

N° 04/2013

*recherches &  
documents*

*Novembre 2013*

International  
humanitarian law,  
nuclear weapons  
and the prospects for  
nuclear disarmament

---

**ANGUEL ANASTASSOV**

*Dr. Jur. Sc., Senior Research Fellow at the Institute of State and Law,  
Bulgarian Academy of Sciences*

Édité et diffusé par la Fondation pour la Recherche Stratégique  
4 bis rue des Pâtures 75016 PARIS

ISSN : 1966-5156  
ISBN : 978-2-911101-74-8  
EAN : 9782911101748

# SOMMAIRE

INTERNATIONAL HUMANITARIAN LAW (IHL) . GENERAL PRINCIPLES .....	5
Gaps in International Humanitarian Law .....	8
THE CHARACTERISTICS OF NUCLEAR WEAPONS AS EXPLOSIVE DEVICES .....	9
THE LEGAL STATUS OF THE ICJ ADVISORY OPINIONS.....	10
THE ICJ ADVISORY OPINION ON NUCLEAR WEAPONS AND IHL.....	11
The principle of distinction.....	12
The prohibition of the use of weapons that cause unnecessary suffering or superfluous injury.....	12
NATO'S NUCLEAR POLICY IN THE PRESENT INTERNATIONAL ENVIRONMENT .....	16
NUCLEAR DETERRENCE TODAY .....	17
PROSPECTS FOR NUCLEAR DISARMAMENT .....	18



## International Humanitarian Law (IHL) – General Principles\*\*

IHL is considered one of the oldest branches of public international law. Terms such as law of armed conflict, *jus in bello*, or IHL have been generally used as synonymous. This body of law defines the legal boundaries of the uses of various types of weapons.

IHL has evolved to meet contemporary developments and is not limited to certain types of weaponry. There are a number of general principles of a customary nature which are based on military manuals of various countries that should be considered with reference to the legality of nuclear weapons,<sup>1</sup> as follows:

1. *The right to adopt means of injuring the enemy is not unlimited.* In accordance with this principle the combatants are not unrestricted in their use of weapons even where there is a lack of a specific prohibition relating to those weapons.<sup>2</sup>

2. *It is prohibited to use weapons or tactics that cause unnecessary aggravated devastation and suffering.* In other words, any action in armed conflict should be proportionate to the legitimate aims of the conflict.

3. *It is prohibited to effect reprisals that are disproportionate to legitimate military objectives, or disrespectful of persons, institutions and resources by the laws of military conflict.* International humanitarian law protects civilians and civilian populations, civilian objects, the natural environment,<sup>3</sup> the wounded, sick, shipwrecked, prisoners of war,<sup>4</sup> medical establishments and personnel.<sup>5</sup>

4. *It is prohibited to use indiscriminate methods and means of warfare that do not distinguish between combatants and civilians and other non-combatants.* The legal protection of civilians and other non-combatants is a fundamental principle of international humanitarian law.

---

\* Some of the views of the author in this publication were used in his article Anguel Anastassov. "Are Nuclear Weapons Illegal? The role of public international law and the International Court of Justice". *Journal of Conflict and Security*, Oxford University Press, 2010, Volume 15, Issue 1, pp. 65-87.

Dr. Anastassov has participated in multilateral negotiations on various aspects of nuclear non-proliferation. Currently he is associated with the Organisation for the Prohibition of Chemical Weapons, The Hague. The views expressed in this article are those of the author and do not express or otherwise reflect the views of the organisations he is affiliated with.

<sup>1</sup> Written Statement of the Government of New Zealand, 20 June 1995. The Statement was delivered to "furnish information" to the ICJ with reference to the Order of the Court of 1 February 1995 on the request by the UN General Assembly for an Advisory Opinion related to the question of legality of the threat or use of nuclear weapons.

<sup>2</sup> This general principle was proclaimed for the first time in the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November " 11 December 1868.

<sup>3</sup> Articles 51 (6), 52 (1) and 52 (2) of 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

<sup>4</sup> Art 46 of the First Geneva Convention 1949, Art 47 of the Second Geneva Convention 1949 and Art 13 of the Third Geneva Convention 1949.

<sup>5</sup> Articles 19 and 24 of the First Geneva Convention 1949.

5. *It is prohibited to use asphyxiating, poisonous or other gases and all analogous materials.* The prohibition of poison and poisonous weapons has been set out in the 1925 Geneva Protocol<sup>6</sup> and is part of customary law.

6. *Methods and means of war should not cause widespread, long-term and severe damage to the environment.* A number of multilateral agreements in the area of protection of the environment have been concluded recently.

7. *Methods and means of warfare should not violate the neutrality of non-participating States.* In accordance with this rule, belligerents should not carry out hostilities in the territory of a non-involved State.

A number of international conventions in the area of international humanitarian law should also be considered in the context of the legality of nuclear weapons. The *St Petersburg Declaration 1868* proclaimed that the right to injure the enemy is not unlimited and that means of warfare which cause unnecessary suffering are prohibited. Certain conventions of relevance to the legality of nuclear weapons were adopted during the *First and Second Hague Peace Conferences held in 1899 and 1907*. The damage caused by nuclear weapons can last for a number of years, distinguishing them from other weapons of mass destruction, for their extreme cruelty.

Against this background, the analysis of the legality of the nuclear weapons may begin with the general principles incorporated in the Hague Conventions of 1899 and 1907. Above all, the principles of relevance limit the belligerents' choice of means and methods of combat and prohibit the weapons and methods of combat that may cause unnecessary suffering. The concept of human security today could be seen as a logical development<sup>7</sup> of the basic principles enunciated in the Hague Conventions of 1899 and 1907.

Given the likelihood of escalation in the cases of use of nuclear weapons, the Genocide Convention<sup>8</sup> would be partially applicable because of the inevitable annihilation of populations and the need of *dolus specialis* in order to commit genocide. The *1949 Geneva Conventions* confirm the distinction between combatants and non-combatants and the prohibition of unnecessary and aggravated suffering. The *ōMartens Clauseö*<sup>9</sup> has been incorporated in each of the conventions. *The Hague Cultural Property Convention*<sup>10</sup> obliges States Parties to avoid action likely to expose property of great importance to the cultural heritage of every person to damage as a result of armed conflict. The *ENMOD Convention*<sup>11</sup> prohibits the hostile use of environmental modification techniques having widespread, long-

---

<sup>6</sup> Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.

<sup>7</sup> A.C. Trindade, *‘The Right to Live: the Illegality under Contemporary International Law of All Weapons of Mass Destruction*. Study presented in the form of lecture, delivered at the University of Hiroshima, in Hiroshima, Japan, on 20 December 2004.

<sup>8</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948.

<sup>9</sup> This clause was included to make clear that *ōin the absence of a written undertaking, unforeseen cases should not be left to the arbitrary judgment of military commandersö*. Preamble to 1907 Hague Convention IV.

<sup>10</sup> The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954.

<sup>11</sup> United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977.

lasting or severe effects. The *1977 Protocols to the Geneva Conventions*<sup>12</sup> reconfirm the basic principles of limitations to choose methods of warfare which should not cause unnecessary suffering or superfluous injury. Protocol I prohibits methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe effects to the environment. The Protocols set out specific norms for the protection of the civilians. Indiscriminate attacks are defined and prohibited,<sup>13</sup> and precautionary measures have to be taken to spare the civilian population<sup>14</sup>. Cultural objects and places of worship are protected from military attack.<sup>15</sup>

Certain nuclear States made specific statements during the negotiations of the *1977 Protocol I* emphasizing that this legal instrument should not impair their right of sovereignty with regard to nuclear weapons. Protocol I of 1977 does not explicitly prohibit the use of nuclear weapons. But given the fact that these weapons are by nature indiscriminate and protection of the civilian population cannot be guaranteed in an attached territory, nuclear weapons are indirectly prohibited by the Protocol's provisions on indiscriminate or area attacks.<sup>16</sup> The Protocols therefore apply to the use of nuclear weapons only in so far as they set out general principles of international humanitarian law that codify or represent customary international law.<sup>17</sup> This conclusion has been supported by such national case law as the *Shimoda Case*.<sup>18</sup> In this case, the District Court of Tokyo emphasised that the use of nuclear weapons was not expressly prohibited by international law, but it felt that the use of a particular weapon was to be ascertained in light of the principles of international law applicable to the conduct of warfare, in particular the prohibition on indiscriminate bombardment of an undefended city and the prohibition on inflicting unnecessary suffering.

On the question of the use of nuclear weapons in the conduct of reprisals, the ICJ took the view that these, *inter alia*, are subjected, like self-defence, to the principles of proportionality.<sup>19</sup> The other principles of international humanitarian law have not been referred to by the ICJ, especially the illegality of reprisals against prisoners of war, the civilian population, civilian objects and certain installations.

A question arises as to whether the resolutions of the United Nations General Assembly represent evidence of customary international law. The most frequently quoted example by the commentators is the 'Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons'<sup>20</sup>, which states, *inter alia*, that the use of nuclear weapons is a

---

<sup>12</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

<sup>13</sup> Article 51(4) and (5) of Protocol I.

<sup>14</sup> Articles 57 and 58 of Protocol I.

<sup>15</sup> Article 53 of Protocol I; Article 16 of Protocol II.

<sup>16</sup> I. Dettner, *The Law of War* Second Edition. Cambridge University Press, 2007, at p. 240.

<sup>17</sup> Written Statement of the Government of New Zealand, 20 June 1995.

<sup>18</sup> *Shimoda et al. v. The State*, Tokyo District Court, 7 December 1963, *The Japanese Annual of International Law*, vol. 8, 1964, at p. 231.

<sup>19</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, pp. 226-67, available at <<http://www.icj-cij.org/docket/files/95/7495.pdf>>, further Nuclear Weapons Advisory Opinion, para. 46.

<sup>20</sup> UNGA Resolution 1653 (XVI) of 24 November 1961.

÷direct violation of the United Nations Charter÷ ÷contrary to the rule of international law and to the laws of humanity÷ and ÷a crime against mankind and civilization÷<sup>21</sup> Under Article 10 of the Charter, resolutions of the UN General Assembly are recommendatory only and not legally binding. Equally important however is the fact that resolutions often incorporate or rely on existing customary international norms that by definition create legal obligations.

In conclusion, it should be pointed out that although nuclear weapons are the only weapons of mass destruction not expressly subject to general prohibition by a treaty, there is a considerable body of international law - treaty law, customary international law and state practice which circumscribes the illegality of nuclear weapons. Equally important is highlighting the merits of a comprehensive abolition of nuclear weapons through international legal instruments.

### ***Gaps in International Humanitarian Law***

Speaking of the IHL in general, we should not forget that its legal regime has certain gaps<sup>22</sup> related mainly to the following:

- The notion of a protected person is applicable mainly to enemy nationals. Nationals of third (neutral or co-belligerents) States are not covered by the Geneva Convention IV as long as their States of nationality have normal diplomatic relations with the State in which they find themselves.
- The second classification in the Geneva Convention IV is between ÷own territory÷ and ÷occupied territory÷. The provisions relevant to the own territory are not particularly developed (Art. 27 ó 46) and cannot protect all endangered human rights although they offer some basic protection. In accordance with the Geneva Convention IV its application ceases to apply ÷in occupied territory í one year after the general close of military operations÷. In the case of such occupation, the inhabitants of the territory would be in a disadvantaged position.
- The basic mechanisms for the implementation of humanitarian law have either proved inadequate or are absent in cases of a non-international armed conflict. IHL is not relevant in situations of acts of violence such as internal disturbances and tensions since the trigger for the applicability of IHL is an armed conflict.
- Current IHL does not cover all instances of violations of public international law. New international actors other than States have emerged, whereas the international legal framework is mainly State-centered.

The applicability of IHL to the use of nuclear weapons is a well recognised doctrine in for instance the USA military manuals. The Air Force in its 2009 manual, recognises that the use of nuclear weapons is subject to the principles of the law of war generally. The manual states, in particular, ÷Under international law, the use of nuclear weapons is based on the same

---

<sup>21</sup> Similar resolutions include Resolution 36/100 of 9 December 1981 entitled ÷Declaration on the Prevention of Nuclear Catastrophe÷ and others adopted at each regular session of the UN General Assembly.

<sup>22</sup> Mastorodimos Konstantinos. The utility and limits of International Human Rights Law and International Humanitarian Law÷ parallel applicability. Electronic copy available at: <http://ssrn.com/abstract=1539986>

targeting rules applicable to the use of any other lawful weapon, i.e. the counterbalancing principles of military necessity, proportion, distinction, and unnecessary suffering.<sup>23</sup>

## The Characteristics of Nuclear Weapons as Explosive Devices

Nuclear weapons have a number of severe consequences, particularly when used in highly populated areas. The ICJ in its 1996 Advisory Opinion pointed out that nuclear weapons are explosive devices whose energy results from the fusion or fission of an atom. Immense quantities of heat and energy are released by a nuclear explosion, as well as powerful and prolonged radiation. The Court concluded that the first two causes of damage are vastly more powerful than the damage caused by conventional weapons. Certainly, the phenomenon of radiation is specific to nuclear weapons.

The damage caused by nuclear weapons can last for a number of years, distinguishing them from any other weapons of mass destruction, due to their extreme cruelty.

These features of nuclear weapons have been advanced in the course of modernization of contemporary nuclear forces.

The humanitarian approach to nuclear weapons extends beyond legal aspects and covers moral and political dimensions as well. This approach entails an emphasis on actual consequences and not only on the effect intended or claimed by users of the weapon. On that basis, evidence and critical investigation are important elements of any humanitarian lens.<sup>24</sup>

One argument that nuclear possessors States used in their position on the legality of nuclear weapons at the ICJ in 1995 was that effects of some nuclear weapons, such as a small number of accurate attacks by low-yield weapons against an equally small number of military targets in non-urban areas<sup>25</sup> are controllable. This is partly true for a small segment of the arsenal and for specific circumstances. The USA argued that radiation is inherent and is a by-product of the nuclear weapon whereas the explosive, heat and blast effects are the primary effects. It is stated that since radiation is a secondary effect of a nuclear weapon, its effects do not violate humanitarian constraints. The 1925 Geneva Protocol codifies certain prohibitions against poisonous, or other gases and analogous liquids, materials and devices. The USA is of the view that these rules cover weapons that kill by inhalation or other means of absorption of poison into the body and are not applicable to nuclear weapons, which kill mainly by explosion.<sup>26</sup>

The issue of reprisal for another State's unlawful use of nuclear weapons is of particular relevance. It is highly questionable however that a nuclear weapon could be used in such a manner that is proportionate to the unlawful use.

---

<sup>23</sup> Quoted in: D. Granoff, J. Granoff. International humanitarian law and nuclear weapons: Irreconcilable differences. Bulletin of the Atomic Scientists 2011. The online version of the article can be found at: <http://bos.sagepub.com/content/67/6/53>

<sup>24</sup> J. Borrie and T. Caughley. How are the humanitarian approaches relevant to achieving progress on nuclear disarmament? In: R. Johnson (ed). *Decline or Transform: Nuclear Disarmament and Security Beyond the NPT Review Process*, Acronym Institute, 2012, pp. 35-637.

<sup>25</sup> International Court of Justice (1995). Public sitting held on Wednesday, November 15 at 10 a.m. at the Peace Palace. Available at: [www.icj-cij.org/docket/files/95/5947.pdf](http://www.icj-cij.org/docket/files/95/5947.pdf).

<sup>26</sup> US Government (1995) ICJ Memorandum/GA App. 23025. Quoted in: D. Granoff, J. Granoff. International humanitarian law and nuclear weapons: Irreconcilable differences. Bulletin of the Atomic Scientists 2011. The online version of the article can be found at: <http://bos.sagepub.com/content/67/6/53>

The position of the United States that each potential use of nuclear weapons has to be evaluated in its own merits deserves respect.

## The Legal Status of the ICJ Advisory Opinions

The function of the ICJ has been primarily conceived as to decide legal disputes between State Parties when they agree to submit their dispute to it. The ICJ may provide an advisory opinion on any legal question at the request authorized by, or in accordance with, the UN Charter. Under Article 96 of the Charter, the General Assembly and the Security Council may request an advisory opinion from the Court on any legal question. Other organs of the UN may do so as well, if authorized by the UN General Assembly. Although an advisory opinion lacks the binding force of a judgment in a contentious case, the international community has treated the opinions of the ICJ as authoritative statements of law possessing a strong persuasive value. There have been various proposals by individual scholars and institutions to strengthen the Court's role as the central judiciary body of the international community, especially through expansion of the advisory functions. Among these proposals are authorizing the UN Secretary-General to request advisory opinions from the Court on legal questions connected with the discharge of his/her responsibilities,<sup>27</sup> or extension of such power to other organs of the UN, specialized agencies and individual States.

Advisory opinions of the ICJ are not binding on States as such, but they may bind the organs that requested the opinion itself. Judge Lauterpacht in an advisory opinion on South-West Africa took the view that they should become the law of the UN. A question arises as to whether the advisory opinions bind all the principal organs of the UN, or only the organ that requested the opinion.<sup>28</sup>

The non-binding character of the advisory opinions do not for instance reflect the position of the General Assembly of the UN as a collective body, since it is the function of the opinions of its member States, which might differ over the years. In the view of Judge Shahabuddeen "although an advisory opinion has no binding force under Article 59 of the Statute, it is as authoritative a statement of the law as a judgment rendered in contentious proceedings".<sup>29</sup>

The UN General Assembly has adopted resolutions every year since 1996 calling on all States to inform the Secretary-General of the measures they undertake with respect to the ICJ's advisory opinion, and in particular, to fulfil their obligation through the commencement of multilateral negotiations leading to the conclusion of a nuclear weapons convention (NWC) prohibiting the development, production, testing, deployment, stockpiling, transfer, threat or use of nuclear weapons and providing for their elimination.

Forty-two States participated in the written phase of the pleadings. One of the five declared NWS (China) did not participate. It is important to highlight a trend related to the more and

---

<sup>27</sup> F. Orrego Vicuña and Ch. Pinto. *The Peaceful Settlement of Disputes: Prospects for the Twenty-First Century*, Preliminary Report Prepared for the 1999 Centennial of the First International Peace Conference. Quoted in: Pierre-Marie Dupuy. *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*. *International Law and Politics*, Vol. 31, 1999, p. 799.

<sup>28</sup> The question of the possible legally binding character of the advisory opinions for the United Nations was raised by Professor John Dugard during the Special Session of the Global Law Workshop, Center for International and Comparative Law, University of Pretoria, 1 December 2008.

<sup>29</sup> M. Shahabuddeen. *Precedent in The World Court*. Grotius Publications, Cambridge University Press, Cambridge, 1996, p. 171.

more separate and dissenting opinions (or declarations) and of the greater and greater length attached to the decisions of the ICJ. The *Nuclear Weapons* Advisory Opinion itself takes up 41 pages, against 326 pages for the Declarations and Separate and Dissenting Opinions.

The progressive development of international law and recent state practice has provided a basis for closer examination of the jurisprudence of the ICJ on the question of the legality of nuclear weapons.<sup>30</sup> In Resolution 49/75 K (1994) the Court was requested by the UN General Assembly to render an advisory opinion on the question "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The framing of the question and whether the Court should identify a permission norm or a prohibition one, was the subject of lengthy discussion.<sup>31</sup> Finally, the Court took the view that it is necessary to define whether international law contained a prohibition of nuclear weapons.

The Advisory Opinion taken by the ICJ has provided a number of important conclusions related to the military security of States, encompassing the law of collective security, the law of armed conflict and the international law of arms control.<sup>32</sup>

## The ICJ Advisory Opinion on Nuclear Weapons and IHL

The Court reviewed a number of treaties limiting the possession, testing and proliferation of nuclear weapons and found that there was no specific and comprehensive norm either in customary or in conventional humanitarian law, which prohibits nuclear weapons.<sup>33</sup>

The argument raised by a number of States was that the UN General Assembly resolutions on nuclear weapons reflected a customary law prohibition, which was not accepted by the Court. It was underlined that the essence of customary international law is the actual practice and *opinio juris* of States<sup>34</sup> and the UN resolutions have not reflected that essence. The Court came to the conclusion as well that nuclear weapons have not been subject to prohibition by international treaties banning the use of poisoned weapons, chemical, bacteriological or toxic weapons.<sup>35</sup> Paradoxically, nuclear weapons, which have arguably greater destructive effects than other weapons of mass destruction, are not yet prohibited and the Court simply stated the obvious fact, the lack of a conventional prohibition norm.

Since the Court upheld that there was no specific prohibition of nuclear weapons, any limitation of their use had to be looked at under the general principles of international humanitarian law. The Court underlined that international humanitarian law is basically composed of two branches of international law, namely laws and customs of war (the so-called "Hague Law" which includes the 1899 and 1907 Hague Conventions) and norms on

---

<sup>30</sup> S. Sur. "Avis consultative CII, 8 juillet 1996, Licéité de la menace ou de l'emploi des armes nucléaires" Préface de l'ouvrage: Marie-Pierre Lanfranchi, Théodore Christakis, La licéité de l'emploi d'armes nucléaires devant la Cour internationale de Justice, Economica, 1997, pp. 1-7.

<sup>31</sup> *Nuclear Weapons Advisory Opinion*, Declarations of President Bejaoui and Judge Ferrari Bravo and the Separate Opinions of Judges Ranjeva and Guillaume.

<sup>32</sup> P.J. Myjer, "The Law of Arms Control, Military Security and the Issues: An Introduction." In: Issues of arms control law and the Chemical Weapons Convention. Martinus Nijhoff Publishers, 2001, p. 4.

<sup>33</sup> *Ibid.*, paras. 58-63.

<sup>34</sup> *Ibid.*, para. 64.

<sup>35</sup> *Ibid.*, para. 55.

victims of armed conflicts (the so called "Geneva Law" which includes the 1864, 1906, 1929 and the 1949 Geneva Conventions). The Court referred specifically to such "cardinal principles" of international humanitarian law as the principle of distinction, the prohibition of weapons designed to cause unnecessary suffering, the protection of neutral States from invasion into their territories and the Martens Clause.

The ICJ did not express a view on the use of a nuclear weapon as a reprisal in response to the first use of a nuclear weapon by another State. The Court only noted that any reprisal must be proportionate to the violation it aims to stop. A number of military manuals highlight that reprisals carry a danger of escalation through repeated reprisals and counter-reprisals.

### ***The principle of distinction***

The Court observed that the principle of distinction is aimed "at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants"<sup>36</sup> It is important that the Court reaffirmed the customary nature of this basic principle of humanitarian law as this provision is only to be found in conventional form in the First Additional Protocol of 1977. Closely linked with the principle of distinction is the *prohibition of the use of indiscriminate weapons*. The Court came to a conclusion that States must never use weapons that do not distinguish between civilian and military targets.<sup>37</sup> Judge Bedjaoui considered this rule as *jus cogens*<sup>38</sup> and Judge Guillaume pointed out that this rule was absolute.<sup>39</sup> Article 51(4) (b) and (c) of the Additional Protocol I defines the characteristics of indiscriminate "methods or means of combat" as follows:

"(b) . . . which cannot be directed at a specific military objective; or (c) . . . the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of nature to strike military objectives and civilians or civilian objects without distinction"

Arguably, the use of modern types of nuclear weapons, especially those known to be designed especially to destroy bunker targets, could be accurate enough to respond to the first criterion. As far as the second criterion is concerned, the analysis should be placed on the possible violation of the principle of distinction in the case of the use of nuclear weapons.

### ***The prohibition of the use of weapons that cause unnecessary suffering or superfluous injury***

The Court emphasized that it is prohibited to use weapons causing unnecessary suffering to combatants or uselessly aggravating their suffering, in other words, to cause harm greater than that unavoidable to achieve legitimate military objectives.<sup>40</sup> A judgment on the above principle presupposes a general assessment of the lawfulness of the weapons concerned. If it

---

<sup>36</sup> Ibid., para. 78.

<sup>37</sup> Ibid., para. 78.

<sup>38</sup> *Nuclear Weapons Advisory Opinion*, Declaration of Judge Bedjaoui, President, para. 21.

<sup>39</sup> *Nuclear Weapons Advisory Opinion*, Separate Opinion of Judge Guillaume, para. 5.

<sup>40</sup> *Nuclear Weapons Advisory Opinion*, para. 78.

fails the test the weapons cannot be legally used at all.<sup>41</sup> A good reference document to assess the effects of nuclear weapons would have been the statement in the St Petersburg Declaration of 1868 that weapons that cause inevitable death are excessive to the needs of war. The ICJ, however, did not assess nuclear weapons against this test.<sup>42</sup> The Court has not examined another important feature of the use of nuclear weapons, namely the fact that the effects of nuclear weapons are always unpredictable due to the incalculable behaviour of secondary radiation.<sup>43</sup>

Modern international law prohibits combatants from deploying any means that exceed what is necessary for the achievement of their legitimate military objectives.<sup>44</sup> The 2001 Commentary of the International Law Commission on its Draft Articles on Responsibility of States for Internationally Wrongful Acts reiterated the ICJ's view that "necessity" and "proportionality" are always "considerations" in addressing the legality of a resort to any kind of coercion.<sup>45</sup>

The proceedings and Opinions raised interesting perspectives on different approaches to international humanitarian law and on the relationships between law and politics in an international context. The key question is: *What are the limits of international law when faced with a subject which goes to the core of the exercise of state power?*

It is clear today that international humanitarian law finds itself in a different and altogether more complex situation than the one which prevailed at the close of previous centuries. Certainly, there are more actors (state and non-state, international organisations, NGOs) on the international scene, more areas subject to international regulation (virtually every aspect of human activity), and more approaches.

On 8 July 1996 the ICJ did give an Advisory Opinion in the request from UNGA ruling by the narrowest of majorities that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict", subject to one apparent exception. The ambiguity of the Court's main conclusions was amply reflected in the headlines of three of Britain's leading daily newspapers on the day after the issuance of the Opinion.

The ICJ states in the second part of sub-paragraph E: "However, in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitely 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>41</sup> L. Doswald-Beck. "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons" *International Review of the Red Cross*, No. 316, p. 35 - 55.

<sup>42</sup> Judge Higgins made reference to this legal instrument, but she did not go further to make an assessment of the legality of nuclear weapons against the principle of prohibition of the use of weapons that cause unnecessary suffering or superfluous injury.

<sup>43</sup> L. Doswald-Beck. Statement. A Conference: Freedom from Nuclear Weapons through Legal Accountability and Good Faith, Brussels, European Parliament, 6-7 July 2006.

<sup>44</sup> Th. Frank, "On Proportionality of Countermeasures in International Law", *American Journal of International Law*, October 2008, Vol. 102, No. 4, at p. 727.

<sup>45</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 21(4). In: Report of International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10).

The 'Lotus presumption' was advanced by nuclear powers as part of the argument for the legality of the threat or use of nuclear weapons.

In 1996, the ICJ quoted the so called *Lotus statement* as follows: "Restrictions upon the independence of states cannot therefore be presumed". It should be pointed out that prior to the *Nuclear Weapons Opinion*, the ICJ had not quoted these words at all.

The question of the Legality of Threat or Use of Nuclear Weapons provides basis to interpret the concept of *Non Liqueet*. The term means literally 'It is not clear'. The modern meaning differs from its origin in Roman law, where it referred simply to the deferment of a case for insufficient information. Today, *non liqueet* refers to an insufficiency in the law; specifically, a finding by a court that the law does not permit a conclusion one way or the other concerning the issue in question.

There are scholars that have argued that courts have a duty to decide issues of law, rather than find a *non liqueet*. The prohibition of *non liqueet* is often viewed as a corollary of the completeness of international humanitarian law: in their view, since international humanitarian law is complete, it provides an answer in all cases to the question whether something is lawful or unlawful.

Hans Kelsen in his "Principles of International Law" ... states that in "a case the existing law cannot be applied ignores the fundamental principle that what is not legally forbidden to the subjects of the law is legally permitted to them". In the Advisory Opinion, this approach to *non liqueet* was followed by Judge Shahabuddeen in his dissenting opinion and also apparently by Judge Guillaume in his individual opinion.

For the President of the ICJ Bedjaoui, the situation with respect to the use of nuclear weapons is similar - the old rule is no longer in effect but a successor does not yet exist, in other words, he accepts that international law is incomplete. He interprets the Court's opinion as asserting that 'what is not expressly prohibited by international law is not therefore authorised, and as giving neither a 'green light of authorisation' nor a 'red light of prohibition' to the use of nuclear weapons *in extremis*. If we assume that international law is based on consent, then the incompleteness of international law should not be surprising. States have a wide variety of interests and values. If international law is simply a patchwork of rules, then, there will always be gaps, leading to the possibility of a *non liqueet*.

The international law consists not only of discrete rules but also of general principles such as equity, good faith, sovereign equality, and these are sufficiently rich to provide answers to every legal question, even when treaty and customary rules are not applicable. If so, then international law would be complete and a court would have no occasion to find a *non liqueet*. This theory of the completeness of international law is represented by Vice-President Schwebels dissent, which reflects an alternative 'ontology' of international law. The general principles theory of the completeness of international law finds support in Art. 38(1)(c) of the ICJ's Statute.

In contrast to the theory that a *non liqueet* is impossible because international law is complete and has an answer for every legal question, another theory of *non liqueet* focuses on the duty of judges to decide cases even when the law is incomplete or unclear. Sir Hersch Lauterpacht argued for the prohibition on *non liqueet* as a rule of positive law, based on the 'uninterrupted

continuity of international arbitral and judicial practice'. The avoidance of *non liquets* may have other explanations than the existence of a legal duty - for example, it may simply reflect habits of mind that international judges and arbitrators carry over from their training and experience in domestic law.

The **legal concept of *jus cogens*** captures the moral and emotional force behind the arguments of the non-nuclear-weapon States.

In the absence of specific customary or conventional law authorising or prohibiting the threat or use of nuclear weapons, States and the Court turned to the rules of international law applicable in armed conflict and, in particular, to the principles and rules of IHL. The Court concluded that these were fully applicable to the threat or use of nuclear weapons<sup>46</sup>. However, in attempting to apply this law to the issues before it, the Court was unable to reach a definitive conclusion on the question of legality. According to the Court, its judgment was obscured by gaps in the 'current state of international law' and 'the elements of fact' at the Court's disposal<sup>47</sup> (*Ibid*, para. 97).

The concept of *jus cogens* was defined for the first time in the 1969 Vienna Convention on the Law of the Treaties. Despite the wealth of academic writings on the concept of *jus cogens*, the ICJ has addressed the issue of *jus cogens* or related concepts as obligations *erga omnes* in very few cases and even then the Court seems generally to demonstrate a very cautious approach towards the concept. Nevertheless, some judges (Weeramantry and Koroma) acknowledged the considerable support for the proposition that the principles and rules which collectively constitute IHL, do have the characteristics of *jus cogens*. These authors argue that although the Court refrained from ruling directly that the IHL have the character of *jus cogens*, it appears, nonetheless, to have arrived at a similar conclusion by remarking that 'these fundamental rules are to be observed by all States ... because they constitute intransgressible principles of international customary law'. The gap the Court failed to bridge was primarily one of fact: it was unable to rule out the possibility that nuclear weapons could be used tactically, in a manner that it is proportionate, humane and discriminate.

### **The notion of state survival**

The notion of survival is closely related to the idea of the existence or the preservation of the State. On one hand, the Court adopts the ordinary meaning of survival in paras. 97 and 105(2) E of the conclusions, by presenting it as an extreme circumstance of self-defence. On the other hand, in para. 96, the Court raised survival to the rank of a 'fundamental right' of States and considered it equally as a ground for self-defence.

In its Opinion, the Court, on one hand insisted that the use of nuclear weapons should comply with the requirements of self-defence, notably with necessity and proportionality<sup>48</sup>. On the other hand, it disclosed its incapacity to 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'. The first impression one has in comparing paras. 105(2)C and E is that they are difficult to reconcile. Either the use of nuclear weapons meets all the requirements of self-defence, in which case the reference to State's survival is superfluous, or the second sentence of para. E envisages a situation different

---

<sup>46</sup> Legality of the Threat or Use of Nuclear Weapons, ICJ Reports, 1996, paras. 85-7.

<sup>47</sup> *Ibid*, para. 97.

<sup>48</sup> Paras 40-1 and point C2 of the *dispositif*, ICJ Reports, 1996, pp. 244-5.

from 'normal' self-defence in which one State is victim of an armed attack which does not put its existence at stake.

The Court was unable to decide whether the use of low-yield nuclear weapons in hypothetical proposed circumstances would or would not comply with the law. The Court did not decide on this case and concluded that it did not have sufficient facts or law to decide it. We may guess that the spread of radiation from a low-yield weapon is not predictable and does not comply with the rules of distinction, proportionality and necessity.

## NATO's Nuclear Policy in the Present International Environment

NATO's nuclear doctrine basically stipulates that nuclear weapons should be used as means of deterrence rather than as war-fighting weapons. The USA, UK and France maintain most of their operational nuclear forces on submarine carriers. The USA and the United Kingdom have provided an extended deterrence to members of the Atlantic Alliance through NATO.

A renewed interest has been shown in the last several years in the nuclear weapons based in Europe under the auspices of the North Atlantic Treaty Organization (NATO). Much of that interest stemmed from a number of reviews by the NATO from the 2009-2010 Strategic Concept negotiation process; the 2010 Lisbon Summit; the 2011-2012 Deterrence and Posture Review (DDPR) negotiation process and the 2012 Chicago Summit.

Nuclear weapons-related issues of NATO have been dealt with generally for many years by the Military Committee (MC). Certain military advice and political decisions were proposed by North Atlantic Council (NAC). Another part of the NATO nuclear committee structure is the High Level Group (HLG) made up of senior defence officials from NATO capitals.

There are some other NATO bodies which have reviewed nuclear issues from the perspective of arms control and disarmament, but unlike the policy bodies referred to above, they have no direct impact on, or control over, NATO's nuclear programme.<sup>49</sup> An example of such bodies is the Special Group on Arms Control and Related Matters (SG), created in April 1979. The Terms of Reference of a new body were agreed upon in February 2013, namely the Special Advisory and Consultative Arms Control, Disarmament and Non-Proliferation Committee. The USA will consult on nuclear arms control issues with the Russian Federation via the new body.

The prospects for change of NATO's nuclear policy may not be based on the NATO's existing structures. They are unlikely to act as agents of change because of the conservative approach by the personnel engaged.<sup>50</sup> Against this background, the initiative for change of NATO's nuclear posture and policy may realistically come from one ally – the United States.

The *USA Nuclear Posture Review* which took place in 2010 placed the prevention of nuclear terrorism and proliferation at the top of the US policy agenda. The availability of sensitive equipment and technologies in the nuclear black market create conditions in which terrorists may acquire ways and means to build a nuclear weapon. NATO's the present nuclear arsenal

---

<sup>49</sup> E. E. Seay III. NATO's Nuclear Guardians: Why NATO's bureaucracy is unable to initiate change to, or support reform of, Alliance nuclear policy. Arms Control Association. *Nuclear Policy Paper No. 13*, May 2013, p. 3.

<sup>50</sup> Ibid, p. 6.

is not best suited to effectively address the challenges posed by suicidal terrorists and unfriendly regimes seeking nuclear weapons.

The USA declared a strengthened negative security assurance under which the USA will not use or threaten to use nuclear weapons against non-nuclear weapons States that are party to the NPT and in compliance with their non-proliferation obligations. Certainly, the revised assurance is far from the no-first-use concept proclaimed by China. India's no-first use policy made a shift in 2010 and it is applicable for non-nuclear weapon States only.

In the recent Report on Nuclear Employment Strategy of the United States specific reference was made to the consistency of the new nuclear plans with the fundamental principles of the Law of Armed Conflict and especially with the principles of distinction and proportionality and minimizing collateral damage to civilian populations and civilian objects.<sup>51</sup>

## Nuclear Deterrence Today

No one can deny the nearly 70-year record of nuclear non-use. The USA would consider the use of nuclear weapons in extreme circumstances to defend the vital interests of the USA or its allies and partners. The objective is to make deterrence of a nuclear attack on the USA and its allies and partners the sole purpose of US nuclear weapons.

Dr. Bruno Tertrais raised valid points on the morality of nuclear deterrence as an efficient conflict prevention device in his paper "In Defence of Deterrence – The Relevance, Morality and Cost-Effectiveness of Nuclear Weapons", published in 2011. More concretely, the credibility of nuclear deterrence does not rely on the targeting of a civilian population per se; the collateral damage of the use of low-yield weapons is comparable to that of some modern conventional weapons; escalation of a nuclear exchange is not inevitable; the option of bringing aid to victims of a nuclear war is not excluded in all circumstances; the fact that it is difficult, if not impossible, to defend against nuclear weapons could be viewed as an argument in favour of nuclear deterrence.

Touching upon the present security environment, I cannot but underline the fact that there are bigger and immediate threats to international security than the lack of nuclear disarmament – North Korea and Iran perhaps are two examples which do not need further elaboration.

When discussing the role of possible replacement of nuclear deterrence with a conventional one, we should bear in mind the level of maturity of the democratic institutions of the respective societies. It would be difficult in a democratic country to maintain a sustained conventional campaign unlike in non-democratic States.

Another fact should be taken into account, namely the common frontier between the European Union and the Russian Federation and the Union is an immediate neighbour of the largest nuclear power in the world. We should consider the fact that Russia and the western world are no longer adversaries and chances for military confrontation have declined.

---

<sup>51</sup> Report on Nuclear Employment Strategy of the United States Specified in Section 491 of 10 U.S.C. Available at: [http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy\\_Section491.pdf](http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy_Section491.pdf)

## Prospects for Nuclear Disarmament

Some differences between the humanitarian disarmament approach and the traditional arms control and non-proliferation approach are pointed out below.<sup>52</sup>

<b>Arms control and non-proliferation approach</b>	<b>Humanitarian disarmament approach</b>
Regulating a high value important weapon	Abolishing an inhumane, unusable weapon that is contrary to humanity's interests
Focus on stabilizing the <i>status quo</i> among õhavesõ and counter proliferation to prevent nuclear weapons being acquired by new or õbadõ actors	Focus on creating security without nuclear weapons, and on delegitimizing the use and doctrines of threatened use (incl. nuclear deterrence)
Emphasis on reducing numbers of the largest arsenals	Emphasis on banning use, deployment and production for all nuclear-armed States as well as reducing arsenals
Maintain strategic stability, especially among NWS	Enhance global and human security and prevent harm to potential victims
Maintain (and if necessary) adapt nuclear deterrence	õNuclear deterrenceö myths and postures are part of the problem and create additional risks
Primary actors are the NWS, other nuclear-armed governments, military and technical experts	Initiating drivers: NNWS, especially nuclear-free States, humanitarian as well as disarmament HGOs, and all sectors of civil society
NNWS are largely irrelevant except to provide diplomatic context, cover and support	NWS invited to participate but not empowered to block

<sup>52</sup> R. Johnson. Preventing Nuclear Use: The Humanitarian Imperative for Nuclear Disarmament. Paper, prepared for the 13<sup>th</sup> PIIC Conference, Beijing, 30 October ó 3 November 2012.

The current arms control paradigm developed during the Cold War presupposes that the possession of nuclear weapons has been associated with special treatment such as responsibilities, privileges and international bargaining power and the simple fact that the first five nuclear-armed States are P5 permanent members of the UN Security Council.

The prospects for nuclear disarmament would depend on many factors and basically on the democratic principles and values, on the respect of the interests of each State and the international community as a whole. This is not an easy process since it intersects with the sovereignty of the States and their independence.

There should be certain conditions in place which would permit the nuclear weapon States to give up their nuclear weapons without risking greater international instability.

The conditions that have been referred to often are the following: non-proliferation of nuclear weapons; greater transparency into the nuclear programmes of key countries of concern; efficient verification methods of detecting violations of disarmament obligations; strong and credible enforcement measures to deter possible violations of disarmament obligations; resolve the regional conflicts that can motivate rival States to acquire and maintain nuclear weapons.

Certainly, these conditions do not exist at present. So, it is quite clear that if someone wants to postpone the real nuclear disarmament for an indefinite period, the international community should wait until the above issues will be adequately resolved. From another perspective, no matter how influential the non-nuclear weapons States are, no matter how many Resolutions will be adopted by the UNGA, the nuclear weapons States should decide themselves (and not by a public pressure) to start nuclear disarmament.

There are no near-term prospects for a Comprehensive Nuclear Convention that will lead to the outlawing of nuclear weapons and their elimination. A more realistic concept would involve using a multilayered approach engaging different types of players and negotiations and the implementation of different practical measures. Among these are: reversing of the nuclear plans of North Korea and Iran, strengthening the IAEA's safeguards, implementation of a New Strategic Arms Reduction Treaty (New START), entry into force of the CTBT, negotiation of a verifiable Fissile Material Cut-off Treaty and certainly, adding new territories to already established nuclear-weapon-free-zones (NWFZ) in various parts of the world. Hundred and fifteen States have already been included in the established NWFZ, which represent around 39% of the world population.

Among the "exotic" options for nuclear disarmament is the so called "wildfire" approach in accordance to which it is time to change the philosophy of the game. With this in mind two steps are proposed: 1) negotiate and bring into force a ban on the acquisition, possession, transfer and use of nuclear weapons (without the participation of nuclear weapons States); 2) Nuclear weapons States may join after entering into force of the convention in question through an accession Protocol on time-bound disarmament steps and verification provisions.

Another avenue could include efforts to advance IHL<sup>53</sup> through renewed efforts by the International Committee of the Red Cross, which could launch a Fourth Protocol additional to

---

<sup>53</sup> See International Humanitarian Law and Nuclear Weapons. Examining the humanitarian approach to nuclear disarmament. Nuclear Abolition Forum, October 2011, Issue No. 1, p. 33.

the Geneva Convention of 1949 which would address the rights of citizens not to be subject to threats of use of nuclear weapons.

The Sixth Ministerial Meeting of the Non-Proliferation and Disarmament Initiative - NPDI (Australia, Canada, Chile, Germany, Japan, Mexico, The Netherlands, Poland, Turkey and the United Arab Emirates) took place on 9 April 2013 in The Hague. Three new developments were referred to in the Joint Statement of the members of the NPDI as follows: Resolution 67/53 of the UNGA on the establishment of a group of governmental experts to make recommendations on aspects contributing to a Fissile Material Cut-Off Treaty; Resolution 67/56 on the establishment of an open-ended working group to develop proposals for the achievement and maintenance of a world without nuclear weapons; and on the establishment of a High Level Meeting on Nuclear Disarmament.

In practical terms and in a near-term perspective, it seems that the most promising is an approach which would put an emphasis on steps necessary to prevent any use of a nuclear weapon. Certainly, the total elimination of nuclear arms remains the only guarantee against their use. Among the necessary steps before reaching the final goal of a world without nuclear weapons would be diminishing the risk of a nuclear detonation through accident, misperception or miscalculation.<sup>54</sup>

It is indicative to point out that the 2010 NPT Review Conference<sup>55</sup> included for the first time in its final document its recognition of the catastrophic humanitarian consequences of any use of nuclear weapons. When some NNWS decided to prepare a statement which further elaborated on this new subject at the 2012 NPT PrepCom, sixteen States only associated themselves with the statement in question. Germany, Canada, Benelux and Italy amongst them seemed to feel that the endorsement of the statement would be in conflict with their alliance commitment within NATO.

A further statement on the humanitarian dimension of nuclear disarmament under the leadership of Switzerland was launched at the UNGA held in 2012. Out of 34 States associated, only Denmark, Iceland, Luxemburg and Norway from NATO member States joined the statement.

The Joint Statement on the humanitarian impact of the nuclear weapons delivered at the Second Session of the Preparatory Committee for the 2015 Review Conference of the Parties to the NPT has been endorsed by 74 States Parties but not by the nuclear weapons States and a number of other States. This was a clear signal that the international community has not arrived yet at an agreed agenda on the need for nuclear disarmament.

The arguments for "humanitarian disarmament" have already been successfully used to negotiate cluster munitions and anti-personnel mines, as well as biological and chemical weapons. The humanitarian impact of nuclear weapons covers various effects of nuclear weapon detonations such as unlikeliness that any State or international body could adequately

---

<sup>54</sup> "Beyond International Humanitarian Law: Implications for Disarmament Diplomacy" Remarks by P. Meyer, Senior Fellow, The Simons Foundation, at side event NPT PrepCom meeting, 22 April 2013, Palais des Nations, Geneva.

<sup>55</sup> For an analysis of the discussions of the 2010 NPT Review Conference see M. Asada. The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol. *Journal of Conflict and Security Law*, 2011, Vol. 16, Issue 1, pp. 3-34.

address the immediate humanitarian emergency; devastating immediate and long-term effects which cannot be constrained by national borders.<sup>56</sup>

In conclusion, a fundamental principle of public international law is that restrictions on States – particularly those affecting the armed conflicts – cannot be presumed. The restrictions have to be available in conventional law specifically accepted by States, or in customary law generally accepted as such by the international community. Having said that, the prospects for nuclear disarmament mainly depend on the sovereign decisions of the nuclear States which could be influenced by the generally recognised principles of international humanitarian law.

---

<sup>56</sup> Chairs Summary of Humanitarian Impact of Nuclear Weapons, Oslo, 4 -5 March 2013. Ministry of Foreign Affairs. Speeches and Articles.