

The Use of Nuclear Weapons: An International Humanitarian Law Perspective

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Introduction

In the international legal system, the use of nuclear weapons has always been subject to intense debate. This is because the issue is of crucial importance in relation to humanity.

Whilst politics and morality are closely related in any attempt to analyse the use of nuclear weapons, it is not the concern of this article to do so. That is to say questions of whether or not the possession of nuclear weapons is politically or economically wise, or whether or not the use of nuclear weapons are morally justifiable, are not at issue here.

Instead, this article will give particular focus on the use of nuclear weapons in international humanitarian law, more commonly termed the law of armed conflict, with reference and discussion from the perspective of international law as a whole and drawing particular attention to several important judicial decisions.

Nuclear Weapons

Before attempting to analyse the use of nuclear weapons in the context of the law of armed conflict, it is essential to begin by asking: What is a nuclear weapon?

Indeed, the term "nuclear weapon" does not sound Greek. In simple English, a nuclear weapon is a weapon of mass destruction, empowered by nuclear reaction - either from nuclear fission or nuclear fusion - which consequently produces a destructive force. The different types of nuclear weapons include fission bombs, fusion bombs, hydrogen bombs and atomic bombs.¹

To date, it is recorded that two nuclear weapons have been used in the course of warfare, both times by the United States towards the end of World War II. On 6th August 1945, the first atomic bomb (code-named "Little Boy") was dropped on Hiroshima. It was followed three days later by a second bomb (code-named "Fat Man") being dropped on Nagasaki which resulted in the deaths of approximately 20,000 people.² Such a catastrophic effect of nuclear weapons raises important questions about their legality, and in particular about the weapons' compatibility with international humanitarian law.

Are Nuclear Weapons prohibited?

No. To avoid confusion, it is worth pointing out that the use of nuclear weapons as such is not banned by any international treaty in the context of international law.

¹ For more information on the nuclear fission and nuclear fusion, see http://www.bbc.co.uk/schools/gcsebitesize/science/add_aqa_pre_2011/radiation/nuclearfissionrev1.shtml accessed 28 December 2013

² —‘1945: US drops atomic bomb on Hiroshima’ *BBC News* <http://news.bbc.co.uk/onthisday/hi/dates/stories/august/6/newsid_3602000/3602189.stm> accessed

Notably, the International Court of Justice (ICJ) in its advisory opinion on the ***Legality of the Threat or Use of Nuclear Weapons*** opined that "there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."³ It is also noted that the ICJ stated unanimously that the international legal system contains no "specific authorisation of the threat or use of nuclear weapons."⁴

In particular, the ICJ replied that it cannot conclude in a definitive statement as to whether the use of nuclear weapons would be lawful, or unlawful, in extreme situations where the survival of a State would be at stake because all States are entitled to the inherent right to self-defence under Article 51 of the Charter of the United Nations.⁵

If one takes an in-depth analysis on the advisory opinion by the ICJ, one would easily realise that the ICJ employed the concept of *non liquet*, meaning that there is no applicable law. Essentially, if one embraces the ***Lotus*** approach which provides that in the absence of explicit prohibition in an aspect under international law, sovereign States are entitled to act in any way they wish.⁶ This would mean that since there is not an explicit prohibition on the use of nuclear weapons, States should be allowed to use such weapons, especially for self-defence. Nevertheless, the fact that the ICJ expressly stated that there is no specific authorisation means that embracing of the *Lotus* approach is rather too simplistic.

³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 266
<<http://www.icj-cij.org/docket/files/95/7495.pdf>> accessed 3 January 2014

⁴ ibid

⁵ (n 3) 263 at [96]

⁶ *The Case of the S.S Lotus (France v Turkey)* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

Nuclear Weapons from a Humanitarian Perspective

In order to answer to the question put forward by the United Nations General Assembly, the ICJ had to consider the legality of using nuclear weapons with reference to the international humanitarian law, which will be the focus of this article.

As mentioned, international humanitarian law, or the law of war, or law of armed conflict, is a branch of international law which regulates the conduct of armed conflicts. Once again it must be clarified that the law of war does not specifically prohibit the use of nuclear weapons. In spite of this fact, their use in armed conflict is intensively regulated by the general principles of international humanitarian law, in particular by restraining how weapons may be used, as well as outlining the measures which must be taken to limit their impact on civilians and civilian areas.

Principles of International Humanitarian Law

1. Rule prohibiting indiscriminate attack

It is noted that the preamble to the St Petersburg Declaration emphasises that in the course of warfare, the only legitimate object which States should endeavour is to weaken the military forces of the enemy.⁷

⁷ See St. Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles

This is essentially the concept of ‘military necessity’ noted in the Nuremberg Trials which prohibits the killing of innocent inhabitants for the purpose of revenge, or the satisfaction of a lust to kill.⁸ In other words, international humanitarian law prohibits indiscriminate attacks by emphasising a strict distinction at all times between members of the civilian population and those who take an active participation in hostilities.

According to Article 51(4) of the 1977 Additional Protocol I, it is noted that attacks are considered ‘indiscriminate’ where they are not directed at military objectives, including any method or means of combat which cannot be directed at a specific military objective.⁹ Obviously, the use of nuclear weapons will always violate international humanitarian law, at least to the extent that it falls under this definition for not being able to discriminate between civilians and combatants.

The bombings of Hiroshima and Nagasaki for instance, carried no military necessity and resulted in no military advantage whatsoever as the two bombs were not targeted at military objectives. In fact, it is recorded that the bombings have resulted in the deaths of approximately 200,000 people, mostly civilians. Moreover, it is argued that those were not

<<http://www.amdro.org.uk/SiteCollectionDocuments/Learning/Nat%20Curr%207%20-2014/History/Curr%20Links/WW1%20Documents/St.%20Petersburg%20Declaration.pdf>> accessed 10 January 2014

⁸ I Pogany (ed), *Nuclear Weapons and International Law* (Avebury 1987) 5

⁹ Protocol I Additional to the Geneva Conventions (Adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3

the means that brought the Second World War to an end; it was the Soviet declaration of war on Japan that left the Japanese with no choice.

The ICJ pointed out in its advisory opinion that this is a principle aimed at the protection of civilian population. Therefore, it is submitted that “States must never make civilians the object of attack and consequently must never use weapons that are incapable of distinguishing between civilians and military targets.”¹⁰ Judge Bedjaoui considered this rule as *jus cogens*¹¹ and Judge Guillaume¹² pointed out that this rule was absolute.

By equating the use of indiscriminate weapons with a deliberate attack on civilians means that any weapon, including nuclear weapons, if tested and found to be falling foul of this principle, would be declared prohibited without there being a need for State practice or special treaty. As this opinion was given in the context which concerned the legality of the use of nuclear weapons, it is able to conclude that the use of nuclear weapons which are unable to distinguish between civilian population and military objectives would always be prohibited because they conflict with fundamental principles of international humanitarian law. In addition, following the court's logic, the following prohibition against deliberate attacks on civilian population found in Additional Protocol II¹³

¹⁰ (n 3) at [78]

¹¹ Declaration of Judge Bedjaoui, President at [21]

<<http://www.icj-cij.org/docket/files/95/7499.pdf>> accessed 15 January 2014

¹² Separate Opinion of Judge Guillaume at [5]

<<http://www.icj-cij.org/docket/files/95/7509.pdf>> accessed 17 January 2014

¹³ Protocol II Additional to the Geneva Convention (Adopted 12 December 1977, entered into force 7 December 1978) 1125 UNTS 609

automatically means that the use of indiscriminate weapons such as nuclear weapons is also prohibited in non-international armed conflicts to which the Protocol applies.

Nevertheless, the two Protocols appear to have another possibility. It can be argued that the use of nuclear weapons will not always violate international humanitarian law if they can be aimed at a specific military objective. Notably, three judges seem to have come to the conclusion that the use of nuclear weapons is not necessarily indiscriminate in nature if one refers to the accuracy of the delivery system by solely targeting on a specific military objective. On the other hand, it appears that only Judge Higgins attempted to define indiscriminate weapons in her dissenting opinion which reads:

"It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs"¹⁴

Applying this reasoning to the context of nuclear weapons, she went on to say:

"Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in their

¹⁴ Dissenting Opinion of Judge Higgins at [24]
<<http://www.icj-cij.org/docket/files/95/7525.pdf>> accessed 14 January 2014

effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful"¹⁵

I must say that I could not agree more with Judge Higgins. In fact, it is submitted that even if nuclear weapons are used discriminately by targeting at military objectives, there can still be no discriminate effect as a hydrogen nuclear bomb weighing approximately 1,100 kg can even produce an explosive force comparable to detonation of more than 1.2million of TNT. Such amount of energy is enough to devastate an entire city by fire, blast and radiation. As noted in the case of ***Shimoda et al. v The State***, the Tokyo District Council pronounced that:

"... It is proper to conclude that the bombings in Hiroshima and Nagasaki were an illegal act of hostilities... as an indiscriminate bombardment of undefended cities. This is so since aerial bombardments with an atomic bomb, even if its target is confined to a military objective, brings about the same result as blind aerial bombardment because of the tremendous destructive power of the bomb."¹⁶

Indeed, the International Committee of the Red Cross also doubted the legality of this new weapon of mass destruction. As pointed out in an appeal launched in the year of 1950:

¹⁵ ibid

¹⁶ Shimoda (1963), Chisai Tokyo, 335 Hanji, pp. 17 *et seq*; trans. in [1964] 8 Japanese Yearbook of International Law 212

"Within the radius affected by the atomic bomb, protection is no longer feasible... with atomic bombs and non-directed missiles, discrimination becomes impossible."¹⁷

In furtherance of this argument, reference is also made to one of the judges involved in that 1996 Advisory Opinion of 1996, namely Judge Mohammed Bedjaoui. Judge Mohammed in his separate declaration wrote that:

"By its very nature the nuclear weapon, a blind weapon... has a destabilising effect on humanitarian law, the law of discrimination which regulates discernment in the use of weapons."¹⁸

The fact that a nuclear weapon was referred to as 'blind weapon' indicates its incapability to achieve a distinction between combatants and civilians. Judge Mohammed went on to say that nuclear weapons are the ultimate evil and its existence constitutes a major challenge to the current international humanitarian law. Certainly, if nuclear weapons are instruments of terror by definition and have posed a serious threat to the law of war, there is no way that their use can be in compliance. In other words, this indicates that the right of the parties in an armed conflict to choose methods or means of warfare is not unlimited.

¹⁷ M Huber, 'La fin des hostilités et les tâches futures de la Croix-Rouge' [1945] 321 IRRC 657

¹⁸ (n 11) at [20]

In addition, the principle of prohibition against indiscriminate attacks is also supported by Judge Gez Herezegh which stressed that international humanitarian law does not recognise any exception to any of its principle.¹⁹ Hence, the use of nuclear weapons will always violate international humanitarian law, despite the fact that the law of war contains no specific ban.

2. Rule Prohibiting Unnecessary Suffering or Superfluous Injury

As mentioned earlier, the only legitimate object which States should endeavour is to weaken the military forces of enemy. Therefore, it is for this purpose that the preambles of St Petersburg Declaration of 1868 bans the explosive projectiles of less than 400g weight as such objects would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled people or render their death inevitable.²⁰ This is closely related to the first principle, both of which form the most widely discussed rules of the international humanitarian law in the context of the use of nuclear weapons.

In relation to the actual interpretation of the rule, the ICJ in its advisory opinion provides that it is "accordingly prohibited to use weapons causing such harm or uselessly aggravating their suffering..."²¹ Furthermore, Article 23(e) of the Hague Regulations of 1907 expressly prohibits the employment of arms, projectiles or material which is calculated to cause

¹⁹ Declaration of Judge Herczegh at page 275

<<http://www.icj-cij.org/docket/files/95/7501.pdf>> accessed 15 January 2014

²⁰ (n 8) 3

²¹ (n 3) 257 at [78]

unnecessary suffering.²² In this context, it appears that the destructive force, the thermal, blast and radiation effects of nuclear weapons, as well as the wide areas over which they occur, have raised serious questions as to whether such weapons can be directed at a specific military objective without causing unnecessary suffering. This is because even if the weapons are directed at a specific military objective, its radioactive effects would uselessly aggravate the suffering of the survived combatants as well as the civilians within its radius.

In fact, unlike conventional weapons, nuclear weapons release ionising radiation which kills cells, damages organs and leads to cancer and genetic mutation. The extreme heat released by nuclear weapons could even cause people in underground shelters to die from lack of oxygen and carbon monoxide poisoning. As pointed out by the court, nuclear weapons could cause congenital deformities, mental retardation and genetic damage for generations.²³ In other words, this means that people living within the radius of nuclear weapons are left to face two consequences: to die, or to live and suffer the pain of the effects of radiation. Hence judging from this perspective, it is submitted that nuclear weapons would cause suffering because of their long-term effects and thus violate international humanitarian law. In particular, the long-term radiation effects would prevent recovery from otherwise non-lethal injuries as radiation suppresses the body's ability to heal, causing superfluous injury or unnecessary suffering.

²² Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (entered into force 26 January 1910)

²³ (n 3) at [35]

Notably, the most frequently quoted example by the commentators is the ‘Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons’,²⁴ which states *inter alia* that the use of nuclear weapons is a “direct violation of the UN Charter, contrary to the rule of international law and to the laws of humanity (humanitarian law) as well as crime against mankind and civilisation.” It must be emphasised that in the international legal system, resolutions of the UN General Assembly are merely ‘soft law’ which is recommendatory in nature and with no binding force. Equally important, is the fact that resolutions often incorporate, or rely on, existing customary international norms that by definition create legal obligations; herein lies its strength in indicating that the use of nuclear weapons will always violate, among others, the law of armed conflict.

In addition, although the Opinion also made reference to the Hague Declaration of 1899, Article 23(a) of the 1899 and 1907 Hague Regulations and the Geneva Gas Protocol, the ICJ opined that these did not cover nuclear weapons because State practice showed that these treaties covered weapons whose exclusive effect was to poison and asphyxiate. Nevertheless, it is submitted that this is inaccurate because poison-tipped bullets or arrows are included in such prohibition, even though the poison is not the main wounding mechanism. Unfortunately, the ICJ dealt with the prohibition of poison only in the context of treaty law. Had the court considered the prohibition in light of customary international law (namely that poison prevents the possible recovery of wounded soldiers)

²⁴ Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons’ (adopted 24 November 1961) UNGA Res 1653 (XVI)

²⁵ such consideration would certainly carry great relevance in assessing the legality of the use of nuclear weapons in the context of international humanitarian law.

On the facts, only Judge Weeramantry²⁶ and Judge Koroma²⁷ decided in their dissenting opinions that nuclear weapons are prohibited because one of their major effects is poison, which would inevitably cause unnecessary suffering both to the combatants and to the civilian population. As the ICIJ did not rule in majority, if one reads in this context one could almost certainly come to the conclusion that, despite the catastrophic effects, the use of nuclear weapons may not always violate the law of armed conflict.

The extent of this principle has always been controversial. In particular, the problem lies in a rather wide interpretation as to what does the term "unnecessary suffering" actually means. If one takes the meaning of the term in its manifest literal sense where so much would be covered, it would cease to have any practical value.

The principle of unnecessary suffering was discussed by the Conference of Experts which declared that this concept "involved some sort of equation between, on the one hand, the degree of injury, or suffering inflicted (the humanitarian aspect) and on the other, the

²⁵ 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' 316 IRRC under "The prohibition of poison"

²⁶ Dissenting Opinion of Judge Weeramantry

<<http://www.icj-cij.org/docket/files/95/7521.pdf>> accessed 17 January 2014

²⁷ Dissenting Opinion of Judge Koroma

<<http://www.icj-cij.org/docket/files/95/7523.pdf>> accessed 17 January 2014

degree of necessity underlying the choice of a particular weapon (the military aspect)."²⁸

The determination of such equation, however, is an uphill task. In particular the United States Department of the Air Force noted that the critical factor in relation to the principle of prohibition against unnecessary suffering is "whether the suffering is needless, or disproportionate, to the military advantages secured by the weapon."²⁹ Thus if one adheres to such interpretation, the fact that the use of nuclear weapons could inflict needless suffering on combatants and civilians does not of itself violate such rule under international humanitarian law.

As it is difficult to interpret textually, the interpretation must now turn to the actual state practice. More specifically, it is submitted that state practice has determined that it is *per se* illegal to use of any substance that would unnecessarily inflame or aggravate the wound they cause. This is essentially the approach advocated in the US and UK manuals of military law, which stress that only state practice, can demonstrate what is or is not calculated to cause unnecessary suffering or superfluous injury. This means that for every weapon and method of warfare which includes the use of nuclear weapons, state practice is necessary to weigh military advantage against humanitarian demands. For instance, it is commonly accepted that should there be two means of achieving the same military advantage, the one which would subsequently involve the greater suffering must therefore be rejected.

Applying this in the context of the use of nuclear weapons, this means that whether or not their use would violate international humanitarian law must be assessed by state practice

²⁸ (n 8) 4

²⁹ ibid

and be considered on case by case basis. However, this does not automatically mean that the use of nuclear weapons would always violate the law of war.

Having discussed the two most relevant and significant principles, I will now move on to what I would regard as the supplementary principles namely the principle of neutrality, rule of proportionality and protection of environment, all of which are relevant and significant, but are not as widely and critically discussed as the two principles stated above. I will begin with the principle of neutrality.

3. Principle of Neutrality

It is noteworthy that The Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land clearly emphasises that ‘the territory of neutral powers is inviolable’.³⁰ This carries great relevance in the context of the use of nuclear weapons owing to the fact that the effects of a nuclear explosion may well affect neighbouring states that are neutral.

Notably, in Para 88 and 89 of the Advisory Opinion, the ICK opined that in the cases of the principles of humanitarian law applicable in armed conflict, international law leaves no

³⁰ Hague Convention (V) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (entered into force 26 January 1910)

doubt that the principle of neutrality, whatever its content, is applicable to all international armed conflict regardless of the type of weapons might be used.³¹

For instance, suppose there are two belligerent states firing nuclear bombs at each other. Neutral states that are not in the least concerned with the conflict could potentially be irretrievably damaged. Nevertheless, such a principle applies in a hypothetical situation. In other words, not all uses would necessarily affect another neutral state. Hence, it is not possible to reach the conclusion that the use of nuclear weapons will always violate the law of war.

4. Rule of Proportionality

The concept of proportionality, alongside the rule of distinction as discussed above, form the important factors in assessing military necessity.

In general, the concept of proportionality means that any measure taken must be reasonable, necessary and suitable in achieving the aim so as to be proportionate. In the context of international humanitarian law, the concept of proportionality can be assessed in two ways:

1. Has a military objective been targeted?

³¹ (n 3) at [88] and [89]

2. Is the collateral damage likely to be excessive in relation to the value of target?

Thus the harm caused to the civilian population and any property must be proportionate, and not excessive with regards to the concrete and direct military advantage anticipated by an attack on a military objective.

It is however strange to find that the ICJ in its advisory opinion did not make any specific or direct reference. Nonetheless, several judges such as Judge Higgins, Judge Schwebel and Judge Guillaume did affirm its customary nature. In particular, Judge Higgins took a restrictive approach and held that the damage caused by nuclear weapons was so destructive, to the extent that only in extreme circumstances could the military objective be important enough for the collateral damage not to be excessive. Indeed, by using the word "only in extreme circumstances" it is implied that there are times where the use of nuclear weapons will not be regarded as going against the law of war. In relation to the question as to what are "extreme circumstances," Judge Higgins held that:

"The military advantage must indeed be one related to the very survival state of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of

vast and severe suffering on its own population; and that no other method of eliminating this military target be available."³²

It is only partially correct if one was to say that the use of nuclear weapons will always violate international humanitarian law as its use in a situation where the survival of a state is at stake (as pointed out by Judge Higgins) is in fact proportionate; hence being in line, rather than violating such rule under the law of war.

Judge Schwebel, on the other hand, also acknowledged that although there may be specific cases where the use of nuclear weapons would not violate the rule of proportionality, but in most cases its use would not be in conformity.³³ In spite of this fact, this does not mean that its use will always violate international humanitarian law. Instead, what can be inferred from Judge Schwebel's opinion is that the use of nuclear weapons would mostly, but not always, go against the law of war - at least in relation to the principle of proportionality.

The bombings of Hiroshima and Nagasaki for instance, can be regarded as proportionate towards achieving an objective; to contribute in bringing the World War II to an end. For instance, in Truman's 1955 Memoirs, he states that "...the atomic bomb probably saved half a million US lives — anticipated casualties in an Allied invasion of Japan planned for

³² (n 14) at [21]

³³ Dissenting Opinion of Vice President Schwebel at [23] and [24]
<<http://www.icj-cij.org/docket/files/95/7515.pdf>> accessed 17 January 2014

November.”³⁴ Stimson subsequently talked of saving one million US casualties, and Churchill of saving one million American, and half that number of British lives.³⁵ Scholars have pointed out various alternatives which could have ended the war just as quickly without an invasion, but these alternatives could have resulted in the deaths of many more Japanese. In this context, it can therefore be submitted that the use of nuclear weapons in such situation may not appear to be violating international humanitarian law.

5. Protection of the Environment

It is also noteworthy that the increasing concern with the protection of the environment has attracted significant international attention in attempting to interpret the rules in the context of the use of nuclear weapons. Importantly, the ICJ in its advisory opinion also found the existence of customary environmental law:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”³⁶

Notably, the study conducted by the International Committee of the Red Cross also pointed out that there is a customary norm that methods of warfare causing ‘widespread long-term

³⁴ Kyoko and M Selden (ed), *The Atomic Bomb: Voices from Hiroshima and Nagasaki* (M.E. Sharpe, 1989) xxx - xxxi

³⁵ *ibid*

³⁶ (n 3) at [29]

'and severe' damage to the natural environment is prohibited, and destruction of the environment should not be used as weapon.³⁷ Not surprisingly, the threshold criteria for violation of Article I of the ENMOD Convention are either 'widespread, long-lasting or severe'. The same prohibitions are listed in Articles 35(3) and 55 of Additional Protocol I. Those three criteria were also reflected in the Rome Statute of the International Criminal Court.

In particular, Article 35(3) of Protocol I which states that it is prohibited to employ methods or means of warfare which may be expected or which are intended to cause widespread, long term and severe damage to the natural environment. The ICJ went on to opine that environmental law treaties could not have intended to deprive States of their exercise of their right to self-defence. Nevertheless, "State must take environmental consideration into account when assessing what is necessary and proportionate in the pursuit of legitimate military objective"³⁸ [my emphasis added].

Applying it in the context of the use of nuclear weapons, it indicates that with the obligation to take such consideration being imposed on States as per the word "must", one cannot simply argue that the rule of proportionality is not violated with the basis on the sole fact that the nuclear weapons are only used to target in an area that has little or no human population. In fact, the Court also cited with approval of the General Assembly resolution

³⁷ See 'Customary IHL - Practice Relating to Rule 45. Causing Serious Damage to the Natural Environment' <http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule45_sectionb> accessed 18 January 2014

³⁸ (n 3) at [30]

47/37 on the Protection of the Environment in Times of Armed Conflict, stating that it affirms “the general view... destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law”³⁹ Nevertheless, it is only when the use of nuclear weapons are not justified by military necessity and therefore caused massive destruction to the environment would their use be considered as violating the law of war. This means that if there is such military necessity to use nuclear weapons, it would therefore be permissible and that their use will not always violate this rule of international humanitarian law.

Jus ad bellum vs. Jus in bello

As discussed in the previous section, there seem to be situations where the use of nuclear weapons may appear to be proportionate and thus will not always violate the law of war. Indeed, I would like to discuss in this section with reference to “an extreme circumstance of self-defence” as established in paragraph 105, 2E of the Advisory Opinion.⁴⁰ Whilst I am aware that the question focuses the use of such weapon in the context of the law of war (*jus in bello*) it is also important address the relationship between the two where the some judges in the advisory opinion have seemed to suggest that priority should be given to *jus ad bellum*.

³⁹ Protection of the Environment in Times of Armed Conflict (adopted 25 November 1992) UNGA A/RES/47/37
⁴⁰ (n 3) at [105]

Jus ad bellum, Latin for right to war, is a set of criteria which must be assessed before engaging in a war. *Jus in bello* on the other hand, means international humanitarian law which sets out wartime conduct. Judge Fleischhauer in paragraph 2 of his separate opinion first stated that the use of nuclear weapons is the negation of the law of armed conflict.⁴¹ However, he went on to argue that if the use of nuclear weapons is denied as a last option in self-defence, then this would give priority to international humanitarian law over the right to self-defence which, he said, cannot be acceptable because all legal systems allow the right of self-defence. Judge Fleischhauer essentially acknowledges that the use of nuclear weapons will always violate the law of armed conflict. Nonetheless, he is clear that such a violation should be allowed because international humanitarian law should not trump the international law of the right to self-defence. This is a dangerous statement as it is implying that there is no need to assess whether the use of nuclear weapons would violate the law of war as when there is a clash between *jus ad bellum* and *jus in bello*, the former shall prevail.

Fortunately, in paragraph 42 of the Opinion, the ICJ made an important and correct statement:

“...a use of force that is proportionate under the law of self-defence must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which compromise in particular the principles and rules of humanitarian law”⁴²

⁴¹ Separate Opinion of Judge Fleischhauer at [2]
<http://www.icj-cij.org/docket/files/95/7513.pdf> accessed 19 January 2014
⁴² (n 3) at [42]

Indeed, this is a balanced approach as it indicates that in order the use of nuclear weapons to be lawful, not only must the conditions of self-defence such as necessity and proportionality be respected but also the rules of international humanitarian law. It is not one or the other.

Conclusion

Having analysed the conformity of the use of nuclear weapons in the context of international humanitarian law with each of its principles, we should now consider the discussion as a whole.

In summary, it has already been discussed that many of the principles can be viewed from different perspectives, and from these it may be possible to reach a conclusion that is similar to the ICJ in its nuclear weapons advisory opinion in which the use of nuclear weapons would generally but not always be incompatible with the law of armed conflict. In spite of this fact, the use of nuclear weapons cannot be compatible with the rule of distinction. In other words, there is no way in which their use is able to discriminate between combatants and civilian population - even if targeted specifically against a military objective. As such, it is my conclusion that the use of nuclear weapons will always violate international humanitarian law, though not necessarily so in relation to other principles (as discussed above), but at least to the rule of distinction.

Of course, if one decides not to be over legalistic in discussing this topic by including the issue of morality, one may easily come to the conclusion that the use of nuclear weapons will always violate all the principles of the law of war. Nonetheless, as clarified at the very beginning of this essay, it is my aim in attempting to discuss this issue in a strict legal sense. Thus it is only the first principle (rule prohibiting indiscriminate attack) that clearly illustrates the use of nuclear weapons as violating international humanitarian law.

It is noted that State parties are under the obligation stated under Article 36 of Additional Protocol I to ensure that the employment of new weapons, means or methods of warfare complies with the rules of international law, and in particular, to include the rules of international humanitarian law. As such, this has seemed to become a promising way to check the lawfulness of weapons prior to their actual use. The time has come for all States to come together with the involvement of the scientific community to engage in the processes of assessment and review of the legality of the use of nuclear weapons in order for future adoption of an international treaty that concerns its use.

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