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First point: the ICJ’s Advisory Opinion contains very clear and accurate analyses of IHL. But its conclusion, which is what it’s famous for, does not fit with its preceding analysis. If it had applied its analysis to the facts it had articulated with respect to nuclear weapons, it would have concluded that any use of nuclear weapons would be illegal. Eight judges (the majority) made that point exactly: it is impossible to use nuclear weapons in a way that respects IHL. I won’t dwell on last paragraph – it is far more important to look at the accurate things the Court did say.

The first of those is that any use of nuclear weapons must be compatible with IHL. The states taking part in the proceedings, even the NWS, agreed with this point. So what are the main rules?

The two main ones are what the court referred to as “cardinal principles”:

First: the rule of distinction – between combatants and non-combatants. “States must never make civilians the object of attack, and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.” With this sentence the Court equated the use of indiscriminate weapons with an attack on civilians. This is significant given that an attack on civilians constitutes a war crime under the Statute of the ICC.

What does this mean? Weapons that are inherently indiscriminate may not be used. This is described very well in Art 51 (4)(b and c) of Protocol 1 to the Geneva Conventions and is part of customary international law. There are two aspects to this rule:

A weapon can’t be used -

1. If it cannot be directed at a specific military objective (i.e. an object that has military value).

So a weapon that cannot be aimed at something would be indiscriminate. Not many weapons fall into this category today.

2. If its effects cannot be limited, with the result that it strikes both military objectives and civilians and civilian objects without distinction.

This second aspect is the most significant one and it has totally or partially motivated the ban on many weapons: biological, chemical, anti-personnel landmines, cluster munitions etc.

Collateral damage to civilians and civilian objectives is not prohibited, but any expected collateral damage must be proportional to the anticipated military advantage of an attack. The important thing to make clear is that quite often certain states, especially
NWS, will say that an attack using nuclear weapons could respect the collateral damage proportionality rule, because in an extreme situation huge collateral damage would not be excessive for the military requirement. However, in order to respect this proportionality rule, a commander needs to know in advance not only what the military need is, but also what the collateral damage is likely to be, including the extent of it. If it’s not possible to gauge the extent of collateral damage in advance, you can’t analyse whether the rule of proportionality will be respected. This results in a weapon that is inherently indiscriminate. The body of the Opinion’s text on the nature of nuclear weapons makes the following point (para 35):

“The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilisation and the entire ecosystem of the planet. ... 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. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.”

This must be the definition of being unable to pin down the extent of radiation damage in advance and hence any possible proportionality of collateral damage.

Some argue that small tactical nuclear weapons might be able to be used. But their nature is that they must be used in or on the ground. This by definition will create a huge amount of radioactive fallout from the contaminated soil which will then be spread by the winds over a very wide area. While strategic nuclear weapons clearly cannot satisfy the proportionality test, tactical nuclear weapons are every bit as indiscriminate.

The second rule or “cardinal principle” is one that prevents the infliction of unnecessary suffering or superfluous injury to combatants. This rule first saw use in the prohibition of the use of poison or poisoned weapons. The legitimate purpose of a weapon is to put a combatant out of action. But if you use one that will always cause death, or long-term serious disability or suffering to all affected combatants then it’s prohibited if those combatants could have been put out of action with a less harmful weapons. Typically weapons are prohibited if they prevent the normal recovery seen from conventional weapons. This is was the original basis for the ban on chemical weapons, exploding bullets, blinding laser weapons etc. Medical personnel advise that radiation suppresses the immune system and prevents normal recovery from wounds. Soldiers that are exposed to nuclear weapons but don’t die have serious short or long-term consequences on their health. Therefore the effects of NW are similar to poisoned weapons.

Military personnel, in particular army personnel from some NW states, have privately told me that these days conventional weapons can achieve any military requirement, so that there is no military need for nuclear weapons. On this basis, any use of nuclear weapons will cause unnecessary suffering and superfluous injury because of the suppression of immunity caused by radiation.
Shortly after WWII, in 1950, the ICRC sent an open letter to states, the relevant part of which read as follows:

“Contre la bombe atomique, aucune protection n’est plus possible dans le rayon d’action de cette arme…toute discrimination devient impossible…Comment ces armes pourraient-elles épargner les hôpitaux, les camps de prisonniers de guerre, la population civile? Ils conduisent à l’extermination pure et simple. De plus, la bombe atomique cause à ses victimes des souffrances sans proportion avec les nécessités tactiques puisque beaucoup de ses victimes périsent des suites de leurs brûlures après des semaines d’agonie, ou restent frappées, pour la vie, de douloureuses infirmités. Enfin, ses effets immédiats et durables interdisent de secourir les sinistrés.”

In this letter, written when the reality on the ground was fresh in people’s minds, the ICRC had no compunction in stating unambiguously that NW are illegal because they are indiscriminate and cause unnecessary suffering.