The use of nuclear weapons and international humanitarian law

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Nuclear weapons were developed, and are primarily seen, as weapons of war. International humanitarian law (IHL), also known as the law of armed conflict or the law of war, is therefore a critical reference point in the international legal framework applying to nuclear weapons.

IHL seeks to limit the effects of armed conflict, and in so doing to mitigate suffering. To this end, its rules impose general and specific limits on the choice of means and methods of warfare. While IHL does not specifically prohibit nuclear weapons, their use is restricted by the general rules of IHL regulating the conduct of hostilities, which apply to the use of all weapons in armed conflict.

These rules aim to protect civilians from the dangers that arise from military operations and to minimize civilian death and suffering and damage to civilian objects. They also aim to protect combatants from injury and suffering that serves no military purpose. IHL also contains rules aimed at protecting the natural environment from the effects of warfare.

It is important to note that IHL’s rules on the conduct of hostilities are primarily concerned with the use of nuclear weapons, as with the use of any other means of warfare. As such, it does not regulate their development, production, possession or transfer, which would be covered by other bodies of international law.

The effects of nuclear weapons raise a number of concerns under IHL. Their use in Hiroshima and Nagasaki in 1945 and subsequent studies have shown that nuclear weapons have severe immediate and long-term consequences due to the heat, blast and radiation generated by the explosion and the distances over which these forces are likely to be spread. The unique characteristics of nuclear weapons were recognized by the International Court of Justice in its 1996 Advisory Opinion. The Court also observed that “[t]he destructive power of nuclear weapons cannot be contained in either space or time.” Indeed, in the view of the ICRC, the sheer scale of civilian casualties and destruction that would result from the use of a nuclear weapon in or near a populated area and its long-term effects on human health and the environment raise serious questions about the compatibility of this weapon with the rules of IHL.

I would like to look more closely at the effects of nuclear weapons in light of several key IHL rules, in particular: the prohibition of indiscriminate attacks, the rule of proportionality in attack, and the requirement to take precautions in attack – each of which aim to protect civilians and civilian objects. I will also briefly highlight the prohibition on means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering -- which specifically aims to protect combatants, and the rule on the protection of the natural environment.

I should stress that the ICRC considers that these rules, which are found in Protocol I (1977) additional to the Geneva Conventions, as reflecting customary IHL applicable in all armed conflicts, be they of an international or non-international character.

The prohibition of indiscriminate attacks outlaws attacks that are of a nature to strike military objectives and civilians or civilian objects without distinction. Such attacks include the use of weapons that cannot be directed at a specific military objective or that have effects that cannot be limited as required by IHL.
There are serious doubts as to whether nuclear weapons can be used in accordance with this rule. As I mentioned a moment ago, nuclear weapons are designed to disperse high heat, blast effects and radiation, and in most scenarios this will occur over wide areas. For example, although the effects of a nuclear weapon in a given case will depend on a variety of factors, the use of a single 10 to 20 kiloton bomb (the yield of the bombs used in Hiroshima and Nagasaki) in or near a populated area will likely kill or severely injure very large numbers of civilians even if used against a military objective. The heat generated by the explosion could cause severe burns to exposed skin up to three kilometres from the epicentre. Massive destruction of buildings and infrastructure within several kilometres from the epicentre is also foreseeable. Given such effects, it would be hard not to classify such an attack as striking military objectives and civilians and civilian objects without distinction.

There is also a serious risk that the effects of such an explosion would not be limited in space and time, but would continue long after the weapon was used. This is particularly true for the fires, and possibly firestorms, that can result from the heat generated by a nuclear explosion. The same concern applies to radioactive fallout. While it is certain that radioactive particles will fall in the immediate area affected by the explosion, they are also likely to spread far from it, depending on weather conditions, particularly the prevailing winds. Recent studies have also highlighted the potential for nuclear weapons to seriously affect the global climate and future food production. Such consequences are a clearly foreseeable given what we now know about nuclear weapons.

These kinds of effects also raise doubts that an attack against a military objective located in or near a populated area would respect the IHL rule of proportionality in attack. This rule requires that, for an attack to proceed, the concrete and direct military advantage anticipated outweigh the foreseeable incidental impact on civilians and civilian objects. In conducting this assessment, a party would be required to take into account, the immediate civilian deaths and injuries and damage to civilian objects (such as homes, buildings and infrastructure) that are expected to result from the explosion, and the foreseeable long-term effects of exposure to radiation. The proportionality assessment must also, in the ICRC’s view, consider other foreseeable long-term repercussions, such as those stemming from damaged or destroyed water and electrical supply systems and other critical infrastructure supporting services essential for the survival of the civilian population, including health services.

In view of the devastating consequences, surely such use would also raise doubts with the IHL rule of precautions in attack. This rule requires that constant care be taken to spare the civilian population, civilians and civilian objects and that feasible precautions be taken in the choice of means and methods of warfare to avoid and in any event minimize incidental civilian casualties and damage to civilian objects.

While combatants may be lawfully attacked, IHL prohibits the use of weapons of a nature to cause them unnecessary suffering, meaning suffering that is out of proportion to the military advantage sought. Today, we know that a nuclear explosion will generate high doses of radiation which have devastating immediate and long-term consequences to the health of exposed individuals. Effects include damage to the central nervous system and to the gastrointestinal tract and an increased risk of developing certain cancers, such as leukaemia and thyroid cancer. The horrific short- and long-term illnesses, permanent disability and suffering caused by radiation exposure raise serious questions about the compatibility of nuclear weapons with the IHL prohibition to cause unnecessary suffering.

Finally, there are restrictions that stem from the rule on the protection of the natural environment. Under this customary international law rule, which slightly differs from the one of Additional Protocol I, all means and methods of warfare must be employed with due regard to the protection and preservation of the natural environment and all feasible
precautions must be taken to avoid, and in any event minimize, incidental damage to the environment. Thus, any decision to use nuclear weapons must take into account the potential impact on and damage to the environment.

Some have argued that low-yield nuclear weapons could be compatible with IHL. While the use of low-yield nuclear weapons in a remote area, such as against troops in a desert or against a fleet at sea, may not have immediate effects on civilians, there would remain significant concerns, not just about the eventual spread of radiation to civilian areas, but also the radiological contamination of the environment and the impact of radiation on combatants. In other words, even the use of a nuclear weapon far from civilian settlements would raise questions of compatibility with IHL rules.

This is an overview of some of the issues that the use of nuclear weapons would raise under the fundamental rules of IHL. These concerns have led the International Red Cross and Red Crescent Movement's Council of Delegates to conclude in 2011 that “it is difficult to envisage how any use of nuclear weapons could be compatible with the requirements of international humanitarian law.”

It is worth emphasizing that the International Red Cross and Red Crescent Movement's position was taken well before the conferences held in Oslo, Nayarit and this meeting here in Vienna. In our view, the new evidence that has emerged in the last two years about the humanitarian impact of nuclear weapons casts further doubt on whether these weapons could ever be used in accordance with the rules of customary IHL.

In closing, I would like to highlight that IHL has specifically prohibited other weapons of mass destruction, in particular biological and chemical weapons, due to their severe humanitarian consequences and the concerns that these weapons raise under IHL. In banning these weapons, States have signaled that they are unacceptable as means of warfare and many have reacted strongly on those few occasions when such weapons were subsequently used. States should do all they can to ensure that nuclear weapons are never used again. As the ICRC's President, Peter Maurer, stated yesterday, preventing the use of nuclear weapons requires the fulfilment by States of their existing obligations to pursue negotiations aimed at prohibiting their use and completely eliminating them through a legally binding international agreement.

Thank you.

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