

International humanitarian law and nuclear weapons

On 8 July 1996, the International Court of Justice gave its advisory opinion in response to two enquiries as to the legality of the threat or use of nuclear weapons.¹ Whilst the Court did not examine in detail the request put forward by the World Health Organization, it did give very close attention to the question presented by the General Assembly:

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

The Court’s opinion is interesting, especially in that the judges in The Hague considered whether the threat and/or use of nuclear weapons is compatible with international humanitarian law. A detailed account of their deliberations and findings will not be given at this point, but two observations should be made: on the one hand, the Court did not find any international rule specifically prohibiting, in all circumstances, the threat or use of nuclear weapons during an armed conflict. On the other hand - and this is the key point - the Court decided unanimously that any use of nuclear weapons would be subject to the rules and requirements of international humanitarian law. The International Court of Justice has thus confirmed that such weapons are not above the law.

The Review will return to this important decision at a later date.

For the time being, we shall simply reproduce the earliest ICRC text on nuclear weapons. It was written by Max Huber, who was then Acting President of the ICRC. The following brief extract is from a circular letter to the National Red Cross and Red Crescent Societies, dated 5 September 1945 and entitled “The end of hostilities and the future tasks of the Red Cross”.² It will be noted that this first position paper on nuclear weapons

¹ International Court of Justice, Advisory opinion of 8 July 1996: *Legality of the threat or use of nuclear weapons (Request for advisory opinion by the General Assembly of the United Nations)*. Press release No. 96/23 of 8 July 1996 and text (as yet unpublished) of the Court’s opinion.

² See *International Review of the Red Cross*, No. 321, September 1945, p. 657 ff., and *Report of the International Committee of the Red Cross on its activities during the Second World War*, Vol. I, General Activities, Geneva, May 1948, pp. 689-690.

was published less than one month after the atom bomb destroyed Hiroshima and Nagasaki.

“It is indeed questionable whether the latest developments of the technique of warfare leave any possibility for international law to cover a firm and sound order of society. Already the First World War, and still more the long disaster of the past six years, demonstrate that the conditions which prompted the framing of international law in its model form in the Geneva and Hague Conventions, have undergone far-reaching change. It is clear that developments in aviation and the increasingly destructive effects of bombing have made practically inapplicable the distinctions hitherto drawn, whereby certain classes of people had by right a special protection (for instance, the civil population in contrast to the armed forces). The inevitable development of weapons, and so of warfare as a whole, has a greater significance by reason of the exploitation of the discoveries in nuclear physics, which permit the producing of arms of a potency hitherto unknown.

“It would be useless to attempt a forecast for this new weapon, or even to express an opinion on the prospect that the Powers would relinquish it altogether. The question arises whether they would, perhaps, keep it in lasting and unflinching reserve as a supreme safeguard against war and as a means of preserving a just order. This hope is not, perhaps, entirely vain as, during this six years struggle, there has been no recourse to the chemical or bacteriological means of warfare as outlawed by the Powers in 1925. It is as well to remember this fact at a time when there have been so many infringements of law and so many reprisals have been taken.

“In former times war was, essentially, an armed contest between combatant forces. To-day, it supposes the total mobilization of all living forces of the nation against the enemy country and it involves the whole population. Warfare has now altered fundamentally owing to recent discoveries and to technical application of them. Mankind is thus faced with a problem of supreme gravity which calls for decisions on the moral plane.

“The Geneva Convention gives guarantees to the wounded and sick of the armed forces - just as to their adversaries - that their lives will be protected and they will have the right to proper care; the Convention on the treatment of prisoners of war watches over the physical and moral situation of those in captivity. The terms of these instruments declare the absolute inviolability of an enemy who is no

longer fit for combat and give recognition to the dignity of the human personality. Protection of the civil population must rest on these same principles. The same applies to the endeavours made by the Red Cross to bring relief supplies of all kinds - foodstuffs, clothing and indispensable medicaments - to women, children and old people in occupied territories. Safeguarding of children is the last line which the Red Cross must defend, if war is not to mean utter destruction of mankind.

“From totalitarian war have sprung new techniques. Must it then follow that the individual person will no longer enjoy the protection of the law and that he will thus be considered as a mere pawn in the mass struggle? That would mean the collapse of the principles that are the foundation of international law, which affords physical and moral protection to the human person. Even in time of war, a system of law which is purely expedient, based on self-interest and which serves only the exigence of the moment, could never offer an enduring security. Unless respect for the significance and dignity of man is sustained, war will inevitably lead to boundless destruction, since the human mind which harnesses the forces of the universe seems, by the mechanisms it contrives, to hasten the onrush of destruction.”

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