



Re-examining the 1996 ICJ Advisory Opinion: Concerning the Legality of Nuclear Weapons

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Abstract

The primary objections raised against total elimination of nuclear weapons are built around a few arguments mostly of non-technical nature.

Nuclear weapons and the strategies for their use have resulted in the establishment of a vicious circle within which the international community is trapped.

The argument that the world will be unsafe without nuclear weapons is only meant to further the narrow self-interest of the nuclear weapon states and their allies.

The World Court's far-reaching 1996 advisory opinion concluded that almost any use or threat of use of nuclear weapons would violate international humanitarian law and law applicable in armed conflict, undermining most claims of nuclear weapon states regarding the legitimacy of possession, use or threat of use of nuclear weapons. The next logical step would be an initiative for a nuclear convention banning the use and threat of use of nuclear weapons in Asia and the adjoining oceans. But as long as the dominant elites in society and the nation-state believe in the utility of nuclear weapons for national security or as the currency of power, abolition of nuclear weapons will remain a mirage.

Although in recent years President Obama and some of the leading Cold Warriors have taken up the cause of nuclear disarmament, we must clarify two points: (i) that disarmament means different things to different people, and (ii) the sudden affection for nuclear disarmament appears to have been a ruse in order to present a rosy picture at the NPT Review Conference in May 2010. Actually, no progress had been made in the previous ten years to move toward inalienable commitments given during the Review conference in 2000. The primary objections raised against total elimination of nuclear weapons are built around a few arguments mostly of non-technical nature. *Cold War*, for example, used to be cited as a justification for nuclear weapons, but it has been more than two decades since the Cold War ended. On the other hand, nuclear weapons are justified and retained by the nuclear weapon states on the grounds that *there is no Cold War now* and uncertainty caused by this factor is sought to justify retaining them!

The problem is that nuclear weapons and the strategies for their use have resulted in the establishment of a vicious circle within which the international community is trapped. This

has been appropriately summed up by William Arkin in the following terms:¹

What are the targets of nuclear weapons?

– *Nuclear weapons.*

What provocation could bring about the use of nuclear weapons?

– *Nuclear weapons.*

What is the defence against nuclear weapons?

– *Nuclear weapons.*

How do we prevent the use of nuclear weapons?

– *By threatening to use Nuclear weapons.*

Why can't nuclear weapons be abolished?

– *Nuclear weapons.*

To this can be added one more question: what is the strongest incentive to nuclear proliferation?

– *Nuclear weapons.*

Four years after the end of the Cold War in 1993, the CSIS Nuclear Strategy Study Group (in USA) had concluded that “there is no consensus, nor any immediate prospect of one, that total and complete disarmament will under any circumstances, be a feasible proposition”.² The report, however, went on to state that “it would be a tragedy if the present momentum toward international co-operation and disarmament passed without some attempt to establish a more robust nuclear end-state whose practical effect is virtually to eliminate the risk that nuclear weapons will be used”. The permanent extension of the NPT (Non-Proliferation Treaty) in May 1995 without any unambiguous, leave alone binding, commitment to nuclear disarmament only reinforced the concerns that nuclear disarmament was not likely to be pursued by the weapon states in any meaningful way in the foreseeable future.

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On the other hand, some new voices also emerged since then to join the international community in demanding total elimination of nuclear weapons. China, unlike Russia, still supports the elimination of nuclear weapons, and has been seeking a no-first-use treaty among the weapon states. The argument that the world will be unsafe without nuclear weapons is only meant to further the narrow self-interest of the nuclear weapon states and their allies. Competent people like former US defence secretary and senior military commanders in the report of the committee chaired by General Andrew Goodpaster have already argued that *US security will be enhanced* with total elimination of nuclear weapons.³ They have recommended a phased programme of disarmament that could be achieved in a couple of decades. Australian Prime Minister Mr. Paul Keating, while announcing the setting up of the Canberra Commission of experts to work out a plan for total elimination of nuclear weapons, had

stated that, “I believe that a world free of nuclear weapons is now feasible.”* He went on to say that, “We want the nuclear weapon states to carry out their commitments to the elimination of their nuclear stockpiles by adopting a systematic process to achieve that result.”

Perhaps the most significant step to devalue and eliminate nuclear weapons was the referral by the UN General Assembly to the International Court of Justice at The Hague. As the Cold War ended, non-governmental organisations, especially the prestigious IPPNW (International Physicians for the Prevention of Nuclear War) and IALANA (International Association of Lawyers Against Nuclear Arms), proposed on 3rd September, 1993[†] that the World Health Organisation (WHO) Assembly seek from the International Court of Justice (ICJ, Generally referred to as the World Court) an advisory opinion on the question:

“In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?”

The ICJ considered WHO’s request and sought written submissions. After considering the case, the Court refused to give any advisory opinion on the WHO question on the grounds that the question did not fall within the scope of WHO’s activities as is required by Article 96(2) of the UN Charter.[‡] Meanwhile, the UN General Assembly adopted a resolution A/RES/49/75K on 15th December, 1994 (by 78 states voting in favour, 43 against, 38 abstaining and 26 not voting) which asked the ICJ to render its advisory opinion urgently on the following question:[§]

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

While the resolution was instigated by NAM (Non-Aligned Movement), as may be seen, the voting pattern did not reflect a cohesive NAM position and actually showed the post-Cold War international order and perceived national interests of various countries. Of the five acknowledged nuclear weapons states, only China did not participate in the voting. The Resolution was submitted to the Court on 18th December, 1994. A total of 42 states (including India) provided written submissions to the Court and participated in the proceedings. Twenty states participated in oral hearings which were held during October-November 1995. The ICJ ultimately rendered its opinion on 8th July, 1996. The 15 judges of the ICJ decided that the Court was not able to give an advisory opinion requested by WHO. The reason rested on the fact that questions of use of force etc. were beyond the scope of specialised agencies like the WHO and hence, the Court confined its opinion to the UN General Assembly request.

The Opinion of the ICJ may be summarised as follows:

1. The threat or use of nuclear weapons is generally contrary to International Humanitarian Law (Opinion, para 105D). There are no international agreements banning them as nuclear weapons. However, the Court confirmed unanimously that their threat or use, just like other weapons, must comply with International Humanitarian Law and

*Speech given by P.J. Keating, Prime Minister of Australia on the 50th Anniversary of the United Nations, October 24, 1995.

†“ICJ Press Release on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict” General List No. 93 (1993-1996).

‡ICJ Press release on the Legality of the threat or use of nuclear weapons – ICJ Advisory Opinion, 8th July, 1996. ICJ General List No. 93.

§General Assembly Resolution 49/75 K, Request for an advisory opinion from the International Court of Justice on the legality of the threat or use of nuclear weapons.

be judged according to their effects and the circumstance of their use (Opinion, para 86, 105, 2D). Weapons which do not distinguish between civilian and military targets would be unlawful.

2. To threaten anything illegal is itself illegal (Opinion, para 47). Possession and deployment of a weapon with the stated intention of its use under certain circumstances would constitute an illegal threat if the purpose of its use would inevitably violate the principles of necessity and proportionality (Opinion, para 48).
3. Proportionality includes the requirement that even if a nuclear response were proportionate to a threat or attack, it would still have to meet the requirement of humanitarian law (Opinion, para 42).
4. The Court said that “the use of such (nuclear) weapons is in fact scarcely reconcilable with respect for such requirement” (Opinion para 95) and noted that no state making submissions to the Court provided a plausible scenario in which the use of nuclear weapons would be lawful (Opinion, para 94).
5. The Court could not decide whether threat or use of nuclear weapons by a state would be lawful if its “very survival would be at stake” (Opinion para 97) because it did not have sufficient detailed information before it abutted the precise circumstances of such an event (Opinion, para 95), but the President of the Court said that this “*cannot in any way be interpreted as a half-open door to the recognition of the legality of the threat or use of nuclear weapons*” (Judge Bedjaoui, Separate Statement, para 11).
6. The restrictions imposed by the International Humanitarian Law are intransgressible. This means that it applies in all circumstances, even if the very survival of a state would be at stake (Opinion, para 79).
7. The Court unanimously decided that “**there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspect under strict and effective international control**” (Opinion, para 105F).

The World Court has relied heavily on humanitarian laws and conventions in coming to its conclusions. This is as it should be. But the international community has been prompt in ignoring this linkage. As it is, an international community that places a heavy emphasis on humanitarian issues and the rule of law must act to remove the basic lacunae in its approach to nuclear weapons. For example, numerous conventions and agreements have come into being to ban even conventional weapons which lead to serious debilitating effects and violate the dignity and life of people.

While the World Court judgement does not go far enough for all those seeking elimination of nuclear weapons, it, nevertheless, contains far-reaching conclusions. Firstly, the Court has unanimously ruled that “*there is in neither customary nor conventional international law any specific authorization of the threat and use of nuclear weapons*”. This is an important opinion which naturally requires legislating an appropriate law. It is ironic — or rather tragic — that the international community has obtained a convention to outlaw landmines but seems to be unwilling to move toward a similar convention governing nuclear weapons which would, at the very minimum, create norms and inhibitions against the use of nuclear

weapons. The ruling also clearly knocks down the claim of nuclear weapon states that their possession and use or threat of use of such weapons are legitimate. It is obvious that such claims by nuclear weapon states are a reflection only of a cynical exercise of power rather than any regard for such norms. At the same time, in an 11:3 judgement it also ruled that there is no “comprehensive and universal prohibition of the threat and use of nuclear weapons as such” in international law. The UN General Assembly should have forecast this ruling. For an action to be declared as illegal, it is obvious that there must be a law, customary or statutory, which prohibits such actions. Use of poison was considered illegal for a long time, and a specific prohibition against its use was instituted by the international community through the 1925 Geneva Convention.

The World Court, in a 7:7 vote with the President casting the deciding vote, also ruled that “the threat and 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”. At the same time, the Court ruled that “in view of the current state of international law”, (essentially the absence of specific law) the Court “cannot conclude definitely 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”. This raises two issues. First, there is an over-riding necessity of a global convention to ban the threat and use of nuclear weapons. Second, since all nuclear weapon states are unlikely to agree to such a convention, (for example, the United States joined the 1925 Geneva Convention banning the use of chemical weapons only in 1975) states could be authorised to keep their weapons and their use could be clearly circumscribed in the case of self defence when the survival of the state is threatened by nuclear weapons.

The World Court judgement, read in its totality, clearly emphasises the need for properly framed and instituted laws to prohibit the use and threat of nuclear weapons. One can argue that nuclear weapons, even when present in quantities exceeding 65,000 warheads at one time, have not been used since the atomic bombings of Hiroshima and Nagasaki in 1945. One can argue that non-use has become the norm over the past seven decades. But, while this norm needs to be made more permanent, non-use would give a false sense of success since it hides the reality of nuclear threats being held out and readiness levels being enhanced in over 56 crises since 1946. Any one of them could well have resulted in actual use of nuclear weapons. The Cuban missile crisis was an important benchmark in highlighting how close the world came to extensive use of large arsenals of the superpowers. There are also numerous instances when accidental use was stopped just in time. It is debatable whether we rely on the norm of seven decades of non-use as a valid substitute for legal framework to control the threat and use of nuclear weapons.

Nuclear weapon states and their allies relying on such weapons may be expected to oppose the institution of such legal norms and laws as their submissions at the World Court also indicated. But they are increasingly being forced to accept through protocols, a prohibition to use or threat of use of nuclear weapons in an enlarging portion of the globe falling within nuclear-weapon-free zones. At the same time it is necessary to recall that an overwhelming majority of states have been voting for a convention to outlaw the threat and use of nuclear weapons. India had been in the forefront of moving such a resolution at the UN year after year since 1978. In fact, it is most unfortunate that support for such a resolution declined after the

end of the Cold War. As long as nuclear weapons remain and are seen as legitimate, India will continue to face the dilemma of working to achieve global zero while keeping its option open and retaining its weapons for self-defence. The logical step required is to resurrect this resolution at the forthcoming session of the UN General Assembly and generate maximum support for it. Meanwhile, since most of the Asian countries have supported the concept so far, they should take the initiative for a nuclear convention banning the use and threat of use of nuclear weapons in Asia and the adjoining oceans.

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Creating a Legal Norm

Even a brief study of human history would clearly indicate that all major changes affecting human behaviour have come about on the basis of change in ideas and belief systems prevalent at that point in history. The easiest example that comes to mind is the abolition of slavery. There is no doubt that a civil war became the vehicle of that change. But other changes like the demise of apartheid in South Africa or untouchability in India came about through changes in prevailing beliefs and ideas, no doubt propelled by humanitarian statesmen. Unfortunately, most attempts and draft conventions to eliminate nuclear weapons ignore this crucial element. As long as the dominant elites in society and the nation-state believe in the utility of nuclear weapons for national security or as the currency of power, abolition of nuclear weapons would remain a mirage. No amount of extremely well argued and apparently unbeatable draft proposals stands any chance of success as long as the dominant ideas actually perceive an advantage whether for deterrence of other countries or compellence or even simply because others have it and hence hope to change their relative place in international hierarchy.

The above conclusions are based on the simple but horrifying reality that nuclear weapons possess enormously high levels of extremely lethal and destructive power. Link that with the stark fact that the modern world, in spite of exponential advances in technology, has not been able to find any credible defence against such weapons. These two factors provide nuclear weapons with the power unmatched by any other weapon. Some people may point to the development and deployment of BMD (Ballistic Missile Defence). But that would be ignoring what is obvious: that BMD may provide defence against incoming missiles, the delivery system for nuclear weapons, but it leaves out other means and methods of delivering nuclear weapons.

Doctrinal changes in the use and utility of nuclear weapons are another aspect of the process of de-legitimation. There is an urgent need for a binding political agreement among the eight declared/undeclared nuclear weapon states (five weapon states, and India, Pakistan and Israel) not to be the first to use nuclear weapons/capabilities. Of these, China and India have always supported the concept of no-first-use pledge. The Soviet Union used to support the concept also, but the Russian Federation has moved away from that position. However, it is not an absolutist shift. In late 1990s, Russia and China agreed to a bilateral no-first-use (of nuclear weapons) commitment within a broader non-aggression pact. In a profound change

from its earlier position, NATO adopted the position in July 1990 that nuclear weapons were “truly weapons of last resort.” It is significant that even in Pakistan, which used to thump its chest and threaten using the nuclear weapons first and at an early stage in an armed conflict, some of the leading thinkers began to argue within two years in favour of a doctrine of “first, in last resort.”⁴ The new Strategic Concept adopted by NATO in November 1991 further relegated nuclear weapons to margins of NATO strategy by stating that the “circumstances in which any use of nuclear weapons might have to be contemplated” are “remote”.⁵

“Nuclear weapons must be totally eliminated from national arsenals.”

The new NATO-Russia Founding Act signed at Paris on May 27, 1997, states that “Russia and NATO do not see each other as adversaries”. President Clinton, speaking about the Charter stated that “The veil of hostility between East and West has lifted. Together we see a future of partnership too long delayed that must no longer be denied.” President Chirac of France and Chancellor Kohl of Germany endorsed these views. As early as 1993, a seminal study by eminent experts in USA concluded that “The changing political landscape in Europe has produced a strategic revolution; neither deterrence of conventional attack nor deterrence of nuclear attack any longer requires the presence of large numbers of . . . nuclear weapons on the European continent.”⁶ The forecast of changes in the geo-political landscape, if anything, has been more profound and extensive than that visualised by the CSIS study. There is every reason to expect, therefore, that NATO would move at an early date from its current “last resort” position.

In the view of many experts, the current NATO position is well short of a no-first-use commitment. But if more recent developments are any indication, there is no reason why the NATO states would/should not go to fuller commitment to no-first-use at an early date. The most important development is the agreement between NATO and Russia regarding NATO expansion where, in fact, President Yeltsin made the surprise announcement that Russian nuclear weapons have been taken off their earlier mission of targeting NATO member countries. But difficulties may also arise from Israel and Pakistan not coming forth with such commitments. In that case, the agreement could be concluded among the five declared nuclear weapon states and India, while Israel and Pakistan could be invited to join at the earliest opportunity.

Two aspects need consideration: one concerns the “no-first-use” concept and commitment, and the other relates to the principle of proportionality, even in circumstances where the Court has been undecided, that is, in self-defence under specific circumstances related to the survival of the State. The first should be seen in the context of the Court’s opinion that there is no specific law either authorising or prohibiting use and threat of nuclear weapons. Till the issue of such a law is settled, use and threat of nuclear weapons would continue to be generally inconsistent with law. This should place an obligation on all countries to adapt nuclear doctrines now in consonance with the World Court ruling. There can be no reasonable situation where threat of use of nuclear weapons would be justified for self-defence. But such a threat exists in the very possession of nuclear weapons themselves. The implication, therefore, is that nuclear weapons must be totally eliminated from national arsenals.

Although the Court has not specified the particular circumstances under which threat and use of nuclear weapons might be justifiable when the very survival of the State is in question, the principle of proportionality would require that even under these circumstances, nuclear weapons can be considered legal only in extreme situations if the survival of the State is threatened by the nuclear weapons of other states. The effects of use of nuclear weapons extend beyond territorial limits of a state. The matter of use under extreme circumstances of protecting the survival of the State has to take this into account. The logic which has sought to justify possession and use of nuclear weapons against superior conventional forces, as by NATO for four decades and Pakistan in justifying its weapons programme, cannot remain valid in terms of the principle of proportionality. The final assurance of the survival of the state has to be provided by the international community, in particular by the UN, whose primary responsibility is to ensure international peace and security. At the same time, the World Court ruling has also made it clear that the definition, rights, and limits of action for self-defence will require elaboration and acceptance by the international community. The Secretary General should ensure movement toward this direction.

The Court has also ruled that the international community, especially the five nuclear weapon states, have not only an obligation to negotiate (in good faith) a treaty for total nuclear disarmament, but also have an obligation to conclude such a treaty. It may be recalled that in the run up to the permanent extension of the NPT, many experts and diplomats, in particular British, had been arguing that Article VI of the NPT imposes only an obligation to negotiate, but does not actually require conclusion of such a treaty! We may expect that the nuclear weapon states (and their allies under nuclear umbrellas) will cynically disregard the ruling of the World Court as they have been doing all along in their pursuit of nuclear hegemony. But the remaining 150 or so countries also bear a responsibility to keep nudging the recalcitrant states into implementing their commitments to disarm.

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Notes

1. William Arkin, "The bomb has many friends," *The Bulletin of Atomic Scientists* (1997): 37-39.
2. *Toward A Nuclear Peace: The future of nuclear weapons in US foreign and defense policy* (Washington D.C.: CSIS Nuclear Strategy Study Group Centre for Strategic and International Studies, 1993), 67.
3. *An Evolving US Nuclear Posture*, Second Report of the Steering Committee, Project on Eliminating Weapons of Mass Destruction (Washington D.C.: Henry L. Stimson Centre, 1995).
4. Agha Shahi, Zulfiqar Ali Khan and Abdul Sattar, "Securing Nuclear Peace," *The News International* October 5, 1999.
5. *Toward A Nuclear Peace*, CSIS Nuclear Strategy Study Group Report, 27.
6. *Toward A Nuclear Peace*, CSIS Nuclear Strategy Study Group Report, 28.