
**VII. COMMENTS OF DELEGATIONS
AND MEMBER STATES ON THE
DRAFT REPORT ON LEGALITY OF
NUCLEAR TESTS**

*Comments of Delegations and Member
States on the Draft Report on
Legality of Nuclear Tests*

JAPAN

The major part of the Draft Report from page 195 to page 219 is based on the background paper prepared by the Secretariat. The Committee, however, did not discuss the matter in such detail either at its Fourth or Fifth Session.

Therefore, the Japanese Delegation hold that the said part of the Draft Report should be treated separately as a working paper provided for by the Secretariat, and that the Draft Report should merely mention the fact that the Committee discussed the topic on the basis of the working paper. Such being the position of the Japanese Delegation, expressions like "The Committee is of the opinion that . . ." should be omitted from such working paper for they do not necessarily reflect the views of the whole Committee.

In the event that the above-mentioned part of the Draft Report is to be adopted as the Report of the Committee, the Japanese Delegation will be obliged to reserve their position with regard to any and all parts of such Report.

2. The Japanese Delegation consider that the Report of the Committee should make it clear that the Committee, while it has agreed on the importance of humanitarian consideration or political aspects of the question of cessation of nuclear weapon tests, has decided to devote its work at the present session to the question of legality of nuclear weapons tests.

3. Theoretically viewed, the problem of legality of nuclear tests should be distinguished from the problem of compensation for loss or damage by nuclear tests. The Japanese Delegation hope that the Draft Report be drawn up in precise knowledge of such distinction.

4. The Japanese Delegation hold that a State that has carried out nuclear tests should incur a strict liability for actual loss or damage caused by them under the general principles of law recognised among civilised nations, whether or not *dolus* or *culpa* can be attributed to the testing State. The very occurrence of actual

less or damage, however, should be established by the claimant State. The idea to shift the burden of proof from the claimant to the testing State in regard to the existence of such loss or damage, which in effect makes the testing State to prove the non-existence of any loss or damage by nuclear tests, poses a most difficult legal question because, although quite interesting *lege ferenda*, such an idea would necessitate an extreme expansion of the theory of strict liability now recognised in the civilised society and would result in a general change to the traditional doctrine of procedural equality between the parties (*Prinzip der Waffengleichheit*).

5. In this connection, "actual damage" should include all kinds of biological effects so long as they are medically predictable. And *lege ferenda*, the genetic effects should also be regarded as "actual damage" if scientific evidence can show that the future occurrence of the genetic effects is highly probable. And again *lege ferenda*, if the genetic effects have actually appeared at a later period, they will be regarded as new damage for which compensation can be claimed.

6. The Japanese Delegation hold that the scientific evidence made available to the Committee shows that the radioactive contamination of the earth's environment caused by the nuclear tests results in increases in the global levels of radioactive fall-out and thus constitutes a growing threat to the present and future generations, and also that such radioactive fall-out could become harmful when accumulated.

Therefore, the Japanese Delegation hope that the Draft Report should state clearly that the cumulate nature of radioactive fall-out causes or is capable of causing the harmful effects to the world-wide environment.

7. In the light of the position stated above, the Japanese Delegation would like to propose the following amendments to specific passages of the Draft Report.

- (1) At page 197 delete "as to whether scientific evidence did establish that the nuclear tests have harmful effects on the human beings," and insert "as to whether scientific evidence did establish that *all* nuclear weapons tests have harmful effect on human beings."

- (2) Delete the part on page 198 beginning with "in the absence of....." and ending by "..... have harmful effect", and substitute "in as much as no factual and scientific evidence to the contrary *has been made available before the Committee*, it would be reasonable to proceed on the basis that nuclear weapons tests cause or are capable of causing harmful effects."

- (3) On page 199 delete "rather than rely on principle of international law."

- (4) On page 218, in paragraph (4) of the conclusions, delete the words "on the basis of...." and substitute "on the basis of scientific evidence."

- (5) On page 218 amend paragraph (5) of the conclusions to read as follows :

"(5) Without prejudice to paragraph (1) of the conclusions, nuclear weapons tests constitute internationally wrongful conduct for the damage or injuries caused thereby to other States and their nationals."

- (6) On page 218, amend paragraph (6) of the conclusions to read as follows :

"(6) A nuclear weapon test is to be considered as a infringement upon the principles contained in the United Nations Charter and the Declaration of Human Rights, and at any rate upon the spirit behind them."

- (7) On page 219, amend paragraph (7) of the conclusions to read as follows :

"(7) To carry on nuclear weapons tests in the high seas constitutes an abuse of right so long as the carrying on of such tests interfere with the freedom of navigation and fishery on the part of other nations."

THAILAND

1. The Delegation of Thailand finds the Draft Report on Legality of Nuclear Tests prepared by the Secretariat of the Asian-African Legal Consultative Committee unacceptable as a whole.

2. The Delegation of Thailand finds it possible to accept only one part of the Draft Report from page 216 beginning with the phrase "The next question to be considered. . . ." to page 217.

3. The conclusions reached in the Draft Report are not acceptable to the Delegation of Thailand, which can only accede to paragraphs 1, 7 and 8 of the Conclusions as they now stand.

4. It is the view of the Delegation of Thailand that it is not possible to give a conclusive legal opinion on the legality of nuclear tests without examining all the scientific evidence including materials referred to by the testing States, particularly on underground tests.

5. Subject to amendments, paragraph 2 of the Conclusions may be accepted by the Delegation of Thailand :

(i) After the opening phrase "scientific evidence as available and "to the Secretariat".

(ii) The word "impossible" at the beginning of the fifth line should read "not yet reasonably practical".

6. The Delegation of Thailand is of the opinion that a large portion of the Draft Report which leads to the conclusion in paragraph 4 is labouring under misapprehension that there is as yet no liability under international law for the damage or injuries caused by nuclear tests. International law has already developed far beyond that stage and the Thai Delegation is prepared to support as a proposition of international law that the testing State is liable to pay compensation to the injured State in respect of damage to properties or loss of lives or physical injuries. This liability is eminently under the heading of State responsibility or sub-heading "private claims" or "international claims". There is no need to go into the history of the development of international law on this particular topic. But if trace must be made, it can be made to the

common law concept of nuisance as illustrated by the *Trail Smelter Award*, or the theory of absolute liability, or the maxim "*sic utere tuo ut alienum non laedas*", which incidentally is separate from and unconnected with the notion of abuse of right in international law. Paragraph 4 should be redrafted to read :

"The testing States are liable to pay prompt and full compensation to the injured State or States in respect of damage caused by nuclear tests under the modern international law doctrine of State responsibility."

7. Paragraph 3 of the draft Conclusions is not acceptable to the Thai Delegation for two reasons : (i) Reference to the doctrine of "abuse of right" is not helpful to the discussion, because it has very little connection with the problem of nuclear tests. The only accurate reference to "abuse of right" is found in page . . . of the Draft Report in a quotation from an opinion given by the International Law Commission — (ii) Reference to the plea of justification on the ground of self-preservation is irrelevant. The right of individual and collective self-defence is expressly provided in Article 51 of the Charter of the United Nations.

8. Paragraph 5 of the draft Conclusions is not acceptable to the Thai Delegation for the following reasons :

(i) It is supported by the lack of evidence to the contrary, while in fact evidence to the contrary has not yet been examined. Damage need not necessarily follow.

(ii) Nuclear tests resulting in damages are actionable. They are not *injuria sine damno* or actionable without proof of damage. In international law, damage cannot be assumed, because of the complicated problem of "nationality of claim". If nuclear tests are actionable *per se*, it would not be possible to recognise who the injured party is and how the compensation is to be assessed. Confusion would be introduced into the theory and practice of international law.

(iii) Actionability is still remote from illegality or criminality. Civil wrongs or tortious acts are not the same as wrong-

ful conduct or illegal act or criminal offence. The idea of illegality has not yet fully developed in international law. It is nevertheless closely linked to the concept of legal control of State acts.

9. The Delegation of Thailand is predisposed to accept paragraph 6 of the draft Conclusions, if it can be so amended as to read :

“Having regard to the potential harmful effects of nuclear weapon tests, the testing of nuclear weapon explosions may be said to violate the principles of human rights and fundamental freedoms contained in the Preamble of the Charter of the United Nations and the Universal Declaration of Human Rights.”

10. It is the view of the Delegation of Thailand that the question of legality of nuclear tests cannot be discussed separately or divorced from the question of legal controls of nuclear tests. Nor can it be said that one is more political than the other. Legal controls of nuclear tests are exclusively legal questions from the point of view of international law just as legal controls of international conflicts are purely juridical in the eyes of Professor Julius Stone. The creation of an international machinery to control nuclear tests, once a conclusion is reached that such tests are potentially dangerous although not necessarily always illegal, is no more political and no less a legal question for an international lawyer than the creation and functioning of an international tribunal to control international conflicts or to settle international disputes.

It is therefore the submission of the Delegation of Thailand as a Member of this Committee that legal aspects of the legal control of nuclear tests should be studied together with the examination of further evidence on the effects of nuclear tests, as it is inseparably bound up with the question of legality of nuclear tests.

UNITED ARAB REPUBLIC

Extracts from the letter dated 7th May, 1962 of H.E. Hafez Sabek, Head of the U.A.R. Delegation to the A.A.L.C.C. and Chief Justice of U.A.R. addressed to the Secretary, A.A.L.C.C.

In response to your letter dated March 28th, 1962, I recall that the U.A.R. Delegation had accepted at the Rangoon Session the Draft Report prepared by the Secretariat on the subject of “Legality of Nuclear Tests”. The Delegation stands still on its position but reserves his rights to express further views on the comments which the other delegations may send to the Secretariat.

CEYLON

The statements made by very many of the Delegates at the Rangoon Session during the discussion of the Legality of Nuclear Tests took the form of answers to specific questions, which had been posed in the Brief prepared by the Secretariat. What are set out, at the end of the Draft Report, in the form of “conclusions reached by the Committee”, purport to be summaries of the opinions expressed by the Delegates in answer to those questions. For the reason that this summary does not adequately give expression to certain doubts and reservations contained in some of the statements rendered at the Session, the Delegation of Ceylon, while stating its general agreement with the conclusions as set out in the Draft, reserved the right to make the comments which we now offer.

As a general observation, we consider that the Report, as drafted, does not contain adequate indication of the distinction, underlined by many Delegates, between the humanitarian and practical considerations which render imperative the condemnation of nuclear testing on the one hand, and the considerations which, on the other hand, affect the different question of the legal validity of such tests. We consider that any effectiveness which the Committee's conclusions may have will be enhanced, rather than reduced, if it is realised that this distinction was borne in mind during the discussions.

The Committee, consisting, as it does, solely of personnel experienced in the practice, teaching and administration of Law, had necessarily to be guided by opinions of other authorities on the question whether nuclear tests are inherently dangerous to human and other life. On the basis of material collated by the Secretariat,

our Delegation thought it reasonable to assume that the fact of such danger had been quite satisfactorily established by past experience. Nevertheless, the Committee did not have the advantage of hearing "the other side" with respect to this vital question of fact. Hence we cannot be certain that the assumption of necessary and inevitable danger is completely justifiable. If tests *can* be conducted without any risk of danger to life, the basis for the condemnation of the Tests *on the ground of illegality* would no longer exist.

In regard to the legal bases for the conclusion that nuclear tests are illegal or ought to be illegal (with which conclusion our Delegation agrees) we are aware that there have been arguments put forward by students of international law in favour of a view contrary to that reached in the Report. The value to be attached to the Committee's Report would have been enhanced if these contrary views could have been examined.

We consider that the ground of "justification" for the conduct of the tests may be somewhat more substantial than the treatment of the matter in the Draft Report would indicate. Had the question of legality to be considered *in limine, before any actual tests had been conducted*, the possible plea of justification (*i.e.*, that tests may be necessary as a measure of preparation for defence in anticipation of nuclear attack), could have been ruled out as being quite untenable. To have ruled it out at that stage, antecedently to the commencement of testing, would have meant only that all States would be in a position of equality in the matter of preparation for defence, and that in the event of hostilities each State would equally lack the advantage of the use of tested weapons. But *unfortunately*, the validity of the plea of justification has to be considered in different circumstances, in the light of the unhappy fact that tests have actually been conducted by some States, one or some of which may already enjoy a potential offensive superiority in consequence. A particular State may in all reason and sincerity be fearful or even convinced that some other State has, through tests which have already taken place, perfected a weapon for future use, and may therefore desire to conduct tests only with a view to the equalisation of offensive strength as a measure of defence. In such a context, we cannot with full confidence adhere to the conclusion that the plea of justification must at this stage be rejected without

qualification. So to reject it would amount to perhaps unreasonable condemnation of the motives by which the nuclear States are at present influenced.

For similar reasons, it is difficult to agree fully with the conclusion that nuclear testing, by reason of the risk involved to the nationals of the testing State itself, violates the principles of the Charter and the Declaration of Human Rights. If indeed a State conducts tests in good faith in the interests of its defence as a measure of protection *against tested weapons* believed to be within the possession of other States, it would be doing so in the interests of its nationals. Such a State would be faced with the difficult choice of endangering its nationals by the conduct of tests or else of exposing its nationals to the risk of possible nuclear attack with no assurance of protection in such an event. We consider that at the least there is room for difference of opinion on the question whether a State which in such a situation chooses to conduct tests can be said to be acting prejudicially to the human rights of its nationals. Here again, the fact that an unlawful act has already been done by another State would appear to raise considerations similar to those upon which the law of self-defence is based, and to render justifiable a course of action which might in other circumstances have been indefensible.

The Draft Report indicates the intention of the Secretariat to append the statements made by the Delegates of their opinions on the several questions posed for consideration at the Rangoon Session. We do not therefore think it necessary to mention in the present comments certain less important points upon which our Delegation's opinions are not precisely in accord with the "conclusions" as set out in the Draft Report.

PAKISTAN

Extracts from the Letter No. F. 23 (1)P/62-III dated December 18, 1962 from Mr. Mohd. B. Babar, Third Secretary, Pakistan High Commission, New Delhi, addressed to the Secretary, A.A.L.C.C.

I am desired to refer to your letters No. F. (Res.)12/62(1) dated April 24, 1962, and F. (Res.)-12/62(4) dated October 20, 1962, regarding the comments of the Government of Pakistan on the

Draft Report on Legality of Nuclear Tests, and to state that the Government of Pakistan are in agreement with the views contained in Paras 3 to 8 of the conclusions reached by the Committee.

INDIA

I. *General Observations*

The Government of India are generally in agreement with the conclusions reached by the Committee on this subject. However, it is suggested that the Report should also deal with the question as to whether an injunction for stoppage of nuclear tests is necessary. This indeed is a very important question, for, the question of reparation comes only after the event and it is no solution to the real issue which is to save humanity and property from damage and destruction. The International Court of Justice has the power to indicate, if circumstances so require, provisional measures which ought to be taken to preserve the respective rights of either parties. (See Article 41 of the Statute of the International Court of Justice). If occasion arises for the International Court of Justice to consider this question, we think that the Court will not hesitate to issue a suitable order of injunction. In this connection, we would also like to draw the attention of the Committee to the statement of the Delegate of India when this subject was discussed at the Fifth Session of the Committee. We would therefore suggest that a paragraph on the subject may be included in the Final Report.

II. *Other Comments*

Injury or harm to human beings resulting from nuclear tests may be either instantaneous or delayed. Though the Report deals with this question, the conclusion merely refers to the harmful effects resulting from the nuclear explosions.

It is suggested that the conclusions appearing on pages 217 to 219 of the Report may be redrafted as follows :—

(1) The available factual data and the result of scientific research establish beyond doubt that every nuclear explosion caused by testing of nuclear weapons is capable of causing damage to human life and health as well as to property by its blast, heat, toxicity and radioactive fall-out ; such damage may be instantaneous or

delayed ; the extent of actual and possible damage might vary according to the magnitude of the explosion. The possibility of damage can neither be controlled nor predicted.

(Reference may be usefully made in this connection to the Nagasaki and Hiroshima incidents and after, the explosion at Bikini and the various works recording scientific researches).

(2) As the nuclear explosion, the harmful effects of which are neither predictable nor controllable, is likely to cause wide spread and large scale damage, a State which carries out or permits the carrying out of nuclear tests must be held to be indulging in or permitting a dangerous or ultra-hazardous activity.

(3) The liberty of a State to carry on any activity, however dangerous, on its territory is based on the theory of absolute sovereignty. But it is recognised in international law that a State shall not knowingly use or allow its territory to be used for acts which affect the other States. (See the *Corfu Channel Case* and the *Trail Smelter Case*).

(4) The theory of absolute sovereignty of a State has also received a setback by the modern developments in the international sphere which preclude a State from acting in a manner detrimental to the interests of the other States.

(Reference is invited to the Preamble of the Charter of the United Nations, the Universal Declaration of Human Rights, the views of the International Military Tribunal of Nuremberg, Conventions on the Law of the Sea, Genocide Convention etc.).

(5) Accordingly, nuclear tests, potentially capable of causing harm to other States and their nationals, cannot be justified on the accepted principles of international law and usage—at any rate having regard to the modern trend in the development of international law and usage.

(6) The plea of justification for nuclear tests on the ground of self-preservation cannot and ought not to be accepted as no State can claim to cause harm to other States, without provocation, in its effort to preserve itself.

(7) A State carrying on nuclear tests on its territory is unquestionably guilty of an international tort and is liable for the damage caused thereby to other States and their nationals. The liability of the State should be absolute or strict—without proof of fault or negligence.

(8) An action for injunction restraining a State from carrying on nuclear tests would probably succeed in the International Court of Justice.

(9) Nuclear tests carried on in the High Seas violate the principle of the freedom of the seas inasmuch as the carrying on such tests interfere with the freedom of navigation and they result in pollution of the water and destruction of the living resources of the sea.

(10) A State carrying on such tests in trust territories must be held to be acting contrary to Articles 73 and 74 of the United Nations Charter.

VIII. DRAFT ARTICLES ON NUCLEAR TESTING

Submitted by the Delegation
Of Ceylon at the Sixth Session

Draft Articles on Nuclear Testing

Article I

It shall be unlawful for a State to cause damage, direct or indirect, to aliens, whether on its territory or outside its territory and whether in respect of person or property, by the explosion of nuclear weapons by testing. The State causing such damage shall incur international responsibility to the national State or States of the injured aliens involving the duty to make reparation to the latter State or States.

Article II

It shall be unlawful for a State to cause damage, whether direct or indirect, to another State, whether on the territory of the former or outside it, by the explosion of nuclear weapons by testing. The State causing such damage shall incur international responsibility to the injured State involving the duty to make reparation.

Article III

It shall be a violation of the sovereignty of the State by another where the latter causes damage on the territory of the former by the explosion of nuclear weapons by testing and the latter shall give satisfaction for this to the former.

Article IV

(a) The question whether an explosion of nuclear weapons by testing has caused particular damage shall be answered by determining whether the damage was the probable consequence of the explosion of the nuclear weapons concerned.

(b) Such damage shall be presumed to be the consequence of the test carried out.

(c) Such presumption may be rebutted by proof beyond reasonable doubt that in view of the precautions taken by the State concerned the damage was not caused by the explosion caused by it.

Article V

It shall be no defence to any of the unlawful acts enumerated in Articles I to III that the damage caused was unforeseeable or that

reasonable care was taken to avoid such damage provided such damage is the natural consequence of the explosion of the nuclear weapons concerned.

Article VI

It shall be no defence to any of the unlawful acts enumerated in Articles I to III that the damage caused was the result of the pollution of the high seas by such explosions.

Article VII

It shall be no defence to any of the unlawful acts enumerated in Articles I and III that the explosion of nuclear weapons was carried out in circumstances in which preparation for self-defence against nuclear attack was called for by the prior explosion of nuclear weapons by another State.

Article VIII

Where two or more explosions of nuclear weapons by more than one State cause damage but it is uncertain how much of the damage was caused by each State, there shall be a presumption that each of these States is jointly and severally liable for all such damage. This presumption may be rebutted by proof that any one State was responsible for a specific portion of the damage only.

Article IX

The quantum of damages payable for any unlawful damage for which a State is responsible shall be determined in accordance with the rules of international law, deriving from any relevant source of international law, pertaining to the qualification of damage.

Article X

The persons on whose behalf claims may be brought by a State shall be determined in accordance with the rules of international law, deriving from any relevant source of international law, pertaining to the bringing of such claims.

Article XI

Passage through the territorial sea of a State shall not be innocent where such passage involves the carriage of nuclear weapons without the permission of the littoral State.

Article XII

An injunction should be granted in appropriate cases at the instance of any State whose nationals are likely to be injured against an imminent threat of an explosion.

**IX. FINAL REPORT OF THE
COMMITTEE**

Adopted at the Sixth Session

Final Report of the Committee

The Asian-African Legal Consultative Committee at its Third Session held in Colombo in January 1960 decided to take up for consideration the question of Legality of Nuclear Tests, a subject which had been suggested by the Government of India under article 3 (c) of the Statutes of the Committee, being a legal matter of common concern to all the states participating in the Committee.

At its Fourth Session held in Tokyo, in February 1961, the Secretariat of the Committee presented before it the relevant material both from the scientific and legal points of view, which formed the basis of discussion at that session. After a general discussion the Committee decided to study the matter further and to take up the question for fuller consideration at its Fifth Session. The Committee decided that it would not concern itself with the question regarding the use of nuclear weapons in time of war, but that it would confine itself to an examination of the problem of the legality of nuclear tests in time of peace.

In accordance with the decision taken by the Committee at its Tokyo Session, the Secretariat prepared a report which was placed before the Committee at its Fifth Session held in Rangoon in January 1962, on the basis of which the matter was further considered.

The Committee heard the views and expressions of opinion on the various topics arising on this subject from the Members for Burma, Ceylon, India, Indonesia, Japan, Pakistan, Thailand, and the United Arab Republic. Thereafter further comments were submitted by member governments.

At the Sixth Session of the Committee held in Cairo, in February-March 1964, the Committee considered the report prepared by the Secretariat and the comments received from Governments. The Committee took into account the various United Nations resolutions and international agreements relevant to the subject and the scientific data placed before the Committee. It also noted with satisfaction the conclusion of the Treaty of 5th August, 1963 prohibiting nuclear tests, which has had a considerable effect upon the ultimate outcome of the Committee's deliberation.

The Committee has formulated the following conclusions, stating that they apply equally to test explosions of nuclear weapons carried out by anyone for whose action the State is responsible in international law.

CONCLUSIONS

1. As sufficient evidence regarding the harmful effects of the underground test explosions of nuclear weapons is not at present available to the Committee, the Committee is unable at this stage to express any opinion on the legality or otherwise of such test explosions. The conclusions hereinafter set out are therefore referable to all test explosions of nuclear weapons other than underground test explosions.

2. Scientific evidence examined by the Committee shows that every test explosion of nuclear weapons results in widespread damage, immediate or delayed, or is capable of resulting in such damage; the present state of scientific knowledge does not indicate that the harmful effects of such test explosions can reasonably be eliminated. Such test explosions not only cause direct damage, but pollute the atmosphere and cause fall-out of radioactive material and also increase atomic radiation, which are detrimental to the well-being of man and also affect future generations.

3. Having regard to its harmful effects, as shown by scientific data, a test explosion of nuclear weapons constitutes an international wrong. Even if such tests are carried out within the territory of the testing State, they are liable to be regarded as an abuse of rights (*abus de droit*).

4. The principle of absolute liability for harbouring dangerous substances or carrying on dangerous activities is recognised in International Law. A state carrying out test explosions of nuclear weapons is therefore absolutely liable for the damage caused by such test explosions.

5. Test explosions of nuclear weapons are also contrary to the principles contained in the United Nations Charter and the Declaration of Human Rights.

6. Test explosions of nuclear weapons carried out in the high seas and in the airspace there above also violate the principle of the freedom of the seas and the freedom of flying above the high seas, as such test explosions interfere with the freedom of navigation and of flying above the high seas and result in pollution of the water and destruction of the living and other resources of the sea.

7. Test explosions of nuclear weapons carried out in trust territories and non-self-governing territories also violate Articles 73 and 74 of the United Nations Charter.