

The International Committee of the Red Cross and nuclear weapons: From Hiroshima to the dawn of the 21st century

François Bugnion*

François Bugnion is the ICRC Director for International Law and Cooperation within the Movement.

Abstract

Nuclear weapons raise fundamental questions which go to the very heart of international humanitarian law and of Red Cross assistance activities. Sixty years after Hiroshima and Nagasaki, the author describes the attempts of the International Committee of the Red Cross to deal with these weapons.

: : : : : :

The tragedies of Hiroshima and Nagasaki, which brought the Second World War to an end, were also the culmination of an escalating series of bombing raids on cities. While it was Germany that had taken the initiative, with its bombing of Warsaw, Rotterdam, London and Coventry, the Allies were soon in a position to strike back with interest. But above all, these tragedies propelled the world into a new era: humanity had acquired the means to bring about its own annihilation.

The atom bomb represented a complete break from previous weapons, even the most deadly. Owing to its practically unlimited destructive capacity, the instantaneous nature of its power to annihilate, the near impossibility of protecting oneself against its pernicious effects and the long-term consequences of ionizing radiation, the atom bomb constituted a cataclysm without equal in the

* The article reflects the views of the author alone and not necessarily those of the ICRC.

history of mankind, creating a deeper rift with the past than had been engendered by any other material event recorded in human memory.

Precluding any discrimination between military objectives and civilian objects, causing atrocious suffering to those stricken by its effects, and impeding any possibility of bringing aid to the victims of the cataclysm they cause, nuclear weapons called into question the very foundations of the law of war and of the assistance activities conducted by the Red Cross.¹

The action taken by the Japanese Red Cross and the International Committee of the Red Cross²

On 6 August 1945, at 8.15 a.m., a flash a thousand times brighter than the sun set the sky afire over Hiroshima. It was immediately followed by a wave of incandescent heat and, a few moments later, a hurricane which swept away everything in its path. The terrifying heat released by the atom bomb turned the centre of the city into a gigantic inferno, which in turn generated a violent wind followed by black rain. The fire spread from neighborhood to neighborhood and burned itself out in the mid-afternoon, when there was nothing left to burn. By that time the entire city was gone.

Immediately below the epicenter of the explosion, and within a radius of one kilometer, everything was obliterated, and even the foundations of the buildings that had stood there could no longer be perceived. All that remained was, on one of the channels of the river Ota, the gutted shell of the Hiroshima Prefecture Industrial Promotion Hall, dominated by the metal framework of an enormous glass dome. This structure was to become the symbol of the cataclysm. All around, for a radius of four or five kilometers, houses had been reduced to rubble, trees uprooted, vehicles hurled over long distances, and train rails twisted as if by a supernatural force. In all, 90% of buildings were destroyed or badly damaged. Windows were shattered as far as 27 kilometers from the point of impact. The Japanese Red Cross hospital in Hiroshima was miraculously spared, although the doors, windows and part of the roof were destroyed by the blast.

About 80,000 people were killed in the explosion, and almost as many suffered severe injuries.³ During the weeks and months that followed many were to die

1 In accordance with the practice of more than a century, in this article the expression “International Red Cross,” or simply “Red Cross,” is used to designate the International Red Cross and Red Crescent Movement, especially when those expressions relate to periods when they were the only ones used.

2 Cf. François Bugnion, Remembering Hiroshima, *International Review of the Red Cross*, No. 306, May–June 1995, pp. 307–313.

3 There are major divergences as regards the number of victims of the disaster. The report of the US Commission on the effects of strategic bombing gives the figures of 80,000 killed and as many injured (*The United States Strategic Bombing Survey: The Effects of Atomic Bombs on Hiroshima and Nagasaki*, Chairman’s Office, 30 June 1946, United States Government Printing Office, Washington, 1946, p. 3). A survey carried out by the Hiroshima City Council up to 10 August 1946 arrived at the following figures for a civilian population of 320,081 on the day of the explosion: 118,661 killed, 30,524 seriously injured, 48,606 slightly injured, and 3,677 missing (*Hiroshima and Nagasaki: The Physical, Medical and Social Effects of the Atomic Bombings*, The Committee for the Compilation of Material Damage caused by the

in terrible agony from the burns they had sustained, or from the effects of radiation: internal bleeding, cancer, leukemia. Three days later another bomb destroyed the city of Nagasaki, with consequences just as horrifying as those in Hiroshima.

The day after the disaster several medical teams from the Japanese Red Cross Society arrived in Hiroshima from neighboring towns. Two of these teams helped the staff at the Japanese Red Cross hospital, while the others worked in improvised dispensaries set up in tents in different parts of the devastated city. A total of 792 staff members and volunteer workers from the Japanese Red Cross Society treated some 31,000 patients during the three weeks following the cataclysm.⁴

Relief operations were, however, seriously hampered by the scale of the catastrophe and the number of victims it claimed, the shortage of staff and appropriate equipment and supplies, the incurable nature of some of the wounds, and uncertainty as to the treatment required. There were no medicines; in the appalling hygiene conditions resulting from the heat and the lack of drinking water, wounds became infected and disease began to spread. In addition, many of the relief workers who came in to help the victims in the hours and days that followed were themselves affected by the radiation.

On 29 August an ICRC delegate, Fritz Bilfinger, was able to reach Hiroshima. He was the first neutral witness to arrive on the scene of the disaster, and the telegram he sent the next day to the delegation conveys the full extent of the tragedy:

“Visited Hiroshima thirtieth, conditions appalling stop city wiped out, eighty percent all hospitals destroyed or seriously damaged; inspected two emergency hospitals, conditions beyond description full stop effect of bomb mysteriously serious stop many victims, apparently recovering, suddenly suffer fatal relapse due to decomposition of white blood cells and other internal injuries, now dying in great numbers stop estimated still over one hundred thousand wounded in emergency hospitals located surroundings, sadly lacking bandaging materials, medicines stop please solemnly appeal to allied high command consider immediate air-drop relief action over centre city stop required substantial quantities bandages, surgical pads, ointments for burns, sulfamides, also blood plasma and transfusion equipment stop immediate action highly desirable, also dispatch medical investigation commission stop report follows, confirm receipt.”⁵

The head of the ICRC delegation, Dr Marcel Junod, immediately contacted the Japanese authorities and the High Command of the occupation forces

Atomic Bombs in Hiroshima and Nagasaki, translated by Eisei Ishikawa and David L. Swain, Basic Book Publishers, New York, 1981, p. 113). See also: Kenjiro Yokoro and Nanao Kamada, “The public health effects of the use of nuclear weapons,” in *War and Public Health*, Barry S. Levy and Victor W. Sidel, eds, Oxford University Press, Oxford, 1997, pp. 65–83. On 30 October 1961, the Soviets exploded a 50-megaton bomb, the equivalent of 50 million tonnes of TNT, at Novaia Zemlya. This bomb, the biggest ever tested, was 2,500 times more powerful than the one which destroyed Hiroshima.

4 According to information kindly supplied to the author of this article by the Japanese Red Cross on 5 June 1995.

5 Fritz Bilfinger, telegram of 30 August 1945, copy, ICRC Archives, file No. G. 8/76.

which were beginning to deploy in the archipelago. He in his turn traveled to Hiroshima accompanied by an American commission of inquiry and a professor of radiology from the University of Tokyo, taking with him 20 tons of medicines and dressing materials donated by the American authorities.

What he saw confirmed in every respect the apocalyptic scene depicted in Fritz Bilfinger's telegram: the obliteration of most of the city, where "nothing but silence and desolation" remained, the extremely serious and, in many cases, fatal nature of the injuries caused by burns and radiation, the overcrowding in the makeshift hospitals, the lack of medical materials and medicines, the helplessness of medical staff, also decimated and having to cope with entirely new types of lesions for which there was no treatment, and, finally, the despondency of the survivors of a disaster which, with lightning speed, had wiped out their city.⁶ In the face of such a disaster, humanitarian action appeared derisory.⁷

The appeal of 5 September 1945

The International Committee of the Red Cross did not wait for its delegates' reports before taking a stand on the new means of mass destruction that humankind had just acquired. In a circular sent on 5 September 1945 — less than a month after Hiroshima — to the National Societies on the end of hostilities and the future tasks of the Red Cross, the ICRC was already questioning the lawfulness of atomic weapons and calling on States to reach an agreement banning their use.

"There can be no doubt that war, an anachronism in a civilized world, has taken on a character so devastating and so widespread [...] that the thoughts and labours of all should be turned to the paramount task of making impossible the resort to arms. The Red Cross, nevertheless, is compelled, in time of war, to pursue its traditional efforts in the field of international law, which is to rise in defence of humanity and of the demands that it makes. At a moment when peace seems, at last, to have returned, it may appear ill-timed to take up such a task, but that should not deflect the Red Cross from this fundamental duty. As the destructive forces of war increase, so much the more imperative does it become to protest against this overthrow of human values and to turn the light of man's conscience, frail though it be, to pierce the darkness.

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

6 Marcel Junod, *Warrior Without Weapons*, ICRC, Geneva, 1982, pp. 286–300 (first edition in English, Jonathan Cape, London, 1951); Marcel Junod, *The Hiroshima Disaster*, extract from the *International Review of the Red Cross*, Nos 230 and 231, September–October 1982, pp. 265–280 and November–December 1982, pp. 329–344.

7 For the action taken by delegates Fritz Bilfinger and Marcel Junod, see Marcel Junod, *Warrior Without Weapons*, *op. cit.* (note 6), pp. 272–285 and 301–307; Marcel Junod, *The Hiroshima Disaster*, *op. cit.* (note 6), François Bugnion, "Remembering Hiroshima," *International Review of the Red Cross*, No. 306, May–June 1995, pp. 307–313.

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.”⁸

This stand did not prevent the ensuing race for strategic weapons. Nevertheless, less than a month after the destruction of Hiroshima, through the voice of the International Committee, the Red Cross unequivocally stated its position on the legal and ethical implications of the destructive power which mankind had just acquired.⁹

The 1949 Diplomatic Conference

Even before the end of the Second World War, the International Committee of the Red Cross had begun work on the revision of the 1929 Geneva Conventions and the drafting of a new convention for the protection of civilian persons in time of war, which had been so cruelly lacking during the six-year conflict.

The question of a general limitation on aerial bombardment was not on the agenda of the 1949 Diplomatic Conference, which only marginally broached the issue.¹⁰ That did not prevent the Soviet delegation from submitting, in

8 “The end of hostilities and the future tasks of the Red Cross,” Circular Letter No. 370 to the Central Committees of the Red Cross Societies, 5 September 1945, *Report of the International Committee of the Red Cross on its Activities during the Second World War*, ICRC, Geneva, May 1948, Vol. I, pp. 688–690.

9 The 17th International Conference of the Red Cross, meeting in Stockholm in August 1948, unanimously endorsed the International Committee’s stand on atomic weapons. See Resolution XXIV, *Seventeenth International Red Cross Conference, Stockholm, 1948, Report*, Swedish Red Cross, Stockholm, 1948, pp. 78 and 94.

10 *Final Record of the Diplomatic Conférence of Geneva of 1949*, Federal Political Department, Bern, 1949, Vol. II-A, pp. 761–762 and 802–805; Vol. II-B, pp. 495–508; Vol. III, pp. 180–181 (hereinafter *Final Record 1949*); Paul de La Pradelle, *La Conférence diplomatique et les Nouvelles Conventions de Genève du 12 août 1949*, Les éditions internationales, Paris, 1951, pp. 35–42 and 67–69; René-Jean Wilhelm, “Les Conventions de Genève et la guerre aérienne”, (The Geneva Conventions and War from the Air), *Revue internationale de la Croix-Rouge*, English Supplement, Vol. VII, No. 3, March 1954, pp. 55–56.

Committee III, a draft resolution declaring that the use of atomic, bacteriological or chemical weapons was incompatible with the basic principles of international law, calling on States that were not bound by the Geneva Protocol of 17 July 1925 prohibiting the use of chemical and bacteriological weapons to adhere to it, and urging States immediately to adopt a convention banning atomic weapons as a means of mass extermination of the population.¹¹ The Committee, and subsequently the Conference in plenary, declared the Soviet proposal inadmissible.¹²

This led to a paradoxical result: while the Diplomatic Conference had revised in the most minute detail all the rules affording protection to victims of war, the most grave uncertainty hung over the validity of the principle of the immunity of the civilian population which underlies the major part of humanitarian rules, and in particular the Fourth Convention which the Conference had just adopted.¹³ The same uncertainty hung over the crucial issue of the lawfulness of nuclear weapons. Four years after Hiroshima, the rules governing aerial bombardment were still the same as those adopted by the Second International Peace Conference in The Hague in 1907, which prohibited the discharge of projectiles from balloons.

While welcoming the results of the Diplomatic Conference, which had enabled it to achieve its main objectives, the International Committee of the Red Cross could not but be concerned about the discrepancy between the precise and detailed rules which the 1949 Conference had adopted with a view to protecting wounded, sick or shipwrecked members of armed forces, prisoners of war and civilian persons in the power of the enemy on the one hand, and the chaotic state of the rules protecting the entire civilian population from the effects of hostilities on the other.

In an appeal launched on 5 April 1950, the ICRC expressed its concern over the development of weapons of mass destruction:

“Today (...) the International Committee feels obliged to underline the extreme gravity of the situation. Up to the Second World War it was still to some extent possible to keep pace with the destructive power of armaments. The civilian population, nominally sheltered by International Law against attack during war, still enjoyed a certain degree of protection, but because of the power of the arms used, was increasingly struck down side by side with combatants. Within the radius affected by the atomic bomb, protection is no longer feasible. The use of this arm is less a development of the methods

11 *Final Record 1949*, Vol. II-A, p. 762; Vol. III, p. 181; La Pradelle, *op. cit.* (note 10), p. 36. The head of the Soviet delegation, General Slavin, presented the Soviet proposal and stressed that the basic flaw in the draft Convention for the protection of civilian persons lay in the fact that it did not contain a sufficient guarantee of the protection of the civilian population against the effects of modern warfare (*Final Record 1949*, Vol. II-A, pp. 761–762; La Pradelle, *ibid.*, p. 37).

12 *Final Record 1949*, Vol. II-A, pp. 804–805, Vol. II-B, pp. 495–508; La Pradelle, *op. cit.* (note 10), p. 39.

13 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, *Final Record 1949*, Vol. I, pp. 297–341.

of warfare than the institution of an entirely new conception of war, first exemplified by mass bombardments and later by the employment of rocket bombs. However condemned — and rightly so — by successive treaties, war still presupposed certain restrictive rules; above all did it presuppose discrimination between combatants and non-combatants. With atomic bombs and non-directed missiles, discrimination becomes impossible. Such arms will not spare hospitals, prisoner of war camps and civilians. Their inevitable consequence is extermination, pure and simple. Furthermore, the suffering caused by the atomic bomb is out of proportion to strategic necessity; many of its victims die as a result of burns after weeks of agony, or are stricken for life with painful infirmities. Finally, its effects, immediate and lasting, prevent access to the wounded and their treatment.

In these conditions, the mere assumption that atomic weapons may be used, for whatever reason, is enough to make illusory any attempt to protect non-combatants by legal texts. Law, written or unwritten, is powerless when confronted with the total destruction the use of this arm implies. The International Committee of the Red Cross, which watches particularly over the Conventions that protect the victims of war, must declare that the foundations on which its mission is based will disappear, if deliberate attack on persons whose right to protection is unchallenged is once countenanced.

The International Committee of the Red Cross hereby requests the Governments signatory to the 1949 Geneva Conventions, to take, as a logical complement to the said Conventions — and to the Geneva Protocol of 1925 — all steps to reach an agreement on the prohibition of atomic weapons, and in a general way, of all non-directed missiles. The International Committee, once again, must keep itself apart from all political and military considerations. But if, in a strictly humanitarian capacity, it can aid in solving the problem, it is prepared, in accordance with the principles of the Red Cross, to devote itself to this task.”¹⁴

The concerns of the International Committee were shared by the Red Cross as a whole. The International Conference of the Red Cross regularly stated its position on the threat that weapons of mass destruction posed to non-combatants and, ultimately, to the future of humanity.¹⁵

The political and strategic issues at stake in this matter, however, were beyond the sphere of competence of the Red Cross, so the Conference had to confine itself to expressing its deep concern, appealing to belligerents to renounce any use of weapons of mass destruction, and inviting governments to reach agreement on their prohibition.

14 “Arme atomique et armes aveugles” (Atomic weapons and non-directed missiles), *Revue internationale de la Croix-Rouge*, English supplement, Vol. III, No. 4, April 1950, pp. 70–73.

15 Resolution XXIV of the 17th Conference (Stockholm, 1948); Resolution XVIII of the 18th Conference (Toronto, 1952); Resolution XVIII of the 19th Conference (New Delhi, 1957); Resolution XXVIII of the 20th Conference (Vienna, 1965); Resolution XIV of the 21st Conference (Istanbul, 1969); Resolution XIV of the 22nd Conference (Teheran, 1973); Resolution XII of the 23rd Conference (Bucharest 1977); Resolution XIII of the 24th Conference (Manila, 1981).

The Draft Rules for the limitation of the dangers incurred by the civilian population in time of war

In 1954 the ICRC convened a Conference of Experts charged with examining the legal problems relating to protection of the civilian population and other victims of armed conflict against the dangers of aerial warfare and against the use of weapons of mass destruction,¹⁶ and drew up Draft Rules for the limitation of the dangers incurred by the civilian population in time of war.¹⁷

In fact this was a draft convention aimed at restoring the principle of the immunity of the civilian population, defining military objectives, the only ones against which attacks could be directed, laying down the precautions to be taken in planning attacks, prohibiting area bombing and the use of weapons whose harmful effects, in particular the dissemination of incendiary, chemical, bacteriological, radioactive or other agents, could escape from the control of those who employed them and thus endanger the civilian population. Article 14, para. 1, provided:

“Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects — resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents — could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.”¹⁸

The Draft Rules were submitted to the 19th International Conference of the Red Cross, meeting in New Delhi in October and November 1957. The issue of atomic weapons was naturally a focus for controversy. The delegations from socialist countries criticized the lack of clarity of the ICRC draft and demanded an unequivocal ban on nuclear and thermonuclear weapons.¹⁹ The Western powers, for their part, denounced the unrealistic nature of a ban on the use of atomic weapons which was not accompanied by general disarmament and effective verification measures. Finally the Conference asked the International Committee to transmit the Draft Rules to the governments for study.²⁰ The project was scuttled.

Since the governments did not want detailed regulation, all the International Committee could do was to start over again, taking up the question of the protection of the civilian population on the level of the most basic principles. This

16 *Revue internationale de la Croix-Rouge*, English Supplement, Vol. VII, No. 4, April 1954, pp. 108–110.

17 *Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, second ed., ICRC, Geneva, April 1958 (first edition: September 1956).

18 *Ibid.*, pp. 12 and 99–111; Dietrich Schindler and Jiri Toman, eds, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, fourth edition, Martinus Nijhoff Publishers, Leiden & Boston, 2004, p. 342.

19 Nuclear weapons operate by atomic fission, that is, a process which disintegrates the atomic nucleus of a heavy metal such as uranium or plutonium. Thermonuclear weapons operate by atomic fusion, that is, the combination of two light atoms, deuterium and tritium, which are both isotopes of hydrogen. In both cases a chain reaction takes place, resulting in the release of vast amounts of energy.

20 Resolution XIII, *XIXth International Conference of the Red Cross, New Delhi, October–November 1957*, *Proceedings*, pp. 153–154; *XIXth International Conference of the Red Cross, New Delhi, October–November 1957, Final Record concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, ICRC, Geneva, April 1958, cyclostyled.

is what it did in a report, a rather timid affair, submitted to the 20th International Conference of the Red Cross held in Vienna in October 1965.²¹

The Conference adopted without opposition a resolution requesting the ICRC to pursue its efforts in this regard, solemnly declaring that the parties to conflict should comply at least with the following principles:

- “- the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- it is prohibited to launch attacks against the civilian population as such;
- distinction must be made at all times between persons taking part in the hostilities and members of the civilian population, to the effect that the latter be spared as much as possible;
- the general principles of the Law of War apply to nuclear and similar weapons.”²²

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (1974-77) and the Protocols additional to the Geneva Conventions

The protection of the civilian population against the effects of war was to be the primary concern in the proceedings of the Conferences of Government Experts convened in Geneva in 1971 and 1972, and later of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, which took place in Geneva from 1974 to 1977.

The result was a set of provisions — Articles 48 to 58 of Protocol I — which reaffirm the principle of the distinction between combatants and the civilian population and between military objectives and civilian objects, reaffirm the principle of the immunity of the civilian population, and prohibit attacks directed against civilians, indiscriminate attacks, reprisals against the civilian population, and “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”²³ With the exception of the prohibition of reprisals, these provisions are taken up in Article 13 of Protocol II, which applies to non-international armed conflicts.

On the other hand, the Diplomatic Conference did not broach the issue of nuclear weapons; this subject had been excluded from the scope of the delib-

21 XXth International Conference of the Red Cross, Vienna, October 1965, *The legal protection of civilian populations against the dangers of indiscriminate warfare, Report submitted by the International Committee of the Red Cross*, ICRC, Geneva, March 1965 (Report reproduced in the *International Review of the Red Cross*, No. 59, February 1966, pp. 79–89).

22 Resolution XXVIII, *XXth International Conference of the Red Cross, Vienna, 2–9 October 1965, Report*, Austrian Red Cross, Vienna, 1965, pp. 108–109. The United Nations General Assembly was to adopt these principles – apart from the fourth – as its own in Resolution 2444 (XXIII), passed unanimously on 19 December 1968: see *Resolutions Adopted by the General Assembly during its Twenty-Third Session*, 24 September - 21 December 1968, Official Records of the General Assembly, Twenty-third Session, Supplement No. 18, Document A/7218, pp. 50–51.

23 Article 51 para. 2 Additional Protocol I. An identical provision appears in Article 13 para. 2 Additional Protocol II, which applies to non-international armed conflicts.

erations because certain States had made their participation in the proceedings conditional on the understanding that it would not be raised. Unlike the case in 1949, no attempt was made to reintroduce the issue during the deliberations.

Nevertheless, it should not be deduced from this that the proceedings of the Diplomatic Conference had no effect on the question of the lawfulness of the use of nuclear weapons. Indeed, it is quite obvious that the rules of international humanitarian law, and in particular the provisions which protect non-combatants and the civilian population against the effects of hostilities, apply to the use of nuclear weapons just as they apply to the use of any other type of weapon.²⁴ In its Advisory Opinion of 8 July 1996 concerning the legality of the threat or use of nuclear weapons, the International Court of Justice confirmed these conclusions.²⁵

The Advisory Opinion of the International Court of Justice

The United Nations General Assembly requested the International Court of Justice to hand down an Advisory Opinion on the following question:

“Is the threat or use of nuclear weapons in any circumstance permitted under international law?”²⁶

The Court delivered its opinion on 8 July 1996.²⁷ Having found neither a treaty-based rule of general scope nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, the Court examined whether recourse to nuclear weapons must be declared illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict.²⁸

The Court set out the fundamental principles of humanitarian law, in particular that of the distinction between combatants and non-combatants, the prohibition on making civilians the object of attack, and the prohibition on using weapons that are incapable of distinguishing between civilian and military targets; it also examined the prohibition on causing superfluous injury or unnecessary suffering to combatants, and thus on using weapons which uselessly

24 See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Yves Sandoz, Christophe Swinarski and Bruno Zimmermann, eds, ICRC and Martinus Nijhoff Publishers, Geneva, 1987, pp. 592–593.

25 “[W]hile, at the Diplomatic Conference of 1974–1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974–1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.” ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports 1996*, p. 259.

26 International Court of Justice, *op. cit.* (note 25), p. 228.

27 *Ibid.*, pp. 226–267.

28 *Ibid.*, pp. 256–60, paras 74–87.

29 *Ibid.*, pp. 256–257, paras 75–78; Declaration to the Effect of Prohibiting the Use of Certain Projectiles in

aggravate the suffering of disabled men or make their death inevitable.²⁹ The Court stressed that these principles had to be upheld by all States, whether or not they had ratified the treaties that contained them, since they constituted “intransgressible principles of international customary law.”³⁰ It pointed out, however, that although it was accepted that the principles and rules of humanitarian law applied to nuclear weapons, the conclusions to be drawn from that applicability were controversial.³¹

The Court nevertheless found that in view of the unique characteristics of nuclear weapons, their use seemed scarcely reconcilable with respect for the requirements of humanitarian law.³² However, taking account of the policy of deterrence to which a large number of States had adhered for many years, the Court considered that, in view of the current state of international law and of the elements of fact at its disposal, it could not reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.³³ But it also drew attention to the fact that that, under the provisions of Article 6 of the Treaty on the Non-Proliferation of Nuclear Weapons, States had recognized the obligation to negotiate in good faith in order to achieve nuclear disarmament.³⁴

Commenting on the Advisory Opinion before the First Committee of the United Nations General Assembly on 18 October 1996, the ICRC welcomed the Court’s unequivocal reaffirmation that the principles and rules of international humanitarian law applied to nuclear weapons:

“We were pleased to see the reaffirmation of certain rules which the Court defined as ‘intransgressible’, in particular the absolute prohibition of the use of weapons that are by their nature indiscriminate as well as the prohibition of the use of weapons that cause unnecessary suffering. We also welcome the Court’s emphasis that humanitarian law applies to all weapons without exception, including new ones. In this context we would like to underline that there is no exception to the application of these rules, whatever the circumstances. International humanitarian law is itself the last barrier against

Wartime, signed at St Petersburg, 29 November–11 December 1868, *Handbook of the International Red Cross and Red Crescent Movement*, thirteenth edition, International Committee of the Red Cross and International Federation of Red Cross and Red Crescent Societies, Geneva, 1994, pp. 297–298; *The Laws of Armed Conflicts*, *op. cit.* (note 18), pp. 91–93.

30 International Court of Justice, *op. cit.* (note 25), p. 257, para. 79.

31 *Ibid.*, p. 261, para. 90.

32 “[...] [M]ethods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements.” *Ibid.*, p. 262, para. 95.

33 “Accordingly, in view of the present state of international law viewed as a whole [...] and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.” *Ibid.*, p. 263, para. 97.

34 *Ibid.*, pp. 263–265, paras 98–103.

35 “ICRC statement to the United Nations General Assembly on the Advisory Opinion of the International

the kind of barbarity and horror that can all too easily occur in wartime, and it applies equally to all parties to a conflict at all times.

Turning now to the nature of nuclear weapons, we note that, on the basis of the scientific evidence submitted, the Court found that ‘...The destructive power of nuclear weapons cannot be contained in either space or time... the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations...’ In the light of this, the ICRC finds it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law.”³⁵

The position of the International Committee of the Red Cross

The ICRC was anxious to re-examine its position with regard to nuclear weapons following publication of the Advisory Opinion of the International Court of Justice of 8 July 1996, and defined that position by decision of its Assembly on 27 June 2002. Although its legal conviction was founded on the international law in force and the opinion of the Court, the ICRC, in accordance with its humanitarian calling, adopted a stance which also took account of broader considerations, both ethical and humanitarian. Its position is as follows:

- The principles and rules of international humanitarian law, and in particular the principles of distinction and proportionality and the prohibition on causing superfluous injury or unnecessary suffering, apply to the use of nuclear weapons. The ICRC finds it difficult to envisage how the use of nuclear weapons could be compatible with the principles and rules of international humanitarian law.
- In view of the unique characteristics of nuclear weapons, the ICRC calls on States to ensure that these weapons are not used, irrespective of whether they consider them to be lawful or not.
Nuclear weapons are characterized in particular by their destructive power, the unspeakable suffering caused by their use, the fact that it is extremely difficult to bring aid to victims, the fact that it is impossible to control their effects in space and time, the risk of escalation and proliferation which any use of nuclear weapons necessarily involves, and the dangers which such weapons entail for the environment, future generations and the survival of humanity.
- The ICRC furthermore calls on States to take every appropriate measure to limit the risk of the proliferation of nuclear weapons and to effectively combat any trade in substances or components liable to promote such proliferation.

Court of Justice on the legality of the threat or use of nuclear weapons,” *International Review of the Red Cross*, No. 316, January-February 1997, pp. 118–119.

36 (Internal) Document A 1218rev2, adopted by the ICRC Assembly on 27 June 2002; “Use of nuclear,

- Finally, the ICRC calls on States to pursue negotiations with a view to achieving a complete prohibition on nuclear weapons as well as the elimination of such weapons, as they have undertaken to do.³⁶

Conclusions

Any humanitarian action, as necessary as it may be even in the worst disasters, seems derisory in the face of the potential effects of weapons of mass destruction, and nuclear weapons in particular. The question of the lawfulness of the use of nuclear weapons and that of their possible prohibition have therefore been the subject of repeated discussions since 1945, without any success being achieved either in reaching a definitive conclusion as to their lawfulness or in negotiating a general agreement to ban them.

Some States, however, have formally renounced the possession of nuclear weapons, either in peace agreements or in regional accords. Furthermore, when the Treaty on the Non-Proliferation of Nuclear Weapons was renewed, the five permanent members of the Security Council pledged that they would not resort to the use of nuclear weapons against States party to the treaty which did not possess such weapons, except in the case of aggression committed by a State party to the treaty with the support of a State in possession of nuclear weapons.

Moreover, it is acknowledged that the principles and rules of international humanitarian law apply to nuclear weapons, as unequivocally confirmed by the International Court of Justice in its decision of 8 July 1996.

On the other hand, as the Court pointed out, opinions diverge as to the conclusions to be drawn from this, some States considering that nuclear weapons could be used in certain very specific circumstances without necessarily violating international humanitarian law, while others believe that any use of nuclear weapons would necessarily violate the provisions of international humanitarian law.

Since the destruction of Hiroshima and Nagasaki, States holding nuclear weapons have refrained from using them, although the US and Soviet strategic forces were put on maximum alert at least once during the Cold War, at the time of the Cuban missile crisis.

This restraint was due first and foremost to the knowledge that any nuclear attack against another State possessing nuclear weapons or against one of its allies would inevitably prompt reprisals against which there was no possible protection. The prospect of reciprocal annihilation was at the heart of the policy of deterrence and the balance of terror under which the world lived from the end of the Second World War to the end of the Cold War.

biological or chemical weapons: Current international law and policy statements," Information note to Presidents / Secretary Generals of National Societies, 4 March 2003, ICRC Archives, file 141.2-011.

There can be no doubt, however, that the apocalyptic proportions of the Hiroshima tragedy forced States to weigh the consequences of a nuclear war, and in this way indirectly contributed to protecting future generations from the scourge of nuclear warfare.