



ISSN: 0975-833X

Available online at <http://www.journalcra.com>

International Journal of Current Research
Vol. 10, Issue, 06, pp.70240-70243, June, 2018

INTERNATIONAL JOURNAL
OF CURRENT RESEARCH

RESEARCH ARTICLE

A TAKE ON THE 1996 ICJ ADVISORY OPINION ON THE LEGALITY OF THREAT OF NUCLEAR WEAPONS

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ARTICLE INFO

Article History:

Received 04th March, 2018

Received in revised form

29th April, 2018

Accepted 16th May, 2018

Published online 28th June, 2018

ABSTRACT

This article explores the applicability of the 1996 advisory opinion of the International Court of Justice on the legality of threat of nuclear weapons in the current geopolitical scenario when it comes to nuclear weapons. It scrutinizes the changes in nature of circumstances, and certain unexplored domains during the 1996 judgment.

Key words:

Possession, Testing
Consideration.

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Citation: Rishab Bhattacharyya, 2018. "A take on the 1996 ICJ advisory opinion on the legality of threat of nuclear weapons", *International Journal of Current Research*, 10, (6), 70240-70243.

INTRODUCTION

The Hiroshima-Nagasaki bombings triggered a series of events. One of which being the former Soviet Union and the United States of America being engaged in a cold clash of secrecy and suspicion over the former and the latter's possession and development of nuclear weapons. They kept each other in check through the policy of nuclear deterrence and mutually assured destruction. One can relate that to the foreign policy of Democratic People's Republic of Korea and understand as to why they developed nuclear weapons. At this very backdrop, the General Assembly adopted resolution 49/75 K on 15 December 1994, to submit to the International Court of Justice the following question "Is the threat of use of nuclear weapons in any circumstance permitted under International Law? ". Written statements were filed by 28 States, and subsequently written observations were presented by two States. In the course of the oral proceedings, which took place in October and November 1995, 22 States presented oral statements. This article explores certain questions regarding the legal aspects in the context of nuclear weapons referring back to the 1996 judgment.

1) Whether the determination of legality of nuclear weapons is *non liquet*?

It is important to understand that the legality of an element is a coin which has two sides: -either it is legal or it is illegal and

also that international law is all about consent. If the Lotus dictum is taken into consideration, the only way the illegality of an element can be proved is if a State violates a prohibitory clause that they consented to. Now regarding nuclear weapons there are two aspects:

- Possession
- Testing.

The international agreements aimed at prohibiting, banning manufacture, testing or possession of nuclear weapons are 1963 Limited Test Ban treaty." the 1967 Outer Space Treaty, the 1968 Non-Proliferation treaty, the 1971 Seabed Arms Control Treaty, the 1972 Anti-Ballistic Missile (ABM) Treaty, the 1974 Threshold Test Ban Treaty. These treaties would be unnecessary if there were already a generally-accepted prohibition on the use of nuclear weapons. Further, the terms of these treaties implicitly acknowledge in many ways that the continued possession and use of such weapons (within the confines of treaty limitations) are not prohibited. The Non-Proliferation Treaty accepts the lawfulness of the development and possession of nuclear weapons by the nuclear-weapon States designated in the Treaty, which would be senseless if all uses of such weapons were unlawful. The ABM and START Treaties go even further in that they sanction the need for deterrent-nuclear-weapon forces, prohibit the creation of

destabilizing defences against them, and prohibit or restrict offensive forces that could destroy them. Furthermore, the START Treaty accepts the legality and propriety of limited deployments of nuclear-weapon systems that are deemed to contribute to a stable nuclear deterrent posture. This entire structure of obligations would be meaningless if the use of nuclear weapons were considered to be unlawful under all circumstances.

2) Whether the threat of use of nuclear weapons is valid under Article 51 of the UN Charter?

Again, if the Lotus dictum is applied in this case, States are free to threaten or use nuclear weapons unless it can be shown that they are not bound to do so with respect to a prohibitory clause that they consented to. Now reverting back to the 1996 advisory opinion of the ICJ, the Court underlined that the use of force and the threat to use such a force goes hand in hand. In simple words, the only way the 'threat of use of nuclear weapons' will be illegal is if 'use of nuclear weapons' as force is illegal. Now Article 2(4) of the UN Charter put a prohibition on the threat or use of force, but its exception can be found in Article 39 and Article 51 of the Charter. Here first we have to conclude that whether States have a legal right to use nuclear weapons under the regime of International Law. As the ICJ stated in the past in its advisory opinion and also taking into consideration the Lotus doctrine, States do have a right to resort to use of nuclear weapons in their inherent right to self-defence under Article 51 of the UN Charter. Henceforth, if the use of nuclear weapons as a force is valid under the precepts of the ICJ ruling and the Lotus doctrine, threat of use of nuclear weapons is parallelly valid. Another aspect we need to take into consideration are the implications stemming under the doctrine of pre-emptive self-defence, and its validity under Article 51. Under the regime of Customary International law which developed long before UN Charter was adopted, it was accepted that pre-emptive force was permissible in self-defence. Moreover, if we apply the Lotus doctrine there is no prohibition on pre-emptive self-defence in any International legal frameworks. What we do need to consider is whether pre-emptive self-defence still qualifies as a Customary International Law post formation of UN Charter. For that we need to establish State Practice and *Opinio juris*, which can be easily established by countless instances of pre-emptive strikes post formation of UN Charter, examples being U.S.-sponsored Bay of Pigs invasion (1961), Warsaw Pact invasion of Czechoslovakia (1968); the Arab action in the 1973 Six-Day War; North Vietnamese actions against South Vietnam (1960–1975) and the list goes on. But to ensure the validity of pre-emptive strike, it should follow the Caroline doctrine which again follows the principles of necessity and proportionality. Necessity here is implied by the imminence of an attack. Therefore, if these conditions satisfy states have a right to resort to the use of nuclear force as long as the threat to use of nuclear force is justified,

3) Whether NPT reflects customary law obligations?

To consider whether NPT reflect customary international law obligation, it is necessary to establish 1) State Practice 2) *Opinio Juris*. Now the Article 6 of the NPT which aims at negotiating in good faith regarding disarmament, is the only article close to have customary law obligations. Now, it is imperative we understand an important fact, that to substantiate whether NPT reflect customary law obligations we

have to establish *State practice* and *Opinio Juris* for not just Member States, but also for non-member states who despite not being a part of the NPT follow the NPT. The States which are not part of the NPT are India, Israel, Pakistan, South Sudan, DPRK. Now since the commencement of NPT, India conducted a series of nuclear test in 1974 and 1998 and India currently possess around 110 nuclear weapons, Pakistan conducted a series of nuclear tests in 1998, the Bulletin of Atomic Scientists estimated that Pakistan possesses around 70-90 nuclear warheads. Israel has secretive nuclear weapons program. Moreover, the states which are part of the NPT specifically the "nuclear weapons states" have also conducted nuclear tests in the recent past US 1992; Russia, 1990; United Kingdom, 1991; France, 1996,1974; China, 1996. And lastly DPRK has conducted several nuclear tests since 2006. Moreover, the CTBT which aims at banning nuclear tests hasn't come into force. The most recent case which puts a dent in the State practice is the deployment of THAAD in South Korea. If we look at ICJ precedences, the North Sea Continental Shelf Case and the Asylum case (Columbia v Peru) the ICJ had set two very important prerequisites for establishing State Practice-1) extensiveness 2) uniformity. As we can see here that State Practice aimed at disarmament is neither extensive nor is there any uniformity. Now, coming to establishment of *Opinio Juris* which is basically establishing a legal obligation. If we look at past GA resolutions aimed at disarmament, India, Pakistan and Israel to some extent in most of the case either abstained from voting or voted negative. In the most the recent General Assembly resolution, the L.41 resolution which aimed at prohibiting nuclear weapons, the only condition which nullifies the legality of nuclear weapons, India and Pakistan abstained from voting, Israel voted in the negative. Moreover, the Member States of NPT, namely the Nuclear Weapon States either abstained from voting or voted no. Further-more, GA resolutions are not legally binding. Therefore, opinion juris cannot be established. Therefore, Customary International Law obligations cannot be established regarding NPT.

4) Whether the use of Nuclear Weapons would violate International Humanitarian Law?

States opposing nuclear development, in the 1996 ruling contend that if weapons were used even in the exercise of the right to self-defence, their use would still be illegal as the inherent nature of nuclear weapons will deter these attacks from abiding by the Laws of Armed Conflict ("LAOC"). LAOC requires every armed attack that is carried out to be governed by the principles of indiscriminate, proportionality and necessity. The principle of indiscriminate is that a weapon used for armed conflict could be controlled in a manner that it can differentiate between a combatants and civilians, especially in its consequences. The use of a weapon that cannot do so is prohibited in international law. Similarly, proportionality requires that the military damage caused by the use of that weapon, should be proportionate to the collateral damage caused. The test for proportionality is that when compared, the military damage must be greater than the collateral damage caused by the attack. Necessity implies that any force used by the country engaging in armed attack should be absolutely necessary to achieve the military objective. No force that is used would be legitimate if it is more than the amount required to achieve military objective. This Court had noted the definitions of nuclear weapons contained in various treaties and accords. It also noted that nuclear weapons are explosive devices whose energy results from the fusion or

fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations. It is in the backdrop of the peculiar nature of nuclear weapons that the states opposing the development of nuclear weapons contend that in no circumstances would the use of nuclear weapons be consistent with the LOAC. Even if in the right to self-defence, a nuclear attack in response to one that has been conducted, the principle of necessity would be justified, but considering the fact that the explosion cannot be contained in space or time, neither can its consequences be, the requirement of indiscriminate would remain unfulfilled. Further, when considering the long-lasting effects created by nuclear weapons on the environment, food and marine ecosystem and the effects that it will have on the health of future generations, the collateral damage will be greater in all circumstances to the damage caused to achieve the military objective. Now, there are certain arguments that need to be taken into account before we take into account the consideration of the applicability of International Humanitarian Law in case of use of nuclear weapons.

- It has been long argued that the use of nuclear weapons would cause civilian collateral damage because of the destructive nature of nuclear weapons. However, this does not mean that attacks on legitimate military objects are prohibited because it causes collateral damage, as occurs in case of armed conflicts.
- It has also been argued upon that nuclear weapons are indiscriminate weapons which cannot differentiate between civilian and military objectives. This completely ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, which makes nuclear weapons discriminatory.
- It has been long argued that the use of poison weapons is comparable to use of nuclear weapons, and therefore is prohibited 1907 Hague Convention on the use of poison weapons. However, this comparison is inaccurate as This prohibition was validated with particular reference to top projectiles that carry poison into the body of the victim. It was not intended to apply, and has not been applied, to weapons that are manufactured and designed to injure or cause destruction by other means, even though they also may create toxic by-products. For example: the prohibition of poison weapons does not include convention explosives even though they provide toxic fumes. By the same parallel we can also say that they do not prohibit nuclear weapons.

5) Whether the principle of neutrality in Law's of Armed Conflict apply to the use of nuclear weapons?

The principle of neutrality is an assurance given to neutral states of immunity from the effects of war, whether environmental or economical. The principle of neutrality basically defines the rights and duties of neutral states and belligerents in lawful acts of war. However, the principle of neutrality cannot be applied because there has been no precedence where a belligerent has been held responsible for collateral damage to the neutral in a lawful act of war outside the neutral territory. Another assumption often made when it comes to nuclear weapons is, nuclear weapons would inevitably cause affect and damage neutral territories. This assumption is highly speculative. We cannot to deliberate that such damages would take place without knowing the situations and circumstances at hand.

6) Drawing a distinction between *jus ad bellum* and *jus in bello* in the context of use of nuclear weapons.

It becomes extremely important to clarify the distinction between *jus ad bellum* and *jus in bello*, especially after the confusion created in the Legality of Nuclear Weapons Case, 1996. *Ad bellum* governs the legality of the decision to resort to force i.e., to enter into the armed conflict itself, whilst *in bello* governs the conduct of the belligerent during the war. In simple words *in bello* deals with the rules of a 'just war'. *Ad bellum* can be equated with the idea of a "just war", that is, whether the war that has been entered into is justified or not. Once the war has been entered into, the *in bello* becomes applicable. Both *ad bellum* and *in bello* require the satisfaction of principles of necessity and proportionality. However, both terms have different connotations in both circumstances. In case of *ad bellum*, the right to resort to force becomes justified if there is an equivalent threat to the nation. Therefore, the decision to use force would be justified if there is a threat of that nature to the state, while in *in bello*, the military advantage that is sought to be achieved has to be greater than the civilian damage that ensued. Necessity also has a differing connotation. While *ad bellum* requires that force is resorted to only when all other practical means of resolving the threat have been exhausted, *in bello*'s requirement is that during war, a particular act of force must be necessary to achieve the aimed military advantage. A very important question that needs to be considered is whether a State is engaged in an armed conflict or not? It is evident that the Law of Armed Conflict or *jus in bello* principles do not apply in this case as no use of nuclear weapons has been carried out in the first place. The Law of Armed Conflict is applicable after a use of force has taken place. The very absence of use of nuclear weapons makes it impossible for the application of international armed conflict. The threat of use of nuclear weapons can't be considered "armed conflict" under international humanitarian law. Under the right to self-defence, there is a reasonable possibility of the use of nuclear weapons being justified by *jus ad bellum* if there is compliance of the rules of proportionality and necessity. However, *jus in bello*, or International Humanitarian Law will most likely be unsatisfied due to the peculiar nature of nuclear weapons and their inability to contain damage. Use of nuclear weapons, would also be unjustified under international humanitarian law, as the criteria of indiscriminate will remain unfulfilled as nuclear weapons and its effects cannot be controlled.

However, it has been suggested before that there exists a possibility of Tactical Nuclear Weapons, as distinguished from Strategic Nuclear weapons that have a catastrophic effect. Tactical weapons can attack in a targeted fashion, and whose effects can be controlled in a manner that would be consistent with the requirements of *jus in bello*. For similar reasoning we find that determination of whether there is a legitimate right of pre-emptive self-defence available to a member state will depend on the actual use as if those acts of self-defence can be justified under principles of necessity and proportionality. Since doctrine of pre-emptive self-defence also requires compliance with rules of proportionality and necessity in *jus ad bellum* and *jus in bello*, it is irrelevant to venture into the applicability and existence of the doctrine in itself. As before the threat of use of weapons would be illegal only if the use of weapons is illegal. As stated in Legality of Nuclear Weapons case, *jus ad bellum* can be justified by the right of self-defence. But it becomes tough for this court to determine whether the use of nuclear weapons would be justified by the rules of *jus in bello*, as that essentially governs the types of weaponry and its effects. Without knowledge of the kind of weapons possessed by the belligerent, the legality of the threat or use of nuclear weapons by the belligerent cannot be determined.

Conclusion

Post Second World War, there was a lot of tension between the major superpowers in the world. The Hiroshima-Nagasaki bombing exposed the fiendish reality of nuclear weapons. The major powers wanted to develop these weapons as a policy of nuclear deterrence and mutually assured destruction. At this backdrop, it was time that necessary international frameworks were developed in order to make sure that another Hiroshima-Nagasaki doesn't take place. Moreover the 1996 judgement was an important milestone, that assessed the legal implications in using nuclear weapons as threat or force. After exploring this article, an important conclusion can be drawn, that the threat of use of nuclear weapons, when the survival of a state is at stake, is justified under International Law. This is a deviation from the 1996, which could not conclude conclusively for the same. NPT is a very important international agreement, which is a cornerstone for disarmament of nuclear weapons, does not have Customary International Law obligation as there are inconsistencies in State Practice and *Opinio Juris*. Also, the implication and application of International Humanitarian Law, specifically the concept of Neutrality was assessed in the context of Nuclear Weapons. The development of tactical nuclear weapons has certain implication under International Humanitarian Law, which were assessed. However, the application of IHL in the context of nuclear weapons could not be conclusively determined.

Therefore the 1996 status quo remains the same. There was a clear distinction made between *jus ad bellum* and *jus in bello*. Lastly, it is very important for member states to follow through on the promises they made to maintain international peace and security. It should also be noted that, the Court in the 1996 judgment noted, that member states has an obligation to disarm in good under Article VI of the NPT. A brilliant example of this would be the resumption of diplomatic talks between the Democratic People's Republic of Korea and South Korea, which can finally be the stepping stone to end the decade long conflict in the Korean Peninsula.

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