



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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GUIDANCE FROM THE WORLD COURT ON THE LEGALITY OF USING NUCLEAR WEAPONS – AN ANALYSIS

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Abstract

Contemporary world is witnessing the nuclear era and the devastating effects which have been perceived during Second World War. Nuclear weapons are most destructive, many countries including India has started engineering the nuclear weapons. Here persists a question about the authorised practice, building, expansion and legality of using the nuclear weapons by international actors. (WHO) World Health Organisation has raised this question of legality of using the nuclear weapons in the forum of ICJ (International Court of Justice) to get an advisory opinion. It's very significant that everyone should have the knowledge about the advisory opinion of ICJ and the relevant things. This article will give the detail understanding about the advisory opinion of ICJ.

Key Words:

Nuclear weapons, Legality of use or threat, Advisory opinion, World Court, International Court of Justice.

Introduction

Contemporary world stands perceiving era of nuclear weapons. Many countries including India has started developing nuclear weapons. World has witnessed the devastating effects of nuclear weapons in Japan during Second World War. In spite, international actors want to build nuclear weapons at least to generate deterrence. The detonation of nuclear weapons is very dangerous and it also create transborder environmental impact in recent days. Earlier concept of waging war comes to an end with the advent of nuclear deterrence theory. The idea of nuclear deterrence follows the basis of first user principle. To square the basis of manufacture, expansion and use of

it, General Assembly of United Nations¹ has passed a resolution seeking the guidance on legality of using nuclear weapons under the situations permitted under the Law of Nations from International Court of Justice² .

Circumstances of the case

The topic of whether it is legal to use or threaten to use nuclear weapons under international law was raised by the World Health Organization in 1993 before the International Court of Justice. Since WHO lacked the authority to ask the court the specific issue, the court declined to respond. A decision made by the UN general assembly to ask the court for an advisory opinion on the question "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" was later formally communicated to the Registry by the UN Secretary-General in 1995.

By a slim majority of 78 to 43, with 38 abstentions, the resolution was approved. That made it very evident how different state actors were regarding the advisory opinion. The court provided its advisory opinion in the midst of hearing oral pleadings and receiving the written submissions.³

Procedural questions - Competency

Initially,

The Court has decided the procedural questions

1. Whether the ICJ have Jurisdiction to address the request of General Assembly?

The UN Charter states that "Every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others." The ICJ has upheld the General Assembly's jurisdiction, which is derived from Article 96(1), which states, "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

The General Assembly "may call the attention of the Security Council to situations which are likely to endanger international peace and security," as stated in Article 11. Moreover Article 13 states that the implementation of human rights and fundamental freedoms for all people, without regard to differences in racial, sexual, gender, or religious background, is to be aided

¹ UNGA, policy making organ of United Nations.

² ICJ, judicial wing of United Nations.

³ Given 8th July 1996

by international cooperation in the domains of economics, social work, culture, education, and health.

These intricately worded United Nations Charter clauses primarily address the welfare of the global community by fostering global peace. According to these provisions, the General Assembly, as a body that maintains international peace, is authorized to ask for advice on any legal matter.

Political players said that the specific issue is only of a political nature and should not be considered a legal one. The Court affirms that the question will retain its legal character despite the political aspect it has been given.

2. If the response is yes, were there any justifications for refusing to exercise jurisdiction in order to deny the request?

Given that the main UN body is making the request, the court must exercise due process and refrain from declining to provide an advisory opinion.

The International Court of Justice (ICJ) can provide an advisory opinion on any legal matter upon request from any organization that is authorized by the United Nations charter to make such a request, as stated in Article 65 of the ICJ charter. This is not only an enabling clause. Once the Court has demonstrated its competence, the statute leaves it up to it to decide whether or not to provide the advisory opinion that has been asked.

In addition, a number of international players have expressed the view that the court should exercise its discretion in declining to render a decision because the General Assembly's query was ambiguous and abstract. According to states, the court has stepped beyond its judicial purview and assumed the role of legislating authority. The court declares that it did not legislate, just state the current law. The court has acknowledged that it is competent under Article 65 of the UN Charter and that there are no compelling grounds for it to decline to respond to the question. In conclusion, the Court affirmed its Advisory Jurisdiction, finding that the issue at hand is legitimate.

Substantial Questions

The Court has decided the following substantial questions

1. Whether International Customary Law or any Treaty authorise the use of nuclear weapons?
2. Does international law or treaty-based legislation contain any outright bans on the threat or use of nuclear weapons?
3. Is it possible for the threat or use of nuclear weapons to coexist with other legal initiatives and international humanitarian law?
4. When the very existence of a state is in jeopardy, will it be legal to threaten or use nuclear weapons in self-defence?
5. Is it the state's responsibility to pursue nuclear disarmament?

Determining Relevant Law:

The International Court of Justice (ICJ) reviewed the principles of public international law, the UN Charter, and the laws governing the use of force, law of neutrality, and armed conflict in order to decide whether the threat or external use of nuclear weapons was lawful or unlawful.

The International Covenant on Civil and Political Rights (ICCPR) Article 6 outlines fundamental human rights concepts, including the right to life. Nobody's right to life may be arbitrarily taken away from them. All laws, whether in times of peace and conflict, have granted and safeguarded this privilege. A number of governments have submitted to the court that the Convention on the Prevention and Punishment of Crimes Against Genocide's prohibition against genocide is a pertinent custom.

International treaties and instruments must also be mentioned by the court. These include the Convention of 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which forbids the use of weapons that have widespread, long-lasting, or severe effects on the environment, and Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35 of which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment." The shared principle of states concerned is expressed in Principles 2 of the Rio Declaration of 1992 and Principle 21 of the Stockholm Declaration of 1972 as follows: "to ensure that activities within their authority or control or refrain from harming the environment in states other than your own or in regions outside of your country's borders. States have a

commitment to protect the environment by not causing transboundary contamination and by determining whether using nuclear weapons in military operations is necessary and proportionate. The Rio Declaration's Principle 24—"Warfare is inherently destructive of sustainable development"—supports this approach. As a result, states must abide by international law that protects the environment during armed conflict and work with others to further expand it as needed.

Findings and Reasoning:

1. Whether International Customary Law or any Treaty authorise the use of nuclear weapons?

The argument put forth by states was that there is no custom or conventional rule that forbids the use of nuclear weapons. governments also claimed that international law "permitted" the threat or use of nuclear weapons, and that governments were obligated to use the phrase "prohibited" as a substitute. The governments justified their position by citing the S.S. Lotus Case Vlz., contending that they are free to threaten or deploy nuclear weapons unless they can demonstrate that they are prohibited from doing so by either treaty law or customary international law. It was confirmed that states hold residual rights. The answer provided by the Court was that the use of nuclear weapons is not authorized by either express treaty or international customary law. States would have the authority to use nuclear weapons if it is not against international law. This would resolve the legality of nuclear weapons. The Lotus Principle does not grant states the authority to wipe out human civilizations. The court thoroughly explained the Lotus Dictum but decided not to apply it.

2. Is there a strict ban on the threat or use of nuclear weapons imposed by treaties or international law?

The court comes to the conclusion that neither international customary law nor treaties contain a complete and universal ban on the threat or use of nuclear weapons. In addition, neither the use of nuclear weapons nor its use is specifically forbidden by the UN charter's rules governing the use of force or armed conflict. There are several clauses in the charter that deal with the threat or use of force.

Article 2(4): It is forbidden to threaten or use force against the political independence or territorial integrity of another state, as well as to act in any other way that is against the United Nations charter.

Article 42 empowers the Security Council to uphold or reinstate global peace and security in the event that it deems non-combative measures to be insufficient. Chapter VII of the Charter permits the Security Council to adopt military enforcement measures; however, nuclear weapons were not mentioned in this section. No weapon, including nuclear weapons, is specifically forbidden or permitted under the charter.

Customary international law establishes the right to self-defence, which may be used in accordance with necessity and proportionality requirements (Article 51). According to a well-established rule in customary international law, self-defence would only be permitted in cases where measures taken are both necessary to counter an armed attack and proportionate to it. The court made this claim in the Nicaragua v. United States case concerning military and paramilitary activities in and against Nicaragua. Nuclear weapons could be used in self-defence; this is also not prohibited by the proportionality principle. To mitigate the risk, the court did not seek to quantify the hazards or inquire about the existence of any strategic nuclear weapons. States held the belief that they might exercise self-defence by utilizing nuclear weapons.

3. Is it possible for the threat or use of nuclear weapons to coexist with other legal initiatives and international humanitarian law?

The Hague Convention IV of 1907 and the Geneva Protocol of 1925, among other international humanitarian law conventions, according to the court, do not include nuclear weapons. A set of guidelines governs how military operations are conducted. Humanitarian law's fundamental principles defined the boundaries between combatants and non-combatants and attempted to protect civilians and civilian property. Attacks against civilians are never appropriate. weaponry that is unable to discriminate between military and civilian targets. States are not allowed to use any kind of weapon they want. These humanitarian precepts, which apply to armed conflicts, had already been established and that did not apply to nuclear weapons.

The court refrains from holding that nations must never attack people and, as a result, never employ weaponry that is unable to discriminate between military and civilian targets. Nuclear weapons use is not prohibited under other humanitarian law treaties that regulate WMDs, such as the conventions on biological and chemical weapons. According to UN charter article 51, the use of these weapons must be commensurate with the armed attack. Regarding the use of nuclear weapons for retaliation, the court did not reach a decision.

Some governments declared that it would be legal to retaliate using nuclear weapons. Since armed retaliation during times of peace is regarded as illegal, the court does not evaluate this issue. It is also not required to make a statement regarding the issue of belligerent retaliation, other than to point out that, as with self-defence, any right of recourse to such reprisals would be subject to the proportionality principle. The use of nuclear weapons is governed by international humanitarian law, which encompasses the requirements of necessity, proportionality, and the opposing rule of controllability. States have frequently acknowledged this. The court believes that even if using nuclear weapons is permitted, it still needs to abide by the relevant legislation.

4. In cases where the state's ability to survive is in doubt, will it be legal to threaten or use nuclear weapons in self-defence?

As a result, the court finds that the state cannot deny anyone the right to self-defence.

Freedom to defend oneself Only when there is a "armed attack," whether it is impending or already underway, may one employ force in self-defence.

An attack against a state's territory is not the only thing that qualifies as an "armed attack"; it can also target state establishments like embassies and military bases.

In self-defence, force may only be employed when the attack involves the threat or actual use of force—not just economic coercion, such as when the attacker possesses the means and the purpose to attack—and when the attack is focused on from outside territory.

A real threat of attack, whether directed by the defending state or an indiscriminate attack, must exist in order for there to be a threatened attack. That addresses the question of whether the attack is required.

"Nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it," the principle of proportionality was articulated in the Caroline case.

According to UN Charter Article 51, the use of force may be justified if it satisfies the standards of necessity and balance as established by customary international law. The need to employ nuclear weapons and the scope of their deployment must be justified by the state. When

exercising its right to self-defence, the state should keep the required requirements in mind.

5. Is the government required to work toward the disarming of nuclear weapons?

In conclusion, the court held that all states parties have a duty to engage in sincere negotiations and reach accords that will eventually result in disarmament. A key component of nuclear disarmament today is the non-proliferation treaties. State parties that have ratified the Non-Proliferation Treaty need to move quickly to fulfil their responsibilities and fulfil their commitments. Governments that have committed to non-proliferation should investigate the chances it presents for a world free of nuclear weapons. It is both a shared duty and a pressing humanitarian necessity to disarm nuclear weapons. The General Assembly and the Security Council are requested to offer their support and services in order to enable him to complete the obligations assigned to him under the nuclear weapons ban treaty. Although many States have agreed to the nuclear non-proliferation treaties' ban on the use of nuclear weapons, this ban is not unqualified.

Principle of Neutrality

Talking about armed conflicts requires taking the neutrality principle into account as well. For a state that is not involved in an armed conflict, neutrality is the official position. It is the right of the neutral state to stay out of the war and not be hurt. The interaction between states that are parties to an international armed conflict and states that are not, on the one hand, is regulated by neutrality law. Preventing the intensification of an international armed confrontation is the main goal of the law of neutrality. Respect for a neutral treaty's inviolability is required of all parties involved in the conflict. Weapon use is forbidden since it infringes on the neutral sovereignty of governments that are not involved. They need to be shielded from the destructive power of nuclear bombs.

Principles of Public International Law

Many state parties contended, on the basis of the international customary principles of public international law, that since no nuclear weapons had been used prior to World War II, the international community has decided to adhere to the customary principle in practice and reached the general conclusion that states should not use nuclear weapons. States that retaliate against that have reserved the right to use nuclear weapons and to self-defence since no formal duty has been established by treaties. In its advisory judgment, the court stated that no nuclear weapons had been

utilized since World War II since there hasn't been a necessity for them.

Conclusion

The World Court rendered a single opinion regarding the legality of using or threatening to use nuclear weapons after taking into account the sources of international law under Article 38 of the ICJ, the UN charter, human rights law, and international humanitarian law. The court's ruling is not final and is not enforceable. These days, states are developing armaments to discourage the opposition state. Although the state is creating the same for deterrent, the court omitted to specify the extent or limit to which a state can stop the development. The court decided not to press further on the environmental effects that result from radioactive waste. The court rejects its portion regarding the use of nuclear weapons in armed conflict and the degree of compatibility with international humanitarian law. Regarding the posed query, the court has not provided a clear response. It has provided ambiguous and contradictory guidance. Rather than the ideal of exhilarating self-defence, the goals of humanitarian law must be met. The Court did not investigate the issue of armed retaliation in a peaceful period. It's possible that the court prioritized the international community's goal over state interests.

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