

# TNW in Nuclear First Use: The Legal Counter

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## Introduction

Pakistan's ISPR (Inter Services Public Relations) in a press release in April announced the development of the Nasr (Hatf IX) a 'Short Range Surface to Surface Multi Tube (sic) Ballistic Missile'. According to the release, 'the missile has been developed to add deterrence value to Pakistan's Strategic Weapons Development programme at shorter ranges'. The Director General Strategic Plans Division, Lt Gen (Retd) Khalid Kidwai stated that it will help in 'consolidating Pakistan's strategic deterrence capability at all levels of the threat spectrum.'<sup>1</sup>

The military response to the Nasr - both at the conventional and nuclear level - must already be under consideration in India. However, there is also the diplomatic reaction that India would need to set in motion, not only to deter it but also in case of a failure to deter the deployment of Nasr. This diplomatic reaction would have to rely on the legality or otherwise of the use of TNW by Pakistan in case of conflict.

This article approaches the issue of the employment of TNW of the likes of 'Nasr' from the legal view point. The aim is to discuss the legal aspect of TNW use in the hypothetical context of an India-Pakistan conflict. The seeming illegality of their employment needs to be highlighted to ensure that Pakistan refrains from resorting to these. The threat of a political and diplomatic isolation of the Pakistani state and the possibility of its national and military leadership laying itself open to international legal action in the International Criminal Court can be used to dissuade Pakistan from indulging in nuclear adventurism. Ensuring Pakistan's accountability at the individual level, will make its leadership less nuclear trigger happy. The legal aspect examined here will ensure self-deterrence in its case.

The article first looks at Nasr and its likely usage. Thereafter it deals with the legality of such nuclear first use in terms of the 'advisory opinion' of the International Court of Justice on nuclear weapons, humanitarian law and international criminal law. Lastly, it makes out a case for how the legal dimension can be handled by India diplomatically, both prior and post use of TNW as nuclear first use by Pakistan.

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## The Possible Utility of Nasr

The Nasr reportedly has a range of 60 km and 'carries nuclear warheads of appropriate yield with high accuracy, shoot and scoot attributes.' As a 'quick response system (it) addresses the need to deter evolving threats.' According to Kidwai in the 'hierarchy of military operations, the Nasr Weapon System now provides Pakistan with short range missile capability in addition to the already available medium and long range ballistic missiles and cruise missiles in its inventory.'<sup>2</sup>

The Nasr has rightly been seen by Indian analysts as an attempt by Pakistan to project a low nuclear threshold.<sup>3</sup> It is an attempt to deter an Indian conventional reaction to Pakistani sub-conventional provocations by constricting the space for conventional operations. This way it keeps up the 'stability/instability paradox' in which instability at the nuclear level in terms of likelihood of nuclear escalation by resorting to TNW lowers the likelihood of conventional operations by India. Stability at the upper levels – nuclear and conventional – is obtained thus; instability at the lower levels can then be taken advantage of by Pakistan by continuing its proxy war in Kashmir and terror provocations elsewhere. It is also in keeping with Pakistani thinking on nuclear weapons utility that like the NATO earlier and unlike India, has it, that nuclear weapons also help to deter conventional war.

The recent development and possible deployment of Nasr in the near future suggests, as acknowledged by Kidwai, the intent to use the missile early on in the conflict against offensive Indian formations. This has deterrent value against India's conventional proactive doctrine of 'Cold Start'.<sup>4</sup> In case of Indian offensives the Nasr can have multiple uses. It can pose India a problem that its nuclear doctrine has found difficult to resolve. The situation that has found mention in strategic analyses is: Pakistani nuclear first use in a defensive mode against advancing Indian armoured formations on its territory.<sup>5</sup> This questions the credibility of India's nuclear doctrine. There are two forms of punitive nuclear retaliation: one is premised on a 'massive' counter; and the second of a lesser order, is the infliction of 'unacceptable damage'.<sup>6</sup> Even if a 'massive' punitive strike is ruled out in such a case for reasons as proportionality etc, the resort to a strike inflicting 'unacceptable damage' may prove escalatory. India could end up at the receiving end of a counter strike of equal dimension since Pakistan has a three digit inventory. Pakistan's realisation of the Indian quandary in such a setting has possibly partially driven its TNW ambitions.

The gains it stands to make by introducing nuclear weapons into the conflict at an early stage are not necessarily battle-field oriented. As has been demonstrated elsewhere competently, it takes several TNW sized warheads to stop an armoured thrust.<sup>7</sup> Pakistan is aware of this and is therefore less interested in the tactical utility

of TNW than in their operational and strategic value. The operational value lies in slowing down Indian spearheads by making them more cautious in a 'button down' mode. A possible nuclear environment would make the tactics of advance more complicated, thus slowing it down. It will ensure a greater dispersal of Indian columns, making them less wieldy and potent against Pakistani reserves. This will make them less potent since offensive action presupposes a concentration of forces at the time and location of attack. These are the psychological gains that Pakistan hopes to achieve. More importantly, at the strategic level, it would like to focus the international community's attention on to the nuclear dimension in the hope of early conflict termination initiatives. While the operational level gains will no doubt will be suitably countered by the Indian military; its contemplation of offensive operations in the nuclear environment, will require a politico-diplomatic response. The response will be considerably influenced by the legal position of the nature of Pakistani use of TNW in its nuclear first use.

Pakistan's could use TNWs in different ways, initially. It could launch a TNW strike on an advancing Indian pincer, not so much to stop it as much as for strategic signalling.<sup>9</sup> It could do so either, by actually targeting Indian troops, but also in 'green field' mode, i.e. by not addressing any Indian target but as a demonstration strike. At the next level it could use a set of TNWs to halt a pincer that it is otherwise unable to counter due to operational disadvantages forced on it by the particular advance in conjunction with advances of such pincers elsewhere and India's application of air, artillery and missile delivered firepower. The TNWs could be used for battle field application or along the shaft of the offensive up to its range, either targeting the logistic tail or follow on formations. The latter strike(s) could well be on launch pads in Indian territory. The nature of the strike is important to the discussion that follows on the legality of such strikes.

## The Legal Angle

Pakistan can be reasonably expected to be mindful of the legal aspect of nuclear weapons use. Having a legally sustainable case will add to its diplomatic rationale, prevent the moral high ground from being captured by India and will be politically useful. In case it is legally compliant to the extent possible, it will help its political-military leadership to ward off International Criminal Court proceedings for breaking the nuclear taboo. Since, as seen, it would like to influence the international community, it would not like to increase the 'opprobrium quotient'<sup>9</sup> of its crossing of the nuclear rubicon. Given that the nuclear taboo norm has become stricter since the last and only use of nuclear weapons in conflict,<sup>10</sup> its resort to nuclear weapons would require considerable rationalisation from its side. Clearly, overly provocative nuclear first use by it would fail to influence international opinion in its favour. It would therefore per force have to both display and project self-restraint in its nuclear resort. Doing so in a legally sustainable manner is one way.

In resorting to the low yield nuclear weapons, Pakistan would attempt to remain on the right side of international law to the extent possible. A TNW may help in ensuring low collateral damage, thereby enhancing discrimination. In targeting military forces, it may be easier to abide by the principles of military necessity and proportionality. This is possible in case of a variegated nuclear capability. That it may have sub-kiloton or very low yield weapons can be surmised from the Chagai tests in which, of the five tests, it claimed to have tested three sub-kiloton devices.<sup>11</sup> In choosing military targets in its own territory it would be further bolstering its case legally. Its choice of theatre of employment could well be such as to bring civilian collateral damage down to a minimum, such as, for instance, by using it in the Cholistan desert. Further, it could further evacuate its own population from such areas prior to or at the outbreak of the conflict so as to prepare the ground for nuclear employment in a thinly populated areas.

Irrespective of the precautions Pakistan manages to take, India would need to be proactive in faulting it legally, so as to gain a diplomatic and political dividend and an information war advantage. War necessitates heightened employment of all instruments of national power. Increasingly, in this information age, the non-military dimension of war is to the fore. Towards this end, India's first line of argument must be that Pakistan should be held accountable for breaking the 'nuclear taboo'. This line of legal argument would be that the nuclear resort by Pakistan is not in line with the advisory opinion of the ICJ of 1996 given to the General Assembly in response to the question 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'.<sup>12</sup>

The court had ruled unanimously that 'a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the Charter of the United Nations and that fails to meet all the requirements of Article 51 is unlawful.'<sup>13</sup> Article 2 Paragraph 4 deals with territorial sovereignty and political independence. India can project that since it had no intention of depriving Pakistan of either - post conflict - there was little reason for it to resort to nuclear weapons. This may require making its case for going to war explicit and clear at the very outset and laying out its war aims as unambiguously precluding any threat to Pakistani political independence and territorial integrity. This will undercut Pakistan's projection of nuclear resort as 'last resort'.

Article 51 deals with the right of self-defence.<sup>14</sup> While Pakistan would be exercising this right in case of a proactive offensive by India,<sup>15</sup> it would nevertheless require taking into account the necessity of proportionality in reaction. India could fault Pakistan on proportionality in terms of nuclear use being disproportional and amounting to a qualitative and uncalled for escalation. Further, Article 51 allows self-defence measures, with the proviso that the state report such measures to the UN Security Council and persist with these 'until the Security Council has taken

measures necessary to maintain international peace and security.' Early use of nuclear weapons would constitute a *fait accompli* to the Security Council, going beyond the spirit of Article 51.

The court was evenly divided over the place in law of nuclear weapons use stating the following:

generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of 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...<sup>16</sup>

While Pakistan can be expected to have planned its TNW targeting to conform as much as possible to humanitarian law (more of that below), early use will be very difficult to justify in respect of the second circumstance. Since India would not be threatening the 'survival' of the Pakistani state, its resort to nuclear weapons, how so ever much in keeping with IHL principles, can be argued to be illegal by this yardstick. Pakistan for its part would argue that apprehending a threat to state survival it ventured into nuclear terrain. It would marshal history in terms of its 1971 experience and its concerns with an existential threat since. This can be refuted by India by alluding to its stated aims. These would be necessarily limited in light of its doctrine of Limited War that does not seek to challenge Pakistan's nuclear threshold<sup>17</sup> and its long standing strategy of restraint. Legally, it would need to be proved that at the stage of nuclear first use, there was no threat to state survival. Mere apprehension is not cause enough for nuclear resort. By this yardstick, early use of TNW would place Pakistan manifestly afoul of international law.

As for the case in terms of international humanitarian law, illegality would be less than self-evident. This will be particularly so in case of demonstration strikes causing no damage. In its targeting, Pakistan will likely take into consideration tenets of Additional Protocol I to the Geneva Conventions,<sup>18</sup> even though it is not a signatory and these do not amount to customary law. The specific Articles in question are Article 48 to Article 58.<sup>19</sup> It can make a studious distinction between civilian population and combatants and between civilian objects and military objectives. This will be relatively easier to do in the case of targeting Indian spearheads in the Cholistan desert. It will likely be mindful of Article 35 on 'Basic Rules' that prohibits employment of weapons and methods that cause 'superfluous injury or unnecessary suffering' and employment of methods or means which are intended to cause 'widespread, long-term and severe damage' to the natural

environment. It would argue that sub-kiloton warheads can be seen in continuum with high explosives and cannot be said to cause either. India for its part would need to point out that the very first of the Basic Rules is that the choice available to states in choice of means and methods is 'not unlimited'. The ICJ opinion has it that nuclear weapons have 'unique characteristics...in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.'<sup>20</sup>

Highlighting the possible illegality is not enough. The leadership that ordered the attack would need to be held accountable. The ICC can arraign such a leadership, even if neither state is party to the Rome Statute. In case of civilians being targeted, such a nuclear attack can be taken as genocide (Article 6), crimes against humanity (Article 7) or war crime (Article 8). For this reason, the use of TNW by Pakistan will be more circumspect. The precise use of TNW against military targets is not impossible. Careful targeting can help minimise collateral damage to keep within the caveat that such damage must not be 'clearly excessive in relation to the concrete and direct overall military advantage anticipated'.<sup>21</sup> Therefore, it will be difficult to nail Pakistan on this line. This is even more so because the Statute also states:

Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.<sup>22</sup>

Since nuclear weapons are not subject to a 'comprehensive prohibition', only the nature of use would determine India's line of argument. Pakistan will therefore attempt to get away by sensibly employing TNW. This will have to be denied it by India by recourse to law in order to pressure its leadership against first use consideration. Working towards a universal No First Use regime – admittedly a seemingly unlikely prospect - may help with this over time.

## **The Diplomatic Offensive**

Employment of TNWs in nuclear first use is more likely for influencing international opinion than to address combat situations. This can only be done by amplifying their effect through media and diplomacy. Once first use has occurred, while the nature of retaliation and escalation control will be to fore, the need to corner Pakistan by the other instruments of national power cannot be neglected. This

can be done by mounting a telling argument and increasing the perception of illegality regarding Pakistani nuclear first use, irrespective of its nature. Mounting international pressures on Pakistan over first use will have a deterrent effect on any subsequent nuclear resort and its counter strikes. Thinking through the lines of argument presented, and being informed by legal expertise is a necessary prior. Discussing this in open literature has the advantage of reinforcing deterrence, in that the decision maker there will be self-deterred because of being identified as a candidate for prosecution by the ICC.


India's diplomatic position is strengthened by its nuclear doctrine positing NFU. Its 'retaliation only' nuclear resort will be entirely understandable. However, the nature of the retaliation will also be consequential. In case of 'massive' punitive retaliation – liable to be seen as disproportionate in answer to TNW - India's case may not be legally compliant or credible. The opprobrium Pakistan attracts by breaking the nuclear taboo will be diluted by India's seemingly 'unwarranted' reaction, if it is a disproportionately higher order counter strike in relation to a lower order nuclear strike. This is possible in case India follows through on its promise of 'unacceptable damage' as a default reaction. India would therefore need to think through its nuclear employment doctrine on the breakdown of deterrence, even if its nuclear deterrence doctrine remains as declared in its 2003 formulation. Nuclear retaliation would require not only to be configured by in-conflict deterrence compulsions and need for retribution, but must also help with the political isolation of Pakistan for its first use. Proportionate retaliation will be useful in this.

The diplomatic amplification of the legal aspect of Pakistani nuclear first use would be sequential. The first will be in 'peace time' and the second in 'war time'. In peacetime, the nuclear taboo or tradition of nuclear non-use needs to be strengthened. This will make the eventuality of Pakistani nuclear first use more repugnant, despite any attempt by that state to ensure careful targeting. The limitation inherent in this line of action is that it would ideally involve accession to Additional Protocol I and the ICC. In war time, the emphasis would be on identifying the leadership with any nuclear decision, thereby constraining its propensity to make such decisions with any expectation of impunity.

The requirement of in-conflict nuclear deterrence apart, it can be hazarded here that India's legal-diplomatic case would be strengthened immeasurably should it choose *not* to retaliate with nuclear means. The military implication of such recourse is not necessarily catastrophic. The implication is that India could pursue the conflict more vigorously conventionally. The international community would be more inclined to bring the nuclear decision maker to justice. Nuclear first use can well lead to Pakistan regaining its rationality. India's self-restraint in the first instance can reinforce its case for harsher response in case of a second nuclear

resort by Pakistan. The knowledge of this will deter Pakistan – thus making for self-deterrence. This means that there are non-military responses that can and should be considered by India's Nuclear Command Authority.

## Conclusion

The ICJ criterion of 'last resort' on legality of nuclear weapons use implies that early first use of TNW in a low threshold mode by Pakistan is unambiguously illegal. The Indian offensive would be in its early stages at this juncture and therefore Pakistan cannot be said to be in a position of 'use them-lose them'. Its national survival, which alone makes nuclear weapons use permissible, would certainly not be at stake. This legal position needs to be aired by India and its legal-diplomatic campaign needs thinking through. Doing so in peace time will help deter Pakistani decision makers since it would end any assurance of impunity. In war time, the circumstance of nuclear first use must be capitalised on, particularly in terms of international humanitarian law. In turn, India's nuclear retaliatory doctrine in respect of its default intent to inflict 'unacceptable damage' must be made international law and international humanitarian law compliant. This is possible in case of a proportionate and discriminate nuclear strike. Such doctrinal innovation will help strengthen its diplomatic-legal case against Pakistani resort to TNW. 

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### Notes:

- 1 ISPR press release No PR94/2011-ISPR of 19 April 2011 [http://www.ispr.gov.pk/front/main.asp?o=t-press\\_release&id=1721](http://www.ispr.gov.pk/front/main.asp?o=t-press_release&id=1721)
- 2 Ibid.
- 3 Sethi, Manpreet, 'New Toy in Pakistan's Nuclear Shop', *Geopolitics*, July 2011.
- 4 Cold Start, a colloquial term to refer to India's conventional war doctrine, has been discontinued lately and the term 'proactive operations' is being used instead. General VK Singh has unambiguously stated (Pabby, M. (2010), "No to Cold Start Doctrine, India tells US", *The Indian Express*, New Delhi, 9 September 2010), "There is nothing called 'Cold Start'. As part of our overall strategy we have a number of contingencies and options, depending on what the aggressor does. In the recent years, we have been improving our systems with respect to mobilisation, but our basic military posture is defensive."
- 5 Kanwal, Gurmeet, *Indian Army: Vision 2020*, New Delhi: Harper Collins, 2008, p. 79.
- 6 CCS (2003), "Press Release of the Cabinet Committee on Security on Operationalisation of India's Nuclear Doctrine, <http://meaindia.nic.in/pressrelease/2003/01/04pr01.htm>.
- 7 Kanwal, *Indian Army: Vision 2020*, p. 80.
- 8 Ahmed, Ali, 'Pakistani Nuclear Use and Implications for India', *Strategic Analysis*, Vol. 34, No. 4, July 2010.
- 9 A term used by General Sundarji to denote the levels of revulsion and consequently the levels of international pressures that the type of nuclear use would invite.



- 10 Thomas Schelling writes ('The Nuclear Taboo', <http://web.mit.edu/mitir/2007/spring/taboo.pdf>): 'The taboo... has become a powerful tradition of nearly universal recognition.'
- 11 CTBTO, 'Significant nuclear explosions', available at <http://www.ctbto.org/nuclear-testing/types-of-nuclear-weapons/page-6/>
- 12 ICJ, 'Summaries of Judgments - Legality Of The Threat Or Use Of Nuclear Weapons: Advisory Opinion of 8 July 1996'; available at <http://www.icj-cij.org/docket/files/95/7497.pdf>
- 13 Ibid, Para C, p. 94.
- 14 'Charter of the UN', <http://www.un.org/en/documents/charter/chapter7.shtml>
- 15 India's proactive action will very likely be one provoked by continued Pakistani provocations at the subconventional level, thereby giving India a plausible *casus belli*.
- 16 ICJ, 'Advisory Opinion', Para E, p. 95.
- 17 For a perspective on Limited War thinking in India, see Ladwig, W. (2008), "A Cold Start for Hot Wars? The Indian Army's new Limited War Doctrine", *International Security*, Vol. 32, No. 3: 158-190.
- 18 ICRC, 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977', available at <http://www.icrc.org/ihl.nsf/full/470?opendocument>
- 19 These deal with the civilian-military distinction and the precautions necessary in attack.
- 20 ICJ, 'Advisory Opinion', Op. Cit., p. 96.
- 21 Rome Statute of the International Criminal Court, Article 8, Para 2 (b) (iv), available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.
- 22 Ibid, Article 8, Para 2 (b) (xx).