



For nuclear weapons there is no treaty of general prohibition

The Non-Proliferation Treaty Review Conference: Breakthrough or Bust in '05?

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The Illegality of Nuclear Weapons

Background

For nuclear weapons there is no treaty of general prohibition as there is for biological and chemical weapons. Save where nuclear weapons are prohibited by particular treaties, like those creating Nuclear Weapons Free Zones (<http://www.basicint.org/nuclear/NPT/2005rc/brief02.pdf>), the legality of their use and threatened use must be determined with reference to the UN Charter and the law of armed conflict.

Article 2(4) of the UN Charter provides:

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.

(<http://www.un.org/aboutun/charter/index.html>)

In the *Nuclear Weapons Case* (see below), the International Court of Justice (ICJ) held that 'threat' and 'use' stand together so that if the use of force in a given case is illegal for whatever reason, the threat to use such force is likewise illegal.

One exception is the right of self-defence under Article 51 of the UN Charter, the exercise of which is subject to the conditions of necessity and proportionality. However, a use of force that is necessary and proportionate under the law of self-defence must also comply with the law of armed conflict, especially international humanitarian law. If an envisaged use of weapons would violate humanitarian law, a threat to engage in such use would also violate that law.

The law of armed conflict

The cardinal principles of international humanitarian law are:

- **The principle of discrimination:** States must never make civil-



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ians the object of attack and consequently must never use weapons that are incapable of distinguishing between civilian objects and military objectives; and

■ **The prohibition against causing unnecessary suffering:** it is prohibited to cause harm to combatants greater than that unavoidable to achieve legitimate military objectives.

Also relevant are the principle of neutrality, the prohibition against environmental damage and the Martens Clause. As to the latter, see Article 1(2) of Additional Protocol I 1977:

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.

The fundamental rules of humanitarian law constitute “intransgressible principles of international customary law” (*Nuclear Weapons Case*, para 79).

Although there is no doubt that international humanitarian law applies to nuclear weapons, the UK Government (among others) consider that:

In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties (*Nuclear Weapons Case*, para 91)

However, this is highly theoretical and even fanciful. Legality must be determined with due regard for a weapon’s nature and the foreseeable effects of its use given the ‘actuality’ of the State’s defence policy and the risk of escalation to full-scale nuclear war. ***Because of the blast, heat and especially radiation effects, the use of nuclear weapons in any realistic military scenario would violate international humanitarian law.***

Even the use of relatively low yield, earth-penetrating nuclear weapons against underground targets would ventilate highly irradiated material, contaminating the atmosphere and causing substantial civilian casualties.

The Nuclear Weapons Case

(<http://www.icj-cij.org/icjwww/idecisions.htm>)

In response to the General Assembly’s question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” the ICJ delivered its advisory opinion on 8 July 1996. It unanimously held that a threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of the UN Charter and fails to meet all the requirements of Article 51 is unlawful; and that a threat or use of nuclear





weapons must be compatible with the requirements of the law applicable in armed conflict, particularly international humanitarian law. By a majority of one (the President's casting vote made it 8-7), the ICJ then held:

It follows from the above-mentioned requirements 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 international humanitarian law.

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. (Nuclear Weapons Case, para 105, point 2E)

Three judges dissented from that part of the ruling because they considered that the threat or use of nuclear weapons is unlawful in all circumstances. Thus, the Court was more united than the need for a casting vote by its President suggested.

Responses to the advisory opinion

The Nuclear Weapon States generally downplayed the ruling's significance, asserting that it was not legally binding upon them. The UK Government responded as follows:

The ICJ opinion does not require a change in the United Kingdom's entirely defensive deterrence policy. We would only ever consider the use of nuclear weapons in the extreme circumstance of self-defence which includes the defence of our NATO allies (Hansard, HL Debates, 26 January 1998, Cols 7-8).

However, this wrongly assumes that there is an exception to the general prohibition of threat or use. With reference to point 2E of the ruling, the Court's President stated:

I cannot sufficiently emphasise that the Court's inability to go beyond this statement of the situation can in no way be interpreted to mean that it is leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.

Indeed, the text and tenor of the ICJ's opinion reveal a strong inclination towards illegality in all circumstances. In view of "the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering and their ability to cause damage to generations to come", the Court stated that the use of such weapons "seems scarcely reconcilable" with respect for the law of armed conflict, "at the heart of which is the overriding consideration of humanity" (*Nuclear Weapons Case*, paras 36 and 95).

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In contrast, before the Defence Committee on 20 March 2002 (<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/644/2032008.htm>) and in a subsequent television interview, the UK's Secretary of State for Defence indicated a willingness to use nuclear weapons in response to a non-nuclear attack involving chemical or biological weapons against troops in the field, and even pre-emptively. Even if the ICJ had ruled that nuclear weapons may be used "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake", that scenario would not qualify.

Nuclear weapons are considerably more destructive than chemical or biological weapons, and the willingness to use them pre-emptively lowers the use threshold to new and dangerous levels.

(<http://www.basicint.org/nuclear/NPT/2005rc/brief03.pdf>)

Recommendations

1. The Nuclear Weapon States must:

- renounce the first use of nuclear weapons and give binding security assurances to all Non-Nuclear Weapon States; and
- acknowledge that the ICJ did not recognise any exception to the general prohibition of the use or threatened use of nuclear weapons and revise their defence policies accordingly.

2. All States Parties should, in good faith, pursue and conclude a treaty which comprehensively, universally and explicitly prohibits recourse to nuclear weapons.

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