

Note Verbale dated 19 June 1995 from the Embassy of Italy, together with
Written Statement of the Government of Italy



AMBASCIATA D'ITALIA
L'AJA

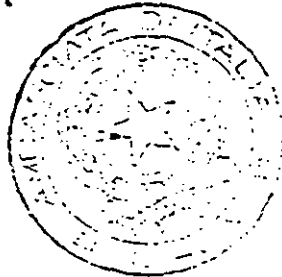
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VERBAL NOTE

The Embassy of Italy presents its compliments to the International Court of Justice and with reference to its letter 95588 of 8 February 1995 regarding the request for advisory opinion transmitted to the Court under the United Nations General Assembly Resolution 49/75K of 15 December 1994 concerning the legality of the threat or use of nuclear weapons, has the honour to enclose the written statement of the Italian Government.

The Italian Embassy avails itself of this opportunity to renew to the International Court of Justice the expression of its highest consideration.

The Hague, 19 June 1995



TO THE INTERNATIONAL COURT OF JUSTICE
THE HAGUE



Ministero degli Affari Esteri

SERVIZIO DEL CONTENZIOSO DIPLOMATICO
Ufficio dell'Agente del Governo Italiano

THE ITALIAN GOVERNMENT,

Considering resolution 45/75 K, adopted by the United Nations General Assembly on December 15, 1994, whereby the Assembly addressed the Court of Justice a request for an advisory opinion on the following matter:

"Is the threat or use of nuclear weapons in any circumstance permitted under international law?";

Considering the Court Order of February 1, 1995, establishing the deadline of June 20, 1995, for the presentation to the Court of written observations, in compliance with Article 66, paragraph 2, of its Statute;

Has the Court of Justice received the following observations:

1. First of all, the absence should be underlined of international general rules, and customary laws in particular, governing the use or the threat to use nuclear weapons.

The fact that numerous UN General Assembly resolutions have been adopted on this subject (1653/XVI, 2398/22, 2444/22, 2936/27, 2996/27, 3314/29, 33/71B, 34/58, 35/152D, 36/92, 36/100, 37/78J, 37/100C, 38/73G, 38/75, 38/183B, 39/63H, 39/148P, 40/151F, 41/60F, 42/39C, 42/42D, 43/78F, 44/117C, 45/59B, 45/94, 47/37, 47/53C, 48/72B) is at the same time an evidence and a consequence of this situation, and this is even more clearly demonstrated by the circumstance that the above UN resolutions were all adopted with a majority vote. It should hardly be noted that only if resolutions limiting

the use or the threat to use nuclear weapons had been adopted by consensus, it would have been possible to speak about the beginning of a process of international prohibitive or limitative customary rules, compared to which those resolutions should be considered as *opinio juris*, already well defined and capable of originating the material repetition of similar attitudes (*diuturnitas*).

Moreover, one cannot construe that limitative factors, or even an actual prohibition can derive from conventional provisions envisaged by collective Treaties.

The provisions quoted in this connection (Article 1 of the Convention Prohibiting Military Techniques or Other Hostilities Implying Modifications to the Environment, of May 18, 1977; Article 35, para 3, of the First 1977 Protocol additional to the Geneva Conventions of 1949; Article 1 of the 1948 Convention on the Repression of the Crime of Genocide), which prohibit at the international level the production of particularly dangerous events - specifically identified in each one of them - cannot be extended and applied to the threat to use nuclear weapons.

In the light of the above, it is impossible to consider the above-mentioned provisions as the source of juridical limitations on the subject of the threat to use or the use of nuclear weapons.

2. The opinion of those who consider that the provisions of the conventional war law on the limitations to the use of conventional weapons can by analogy be applied to the use of nuclear weapons, rests on even less sound foundations.

An argument against this use of analogy is the evident impossibility to concede that the provisions conceived to regulate the use of weapons having an at

least relatively reduced destructive scope do have a so wide ratio legis that their application to the resort to and the use of nuclear weapons is functionally correct and adequate. The validity of this opinion is specifically and positively confirmed by the slow, but relentless building of a specific corpus of rules bound to be applied not only and not so much to the manufacturing and use of mass destruction weapons, but also and above all to the manufacturing and use of objects having these characteristics, and thus of rules pursuing the complex and delicate objective of disarmament.

It is first of all to be noted that some of these conventional provisions can be applied without distinction to all types of mass destruction weapons. Reference is being made above all to the so-called demilitarization agreements concerning the ocean floors (Treaty of February 11, 1971), the Moon and the other celestial bodies (Article 4 of the Treaty on the Outer Space, of January 27, 1967), Latin America (the Tlatelolco Treaty of February 14, 1967) and the Southern Pacific (Nuclear Free Zone Treaty of August 6, 1985).

Moreover, conventions have been concluded which can specifically be applied to the manufacturing and detention of individual species of weapons that can be defined as mass destruction weapons, aiming at establishing international controls on their compliance (such as the Protocol on the Prohibition to Use Chemical Weapons of 1925, the Convention on their Ban of 1993, as well as the Convention on Biological and Bacteriological Weapons of 1972).

The above situation clearly shows that a process of gradual development of international rules on disarmament is underway, aiming at working out collective

conventions 'tackling and solving - with no forced interpretations - the whole set of problems linked to the manufacturing, testing, detention and use of those weapons. Thus, adequate solutions are taking shape, which take into account the specific nature of each individual category of weapon, even from the point of view of their control.

It is therefore absolutely evident that any attempt to separately regulate the use of nuclear weapons in the absence of the simultaneous availability of adequate mechanisms of international control on the manufacturing and detention of these weapons would produce distortions, and could rather slow down the solution of the afore-mentioned problems.

In this connection, it is hardly worth mentioning that the recent renewal, with no expiration date, of the Non Proliferation Treaty finally sanctioned the lawfulness of the detention of nuclear arsenals, at least by some States. It should also be underlined that the subject of the threat to use nuclear weapons gives rise to delicate questions, affecting - in particular - national defense and international policy strategies which can only be affected by *ad hoc* rules, to be conventionally defined. Therefore, it is the international community as a whole which should proceed in the direction of a global discipline of the whole subject, within the context of nuclear disarmament negotiations - which, on the other hand, were already launched a long time ago.

The above observations lead to the unavoidable conclusion that - within the limitations imposed by the NPT - the manufacturing and detention of nuclear weapons by certain States should be considered, for the time being, as legitimate, because they are not

prohibited. The validity of this conclusion cannot be effectively questioned, also considering that such a stance should not hinder or slow down the process leading to nuclear disarmament, whose rapid and positive conclusion is strongly advocated by the international community as a whole.

This conclusion does not clash with the existence of some general prohibitions on the matter, whose objective is to avoid or limit resorting to armed violence. Reference is hereby being made to the prohibition to use or the threat to use weapons set by Article 2, paragraph 4, of the United Nations Charter, whose applicability does anyway depend both on the compliance with the limitations imposed by Article 51 of the Charter itself, and on the limitations stemming from Resolution 1914 of the UN General Assembly, containing the definition of aggression. Mention should finally be made of the principle of the respect for civil populations, generally defined by the IV Geneva Convention of August 12, 1949, and by Article 23, point e, of the Hague rules of 1864, according to which - on the basis of the principle of proportionality - the exercise of armed violence should be carried out so as not to bring about unnecessary, and thus superfluous or useless sufferings.

For the Italian Government

Prof. Umberto Leanza

