Contemporary Issues as to Nuclear Weapons and International Law in the Post 9/11 World.

Professor Charles Moxley Jr.

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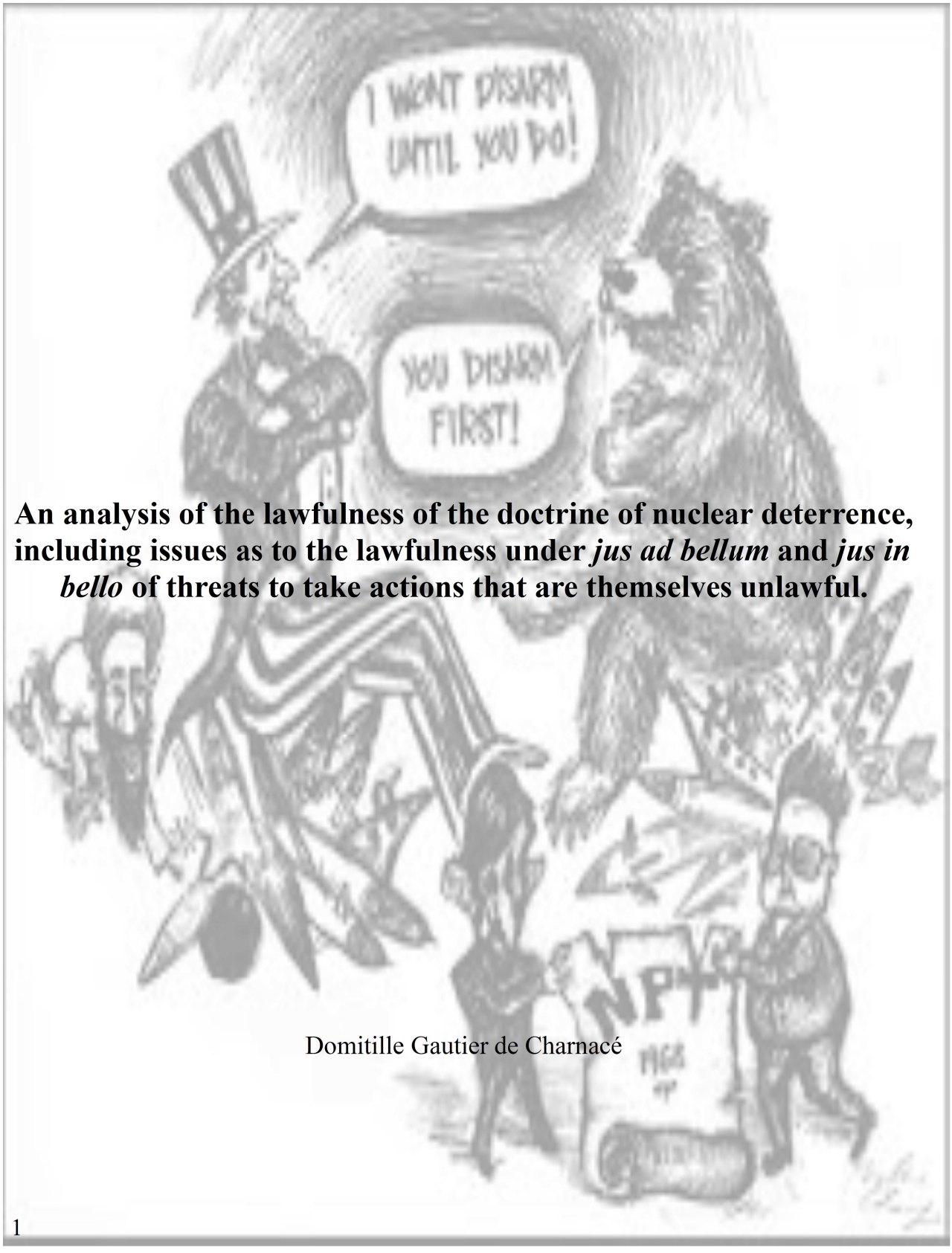


**An analysis of the lawfulness of the doctrine of nuclear deterrence, including issues as to the lawfulness under *jus ad bellum* and *jus in bello* of threats to take actions that are themselves unlawful.**

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## Sommaire

## Executive Summary

This paper attempts to assess the legality of the policy of nuclear deterrence under jus ad bellum and jus in bello. It considers two approaches regarding deterrence. The first one is that nuclear deterrence always equal to threats because of the specificities of nuclear weapons. Under this approach, the question of the legality of nuclear deterrence and the question of the legality of threats are therefore the same and only question. On the other hand, we also consider an approach under which only part of deterrence amount to threats under international law. This was the approach adopte by the International Court of Justice in its Advisory Opinion. Under this approach, the legality of the actions of deterrence not amounting to a threat have been left unanswered.

We adopt the dichotomy between jus ad bellum and jus in bello and assess the legality of deterrence according to both approaches. But is such an assessment the more realistic way to study nuclear deterrence? Indeed, nuclear deterrence is highly political and state use it on a daily basis, and will continue to do so, notwithstanding the answer of such an assessment.

"On n'utilise pas un canon pour tuer une fourmi."[1]

This idiom, literally translating as "don't use a canon to kill an ant" illustrates the inherent disproportionality of nuclear weapons. Indeed, nuclear weapons have an unparalleled power of destruction. But beyond this power of immediate destruction, they can jeopardize the very survival of humanity because of the effects of the radiation. Nuclear weapons have not been used in a conflict since World War II. Yet, nine countries in the world officially possess those weapons which represents a global stock pile of around 16300 nuclear heads[2] . After considering those facts, one would easily draw the conclusion that nuclear weapons should be illegal according to International Law and especially the Law of war. As expressed by Professor C. Moxley: "it seems to be widely recognized that nuclear weapons […] are reasonably not usable"[3]. However, unlike biological and chemical weapons[4], nuclear weapons are not unlawful per se. Several efforts were made in the international community to stop the proliferation, the most famous one being the Treaty of non-proliferation signed in 1968[5]. In 2004, the United Nations Security Council took the Resolution 1540 which declared the proliferation of nuclear weapons as a threat to International Peace and Security[6]. The General Assembly declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity[7]. Furthermore, the Vancouver Declaration of February 2011 declared those weapons inhumane and incompatible with the law of armed conflict[8].

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1 ELLI LOUKA, NUCLEAR WEAPONS, JUSTICE AND THE LAW 335 (Edward Elgar, Cheltenham, UK)
2 STOCKOLM INTERNATIONAL PEACE RESEARCH INSTITUTE

3 CHARLES J. MOXLEY, JR, UNLAWFULNESS OF THE UNITED KINGDOM'S POLICY OF NUCLEAR DETERRENCE-INVALIDITY OF THE SCOTS HIGH COURT'S DECISION IN ZELTER, DISARMEMENT DIPLOMACY n. 58 (2001)
4 See CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION AND STOCKPILING OF BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS AND ON THEIR DESTRUCTION. Opened for Signature at London, Moscow and Washington. 10 April 1972 ; CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION, Paris 13 January 1993
5 TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (1989), 729 UNTS 161; 7 ILM 8809 (1968); 21 UST 483 available at http://www.un.org/disarmament/WMD/Nuclear/NPT.shtml
6 S.C. RES 1540 (2004)
7 G.A. RES 1653 (XVI) of (November, 24 1961), G.A. RES 33/71 B (December, 14 1978), G.A. RES 34/83 G (December, 11 1979)
8 VANCOUVER DECLARATION, February 11, 2011 , available at

However, the International Court of Justice, being asked if “the threat or use of nuclear weapons (was) in any circumstance permitted under International Law", didn't establish a clear permanent unlawfulness[9]. The court decided that under International Law, there was neither an authorization nor a prohibition of the threat or use of nuclear weapons. Here, we will mainly consider half of the question : “Is the threat of nuclear weapons in any circumstance permitted under international law?". Our subject is about deterrence, however, threats are an huge part of it and we therefore study both deterrence and threats. The questions whether they should be distinguished will be one of the core question of this analysis. Furthermore, we will not consider every area of International Law but focus on *Jus ad Bellum* and *Jus in Bello*. Those areas, as acknowledged by the Court, are the “most directly relevant applicable law governing the question”[10]. Therefore, some areas of International Law directly concerned by the threats to use nuclear weapons like environmental law or international criminal law will not be discussed. Finally, if the Court only addressed “threats”, we are here considering the policy of deterrence which is broader than threats.

To conduct this analysis, we first need to define what is deterrence and is it equals to a threat in every circumstances. Then we will assess the legality of deterrence under *jus ad bellum* and *jus in bello*. Finally we will consider some non legal perspectives of deterrence.

http://www.thesimonsfoundation.ca/projects/vancouver-declaration-law’s-imperative-urgent-achievement-nuclear-weapon-free-world

9 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: http://www.refworld.org/docid/4b2913d62.html

10 Id at para 34

## I. Some Definitions

Before assessing the legality of the policy of deterrence, it is necessary to define what deterrence in comparison to a threat is. Are threats and deterrence synonyms? Should they follow the same legal regime?

### A. Deterrence

Nuclear deterrence has been a central element of international relations and geopolitics since the end of the Second World War. Nuclear deterrence was the key element of the stalemate between the two blocks during the Cold War. Since the end of this bipolarization, the world is still divided in different nuclear umbrellas under which countries without nuclear weapons beneficiate from the policy of deterrence of a nuclear power. It is very important to realize that nuclear deterrence did not stop being a concern with the end of the Cold War. On the contrary, deterrence can be seen as the main nuclear concern as it is used on a daily basis and is "the only tangible value that states armed with nuclear weapons have asserted since WWII". The fact that deterrence was an important point of the 2010 Nuclear Posture Review of the United States shows this importance.[11]

Deterrence is defined in the Oxford dictionnary as the "The action of discouraging an action or event through instilling doubt or fear of the consequences"[12] . Deterrence must be differentiated from compellence. Indeed, compellence means to "induce the threatenee into doing something" when deterrence is to "deter the threatenee from doing something"[13]. Therefore, nuclear deterrence can be defined as "using the threat of nuclear attack to dissuade.

The four main characteristics of deterrence are: Capability, Commitment,

11 Department of Defense, "Nuclear Posture Review Report," April 2010, pages i-xiv, available at http://archive.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf

12 Oxford Dictionnary of English, 3.Ed (2010)

13 STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW 58 (Cambridge University Press 2007)

Communication and Credibility.[14] Those elements are all interlinked and insure alltogether that deterrence will be effective. When it comes to nuclear deterrence, capability means that a nuclear state must be able to retaliate and issue a second strike when being attacked. To assure this second strike capacity, nuclear powers have developed the "nuclear triad", which is the use of three different means to deliver the bomb (bombers, missiles, and submarines). Then, commitment lies in the intention of the nuclear power to actually execute its threat if the deterrence failed. Finally, he credibility of the commitment is built through communication, usually consisting in declarations of officials.[15]

**B. Threat**

A threat can be defined as a "practical warning directed against a specific opponent[16]". It is easy to see, just by comparing this definition to the one of deterrence, that a threat is more precise and aggressive that a general action of deterrence. As expressed by Judge Schwabel: "the policy of deterrence differs from that of the threat to use nuclear weapons by its generality."[17]. But before attempting to clarify the treshold of specificity separating deterrence from a threat, we need to apprehend the concept of threat.

Threats are under the same prohibition as the use of force contained in the Charter of the United Nations, and which will be studied later on. The implication of this common regime is that it is unlawful to threaten to do something that it would be unlawful to do. The International Court of Justice expressed this idea in the following paragraph of its Advisory Opinion:

14 FRANCIS GRIMAL, THREATS OF FORCE, INTERNATIONAL LAW AND STRATEGY (Routledge 2013)

15 See Barack Obama Speach in Prague : «The United States will maintain a safe, secure and effective arsenal to deter any adversary» (April, 5 2009)

16 Lord's Murray statement

17 Dissenting opinion of Judge Schwabel at 314, 35 I.L.M 809 (1996)

> "The notion of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal."[18]

Sir Ian Browlie expressed this idea in what is now known as the 'Brownlie formula': "If the promise is to resort to force in conditions for which no justification for the use of force exists, the threat itself is illegal."[19]

Beyond this entanglement with the use of force, it is uneasy to apprehend the notion of threat as it has not been studied a lot by scholars.[20] Indeed, scholars have focused more on the use of force. This can be explained by the fact that, when a threat leads to the use of force, threat will be overlooked by the use. On the contrary, when the threat is not carried out, the international community and scholars focus on the relief that no force was not used.[21] Furthermore, there are no specific provisions in the NPT regarding the threat of force.

Nonetheless, some authors have studied threats and notably Romana Sadurska. [22] Indeed, she attempted to classify them in four categories : Verbal threat ; joining a defensive treaty; series of communications and military manœuvres. Furthermore, for Romana Sadurska, the main element of a threat is coercion. This mean that a person under a threat is in a psychological mindset where his or her choice has been removed by the threat.[23]

The Perception of the threat by the threateneeis also important.[24] The threatenee needs

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18 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, §47-48

19 IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 364 (Oxford University Press, 1963)

20 THE CHARTER OF THE UNITED NATIONS, A COMMENTARY, 2nd ed, Volume 1 (Bruno Simma, Oxford University Press 2002)

21 FRANCIS GRIMAL, THREATS OF FORCE, INTERNATIONAL LAW AND STRATEGY 7 (Routledge) (2013)

22 ROMANA SADURSKA, THREATS OF FORCE, *The American Journal of International Law* (1988) supra note 2, at 241, available at http://www.jstor.org/stable/2203188?seq=1#page_scan_tab_contents

23 Id at 241

to believe in its credibility, otherwise it has no effectiveness. Does this mean that perception is a constitutive element of a threat ? What about a political leader who would be ready to sacrify millions of lives and therefore would not be feel coerced by a nuclear threat from another state ? Does this means that such a threat is legal ? A contrario, what about a state that would feel coerced by a simple armement program of another state without any specific threat being directed toward it? The influence of perception will depend on the reasonableness of this perception and this must be assessed on a case by case basis. In this regard, context is important. For example, Francis Grimal considers the situation of Switzerland starting a special progam of training for its military guards. Can such an action, emanating from a neutral state, constitute a threat ? Probably not.[25]

All those elements are used to identify threats. When it comes to nuclear weapons, they are used to determine if an action rise to the level of threat or is a mere action of deterrence.

**C. Deterrence and Threats considered as identical**

The International Court in its Advisory Opinion only assessed the legality of threats and uses of force, letting aside the legality of deterrence. Indeed it said that it did not "intend to pronounce itself on the practice known as the policy of deterrence"[26]. This is why, when looking for an eventual customary rule, the Court only searched if the non utilization of nuclear weapons since the Second World War had created one but did not assess if the permanent use of the policy of deterrence did. This can be explained by the fact that deterrence was not mentioned in the question asked to the Court and also by the fact. Also, Article 2§4 talks about "threats" but not "deterrence".

Yet could the Court have considered deterrence and threats all together and applied to

24 Id at 245.

25 FRANCIS GRIMMAL, THREATS OF FORCE, INTERNATIONAL LAW AND STRATEGY 44 (Routledge 2013)
26 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, § 61

them the regime of Art 2§4? Deterrence and threats are so closely linked that one could consider that any policy of deterrence should respect the legal regime of threats. Indeed, as expressed by Judge Wereemantry, "if a threat of possible use did not inhere in deterrence, deterrence would not deter".[27] Therefore, any policy of deterrence needs to contain implied threats to be credible. And if we consider that there is always a threat, expressed or implied, attached to a policy of deterrence, we should consider that deterrence and threats should follow the same legal regime. Under this theory of the implied threat, there would be no distinction between deterrence and threats.

Furthermore, it is also possible to consider that, because of the uniqueness of nuclear weapons, any action of nuclear deterrence always rise to the level of a threat.[28] Under this theory, threats and deterrence become synonyms. Francis Grimal, who advanced it, provided another argument than the uniqueness of the weapon. For him, nuclear deterrence can never be broad. On the contrary it is always specific because always towarded to another country. Indeed, what triggers states to developp a nuclear arsenal is to defend themselves against potential ennemies. Those ennemies are always identified. For example, Pakistan and India nuclear arsenal are towarded against each other. Therefore, even if they don't issue any verbal threat or deploy their arsenal, the simple fact that one possess such arms is a threat for the other.[29] Similarly, the US and the UK consider that the mere possession of nuclear weapons by North Korea and Iran are a threat to US international security.

We agree with this conception of nuclear deterrence and nuclear threats. However, the Court clearly distinguished between deterrence and threats and only addressed the legality of actions of deterrence amounting to threats. Therefore, we also need to consider this theory

27 Dissenting opinion of Judge Schwebel, at 3,35 I.L.M at 835. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*

28 FRANCIS GRIMMAL, THREATS OF FORCE, INTERNATIONAL LAW AND STRATEGY 60

29 Id at 65

where there is the global policy of deterrence, of which the legality is unknown, and inside of this policy we find some nuclear threats that are regulated under International Law.

**D. Deterrence and Threats Distinguished**

This leads to the necessity to determine, on a case by case basis, if a certain policy of deterrence equals to a threat under International Law. Only few cases have considered the subject.[30] In the Corfu case, the action at stake was the "Operation Retail" which consisted of the UK putting mines in the water of Albania. The ICJ considered that this was a use of force but not a threat because there was no pressure put on Albania.[31] In the Nicaragua case, on the other hand, the US support to the Nicaraguan guerilla fighting against the regime was a threat against Nicaragua. This can be qualified as an indirect threat[32]. However, the US troops manœuvres along the borders of Nicaragua were not qualified as a threat.[33]

The main controversy in this area is to establish whether possession of nuclear heads is a threat or not. Mere possession has been qualified as "existential deterrence".[34] The Court in its Advisory Opinion said that "possession […] may indeed justify an inference of preparedness to use them"[35] but did not clearly establish if possession was a threat or not. Does this statement mean that the difference between mere possession and threat lies in the intention? Doesn't any possession reveal an intention to use if necessary? In that case we come back to the implied threat theory. After this Opinion, the Scots High Court Zelter had to face this question. In the Zelter case, the High Court found that the policy of deterrence of the

30 Id at 65

31Corfu Channel Case (United Kingdom v. Albania); Assessment of Compensation, 15 XII 49 International Court of Justice (ICJ), 15 December 1949

32 FRANCIS GRIMAL, at 45

33 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986

34 COLIN S.FRAY, MODERN STRATEGY (Oxford : Oxford University Press. 2005).

35Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (ICJ) para 48

United Kingdom (UK), which included “ordinary deployment” and “routine patrol”, was not amounting to a threat. Yet this policy involved nuclear heads which were not low yield weapons and which had a range of 7400km. The nuclear heads were not pointed toward any state in particular but they were not properly de-targeted (physical separation of the warheads from the missiles and storage of them in separate place at distance)[36]. As a result, they were directable to a target within few minutes. Yet, despite those facts, the High Court found that this policy of deterrence was legal because it was not amounting to a threat. Professor Mowley considered that this finding of the High Court was false and that the UK policy of deterrence was unlawful.[37] Eventhough the conclusion of the Court is questionable, at least the High Court, contrary to the ICJ, went through a detailed study of whether or not possession was a threat. This decision nonetheless shows the loophole created by the International Court of Justice when it refused to consider that deterrence was always amounting to a threat.

## II. Analysis of the Legality of the Policy of Deterrence under *jus ad bellum* and *jus in bello*

### A) Separation of jus ad belum and *jus in bello*

The dichotomy between *jus ad bellum* and *jus in bello* is the corner stone of the law regarding the use of force. For the purpose of our analysis, we will adopt this dichotomy without considering the opinions of the authors whom believe that it should be abandoned.

*Jus ad bellum* establishes the thresholds to be met to resort to force while *jus in bello* is the “entire body of law of armed conflict”[38]. Kant, who theorised the separation, described them as “the right to go to war” (*jus ad bellum*) and the “right during war” (*Jus in bello*)[39].

36 CHARLES J.MOXLEY JR ; UNLAWFULNESS OF THE UNITED KINGDOM'S POLICY OF NUCLEAR DETERRENCE-INVALIDITY OF THE SCOTS HIGH COURT'S DECISION IN ZELTER.

37 Id

38 CHARLES J. MOXLEY, JR; NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD, at 44 (unpublished)

39. IMMANUEL KANT,THE PHILOSOPHY OF LAW. AN EXPOSITION ON THE FUNDAMENTAL PRINCIPLES OF

According to K. Okimoto, there are three main differences between *jus ad bellum* and *jus in bello*. Firstly, they don't have the same purpose: *jus ad bellum* aims to maintain peace when *jus in bello* aims to protect civilians. Then, they are applied differently: *jus ad bellum* creates an unequal status between the aggressor and the victim whereas *jus in bello* applies equally to both parties. Finally, the consequences of the violation of *jus ad bellum* can only be borne by a state but the violations of *jus in bello* can give rise to individual responsibility. [40]

As the Court did, we will consider both sets of rules one after the other. However, as they are closely linked, it is important to keep in mind that one set of rules can influence the analysis of the other and they can also complement each other when they are applied simultaneously.

**B. *Jus ad bellum***

1. Regime

The regime of *jus ad bellum* is defined in the Charter of the United Nations at Article 2§4 which reads as follow:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

There are two exceptions to this prohibition to threaten to use force or to use force: the right to resort to self defense[41] and the right of the Security Council to take measures under Chapter

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JURISPRUDENCE AS THE SCIENCE OF RIGHT, (1887) para. 53.

40 KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN US AD BELLUM AND JUS IN BELLO (Hart Publishing 2011)

41 United Nations, *Charter of the United Nations art.51,* 24 October 1945, 1 UNTS XVI

VII. Interestingly, the Court only considered the first exception when the question it had to answer was under "any circumstances".[42] This is understandable as it seems unconceivable that the Security Council would expressely authorize states to resort to nuclear weapons[43]. Analysis of the legality of threats to use nuclear weapons under Article 42 authorisation would therefore be purely theoretical. One could argue that an authorization to resort to the use of force by the Security Council could be interpreted as including nuclear weapons. Indeed, the resolutions often authorize the use of "all necessary means". However, in our opinion, it would be inconceivable for a State to justify a threat or use of nuclear weapons under a resolution of the Security Council. We believe that the Court shared this opinion which would explain why it did not consider Chapter VII in its decision. We are mentioning it here because it is interesting to see that the Court considered the exception of Chapter VII as unrealistic but did not reach this conclusion for the exception of self defense.

Under the law of the United Nations, *jus ad bellum* is weapon neutral[44]. This means that the nature of the weapons considered does not impact the legality of the threat under *jus ad bellum*. Therefore, the fact that we are talking about nuclear weapons does not exclude the right of self-defense. Yet, the Court still took in consideration the nature of nuclear weapons when applying the Charter. Indeed, it considered that it was

> "imperative [...] to take into account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come".[45]

These particularities led it to decide that the threat to use nuclear weapons was contrary to

42 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion para 49: "*From the statements presented to it the Court does not consider it necessary to address questions which might, in a given case, arise from the application of Chapter VII"*

43 FRANCIS GRIMMAL, at 62

44 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion para 39

45 Id, para 36

Article 2§4 of the United Nations Charter but that it could be lawful "in an extreme circumstance of self defense, in which the very survival of State would be a stake."[46] The Court did not define those "extreme circumstances" but laid down criteria to assess the legality of a threat under *jus ad bellum*. This criteria can give an idea of what would be "extreme circumstances"

2. Court's Conditions of Legality under *jus ad bellum*

The Court decided that:

> "Whether a policy of deterrence is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defense, it would necessarily violate the principles of necessity and proportionality." [47]

Those criteria are the one found in the Charter and in International Humanitarian Law, which apply in time of peace.[48] We will assess whether a nuclear threat could respect those criteria and, because it is unlawful to threaten to do what is it unlawful to do, we will also assess the legality of the actual use contained in the threat.

First of all, it is unsure whether a nuclear threat could respect territorial integrity and political independence of the threatenee state. According to Ian Brownlie, they are used to "pitomize the total legal rights which a state has". Therefore, a threat would always jeopardize at least one right and be contrary to the territorial integrity and political independent.[49]Then, it

46 Id, dispositif, para 2E

47 Id at 47

48 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of Arnerica) : there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" (I. C. J. Reports 1986), p. 94, para. 176

49 IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATE (Oxford University Press, 5th

is doubtful that a threat of a nuclear attack could respect the principles of the United Nations. Those principles are notably the following:

> " maintaining international peace and security; prevention and removal of threats to the peace; adjustment or settlement of international disputes or situations which might lead to a breach of the peace; development of friendly relations among nations; achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character; promoting and encouraging respect for human rights and for fundamental freedoms; and fostering of international peace, security and justice". [50]

Professor Moxley considers that a nuclear threat does not respect those principles.[51] A fortiori, if the threat was carried out, the actual use would not respect those principles either.

Then, a nuclear threat must respect the humanitarian law principles of proportionality and necessity. Despite the customary nature of their application to self defense, the Scots High Court in the Zelter case considered that principles of humanitarian law were not applicable in times of peace. Indeed, in this case, the High Court did not apply the criteria of proportionnality and necessity and just mentioned them as "other considerations" without conducting the analysis.[52] This wrong reasoning is incompatible with the Advisory Opinion.

Regarding the requirement of proportionality under self defense, it includes a balance between the armed attack and the military response to it[53]; a balance between the armed attack and the aim to halt and repel it; considerations on the target selection; consideration on the effect on civilians; considerations on the geographical scope. The target must be relevant to the

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ed., 2011) supra note 25, at 267

50 United Nations, *Charter of the United Nations art.1 and 2*, 24 October 1945, 1 UNTS XVI

51 CHARLES J.MOXLEY JR ; UNLAWFULNESS OF THE UNITED KINGDOM'S POLICY OF NUCLEAR DETERRENCE-INVALIDITY OF THE SCOTS HIGH COURT'S DECISION IN ZELTER at 8

52 Id

53 Nicaragua Case (merits), para 176

initial attack[54] but the geographical area is flexible according to each circumstance. If we consider that the armed attack was itself nuclear, a threat to retaliate under self defense would be proportionate, as long as it aims a lawful target. But if the threat was carried out, could the use be proportionate? This is uncertain because of the massive scale of nuclear weapons attacks and the radiations. We think that it could under the circumstance where the attack was nuclear and if the victim state as under threats of other nuclear attacks.

Regarding the requirement of necessity, it needs to be assessed whether the "circumstances (are) such that they render the recourse to force necessary"[55]. In other words, we consider if there is an alternative to the use of force. Some authors interpret the requirement of necessity as requiring the threat to be be necessary to halt and repel the armed attack. However, we don't use this interpretation under which necessity becomes a synonymous of proportionnality.[56] In the scenario where the armed attack is nuclear and where there is a threat of other ones, we believe that it could also be considered as necessary to threaten or to use nuclear weapons as a self defense.

Finally, self defense must also comply with the conditions set up in Article 51: self defense is only permitted "until the Security Council has taken measures necessary to maintain international peace and security" and the self defense must be "immediately reported to the Security Council".[57] There is a doctrinal debate aiming to establish the exact time frame of this article. T.Frank believes that a state looses the right to self defense as soon as the Security Council takes action when E.Rostow believes that they only loose it if the Security Council successfully resolve the situation[58]. If we come back to our scenario where a state has attacked

54 Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America, International Court of Justice (ICJ), 6 November 2003, para 51

55 GRO NYSTUEN, STUART CASEY-MASLEN AND ANNIE GOLDEN BERSAGEL, EDITORS, NUCLEAR WEAPONS UNDER INTERNATIONAL LAW at 17(Cambridge University Press 2014).

56KEIICHIRO OKIMOTO, THE DISTINCTION AND RELATIONSHIP BETWEEN US AD BELLUM AND JUS IN BELLO (Hart Publishing 2011)

57 United Nations Charter Art 51

58DUNOFF & RATNER, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS (4th ed., 2015)

another one with nuclear weapons and is threatening to strike again, it is very likely that the Security Council would issue a resolution, at least to take sanctions under Article 41. Under T. Frank theory, the right of self defense would then be paralyzed and any nuclear threat from the victim state would be illegal. However we here adopt the interpretation of E. Rostow and only consider a situation where the Security Council did not resolve the crisis.

Considering those elements, we could almost reach the same conclusion as the Court that nuclear threats can be lawful according to *jus in bellum* under extreme circumstances where the very survival of the state victim is at stake. We consider that those extreme circumstances would need to be a nuclear attack followed by threats of other nuclear attacks. Regarding the criteria of territorial integrity, political independence and the respect of the principles of the United Nations, we cannot conclude that they would be met under extreme circumstances. But these criteria is the most political one and it could be easy to argue that, under those extreme circumstances, nuclear threats from the victim state are necessary to protect international peace and security.

This conclusion does not establish the legality of the policy of deterrence under jus ad bellum but only the one of the nuclear threats.

3. The Legality of Mere Deterrence Left Open

One question arising from the finding of the Court is to know whether, under extreme circumstances where the very survival of the state is at stake, an action that respects the five criteria exposed before is a legal threat or if it is an action of deterrence not rising to the level of threat. Does the finding of the Court means that any action of deterrence not rising to the level of an unlawful threat is legal under *Jus ad Bellum*? If so, determining if an action respecting the criteria of the Court is a legal threat or a simple deterrence action does not have any practical impact because, in both scenario, the action would be legal anyway. However, the Court did not clearly state that all actions of deterrence not equalling to an illegal threat are

lawful. Could a policy of deterrence not equalling to a threat be illegal on other basis? The arguments raised by States defending nuclear weapons in front of the ICJ to insure the legality of deterrence were  the existence of multiple treaties that recognized the possession of nuclear weapons by the five Nuclear States; the fact that those States have constantly used deterrence since decades; the fact that no customary law prohibiting deterrence exist.[59] Those arguments are easy to counter. Indeed, the NPT treaty aims to the suppression of all nuclear weapons and therefore cannot be seen as a validation of the policy of deterrence. Then, a custom could not be born from the use of the policy of deterrence in the past decades because all states are « specially affected » by such a dangerous policy and many states are opposed to it. In any case, those considerations are not specific to *jus ad bellum* on which we focus here. Therefore, under *jus ad bellum*, we think that the policy of deterrence is legal, as long as it did not equal to an unlawful threat as defined by the ICJ, if we seperate deterrence and threats.

We then come back to the danger of the blurriness of the frontier between deterrence and threats. Indeed, thanks to the evasiveness of the International Court of Justice regarding deterrence, it is easy to apply the requirements of proportionality and necessity in a permissive way and to avoid the qualification of unlawful threat. This is exactly what the High Court did in the Zelter case. When can it be established that an action of deterrence breaks proportionality and necessity? If possession is not enough to equal to an unlawful threat, what about deployment of nuclear submarines along the coast of a country without an expressed specific threat? This is obviously a case by case assessment. Nobuo Hayashi consider that "The Court's failure to clarify the relationship between deterrence and threats appears to be partly responsible for the Advisory Opinion's deeply unsatisfactory treatment of the ad bellum principles of necessity and proportionality in relation to deterrent threats."[60]

59  The ICJ Advisory Opinion, *supra* note 1 at ¶61, 66-67

60 Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel, editors, Nuclear Weapons Under International Law at 44 (Cambridge University Press 2014).

**B. *Jus in bello***

1. Pertinence of the analysis

The legality of nuclear threats under *jus in bello* has been less studied because it is seen as a very theoritical subject. Indeed, a country already in a situation of war would resort to a higher level of force than the one of a simple threat, even if the threat is of a nuclear nature. However, we believe that this is not purely theoritical as threats to use nuclear weapons can be used along with attacks with conventional weapons during a war. Moreover, the policy of deterrence is actually never as important as during war. Indeed, a nuclear state at war would heavily rely on its nuclear deterrence, along with conventional strike, to get its adversary to surrender.

Some authors also believe that it bears less importance than the analysis under *jus ad bellum* because, according to them, the Court in its advisory Opinion decided that an illegality in bello can be covered ad bellum. As we will now see, we do not agree with this interpretation.

2.The Equal Application of *jus in bello*

One of the core characteristics of *jus in bello* is that it always applies equally to both parties, whether they are the aggressor or the victim under *jus ad bellum*.[61] Therefore, *jus in bello* does not consider whether a country entered war by breaching *jus ad bellum* or not. However, some authors believe that the Court in it advisory opinion decided that threats or use of nuclear weapons could violate *jus in bello* if they were in compliance with *jus ad bellum* under extreme circumstances.[62] This would mean that, in those extreme *ad bellum* circumstances where the survival of the state victim is at stake, this state would not need to

61 Id

62See C. GREENWOOD '*JUS AD BELLUM*AND *JUS IN BELLO*IN THE NUCLEAR WEAPONS ADVISORY OPINION' IN L. BOISSON DE CHAZOURNES AND P. SANDS (EDS.), INTERNATIONAL LAW, THE ICJ AND NUCLEAR WEAPONS at 263 (Cambridge University Press, 1999),

respect humanitarian principles. This interpretation is shared by Judge Fleischhauer and Judge Verinschchetin and by the High Court of Scotland in the Zelter case. Its source can be found in paragraph 2E of the Advisory Opinion dispositif:

> "It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;"

The key word regarding the interpretation of this paragraph is "generally". The above mentioned interpretation considers that the second part of the paragraph applies in the "general" situation where threats are unlawful. Then, despite this general unlawfulness under *jus in bello*, threats can be lawful under *jus ad bellum* in those extreme circumstances of self defense. This is an extremely dangerous and slippery interpretation as reciprocity is essential to ensure the respect of humanitarian law. Breaking up this element of reciprocity would be "an invitation to unrestricted warfare"[63]. Furthermore, it would be impracticable because both sides would argue that they are acting on the ground of self defense and in time of war it can be very hard to determine who is the "aggressor" and who is the "victim".[64] According to Akande, "there is no basis in international law for introducing the notion of the survival of the state as a legitimate excuse for violating the law of armed conflict'.[65] This "would inevitably

63 JASMINE MOUSSA, CAN JUS AD BELLUM OVERRIDE JUS IN BELLO?, INTERNATIONAL REVIEW OF THE RED CROSS Volume 90 Number 872 at 23 (December 2008)
64 Id at 26
65 Id at 43

lead to a situation of subjectivity, arbitrariness and unpredictability." [66]A good example of those risks is the war on terror, during which self defense was used to deny the statute of prisoners of war to the Talibans. [67]

However, despite this unclear formulation of paragraph 2E, it is very clear in other parts of the Opinion that the Court required the respect of both *jus ad bellum* and *jus in bello* in all circumstances, even extreme. This can be seen in paragraph 42 :

> "a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law"[68].

Therefore, we reject the interpretation that the Court authorized violations of *jus in bello* in case of compliance with *jus ad bellum* in extreme circumstances.

3. *Jus in Bello* Regime and the Legality of Threats Under *Jus in Bello*

The main principles of *jus in bello* can be found in the 1949 Geneva Conventions and the 1977 additional first Protocol. We will here assess the legality of nuclear threats according to those principles. The Court did state that " If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.[69]" It then established that threats or use of nuclear weapons would generally violate Humanitarian principles but left open the possibility of their legality under extreme circumstances. Because of this statement, it is unclear whether those extreme circumstances concern only *jus ad bellum* or also *jus in bello*. However, it did not really conduct the analysis

66 Id at 43

67"White House Press Secretary Announcement of President Bush's Dtermination Re Legal Status of Taliban and Al Qaeda Detainees 7Fbruary 2002, Us Detartment of State website, www.state.gov/s/l/38727

68 The ICJ Advisory Opinion, *supra* note 1 at para 42

69 Id at 78

which would have, in our view, led it to conclude to the illegality of nuclear weapons under *jus in bello*. We will here conduct this analysis of the legality of threats under *jus in bello*. As it is unlawful to threaten to do something that it would be unlawful to do, we will also need to assess the legality of the potential use contained in the threat.

Firstly, the principle of proportionality prohibits the threat to use a weapon if it is likely to provoke "incidental loss of civilian life, injury to civilians, damage to civilian objects"[70]. The proportionality test is an objective determination as the commanding authority must base its decision on what he knows and what he should have known[71]. A simple threat could not cause injury to civilians. However, if this threat was carried out, it would obviously cause an intolerable amount civilian death and material damages. It is widely recognized that nuclear weapons cannot be proportionate. Yet, the United States argue that the low yielded weapons can be proportionate. Those new type of nukes are designed to penetrate deep in the ground before exploding which is supposed to reduce considerably the casualties.[72] However, this assertion is highly controversial. For example, the Federation of American Scientist consider that no matter how deep in the ground the explosion takes place, it would "blow out a massive crater of radioactive dirt, which rains down on the local region with an especially intense and deadly fallout".[73]

Then, the rule of necessity requires that a state must not use more than the level of force necessary or imperatively necessary to achieve its military objective. It implies that the

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70 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Art 51 (5) (b) 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 17 December 2015]

71 CHARLES J. MOXLEY, JR; NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD, at 52 (2Ed unpublished)

72 ROBERT W. NELSON; LOW-YIELD EARTH-PENETRATING NUCLEAR WEAPONS; FAS Public Interest Report of January-February 2001, Volume 54 Number 1; The Journal of the Federation of American Scientist. Can be found at http://fas.org/faspir/2001/v54n1/weapons.htm

73 Id

weapons must be controllable. If a threat to use a conventional weapon is not enough to deter and to attain a military objective, a nuclear threat could be necessary. However, regarding controllability, it can be argued that a nuclear threat could lead to an escalation of nuclear threats and to a potential nuclear war. But this is unlikely as nuclear weapons were not used since the Second World War despite/thanks to the policy of deterrence. Regarding the situation where the threat would be carried out, the controllabity would be an issue because of the radiation and the massive scale of the explosion. Once again, the only potential way to meet the requirement would be to threaten to use low yield nukes.

Not to forget that, the law of war sets out a principle of moderation which entails that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[74] This principle generally overlaps with the principles of necessity and proportionality and we will therefore not detail it here.

Another principle of *jus in bello* is the one of discrimination. This rule prohibits the use of a weapon that cannot discriminate in its effects between military and civilian targets[75]. It is easy for a nuclear threat to respect this principle by only threatening a military facility. However, the actual use would not be discriminate because of the massive scale of a nuclear attack. Even with low yield nukes, we believe that the radiation would render the use undiscriminating.

Then, the principle of neutrality protects the territory of a neutral State from the effects of war being engaged in by other States. Once again, it would be easy for a nuclear threat to respect this principle by only threatening non neutral states. However, if the threat was carried out, it would necessarily affect states not involved in the conflict because notably of the radiations. Here as well, it could be argued that low yield nuke could meet the neutrality

74CHARLES J. MOXLEY, JR; NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD at 936
75 Id at 78

requirement. However, radiation does not stop at borders and, considering their devastating effect, the criterion of neutrality would not be met.

Finally, another provision of *jus in bello* which could be used to assess the legality of nuclear threats is the prohibition to "order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on that basis."[76]According to the government of the Salomon islands, a threat or use of nuclear weapon would necessarily violate this provision.[77]The deterrent effect of a nuclear threat is based on their horrific power of destruction. Therefore, we think that the idea that there would be no survivors if the threat was carried out is inherent in this threat and agree with the government of the Salomons.

Our analysis leads us to conclude that threats to use nuclear weapons are unlawful under *jus in bello*, even if those weapons are low yield nukes. Does it make sense that threats could be legal under *Jus ad Bellum* but not in time of war? The only way to find threats legal during war time would be to separate them from the use. Can we say that it is artificial to consider that it is unlawful to threaten to do what it would be unlawful to do? On the other hand, would a threat be credible if it was impossible to accomplish it lawfully?

4. Legality of the Policy of Deterrence under *Jus in Bello*

Once again, we are uncertain of the legality of an action of deterrence which would not arise to a threat. Is the frontier between mere deterrence and threat the same under *jus ad bellum* and *jus in bello*? As we saw, this analysis could be seen as less relevant because, in time of war, States would resort to the use of force, not to the threat to use force. However, we already established that deterrence is highly relevant under *jus in bello*. If we consider that all actions of deterrence are threat, then deterrence is illegal under *jus in bello*. If we adopt the

76 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Art 40 8 June 1977, 1125 UNTS 3, available at: http://www.refworld.org/docid/3ae6b36b4.html [accessed 17 December 2015]

77Written Statement of Solomon Islands, Nuclear Weapons Advisory Opinion, pp. 25–6, para. 3.10

theory of the ICJ, then only the threats violating the principles of *jus in bello* are illegal.

D. Time frame

The last question that we need to consider regarding the legality of deterrence under *jus ad bellum* and *jus in bello* is when to apply those set of rules. *Jus ad bellum* applies in case of an armed attack, involving states or groups supported by states, crossing an international border. *Jus in bello* applies in case of an armed conflict and here we will only consider international armed conflict which involve states or groups sponsored by states and which cross international borders. The intensity between an armed attack and an armed conflict differ. For example, a threat of an imminent nuclear attack is an armed attack but not an armed conflict. In this case, the legality of this threat would only be assessed under *jus ad bellum*[78].

However, under some circumstances, *jus ad bellum* and *jus in bello* can be applied at the same time. One of those circumstances is occupation. If a State invades another State, it commits an armed attack which results in a situation of armed conflict. Therefore, both *jus ad bellum* and j*us in bello* apply[79]. In that case, to assess the legality of a policy of deterrence or of a threat, we would need to consider both the rules under j*us ad bellum* and under j*us in bello*. Recall that we consider nuclear threats to always be in violation of *jus in bello*. In a situation of occupation, could a nuclear threat be lawful if respecting j*us as bellum* considering that it would violate *jus in bello*?

Furthermore, is that configuration only limited to occupation? As we saw, nuclear threats would only be legal under *jus ad bellum* in extreme circumstances where the survival of a State is at stake. It seems that an armed conflict would necessarily be born from such circumstances and that therefore *jus ad bellum* and *jus in bello* would always apply at the same

78 GRO NYSTUEN, STUART CASEY-MASLEN AND ANNIE GOLDEN BERSAGEL, EDITORS, NUCLEAR WEAPONS UNDER INTERNATIONAL LAW at 64(Cambridge University Press 2014).
79 Id at 64

time. This leads to conclude that, in every situation where a nuclear threat could be used legally under *jus ad bellum*, *jus in bello* would actually render it unlawful. So the conclusion of the International Court is not only wrong in our opinion regarding *jus in bello* but also impossible to apply in practice. We believe that this can be explained by the fact that the Court could not really answer the question because of its political aspect.

## III. Perspectives on nuclear deterrence.

"International law represents, in essence, a struggle against the subjectivity of politics"[80]. This final part focuses on deterrence as a political strategy and tries to evaluate its effectiveness. Deterrence is not studied from a legal aspect anymore.

### A. The political aspect of the policy of deterrence

"This practice of certain nuclear States (deterrence) is within the realm of international politics, not that of law"[81] . This declaration of Judge Shi illustrates why the decision of the International Court of Justice was blurry and why there was no clear cut answer. The policy of deterrence is a political strategy that cannot be addressed purely as a legal issue. Some authors even argue that it is purely political but the Court disagreed and decided that it could not be dismissed as a pure political question[82]. The Court said that political implications were not relevant in the establishment of its jurisdiction. Could it be argued otherwise? Indeed the Court decided that it had jurisdiction on the matter, yet it acknowledged that it was uncertain that it would be able to give a "complete answer to the question".[83] Considering that we were able to conduct the legal analysis fully with the same factual elements that those of the Court, the

80 MARTTI KOSKENNIEMI, 'THE POLITICS OF INTERNATIONAL LAW' at 4,European Journal of International Law, Vol. 1 (1990)
81Declaration if Judge Shi at 1,35 I.L.M at 883

82 Advisory Opinion, at 234, para13
83 Id para19

reason for the Court partial answer can only be the political implications. One could argue that there is not much difference between declaring that it had no jurisdiction because of the political nature of the question and declaring that, despite this political nature it had jurisdiction, but refusing to answer because of the political considerations.

Elli Louka considers that the blurriness of the Advisory Opinion can be explained by the fact that the question mentioned “threats” and therefore deterrence.[84] According to her, it was impossible for the Court to declare that the threats to use nuclear weapons were either legal or illegal. Declaring them legal would have gone against non-proliferation efforts and the non-nuclear policy of many countries. On the other hand, declaring them illegal would have jeopardized international peace because nuclear deterrence is a big part of international relations and of the equilibrium between countries. The Court admitted that it took into consideration the fact that nuclear powers constantly use deterrence: “it (the Court) (can't) ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered to for many years”. However, we do not agree with Ellie Louka because, as we saw, declaring the use of nuclear weapons illegal in any circumstances would have rendered illegal to threaten to use them in any circumstances. Therefore, the answer to the question asked to the court was deemed to be blurry, because highly political, no matter if it had mentioning threats or not.

One important left out question is to determine if nuclear deterrence is an acceptable political strategy. It has been compared with terrorism because it relies on terror. Also, how can we justify that chemical and biological weapons have been banned but not nuclear?

Beyond determining if the policy of nuclear deterrence is morally acceptable,another important question is to know if it is effective. Indeed, it the policy of deterrence cannot be justified legally or morally, then it should be explained by its results.

84 ELLI LOUKA, NUCLEAR WEAPONS, JUSTICE AND THE LAW AT 309 (Edward Elgar, Cheltenham, UK)

**B. The Doubtful Effectiveness of Nuclear Deterrence**

According to Ward Wilson, nuclear deterrence provides three main benefits: a protection against attack with nuclear weapons, a protection against attacks with conventional weapons, and an indefinable diplomatic clout.[85] Furthermore, the view of the United States in front of the ICJ was that it "has contributed substantially during the past 50years to […] stability, avoidance of global conflict"[86]. However, some recent studies showed that the bombing of Hiroshima and Nagasaki didn't impact the outcome of WWII[87]. Furthermore, those studies made a parrarel with the terror bombing of cities during WWII and argued that those bombing did not have a deterrence impact either.

Then, isn't the effectiveness of nuclear deterrence damaged by all the risks it carries? Indeed, the nuclear policy of deterrence has been associated with the risks of precipitating a nuclear war; fostering an arms race; fostering nuclear proliferation; terrorists group accessing to nuclear weapons; degradation of conventional weapons capability; jeopardy of rule of law; accident during production, storage and disposal. [88]

Another fundamental risk of nuclear deterrence is that, if the threat was carried out, it would affect all countries. As Charles de Gaulle said: "two sides would have neither powers, not aws, nor cities, nor cultures, nor cradles, nor tombs". [89]

85 WARD WILSON, THE MYTH OF NUCLEAR DETERRENCE at 1, Non proliferation Review,Vol.15,No.3, (November2008)

86 United States Written Statement

87 WARD WILSON, RETHINKING THE UTILITY OF NUCLEAR WEAPONS. (2003) Can be found at http://www.strategicstudiesinstitute.army.mil/pubs/Parameters/Issues/WinterSpring_2013/5_Article_Wilson.pdf

88CHARLES J. MOXLEY, JR; NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD, Chapter 22 (2 Ed unpublished)

89 Speech of May 31, 1960, in Charles de Gaulle, Discours et Messages, 3 (Paris: Plon, 1970): 218

**C. The Tolerance of Threats**

« Threats are tolerated because they are necessary weapons in the diplomatic armoury »[90]. Considering the advantages of threats, shouldn't they be authorized ? Should they really follow the same regime as the use of force ? For J.C Barker, because states have been constantly using threats, it is now customary that they are lawful. [91]T.M Franck agrees and consider that Article 2(4) is dead[92]. If we consider that the prohibition of threats have been overlooked by curstomary international law, then the Advisory Opinion is not valid anymore. However, this position is questionable because it legitimates coercion as a diplomatic tool. But it allow states to avoid use of force by using threats instead. [93]

90 FRANCIS GRIMAL, at 5

91 J.CRAIG BARKER, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (London ; New York : Continuum, 2000), supra note 58 at 128.

92See T. M. Franck, 'Who killed Article 2(4)? Or: changing norms governing the use of force by states', American Journal of International Law64 (1970), 809–37.

93 THE CHARTER OF THE UNITED NATIONS, A COMMENTARY, 2nd ed, Volume 1 (Bruno Simma, Oxford University Press 2002) at 124

## Conclusion

Let us first consider that there is the policy of deterrence and inside this policy some actions that amount to illegal threats. To distinguish the legal deterrence and the illegal threats, standards are different under jus as bellum and jus in bello. Under Jus ad bellum, an action will be an unlawful threat if it violate political independence or territorial integrity; or if it violates the principles the United Nations; or if it is not proportional or necessary. If an action does not violate those principles but is mere deterrence, it would be legal. If an action is a threat, it could only be legal under extreme circumstances of self defense where the survival of the state would be at stake. Under jus in bello, an action will be an unlawful threat if it violates one or several of the main principles of International Humanitarian Law. Both of those standards can apply simultaneously in some circumstances. Now, let us consider that nuclear deterrence always amount to a threat because of the specificities of nuclear weapons. Then, the regime described above for threat will apply for all actions of deterrence. We believe that this second solution is the correct one.

However, what matter more than this legal analysis is the practice of the state. Indeed, they use deterrence and threats on a daily basis, nothwithstanding the Charter of the United Nations.