

THE 1996 ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

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INTRODUCTION

War is an old phenomenon that has existed since the inception of human civilisation, and the *laws of war*¹ are probably as old as war itself. Since war was an inevitable phenomenon in the history of mankind, a general necessity of having some kind of regulations to limit the sufferings of both combatants and civilians during an outbreak of an armed conflict had emerged. It was found that in the wars fought around the world during ancient times, there was evidence of interesting customs and agreements with ‘humanitarian’ elements in them. These were rules protecting the victims of armed conflicts as well as regulations that prohibited and implied restrictions on the means and tactics of warfare. Such restrictions on warfare had been a temporary phenomenon until the mid-19th century, when the states ratified the first **Geneva Convention of 1864**,² containing ten Articles which were drafted to safeguard all the soldiers of the conflicting parties

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1. Mary Kaldor, *New and Old Wars* (Stanford University Press, 2007).
2. “The Geneva Convention of 1949,” International Committee of the Red Cross, Geneva, August 12, 1949.

The LoAC contains the basic principles and rules which not only govern the choice of weapons by the parties engaged in a conflict, but also prohibit and restrict the employment of certain weapons to protect civilians and persons who are not, or no longer, taking part in a conflict.

who were wounded on the battlefield so that they could be taken care of without any distinction, on the earnest persuasion of the then newly formed **International Committee of the Red Cross (ICRC)**.³

What later came to be known as the **International Humanitarian Law (IHL)**, or the **Law of Armed Conflict (LoAC)**, or simply the **Law of War**, as contained in the four **Geneva Conventions of August 12, 1949**,⁴ and the three Additional Protocols, comprises a monumental work of over 600 Articles implying:

*International Humanitarian Law is a set of rules which seek, for humanitarian reasons, to protect persons who are not, or are no longer, participating in the hostilities and to limit the effects of armed conflict.*⁵

IHL is considered to be one of the oldest branches of public international law. This branch of law which is often termed as the Law of Armed Conflict (LoAC) is a framework of law that defines the legal limitations of such means and methods of warfare that do not discriminate between combatants, civilians and other non-combatants. It addresses the behaviour of combatants, the conduct of hostilities and the choice of means and methods of warfare that also include weapons. Therefore, it contains the basic principles and rules which not only govern the choice of weapons by the parties engaged in a conflict, but also prohibit and restrict the employment of certain weapons to protect civilians and persons who are not, or no longer, taking part in a conflict. It also protects and spares combatants from the extreme effects of warfare and excessive injuries that ultimately serve no military purpose.

3. Ibid.

4. Dr Wg Cdr (Retd) UC Jha, *International Humanitarian Law: The Laws of War* (New Delhi: Vij Books India Pvt Ltd, 2011).

5. n.2.

Due to the evolution of this particular branch of law in the past few years, it can now meet the contemporary developments and challenges in warfare. Apparently, the implementation of IHL to the use of nuclear weapons is not something new. There is a well-recognised identified doctrine covering this discourse. For instance, the US military manuals⁶ broadly recognise the advantageous purposes of this body of law, both in terms of strengthening a state's application of its combat operations without unnecessary expenditures of force, and in terms of fulfilling what has long been regarded as a fundamental purpose of war, i.e. restoring favourable peace. The US Air Force, in its 2009 manual,⁷ recognises that the use of nuclear weapons is subject to the principles of the Law of War generally. The manual states, in particular,

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*Under international law, the use of nuclear weapons is based on the same targeting rules applicable to the use of any other lawful weapon, i.e. the counterbalancing principles of military necessity, proportion, distinction, and unnecessary suffering.*⁸

Nuclear weapons, by their definition, are devices of terror that can cause unbearable violence on civilians on an extreme scale. The international community has struggled with the problem of how the Law of War might be applicable to such weapons ever since their first and only use in 1945, when, during the final stages of World War II, the US dropped two atom bombs over the cities of Hiroshima and Nagasaki in Japan, the first on August 6, 1945 and

6. Jha, n.4.

7. Christopher Hubbard, "A Critique of the Advisory Opinion of the ICJ", *Edith Cowan University Online Journal*, 1997.

8. Charles J. Moxley Jr, and John Burroughs, "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Prilifiration Treaty", *Fordham International Law Journal* (The Berkeley Electronic Press), 34, no. 4, 2011.

the second on August 9, 1945.⁹ The radiation had an impact over a large area that affected public health, agriculture, natural resources and infrastructure for years to come. Yet the international community failed to come up with a global treaty that would explicitly ban the use of nuclear weapons, until recently, with the adoption of the Treaty on the Prohibition of Nuclear Weapons.¹⁰

This paper seeks to describe and assess the status of nuclear weapons under IHL as it stands today. Though there has been ongoing research on the desirability of complete eradication of this category of non-conventional means of warfare, great care has been rendered to the *lex lata*¹¹ rules that apply to nuclear weapons.

This paper mainly focusses on the International Court of Justice's (ICJ's) 1996 Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion) because in any discussion about the applicability of the rules of IHL to nuclear weapons, it is essential to look at the advisory opinion of the ICJ as it had provided the groundwork for the application of the rules of IHL to nuclear weapons. Apart from that, this was the very opinion in which the ICJ had identified the "unique characteristics" of nuclear weapons, rendering the nuclear weapon as potentially "catastrophic". It had also highlighted the fact that "[t]he destructive power of nuclear weapons cannot be contained in either space or time".

This paper would try to broadly look at first the general principles of International Humanitarian Law in relation to the threat or use of nuclear weapons, followed by a brief background to the 1996 Advisory Opinion of the ICJ. It would then delve in detail into the text of the opinion and the outcome of it.

GENERAL PRINCIPLES OF IHL

Although IHL has not completely forbidden the use of nuclear weapons, it comprises a range of general rules regulating the conduct of hostilities which are customary in nature and apply to all weapons used in armed

9. Jha, n.4.

10. Ibid.

11. *Lex lata* is a Latin expression that means "the law as it exists".

conflict. Most important are (a) *the principle of distinction*; (b) *the prohibition on any random attacks*; (c) *the prohibition on inordinate attacks*; (d) *the prohibition on area bombardment*; (e) *the obligation to take measures before any attack*; (f) *the prohibition on using weapons of a nature to cause superfluous injury or unnecessary suffering*; and (g) *the rules on the protection of the natural environment*.¹² There are also other relevant rules and limitations on aggressive reprisals. These principles are conventional in nature, mostly based on the military manuals of various countries that should be considered while discussing the prohibitions implied by IHL on the use of any Weapon of Mass Destruction (WMD). Some of these principles are elaborated below:

- The right to adopt means and methods for injuring members of the opposing party **should be limited**, which means the combatants of both the parties in hostilities are restricted in their use of weapons even where there is a lack of a specific prohibition relating to such weapons.
- The implementation of weapons or tactics giving rise to unnecessary harassment and suffering to the combatants of either party in a conflict is strictly prohibited, which implies that any action in an armed conflict should be compatible with the justifiable intentions of the conflict.
- Attacks that are incompatible with the legitimate military objectives, or are inconsiderate of people, institutions and resources by the laws of military conflict are strictly prohibited. International Humanitarian Law protects civilians and civilian populations, civilian objects, the natural environment, the wounded, sick, shipwrecked, prisoners of war, medical establishments and personnel.¹³
- Use of random tactics of warfare that do not differentiate between combatants and civilians and other non-combatants is strictly prohibited as the legal protection of civilians and other non-combatants is the most fundamental principle of International Humanitarian Law.
- The use of suffocating fatal or other environmentally unfriendly gases and all analogous materials is prohibited as the prohibition of poison and

12. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1. C.J. Reports 1996, p. 226

13. n.2.

poisonous weapons has been set out in the 1925 Geneva Protocol¹⁴ and is part of customary law.

- The tactics of warfare should not cause permanent, widespread and severe damage to the environment. A number of multilateral agreements regarding the protection of the environment have been concluded recently¹⁵.
- The neutrality of non-participating states should not be affected by the means and methods of warfare and in accordance with this rule, hostilities in the territory of an uninvolved or neutral state should not be carried out by the combatants.

BACKGROUND TO THE ADVISORY OPINION

A general prohibition on the use of force had been implied by Article 2(4) of the 1945 UN Charter that stated:

*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.*¹⁶

Nevertheless, force has been frequently used and threatened, including threats involving nuclear weapons. Though with the exception of Hiroshima and Nagasaki in 1945, no state till date has used nuclear weapons against any other state, thousands of nuclear weapons, with thousands of times greater output in their destructive capabilities than the atomic bombs used in 1945, have been tested, manufactured, deployed and placed on various levels of alert. It is often affirmed that the 1945 nuclear attacks almost forced Japan to hasten its decision to surrender as the deterrent threat was the actual value that states armed with nuclear weapons have imposed since the World War II.

A few years after the end of the Cold War in 1993, the Centre for Strategic

14. United Nations Environment Programme: An Inventory and Analysis of International Law. Protecting the Environment during Armed Conflict (Nairobi: United Nations Environment Programme, 2009).

15. Ibid.

16. UN Charter.

and International Studies, Nuclear Strategy Study Group, USA, in its report,¹⁷ had stated,

There is no consensus, nor any immediate prospect of one that total and complete disarmament will under any circumstances be a feasible proposition.

According to this report, it would be really unfortunate if the current impetus towards international cooperation for achieving nuclear disarmament, such as through the conclusion of the treaty prohibiting nuclear weapons (Ban Treaty), passed by without establishing a stronger nuclear end state with a view to eliminate the risks of the use of nuclear weapons from the face of the Earth. Furthermore, even the permanent extension of the nuclear Non-Proliferation Treaty in 1995 did not ensure a complete commitment towards disarmament, which, in a way, enhanced certainty around the fact that nuclear disarmament was not likely to be pursued by the nuclear weapon states in any meaningful way in the foreseeable future.

Apart from that, there were some new voices, who wanted to join the international community in the demand of the complete elimination of the use or threat of use of nuclear weapons. In this context, China had been supporting the total elimination of nuclear weapons and had been seeking a no-first use treaty among the weapon-possessing states.¹⁸ While announcing the setting up of the Canberra Commission of experts to work out a plan for total elimination of nuclear weapons, the Australian Prime Minister, Mr. Paul Keating, mentioned that he believed that a world free of nuclear weapons was now feasible. He also further noted that now the international community wanted the nuclear weapon states to carry out their commitments to the total elimination of their nuclear stockpiles by adopting a systematic process to achieve that result. The argument that a world will be an unsafe place

17. *Toward A Nuclear Peace: The Future of Nuclear Weapons in US Foreign and Defence Policy* (Washington D.C.: CSIS Nuclear Strategy Study Group Centre for Strategic and International Studies, 1993), p.67.

18. Tong Zhao, "China's Role in Reshaping the Global Nuclear Non-Proliferation Regime", *St Antony's International Review*, vol. 6, no. 2; *China's Rise and Adapting Global Structures* (February 2011), pp.67-82.

The UN General Assembly, through its Resolution A/RES/49/75K, adopted on December 15, 1994, requested the ICJ to render its advisory opinion on the legality of the threat or use of nuclear weapons under the international law on an urgent basis.

to live in without nuclear weapons was one of the ways to intensify the narrow self-interest of the nuclear weapons possessing states and their allies.¹⁹

Hence, with the end of the Cold War, Non-Governmental Organisations (NGOs) such as the International Physicians for the Prevention of Nuclear War or the International Association of Lawyers against Nuclear Arms, had initially requested the World Health Organisation (WHO) to seek an advisory opinion on the legality of the use or threat of use of nuclear weapons from the International Court of Justice (ICJ), Hague. Since the question raised by the WHO didn't fall under the scope of its functions as provided by Article 96(2) of the UN Charter, the ICJ refused to furnish any advisory opinion on the same.

Therefore, to arrive at an acceptable conclusion, the UN General Assembly, through its Resolution A/RES/49/75K, adopted on December 15, 1994,²⁰ requested the ICJ to render its advisory opinion on the legality of the threat or use of nuclear weapons under the international law on an urgent basis. This resolution was, hence, submitted to the ICJ on December 15, 1994, after being adopted by 78 states who voted in favour of it, 43 against it, 38 abstaining and 26 not voting. Though the voting was initiated by the Non-Aligned Movement (NAM), the voting pattern did not show the integrated position of NAM, but, instead, reflected the post-Cold War international order and actually exposed the national interests of various countries. Apparently, of the five legitimate nuclear weapons possessing countries, only China refrained from participating in the voting.²¹ After the resolution arrived at the World Court on December 18, 1994, a total number of 42 states, including

19. Rhodes Richard, *The Twilight of the Bombs: Recent Challenges, New Dangers, and the Prospect For a World Without Nuclear Weapons* (New York: Alfred A. Knopf, 2010), pp.293-296.

20. n.17, p.16.

21. Zhao, n.18.

India, had furnished written submissions and taken part in the proceedings, and 20 states took part in the verbal hearings before the ICJ rendered its final opinion on July 8, 1996.²²

ROLE OF THE UN GENERAL ASSEMBLY

Through Resolution A/RES/49/75K, adopted on December 15, 1994, the UN General Assembly requested the ICJ to render its advisory opinion on the legality of the threat or use of nuclear weapons on an urgent basis. Earlier, in the autumn of 1993, being instigated by NAM, WHO had asked the court a similar question on the legality of the use of nuclear weapons under IHL, but the question was turned down by the ICJ. Initially, it was also suggested that this matter was more within the capacity of the Security Council rather than that of the General Assembly but the court has shown that the General Assembly is more competent, based on Article 10 of the UN Charter that said:

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter.

And, except, as provided in Article 12 of the UN Charter, “The General Assembly may make recommendations to the members of the UN or to the Security Council, or to both, on any such questions or matters”; it is Article 11(2) that asserts that “the General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any member of the UN, or by the Security Council, or by a state which is not a member of the United Nations”, and Article 13 which allows the General Assembly to initiate studies and make recommendations

22. n.12, p.226.

for the purpose of promoting international cooperation in the political field and encouraging the progressive development of international law and its codification of the UN Charter.

Again, as Article 96(1) of the UN Charter allows the General Assembly or the Security Council to request the ICJ to give an advisory opinion on any legal question²³, it was determined by the court that it had jurisdiction to reply to the General Assembly's request. Apparently, a total number of 42 states except China (amongst the declared five nuclear weapon states) had been a part of the written phase of the pleadings, which is said to be the largest number of participants in any proceedings ever before the court. India was the only state amongst the "three threshold" nuclear-weapon states that had participated in the proceedings. Other participants – including those developing states which had earlier not contributed to the proceedings before the ICJ – have also shown great interest to participate in the international legal proceedings in this "post-colonial" era. Besides WHO, 22 states – Australia, Egypt, France, Germany, Indonesia, Mexico, Iran, Italy, Japan, Malaysia, New Zealand, Philippines, Qatar, Russian Federation, San Marino, Samoa, Marshall Islands, Solomon Islands, Costa Rica, United Kingdom, United States and Zimbabwe – participated in the verbal hearings of the court which were held from October 30 to November 15, 1995. During the hearings, each state was assigned one and a half hours to make its statement. On July 8, 1996, nearly eight months after the completion of the verbal phase, the ICJ finally furnished its opinion²⁴.

COMPETENCE OF THE COURT

Composition of the Court

The ICJ is composed of fifteen judges elected to nine-year terms by the UN General Assembly and the UN Security Council. The court's "advisory opinion" can only be requested by specific UN organisations, and is

23. n.16.

24. Laurence Boisson de Chazournes, and Philippe Sands, *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999).

inherently non-binding under the statute of the court. These fifteen judges who gave their advisory opinion regarding the legality of the threat or use of nuclear weapons were: President Mohammed Bedjaoui from Algeria, Vice-President Stephen M. Schwebel from the United States, Judge Shigeru Oda from Japan, Judge Gilbert Guillaume from France, Judge Mohammed Shahabuddeen from Guyana, Judge Christopher Weeramantry from Sri Lanka, Judge Raymond Ranjeva from Madagascar, Judge Shi Jiuyong from China, Judge Carl-August Fleischhauer from Germany, Judge Abdul G. Koroma from Sierra Leone, Judge Géza Herczegh from Hungary, Judge Vladlen S. Vereshchetin from Russia, Judge Luigi Ferrari Bravo from Italy, Judge Rosalyn Higgins from the United Kingdom, Judge Andrés Aguilar Mawdsley (died before the final decision) from Venezuela and Registrar Eduardo Valencia-Ospina from Colombia²⁵.

Through Article 65(1), the Statute of the ICJ allows the court to give an advisory opinion on any legal question at the request of whatever body may be authorised by, or in accordance with, the Charter of the UN to make such a request. It was determined by the court that it had jurisdiction to reply to the request of the General Assembly, since the power of the General Assembly to give an opinion is regulated both by Article 96(1) of the UN Charter, that said "*The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question*" and **Article 65(1)** of the Statute of the ICJ.

As stated above, these Articles provided that the court may issue an advisory opinion on any legal question only when it is requested to do so by the General Assembly and, before doing this, the court must also ensure that the body is "authorized by, or in accordance with, the Charter of the UN to make such a request"²⁶.

The court also needed to assess whether the request made by the General Assembly related to a legal question falls within the ambit of the Statute of the ICJ and the UN Charter, i.e. the compatibility of the threat or use of nuclear weapons with international law. In this connection,

25. n.12, p.226.

26. n.16.

it can be said that the political nature of the motive that gave rise to the request or the political implications of any advisory opinion, and any political aspects of the legal question are not that significant while establishing its jurisdiction to give its opinion. However, the jurisdiction of the court instead depends on whether the requesting organ (in this case, it is the General Assembly) has followed the correct procedure and is not acting *ultra vires*,²⁷ or outside its jurisdiction. Apart from that, the court should also determine the legality of the question raised. Finally, after establishing its competence, the court shall further consider whether or not it should exercise its inherent discretionary power while giving the opinion. The court shall also reaffirm its consistent jurisprudence, according to which any “compelling reason” can lead it to reject a request for an advisory opinion. The court may also confirm the absolute right of the General Assembly to determine the usefulness of an opinion in the light of its own needs. It is, hence, held that it would not consider the origin or political narrative of the request, or the distribution of votes underlying the adopted resolution.

While determining the legality or illegality of the threat of use of nuclear weapons, the court came to the conclusion that the provisions of the UN Charter relating to the threat or use of force, the principles and rules of IHL that form part of the law that applies to armed conflict, the law of neutrality, and any other significant treaties on nuclear weapons are the ones that are most significantly applicable to the law that governs the question put up by the General Assembly. In applying this law, the court considered it crucial to take into account certain unique characteristics of nuclear weapons, in particular their destructive capacity, which can cause immense human suffering for generations to come. The ICJ referred to nuclear weapons to be unique because they release combinations of immensely powerful blast waves, intense heat in the form of thermal radiation, and high amounts of ionized radiation. Their detonation also creates residual radioactive particles (so-called nuclear fallout) with the potential to spread over great distances.

27. *Ultra vires* is a Latin phrase meaning “beyond the powers”.

These features give nuclear weapons the capacity for incredible destructive power, and severe and widespread consequences for human health, civilian structures and the environment. On the basis of these observations, the court had concluded that the use of nuclear weapons would “**generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law**”. However, the court could not determine completely whether the use of nuclear weapons would be unlawful in all circumstances or not. Hence, whether it is legal to deploy nuclear weapons in “an extreme case of self-defence in which the very survival of a state would be at stake, is still a question that remains unresolved.”

OVERVIEW OF THE OPINION

The advisory opinion on the Legality of the Threat or Use of Nuclear Weapons issued by the ICJ on the July 8, 1996, has been one of the landmark legal opinions which stated that there is no such source of customary or treaty law, which specifically outlaws the use or possession of nuclear weapons. Initially, the World Health Organisation (WHO) had requested the opinion on September 3, 1993, but based on the principle of *ultra vires*, this request was dismissed by the ICJ as WHO was acting outside its legal boundaries. Later on, the UN General Assembly requested another opinion in December 1994, which was finally accepted by the ICJ in January 1995. Apart from assessing the legitimacy of the threat or use of nuclear weapons in an armed conflict, the court also discussed the appropriate role of the international judicial bodies, the ICJ’s advisory function, IHL (*jus in bello*),²⁸ and rules governing the use of force (*jus ad bellum*).²⁹

On the July 8, 1996, the ICJ delivered its advisory opinion, under General List No. 95, “Legality of the Threat or Use of Nuclear Weapons”, in response to UN General Assembly Resolution 49/75 K, adopted on December 15,

28. International Humanitarian Law, or *jus in bello*, is the law that governs the way in which warfare is conducted.

29. *Jus ad bellum* is a set of criteria that is to be consulted before engaging in war in order to determine whether entering into war is permissible, that is, whether it is a just war (ICRC).

A threat or use of nuclear weapons must be compatible with the requirements of the international law applicable in situations of armed conflict specifically with the principles and rules of International Humanitarian Law, as well as with obligations under all international mechanisms exclusively dealing with nuclear weapons.

1994³⁰. The main question around which it centred was: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

The international community of nations has considered this matter one of great significance. This was understood from the fact that almost 22 states presented their verbal submissions before the court, along with 43 other states that had already submitted written material. This advisory opinion is of great importance for the international community for various reasons. Firstly, because this was for the first time that this supreme judicial body centring the international legal regime

addressed the fundamental concern about the legal status of nuclear weapons in international law. Secondly, this opinion not only engaged one of the most debatable political issues of modern international law but can also be seen as an important example of the court's judicial independence within the UN system, and the degree to which it might have been vulnerable to political burden from states in a promptly evolving international environment³¹.

The ICJ on issuing its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, unanimously decided:

- that neither the customary law nor the conventional international law, authorise the threat or use of nuclear weapons,
- according to Article 2(4) and Article 51 of the UN Charter, the threat or use of nuclear weapons is unlawful,
- A threat or use of nuclear weapons must be compatible with the requirements of the international law applicable in situations of armed

30. Jasjit Singh, "Re-examining the 1996 ICJ Advisory Opinion", *Calmus: Promoting Leadership in Thought That Leads to Action*, vol. no. 5, October 2005.

31. n.12.

conflict specifically with the principles and rules of International Humanitarian Law, as well as with obligations under all international mechanisms exclusively dealing with nuclear weapons.

- States are required to conclude in good faith the negotiations that would lead to nuclear disarmament.
- By eleven votes to three, it was found by the court that neither in any customary law, nor conventional international law, is there any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.
- **IN FAVOUR:** President Bedjaoui; Vice-President Schwebel; Judges Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;
AGAINST: Judges Shahabuddeen, Weeramantry, Koroma.³²
- Lastly, one of the most debatable parts of the opinion was that by seven votes to seven and with a casting vote of the president, the court held that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and, in particular, the principles and rules of humanitarian law.³³

The court could not come to a definite conclusion about the lawfulness of the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.

However, according to the present state of international law, and of the elements of fact at its disposal, the court could not come to a definite conclusion about the lawfulness of the threat or use of nuclear weapons in an extreme circumstance of self-defence, in which the very survival of a state would be at stake.

32. Ibid.

33. Ibid., p.23.

THE REQUEST SUBMITTED TO THE COURT BY THE GENERAL ASSEMBLY

Is the threat or use of nuclear weapons in any circumstances permitted under international law?

Firstly, the court didn't reply to this question in the form in which it was submitted by the UN General Assembly, but instead reformed the question to some extent while keeping in mind the real objective behind the question. Although the court is obliged to answer the question in the form it was submitted to the court by the General Assembly, it was also the duty of the court to "ascertain what are the real legal questions formulated in a request. This duty is based on the responsibility of the court to contribute to the good functioning of the international organisations and to be able to give a reply that is both useful and conforming to the judicial role of the court. Hence, the newly drafted question that was attempted to be answered by the court was:

Is the threat or use of nuclear weapons legal or illegal in any circumstances?

While determining the legality or illegality of the threat or use of nuclear weapons, the court decided that the most directly relevant applicable law governing the General Assembly's question consisted of the provisions of the UN Charter relating to the threat or use of force, the principles and rules of IHL that form part of the law applicable in armed conflict and the law of neutrality, and any relevant specific treaties on nuclear weapons. In applying this law, the court considered it imperative to take into account certain unique characteristics of nuclear weapons, in particular their destructive capacity, which can cause untold human suffering for generations to come.

According to the ICJ, nuclear weapons were "explosive devices whose energy results from the fusion or fission of the atom". The only two factors that could distinguish nuclear weapons from any other weapon were identified: first, the immense powerful release of heat and energy caused by the fusion or fission of the atom; and, second, the phenomenon of radiation associated

with that process. The ICJ mentioned that “such characteristics render the nuclear weapon potentially catastrophic.” The massively disastrous power of nuclear weapons is capable of destroying “all civilization and the entire ecosystem of the planet.” The ICJ also mentioned the detrimental impact that radiation has on the current and future state of health, agriculture, the environment, natural resources, and demography.

It is worth mentioning here that in most of the disarmament and non-proliferation agreements, there is a lack of a proper definition of nuclear weapons due to the technical complications inherent in the process. Initially, an advisory opinion was requested for nuclear weapons as weapons of mass destruction, but the court’s advisory opinion encompassed all kinds of nuclear weapons that have catastrophic consequences on populations. As indicated by the ICJ, nuclear weapons are excessively ruinous on the grounds that they discharge great impact waves, extraordinary heat in the form of thermal and ionized radiation. Their explosion additionally makes the remaining radioactive particles (alleged atomic aftermath) spread over massive areas.

These characteristics give nuclear weapons the immense destructive power that results in negative outcomes for human well-being, regular citizen structures and the environment. Studies have demonstrated that the explosion of a nuclear weapon would cause widespread death, damage and harm, particularly if it blasts in a populated territory. There would be massive loss of lives resulting from severe burns and trauma that would occur amongst the people of the victim country in the aftermath of the nuclear detonation. As these effects cause fuel and flammable substances to explode or burn, fires and firestorms are also likely to develop, creating large numbers of additional casualties as a result of which people outside the immediate area of the blast would face an increased risk of developing certain cancers such as leukaemia and thyroid cancer, which may manifest themselves decades later .

TEXT OF THE OPINION

After finding that it was competent under the terms of Article 96 of the UN Charter to give an advisory opinion on a legal question placed by the General

As indicated by the ICJ, nuclear weapons are excessively ruinous on the grounds that they discharge great impact waves, extraordinary heat in the form of thermal and ionized radiation. Their explosion additionally makes the remaining radioactive particles (alleged atomic aftermath) spread over massive areas.

Assembly, and that there were no “**compelling reasons**” for it to refuse providing such an opinion, the court subsequently handed down its advisory opinion on July 8, 1996. With a view to explore the existing principles or laws that might be relevant to the request for an advisory opinion on the legality of the threat or use of nuclear weapons, the ICJ carried out a three-part analysis. First, it considered the general rules and principles; then it examined the UN Charter; and, ultimately, it focused on the regulations relevant in armed conflict situations. These are briefly discussed below:

General Rules and Principles

While trying to answer the inquiry put to it by the General Assembly, the court decided after consideration of the great corpus of international law norms accessible to it, on what might be the appropriate international law. The court first examined the Right to Life as guaranteed through Article 6, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR). In this connection, the court also considered the question whether a specific death toll, or casualty as a result of the use of a certain weapon in warfare, is to be viewed as an arbitrary deprivation of life or not in the light of what is noted in **Para 1 of Article 6 of the 1966 International Covenant on Civil and Political Rights** that stated:

Every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of (his) life.

But the treaty is then declared not relevant: although human rights law applies even in war-time, and the right to life cannot be suspended

by operation of Article 4 of the covenant under any circumstances, the question of what constitutes an arbitrary deprivation of life can be decided only by reference to the applicable *lex specialis*,³⁴ namely, International Humanitarian Law.³⁵ Apart from that, the court also attempted to call attention to whether the prohibition of genocide would be applicable in this situation if the decision to use nuclear weapons did indeed necessitate the element of intent, towards a group as such, required

by Article II that lists acts “*committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such*” of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. It may be recalled that this particular convention has within its obligations those components that do not authorise the threat or use of nuclear weapons as stated in the unanimous Clause I of the ICJ judgement.

After its declared prohibition on genocide to be suitable under the Law of Intent, the court then undertook a detailed examination to find out the relation between the existing international law and the protection and safeguarding of the environment. As indicated by the court, though international law does not particularly preclude the use of nuclear weapons in relation to the protection of the environment, it emphasises that important environmental factors should be taken into account in the implementation of IHL. Therefore, it is certain that widespread and long-lasting damage to the environment resulting from the use of nuclear weapons is a favourable argument in condemning the use of nuclear weapons.

In the last part of the General Rules and Principles or the Applicable Law, the apex court goes on to describe the “unique characteristics of nuclear

The court provides that nuclear weapons are particularly disastrous because their capacity “to destroy all civilization and the entire ecosystem of the planet” can cause untold human suffering, excessive damage to future generations and irreparable damage to the environment.

34. *Lex specialis*, in legal theory and practice, is a doctrine relating to the interpretation of laws and can apply in both domestic and international law contexts (ICRC).

35. Stefaan Smis and Kim Van der Borghi, “The Advisory Opinion On The Legality Of The Threat.” n.d. p.376.

weapons". These unique characteristics of nuclear weapons are then examined in relation to the General Rules and Principles or the applicable law, the main components of which, as indicated by the court, are the provisions of the UN Charter relating to the use of force, and IHL. While going on to describe the salient features of nuclear weapons, the court provides that nuclear weapons are particularly disastrous because their capacity "to destroy all civilization and the entire ecosystem of the planet" can cause untold human suffering, excessive damage to future generations and irreparable damage to the environment.

After analysing the first part of the advisory opinion on the general rules and principles, the court inferred that the most significant applicable laws administering the questions related to the use of force were the ones referred in the UN Charter along with the law applicable in armed conflict (LoAC) which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the court might determine to be applicable.

The UN Charter

After examining the unique characteristics of nuclear weapons, the World Court then addressed the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the UN Charter relating to the threat or use of force. In this context, the court considered the provisions of the UN Charter relating to the threat or use of force. Although Article 2, paragraph 4 (generally prohibiting the threat or use of force), Article 51 (recognising every state's inherent right of individual or collective self-defence if an armed attack occurs) and Article 42 (authorising the Security Council to take military enforcement measures)³⁶ do not refer to specific weapons, the court held that they apply to any use of force, regardless of the type of weapon employed. The court observed that the UN Charter neither expressly prohibits nor permits the use of any specific weapon, including nuclear weapons, and that a weapon that is already unlawful by an international treaty or custom does not become lawful by the reason

36. n.16.

of being used for a legitimate purpose under the UN Charter. Regardless of the means of force used in self-defence, the dual customary principles of necessity and proportionality and the law applicable in armed conflict apply, including such further considerations as the very nature of nuclear weapons and the profound risks associated with their use. To elaborate a bit more on the proportionality principle, it can be noted that though this principle itself does not exclude the use of nuclear weapons in self-defence in all circumstances, the use of force that is proportionate under the law of self-defence must meet the requirements of the Law of Armed Conflict that comprises principles and rules of humanitarian law, in order to be lawful. The court also points out that the high risks associated with all nuclear weapons due to their very nature should be remembered by the states that believe that they can exercise a nuclear response in self-defence in accordance with the principle of proportionality. Hence, the principle of the UN Charter clearly states that the threat or use of force is prohibited if it is directed against the territorial integrity or political sovereignty of any state, or if it is in any other manner inconsistent with the purposes of the United Nations.

Regulations Relevant in Armed Conflict: International Humanitarian Law

After examining the provisions of the UN Charter relating to the threat or use of force, the court looked at the law that applies during situations of armed conflict. First, it addressed the question regarding the specific rules in international law that regulate the legality or illegality of taking recourse to nuclear weapons and then it examined the principles and rules of IHL applicable in an armed conflict, and the law of neutrality, after which the court concluded, in its own words:

*The Charter neither expressly prohibits nor permits the use of any specific weapon, including nuclear weapons.*³⁷

37. Smis and der Borghi, n.35.

It noted that the international law does not contain any specific provision that authorises the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, particularly while exercising self-defence. Since self-defence may be the only legitimate basis for taking recourse to force, the legality or illegality of the use of nuclear weapons will, in the first instance, be established on the basis of conformity with the elements of proportionality, necessity, and the rules of *jus in bello*, especially the principles and rules of humanitarian law with which the use of force in self-defence must comply.

Subsequent to inferring that no customary or conventional rule of general degree could be discovered, particularly precluding the threat or use of nuclear weapons, the court swung to the topic of whether the rules and principles of IHL applicable in armed conflict and the law of neutrality would permit the use of nuclear weapons. The Law of War or of armed conflict had existed right from the beginning of human civilization. These rules had, in turn, given rise to a number of prevalent customary laws. To see if the customary laws had provisions or not to prohibit the use or threat of nuclear weapons the ICJ reviewed a number of historical sources. Then, it declared that the Hague Law and Geneva Law together incorporate International Humanitarian Law (IHL).

This corpus of law was to be observed by all the states irrespective of whether they had ratified or not the conventions that contained them because “the great majority of [humanitarian law] had already become customary” when the conventions were ratified. Moreover, despite keeping nuclear weapons aside during the international law conferences of 1949 and 1974 to 1977,³⁸ the court was of the opinion that the principles and rules of humanitarian law are equally applicable to nuclear weapons and, hence, it inferred that the use of nuclear weapons would be incompatible with the humanitarian character of the legal principles laid out under the IHL. The assurance provided by the Marten’s clause³⁹ confirms the righteousness

38. Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts

39. Rupert Ticehurst, “The Marten’s Clause and the Laws of Armed Conflict.” International Committee of the Red Cross, April 30, 1997, <https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm>. Accessed in August 2018.

of the court's decision. The court further highlighted five key concepts of humanitarian regulations that are applicable during an armed conflict for further dialogue. These are:

- Principle of distinction between combatants and non-combatants.
- Prohibition of indiscriminate weapons.
- Prohibition concerning the use of weapons that give rise to unnecessary human suffering or the principle of humanity.
- The principle limiting the means to wage war.
- The prohibition regarding use of weapons that violate the neutrality of non-participating states.

The Principle of Discrimination Between Combatants and Non-Combatants

According to the court, the primary principle is "geared toward the protection of the civilian population and civilian objects." It, consequently, makes a distinction between combatants and non-warring parties. The court, in this context, reaffirms the value of this customary rule that has been the object of various instruments, including Articles 25 and 27 of the Hague Regulations of 1907, General Assembly Resolution 2444 (XXIII) of December 18, 1968, and Article 48 of Additional Protocol I of 1977.

The Prohibition Regarding the Use of Indiscriminate Weapons

As indicated by the court, the states can in no way target civilians as objects of assault, and should, consequently, by no means, use weapons which can be incapable of distinguishing between combatants and non-combatants. This rule is similar to that enunciated in Article 51 paragraphs 4 and 5 of Additional Protocol I. It was important that the court confirms the customary value of the rule because only one instrument expresses this rule and Additional Protocol I has not been ratified by all the states.

The Prohibition Regarding Use of Weapons that Cause Unnecessary Suffering or Aggravate Suffering

As indicated by the court, weapons that cause harm or unnecessarily

increase suffering are prohibited. The court's attention to this principle is worthwhile of the advisory opinion. However, there were some doctrinal discrepancies, for example, the court could not provide a standard for assessing whether the "use of a weapon is causing unnecessary suffering or superfluous injury."⁴⁰

The Principle Limiting the Means to Wage War

In order to talk about the powerful means of addressing the rapid evolution of military technology the court referred to the Marten's clause;⁴¹ this clause had initially appeared in the Preamble of the 1899 Hague Convention respecting the Laws and Customs of War on Land (1899 Hague II) and in the Hague Convention of 1907. According to the court, Article 1, paragraph 2 of Additional Protocol I to the Geneva Conventions of 1949, a modern version of the clause provides, "*In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.*"⁴²

This implies that civilians and combatants remained under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience, even if some element of prohibition is missing in the protocol.

The Prohibition Regarding Use of Weapons that Violate the Neutrality of Non-Participating States

On the principle of the prohibition regarding the use of weapons that violate the neutrality of non-participating states, the court proclaimed that just

40. Robin M Coupland, surgeon, "Abhorrent Weapons and Superfluous Injury or Unnecessary Suffering: From Field Surgery to Law," *thebmj*. November 29, 1997. <https://www.bmj.com/content/315/7120/1450>.

41. The text of the Marten's clause in the Hague Convention IV reads as follows: "Until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

42. Smis and der Borghi, n.35.

like the principles of humanitarian law are appropriate in cases of armed conflict, the principle of neutrality,⁴³ irrespective of the content and similar to the fundamental character of the international humanitarian law shall be applicable in any or all international armed conflict, regardless of the types of weapons used.

Apart from establishing the relevance of the fundamental principles and rules of international humanitarian law that is applicable in all cases of international and non-international armed conflicts, the apex court had also concluded that the use of nuclear weapons by any state (assuming that the use is for the purpose of self-defence) must comply with certain standards established by the court.

Response of States

In a response to the advisory opinion furnished by the ICJ, the participating nuclear-armed states essentially stated that no aspect of the opinion requires them to change their policies. The United States further noted that the court *"declined to pass on the policy of nuclear deterrence"* and both the US and France incorrectly asserted that the *"opinion indicates that the use of nuclear weapons in some circumstances would be legal."* But the truth is that the apex court only stated its incapability to decide the matter in certain possible circumstances and stressed that the states must always comply with rules that protect civilians from the inhumane and devastating effects of warfare. The UK commented, *"Like the court, we believe that the use of nuclear weapons would be considered only in self-defence in extreme circumstances."* Thereafter, the Government of the UK had planned to renew the only British nuclear

43. The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: (1) "the territory of neutral powers is inviolable." Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 1; 2) "belligerents are bound to respect the sovereign rights of neutral powers..." Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, art. 1; 3) "neutral states have equal interest in having their rights respected by belligerents..." Convention on Marine Neutrality, Feb. 20, 1928. Clearly, the "principle of neutrality applies with equal force to trans-border incursions of armed forces and to the trans-border damage caused to a neutral state by the use of a weapon in a belligerent State."

Despite reaching an agreed decision about the applicability of humanitarian principles on the use or threat of nuclear weapons, there is still a great deal of debate surrounding these conclusions.

weapon, the Trident missile system.⁴⁴ On December 19, 2005, it had published a White Paper “**The Future of the United Kingdom’s Nuclear Deterrent**”, by Rabinder Singh QC and Professor Christine Chinkin of Matrix Chambers, where, in relation to the advisory opinion of the ICJ, Singh and Chinkin had argued, “*The use of the Trident system would breach customary international law, in particular because it would infringe the ‘intransgressible’ [principles of international customary law] requirement that a distinction must be drawn between combatants and non-combatants*”.⁴⁵ Russia observed that the opinion “*reflected a complex, mostly political role of nuclear weapons in the modern world.*”⁴⁶

States of the Non-Aligned Movement, in particular Indonesia and Malaysia, had led the campaign to obtain a General Assembly majority in favour of asking the court for its opinion. They emphasised on the unanimous conclusion given by the court in the context of the disarmament obligation in a resolution that had been put forward by Malaysia during the fall of 1996 and adopted annually. Since then,⁴⁷ the General Assembly highlighted the conclusion and called on all the states to comply with the obligation by immediately commencing multilateral negotiations, leading to the early conclusion of a convention prohibiting and eliminating nuclear weapons. The resolution received a considerable number of opposing votes and abstentions, due to the position of states such as Japan that the negotiation

44. Memoranda on the Future of the UK’s Strategic Nuclear Deterrent: The White Paper to the House of Commons Defence Committee

45. Rabinder Singh and Christine Chinkin, “The Maintenance and Possible Replacement of the Trident Nuclear Missile System Introduction and Summary of Advice Archived”, 2013-01-13 at Archive.is for Peace rights (paragraph 1 and 2)

46. John Burroughs, “Looking Back: The 1996 Advisory Opinion of the International Court of Justice, Arms Control Today,” Arms Control Association, August 2016. https://www.armscontrol.org/ACT/2016_07/Features/Looking-Back-The-1996-Advisory-Opinion-of-the-International-Court-of-Justice. Accessed on August 30, 2018.

47. Linh Schroeder, “The ICRC and the Red Cross and Red Crescent Movement: Working Towards a Nuclear-Free World,” *Journal for Peace and Nuclear Disarmament*, 2018.

of the convention was premature. However, when the paragraph welcoming the court's statement of the disarmament obligation was voted on separately, it was approved by an overwhelming majority, not including France, Israel, Russia, the UK, and the United States.

CONCLUSION

Despite reaching an agreed decision about the applicability of humanitarian principles on the use or threat of nuclear weapons, there is still a great deal of debate surrounding these conclusions. While some states are of the opinion that use of low yielding nuclear

weapons in areas of sparse population might comply with the humanitarian standards of IHL, other states opine that the use of nuclear weapons under all circumstances is completely incapable of distinguishing between warriors and non-warriors or civilians and also between civilian objects and military objectives. Furthermore, the attacks will be far from being confined to the military units of a nation; rather, the detonations would result in uncontrollable destruction of human life due to the powerful blast waves and heat radiation often accompanying a nuclear explosion.⁴⁸ On being hesitant to take an agreed position on the threat or use of nuclear weapons by states, the apex court reaffirmed, in reference to the core principles of IHL, that any tactics of warfare that fail to distinguish between civilians and military targets, causing unnecessary suffering to combatants and civilians, are prohibited. However, the court lacks the ability to prove with certainty that the use or threat of nuclear weapons would necessarily disagree with the fundamental rules and principles of IHL. The ICJ had taken a very conservative approach while furnishing the advisory opinion on the threat

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48. Jha, n.4

or use of nuclear weapons that was requested by the General Assembly in 1995.

After analysing all the relevant international mechanisms, including the basic principles of IHL and the provisions on self-defence under the UN Charter and establishing humanitarian standards for the threat or use of nuclear weapons to comply with them, the apex court came to the conclusion that the threat or use of nuclear weapons might contradict the principle rules and regulations of IHL or LoAC. However, the court failed to determine with certainty whether the threat or use of nuclear weapons by states would be legal or not in extreme cases of self-defence, when the very survival of the state would be at stake.

Nevertheless, keeping aside the demerits of the 1996 advisory opinion by the ICJ, it can be safely agreed that this opinion has thrown light on some very relevant points such as: it has been universally accepted since the furnishing of the opinion that the use of nuclear weapons by states is disgraceful and a crime against humanity and, hence, the states in possession of nuclear weapons should gradually proceed towards total disarmament. Secondly, though there is still a lack of an agreed decision on the lawfulness of the threat or deployment of nuclear weapons in extreme cases of self-defence, it is clear from the opinion of the court that the use of nuclear weapons under any circumstances cannot comply with the humanitarian principles of the LoAC. It is also still not clear as to how nuclear weapons can be used without violating the international environmental laws. However, the opinion rendered by the court finally helped in establishing customary rules under the humanitarian law that would be applicable to any present and future weapon that intends to destroy humanity.