

Red Cross Statements on the Illegality of Nuclear Weapons under the ICJ Advisory Opinion, compiled by Prof. Manfred Mohr, IALANA Germany, Former IHL Dissemination and EU Policy Expert of the German Red Cross and Stefan Michalczyk, Int. Coalition to Ban Uranium Weapons (ICBUW)

Working Paper

The following paper examines and puts together statements of the Red Cross Movement as to the illegality of nuclear weapons under the 1996 ICJ Advisory Opinion, drawing a bow from the general acknowledgement of the Advisory Opinion without exceptions, over the efforts towards a legally binding international agreement and the catastrophic consequences on human health and the environment, towards growing difficulties to envisage (any kind of) IHL compatibility.

1. General support of the Advisory Opinion

Since the approval of the Advisory Opinion of the ICJ in 1996, numerous bodies of the Red Cross Movement have acknowledged its decision on the incompatibility of nuclear weapons with international humanitarian law (IHL).

In its statement to the United Nations General Assembly in 2009, the International Committee of the Red Cross (ICRC) “notes that *in 1996 the International Court of Justice confirmed* that the principles of distinction and proportionality found in international humanitarian law apply to nuclear weapons. In applying these principles to nuclear weapons the Court concluded that ‘the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law.’” [1]. In its 2011 Resolution, the Council of Delegates of the International Red Cross and Red Crescent Movement is “*recalling the 1996 advisory opinion* of the International Court of Justice, which confirmed that the principles and rules of international humanitarian law apply to nuclear weapons and concluded that the threat or use of such weapons would generally be contrary to the principles and rules of international humanitarian law” [2].

Finally, in 2012, Mr. Tadateru Konoé, President of the International Federation of Red Cross and Red Crescent Societies (IFRC) and President of the Japanese Red Cross Society (JRCS), remarks at the 20th IPPNW World Congress in Hiroshima “the initiatives of UN Secretary-General Ban Ki-Moon and U.S. President Barack Obama, which consequently encouraged people to study and acknowledge the *1996 advisory opinions of the International Court of Justice* once again” and recalls the 2011 Resolution in which the Movement asserted “that the use of nuclear arms, a weapon of mass destruction, is against the principles set forth by International Humanitarian Law. This assertion takes into account the *1996 advisory opinions issued by the International Court of Justice*” [3].

Beside the international bodies of the Red Cross Movement, various National Red Cross Societies acknowledged the 1996 Advisory Opinion as they are citing its decision on the applicability of IHL in relation to nuclear weapons. Thus, the German Red Cross mentions the applicability of the

principles of IHL confirmed by the ICJ [4], as does the Austrian Red Cross Society [5], or the Canadian Red Cross stating that the 14 judges of the ICJ “concluded unanimously that the principles and rules of international humanitarian law apply to the use of nuclear weapons [...] and] added that the use of nuclear weapons would generally contradict the principles and rules of international humanitarian law” [6].

2. No exceptions

As the general support of the Advisory Opinion by the Red Cross Movement is undoubted, the ICRC also clearly stated that there are no exceptions in applying the (findings of the) ICJ's Advisory Opinion.

Already in 1996 in its brief comment on the Advisory Opinion of the International Court of Justice at the debate in the First Committee of the United Nations General Assembly, the ICRC stated:

“We were pleased to see the reaffirmation of certain rules which the Court defined as 'intransgressible', in particular the absolute prohibition of the use of weapons that are by their nature indiscriminate as well as the prohibition of the use of weapons that cause unnecessary suffering. We also welcome the Court's emphasis that humanitarian law applies to all weapons without exception, including new ones. In this context we would like to underline that there is *no exception to the application of these rules, whatever the circumstances*. International humanitarian law is itself the last barrier against the kind of barbarity and horror that can all too easily occur in wartime, and *it applies equally to all parties to a conflict at all times*.”

Turning [...] to the nature of nuclear weapons, we note that, on the basis of the scientific evidence submitted, the Court found that '...The destructive power of nuclear weapons cannot be contained in either space or time...the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations...' In the light of this, the ICRC finds it *difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law*. We are convinced that because of their devastating effects no one ever wants to see these weapons used. It is the ICRC's earnest hope that the opinion of the Court will give fresh impetus to the international community's efforts to rid humanity of this terrible threat.” [7].

Beside this statement, high-level representatives of the ICRC propagated this opinion of the ICRC, as for example Peter Herby, former Head of ICRC's Arms Unit. He recalls the ICRC's statement, in which “the ICRC welcomed the fact that the International Court of Justice, in its advisory opinion on nuclear weapons, confirmed that *the principles of distinction and proportionality found in IHL are 'intransgressible' and apply also to nuclear weapons*. In applying those principles to nuclear weapons, the Court concluded that 'the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law.' “ [8].

With the same impetus, Jakob Kellenberger, former president of the ICRC, declared in his Statement to the Geneva Diplomatic Corps 2010:

“In 1996 the ICRC welcomed the fact that the International Court of Justice, in its Advisory Opinion on nuclear weapons, confirmed that the principles of distinction and proportionality found in international humanitarian law are 'intransgressible' and apply also to nuclear weapons. In

applying those principles to nuclear weapons the Court concluded that 'the use of nuclear weapons would generally be contrary to the principles and rules of international humanitarian law'. It was unable to decide whether, *even[!]* in the extreme circumstance of a threat to the very survival of the State, the use of nuclear weapons would be legitimate.

Some have cited specific, narrowly defined scenarios to support the view that nuclear weapons could be used legally in some circumstances. However, the Court found that '...The destructive power of nuclear weapons cannot be contained in either space or time (...). The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations...'. In the light of this finding, the ICRC finds it *difficult to envisage how any use of nuclear weapons could be compatible* with the rules of international humanitarian law.

The position of the ICRC, as a humanitarian organization, goes – and must go – beyond a purely legal analysis. Nuclear weapons are unique in their destructive power, in the unspeakable human suffering they cause, in the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the environment, to future generations, and indeed to the survival of humanity. The ICRC therefore appeals today to all States to ensure that such weapons are never used again, regardless of their views on the legality of such use.” [9].

3. Towards a legally binding international agreement

Along with this acknowledgement of the Advisory Opinion without exceptions, the ICRC promotes the idea of a legally binding international agreement.

Yves Sandoz, former Director for International Law and Policy at the ICRC and elected into the Committee, stated 1997 that, “[...] both the Court's Opinion and the ICRC's Commentary [10] refer to the political responsibility of States. We have neither the capability nor the competence to judge the reliability of defence policies based on nuclear deterrence. Yet it is clear that some day - and far be it from us to say when that day will come - easy access to nuclear technology will call these policies into question. At that point *the drafting of a treaty providing for a complete ban*, linked in all probability with nuclear disarmament, will resume its place at the top of the agenda. We can only hope that the States, and in particular the nuclear powers, will seize that crucial opportunity - indeed, they will have no other choice. Nuclear weapons must never be used again: it is up to the States to ensure this, and they are well aware of their responsibility.” [11].

This demand directed at the responsibility of states is also put forward by the ICRC statement to the United Nations in 2012, as it clarifies that “our position, which builds upon earlier Movement resolutions, emphasizes the immense suffering that would result from any use of nuclear weapons, as well as the lack of any adequate international response capacity to assist the victims if a nuclear weapon were to be detonated. It recalls the 1996 Advisory Opinion of the International Court of Justice, which expressed the Court's view that the threat or use of such weapons would generally be contrary to the principles and rules of international humanitarian law. Finally, the Movement calls on all States to ensure that nuclear weapons are never again used and to pursue negotiations to prohibit and eliminate nuclear weapons through a *legally binding international agreement*.” [12].

Furthermore, the ICRC statement to the United Nations in 2010 already expressed that “[t]he ICRC President [Jakob Kellenberger] appealed to all States to ensure that such weapons are never used again, regardless of their views on the legality of such use. He also called on States to fulfil their existing obligations to pursue negotiations to prohibit and eliminate such weapons through a *legally*

binding international treaty.” [13].

4. Catastrophic consequences

Backing this call for a legally binding international treaty, the ICRC highlights the catastrophic consequences of the use of nuclear weapons. As Christine Beerli, Vice-president of the ICRC, states 2014 at the Second Conference on the Humanitarian Impact of Nuclear Weapons in Nayarit, Mexico: “It is our hope that the lessons learned from the past and the new insights gained from the Oslo and Nayarit meetings will guide States as they consider how best to advance nuclear disarmament in the 21st century. We all know that nuclear weapons must never be used again. The prospect of their *catastrophic consequences for humanity* can only lead States to the conclusion they must work urgently and with determination to prohibit and eliminate these weapons once and for all.” [14]. The same emphasis is made by the ICRC Statement at the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, stating that “the evidence before us today shows:

- that nuclear weapons are unique in their destructive power and in the scale of human suffering they cause and that their use, even on a limited scale, would have *catastrophic consequences for human health and the environment*;
- that the effects on human health can last for decades and impact the children of survivors through genetic damage to their parents;
- that the *humanitarian consequences* of a nuclear-weapon detonation would not be limited to the country where it occurs but would impact other States and their populations;
- that, in most countries and at the international level, there is no effective or feasible means of assisting a substantial portion of survivors in the immediate aftermath of a nuclear detonation, while adequately protecting those delivering assistance; and finally
- that the risk of accidental nuclear-weapon detonation remains a very real danger.” [15]

Finally, Peter Maurer, President of the ICRC, expresses in his speech at the Vienna Conference on the Humanitarian Consequences of Nuclear Weapons, that “the *global and long-term humanitarian consequences of nuclear weapons*, which we have heard about at the Oslo and Nayarit meetings, raise profound questions about the limits of warfare and the capacity of the human species to prevent foreseeable catastrophic events. The most universally accepted limits are contained in international humanitarian law. In the view of the ICRC, the information presented over the past 2 years has significant implications for the assessment of nuclear weapons under fundamental rules of international humanitarian law and other fields of international law. Because much of the scientific information on the human costs and environmental impacts, and on the absence of adequate assistance capacities was not previously available *this information should trigger a reassessment of these weapons by States in both legal and policy terms.*” [16].

5. Growing difficulties to envisage IHL compatibility

Just in view of these repeatedly assessed catastrophic consequences of the use of nuclear weapons, the ICRC sees growing difficulties to envisage a compatibility of nuclear weapons with international humanitarian law. In his speech to the diplomatic community in Geneva in 2015, Peter Maurer recalls the ICRC's opinion, as “already in 1996, in response to the Advisory Opinion of the International Court of Justice, the ICRC concluded that ‘it is difficult to envisage how any use of

nuclear weapons could be compatible with the requirements of international humanitarian law.' The evidence that has emerged since only strengthens these doubts. *With every new piece of information, we move further away from any hypothetical scenario where the humanitarian consequences of the use of nuclear weapons could be compatible with international humanitarian law.* This leads us, time and again, to the conclusion that the use of nuclear weapons must be prohibited and the weapons eliminated altogether.” [17].

The development of this process finally leads to the ICRC's statement to the United Nations in 2015, declaring that “the three international conferences on the humanitarian impact of nuclear weapons, held in Oslo, Nayarit and Vienna in 2013 and 2014, heard evidence of suffering on an unimaginable scale that would be caused by the use nuclear weapons, in terms of their immediate and long-term effects on people, societies, health-care systems and the environment. [...] *This compelling evidence of the tremendous human costs of nuclear weapons led the International Movement of the Red Cross and Red Crescent to conclude that it is difficult to envisage how any use of nuclear weapons could be compatible with IHL.* On this basis, the Red Cross and Red Crescent Movement has called on States to negotiate a legally binding international agreement prohibiting the use of and completely eliminating nuclear weapons, based on existing commitments and international obligations.

During times of international instability, it may be tempting for some States to view nuclear weapons as a tool of security. But weapons that risk catastrophic and irreversible humanitarian consequences cannot seriously be viewed as protecting civilians or humanity as a whole. A large majority of States today recognize that the humanitarian impact of nuclear weapons can no longer be ignored and must underpin all nuclear disarmament efforts.” [18].

Notes:

[All emphasises in citations by the authors]

1. United Nations, General Assembly, 64th session, First Committee, Items 96 & 100 of the agenda, Statement by the International Committee of the Red Cross (ICRC), New York, 9 October 2009: Weapons: ICRC statement to the United Nations, 2009, <https://www.icrc.org/eng/resources/documents/statement/united-nations-statement-091009.htm> (access on 03.04.2016).

2. Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, Switzerland, 26 November 2011: Resolution 1: Working towards the elimination of nuclear weapons, <https://www.icrc.org/eng/resources/documents/resolution/council-delegates-resolution-1-2011.htm> (access on 03.04.2016).

3. See Remarks by Mr. Tadateru Konoé, 20th IPPNW (International Physicians for the Prevention of Nuclear War) World Congress, Hiroshima, 24 August 2012: Perspectives from Hiroshima on nuclear weapons and nuclear disaster, <http://www.ifrc.org/en/news-and-media/opinions-and-positions/speeches/2012/perspectives-from-hiroshima-on-nuclear-weapons-and-nuclear-disaster/> (access on 03.04.2016).

4. See German Red Cross: Das humanitäre Völkerrecht - Antworten auf Ihre Fragen - IKRK

http://www.drk.de/fileadmin/Ueber_uns/_Dokumente/humanitaeres_voelkerrecht/Das_Humanitaere_Voelkerrecht__Antworten_auf_Ihre_Fragen.pdf (access on 03.04.2016).

5. See Austrian Red Cross, 9 April 2010: Das humanitäre Völkerrecht und “neue” Konflikte, <http://www.rotekreuz.at/news/datum/2010/04/09/das-humanitaere-voelkerrecht-und-neue-konfli/> (access on 03.04.2016).

6. See Canadian Red Cross: Nuclear, Biological and Chemical Weapons – Nuclear Weapons: <http://www.redcross.ca/how-we-help/international-humanitarian-law/what-is-international-humanitarian-law/weapons-and-international-humanitarian-law/nuclear--biological-and-chemical-weapons> (access on 03.04.2016).

7. Debate in the First Committee of the United Nations General Assembly (51st Session, 1996) on agenda items 71 and 75 (disarmament and the 1980 Conventional Weapons Convention): ICRC statement to the United Nations General Assembly, In: International Review of the Red Cross (1997) No. 316 – Nuclear weapons, The Advisory Opinion of the International Court of Justice on the legality of nuclear weapons and international humanitarian law, p.118/119, <https://www.icrc.org/eng/resources/documents/article/other/57jnfu.htm> (access on 03.04.2016).

8. See Interview with Peter Herby, 20 April 2010: Nuclear weapons: an historic opportunity, <https://www.icrc.org/eng/resources/documents/interview/nuclear-weapons-interview-200410.htm> (access on 03.04.2016).

9. Statement by Jakob Kellenberger, former President of the ICRC, to the Geneva Diplomatic Corps, Geneva, 20 April 2010: Bringing the era of nuclear weapons to an end, <https://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm> (access on 03.04.2016).

10. See Commentary on the 1977 Additional Protocols: <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=78C0DA9A7B459ACEC12563CD0042F649> (access on 03.04.2016).

11. Yves Sandoz (1997): Preliminary remarks, In: International Review of the Red Cross (1997) No. 316 – Nuclear weapons, The Advisory Opinion of the International Court of Justice on the legality of nuclear weapons and international humanitarian law, p.8, <https://www.icrc.org/eng/resources/documents/article/other/57jnfj.htm> (access on 03.04.2016).

12. General Debate on all disarmament and international security agenda items. United Nations, General Assembly, 67th session, First Committee, statement by the ICRC, New York, 16 October 2012: Weapons: ICRC statement to the United Nations, 2012, <https://www.icrc.org/en/document/weapons-icrc-statement-united-nations-2012> (access on 03.04.2016).

13. United Nations, General Assembly, 65th session, First Committee, items 97 & 101 of the agenda, statement by the ICRC, New York, 12 October 2010: Weapons – ICRC statement to the United Nations, 2010, <https://www.icrc.org/eng/resources/documents/statement/united-nations-weapons-statement-2010-10-12.htm> (access on 03.04.2016).

14. Statement by Christine Beerli at the Second Conference on the Humanitarian Impact of Nuclear Weapons, Nayarit, Mexico, 13 February 2014: Nuclear weapons must be prohibited and eliminated once and for all, <https://www.icrc.org/eng/resources/documents/statement/2014/02-13-nuclear-weapons-statement.htm> (access on 03.04.2016).
15. 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 27 April - 22 May 2015, Statement of the ICRC: Eliminating nuclear weapons, <https://www.icrc.org/en/document/nuclear-weapons-conference> (access on 03.04.2016).
16. Speech by Peter Maurer, President of the ICRC, Vienna Conference on the Humanitarian Consequences of Nuclear Weapons, 8 December 2014, Vienna, Austria: Nuclear weapons: Create conditions to make nuclear disarmament possible, <https://www.icrc.org/en/document/nuclear-weapons-create-conditions-make-nuclear-disarmament-possible> (access on 03.04.2016).
17. Speech by Peter Maurer, President of the ICRC, to the diplomatic community in Geneva, 18 February 2015: Nuclear weapons: Ending a threat to humanity, <https://www.icrc.org/en/document/nuclear-weapons-ending-threat-humanity> (access on 03.04.2016).
18. General debate on all disarmament and international security agenda items. United Nations, General Assembly, 70th session, First Committee, statement by the ICRC, New York, 15 October 2015: Weapons: ICRC statement to the United Nations, 2015, <https://www.icrc.org/en/document/weapons-icrc-statement-united-nations-2015> (access on 03.04.2016).