

Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons

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There are some questions which one would prefer not to raise. The legality of the use of nuclear weapons in war is surely a case in point.

With the emergence and development of nuclear weapons mankind crossed a major threshold: for the first time, it had weaponry which threatened its very survival. The dropping of atomic bombs on Hiroshima and Nagasaki brought about a moral cataclysm and changed the whole face of warfare. The ICRC immediately saw the implications of those events. It shared its concern with all the National Red Cross and Red Crescent Societies in a circular letter that its President, Max Huber, sent out on 5 September 1945, less than one month after Hiroshima and Nagasaki.¹

From a “doomsday” weapon wielded by a single power, nuclear capability became a means of mutual deterrence as soon as it was acquired by the other major military powers. While preventing direct confrontation between the great powers, the nuclear threat did not forestall the outbreak of numerous other conflicts, with civilians paying the highest price.

Clearly, there was a need to rethink and develop international humanitarian law. This process could not in all honesty evade the question of means of combat whose indiscriminate effects ruled out any distinction between combatants and civilians — a distinction which is essential in humanitarian law. And how could this question possibly be raised without broaching the issue of the use of nuclear weapons?

¹ Reproduced in *IRRC*, No. 313, July-August 1996, pp. 501-502.

The *Draft Rules for the limitation of the dangers incurred by the civilian population in time of war* presented by the ICRC in 1956 were rejected precisely because they directly addressed the question of nuclear weapons. As a result, and although the international situation made such rules increasingly necessary, the ICRC decided to avoid the problem of nuclear weapons altogether when it drafted the Additional Protocols, adopted by consensus in 1977. The Ad Hoc Committee of the Diplomatic Conference which examined the question of weapons acknowledged that “nuclear weapons and other weapons of mass destruction were, of course, the most destructive”. But most of its members accepted that the Committee’s work should be restricted to conventional weapons, because “nuclear weapons in particular had a special function in that they act as deterrents preventing the outbreak of a major armed conflict between certain nuclear powers”.²

The relationship between the 1997 Additional Protocols and international humanitarian law was thus somewhat ambiguous: while it was impossible to exclude the weapon with the greatest potential for destruction from the field of application of international humanitarian law, the law could not be expected to resolve a problem of strategic balance which clearly went beyond its purview.

Hence the quandary in which the ICRC found itself when it drew up its Commentary on the 1977 Additional Protocols, and the dilemma faced by the International Court of Justice when it was requested to hand down an opinion. Hence also the difficulty of broaching the question of whether it is lawful to use nuclear weapons in war.

But then the question *was* raised, and the Court’s Opinion, along with the explanations, dissenting opinions and arguments put forward during the proceedings, supplied a wealth of information which is extremely useful in understanding the problem in general and international humanitarian law in particular. The *Review* has accordingly decided to devote a large section of this issue to the matter.

Beyond the studies conducted on this topic, we consider it important to emphasize one point which may not have emerged from the debate and which should make it possible to leave all “sterile” legal arguments behind. Nobody really wants to see these weapons unleashed, and every-

² See Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, para. 1849, p. 592.

one knows that their use would spell disaster for humanity. The reason why the advocates of nuclear deterrence want at all costs to keep the door open for such use is because they believe that this will strengthen the credibility of deterrence. For them it is the best way of ensuring that nuclear weapons will never be used, an objective shared by those who think that it would be preferable to declare an unequivocal ban on the use of nuclear weapons by means of an international treaty. Opinions may differ on strategy and analysis, but not on the final aim.

That is why both the Court's Opinion and the ICRC's Commentary refer to the political responsibility of States. We have neither the capability nor the competence to judge the reliability of defence policies based on nuclear deterrence. Yet it is clear that some day — and far be it from us to say when that day will come — easy access to nuclear technology will call these policies into question. At that point the drafting of a treaty providing for a complete ban, linked in all probability with nuclear disarmament, will resume its place at the top of the agenda. We can only hope that the States, and in particular the nuclear powers, will seize that crucial opportunity — indeed, they will have no other choice. Nuclear weapons must never be used again: it is up to the States to ensure this, and they are well aware of their responsibility.