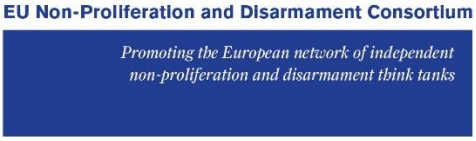

Nuclear Weapons and International Humanitarian Law – A doctrinal wormhole

Of doctrinal fission and captured thoughts

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Introduction:

"With nuclear weapons, humanity is living on a kind of suspended sentence",[1] declared Judge Bedjaoui while presiding the ICJ for the 1996 Advisory Opinion on the *Legality of the threat and use of nuclear weapons*.[2] The moratorium or time-out expressed by Judge Bedjaoui has translated into a deferment of international law, eroding its development and application to nuclear weapons, leaving the question to an unhelpful past and denying its established impact on our present and future. On the brink of the entry into force of the Treaty on the prohibition of nuclear weapons – set to enter into force on January 22nd, 2021 – it seems appropriate to reconsider the issue of nuclear weapons under international law and to challenge some rooted beliefs and views.

Although starting with a quote related to the 1996 ICJ Advisory Opinion might lack originality, it appeared to us as the best opening for a literature review on nuclear weapons and international humanitarian law, as this opinion is the source of the majority of the works of interest and has laid down the foundation stones of the legal thinking on this matter. Also, as this opinion opened a door, created a loophole, that has nurtured debate for more than twenty years. We would like not only to assess the subsequent controversy, but also the very nature and foundation of this loophole. But perhaps was it a mere reflection of a preexisting vagueness.

Despite the weight of nuclear weapons on global security, politics, law and economy, *inter alia,* international jurists do not seem to be especially drawn to this subject nowadays.[3] Nuclear weapons are treated fairly infrequently in specialist publications, almost in a resigned impulse, as if it was scarcely significant to international law. As if everything that needed to be said and written about nuclear weapons already existed and the whole matter was exhausted from an international legal perspective. Yet, it seems that the nuclear weapons issue has always moderately attracted jurists. It might be explained, at least in part by the highly political dimension of the question.[4] In that sense, the ICRC Commentary on the Additional Protocols

[1] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, para.2-3.
[2] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226.
[3] "Arguably, given the hugely destructive effects of all nuclear weapons, whatever their explosive yields, too few lawyers are currently involved in reflections and discussions in this area", NYSTUEN (G.), CASEY-MASLEN (S.) and GOLDEN BERSAGEL (A.) (eds), *Nuclear Weapons under International Law*, Cambridge, Cambridge University Press, 2014, xvii.
[4] In that regard, Burns Weston wrote in 1982, "concededly, there is a tendency among international lawyers not to take up the debate, due in part to a sense of despondency about the influence of international law upon issues of

to the Geneva conventions published in 1987 did not properly deal with nuclear weapons as their deterrence "function" "is outside the scope of international humanitarian law". [5] Ian Brownlie underlined this lack of interest as early as 1965 stating that it could be explained in light of "a feeling of despondency arising from the undoubtedly correct assumption that, where matters of high policy are concerned, the influence of international law is minimal". [6] But he further wrote that "as a comparative assessment of the role of the law this is incontrovertible and yet it cannot be said to justify the tacit removal of certain subjects from the agenda".[7] In fact, the ICJ itself did not deny its jurisdiction in 1996 despite the highly politicized nature of the nuclear issue[8].

Although the humanitarian approach has prevailed in recent international negotiations concerning nuclear weapons – especially with the so-called « Humanitarian initiative » – , [9] however, it seems that humanitarian law has progressively lost its interest in these same negotiations. In fact, whereas disarmament law, treaty law, international trade law and other branches of International law have been evolving concerning matters of nuclear weapons, international humanitarian law appears to be very still, as if "suspended", in the words of Judge Bedjaoui.[10] Therefore, this review will focus on international humanitarian law or *jus in bello* in order to investigate its stillness – or that of the doctrine – on the nuclear weapons issue.

As "the goal of all science […] should be to explain the explicable, predict the predictable, and equally important, separate the knowable from the unknowable", [11] our review will try to assess the way the doctrine[12] has explained and predicted the international humanitarian law and nuclear weapons nexus. But we will also investigate its attitude towards

high policy", WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *28 McGill LJ*, 543, 1982, p.545. More recently, Gro Nystuen and Stuart Casey-Maslen observed that "the fabric of the world's security politics as it has evolved since 1945 has made it very difficult to discuss nuclear weapons as weapons rather than as an overpowering political and security issue", NYSTUEN (G.) et al., *Nuclear Weapons under International Law*, *op.cit.,* p.1-2.

[5] SANDOZ (Y.), SWINARSKI (C.), and ZIMMERMANN (Z.) (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva: ICRC, Martinus Nijhoff, 1987, p.596.

[6] BROWNLIE (I.), "Some Legal Aspects of the Use of Nuclear Weapons", *International and Comparative Law Quarterly*, vol. 14, no. 2, April 1965, p. 437-451, p.437.

[7] *Ibidem.*

[8] "The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute' ", *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 234, para.13.

[9] See the Oslo Conference on the Humanitarian Impact of Nuclear Weapons, March 2013; The Nayarit Conference of February 2014; The Vienna Conference of December 2014.

[10] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p.226, para.2-3.

[11] Timur Kuran, "The Inevitability of Future Revolutionary Surprises," *The American Journal of Sociology*, Vol. 100, No. 6, 1995, p. 1534.

[12] The doctrine and the literature of interest being considered for their contribution to human sciences.

the knowable, and as far as nuclear weapons are concerned, the significant unknowable.[13] Therefore, this review will focus on both the French and English legal literature that deals with nuclear weapons under international humanitarian law (IHL). As any literature review, it does not aim to encompass all existing literature on the subject, but rather to draw an overview of the main works in order to determine the state of knowledge and propose a research strategy to either reveal that the controversy is void, or to adjudicate it. I will thus favor landmark works while trying to include more heterogenous and dissenting voices. As my aim is to give a glance at the state of the art of nuclear weapons under International humanitarian law, the most recent works will be compared to some earlier relevant works that make a real contribution or bring an original light on the issue.

This review will embrace a temporal approach[14] in order to reveal multiple peculiarities that link international law and time when it comes to nuclear weapons. A chronological perspective will allow us to underline numerous evolutions – both quantitative and qualitative – in the way the subject is treated by jurists.

First, interest in the subject has waxed and waned, with most works having been published at key moments, mainly around the 1996 ICJ Advisory Opinion and with every political proliferation issue – i.e. after the adoption of the TPNW, as will foreseeably happen with its entry into force. But it should be noted that each wave brings a new angle, focusing either on disarmament, non-proliferation, arms control, safeguards, humanitarian considerations, international humanitarian law rules, nuclear security, nuclear terrorism. Nowadays the issue is mainly confined to a brief sub-section in books and manuals dealing with international humanitarian law and law of armed conflicts.[15] In fact, it might seem that this

[13] "Bernard Brodie is frequently quoted as summarizing the nuclear condition as follows: 'Everything about the atomic bomb is overshadowed by the twin facts that it exists and that its destructive power is fantastically great'. I would contend that there is another set of twin facts. They are two known unknowables: we do not know, cannot know and will never know in advance when exactly nuclear war will happen and whether humankind will survive it. This is all the more important as the nuclear discourse often ignores the first unknowable (the question of when) and mischaracterizes the second one (the question of survivability) as a knowable entity. The latter mischaracterization produces two opposite biases: a survivability bias and an extinction bias, both premised on an overstatement of what can be known for sure, neglecting the role of imagined futures, value judgments and memories of the past in the construction of such knowledge", PELOPIDAS (B.), "BOOK SYMPOSIUM, Power, luck, and scholarly responsibility at the end of the world(s)", *International Theory,* 2020, p.5-6.

[14] An approach relating to time, considering the attitude of the doctrine in different periods, without necessarily being linear, nor chronological.

[15] For example, Henckaerts' and Doswlad-Beck's *Customary International Humanitarian Law* deals with nuclear weapons in one page only, whereas Sassoli's *International humanitarian law : rules, controversies, and solutions to problems arising in warfare* dedicates only two pages to our subject of interest. See: HENCKAERTS (J.), DOSWALD-BECK (L.), ALVERMANN (C.), DÖRMANN (K.), & ROLLE (B.), *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, chapter 22, p.255; SASSOLI (M.), NAGLER

subject used to be discussed widely and drew the attention of many experts and non-experts. And that there is a tendency for experts specialized in disarmament and nuclear weapons to gradually become the only ones interested in it. Some see this shifting interest as a "relief",[16] for nuclear weapons' use appears to become merely "theoretical" [17] as time passes. Still, nuclear weapons were used, twice, in 1945 and detonated more than 2000 times since[18]. The fact that they were not used since does not mean that they never will be. Their non-use in anger for seventy-five years rather than establishing that they won't be used again, may simply indicate that they are used every seventy-five years. Moreover, the qualification of this issue as "theoretical" seems to rely on the – questionable[19] – assumption of controllability of nuclear weapons. Also, defining them as deterrent weapons does not render them inoperable. Quite to the contrary, deterrent policies rely on constant preparation and readiness to use nuclear weapons. They justify themselves in light of a possible nuclear attack which is not seen as mere fantasy. In the meantime, nuclear weapons still exist, and states are still investing enormous amounts to develop their arsenals,[20] which makes the question of their legal regime relevant.

Second, a chronological approach will reveal a shift in both the substantive and methodological assumptions of jurists on the subject. In fact, if many differences of understanding and methodology applied to nuclear weapons in the works of interest can be explained by subjective background and positions,[21] some shifts appear with time. In that

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PATRICK (S.), *International humanitarian law : rules, controversies, and solutions to problems arising in warfare,* Cheltenham, Edward Elgar Publishing, 2019, p.394-396, §8.404-407.

[16] In that respect, Charles Garraway wrote as a foreword to *Nuclear Weapons under International Law :"It is a relief to me – and to many – that the argument has now shifted from the political suspense of the Cold War into the more rarefied atmosphere of academia",* NYSTUEN (G.), et al., *Nuclear Weapons under International Law, op.cit.,* xv.

[17] "The question of whether the use of nuclear weapons by states not bound by this new treaty would nonetheless be prohibited by IHL as necessarily violating rules applicable to the use of any weapon is fortunately theoretical because nuclear weapons have not been used since their first use in 1945. It is nevertheless an important question, SASSOLI (M.), NAGLER PATRICK (S.), *International humanitarian law : rules, controversies, and solutions to problems arising in warfare, op.cit.*, p.394-395.

[18] See in this regard the Arms Control Association's tally : Arms Control Association "The Nuclear Testing Tally", last reviewed in February 2019, available online : https://www.armscontrol.org/factsheets/nucleartesttally

[19] PELOPIDAS (B.), "The unbearable lightness of luck: Three sources of overconfidence in the manageability of nuclear crises", *European Journal of International Security, 2*(2), 2017, p.240-262.

[20] "The fact remains, however, that nuclear weapons are still being produced, maintained and stockpiled in most parts of the world. The issue of legal regulation of nuclear weapons therefore remains vital because the potential for large-scale destruction and suffering as a consequence of their use is so enormous", NYSTUEN (G.) et al., *Nuclear Weapons under International Law*, *op.cit.,* p.483.

[21] "The point, rather, is to acknowledge unabashedly the oft-disregarded truth that subjective factors such as position and influence (like culture, class, interest, personality, and past exposure to crisis) commonly condition legal decision, both advertently and inadvertently. They affect not only the substance of our legal judgments; they affect also the evidence we select and the criteria we adopt to reach them - indeed, even our assumptions about the legal system that makes them possible in the first place (the nature of which must be established before we can ascertain the content of the norms that help order our judgments and the system as a whole)", WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *28 McGill LJ*, 543, 1982, p.545.

regard, going through the literature, a particular aspect caught our attention. No matter how opposed and contentious the approaches and conclusions of the contemporary jurists are, a common assumption seems to appear: considering the subject of interest as being outdated. Indeed, nuclear weapons are not considered to be an urgent or topical issue anymore for most jurists, whatever their background and understanding of nuclear weapons legality. The subject is perceived as having received considerable attention when it was an up-to-date concern, however these days are believed to be behind us. Going through the main international law reviews and journals, astonishingly few articles on nuclear weapons can be found[22]. Based on this observation, I would like to formulate the following question: why are nuclear weapons perceived by jurists, as an outdated subject while they still exist, despite many new elements [23] (i.e. adoption and ongoing ratification of the TPNW, end of the INF treaty, ongoing investment and development of nuclear military technology such as tactical weapons) and more importantly despite the lack of a clear-cut answer to their lawfulness?[24]

I would like to question the origins and foundations of this "belief" [25] – this qualification seems to be particularly appropriate in the international legal realm as described by Jean D'Aspremont.[26] I will further try to reveal the underlying confinement of this subject in the past – as if it was inevitably trapped. Henceforth, could this belief and the entailed confinement be

[22] Launching an advanced research on main international law reviews' websites, too few relevant articles that deal with nuclear weapons under international law can be found. Rarer still are those dealing with nuclear weapons under international humanitarian law and which are the focus of this review. In fact, in the *American Journal of International Law*, out of the 244 results given for "nuclear weapons", only 8 articles are relevant. In the *European Journal of International Law*, out of the 184 results given for "nuclear weapons", only 1 article includes these words in its title. In Brill's *Journal of International Humanitarian Legal Studies*, out of the 50 results given for "nuclear weapons", no article includes these words in its title. In the *Yearbook of International Humanitarian Law*, only 1 result is given for "nuclear weapons". In the *Asian Journal of International Law*, no article includes "nuclear weapons" in its title. In the *Chinese Journal of International Law*, only 1 article deals with the central Asia Nuclear Weapons Free Zone, and 1 with the NPT. In the *Annuaire de l'Institut de Droit International*, no relevant results can be found between 2003 and 2015. Only in the *International Review of the Red Cross* can 51 relatively relevant results be found for "nuclear weapons".

[23] "It might be easy to conclude that nothing new can be said on the subject. However, recent developments have brought renewed attention to the issue", MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *International Review of the Red Cross, 97*(899), 2015, p.621-645, p.622.

[24] "The exact limitations of what is prohibited by international humanitarian law as regards the use of nuclear weapons during armed conflict remains to be determined. This question does not really seem to have ever been resolved", SANDOZ (Y.), SWINARSKI (C.), and ZIMMERMANN (Z.) (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, *op.cit.*, p. 593.

[25] "The literature review is an attempt to summarize the existing state of knowledge about a subject […] Knowledge, in this context, does not necessarily mean 'Truth' with a capital T. Rather knowledge refers to beliefs", KNOPF (J.W.), "Doing a literature review", *PS, Political Science & Politics*, Jan 2006; 39, 1; ProQuest Research Library, p. 128.

[26] Jean D'Aspremont writes that *« international lawyers – whether as scholars, judges, counsels, militants or teachers – engage with the problems of the world through the deployment of a belief system »*, D'ASPREMONT (J.), *International Law as a belief system*, *op.cit.,* xi.

obstructing any evolution of international law and its applicability[27] and application to nuclear weapons? Does this deadlock prevent the "creative evolution" [28] and development of international law to further grasp nuclear weapons?

The review will proceed as follows. The ICJ opinion will be our starting point, we will try to assess whether it was a turning point that shaped the IHL / nuclear weapons nexus as perceived by the doctrine. Secondly, we will investigate the peculiarities of IHL and the way it oriented IHL experts' writings as opposed to non-IHL experts. Lastly, we will explore both the "unanswered" and "unknowable" regarding the application of IHL to nuclear weapons and the attitude of the doctrine thereupon. As a conclusion, we will attempt to explain the lack of interest of contemporary legal experts for nuclear weapons in light of our developments.

[27] The question of the applicability of IHL to nuclear weapons is less contentious than that of its application as nuclear weapon states admit that the use of nuclear weapons is regulated by IHL rules. In this respect, the ICJ stated in its Advisory Opinion that "none of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints", *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, op.cit.,* para.86, p.260. See also, US Secretary of Defence, *Nuclear Employment Strategy of the United States specified in Section 491 of 10 USC*, June 2013, p.4-5 ; UK Ministry of Defence, *Joint Service Manual of the Law of Armed Conflict,* Joint Service Publication No. 383, 2004, p.117 n.82, Chapter 5.

[28] BERGSON (H.), *Creative evolution,* Lanham, New York, University press of America, 1984.

I- The 1996 ICJ Advisory Opinion: a starting point and a deadlock

As things stand to this day, nuclear weapons are not expressly and completely prohibited by any international legal tool[29]. And this makes it difficult or at least arguable to categorically settle their lawfulness under international law and international humanitarian law more specifically. In that respect, the Advisory Opinion rendered by the International Court of Justice in 1996 on the Legality of the Threat or Use of Nuclear Weapons[30] transcribes well the ruling legal uncertainty. In the absence of an explicit prohibition of nuclear weapons by a specific tool – conventional or customary – there remains room for debate and research.

The 1996 Advisory Opinion undoubtedly constitutes a point of reference for the doctrine, be it consensual when it comes to its precedential value or conflictual when it comes to its substantive interpretation. Accordingly, this section will successively consider the importance given to the Advisory Opinion and its interpretation by the legal doctrine.

1- The 1996 Advisory opinion as a consensual starting point

The 1996 ICJ Advisory Opinion acted as a starting point that exacerbated jurists' interest and concern for nuclear weapons. The General Assembly had "urgently" addressed the Court with the following question "Is the threat or use of nuclear weapons in any circumstances permitted under international law?"[31] Eighteen months later, the Court rendered an opinion that would be controversial for some twenty years. 1996 and the few years that followed can be described as the blooming season of the works on nuclear weapons under international humanitarian law. This opinion and the dissenting opinions of the judges stimulated publications.

Although to this day limited literature has to do precisely and exclusively with nuclear weapons under IHL – in chronological order, Burroughs and Cabasso[32], Clark[33], Becker[34],

[29] The Treaty on the Prohibition of Nuclear Weapons (TPNW) of 2017 having not yet entered into force.
[30] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 226.
[31] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996.*
[32] BURROUGHS (J.), CABASSO (J.), "Nukes on Trial," *The Bulletin of the Atomic Scientists*, March/April 1996, pp. 41-45.
[33] CLARK (R.S.), *The laws of armed conflict and the use or threat of use of nuclear weapons*, Criminal Law Forum, June 1996, Volume 7, Issue 2, pp. 265–298
[34] BEKKER (P.), "Legality of the Use by a State of Nuclear Weapons in Armed Conflict", *American Journal of International Law, 91*(1), 1997, p.134-138.

Burroughs[35], Christakis and Lanfranchi[36], Doswald-Beck[37], Falk[38], Greenwood[39], Mccormack[40], Rosenne[41], Azar[42],Boisson de Chazournes and Sands[43], Gardam[44], Bugnion[45], Koppe[46], Granoff and Granoff[47], Moxley, Burroughs and Granoff[48], Thurer[49], Nystuen, Casey Malsen and Golden Bersagel[50], Maresca et Mitchell[51] and Burroughs[52] – most of those works focus on the ICJ Advisory opinion as they were published subsequently. All of these publications at least refer to the ICJ Advisory Opinion, when they do not completely base their reflection and outline on it.

The Advisory Opinion remains today the first and most universally considered ruling on nuclear weapon's legality. Most of the considered authors cite the Advisory Opinion as an indisputable authority on the matter, sometimes even restating some rather contentious and

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[35] BURROUGHS (J.), *The Legality of Threat or Use of Nuclear Weapons,* Münster: LIT Verlag, 1997, pp. 153-155.
[36] CHRISTAKIS (T.), LANFRANCHI (M.-P.), *La licéité de l'emploi d'armes nucléaires devant la Cour internationale de justice, analyse et documents*, Paris, Economica, 1997.
[37] DOSWALD-BECK (L.), "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross, 37*(316), 1997, p. 35-55.
[38] FALK (R.A.), "Nuclear weapons, international law and the World Court: a historic encounter", *American Journal of International Law* 91, 1997, p.64–75.
[39] GREENWOOD (C.), "The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law", *International Review of the Red Cross,37*(316), 1997, p.65-75.
[40] MCCORMACK (T.), "A non liquet on nuclear weapons — The ICJ avoids the application of general principles of international humanitarian law", *International Review of the Red Cross, 37*(316), 1997, p. 76-91.
[41] ROSENNE (S.), "The Nuclear Weapons Advisory Opinion of 8 July 1996", *Israel Yearbook on Human Rights*, Vol. 27, 1997.
[42] AZAR (A.), *Les opinions des juges dans l'avis consultatif sur la licéité de la menace ou de l'emploi d'armes nucléaires, Avis du 8 juillet 1996*, Bruxelles, Bruylant, 1998.
[43] BOISSON DE CHAZOURNES (L.), SANDS (P.J.), *International law, the international Court of justice and nuclear weapons*, Cambridge, Cambridge university press, 1999.
[44] GARDAM (J.), "The Contribution of the International Court of Justice to International Humanitarian Law", *Leiden Journal of International Law, 14*(2), 2001, p.349-365.
[45] BUGNION (F.), 'The International Committee of the Red Cross and nuclear weapons: from Hiroshima to the dawn of the 21st century', *International Review of the Red Cross* 87(859), 2005, 511–24.
[46] KOPPE (E.V.), *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict,* Bloomsbury Publishing, 25 April 2008.
[47] GRANOFF (D.) & GRANOFF (J.), "International humanitarian law and nuclear weapons: Irreconcilable differences", *Bulletin of the Atomic Scientists*, 67:6, 2011, p.53-62.
[48] MOXLEY (C.J.), BURROUGHS (J.) GRANOFF (J.), "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *Fordham International Law Journal*, *Volume* 34, *Issue* 4, 2011, *Article* 1.
[49] THURER (D.), "The Legality of the Threat or Use of Nuclear Weapons: The ICJ Advisory Opinion Reconsidered", in Volkerrecht und die Dynamik der Menschenrechte: Liber Amicorum Wolfram Karl, Wien, 2012.
[50] NYSTUEN (G.), CASEY-MASLEN (S.) and GOLDEN BERSAGEL (A.) (eds), *Nuclear Weapons under International Law*, Cambridge, Cambridge University Press, 2014, Part II Nuclear Weapons and international humanitarian law, p.89-190.
[51] MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *International Review of the Red Cross, 97*(899), 2015, p.621-645. doi:10.1017/S1816383116000291
[52] BURROUGHS (J.), "Looking Back: The 1996 Advisory Opinion of the International Court of Justice", July/August 2016, published online on: *Arms Control Association* (https://www.armscontrol.org).

questionable parts of the Opinion – such as the Brownlie formula on threat and the extreme circumstances paragraph[53].

In fact, even those who tend to relativize its relevance and criticize its content still largely refer to this opinion. In that respect, during a Round Table held by the San Remo Institute in 2016, Nystuen stated : "I think perhaps the Advisory Opinion has been given too much weight in the international law debate pertaining to nuclear weapons – it is just an Advisory Opinion; not some kind of international lex superior".[54] Yet, her intervention largely relies on the Opinion.

However, considering the ICJ opinion as a cornerstone, as most of doctrinal works do, is a restraint in itself given the numerous assumptions and uncertainties the opinion contains.

2- The 1996 Advisory Opinion as a point of doctrinal fission

If the importance of the ICJ opinion is very little discussed, its substantial contribution is subject to endless debate. In its Advisory Opinion, the ICJ opened a loophole, allowing contentious interpretations of its words[55], not only when it comes to the details, but also to the overall finding. Yet, what is certain is that this opinion dismissed those who claimed that laws of war where silenced by nuclear weapons.[56] In fact, IHL is unanimously recognized as being applicable to nuclear weapons, even in army field manuals.[57] The question is not one of applicability of IHL to nuclear weapons anymore, but rather one of practical and substantive application.

The Advisory Opinion certainly scattered the doctrine that still disagrees on the interpretation of the finding of the Court and therefore, on the lawfulness or unlawfulness of nuclear weapons under international humanitarian law. The ICJ Advisory Opinion is today predominantly interpreted as indicating unlawfulness of nuclear weapons' use in most cases.

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[53] Both will be further detailed.

[54] NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", p. 220 in Institut international de droit humanitaire, *The proliferation of weapons of mass destruction and international humanitarian law*, San Remo, Villa Nobel, 2007.

[55] According to Nystuen, « there have been very different opinions as to whether the Advisory Opinion clarified or confused questions pertaining to IHL and nuclear weapons", NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", *op.cit.,* p. 220.

[56] As cited by Weston (B.), p,546, footnote 9: Stowell, *The Laws of War and the Atomic Bomb* (1945) 39 Am. J. Int'l L. 784; Thomas, *Atomic Bombs in International Society* (1945) 39 Am. **J.**Int'l L. 736; and Thomas, *Atomic Warfare and International Law*(1946) 40 Proc. Am. Soc. Int'l L. 84. *Cf.* Baxter, *The Role of Law in Modern War* (1953) 47 Proc. Am. Soc. Int'l L. 90.

[57] For instance, Naval Commander's Handbook, U.S. Dep't of the Navy, Naval War Pub. no. 1-14m, *The commander's handbook on the law of naval operations,* 2007, § 10.1-10.2.1; U.S. Dep't of the Air Force, Doctrine doc. no. 2-12, *Nuclear Operations,* 2009, at 8; U.S. Dep't of the Army, Field manual no. fm27-10, *The law of land warfare,* 1956, with change no. 1 (july 15, 1976), at 18.

This is one of the reasons why nuclear weapons are not considered to deserve attention anymore. But this presumption of unlawfulness is not precisely delimited, nor unanimously accepted. In fact, it is mainly amongst jurists and humanitarians that the Advisory Opinion is understood to have stated unlawfulness of nuclear weapon's use – that is however subject to various interpretations. Whereas few jurists[58] and government officials understand the opinion as allowing use of nuclear weapons in particular circumstances.

The general disagreement surrounding the interpretation of the Advisory Opinion disaggregates into more specific or detailed controversies. One of the main points of contention and that is directly related to the finding of either lawfulness or unlawfulness is the interpretation of paragraph 105.2.E;

"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".[59]

The doctrinal opposition of views is related to the reading of the structure of the given paragraph; does the first part indicate the general rule to which the second part is an exception? Are the criteria of both parts cumulative therefore independent from one another? For some of those who rely on the first reading of the structure, this paragraph allows *jus ad bellum* to override *jus in bello* in extreme circumstances and therefore establishes – at least – partial lawfulness[60]. Others, although relying on the same reading of the structure, denounce the extreme circumstances derogation as leading to a grotesque and absurd result that is in complete

[58] Rudesill, interprets the ICJ opinion's dodge as allowing the use of nuclear weapons in self-defense *"With the status quo characterized by P-5 possession of thousands of nuclear weapons and by decades of argument and evidence that deterrence is linked to state survival, a presumption of legality was the default in the wake of the deadlocked court's dodge*" RUDESILL (D.), "Regulating Tactical Nuclear Weapons", *Georgetown Law Journal*, Vol. 102, No. 99, 2013, p. 124. Also see in that sense, CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel*, Lyon, CLESID – Université Jean Moulin Lyon 3, 2000, révisée en 2005.
[59] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 266, §105.2.E.
[60] "En donnant à la victime d'une agression la faculté de ne pas se considérer liée par le jus in bello, la Cour suggère que le jus ad bellum l'emporte sur le jus in bello et que la réserve du cas d'exception établit une hiérarchie entre les 'droits fondamentaux de l'Etat' et les principes fondamentaux du DIH". CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel, op.cit.*, p. 101.

opposition to the essence and meaning of IHL.[61] Koskenniemi condemns this derogation that "tends to devour the rule altogether".[62] A more holistic interpretation of the paragraph and of the Opinion altogether suggests that "while the language of the ICJ decision was unclear at some points, the totality of the ICJ decision […] was clear that a state's exercise of its right of self-defense, whether it be in 'extreme' or non-extreme self- defense, is subject to IHL".[63] Few other jurists suggest that the contentious paragraph might indicate that nuclear weapons could potentially conform to IHL rules in some cases.[64]

But maybe was the opinion precisely voted because each judge understood these words in a different way. Especially when considering how cast the vote was[65]. It is worth mentioning that all fourteen judges either wrote individual opinions or made declarations.[66] For Doswald Beck "it may be more appropriate to see the two sentences as representing the two different points of view rather than one thought".[67]

Another major point of contention can be found in paragraph 105.D on the threat of nuclear weapons. To wonder about the lawfulness of the threat of nuclear weapons under IHL is to make the assumption that IHL applies to threats. Yet, IHL is only explicitly concerned with threats in two cases; threats of denial of quarter as in article 40 of Additional Protocol I[68] and threats of terror against the civilian population as in article 51(2) of Additional Protocol I. The view that the same IHL rules that prohibit the use of nuclear weapons also prohibit the threat of such use goes back to what is called the Brownlie formula formulated as follows by

[61] Nystuen expressed in that sense : "The body of law that constitutes IHL is in itself an emergency regime and, therefore, it does not contain any basis for derogation in times of crisis. It cannot be modified or set aside because of alleged or actual deficiencies in the legal basis for an armed conflict or because of the seriousness of an armed conflict" , ", NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", *op.cit.*, p. 222.

[62] KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *Leiden Journal of International Law* 10, 137, 1997, 137–62., p.149.

[63] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 674.

[64] Doswald-Beck writes in that respect ; "The only way for the statement in paragraph 2E to be in conformity with the previous statement of the Court in paragraphs 41 and 42 is that indicated by the purely positivist analysis of Judge Higgins, namely, that in her opinion nuclear weapons are not necessarily inherently indiscriminate and that in certain extreme circumstances their use would infringe neither the rule of proportionality nor the rule prohibiting unnecessary suffering to combatants. However, the majority of judges actually found nuclear weapons to be inherently unlawful in humanitarian law and Judge Higgins delivered a Dissenting Opinion. », DOSWALD-BECK (L.), "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *op.cit.,* p. 54.

[65] Paragraph 2.E having been voted by seven votes to seven with the president's casting voice.

[66]Kazuomi Ouchi, "The Threat or Use of Nuclear Weapons: Discernible Legal Policies of the Judges of the International Court of Justice", 13 Conn. J. Int'l L. 107, 1998.

[67] DOSWALD-BECK (L.), "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *op.cit.*, p. 42.

[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Ian Brownlie in the XXth century : "[if] the promise is to resort to force in conditions in which no justification for the use of force exists, the threat is itself illegal."[69] No conventional nor customary legal foundation can be found to this formula. The only enshrinement of this doctrinal formula is the 1996 ICJ Opinion 78th paragraph that states: "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."[70] Based on this, the doctrine had different reactions. In fact, as some took the ICJ's words for established law[71], others denounced such attitude[72] considering that the Court "gave an explicit statement of law"[73] without any explanation.[74] Clearly the legal value of the Court's interpretation is in question and that is a much more fundamental issue.

However, could threats of nuclear weapons "constitute violations of both" of articles 40 and 51 of Additional Protocol I?[75] Furthermore, will "the use of nuclear weapons […] always violate these rules"?[76] This question calls for a practical assessment that has not been made by the Court in view of the insufficient "elements of fact at its disposal".[77] It also implies a wider questioning pertaining to the very definition of threats. In the absence of a consensual definition of threats, how can the lawfulness of the threat of nuclear weapons be settled? Does the mere possession of nuclear weapons constitute a threat?[78] Are only explicit threats considered? Are

[69] BROWNLIE (I.), *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963., p. 364.
[70] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, §78.
[71] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.*, p. 606.
[72] After citing Moxley, Burroughs and Granoff's article, Nystuen observes "these authors do not produce any independent legal argumentation for why threats of the use of a weapon should be generally banned under IHL. They simply repeat the assertion made by the ICJ – an assertion that, as noted above, lacks legal reasoning.", NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.*, p. 161.
[73] NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.,* p.157. Moreover, "the fact that there are two explicit provisions on threats in AP I suggests that there is no general prohibition on threats of violating provisions in AP I, as the Court suggests that there is", NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", *op.cit.*, p. 225.
[74] "There was also no indication of the basis of this statement", DOSWALD-BECK (L.), "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *op.cit.,* p. 49.
[75] NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", *op.cit.*, p. 224.
[76] NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", *op.cit.*, p. 224.
[77] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 44.
[78] "An important point seems to be overlooked in the request, namely a possibility that nuclear weapons may well be considered to constitute a 'threat' merely by being in a State's possession or being under production by a State, considering that the phrase *'threat or* use of nuclear weapons' (emphasis added) was first used in the request while the phrase 'the use *or threat of use* of nuclear weapons' (emphasis added) had long been employed in the United Nations resolutions." *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996, I.C.J 226, 324-27, July 8, da, J. dissenting, para. 4.

implicit threats included? Does the threat have to be credible? Nuclear weapons are once more, a mere catalyzer of wider debates fostering the international legal experts' community.

From there, the question of the lawfulness of deterrent policies has been raised. Although the Court itself decided not to settle the matter,[79] some have considered its ruling as indicating unlawfulness of deterrent policies as constant threats[80]. Yet, if we stand by the view that threats are not necessarily unlawful under IHL – except for articles 40 and 51 of Additional Protocol I, then the grounds for unlawfulness of deterrent policies are undermined. Even more importantly, considering deterrent policies' lawfulness with an IHL lens participates in the *in bello* / *ad bellum* conflation. But such conflation is not limited to the paragraph on threats. Indeed, hints to that effect can be found throughout the opinion.

The Advisory Opinion considered both *in bello* and *ad bellum* regimes. Some paragraphs are so ambiguous that they have created contentious reactions in the literature, especially the extreme circumstances paragraph and the one on threats. These paragraphs have been described as putting the IHL protection system at risk altogether [81] by "confus[ing] *jus ad bellum* and *jus in bello"*.[82] Such evidence can be found in the classification by some authors of the "right of self-defense" as an IHL principle.[83] Yet, is this conflation related to the very nature of nuclear weapons and to what some have called the "nuclear aporia"? [84]

[79] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 254, §67

[80] GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.*, p. 59.

[81] "If jus ad bellum considerations are used to determine to what extent IHL applies, then the legal regime for protecting those affected by armed conflict will disintegrate", NYSTUEN (G.) "Nuclear weapons: IHL considerations revisistd, 20 years after the ICJ Advisory Opinion", *op.cit.*, p. 225. "To allow the necessities of self defence to override the principles of humanitarian law would put at risk all the progress in that law which has been made over the last hundred years or so and raise the spectre of a return to theories of 'just war'" GREENWOOD (C.), "The Advisory Opinion on nuclear weapons and the contribution of the International Court to international humanitarian law", *International Red Cross Review*, 316, 1997, p. 65-75.

[82] SASSOLI (M.), NAGLER PATRICK (S.), *International humanitarian law : rules, controversies, and solutions to problems arising in warfare*, *op.cit.,* p. 395.

[83] GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.*; MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.*

[84] Cf. CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel, op.cit.*, p. 79 ; Also, COUSSIRAT-COUSTERE (V.), "Armes nucleaires et droit international. A propos des avis consultatifs du 8 juillet 1996 de la Cour internationale de Justice", *Annuaire Français de Droit International*, 1996, 42 , pp. 337-356, p. 338.

3- The 1996 *Non liquet* as a doctrinal wormhole

Whatever the exact understanding of the lawfulness of nuclear weapons, most jurists seem to read the opinion as a *non liquet*[85]. Does this *non liquet* qualification refer to an insufficiency in factual information necessary to judge the case or an insufficiency in the law? When reading paragraph 105, its seems like there was a lack in both factual and legal elements: "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".[86]

On the legal aspect, as law does not expressly regulate nuclear weapons, their lawfulness and the lawfulness of their use are subject to views and interpretation. On the factual aspect, the technical information made publicly available is not sufficient. Moreover, there is a need for contextual information related to the precise circumstances of a specific use in order to assess the lawfulness of nuclear weapons in regard to IHL principles. In Koskenniemi's words, "going any further would have required an appreciation not only of uncertain technical and factual information but also of alternative 'scenarios' involving 'factors' whose number cannot be limited and whose relevance cannot be assessed in advance".[87]

In fine, the 1996 Advisory Opinion, which stands as the sole judicial reference on nuclear weapons' lawfulness under IHL gave little clear answers. Or maybe did this *non liquet* give to everybody what they expected.[88] Some read in this nebula a "conflict of norms",[89] others a "disclaimer"[90] or even a "deadlocked […] dodge".[91] Yet, this dodge found advocates which

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[85] Cf ANASTASSOV (A.), "International humanitarian law, nuclear weapons and the prospects for nuclear disarmament", *Recherches et documents*, issue 04, Paris, Fondation pour la Recherche Stratégique, Novembre 2013, p.14 ; MCCORMACK (T.), "A non liquet on nuclear weapons — The ICJ avoids the application of general principles of international humanitarian law", *International Review of the Red Cross, 37*(316), 1997, p.76-91.

[86] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 266, §105.E.

[87] KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.*, p. 151.

[88] "Face à l'intensité politique de la controverse, la CIJ a préféré ne pas trancher et ouvrir la voie à des interprétations contradictoires de l'avis où chacun peut lire ce qu'il veut. », CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel*, *op.cit.*, p. 100.

[89] "Conflit de normes", CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel*, *op.cit.*, p. 101.

[90] "Probably because the Court issued a **'disclaimer'** in declaring the question non liquet, the Advisory Opinion made no attempt to justify this inference with legal reasoning », (emphasize added), NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.*, p. 150.

[91] "Michael Reisman observes that the I.C.J.'s attempted finessing of its conflicted thinking failed, tending to legitimize nuclear weapons as an instrument of war. With the status quo characterized by P-5 possession of thousands of nuclear weapons and by decades of argument and evidence that deterrence is linked to state survival, a presumption of legality was the default in the wake of the deadlocked court's dodge", RUDESILL (D.), "Regulating Tactical Nuclear Weapons", *op.cit*., p. 124.

were convinced of the virtues of this "beneficial silence"[92] as it avoided "addressing the unaddressable". [93] In any case, it is clear that the ambiguities and loopholes of the opinion have been mirrored and sometimes amplified in the existing literature. Departing from these conflicting doctrinal remarks, we may compare the opinion to a wormhole that led experts and jurists to various dimensions having each its laws and paradigm and resulting to dissenting views on the status of nuclear weapons under IHL. We might even suggest that this opinion has indirectly created a doctrinal knot, preventing international humanitarian law from fully and consensually grasping nuclear weapons. Thus, the opinion that treated the question of nuclear weapons' lawfulness "urgently" might have paradoxically and ultimately crystalized the belief that nuclear weapons are an outdated subject. It is more precisely the absence of any other opinion on the legality of nuclear weapons that explains the appearance and continuity of this belief, therefore, trapping the doctrine and the development of the law in the past.

[92] "So whatever the reasons for the Court's silence, it was a beneficial silence inasmuch as it, and it only, could leave room for the workings of the moral impulse, the irrational, non-foundational appeal against the killing of the innocent », KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.*, p. 153.

[93] According to Koskenniemi, giving a clear cut answer "would have opened a professionally honourable and perhaps even a tragically pleasurable way of addressing the unaddressable", KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.,* p. 152.

II- International humanitarian law's peculiarities as a factor of uncertainty and dissension

The 1996 Advisory Opinion's vagueness and some of the major antagonisms that are visible in the literature can be explained in light of IHL's own peculiarities. In fact, it seems that the opposition between IHL's practical and pragmatic approach and more theoretical and general approaches have been transcribed into a fundamental doctrinal dissension. More generally, it appears that the methodologies and scope of evidence used by the considered jurists is a determining factor that has shaped the literature, its conflicting conclusions and beliefs.

1- International humanitarian law's peculiarities and the Non liquet

The *non liquet* issued by the ICJ in 1996 can be directly related to the very nature of IHL as a practical and pragmatic set of rules. In fact, IHL's pragmatic approach does not allow a theoretical and abstract conclusion on the lawfulness of nuclear weapons, or any weapons, as long as they are not expressly and specifically regulated, allowed nor forbidden.

IHL's main aim is to submit all weapons to its rules and regulate their use, and not to expressly ban specific weapons or their possession[94]. It has little to do with disarmament law or *jus ad bellum* considerations which it simply acknowledges. For instance, article 51 paragraph 4 of the First Additional Protocol to the Geneva Conventions that prohibits indiscriminate attacks does not prohibit biological, chemical nor nuclear weapons. It simply prevents their use in any manner that would contravene it[95]. Biological and chemical weapons were banned by distinct international treaties. Therefore, applying IHL to nuclear weapons does not deem them illegal *per se*, but prevents any use that would violate its provisions. IHL's pragmatic and practical approach is even more remarkable as it does not contain "an absolute rule against the killing of the innocent. [It] construct[s] the law in terms of contextual

[94] "Although IHL regulates the use of weapons, there is no general legal basis for prohibiting the possession of weapons whose use would violate IHL. For example, although biological weapons are often named as the textbook example of inherently indiscriminate weapons, their possession would not violate IHL", NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.,* p. 168.

[95] NYSTUEN (G.) "Nuclear weapons: IHL considerations revisited, 20 years after the ICJ Advisory Opinion", *op.cit.*, p. 224. The same goes for article 40 of Additionnal Protocol I, according to the Commentary of the Geneva Conventions, Article 40 "does not imply that the Parties to the conflict abandon the use of a particular weapon, but that they forgo using it in such a way that it would amount to a refusal to give quarter", SANDOZ (Y.), et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op.cit.*, p. 477.

determinants that sometimes allow the (foreseeable although perhaps not intended) killing of non-combatants".[96]

Therefore, IHL can be qualified as practical, having a case-by-case approach, taking into account specific circumstances, rather than having a general theoretical approach to nuclear – or any other – weapons' lawfulness. Henceforth the ICJ's *non liquet* can be explained – at least partly – in light of the difficulty to apply this practical and casuistic body of rules to answer the theoretical and broad question it was asked. According to Greenwood, the question addressed to the Court by the General assembly placed it "in an exceptionally difficult position, because it could not possibly consider all the combinations of circumstances in which nuclear weapons might be used or their use threatened. Yet unless one takes the position that the use of nuclear weapons is always lawful (which is obvious nonsense), falls outside the law (which no state suggested) or is always unlawful (a view which has had some supporters but which the majority of the Court quite rightly rejected), then the answer to the General Assembly's question would have to depend upon a careful examination of those circumstances."[97] In that regard, it seems difficult to claim that the Court could, at the time and with the elements at its disposal, reach a clearer or less ambiguous finding.

2- International humanitarian law's peculiarities and persistence of the doctrinal dissension – methodological differences

Here we would like to suggest that one of the reasons that explain the enormous debate surrounding nuclear weapon's lawfulness under IHL lies in the methodological differences between jurists. As put by Weston, "the point, rather, is to acknowledge unabashedly the oft-disregarded truth that subjective factors such as position and influence (like culture, class, interest, personality, and past exposure to crisis) commonly condition legal decision, both advertently and inadvertently. They affect not only the substance of our legal judgments; they affect also the evidence we select and the criteria we adopt to reach them - indeed, even our assumptions about the legal system that makes them possible in the first place".[98] Close

[96] KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.,* p. 150.
[97] GREENWOOD (C.), "*Jus ad bellum* and *jus in bello* in the *Nuclear Weapons* Advisory Opinion", p. 249 in BOISSON DE CHAZOURNES (L.), SANDS (P.J.), *International law, the international Court of justice and nuclear weapons*, Cambridge, Cambridge university press, 1999.
[98] WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *28 McGill LJ*, 543, 1982, p. 545.

attention will therefore be given to methodology, assumptions, scope of evidence and conclusions, notably to the differences between IHL-experts and non-experts.

Although a lack of a clear-cut answer to the lawfulness of nuclear weapons in the relevant literature might seem odd[99], however, IHL experts' works simply mirror the particular nature of IHL. In that regard, the approach and methodology they use and the results they reach are of a particular interest. In fact, these works are mainly concerned with the continued application of existing IHL rules to nuclear weapons as mere "means of warfare". The use of these specific words is revealing of IHL's approach that treats nuclear weapons like any other weapons, yet with more destructive effects. As opposed to this, non-IHL experts mainly discuss IHL as a prelude or a waypoint for the consecration of a regime specific to nuclear weapons.

Lexical differences and related methodologies are revealing in that sense. IHL experts write about the way precise "attacks" and "use" of nuclear weapons can "contravene"[100], "contradict", "violate" or "offend"[101] IHL rules and are "difficult to reconcile"[102] with them. In their works, IHL is applied to "limit", "control" and "regulate" these weapons in order to "preclude" any violation while taking into account practical circumstances. While IHL experts consider it to be "unpersuasive to argue that all nuclear weapons are either inherently indiscriminate or inherently disproportionate"[103], many non-IHL experts firmly claim "illegality" or "unlawfulness"[104] that is even sometimes qualified as being "inherent"[105] to nuclear weapons. Consequently, most of these non IHL experts, lawyers, humanitarians and activists discuss a "complete" or "conditional" "ban" or "prohibition" of nuclear weapons *per*

[99] Especially in IHL experts' writings which regard any potential nuclear weapons' use as most probably being "irreconcilable" with IHL principles.

[100] MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *op.cit.,* p. 629.

[101] MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *op.cit.,* p. 632.

[102] Maresca qualifies nuclear weapons as "weapons the use of which is difficult to reconcile with existing IHL rules", MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *op.cit.,* p. 645

[103] NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.,* p. 125.

[104] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.*

[105] GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.,* p.53; "inherently uncontrollable", [105] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 642

se as their use is deemed to "necessarily involve grave breaches"[106]. Few others try to demonstrate that IHL rules do not prevent deterrent policies[107].

These lexical differences stem from the more substantial difference of approach. In fact, going through the literature, one can identify conflicting paradigms and their related methodologies, therefore leading to different conclusions on the lawfulness of nuclear weapons. Accordingly, a case-based approach[108] – which seeks to determine the lawfulness of nuclear weapons on the basis of practical and specific considerations and use of these weapons – can be opposed to a more holistic or absolute approach[109] – which determines the absolute lawfulness or unlawfulness of nuclear weapons as a whole. At first, it might seem that the more of a general/absolute approach is adopted, the more likely are nuclear weapons to be considered unlawful. At the opposite, a more relativist and practical approach would allow either conditional or total lawfulness as it considers scenarios with moderate humanitarian and environmental consequences. However, a more careful look reveals that those in favor of a general, absolute approach also rely on a *"relativist calculation"*[110] as they base their conclusions on the practical elements concerning specific use of nuclear weapons.

[106] BROWNLIE (I.), "Some Legal Aspects of the Use of Nuclear Weapons",, *op.cit.*, p. 442.
[107] ANASTASSOV (A.), "International humanitarian law, nuclear weapons and the prospects for nuclear disarmament", *op.cit.*
[108] This is the approach mainly used by IHL-experts as a consequence of IHL's nature. Cf "It seems logical that these situations must be assessed on a case-by-case basis", MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *op.cit.,* p. 644. In the same vein, see NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.*. But this approach has also been advocated by governments and some authors in order to reach at least conditional lawfulness of nuclear weapons, Cf ANASTASSOV (A.), "International humanitarian law, nuclear weapons and the prospects for nuclear disarmament", *op.cit.*
[109] Such approach has been endorsed by many authors: "The excessive and unnecessary nature of such effects can be evaluated now on a categorical basis from which the unlawfulness of their use becomes apparent", MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.*, p. 669 ; Also, GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.,*, p. 58. "it is ridiculous to allow refined examples of putatively lawful use to dominate the legal regime" BROWNLIE (I.), "Some Legal Aspects of the Use of Nuclear Weapons", *op.cit.*, p. 450 ; "**Overall**, the law opposes resort to these instruments of death" (emphasize added), WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *op.cit.,* p. 590. But this approach has also been criticized: "The I.C.J. majority had the opportunity to regulate TNWs separately, referencing them twice. But the I.C.J. dodged here too, falling back on categorical analysis" RUDESILL (D.), "Regulating Tactical Nuclear Weapons", *op.cit*., p. 124.
[110] KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.,* p. 146.

In the same way, a teleological approach[111] can be opposed to an effects approach,[112] the first one assessing the lawfulness of nuclear weapons in regard of the purpose of the weapon whereas the second one focuses on its concrete effects.

One might oppose a realist approach – which supposedly has to do with the law as it is and assesses nuclear weapon's lawfulness on practical grounds – to a so-called idealist approach – which seeks a more ideal regime. It might be tempting to call "idealists" those upholding a complete ban of nuclear weapons, and "realists" those who consider that nuclear weapons are not necessarily unlawful under international law. But this would be a superficial and schematic classification. In fact, it is more appropriate to distinguish a complete ban approach from a case-by-case approach. Indeed, the case-by-case approach has, in turn, been criticized as *"unrealistic"*[113] , *"academic and unreal"*[114]. Otherwise, a de *lege ferenda* approach can be opposed to a *de lege lata* approach.

Furthermore, jurists based their thinking on different scenarios – i.e. tactical vs strategic use, nuclear vs conventional war, attacks in remote areas vs attacks near civilian populations – and assumptions – nuclear weapons being presumed unlawful due to their effects or presumed lawful in the absence of an explicit ban. However, those scenarios and assumptions are of a nature to greatly influence the reflection and outcome, they are most often not clearly presented in the works of interest.

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[111] This approach focuses on the essence of nuclear weapons, as weapons with "inherent uncontrollability", Moxley & Burroughs, p.644; Weapons which "effects go beyond the needs of war", *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996, I.C.J 226, 324-27, July 8, Weeramantry, J. dissenting; "The prime object of deterrent nuclear weapons is ruthless and unpleasant retaliation- they are instruments of terror rather than weapons of war", BROWNLIE (I.), "Some Legal Aspects of the Use of Nuclear Weapons", *op.cit.*,p. 445; "Overall, the law opposes resort to these **instruments of death**" (emphasize added), WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *op.cit.,* p. 590.

[112] As this approach focuses on practical effects, it might allow some uses of nuclear weapons with limited effects. Advocates of nuclear weapons or deterrence policies have tried to plead lawfulness on the basis of a use of nuclear weapons that would have limited effects (i.e. use in remote areas or low-yield nuclear weapons) Cf ANASTASSOV (A.), "International humanitarian law, nuclear weapons and the prospects for nuclear disarmament", *op.cit.* However, this approach has mostly been an argument against nuclear weapons and that has mainly been supported by the humanitarian consequences movement. Anyway the approach considering the humanitarian and environmental effects is now very common and is used in all the mentioned works.

[113] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 664.

[114] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, 324-27 (July 8) (Weeramantry,J. dissenting).

3- Scope of evidence and subsequent dissensions

Another core difference appears when paying attention to the scope of evidence considered by jurists. In fact, maybe the lack of new elements regarding nuclear weapons that is ascertained by the doctrine can be directly connected to the elements and evidence considered by these jurists when assessing the matter. Indeed, it appeared to us that most of the considered literature does not fully explore the post-1996 developments. The scope of evidence considered by most authors and works is mainly limited to past studies and elements, anterior to the XXth century. Too few are the works – although recently published – to draw upon more recent and up-to-date elements and reports. Hence, one might wonder, is the currently available evidence as insufficient as it was in 1996?[115] Is there a proved lack of new evidence or is this related to a mere complacency and habit to refer to the same old opinion and manuals? As a matter of fact, most of the considered works mention new doctrinal publications, international political conferences and summits and military manuals, but these do not contain much new relevant facts about nuclear weapons – such as effects, characteristics and technical developments. The factual and scientific sources used by most works are not recent.

For instance, Moxley, Burroughs and Granoff's 2011 publication, contains a section about factual characteristics[116] which only refers to the 1996 ICJ opinion and judges' opinions.[117] In the same way, Anastassov, in *International humanitarian law, nuclear weapons and the prospects for nuclear disarmament,* uses no scientific or factual evidence relating to the characteristics of nuclear weapons. He mostly refers the 1996 ICJ public hearings and USA memorandums.

In comparison, in a less recent work, Burns Weston went through a very detailed description of the different types of nuclear weapons – strategic and tactical nuclear weapons, countervalue and counterforce nuclear weapons, range, yield[118] – as of 1982 by referring to recent works at the time – a 1982 Secretary-General report and a 1975 United States Arms Control and Disarmament Agency lexicon. Same for Miatello Angelo in 1987 who considered

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[115] "Could the facts have been better developed? One wonders, for example, whether a sounder evidentiary base might have been laid by more direct involvement of NGOs in the written and oral proceedings, or whether more effort should have been made by the parties or the Court itself to develop the facts", CLARK (R.S.), *The laws of armed conflict and the use or threat of use of nuclear weapons*, *op.cit.,* p. 293.

[116] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 603-606.

[117] The same can be said about Granoff and Granoff's article, GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.*

[118] WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *op.cit.,* p. 576-577.

the scientific and ecological effects of nuclear weapons, as well as its definition for a little less than a hundred pages[119].

One might suggest that as the nuclear weapons issue was more up-to-date in the 80's and 90's, jurists had more recent material to base their articles on. Whereas contemporary jurists are deemed to referring to past studies and articles in the absence of any recent relevant elements and reports. Or maybe that nuclear weapon's effects have been studied at great length and therefore jurists do not feel the need to come back to this aspect. Yet, nuclear weapons are in constant development and their effects and characteristics evolve constantly, therefore changing the contextual facts that are relevant when assessing the lawfulness of their use – i.e. yield, precision, radiation etc.

Furthermore, few contemporary works do mention recent evidence. For instance, Rudesill, in his 2013 publication on tactical nuclear weapon, refers to few recent publications and reports that contain substantial and factual elements – i.e. a 2012 Congressional Research Service report, the 2013 Wikipedia *Nuclear Weapon Yield* article, a U.S. Department of Defense's 2010 *Dictionary of military and associated terms*, William c. Potter & Nikolai Sokov's 2011 *Practical measures to reduce the risks presented by non-strategic nuclear weapons.* This tends to prove that recent relevant evidence and sources do exist[120] and can be used by the other jurists. Yet, Rudesill did not draw the consequences of these recent factual elements in terms of IHL.[121]

As of Nystuen, Casey-Maslen and Golden Bersagel's 2014 *Nuclear weapons under international law,* it meant to consider post-1996 evolutions. However, it does not study new points *per se*, but rather it reassesses the main debates that date back to 1996 – mainly the unnecessary suffering rule, threats and reprisals. In all cases, although most references date back to the XIXth, many new elements are considered such as legal academic publications, military manuals[122], some international jurisprudence – i.e. Eritrea-Ethipia Claims Commission cases, ICTY cases – and scientific publications – i.e. A 2003 *Air & Space Magazine* article on scuds, a 2008 US Armed Forces Radiobiology Research Institute study on nuclear weapon's effects, a 2002 *Science and Global Security* article on "Low-yield earth-penetrating nuclear

[119] MIATELLO (A.), *L'arme nucléaire en droit international*, Berne, Frankfurt am Main, Paris, P. Lang, 1987.
[120] For instance, the below work refers to very up-to-date studies: Heather Williams, *Remaining relevant: Why the NPT must address emerging technologies*, Centre for science & security studies, King's College London, London, 2020.
[121] Rudesill merely discusses IHL principles in a small subsection and does not apply IHL principles to these practical elements, nore does he give scenarios and examples, Cf RUDESILL (D.), "Regulating Tactical Nuclear Weapons", *op.cit*., p. 123-125.
[122] Cf NYSTUEN (G.), et al., *Nuclear Weapons under International Law*, *op.cit.,* p. 96, footnotes.

weapons". Koppe's chapter "Use of nuclear weapons and protection of the environment during international armed conflict", refers to factual and scientific sources but which are not that recent – a 1998 IAEA Bulletin article on the radiological conditions at Bikini Atoll, a 1981 SIPRI publication *Nuclear radiation in warfare*, and another 1977 SIPRI publication *Weapons of Mass Destruction and the Environment.*

Maresca and Mitchell's "The human costs and legal consequences of nuclear weapons under international humanitarian law" also uses some quite strong and relevant evidence such as UN studies, medical reports, ICRC and Japanese Red cross data and reports.

At this point, there appears to be a link between the considered scope of evidence on one hand and the attitude of the jurists and the conclusions reached regarding the lawfulness of nuclear weapons on the other hand. Indeed, Moxley, Burroughs and Granoff, as well as Anastassov used limited factual and scientific evidence. While the first publication concluded to absolute unlawfulness of nuclear weapons and called for disarmament,[123] the second one maintained that IHL only prohibits use of nuclear weapons that would contradict its rules and does not prohibit deterrent policies. Therefore, both publications were pleading in favor of either disarmament or deterrent policies and gave clear-cut answers to the lawfulness of nuclear weapons. At the opposite, publications using more detailed and recent factual evidence such as Nystuen, Casey-Maslen and Golden Bersagel and Maresca and Mitchell gave more nuanced conclusions. Accordingly, it seems that the profiles and attitude of the considered authors shaped their choices in terms of the scope of evidence they considered.

As a consequence of these methodological differences, most non-IHL experts conclude to absolute lawfulness or unlawfulness[124] whereas IHL experts conclude that IHL would prohibit use of nuclear weapons in most scenarios but does not formally nor completely ban them[125]. The latter nuanced conclusions appear to be very similar to the ICJ's, although this one

[123] "It is the authors' contention that this body of law renders the use and threat of use of nuclear weapons unlawful and compels immediate progress to obtain the elimination of the weapons », MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 609.

[124] Granoff and Granoff consider that "when the rules of war are applied to nuclear weapons, it becomes clear that these weapons cannot comply with international law" GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.,* p. 53. In the same way, Moxley, Burroughs and Granoff write "it is the authors' contention that this body of law [IHL] renders the use and threat of use of nuclear weapons unlawful and compels immediate progress to obtain the elimination of the weapons », MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 609.

[125] For example, Nystuen's book on Nuclear weapons under international law gives the following conclusion : "The critical question is whether it is possible to imagine any use of nuclear weapons that would not violate one or more of these rules. There is no doubt that IHL places heavy restrictions on any perceived use, and would, in most foreseeable scenarios, in fact prohibit such use. Nuclear weapons are not, however, explicitly and without

dates back to 1996, as if the question of nuclear weapon's legality was still in process and IHL was still digesting it.

Although scientific methodology is meant to be objective in nature, a link seems to appear between ideology and methodology used by some authors. Especially when comparing the attitude and methodology of IHL-experts and non-experts. This is all the more valid when it comes to nuclear weapons as it engages "the killing of the innocent".[126] The selected approach, scope of evidence and assumptions clearly shape the conclusions reached regarding the lawfulness of nuclear weapons under IHL. The "epistemological weakness"[127] regarding nuclear weapons is therefore a core issue that can significantly bias the result.

exception barred from use", NYSTUEN (G.), et al*., Nuclear Weapons under International Law, op.cit.,* p. 484. Maresca and Mitchell also give a nuanced conclusion that the use of nuclear weapons in or near populated areas would most probably amount to an indiscriminate attack and propose "a presumption of illegality with regard to the use of such weapons outside populated areas", MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *op.cit.,* p. 645. Vail concluded in his article "it remains unclear whether using nuclear weapons in any fashion is legal under international law—including in situations involving self-defense*"*, VAIL (C.), "The legality of nuclear weapons for use and deterrence", *Georgetown Journal of International Law,* Vol. 48, Issue 3, Georgetown University Law Center, 2017, p. 844.

[126] "The issues of what we can know (faith) and who we are (identity) are settled and linked with how we understand and argue about the killing of the innocent", KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.,* p. 141.

[127] PELOPIDAS (B.), "Dépasser le panglossisme nucléaire" in MESZAROS (T.) (dir.), *Repenser les stratégies nucléaires. Continuités et ruptures*, Bruxelles, Peter Lang, 2019.

III- The nuclear unanswered & unknowable as a mirror of international jurists' identities

Many questions were left unanswered by the 1996 ICJ Advisory opinion (the unanswered). Others have arisen since 1996 along with new factual and legal elements (the unknowable). The point here is to assess the attitude of the doctrine towards the unanswered & the unknowable, and what it reveals about their identity and about International law in general.

1- The unanswered of nuclear weapons under IHL

Many questions were left unanswered by the Court in 1996; What does the particular nature of nuclear weapons mean and what are the subsequent implications? If this particular nature merges with nuclear weapon's "unique characteristics […] in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come", [128] can it justify a derogation to International humanitarian law principles? Can *Ad bellum* "extreme circumstances" justify *in bello* use of nuclear weapons? Is the *jus in bello* / *jus ad bellum* distinction malleable when it comes to nuclear weapons? Can the "survival" of a sole state justify severe and widespread damage that would inevitably follow the use of nuclear weapons?

The doctrine has given heterogenous and even competing answers to these issues, with some answers being more clear-cut and confident than the ICJ opinion itself. For instance, the uncertain or hazardous effects of nuclear weapons have been given various consequences. For some authors, this uncertainty calls for a total ban.[129] Whereas for some, it simply entails a presumption of unlawfulness.[130] For others, the uncertainty does not allow the proportionality principle to be applied.[131]

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[128] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 244, §36.

[129] For instance, Moxley claimed that "the inherent uncontrollability of nuclear weapons, even low-yield nuclear weapons, renders them unlawful under IHL. This seems to be the end of the matter." MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.*, p. 644.

[130] Maresca and Mitchell suggest a "presumption of illegality", MARESCA, (L.) & MITCHELL, (E.), "The human costs and legal consequences of nuclear weapons under international humanitarian law", *op.cit.,* p. 644.

[131] "None of this is possible if the weapon in question has effects which are totally unforeseeable, because, for example, they depend on the effect of the weather. It is submitted that the second test of "indiscriminate weapons" is meant to cover cases such as these, where the weapon, even when targeted accurately and function- ing correctly, is likely to take on "a life of its own" and randomly hit combatants or civilians to a significant degree.", DOSWALD-BECK (L.), "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *op.cit.,* p. 41.

Few other questions were not even asked, such as the occurrence of a nuclear incident either as a trigger of an armed conflict, or as a factor of escalation in an ongoing armed conflict. [132] The general finding is that the doctrine mainly neglected this risk,[133] while it is difficult to imagine that a state victim of a nuclear incident or error, which "consequence would be of the gravest order",[134] would remain passive. In fact, such an incident would most probably be of a nature to create hostility leading to an armed conflict, where such conflict is not already ongoing. Exploring and assessing such scenarios seems of particular interest to us. Indeed, it implies the determination of applicable law, particular legal qualification and consequences.

The issue of the effects of the use of nuclear weapons towards third states has also been largely neglected by the doctrine.[135] Not only does it have to do with the legal qualification and lawfulness of any use of nuclear weapons under IHL, but also with the particular effects for third parties that are not involved in an armed conflict, notably radiation that must not be neglected. Given the grave impact of radioactive effects – that stay severe and widespread even when modulated – let us admit that extreme circumstances may justify a nuclear attack under

[132] Although this question was not considered by the ICJ Opinion, Judge Weeramantry observed in his dissenting opinion : "the factor of accident must always be considered. Nuclear weapons have never been tried out on the battlefield. Their potential for limiting damage is untested and is as yet the subject of theoretical assurances of limitation. Having regard to the possibility of human error in highly scientific operations-even to the extent of the accidental explosion of a space rocket with all its passengers aboard-one can never be sure that some error or accident in construction may deprive the weapon of its so-called "limited" quality. Indeed, apart from fine gradations regarding the size of the weapon to be used, the very use of any nuclear weapons under the stress of urgency is an area fraught with much potential for accident. The UNIDIR study, just mentioned, emphasizes the "very high risks of escalation once a confrontation starts." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, 324-27 (July 8) (Weeramantry,J. dissenting).

[133] Ian Brownlie is one of the few to merely mention this aspect, BROWNLIE (I.), "Some Legal Aspects of the Use of Nuclear Weapons", *op.cit.,* p. 449. More recently, Marko Milanovic raised the gap regarding mistakes of fact pertaining to the use of lethat force in an online post: "it seems to me that there is a significant gap here in the international legal literature*"* Marko Milanovic, *"*Mistakes of Fact When Using Lethal Force in International Law: Part I", *EJIL: Talk!,* published on January 14, 2020, https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/

[134] This qualification was used by Judge Weeramantry in his dissenting opinion :"It is claimed a weapon could be used which could be precisely aimed at a specific target. However, recent experience in the Gulf War has shown that even the most sophisticated or "small" weapons do not always strike their intended target with precision. If there should be such error in the case of nuclear weaponry, the consequence would be of the gravest order." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226, 324-27 (July 8) (Weeramantry,J. dissenting).

[135] Ian Brownlie mentioned this aspect in 1965; "extensive fall-out which could inflict great harm on the populations of neutral States. Such a policy contradicts the duties which customary law imposes on belligerents", BROWNLIE (I.), "Some Legal Aspects of the Use of Nuclear Weapons", *op.cit.*, p. 444. However, it has been neglected since then. Michael Bothe is one of the few who recently raised the question, giving precise examples of potential scenarios in that respect, BOTHE (M.), 'The law of neutrality', in Dieter Fleck (ed.), *The Handbook of International Humani- tarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 560, para. 1108(2). As to the ICJ, it briefly set aside the question in paragraphs 88 and 89 of the Advisory opinion, p. 260-261.

IHL, the rights of third and neutral states remain an open issue. The law of neutrality is therefore in question and needs to be applied.[136]

2- The unknowable of nuclear weapons under IHL

Many other questions appeared or were emphasized after 1996, in relation to evolutions the Court could not anticipate. In that respect, the rise of terrorism,[137] the development of Artificial intelligence, robots and cyber warfare ought to affect the practical use of nuclear weapons and the particular circumstances of such use.[138] Shouldn't these elements be taken into account when assessing nuclear weapon's use under IHL? More importantly, shouldn't tactical nuclear weapons' lawfulness be assessed more specifically in light of recent technological developments?[139] Do we have to wait for an operational use of tactical weapons to occur in order to regulate them?[140] Rudesill notes in that sense "my review of the legal literature yields no publications that broadly address regulating tactical nuclear weapons in a focused way. The existing legal literature includes passing references or limited discussions".[141]

Another question of interest is related to the adoption of the Treaty on the Prohibition of Nuclear Weapons (TPNW) on the 7th of July 2017. After achieving 50 ratifications, one ought to wonder about the consequences of its entry into force on January 22nd, 2021. Particularly, its legal value and practical significance, its effects towards non-State Parties and the way it will affect the legal framework regulating nuclear weapons. Indeed, would the TPNW provisions transcend its merely conventional nature? Would the international community's *opinio juris* transform these provisions into customary norms enforceable against non-State

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[136] Cf *Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, USTS 540 (entered into force 26 January 1910).

[137] Alhough many articles that deal with nuclear terrorism can be found, only one dealing with international drew our attention : HERBACH (J.), "The Evolution of Legal Approaches to Controlling Nuclear and Radiological Weapons and Combating the Threat of Nuclear Terrorism", in GILL (T.), GEIß (R.), KRIEGER (H.), MCCORMACK (T.), PAULUSSEN (C.), DORSEY (J.) (eds), *Yearbook of International Humanitarian Law,* Volume 17, 2014.

[138] We were unable to find relevant doctrinal contributions linking and exploring in depth the link between nuclear weapons and artificial intelligence, robots or cyber warfare.

[139] The only relevant doctrinal contributions we were able to find in that regard are: Rudesill (D.), "Regulating Tactical Nuclear Weapons", *Georgetown Law Journal*, Vol. 102, No. 99, 2013, p. 159; BREAU (S.), *Low-Yield Tactical Nuclear Weapons and the Rule of Distinction*, Flinders Law Journal, 15, n°2, 2013, p. 219; KIRCHNER (S.), *Tactical Nuclear Weapons in International Humanitarian Law*, GRIN Verlag, 2015.

[140] Tactical nuclear weapons were simply mentioned by the Court in its Advisory Opinion, stating it did not have enough elements in order to rule on the matter cf p. 262, §94. Rudesill criticized this statement as follows: "In a legal space as normative, aspirational, and contested as customary international law, arguments mentioned but not rejected can be reinforced, especially status quo arguments. For these reasons, tactical warheads arguably emerged from international judicial review **less regulated than strategic warheads**" (emphasis added), RUDESILL (D.), "Regulating Tactical Nuclear Weapons", *op.cit*., p. 125.

[141] RUDESILL (D.), "Regulating Tactical Nuclear Weapons", *op.cit*., p. 103, footnote 7.

Parties, for instance as "wild customary norms"?[142] What would be the consequences on the application of IHL to nuclear weapons, in particular on their lawfulness? Furthermore, would the entry into force of the TPNW affect or even deplete the value of the 1996 ICJ Advisory Opinion?

Unfortunately, the doctrine did not consider these aspects,[143] at least not in depth. Consequently, failure to answer these questions, the majority of the doctrine has been committed to restating and rephrasing what is endlessly debated. Hence, considering that the subject is outdated while solely exploring its traditional or obsolete aspects is unsurprising.

3- Nuclear weapons as a mirror of Jurists' identity and International law's nature

What does the fact that an unresolved question with many grey areas and huge potential consequences be considered as out-of-date say about jurists? Is it a sign of helplessness, resignation, complacency, non-concern, irresponsibility? Is this deadlock specific to the issue at hand? More broadly, what is the role of international jurists? Are they merely meant to apply objectively the law to the facts without subjectively interpreting it – if indeed possible? Are they meant "to say that [they] know that the killing of the innocent is wrong not because of whatever chains of reasoning [they] can produce to support it, or who it was that told [them] so, but because of who [they] are"?[144] Besides, what does this deadlock say about international law ?

While international law was initially the product of state sovereignty alone, this voluntarist and subjective approach has been progressively undermined, allowing new subjects and sources to shape contemporary international law (i.e. international organizations as new subjects of international law and their resolutions as new potential sources). This more objective approach[145] does not necessarily surrender to state sovereignty and allows it to be contradicted.

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[142] The notion of "wild custom" was conceptualized by René-Jean Dupuy. Antonio Cassese defined wild customary rules as "rules born in a short period of time out of the desire of a large group of States to impose their demands on the whole community", CASSESE (A.), *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter,* Oxford and Portland, Oregon, HART Publishing, 2011, p. 4.

[143] With the exception of the following works that treats the effects of the TPNW: Casey-Maslen (S.), *The Treaty on the Prohibition of Nuclear Weapons : A Commentary*, Oxford Commentaries on International Law, Oxford University Press: Oxford, United Kingdom, 2019.

[144] KOSKENNIEMI (M.), "Faith, identity, and the killing of the innocent: international lawyers and nuclear weapons", *op.cit.*, p. 162.

[145] For definition and detail about the objective approach, see HUBERT (T.), "The Thought of Georges Scelle", *European Journal of International Law*, Volume 1, Issue 1, 1990, p. 193-209.

It is particularly offensive to states when it comes to the regalian domain, notably to nuclear weapons[146].

Accordingly, voluntarists argue that an explicit norm accepted by states is a *sine qua none* condition in order to deem nuclear weapons unlawful, even under IHL. Whereas other jurists consider that "while the lack of an explicit ban may mean that nuclear weapons are not illegal per se, the fact is that restraints on the conduct of war never have been limited to explicit treaty prohibitions alone." [147] In fact, the substance of IHL is not limited to voluntarist norms and a substantive part of it has evolved regardless of states' will. Applying such norms to nuclear weapons – symbol of states' regalian powers – is therefore challenging. The "extreme circumstances" dissension is easier to grasp with these opposing interests in mind.

Furthermore, the issue is not simply about determining the substance of an abstract body of rules which applies to nuclear weapons, but rather about the way these rules apply in practice. Nor is it solely about investigating if international norms banning nuclear weapons or preventing their use exist, but more fundamentally about determining which of these norms truly count and what their scope and consequences are. In other words, the dissension is not only about what the law is, but also "what counts as law".[148] Here, the lines between applicability and application are blurred and the two questions merge into one another. As put by Burns Weston, "the issue is not, fundamentally, the explicitness of the rule. Nor is it whether suitable language can be found to support one position or another. The issue is whether any of the authority cited - in this case, the laws of war - is of a sort that "counts as law" insofar as the use and threat of use of nuclear weapons are concerned. The issue is whether any of it, explicit or implicit, comports with what is needed to give it jural quality relative to nuclear weapons, and, if so, how or to what extent it applies."[149] In other words to what extent do international norms count *in concreto* when determining the lawfulness of nuclear weapons and their use?

[146] "The key question is: What are the limits of international law when faced with a subject which goes to the core of the exercise of state powers?" ANASTASSOV (A.), "International humanitarian law, nuclear weapons and the prospects for nuclear disarmament", *op.cit.* p. 13.
[147] WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *op.cit*, p. 547
[148] D'Amato, "What 'Counts' As Law?" in N. Onuf, ed., *Law-making in the Global Community* (1982) 83.
[149] WESTON (B.H.), "Nuclear Weapons Versus International Law: A Contextual Reassessment", *op.cit*, p. 548.

In fact, it seems that nuclear weapons, given their particular nature, might somehow challenge the "normativity of the law"[150] and even "the limits of international law".[151] Henceforth, determining what the law is and what counts as law is a major challenge and a subject of dissension. It raises the more fundamental question of the nature and aim of IHL in particular and of International law in general. Question which is subject to even more debates than the nuclear issue. "Does International law exist for States or peoples or individuals?"[152] For Moxley, Burroughs and Granoff who concluded to complete unlawfulness of nuclear weapons under IHL, "law has a duty to control the risk" [153],"if law is to have any significance, it must meaningfully constrain this danger".[154] David Cumin who did not, for his part, state the unlawfulness of nuclear weapons, wondered : "in International law, does the concept of humanity prevail legally over the concept of State? De *lege ferenda*, maybe, de *lege lata*, no".[155]

But perhaps the differences in the conclusions reached by the considered authors are also related to different *lex lata / lex ferenda* considerations. In fact, if many scholars, humanitarians and activists conclude to absolute unlawfulness of nuclear weapons, it might be related to the fact that they focus more on what the law should be, rather than what it actually is. Their writings are often[156] driven by and aimed at revealing or creating a special regime that exclusively and specifically applies to nuclear weapons, and even bans them. But this regime is one of *lex ferenda,* not one of *lex lata* as revealed by the halftone conclusion of the ICJ's 1996 Advisory Opinion.

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[150] "La normativité du droit est- elle encore 'normativité' quand il s'agit d'ordonner l'emploi de la force nucléaire? Une telle normativité est- elle encore 'crédible'", COLARD (D.), Compte rendu de [SAYED, Abdulhay. *Quand le droit est face à son néant. Le droit à l'épreuve de l'emploi de l'arme nucléaire.* Bruxelles, Éditions Bruylant, 1998, 203 p.], *Études internationales*, *30* (2), 1999, p. 435–436.

[151] "The key question is: What are the limits of international law when faced with a subject which goes to the core of the exercise of state powers?" ANASTASSOV (A.), "International humanitarian law, nuclear weapons and the prospects for nuclear disarmament", *op.cit.* p. 13.

[152] « Le droit international existe-t'il pour les Etats, pour les peuples ou pour les individus ? », CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel*, *op.cit.*, p. 104.

[153] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 598.

[154] MOXLEY (C.J.), et al., "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty", *op.cit.,* p. 601.

[155] "En droit international, le concept d'humanité l'emporte-t'il juridiquement sur le concept d'Etat ? De lege ferenda, peut-être, de lege lata, non » ; « Le droit international existe-t'il pour les Etats, pour les peuples ou pour les individus ? », CUMIN (D.), *L'arme nucléaire française devant le droit international et le droit constitutionnel*, *op.cit.*, p. 104.

[156] If most lawyers, activists and humanitarians push towards an evolution in the legal regime applicable to nuclear weapons, some simply want to bring states to compliance with the existing rules. For example, Granoff and Granoff are mainly concerned with the fact that "in current real-world deployments, neither the use of nuclear weapons nor the threat of using them can be reconciled with international law", GRANOFF (D.) et al., "International humanitarian law and nuclear weapons: Irreconcilable differences", *op.cit.,* p. 59.

Conclusion

As a conclusion, I will attempt to explain the lack of interest of contemporary legal experts for nuclear weapons in light of our developments. Three of the main reasons were our three sections: the 1996 ICJ Advisory Opinion which ambiguities destabilized the doctrine, preventing further developments; IHL's practical and case-by-case approach which does not allow the settlement of the lawfulness of nuclear weapons theoretically; jurists' attitude towards the issue of nuclear weapons' lawfulness and the limits of international law. However, other elements participated to creating the deadlock surrounding nuclear weapons, such as the confidence which is placed in the possibility to efficiently control nuclear weapons and installations.[157] This feeling is the direct result of the general discourse that makes nuclear weapons a means of ensuring security and does not deem necessary to reassess or question their existence and potential use. In parallel, this political and strategic dimension has always slowed down the processing of nuclear weapons by international law, in particular by IHL. As for the existence of new factual and legal elements, those do exist, but they do not seem to spark the interest of jurists that much.

As a result, of these elements taken together, the very strong belief that nuclear weapons are not an up to date subject has developed. Asserted by most of jurists as if obvious and unquestionable, this belief is even more critical as it is self-sustaining and self-referential; the more jurists believe it to be true, the stronger it gets. In the view of the author, this belief deserves to be put into question, or at least acknowledged. And the lawfulness of nuclear weapons under IHL and other legal aspects further assessed but with a new lens. As for the 1996 ICJ Advisory Opinion, it is time that the doctrine that it has trapped and scattered be emancipated. Thus opening new possibilities for the legal reflection and research.

[157] PELOPIDAS (B.), "The unbearable lightness of luck: Three sources of overconfidence in the manageability of nuclear crises", *European Journal of International Security, 2*(2), 2017, p.240-262.

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