact on human health and the environment would be felt for generations to come.

(c) ICJ opinion would assist WHO in future conduct of activities

These alarming findings have led the WHO and in particular the WHA to consider the proper direction of its activities relating to the effects of nuclear weapons on human health and the environment. In this context, it has become evident that it was necessary for the Organisation to identify the legal basis on which nuclear weapons might be used under international law in order to allow it to assess its own activities in the most efficient manner possible.

The Advisory Opinion which the Court is called upon to give and which it should give on the question relating to the legality of the use of nuclear weapons would allow the WHO to ensure that its activities were properly carried out in a manner that took full account of the priority needs of

functions set out in Article 2 of its Constitution. It is in the application of these functions that the WHO has undertaken its activities for many years on the health and environmental consequences of the use of nuclear energy and materials, including weapons.

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The Advisory Opinion which the Court is called upon to give and which it should give on the question relating to the legality of the use of nuclear weapons would allow the WHO to ensure that its activities were properly carried out in a manner that took full account of the priority needs of the international community consistent with applicable norms of international law.

II. Should the ICJ give an opinion ?

It is clear from the preceding discussion that the WHO is entitled to request an Advisory Opinion from the Court. The Court is not obliged in conformity with Article 65 of its Statute to reply or render the advice on the question asked, however, except in the Eastern Carelia case (1923) the International Court never refused to give an Advisory Opinion when requested.

(a) Responsibility of ICJ to give an opinion

In the case concerning Interpretation of Peace Treaties (1950), the Court emphasised that given the non-binding character of the opinion which it was giving no State could oppose the giving of the opinion. The same principle governs the present question. The opinion requested of the Court would remain purely advisory and would not be binding upon States members of the WHO. Accordingly the giving of the opinion does not depend on the consent of any particular State or group of States. As the Court stated in the Interpretation of Peace Treaties case (1950):

"The Court's opinion is given not to the States but to the organ which is entitled to request it; the reply of the Court, itself an organ of the United Nations, represents its participation in the activities of the Organisation, and, in principle, should not be refused".

This principle equally applies to the present case. It is indispensable for the conduct of its activities in this field that the WHO should be duly enlightened and informed of the legality of the use of nuclear weapons.

(b) ICJ has never refused except in the Eastern Carelia case

In the Eastern Carelia Case (1923), the Court had said that it could not, in the guise of an Advisory Opinion deal with a dispute between two States where one had not recognised its competence, had refused to participate in the procedure and was not even a member of the Organisation which had asked the question.

It is admitted that in the present case the question which has been asked of the Court relates to an important controversy between States. However, as the Court itself has recognised, underlying each request for an Advisory Opinion there will always be a controversy which has led the Organisation to make the request (Namibia Case, 1971) and the mere existence of controversy

does not mean that a contentious dispute exists between the parties. In giving an opinion on the legality of the use of nuclear weapons in view of their effect on human health and the environment, the Court could contribute to the resolution of a controversy but it would not address a dispute within the meaning of Article 36 of the Statute of the Court.

The Court has frequently emphasised that as the "principal judicial organ", it should remain faithful to its character and that an Advisory Opinion requested must relate to a legal question (Certain Expenses of the UN, 1962). However, the fact that the question has political implications is not in itself an obstacle to the giving of an Advisory Opinion and where the Court has been asked to characterise a particular form of behaviour with respect to the provisions of treaty and customary law, the Court is performing a task which is essentially legal.

In the present case, the question asked of the Court relates to the compatibility of the use of nuclear weapons with the provisions of international law including the Constitution of WHO. In asking the Court to characterise the behaviour in the context of established principles of international law, the WHO is inviting the Court to carry out a task clearly related to its judicial functions.

The choices made and the actions to be taken by WHO would depend directly on its knowledge whether the use of nuclear weapons is legal or illegal. Therefore, it is important that the Court should exercise its judicial function and render the advice on the question raised. Even if this has considerable political implications a clarification of the legal aspects involved would in concrete terms enlighten the WHO in the formulation of its own activities.

For the above reasons, it is submitted that the Court should give an opinion on the questions submitted.

III. Legality of the threat or use of Nuclear Weapons

(a) Applicability of the Laws of War

The question of what kinds of weapons may be used in an armed conflict between States is governed by international law and particularly the law relating to armed conflict and more so by the international humanitarian law. The international humanitarian law, among other things, provides for the methods and means of warfare. Thus it regulates the choice of weapons which could be employed; the obligation to distinguish between combatants and non-combatants; the prohibition against attacking civilian targets and health services; the prohibition against use of chemical weapons or poisonous weapons which have indiscriminate effect; the prohibition against use of weapons which render death inevitable or cause unnecessary suffering; the prohibition against violating the territorial integrity and neutrality of third states; the prohibition against causing widespread, long term severe damage to the environment; the obligation to respect the principles of proportionality and humanity and the prohibition against genocide or crimes against humanity.

These rules are well established finding their sources in many of the classical instruments governing jus-in-bello including the 1868 St. Petersburg Declaration, the 1874 Brussels Declaration, 1899 Hague Declaration IV, Regulations annexed to 1907 Hague Convention IV, 1925 Geneva Protocol, 1948 Genocide Convention and the 1949 Geneva Convention.

It has been suggested that in the nuclear age the normal rules of international law have been suspended or perhaps set aside altogether, for all matters relating to nuclear weapons. There are no reasons in law or policy to support this view. The use of nuclear weapons like any other State activity is subject to the general and specific rules of international law, including those reflected in the WHO constitution. The development of new methods and means of armed conflict do not make humanitarian law inapplicable to them. The law of armed conflict applies to all forms of weaponry - old and new, and is not weapon specific. Any other view would not be consistent with the international rule of law and would amount to the need for creation of new law each time a new weapon is invented which is both unnecessary and undesirable.

(b) General Assembly Resolutions

Several rules of international law expressly prohibit the use of nuclear weapons, particularly the UN General Assembly Resolutions which have been consistently supported by a large number of States. Since its 15th Session the United Nations General Assembly has repeatedly adopted resolutions on the non-use of nuclear weapons stating that the use of nuclear weapons is a violation of the Charter of the United Nations and a crime against humanity. It has condemned the use, stockpiling, deployment, proliferation and manufacture of nuclear weapons. These resolutions which are supported by a large number of States are of normative character reflecting customary international law applicable to the entire international community. They are an expression and application of a pre-existing positive law which endorses the classical prohibition embodied in the law of armed conflict.

The arguments that the GA resolutions are contradictory, as they declare that the use of nuclear weapons is illegal but also demand the conclusion of the treaty prohibiting the use of nuclear weapons, do not reflect the correct interpretation of these rules. Many treaty rules codify pre-existing customary rules. The reaffirmation of these rules in a treaty does not imply their prior non-existence as binding obligations. The United Nations' desire to adopt such a convention exists because the use of nuclear weapons is only prohibited in a generic manner - a treaty would codify the existing prohibition.

(c) International law of armed conflicts

The arguments that the use of nuclear weapons is contrary to customary international law usually emphasize four sources.

- (i) Article 23(a) of the Hague Regulations prohibiting poisons and poisoned weapons;
- (ii) the Protocol of 1925 which prohibits the use not only of poisonous and other gases but also of analogous liquids, materials or devices ;
- (iii) Article 23(c) of the Hague Regulations which prohibits weapons calculated to cause unnecessary suffering; and
- (iv) the 1864 Declaration of St. Petersburg which lists as contrary to humanity those weapons which "needlessly aggravate the sufferings of disabled men or render their death inevitable".

The ravages caused by World War II which resulted in large civilian casualties i.e. 24 million out of a total of 50 million left the world stunned. The need for reiteration of the existing provisions and codifying the principles for the protection of war victims was strongly felt.

The 1945 Nuremberg Charter adopted by the allies reaffirmed inter alia that "wanton destruction of cities towns or villages or devastation not justified by military necessity" was a war crime and declared "inhumane acts committed against any civilian population" to be a crime against humanity.

The most complete codification of humanitarian law is contained in the four Geneva Conventions of 1949 under which the Convention No. IV relates to the Protection of Civilian Persons in Times of War.

A number of other legal instruments have been adopted by various bodies which reinforce the notion of moderateness in armed conflicts. The International Committee of the Red Cross has adopted various rules and recommendations for the limitation of the dangers faced by civilians during the time of war which prohibit weapons and means of warfare which are indiscriminate in their effect and cause unnecessary sufferings.

Similarly, recently the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violation of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 empowers the International Tribunal to prosecute persons violating the laws of war by viz. employing poisonous weapons, causing unnecessary suffering, attacks on undefended towns and wanton destruction of cities or towns not justified by military necessity.

(d) The Law of War Prohibits the Use of Nuclear Weapons by reason of their qualitative and quantitative effects

The qualitative and quantitative effects of nuclear weapons characterised by the initial nuclear radiation and nuclear fall out and consequences of those effect brings nuclear weapons within the scope of rules prohibiting the use of poisonous and chemical weapons which violate the principles of international law prohibiting the use of weapons which

- are chemical;
- are poisonous;

- render death inevitable;
- cause unnecessary suffering;
- have indiscriminate effects;
- violate the principles of proportionality and humanity and neutrality; and
- damage the environment

(i) The Principle of Discrimination

It is prohibited to use weapons that fail to discriminate between military and civilian personnel. Article 24, 1923 Draft Rules for Aerial Warfare; Article 1, 9th Hague Convention of 1907; Article XXV, The Regulations on Land Warfare annexed to the 1907 Hague Conventions).

The capacity of today's nuclear weapons which have the yields of several megatons i.e. several hundred times that of the Hiroshima and Nagasaki can kill millions of people. The bomb that exploded over Hiroshima was small by today's standards but still thousands of innocent citizens were burnt, blasted and crushed to death at the moment of explosion. The number of deaths attributable to this single bomb is 200,000. It is self evident that effect of the use such nuclear weapons cannot ensure distinction between combatants and non-combatants. Even nuclear weapons with very low yields are capable of harming non-combatants virtually inevitably whether intended or not.

(ii) 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.

The use of nuclear weapons would inevitably violate the principle of proportionality. The reprisals have to conform to principles of humanitarian law. The civilian population cannot be made the object of reprisals. Article 33 of 1849 Geneva Convention No. IV Relative to the Protection of Civilians Persons in Time of War prohibits reprisals against protected persons and property. Thus civilian objects, cultural objects and places of worship cannot be made the object of the reprisals. Attacks by way of reprisals are prohibited against natural environment,

works or installations containing dangerous forces namely dams, dikes and nuclear electrical generating stations. Objects indispensable for the survival of civilian populations such as foodstuff, agricultural areas livestock, drinking water installations and supplies and irrigation work also cannot be made the object of reprisals.

The use of nuclear weapons, with its consequent effects violate each and every one of the above mentioned rules, the ensuing devastation being out of all proportion to the provocation received and the objective sought to be achieved.

(iii) The Principle of Necessity

It is prohibited to use weapons whose effect is greater than that required to achieve a legitimate military objective. Military necessity cannot override principles of humanity.

Military necessity means that only that destruction necessary, relevant and proportionate to the prompt achievement of lawful military objectives is legal. Not only must such destruction be necessary and relevant to the attainment of military objectives, but it must also be proportionately and reasonably related to the military importance of the object of attack.

Military necessity can never justify use of prohibited weapons or other weapons which if used can cause greater destruction of civilian population and property than that required to achieve a legitimate military objective. Though military object during war is to weaken the military forces of the enemy the use of weapons of mass destruction against the civilian population may weaken the enemies will to fight but not enemies military forces (1868 Declaration of St. Petersburg).

Although derogations from certain principles is permitted under the Additional Protocols no such exceptions are allowed in the Customary laws of war or under Geneva Conventions of 1949. Article 1 of the 1949 Geneva Conventions enjoins the parties to respect their provisions under "all circumstances". Common Article 3 provides that persons not taking part in hostilities shall in "all circumstances" be treated humanely and protected from violence to life and person.

Nuclear weapons cannot be used in self defence. The

principle of military necessity permits a state to apply only that degree and kind of regulated force not otherwise prohibited by the laws of war. The nuclear weapons cause such destruction which far exceed the measure of proportionality and the object of destruction necessary and relevant to the attainment of military objectives.

(iv) The Principle of Humanity

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

This principle was first enunciated in the Declaration of St. Petersburg which forbade the use of certain weapons "which uselessly aggravate the sufferings". Thereafter the 1899 Hague Declaration Concerning Expanding Bullets and the 1925 Gas Protocol expressed the same sentiment. More recently the Convention on the Prohibition of Military or Any Other Hostile Use Of Environmental Modification Techniques 1976 and the Convention on prohibitions or restrictions on use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects 1980 have been concluded to give effect to the established custom and principles of international law in this regard.

Although the nuclear weapons have been treated by some to be sui generis, they are none the less 'weapons' and cannot be regarded as exempt from the general provisions of the law of war relating to use of weapons. The various legal provisions which have the effect of prohibiting the use of weapons which cause 'unnecessary suffering' and means of attack which are indiscriminate in nature would obviously apply to nuclear weapons as well as to those of conventional type.

The effects of nuclear weapons on human beings has been well documented by virtue of testimony of survivors of the Hiroshima and Nagasaki bombardment. It is obvious from these that the burn and blast effects of nuclear weapons and their immediate and long-term consequences including genetic consequences, all place them in the category of weapons that cause unnecessary and aggravated devastation and suffering thereby violating the laws of humanity and the dictates of public conscience.

(v) The Principle of Neutrality

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

The radioactive fallout of nuclear explosion can have transborder effects, damaging the citizens and property of a neutral State. It has been well documented and also shown by Chernobyl experience that the radioactivity in the fall out can have effects over a large area. Thus as nuclear weapons are unable to discriminate between combatants and non-combatants so also they are unable to discriminate between the neutral states and the belligerent states.

(vi) The Principle of Environmental Security

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

The emergence of environment as a vital factor for sustaining humanity and the future generations has been given a new emphasis by the urgent need to prevent pollution of the atmosphere by interalia, carbon dioxide, acid rain and the destruction of the ozone layer. Environment is indivisible in terms of ownership and is the common heritage of mankind, therefore it cannot be appropriated or polluted by any one sovereign state.

The customary as well as conventional law of war prohibits the use of methods and means of warfare that may cause widespread, long-term and severe damage to the environment. Attacks on objects essential to the survival of civilian population or on works and installations that release dangerous forces are also therefore prohibited.

Several other treaties and instruments lay down extensive rules for the preservation of environment. Warfare has been held to be inherently destructive of sustainable development. States are therefore required to respect international law providing protection for the environment in times of armed conflict, the 1976 Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques; 1972 Stockholm Declaration of the United Nations Conference on the Human Environment; 1980 United Nations General Assembly Resolution on Historical Responsibility of States for the Preservation of Nature for Present and Future Generations; Draft Code of Crimes against Peace and Security of Mankind; 1992 Security Council Resolution 687 concerning the Restoration of Peace and Security Iraq and Kuwait; 1992 Rio declaration on Environment and Development, 1982 United Nations Convention on Law of the Sea, 1985 Vienna Convention on Protection of the Ozone Layer; 1992 Framework Convention on Climate Change;

1892 Convention on Biological Diversity.

(vii) The principle of Non-Toxicity

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

The radioactive fall out of a nuclear explosion is a kind of poison that can be absorbed through the skin, breathed in or eaten, it accumulates in the body and when the accumulated dose rises above a certain level, it results in 'radiation sickness', a disease that attacks the bone marrow and other parts of the body. It may lead to progressive anaemia, loss of hair, skin sores, increased susceptibility to infection and in worst cases - death.

The prohibition to use poison or poisonous weapons dates back from the laws of Manu to Grotius the Lieber Code and the 1899 Hague Declaration (IV,2) Concerning Asphyxiating Gases; Article 23(a) of the 1907 Hague regulations; Article of the 1922 Treaty Relating to the Use of Submarines and Noxious Gases in Warfare and the 1925 Geneva Gas Protocol.

The prohibition under the Geneva Protocol is unequivocal. It prohibits not only poisonous and other gases but also the use of all analogous liquids, materials, or devices. Therefore it is not difficult to reach the conclusion that it applies also to the nuclear weapons thereby rendering their use illegal.

(e) Use of Nuclear Weapon is a 'Grave Breach'

All the four Geneva Conventions make provision for penal sanctions which enjoin the parties to enact the necessary legislation to punish persons who commit breaches under these instruments. These instruments define 'grave breaches' which is an important contribution towards the definition of 'war crimes' in international law. This definition is more or less the same in all Conventions with Protocol I elucidating it in greater detail. Since most of the States are parties to the Geneva Conventions, we may rely on the definition under Article 50 of Convention I which states as follows:

Grave breaches... shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful

killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. The indiscriminate nature of nuclear weapons is known to all States, their use with the knowledge that they would kill protected persons would amount to wilful killings with in the meaning of Conventions. Nuclear weapons are known for the aggravation of human suffering. Therefore any such use would amount to 'wilfully causing, great suffering, serious injury to body or health', which is characterised as a grave breach by each of the Conventions. Further 'extensive destruction of property' not justified by military necessity and carried out unlawfully and wantonly are grave breaches. The use of nuclear weapons causes extensive destruction in the affected area and contamination- thereby infringing this rule directly and constituting 'grave breach' as defined in the Conventions.

(f) Prohibition of attacks against civilian population

Under international law it is clear beyond doubt that the use of nuclear weapons against civilians, whatever the nature of size and destructive power of the weapon, will be rendered illegal by virtue of the application of the customary rule which states that belligerent must always distinguish between combatants and noncombatants and limit their attack only to the former. This is an old and well established rule which has achieved universal acceptance. The first multilateral instrument to state it was the St. Petersburg Declaration of 1868, which declares that "the only legitimate object which States should endeavour to accomplish during war is to weakening the military forces of the enemy".

This obligation is repeated and further elaborated in different forms in many instruments, including:

- Article 26 of the Regulation annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and Article 1 of the 1907 Hague Convention IX Concerning Bombardment by Naval Forces in Times of War, to the extent that these provisions prohibit attacks on undefended areas and undefended buildings;

- the resolution of 30 September, 1928, whereby the Assembly of the League of Nations forbade the civilian population from being considered a military objective;
- the 1949 Geneva Conventions prohibiting attacks on military establishments and health transports (Article 19 et seq. of Convention I; Article 22 et seq. of Convention II; Articles 14, 15, 18, 21, 22 of Convention IV);
- UN General Assembly resolutions 2444 (XXIII) of 19 December, 1968 and 2675 (XXV) of 9 December, 1970;

Thus the use of a nuclear weapon against civilian targets or of a weapon having incidental effects on civilians in any circumstances is rendered illegal by virtue of the most elementary rules of the international law of armed conflict.

Moreover, the use of a nuclear weapon against a civilian target would constitute a crime against humanity as defined by Article 6 (c) of the Statute of the Nuremberg Tribunal and Article 2 of the 1948 Genocide Convention. The UN General Assembly has characterised as "crime against humanity and civilization" any use by a State of a nuclear or thermo-nuclear weapons irrespective of whether they are even used against civilians.

The use of a nuclear weapon against a military target will also be illegal. This arises from the following considerations:

- i. Even the use of a limited nuclear weapon with reduced power renders death inevitable for those within the range of its effects;
- ii. the use of a limited nuclear weapon with reduced power could lead to total nuclear war;
- iii. the use of nuclear weapon with enhanced power increases the effects identified above and its indiscriminate effects which cannot be limited to any "permitted" military objectives.

(g) The use or threat of nuclear weapons not justified by international law under any circumstances.

The proponents of the use of nuclear weapons justify their use on the grounds of

1. self defence

- ii. reprisals
- iii. necessity
- iv. deterrence

(i) Self-defence does not justify use of nuclear weapons

Self defence is an exception to the prohibition against the use of force when a State is subject to an armed attack. The legality of war does not release the participants from the application of the rules regulating the conduct of armed conflicts. An aggressor violating the law of the Charter has to comply with limitations on the weapons used. Similar restraint has to be exercised by those fighting in self defence. The application of rules of law of armed conflicts does not depend on the legality of the defended causes; both aggressor or victim, are equally subject to the laws of war - a principle reflected in the fifth preambular paragraph of Protocol I. Only those weapons may be used in self defence whose use is otherwise permitted under international law. Recourse to nuclear weapons prohibited by various rules of laws of war, cannot be justified according to the right of inherent self defence under the UN Charter.

(ii) Reprisals do not justify use of nuclear weapons

- Reprisals against non-combatants and non-military targets

Reprisals against non-combatants non-military targets are prohibited. It is forbidden to resort to reprisals against medical installations, transportations and units; the injured; infirm; civilian populations and property and various categories of civilian populations subject to protection.

- Reprisals against combatants and military targets

The prohibition of reprisals against combatants and military targets is not specifically provided for in any legal instrument but prohibition of the use of nuclear weapons against them is certain because it violates the other principles of laws of armed conflict like causing of unnecessary suffering rendering death inevitable.

The International Law Commission in its Draft Articles of the Responsibility of States stresses under Article 30 on counter-measures that:

"even where the internationally wrongful act in question

would justify a reaction involving the use of force[...] action taken in this guise certainly cannot include, for instance, a breach of obligations of international humanitarian law. Such a step could never be 'legitimate' and such conduct would remain wrongful".

Further Article 1 common to the four 1949 Geneva Conventions put an obligation on the parties to respect those instruments in all circumstances.

In practice, the very nature of nuclear weapons would necessarily violate prohibitions for which reprisals are expressly prohibited - e.g. the prohibition on attacking civilian populations or their property. This is why such reprisals must necessarily be illegal.

(iii) Necessity does not justify the use of nuclear weapons

The law of armed conflicts does not recognise the principle of necessity except in those circumstances where it is expressly provided for. The International Law Commission has stated that this exception does not authorise a State to ignore the prescriptions of humanitarian law as

It would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed, precisely, to prevent the necessities of war from causing suffering which it was desired to proscribe once and for all".

The rules of international law do not admit the possibility of invoking military necessity as a justification for state conduct not in conformity with the obligations they impose. These rules apply equally in relation to nuclear weapons.

(iv) Nuclear Weapons as Deterrents

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, as stated above, 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 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.

(h) Legality of production, manufacture, stockpiling etc of nuclear weapons.

It has been argued by some States in their memorials that only the question of the legality of the use of nuclear weapons is before the Court for consideration in giving its advisory opinion.

However, the question of legality or use of nuclear weapons cannot be distinguished or separated from the legality of its manufacture, production etc.

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.
