

*Translation of Mr. Yves Sandoz's letter of 19 September addressed to H.E. Mohammed Bedjaoui,
President of the International Court of Justice, The Hague*

Re: Request for an advisory opinion on the lawfulness of using or threatening to use nuclear weapons

Mr. President,

Having learned that the International Court of Justice has been asked to give an opinion on the question of whether it is lawful to use or threaten to use nuclear weapons, we feel it is important for the Court to be informed of the position of the International Committee of the Red Cross (ICRC) in this regard. Indeed, the issue is largely one of international humanitarian law and, as you are aware, the international community has entrusted the ICRC with wide powers in this area. The current Statutes of the International Red Cross and Red Crescent Movement, adopted by the 1986 International Conference which was attended by the great majority of States, stipulate that one aspect of the ICRC's role is

"to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (Article 5, para. 2 (g)).

It was in pursuance of this mandate that in 1986 the ICRC published its *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (the English version was published in 1987).

In view of the ICRC's recognized competence in the field of international humanitarian law, it is highly probable that one of the parties concerned will refer to this *Commentary* or to the ICRC'S other writings on the subject. We therefore wish to give a brief outline to our current thinking so as to avoid any misunderstanding.

First of all we venture to suggest that the members of the Court read the section of the *Commentary* concerning nuclear weapons (paras. 1838 to 1862), copy of which is enclosed. This section mentions the circumstances prevailing at the time of the Diplomatic Conference of 1974-1977 and discusses their consequences with respect to interpretation of the relevant texts. In view of the complexity of the matter, it is important that the section be read in its entirety, since the meaning of the authors might be misunderstood if only parts of it were read or if passages were quoted out of context.

Moreover, it should be stressed that the *Commentary* analyses the situation as it was at the time. This obviously leaves open the question of subsequent developments in customary law, especially in view of the widespread acceptance of the 1977 Protocols as a whole, or at least of most of their principles and rules.

We also believe that any examination of the problem today should take into account the "Martens clause", recognized as customary law, as it is expressed in Protocol I:

"In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Article 1, para. 2).

Finally, we should like to point out that, while we are not aware of any technical development that might have modified the characteristics of specific nuclear weapons, it is obvious that any such development would have to be carefully examined before any ruling is given on the lawfulness of using these particular weapons.

Indeed, no one can be unaware of the fact that today nuclear arms of all kinds are generally considered to be weapons of mass destruction, as are biological and chemical weapons. *A priori*, their use would thus appear to be incompatible with the prohibition, reaffirmed in Protocol I, of "methods or means of combat which cannot be directed at a specific military objective" and are thus "of a nature to strike military objectives and civilians (. . .) without distinction" (Article 51, para. 4). In our opinion, the interpretation given to the principle of proportionality does not help resolve the problem. This principle as expressed in Protocol I considers to be indiscriminate, and thus contrary to international humanitarian law, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (Article 51, para 5 (b)).

It is important, therefore to determine what is meant by "the concrete and direct military advantage anticipated". An inordinately broad interpretation would mean acknowledging that very heavy losses may be inflicted on civilians, and a significant part of the regulations designed to protect civilians would thus be rendered meaningless. This would be unacceptable, and the *Commentary* clearly says no in the following paragraphs.

"Comments were also made in various quarters that paragraph 5 (b) authorized any type of attack provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated. This theory is manifestly incorrect. In order to comply with the conditions, the attack must be directed against a military objective with means that are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in a way required by the Protocol; *moreover*, even after those conditions are fulfilled, the incidental civilian losses and damages must not be excessive. Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem, in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above.

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with Article 48 (*Basic rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive" (paras. 1979 and 1980).

If the illegality of any use of nuclear weapon is not admitted, it would therefore be necessary to determine whether specific types of nuclear weapons, having regard to their current technical characteristics, might be used in well-defined situations without contravening the principles and rules of international customary law as set out in Protocol I.

To sum up our institution's concerns, we do not wish the opinions stated in the ICRC's

Commentary to be misinterpreted. Moreover, we should like them to be understood as reflecting the situation prevailing at the time when they were expressed, bearing in mind the possibility of developments in customary law and changes in the public conscience and even in the scientific parameters of the question.

We trust that the opinion which the Court has been requested to give will enable progress to be made in this particularly sensitive issue. Should it be determined that a particular nuclear weapon might lawfully be used in certain specific situations while respecting the international humanitarian law currently in force, it would seem clear that such use could only be very limited and it would be imperative to define without the slightest ambiguity the circumstances in which it would be permitted. As the *Commentary* points out,

"[the] uncertainty which exists regarding the scope of international humanitarian law with respect to the use of nuclear weapons is potentially harmful for such law and consequently all the victims that it aims to protect. This danger is all the greater as a first use of nuclear weapons, considered to be lawful by its user, could be considered a violation by its victim, and clearly entails the risk of uncontrolled escalation" (para. 1861).

We hope that these explanations and our thoughts on the matter will be helpful to the Court and should be happy to provide you with any further information you may require.

Please accept, Mr. President, the assurance of our high consideration.

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