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ABSTRACT

This article explores multiple ways in which the unlawfulness of a threat, under Article 2(4), can result from the threatened force being unlawful under another body of law. It concludes: (a) deterrence is a threat; (b) a threat is unlawful if use of the threatened force would be unlawful; (c) the only possible exception to the general rule that use of nuclear weapons would be unlawful is an extreme circumstance of self-defence; (d) use of nuclear weapons in a belligerent reprisal would be unlawful; and so (e) two specific aspects of UK policy are unlawful: the refusal to rule out first use, and the possibility of low level, high power use. Possible strategies to hold the UK to account are considered, and paragraphs 47–8 of the ICJ's *Nuclear Weapons* advisory opinion are dissected in an appendix. Despite the UK focus, the analysis and conclusions are relevant to other states.

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KEYWORDS Threat of force; nuclear weapons; deterrence; first use; neutrality; UK

1. Introduction and article overview

1.1. Introduction

The United Kingdom (UK) claims to 'uphold and strengthen the rules-based international order to ensure that those who transgress international law … are held to account'.[1] This article considers recent claims that the UK itself, in some specific aspects of its nuclear deterrence policy, currently transgresses international law, and claims about potentially unlawful aspects of nuclear deterrence policies in general, which might apply to the UK. This article

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*All websites accessed on 6 September 2019.

[1]UK Prime Minister, *National Security Strategy and Strategic Defence and Security Review 2015* (Cm 9161, 2015) para 4.8.

This article has been republished with minor changes. These changes do not impact the academic content of the article.

uses the International Court of Justice (ICJ) 1996 *Nuclear Weapons* advisory opinion (the ICJ opinion)[2] as a legal framework for argument, but also takes into account the extensive literature both prior, and subsequent, to that opinion. This reveals some points on which the ICJ opinion might not reflect current legal thinking, but in most areas the advisory opinion is supported and strengthened by subsequent legal analysis. This article considers a more specific set of facts than the ICJ did, in order to arrive at a clearer answer.

1.2. Article overview

Section 2 provides some context and background for the subsequent discussion. Subsections 2.1 and 2.2 briefly outline the relevant categories of international law, the relevant sense of accountability, the nature of deterrence in general, and some specific features of UK deterrence policy. Subsections 2.3–2.6 briefly review why this article considers deterrence (rather than use), why this article considers lawfulness (rather than legitimacy), and the grounds for hope that the UK might change aspects of its current nuclear deterrence policy that are shown to be unlawful.

Section 3 lays the legal foundations on which sections 4 and 5 build. Subsection 3.1 reviews international law relevant to threats of force. Subsections 3.2–3.5 then review the application of this law to nuclear deterrence policies, including the relevance of humanitarian law, and the specific question of reprisals.

Sections 4 and 5 consider (in the light of the analysis in section 3) specific features of UK deterrence policy which have recently been subject to legal challenge (in the literature and the courts). Section 4 covers the UK's refusal to rule out first use of nuclear weapons. Section 5 covers 'low level, high power' use, action to maintain deterrence policy indefinitely, the targeting of cities, and 'unnecessary' use.

Section 6 outlines possible strategies to hold the UK to account, including a further ICJ advisory opinion, this time on a more specific question about nuclear policies, and work to influence opinion at all levels. Section 7 summarises the conclusions, and an appendix dissects two paragraphs from the ICJ opinion which are particularly relevant to nuclear deterrence policies.

Despite the UK focus, the analysis and conclusions are relevant to other states, as briefly mentioned throughout.

2. Context and background

2.1. Context: international law, accountability and deterrence

It is useful to identify and distinguish relevant categories of international law, but there is not complete consistency between writers in how the various

[2]*Legality of the Threat or Use of Nuclear Weapons* (advisory opinion) [1996] ICJ Rep 226.

categories are labelled or defined. This article[3] distinguishes between (a) the law relating to the threat or use of force (including the provisions of the UN Charter), (b) the principles and rules of humanitarian law, (c) the law of neutrality, (d) criminal law, (e) human rights law, and (f) environmental law. This article[4] will avoid the terms *ius/jus in bello* and *ius/jus ad bellum*, which are used frequently, but not entirely consistently, in the literature.

This article takes the UK's phrase 'held to account' (in the opening quotation of this article) to refer to accountability in a broader sense than responsibility or liability.[5] Such accountability suggests a relationship in which one party can be held to explain and justify their behaviour to another,[6] such as the relationship between elected representatives and voters who elect them to office,[7] or that between institutions.[8] In the international context, accountability operates among states and international organisations, but it can also involve multinational non-governmental organizations (NGOs).[9]

There is not consistency among authors using the words deterrence and deployment. In this article, 'deployment refers to the operational readiness to use nuclear weapons', and 'deterrence refers to the policy intention to use nuclear weapons if subject to attack'.[10] Deterrence, thus, in this article, refers to more than the mere possession of nuclear weapons.[11] It refers to a state's published deterrence policy in the context of the deployment of nuclear weapons by that state.[12] There is no single agreed theory, or practice, of deterrence, but most approaches to deterrence share the following core features.[13]

[3]In line with: *Nuclear Weapons* (advisory opinion) (n 2); Dapo Akande, 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court' (1997) 68 *British Yearbook of International Law* 165; and Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons under International Law* (Cambridge University Press, 2014).

[4]In line with *Nuclear Weapons* (advisory opinion) (n 2).

[5]Jan Klabbers, *International Law* (Cambridge University Press, 2nd edn 2017) 152–3; Andrea Bianchi, 'Looking Ahead: International Law's Main Challenges' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009) 392, 401.

[6]Klabbers (n 5) 137–8.

[7]Edward Weisband and Alnoor Ebrahim, 'Introduction: Forging Global Accountabilities' in Alnoor Ebrahim and Edward Weisband (eds), *Global Accountabilities: Participation, Pluralism and Public Ethics* (Cambridge University Press, 2007) 1; Russell Powell and Allen Buchanan, 'Fidelity to Constitutional Democracy and to the Rule of International Law' in Armstrong (ed) (n 5) 249, 254.

[8]Weisband and Ebrahim (n 7).

[9]Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *American Journal of International Law* 348.

[10]Brian Drummond, 'Is the United Kingdom Nuclear Deterrence Policy Unlawful?' (2013) 11 *New Zealand Yearbook of International Law* 107, 109.

[11]This article does not therefore deal with what has been called 'existential deterrence … the idea that mere possession of nuclear weapons deters others from attacking': Francis Grimal, *Threats of Force: International Law and Strategy* (Routledge, 2013) 61, 67, 109; Colin S Gray, *Modern Strategy* (Oxford University Press, 1999) 330, 339.

[12]Michael Quinlan, *Thinking about Nuclear Weapons: Principles, Problems, Prospects* (Oxford University Press, 2009) 25.

[13]Michael MccGwire, 'The Dilemmas and Delusions of Deterrence' in Gwyn Prins (ed), *The Choice: Nuclear Weapons versus Security* (Chatto & Windus, 1984) 75, 77. UK deterrence policy, outlined in subsection 2.2, illustrates some of these features.

Deterrence aims to dissuade others from taking action that would be unwelcome, by making clear that the result of such action will be worse for them than if they had not acted.[14] Deterrence literally means 'frightening from'.[15] Preventing the use of nuclear weapons is not the sole aim of deterrence – its wider aim is to prevent any war between nuclear powers.[16] Similarly, deterrence cannot depend only on nuclear weapons.[17] It aims, on a long-term basis, to achieve a settled understanding which, even in crises, will prevent military action.[18] This article does not comment on whether or not deterrence has achieved, or is likely to achieve, these aims – an area of ongoing controversy.[19]

Deterrence requires a credible capacity to punish through possession of weapons and a will to use them.[20] Deterrence also requires making clear what actions would be unwelcome.[21] Deterrence needs neither to specify precisely the result of the unwelcome action, nor to identify specific adversaries.[22] It depends on a claimed paradox: the likelihood of unwelcome action by others, is inversely proportional to the credibility that the taking of that unwelcome action by others will lead to a worse overall result for them.[23] This may underlie the UK's reluctance[24] to explicitly rule out some specific uses which this article shows would be unlawful.[25]

2.2. Context: UK nuclear deterrence policy

The declared UK deterrence policy includes the following statements:[26]

[14]Quinlan (n 12) 20; Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press, 2007) 46; Mohamed Said El-Banhawy, 'Is There a Legal Basis for Nuclear Deterrence Theory and Policy?' in Maxwell Cohen and Margaret E Gouin (eds), *Lawyers and the Nuclear Debate* (University of Ottawa Press, 1988) 181, 181; Mary Eileen E McGrath, 'Nuclear Weapons: the Crisis of Conscience' (1985) 107 *Military Law Review* 191, 194; Harry H Almond, 'Deterrence and a Policy-Oriented Perspective on the Legality of Nuclear Weapons' in Arthur Selwyn Miller and Martin Feinrider (eds), *Nuclear Weapons and Law* (Greenwood Press, 1984) 57, 73.

[15]Sue Wareham, 'Nuclear Deterrence Theory – a Threat to Inflict Terror' (2013) 15 *Flinders Law Journal* 257, 260.

[16]Quinlan (n 12) 21; Stürchler (n 14) 46; Almond (n 14) 69.

[17]Quinlan (n 12) 22; Gray (n 11) 169.

[18]Quinlan (n 12) 27–8.

[19]Gray (n 11) 78–9, 299, 324–5, 331–9; Ward Wilson, 'The Myth of Nuclear Deterrence' (2008) 15 *Nonproliferation Review* 421; Bryan R Early and Victor Asal, 'Nuclear Weapons, Existential Threats, and the Stability–Instability Paradox' (2018) 25 *Nonproliferation Review* 223.

[20]Kevin C Kennedy, 'A Critique of United States Nuclear Deterrence Theory' (1983) 9 *Brooklyn Journal of International Law* 35, pt II; MccGwire (n 13) 77; El-Banhawy (n 14) 181; Quinlan (n 12) 23, 24.

[21]*Ibid*, 23.

[22]*Ibid*, 24, 25.

[23]*Ibid*, 26; MccGwire (n 13) 76.

[24]See subsection 2.3.

[25]Quinlan (n 12) 24.

[26]Wider aspects of the policy are reviewed in Nick Ritchie, *A Nuclear Weapons-Free World? Britain, Trident and the Challenges Ahead* (Palgrave Macmillan, 2012) 10–13, 19–20.

- We would only consider using nuclear weapons in self-defence (including the defence of our NATO allies), and even then only in extreme circumstances;[27]
- We deliberately maintain some ambiguity about precisely when, how and at what scale we would contemplate use of our nuclear deterrent. We do not want to simplify the calculations of a potential aggressor by defining more precisely the circumstances in which we might consider the use of our nuclear capabilities (for example, we do not define what we consider to be our vital interests), hence, we will not rule in or out the first use of nuclear weapons;[28]
- We … would not use any of our weapons contrary to international law.[29] The legality of any such use would depend upon the circumstances and the application of the general rules of international law, including those regulating the use of force and the conduct of hostilities.[30]
- Our retention of an independent centre of nuclear decision-making makes clear to any adversary that the costs of an attack on UK vital interests will outweigh any benefits.[31]
- Our nuclear deterrent … should influence … any state that might consider transferring nuclear weapons or nuclear technology. … Any state that we can hold responsible for assisting a nuclear attack on our vital interests can expect that this would lead to a proportionate response.[32]
- The UK's continued possession of a nuclear deterrent provides an assurance that we cannot be subjected in future to nuclear blackmail or a level of threat which would put at risk our vital interests or fundamentally constrain our foreign and security policy options;[33]
- The UK's nuclear weapons are not designed for military use during conflict but instead to deter and prevent nuclear blackmail and acts of aggression against our vital interests that cannot be countered by other means.[34]
- The nuclear deterrent is not intended to deter terrorists. The UK has policies and capabilities to deal with the wide range of threats we currently face or might face in the future. Our nuclear deterrent is there to deter the most

[27] Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs, The Future of the United Kingdom's Nuclear Deterrent (White Paper, Cm 6994, 2006) para 2-11. A similar statement appears in UK Government, 'Policy Paper 2010 to 2015 Government Policy: UK Nuclear Deterrent' (updated 8 May 2015) app 1, principle 3, www.gov.uk/government/publications/2010-to-2015-government-policy-uk-nuclear-deterrent/2010-to-2015-government-policy-uk-nuclear-deterrent.

[28] UK Policy Paper 2015 (n 27) app 1, principle 3. A similar statement appears in UK White Paper 2006 (n 27) para 3-4.

[29] UK Policy Paper 2015 (n 27) 'Actions', para 1.

[30] UK White Paper 2006 (n 27) para 2-11.

[31] *Ibid*, para 3-4; UK Government, 'Policy Paper: The UK's Nuclear Deterrent: What You Need to Know' (updated 19 February 2018) second bullet, www.gov.uk/government/publications/uk-nuclear-deterrence-factsheet/uk-nuclear-deterrence-what-you-need-to-know.

[32] UK White Paper 2006 (n 27) para 3-11.

[33] *Ibid*, para 3-10.

[34] *Ibid*, para 3-4; UK Policy Paper 2018 (n 31) 'Myth 1'.

extreme threats to our national security and way of life, which cannot be done by other means;[35]

- Our preference is for an invulnerable … system … capable of being held at high readiness for extended periods of time … thereby giving the Government maximum flexibility in terms of setting and adjusting our nuclear deterrent posture: this is especially important during a crisis.[36] At present, we achieve this invulnerability by maintaining a submarine permanently on patrol.[37]

This article concentrates on three aspects of this policy: the failure to rule out first use, the complete ambiguity about how and at what scale weapons might be used, and the lack of clarity about the circumstances in which the UK might use nuclear weapons.

Legal analysis of UK deterrence policy should consider the potential consequences, of the use of UK weapons, resulting from their 'unique characteristics'.[38] UK nuclear warheads are estimated to have an explosive power which can be varied between one kiloton, 10 kilotons and 100 kilotons.[39] The consequences of a nuclear explosion will vary depending on the explosive power, the height (or depth) at which the explosion happens, and its location.[40] The effects of hypothetical explosions from the use of the UK's weapons can be deduced from the known results of actual equivalent explosions.[41]

2.3. Motivation: why deterrence, rather than use?

Current UK policy is that 'we … would not use any of our weapons contrary to international law'.[42] UK policy also states that '[t]he legality of any such use would depend upon the circumstances and the application of the general rules of international law, including those regulating the use of force and the conduct of hostilities'.[43] The UK Manual of the Law of Armed Conflict

[35]UK Policy Paper 2018 (n 31) 'Myth 1', and 'Threat', bullet 6.
[36]UK White Paper 2006 (n 27) para 4-3.
[37]*Ibid*, para 5-7.
[38]*Nuclear Weapons* (advisory opinion) (n 2) para 36.
[39]Ronald King Murray, 'Nuclear Weapons and the Law' (1999) 15 *Medicine, Conflict and Survival* 126, 134–5; Frank Barnaby, 'What is "Trident"? The Facts and Figures of Britain's Nuclear Force' in Ken Booth and Frank Barnaby (eds), *The Future of Britain's Nuclear Weapons: Experts Reframe the Debate* (Oxford Research Group, 2006) 7, 8–9; Philippe Sands and Helen Law, 'The UK's Nuclear Deterrent: Current and Future Issues of Legality' in Rebecca Johnson and Angie Zelter (eds), *Trident and International Law, Scotland's Obligations* (Luath Press, 2011) 114, 128–9; Ritchie (n 26) 11; Drummond (n 10) 111.
[40]Fred Bright, 'Nuclear Weapons as a Lawful Means of Warfare' (1965) 30 *Military Law Review* 1, 2–12 (outline); William G Lee, 'The United States' Nuclear First Strike Position: A Legal Appraisal of Its Ramifications' (1977) 7 *California Western International Law Journal* 508, 512–14 (brief summary); Erik Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (Hart Publishing, 2008) 62–105 (detailed exploration).
[41]Drummond (n 10) s II.C.
[42]UK Policy Paper 2015 (n 27) 'Actions', para 1.
[43]UK White Paper 2006 (n 27) para 2-11.

notes that those rules 'cannot be applied in isolation from any factual context to imply a prohibition of a general nature. Whether the use, or threatened use, of nuclear weapons in a particular case is lawful depends on all the circumstances'.[44] The then UK Secretary of State for Defence stated in 2010:

> Legality would have to be determined in the light of specific circumstances applying when such use was being contemplated … We have stated this in our submissions to the ICJ, in the 2006 White Paper, and in the UK's Manual of the Law of Armed Conflict … we will not define more precisely the circumstances in which we might consider the use of our nuclear deterrent.[45]

These statements together suggest the UK's extreme reluctance, if not outright refusal, to discuss the legality of any specific *future* use of a specific weapon in a specific *future* circumstance.[46] This article, therefore, emphasises the unlawfulness of the UK's *current* deterrence policy, rather than only dealing with the unlawfulness of a possible *future* use of UK weapons. If the UK's current nuclear deterrence policy is unlawful, then the UK is among those that daily 'transgress international law',[47] and the UK is under an *immediate* legal obligation to change its policy. If deterrence is not itself unlawful, but some proposed uses are unlawful, then no *immediate* legal obligation arises. There is a strong motivation to have this dialogue now. It is hard to imagine that there would be sufficient scope for issues of legality to be adequately determined if that determination is left until such use is being contemplated, as suggested by one reading of the 2010 statement cited previously.[48] It would seem more appropriate to do as much of the determination as possible long before that time.

[44]UK Ministry of Defence, *Manual of the Law of Armed Conflict* (Oxford University Press, 2004) para 6.17.

[45]Letter of 31 August 2010 from the then Secretary of State for Defence, to the author's Member of Parliament, in reply to one on the author's behalf.

[46]The 2010 letter also suggests that (a) the Written statement of the Government of the United Kingdom, 16 June 1995, in relation to *Nuclear Weapons* (advisory opinion) (n 2), (b) the UK White Paper 2006 (n 27), and (c) the UK's Manual of the Law of Armed Conflict (n 44) represent the fullest current statement of the UK Government view of the relevant law. The UK's statements in *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v United Kingdom*) (preliminary objections) [2016] ICJ Rep 833, focused on the UK's preliminary objections to the case, and do not suggest any change to these views.

[47]The phrase used (of other actors) in UK, *National Security Strategy* (n 1) para 4.8, as quoted in subsection 1.1; Richard Falk, Lee Meyrowitz and Jack Sanderson, 'Nuclear Weapons and International Law' (1980) 20 *Indian Journal of International Law* 541, 541, suggest that the policies of most nuclear-armed states at that time constituted 'a grave continuing series of violations of international law … [which] should be terminated'.

[48]Charles J Dunlap, 'Taming Shiva: Applying International Law to Nuclear Operations' (1997) 42 *Air Force Law Review* 157, 167–9, outlines US plans for such determinations to be made by dedicated legal teams at the time use of nuclear weapons is being contemplated; that these plans would be implemented in an extreme circumstance of self-defence appears, at best, unreasonably optimistic, despite the evidence set out in Abram Chayes, *The Cuban Missile Crisis* (Oxford University Press, 1974) 4–7, 14–17; further aspects of this challenge are considered in Anthony J Colangelo and Peter Hayes, 'An International Tribunal for the Use of Nuclear Weapons' (2019) 2(1) *Journal for Peace and Nuclear Disarmament* 219, 220–1, 243–8.

2.4. Explanation: is the word 'unlawful' appropriate?

On one view, any use of any nuclear weapon in any circumstance would be unlawful.[49] There is, however, no consensus in international legal opinion on this point.[50] This lack of consensus is reflected in the ICJ opinion[51] and related commentary.[52] This, at least partly, reflects clarity on some fact patterns, and an inability to be clear on others.[53] In this context, it is worth considering the specific weapons deployed by specific states, and the particular uses of these weapons envisaged in deterrence policies. This approach

[49]Peter B Maggs, 'The Soviet Viewpoint on Nuclear Weapons in International Law' (1964) 29 *Law and Contemporary Problems* 956, 958, notes this as the unanimous view of Soviet legal scholars at that time; Marieke Roos, 'An Updated Overview of the International Law Governing Nuclear Weapons' (2016) 2016 *Journal of South African Law / Tydskrif Suid-Afrikaanse Reg* 640, 653, notes that '[t]his argument has found wide support among civil society and legal scholars'. Examples of the latter include all but the last four of the following authors (the last four highlight the risk of such a conclusion arising from inadequate analysis): Alexander N Sack, 'ABC – Atomic, Biological, Chemical Warfare in International Law' (1950) 10 *Lawyers Guild Review* 161, para 49; Falk, Meyrowitz and Sanderson (n 47); Francis A Boyle, 'The Relevance of International Law to the Paradox of Nuclear Deterrence' (1986) 80 *Northwestern University Law Review* 1407; David M Corwin, 'The Legality of Nuclear Arms under International Law' (1987) 5 *Penn State International Law Review* 271; Eric David, 'The Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons' (1997) 316 *International Review of the Red Cross* 21; Gaillard T Hunt, 'The World Court and the Bomb: Nuremberg and Babel at the Hague' (2001) 8 *ILSA Journal of International and Comparative Law* 151; Saeed Bagheri, 'Towards Fulfillment of Rules of Humanitarian Law in the Context of the Nuclear Non-Proliferation Treaty' (2016) 3(1) *BRICS Law Journal* 66, 88; Daniel Rietiker, 'The Treaty on the Prohibition of Nuclear Weapons: A Further Confirmation of the Human and Victim-Centred Trend in Arms Control Law' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law, vol IV: Human Perspectives on the Development and Use of Nuclear Energy* (TMC Asser Press, 2019) 325, 339. The risk of such a conclusion arising from inadequate analysis is highlighted in Bright (n 40) 13–38; W T Mallison, 'Laws of War and the Juridical Control of Weapons of Mass Destruction in General and Limited Wars' (1967) 36 *George Washington Law Review* 308, 329–39; Raymond E Lisle, 'Nuclear Weapons: A Conservative Approach to Treaty Interpretation' (1983) 9 *Brooklyn Journal of International Law* 275; Eric J McFadden, 'The Legality of Nuclear Weapons: A Response to Corwin' (1988) 6 *Penn State International Law Review* 313.

[50]As reflected, e.g. in Sack (n 49) 171–6; Bright (n 40) 37–8; Carol A Roehrenbeck, 'The Use of Nuclear Weapons under International Law: An Annotated Bibliography' in Miller and Feinrider (eds) (n 14) 215; Elliott L Meyrowitz, 'The Opinion of Legal Scholars on the Legal Status of Nuclear Weapons' (1987) 24 *Stanford Journal of International Law* 111; Nicholas Rostow, 'The World Health Organization, the International Court of Justice, and Nuclear Weapons' (1995) 20 *Yale Journal of International Law* 151, 177–84.

[51]*Nuclear Weapons* (advisory opinion) (n 2) and in particular the opinions of the individual judges.

[52]See, e.g. Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999); Nystuen, Casey-Maslen and Bersagel (eds) (n 3).

[53]Martin Feinrider, 'International Law as the Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons' (1982) 7 *Nova Law Review* 103, 113; Winston P Nagan, 'Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium' (1999) 24 *Yale Journal of International Law* 485, 523–4; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (ICRC, 2001) https://openaccess.leidenuniv.nl/handle/1887/14021, 170–2; Jörg Kammerhofer, 'Gaps, the Nuclear Weapons Advisory Opinion and the Structure of International Legal Argument Between Theory and Practice' (2009) 80 *British Yearbook of International Law* 333, 349; Michael Bothe, 'Nuclear Weapons Advisory Opinions' in Frauke Lachenmann and Rüdiger Wolfrum (eds), *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law Thematic Series, vol 2* (Oxford University Press, 2017) 830, para 18.

has been taken in practice by many legal writers over the decades.[54] Typically such analysis reveals that at least some of the uses envisaged, in the deterrence policies of the nuclear-armed states, are unlawful in at least some respects. The repeated phrase 'at least' in the previous sentence recognises that, in relation to other uses, a fuller review of the law and the facts may reveal that some or all of these other uses are also unlawful.[55]

Some authors 'refrain from comments about whether the behaviour of states is lawful or unlawful',[56] based on the view that legal rules tend to have uncertain content (or are 'indeterminate'). Instead, they ask whether behaviour can be legally justified, assuming a sliding scale. Even on this basis, however, 'once a crucial point is passed (when the justification is not strong enough) the behaviour may be deemed unlawful':[57] 'if most international lawyers find behaviour unlawful, then it probably is'.[58] Others contrast bright-liners and balancers, using the analogous contrast between an on–off switch and a dimmer switch.[59] This article uses the term 'unlawful' to indicate behaviour for which most international lawyers would find little legal justification.[60] For this reason it aims to refer to a body of literature which is large enough to be reasonably representative.[61] It also aims, as far

[54]William V O'Brien, 'Some Problems of the Law of War in Limited Nuclear Warfare' (1961) 14 *Military Law Review* 1, 7–9; Bright (n 40); Ian Brownlie, 'Some Legal Aspects of the Use of Nuclear Weapons' (1965) 14 *International and Comparative Law Quarterly* 437; Lee (n 40); Anthony D'Amato, 'The Purposive Dimension of International Law' (1983) 9 *Brooklyn Journal of International Law* 311; Burns H Weston, 'Nuclear Weapons versus International Law: A Contextual Reassessment' (1983) 28 *McGill Law Journal* 542; Daniel J Arbess, 'The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?' (1984) 30 *McGill Law Journal* 89; Boyle (n 49); Nagendra Singh and Edward McWhinney, *Nuclear Weapons and Contemporary International Law* (Martinus Nijhoff, 2nd edn 1989) 324; H Scott Fairley and Gordon P Crann, 'Is First-Use of Nuclear Weapons Contrary to the Law of Nations?' (1991) 11 *Windsor Yearbook of Access to Justice* 3, s III.A; Stephen Gordon, 'The Prospects for Challenging US Nuclear Weapons Policy in the Light of the World Court's Advisory Opinion on the Legality of the Threat or Use of such Weapons' (1997) 28 *St Mary Law Journal* 665, 705–12; Charles J Moxley, John Burroughs and Jonathan Granoff, 'Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty' (2011) 34 *Fordham International Law Journal* 595; Drummond (n 10); Justin Anderson, 'Law of War Considerations in Fielding Nuclear Forces' (2016) 46(7) *Arms Control Today* 8; Jeffrey G Lewis and Scott D Sagan, 'The Nuclear Necessity Principle: Making US Targeting Policy Conform with Ethics & the Laws of War' (2016) 145(4) *Daedalus* 62; Theodore T Richard, 'Nuclear Weapons Targeting: The Evolution of Law and U.S. Policy' (2016) 224 *Military Law Review* 862; Isha Jain and Bhavesh Seth, 'India's Nuclear Force Doctrine: Through the Lens of *Jus ad Bellum*' (2019) 32 *Leiden Journal of International Law* 111.

[55]This point is visually illustrated in a diagram in Drummond (n 10) 137–8.

[56]Klabbers (n 5) 22.

[57]*Ibid*.

[58]*Ibid*, quoting Schachter.

[59]Matthew C Waxman, 'Regulating Resort to Force: Form and Substance of the UN Charter Regime' (2013) 24 *European Journal of International Law* 151, 157: 'Bright-Liners … preferred doctrinal formulas are "bright" in several senses. First … easily recognizable factual or procedural conditions … Secondly, the legality or illegality of an action at any given time is quite clear and widely recognized and agreed upon'.

[60]Klabbers (n 5) 22; Dean Alfange, 'Wisdom, Constitutionality, and Nuclear Weapons Policy' (1982) 7 *Nova Law Review* 75, 77.

[61]Adam Roberts and Richard Guelff (eds), *Documents on the Laws of War* (Oxford University Press, 3rd edn 2000) 12.

as possible, to focus on 'bright lines' in the contexts where these appear to exist in the relevant law.

International law provides 'a common language and framework for the exchange of claims … between states'.[62] In this diplomatic process international actors invoke 'legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents'.[63] The standards set by the framework are thus flexible, but not wholly subjective: the standards set are generally higher than those achieved in current state behaviour.[64] These standards can, therefore, be used for assessing and comparing the various views of states.[65] This understanding of international law is consistent with the language used in the UK statements quoted in subsections 1.1, 2.2 and 2.3.

Does law apply to deterrence? The view that the ICJ should not deal with matters of security, has been expressed or implied in the context of recent ICJ cases,[66] but has also been opposed.[67] UK policy appears to accept that deterrence is subject to law including the Treaty for the Non-Proliferation of Nuclear Weapons (NPT)[68]: 'Maintaining a minimum nuclear deterrent is fully consistent with all our international legal obligations, including those under the NPT'.[69] The ICJ opinion made clear that international law does apply to deterrence.[70] The opinion also appeared to clarify that the 1995 'negative security assurances', by the UK, the United States (US) and the

[62]Yasuaki Onuma, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 *European Journal of International Law* 105, 130.
[63]Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, 199.
[64]Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395, 416.
[65]Malcolm N Shaw, *International Law* (Cambridge University Press, 8th edn 2017) 49.
[66]Michael A Becker, 'The Dispute that Wasn't There: Judgments in the Nuclear Disarmament Cases at the International Court of Justice' (2017) 6 *Cambridge International Law Journal* 4, 25; Christine Gray, 'The 2016 Judicial Activity of the International Court of Justice' (2017) 111 *American Journal of International Law* 415, 432; Grimal (n 11) 62; Ryszard Piotrowicz, 'The World Court Judges Nuclear Weapons Unjudgeable' (1996) 70 *Australian Law Journal* 959, 961. For an earlier expression of this point, see Eugene Rostow, 'Is There a Legal Basis for Nuclear Deterrence Theory and Policy?' in Cohen and Gouin (eds) (n 14) 175, 177, 180.
[67]James A Green, *The International Court of Justice and Self-Defence in International Law* (Hart Publishing, 2009) 188–94; *Marshall Islands* (preliminary objections) (n 46) dissenting opinion of Judge Bennouna, 2; Vincent-Joël Proulx, 'The World Court's Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes' (2017) 30 *Leiden Journal of International Law* 925, 937–9; Ingo Venzke 'Public Interests in the International Court of Justice – A Comparison between *Nuclear Arms Race* (2016) and *South West Africa* (1966)' (2017) 111 *American Journal of International Law* 68.
[68]Treaty for the Non-Proliferation of Nuclear Weapons (NPT) (1968) 729 UNTS 161.
[69]UK White Paper 2006 (n 27) 21, point 7; UK Policy Paper 2018 (n 31) 'Myth 4', repeats the same statement.
[70]As discussed in subsection 3.3.

other NPT nuclear-armed states,[71] were legally binding restrictions on those states,[72] which also underlines that law does apply to deterrence.

2.5. Clarification: what about legitimacy?

Arguments for nuclear deterrence often, at least implicitly, appeal to legitimacy rather than law.[73] In this context, 'legitimacy is the capacity of a rule to pull those to whom it is addressed towards consensual compliance'.[74] Legitimacy rests on three factors: 'legal validity, … justifiability … in terms of the beliefs and values current in the given society, and evidence of popular consent'.[75]

Over recent decades there has been significant discussion of the role of legitimacy as a standard for assessing the international behaviour of states. At first sight this might appear to challenge the relevance of international law as such a standard, particularly in contexts where it can be argued that 'strict adherence to international law would lead to considerable harm'.[76] Deterrence can be argued to be one of the 'circumstances where strong moral factors seem to require unlawful action and political conditions exist that make such action likely to achieve goals by acceptable means and costs'.[77] While this argument has regularly been made in the literature, it is rarely made by states. This suggests that legitimacy is best seen as a complement, rather than an alternative, to legality:[78] 'legitimate actions are sometimes conducted outside the law, challenging legality. The resulting discord can then produce adjustments and corrections to law,

[71] UNSC Res 984, UN Doc S/RES/984 (11 April 1995); UN Docs S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265 (1995). Both: Dino Kritsiotis, 'The Fate of Nuclear Weapons after the 1996 Advisory Opinions of the World Court' (1996) 1 *Journal of Armed Conflict Law* 95, 100; and Allan Rosas, 'Negative Security Assurances and Non-Use of Nuclear Weapons' (1982) 25 *German Yearbook of International Law* 199 note that these assurances can undermine arguments about the unlawfulness of the use of nuclear weapons in general; the assurances are not discussed further in this article, due to the extensive limitations that they incorporate.

[72] *Nuclear Weapons* (advisory opinion) (n 2) para 105(2)D; George Bunn, 'The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States' (1997) 4(3) *Nonproliferation Review* 1; Anguel Anastassov, 'Are Nuclear Weapons Illegal? The Role of Public International Law and the International Court of Justice' (2010) 15 *Journal of Conflict & Security Law* 65, 79–80; Kritsiotis (n 71) 99, takes a different view.

[73] Nick Ritchie, 'Legitimizing and Delegitimizing Nuclear Weapons' in John Borrie and Tim Caughley (eds), *Viewing Nuclear Weapons Through a Humanitarian Lens* UNIDIR/2013/4 (UN Institute for Disarmament Research, 2013) 44, 46–55.

[74] Thomas M Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 93.

[75] Ritchie (n 73) 46.

[76] Vesselin Popovski and Nicholas Turner, 'Conclusion: Legitimacy as Complement and Corrective to Legality' in Richard Falk, Mark Juergensmeyer and Vesselin Popovski (eds), *Legality and Legitimacy in Global Affairs* (Oxford University Press, 2012) 439, 439.

[77] Richard Falk, 'Introduction: Legality and Legitimacy – Necessities and Problematics of Exceptionalism' in Falk, Juergensmeyer and Popovski (eds) (n 76) 3, 10.

[78] As appears to be argued in Koskenniemi (n 64).

thereby closing gaps between legality and legitimacy and regaining harmony'.[79]

In simple terms, both legitimacy and legality are needed. 'A rule … which is legal but not legitimate will … not be able to sustain its position over the long term. A practice seen as illegal but legitimate is likely to form the nucleus of a new rule'.[80] The ICJ opinion clarified that deterrence has not yet formed any such new rule.[81]

The Treaty on the Prohibition of Nuclear Weapons[82] (TPNW) illustrates the interaction between legitimacy and law. A recent article concludes that 'as yet there exists no comprehensive account of the TPNW's emergence'.[83] One provisional suggestion is that the aim of the TPNW initiative was 'to delegitimise nuclear weapons … and, by extension, the practice of nuclear deterrence';[84] 'the purpose of the new treaty was … to codify and broadcast its signatories resistance to the status quo'.[85] That limited aim is consistent with the apparent recognition among TPNW proponents that it represents only an interim step on the way towards a comprehensive Nuclear Weapons Convention.[86]

The approach of this article, which considers specific weapons and specific envisaged uses, differs from that of the TPNW.[87] That said, the TPNW's influence (to reduce the legitimacy of nuclear deterrence policies) might helpfully complement the efforts outlined in this article (to identify constraints which nuclear deterrence policies must satisfy to avoid being viewed as clearly unlawful).

[79]Popovski and Turner (n 76) 441. See also Franck (n 74) 105.
[80]Shaw (n 65) 46.
[81]*Nuclear Weapons* (advisory opinion) (n 2) para 67.
[82]Treaty on the Prohibition of Nuclear Weapons (2017) UN Doc A/CONF.229/2017/8.
[83]John Borrie, Michael Spies and Wilfred Wan, 'Obstacles to Understanding the Emergence and Significance of the Treaty on the Prohibition of Nuclear Weapons' (2018) 30 *Journal of Global Change, Peace & Security* 95, 117.
[84]Nick Ritchie and Kjølv Egeland, 'The Diplomacy of Resistance: Power, Hegemony and Nuclear Disarmament' (2018) 30 *Journal of Global Change, Peace & Security* 121, 129; Rebecca Davis Gibbons, 'The Humanitarian Turn in Nuclear Disarmament and the Treaty on the Prohibition of Nuclear Weapons' (2018) 25 *Nonproliferation Review* 11.
[85]Ritchie and Egeland (n 84) 136. The signatories represent an estimated 39% of the 2019 world population, based on UN Department of Economic and Social Affairs, Population Division, 'World Population Prospects: The 2017 Revision' (2017), 2019 projection, medium estimate, data acquired via website https://population.un.org/wpp/DVD/Files/1_Indicators%20(Standard)/EXCEL_FILES/1_Population/WPP2017_POP_F01_1_TOTAL_POPULATION_BOTH_SEXES.xlsx.
[86]Merav Datan and Jürgen Scheffran, 'The Treaty is Out of the Bottle: The Power and Logic of Nuclear Disarmament' (2019) 2(1) *Journal for Peace and Nuclear Disarmament* 114, 129–30; Michael Hamel-Green, 'The Nuclear Ban Treaty and 2018 Disarmament Forums: An Initial Impact Assessment' (2018) 1 *Journal for Peace and Nuclear Disarmament* 436, 454–5; Ritchie and Egeland (n 84) 129, 136.
[87]Ritchie and Egeland (n 84) 129: 'The focus [of the humanitarian initiative which led to the TPNW] was no longer on delegitimising specific nuclear practices such as … first use … but on the weapons themselves'.

2.6. Expectation: is it realistic to expect change?

The UK claims to 'uphold and strengthen the rules-based international order'.[88] Similar views have been attributed to China,[89] India,[90] Russia[91] and the US.[92] Such statements do not, however, necessarily reflect the general practice of the states making them.[93] The extent to which states comply with international law depends on factors influencing (a) whether states in general will comply with a particular rule and (b) whether a particular state will comply with the rules in general.[94] For example, small states tend to be influenced to comply with international law by potential negative reactions of international society, while large states tend to be influenced to comply by potential negative reactions of domestic society.[95]

To what extent is the UK likely to comply with international law on nuclear weapons? One possible indication might be the UK's response to the ICJ opinion.[96] The UK has stated that 'we can find nothing in [the ICJ opinion] to make our deterrence policy … unlawful'.[97] This response appears to support the view that the nuclear-armed states have ignored 'clear legal admonitions … without causing any notable criticism either in diplomatic circles or within domestic politics'.[98] That said, even if 'most governments will violate international law if they consider that the vital interests

[88]UK, *National Security Strategy* (n 1) para 4.8.
[89]Muthucumaraswamy Sornarajah and Jiangyu Wang, 'China, India, and International Law: a Justice Based Vision Between the Romantic and Realist Perceptions' (2019) 9(2) *Asian Journal of International Law* 217, 249.
[90]*Ibid*.
[91]Sergei Yu. Marochkin, 'On the Recent Development of International Law: Some Russian Perspectives' (2009) 8 *Chinese Journal of International Law* 695; Anna Dolidze, 'The Non-Native Speakers of International Law: The Case of Russia' (2016) 15 *Baltic Yearbook of International Law* 77; Harold J Berman, 'Soviet Views on the Legality of Nuclear Weapons' (1983) 9 *Brooklyn Journal of International Law* 259, 261–2, attributes this view to the USSR at that time.
[92]Shirley V Scott, 'The Nature of US Engagement with International Law: Making Sense of Apparent Inconsistencies' in Armstrong (ed) (n 5) 210; Jack Goldsmith and Shannon Togawa Mercer, 'International Law and Institutions in the Trump Era' (2019) *German Yearbook of International Law*, forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3324582.
[93]Richard Falk, 'Nuclear Weapons, War, and the Discipline of International Law' in Richard Falk and David Krieger (eds), *At the Nuclear Precipice: Catastrophe or Transformation* (Palgrave Macmillan, 2008) 225, 229; Georg Schwarzenberger, *The Legality of Nuclear Weapons* (Stevens, 1958) 58.
[94]Onuma (n 62) 114–5, where examples of such factors are outlined.
[95]*Ibid*, 120, which notes that domestic reaction may have limited influence in, e.g. China or the US.
[96]Ritchie (n 26) 19–20, suggests that 'the UK has explicitly accepted' the ICJ opinion and taken specific steps to reflect this in policy statements. *Contra* Richard Falk, 'Non-Proliferation Treaty Illusions and International Lawlessness' in Falk and Krieger (eds) (n 93) 39, 39–40, suggesting that 'nuclear weapons states made no effort whatsoever' to accept the guidance in the ICJ opinion (e.g. in relation to their NPT obligations).
[97]Geoffrey Marston, 'United Kingdom Materials on International Law' (1997) 68 *British Yearbook of International Law* 467, 638 (this is consistent with the suggestion (n 46) that UK Written Statement 1995 (n 46) still represents the current UK Government view of the relevant law); Richard (n 54) 949 notes that the US response was similar.
[98]Falk (n 93) 225.

of their nation require them to do so',[99] there are now strong arguments that it is in the interests of all states to comply with international law.[100]

Overall, it does appear realistic to hope that the UK might change aspects of its current nuclear deterrence policy, if these aspects are clearly shown to be ones for which most international lawyers[101] would find little justification in international law, and if this generates sufficient negative reactions, by other states and by UK domestic society, to these aspects.

This article concentrates on the weapons deployed by the UK, and the particular uses of these weapons envisaged in its deterrence policy, but much of the analysis can be readily applied to other states. Where appropriate, I will briefly mention such possible application to other states, including China, the Democratic People's Republic of Korea (DPRK), France, India, Israel, Russia, Pakistan and the US. I hope this article will encourage others to do the corresponding analysis for the other nuclear-armed states.[102]

The scope to hold nuclear-armed states accountable[103] is significant, given that their aggregate population is around half of the world total.[104] There is also a need to hold accountable non-nuclear-armed states in alliances with nuclear-armed states.[105] In recent years these non-nuclear allies have been seen to influence the nuclear-armed states,[106] and such influence is likely to continue.

3. Foundations

3.1. A threat is unlawful if use of the threatened force would be unlawful

Article 2(4) of the UN Charter requires states to refrain 'from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.[107]

[99]Yasuaki Onuma, 'International Law and Power in the Multipolar and Multicivilizational World of the Twenty-First Century' in Falk, Juergensmeyer and Popovski (eds) (n 76) 149, 157. The same point is made in J A G Griffith, 'Nuclear Weapons and International Law' in Prins (ed) (n 13) 154, 171.

[100]*Ibid*, 171; Franck (n 74) 106; Falk (n 77) 4; James A Green, 'An Unusual Silence' (2007) 157(7294) *New Law Journal*, last para.

[101]See the second paragraph of subsection 2.4.

[102]The material in Elli Louka, *Nuclear Weapons, Justice and the Law* (Edward Elgar, 2011) 38–64 will be relevant to any such analysis.

[103]In the sense outlined in subsection 2.1.

[104]Estimate for 2019: 47%, based on UN, Department of Economic and Social Affairs (n 85).

[105]Fairley and Crann (n 54); Ved P Nanda and David Krieger, *Nuclear Weapons and the World Court* (Transnational Publishers, 1998) 179–80; Wareham (n 15); Monique Cormier and Anna Hood, 'Australia's Reliance on US Extended Nuclear Deterrence and International Law' (2017) 13(2) *Journal of International Law and International Relations* 3.

[106]Camille Grand, 'Legality of the Threat or Use of Nuclear Weapons – A French Perspective on the ICJ Advisory Opinion' (1996) 71 *Die Friedens-Warte* 273, 275; Nobuyasu Abe, 'No First Use: How to Overcome Japan's Great Divide' (2018) 1 *Journal for Peace and Nuclear Disarmament* 137, 146.

[107]Charter of the United Nations, Art 2(4).

Prior to 1996, there was a widely cited view that the criteria used to identify the unlawfulness of a threat were distinct from those which identify an unlawful use of force. On this view, a threat of a use of force would not necessarily be unlawful, even if the use of force would itself be unlawful in the (hypothetical) event of that force actually being used.[108] This view is difficult to reconcile with the wording of Article 2(4),[109] and had been argued on the basis of state practice.

The ICJ opinion was unequivocal in its opposition to any such view:

> If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. … The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter.[110]

The ICJ opinion also opposed any view that state practice might differ on this point: 'For the rest, no State – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal'.[111]

Despite the apparent clarity, however, the ICJ opinion has been described as 'agonizingly ambiguous' in its treatment of threats, 'reflecting a clear uneasiness on the part of the Court to say anything definitive about the thorny issue of nuclear deterrence'.[112] This ambiguity is unhelpful because, usually, 'states do not claim that they are responding in self-defense by way of a threat; instead, they threaten to respond in self-defense by way of force'.[113]

Four concerns have since been expressed about this element of the ICJ opinion. (1) Some question the practicality of assessing the legality of threats, given the frequent uncertainty over exactly what use of force is

[108]Romana Sadurska, 'Threats of Force' (1988) 82 *American Journal of International Law* 239; William R Hearn, 'The Legal Regime Regulating Nuclear Deterrence and Warfare' (1990) 61 *British Yearbook of International Law* 199, 210–14, is explicitly based on this view; McGrath (n 14) 206–8, appears to be implicitly based on this view; Berman (n 91) 260, and Maggs (n 49) 959, 967, attribute this view to the then USSR.

[109]Nigel D White and Robert Cryer, 'Unilateral Enforcement of Resolution 687: A Threat Too Far?' (1999) 296 *California Western International Law Journal* 243, 254; Dino Kritsiotis, 'Close Encounters of a Sovereign Kind' (2009) 20 *European Journal of International Law* 299, 104 and footnote 20.

[110]*Nuclear Weapons* (advisory opinion) (n 2) para 47.

[111]*Ibid*.

[112]Nikolas Stürchler, 'Law's Labours Lost? Comment on Dino Kritsiotis, Close Encounters of a Sovereign Kind' *EJIL:Talk!* (25 March 2010) www.ejiltalk.org/laws-labours-lost-comment-on-dino-kritsiotis-close-encounters-of-a-sovereign-kind/.

[113]James A Green and Francis Grimal, 'The Threat of Force as an Action in Self-Defense under International Law' (2011) 44 *Vanderbilt Journal of Transnational Law* 285, 306.

being threatened.[114] (2) Some suggest that state practice has demonstrated a certain tolerance of threats,[115] although such a view is strongly contested.[116] (3) The possible existence of a rule of customary international law permitting nuclear deterrence has been explored, but without any clear conclusions emerging.[117] (4) Some question the technical accuracy of the ICJ's expression of this point in two paragraphs of the ICJ opinion.[118]

Despite these concerns, most recent analyses agree that a threat of force will be unlawful if the hypothetical use of the force threatened would be unlawful.[119] This principle, in the context of the law relating to the use of force, implies that only threats to use force in self-defence, or under Article 42 of the UN Charter, can (although not necessarily will) be lawful.[120] The lawfulness of such threats (to use force in self-defence, or under Article 42) depends on the hypothetical use of the threatened force also complying with the other five of the six categories of law identified subsection 2.1.[121] In this respect, the law on the use of force differs from the law on the threat of force. For a use of force, the six categories of law can to some extent be considered separately. For a threat of force, no such separation is possible.

Understanding these agreed principles, and applying them to deterrence, requires care.

[114]Michael J Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons' (1997) 91 *American Journal of International Law* 417, 431–2; Michael Wood, 'Use of Force, Prohibition of Threat' in Lachenmann and Wolfrum (eds) (n 53) 1300–2, para 10, suggests 'it may be considered that it is only when the eventual use of force would necessarily be unlawful that the threat would contravene Art 2(4)'; Kritsiotis (n 109) 311; Green and Grimal (n 113) 324.

[115]Wood (n 114) para 16; Kritsiotis (n 109); Kritsiotis (n 71) 103–4.

[116]Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54 *Netherlands International Law Review* 229, 245–58; Stürchler (n 112); Olivier Corten, *The Law against War* (Hart Publishing, 2010) 116–25.

[117]Grimal (n 11) 108–13, reaches no clear conclusion; Drummond (n 10) 118, concludes that nuclear deterrence has not generated a new rule of customary international law, partly based on the idea that Article 2(4) represents a *jus cogens* norm; Wood (n 114) para 12, however, suggests that '[e]ven if the prohibition on the use of force … is … a norm of *jus cogens*, it would seem that the prohibition on the threat of force is not'; Green and Grimal (n 113) footnote 17 outlines the latter controversy.

[118]Gro Nystuen, 'Threats of Use of Nuclear Weapons and International Humanitarian Law' in Nystuen, Casey-Maslen and Bersagel (eds) (n 3) 148, 148–9, 170, challenges the statement in *Nuclear Weapons* (advisory opinion) (n 2) para 105(2)E on the basis that 'threats are generally not prohibited under IHL' and suggests that *Ibid*, para 78 (final sentence) 'seems to be largely without legal support'.

[119]Roscini (n 116) 235; Kritsiotis (n 109) 303–8; Green and Grimal (n 113) 294; François Dubuisson and Anne Lagerwall, 'The Threat of the Use of Force and Ultimata' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 910, 915–17; Corten (n 116) 114: 'As far as I know, no State or commentator has challenged the Court's conclusions on this specific point'.

[120]Stürchler (n 14) 273; Green and Grimal (n 113) 295; Grimal (n 11) 97–8; Patrick M Butchard, 'Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter' (2018) 23 *Journal of Conflict & Security Law* 229.

[121]This is explicitly confirmed in *Nuclear Weapons* (advisory opinion) (n 2) para 47: 'if the use of force itself in a given case is illegal – *for whatever reason* – the threat to use such force will likewise be illegal' (emphasis added).

3.2. Deterrence is a threat in general terms

Occasionally there have been very specific threats to use nuclear weapons, for example by France,[122] the US,[123] and Israel.[124] This article however considers a more general and pervasive threat: 'nuclear deterrence is … arguably the most extreme form of threat of force given the nature of the weapons'.[125] To avoid the confusion that often arises in this context, we will distinguish between threats in general, and threats prohibited by Article 2(4). The rest of this subsection considers the question of whether or not deterrence constitutes a threat in general terms. The following subsection goes on to consider whether or not deterrence constitutes a threat prohibited by Article 2(4).

The ICJ opinion itself does not explicitly state whether or not deterrence constitutes a threat in general terms. It does, however, comment on whether or not deterrence constitutes a threat prohibited by Article 2(4).[126] These comments implicitly confirm the ICJ view that deterrence does indeed constitute a threat in general terms, even if the policy is only 'intended as a means of defence'.[127] This implication is clear: if deterrence were not a threat in general terms, then it could not possibly be prohibited by Article 2(4). Thus the ICJ opinion clarifies that deterrence is a threat, regardless of whether or not it is a threat prohibited by Article 2(4). There has, however, been ongoing confusion about what the ICJ opinion said on this point, both in the courts,[128] and in the literature.[129]

Why is deterrence a threat in general terms? Deterrence is based on 'capability, commitment, communication, and credibility … In order to effectively deter your opponent from a particular course of action, they have to feel

[122]Falk (n 96) 44: 'Former President Jacques Chirac said a few years ago that if there were some kind of terrorist attack targeting France, he would feel free to order an attack with nuclear weapons in response'.

[123]Kritsiotis (n 109) 317–22, reviews the evidence underlying Iran's view that there have been 'multiple violations of the Charter's prohibition on the threat of force' by the US.

[124]Letter dated 19 September 2018 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, UN Doc A/73/409–S/2018/859 (26 September 2018), notes that Israel 'explicitly threatened Iran with nuclear aggression and annihilation' and refers to this as 'a serious violation of … Article 2(4)'; letter dated 24 December 2018 from the Chargé d'affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General and the President of the Security Council, UN Doc S/2018/1156 (27 December 2018), refers to further statements by Israel 'implicitly threatening all countries in the region … [which] blatantly violate … Article 2(4)'.

[125]Grimal (n 11) 109.

[126]*Nuclear Weapons* (advisory opinion) (n 2) para 48.

[127]*Ibid*.

[128]*Lord Advocate's Reference (No 1 of 2000) in terms of* Section 123 *of the Criminal Procedure (Scotland) Act 1995* [2001] HCJAC 143, 2001 JC 143 [96]; that judgment is criticized in: Drummond (n 10) 116; Grimal (n 11) 66–7; and Peter Weiss, 'The International Court of Justice and the Scottish High Court: Two Views of the Illegality of Nuclear Weapons' (2001) 4 *Waseda Proceedings of Comparative Law* 149.

[129]E.g. Shaw (n 65) 857, suggests that the ICJ opinion 'stated … whether [nuclear deterrence] amounted to a threat would depend upon … '. This is an unhelpfully curtailed paraphrase of *Nuclear Weapons* (advisory opinion) (n 2) para 48: 'Whether this is a "threat" *contrary to Article 2, paragraph 4*, depends upon whether the particular use of force envisaged would … ' (emphasis added), although the context makes clear Shaw's own view that deterrence is a threat in general terms.

threatened. Deterrence, by definition, is a threat and the enemy has to perceive it as such'.[130] On this basis, a typical nuclear deterrence policy constitutes a threat of force,[131] even when no target is identified,[132] and no immediate action is expected.[133]

The UK deterrence policy states that 'retention of an independent centre of nuclear decision-making makes clear to any adversary that the costs of an attack on UK vital interests will outweigh any benefits'.[134] This statement appears to constitute a threat both by reference to the UK's favoured definition of threat,[135] and a more recent comprehensive legal analysis of threats:[136]

> It is an implied promise by the United Kingdom Government of a resort to force against 'any adversary', conditional on non-acceptance of the demand that the adversary does not 'attack UK vital interests'. It communicates the United Kingdom's readiness to use force against another state and creates an expectation that a particular type of challenge might incur the use of force: 'attack on UK vital interests'.[137]

Based on the preceding analysis, therefore, UK deterrence policy, in common with other typical nuclear deterrence policies, constitutes a threat of force in general terms. The following subsection considers whether or not this deterrence policy constitutes a threat prohibited by Article 2(4).

For those unconvinced by this conclusion, the remaining analysis in this article remains relevant.[138] If there is agreement that specific types of use would be unlawful, then some immediate action would be prudent. Uses of nuclear weapons which are identified as being unlawful could be set out in the relevant guidance for those responsible for decisions on use of nuclear weapons: military manuals,[139] guidance for relevant civilian officials, and official statements of nuclear doctrine. This action might reduce the risk of the identified unlawful uses occurring in future.

[130]Grimal (n 11) 61; Quinlan (n 12) 26.
[131]Kennedy (n 20) 61; McGrath (n 14) 206; Rostow (n 66) 175; Michael N Schmitt, 'The International Court of Justice and the Use of Nuclear Weapons' (1998) 51 *Naval War College Review* 91, 99; Murray (n 39) 132; Stürchler (n 14) 89; Grimal (n 11) 61; Wareham (n 15) 258.
[132]Nobuo Hayashi, 'Is the Nuclear Weapons Ban Treaty Accessible to Umbrella States?' in Black-Branch and Fleck (eds) (n 49) 377, 388; a differing view is expressed in Christian Henderson, *The Use of Force and International Law* (Cambridge University Press, 2018) 27–8.
[133]White and Cryer (n 109) 252–4.
[134]UK White Paper 2006 (n 27) para 3-4; UK Policy Paper 2018 (n 31) second bullet.
[135]UK Written Statement 1995 (n 46) para 3.118: '[a] threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government'.
[136]Stürchler (n 14) 273, requires that, to threaten, a State 'communicate its readiness to use force in a particular dispute' but also that 'creating the expectation that even an unnamed challenge might incur the use of force is sufficient'.
[137]Drummond (n 10) 117.
[138]The comments in this paragraph also apply to those who agree that deterrence is a threat, but are not convinced by the conclusion of subsection 3.1 that threatening unlawful use is itself unlawful.
[139]As described in McGrath (n 14) 213–17, and as appears to be suggested in: Anderson (n 54); Lewis and Sagan (n 54); Moxley, Burroughs and Granoff (n 54); and Singh and McWhinney (n 54) 324.

3.3. Deterrence is unlawful if use of the threatened force would be unlawful

As noted in subsection 3.2, the ICJ opinion comments on whether or not deterrence constitutes a threat prohibited by Article 2(4).[140] The relevant paragraphs of the ICJ opinion are frequently cited, usually in abbreviated form, but rarely analysed in detail. This can lead to confusion given that they contain a mixture of moods (indicative and subjunctive), tenses (present and future), forms (continuous and perfect), and degrees of reality (actual, conditional, and hypothetical).[141] Understanding these paragraphs is important for many of the points discussed in this article. To reduce the scope for misunderstanding or confusion, an annotated version of the relevant ICJ opinion paragraphs is set out in an appendix to this article.

The ICJ opinion describes deterrence as 'the policy … by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose'.[142] The next sentence of the ICJ opinion implies an underlying assumption that such a policy constitutes a threat in general terms. It illustrates the consequences of that assumption, combined with the principle that any threat of an unlawful use of force will itself be unlawful.

> Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.[143]

Thus whether or not nuclear deterrence is unlawful under Article 2(4) of the UN Charter depends on whether or not the use of force threatened in deterrence would be unlawful if (hypothetically) it was actually used: in other words, if (hypothetically) the threatening state (subsequently, actually) were to do what it (currently, conditionally) is threatening to do.[144]

The first question is this. What assumptions should be made, about the circumstances in which the threatened force is (hypothetically) used, in order to assess the lawfulness of that threatened force? The answer follows from the nature of deterrence, as outlined in subsection 3.2, and the analysis

[140] *Nuclear Weapons* (advisory opinion) (n 2) para 48.
[141] The moods, tenses and forms referred to are part of a fuller range, explained and illustrated in J C Nesfield, *English Grammar Past and Present* (Macmillan & Co, 1905) 57–66.
[142] *Nuclear Weapons* (advisory opinion) (n 2) para 48.
[143] *Ibid*.
[144] Stürchler (n 14) 89, which refers to this as 'implementing a deterrent threat'.

of the relevant ICJ opinion paragraphs outlined in the appendix. A typical nuclear deterrence policy is an ongoing conditional threat; in other words, it *continually* threatens to use force, but to use force *only in certain circumstances*. The lawfulness of the threatened force should, therefore, be assessed by assuming (hypothetically) that the circumstances referred to in the threat have arisen. (Some suggest that the lawfulness of the threatened force should be assessed by reference to the actual circumstances at the time the threat is made.[145] This might be appropriate for unconditional threats, but is hard to justify when the threat is conditional. Taking this approach to the conditional threat constituted by deterrence, leads to the result that any ongoing deterrence (nuclear or otherwise) is unlawful.[146] I am not aware of any authors arriving at this conclusion on this basis, and so will not pursue it further.)

Even then, applying the test in practice is not straightforward. The ICJ opinion is worded in terms of a single envisaged use,[147] but typical deterrence policies imply multiple envisaged uses (as, for example, under the UK policy of deliberate ambiguity). Each envisaged use must therefore be considered separately,[148] to see whether or not it would necessarily be unlawful.[149]

The ICJ opinion does not identify any circumstance in which the threat or use of nuclear weapons would be lawful.[150] Nor does this article. The ICJ did identify several uses which would be unlawful, and this article highlights some more.[151] This suggests a 'presumption of illegality',[152] and appears to imply that each nuclear-armed state has a duty to at least 'sketch in outline' a possible lawful use of for the particular weapons they deploy.[153] The UK has not done this.[154]

The UK states that it would not use any of its weapons contrary to international law,[155] but, as noted in subsection 2.4, what this means depends on how that law is interpreted.[156] The UK limits its threat to exclude any use

[145]Green and Grimal (n 113) 322; Henderson (n 132) 28.
[146]This appears to follow from the analysis in Green and Grimal (n 113) 321.
[147]*Nuclear Weapons* (advisory opinion) (n 2) paras 47–8.
[148]Grimal (n 11) 61–2.
[149]Wood (n 114) para 10. There is an extensive literature which considers the lawfulness of various different separate uses (each such use involving a specific type of weapon, used in a specific type of way, on a specific type of target, in a specific type of circumstance); some of this literature is cited at n 54.
[150]*Nuclear Weapons* (advisory opinion) (n 2) para 92.
[151]These points are visually illustrated in Drummond (n 10) 137–8.
[152]Burns H Weston, 'Nuclear Weapons and the World Court: Ambiguity's Consensus' (1997) 7 *Transnational Law & Contemporary Problems* 371, 398. Similar language is used in: Schmitt (n 131) 10; Roda Mushkat, '*Jus in Bello* Revisited' (1988) 21 *Comparative International Law Journal of Southern Africa* 1, 48; and Feinrider (n 53) 125.
[153]Murray (n 39) 135.
[154]*Ibid*; *Nuclear Weapons* (advisory opinion) (n 2) paras 91, 94.
[155]See subsection 2.2.
[156]Koskenniemi (n 63) 199.

other than in an extreme circumstance of self-defence,[157] but the lawfulness of a use of force depends on more than the circumstances in which it occurs. As noted in subsection 3.1, the hypothetical use of the threatened force must comply with all six categories of law identified subsection 2.1. Thus the UK needs to explicitly rule out more of the (multiple) uses which are currently envisaged in its deliberately ambiguous policy, and which currently make that policy unlawful.

In summary, a typical nuclear deterrence policy constitutes an ongoing threat to use force, but to use that force only in certain circumstances. This threat is unlawful, under Article 2(4) of the UN Charter, if the threatened force would be unlawful, were it to be actually used, assuming that the circumstances referred to in the threat have arisen. UK deterrence policy limits the circumstances in which the threatened use might arise, but is otherwise deliberately ambiguous about the threatened uses. Each envisaged use must be considered separately, and unlawful uses need to be ruled out.

3.4. International humanitarian law, paragraph 105(2)E, and self-defence

As noted in subsection 3.1, the lawfulness of threat to use force in self-defence depends on whether or not the threatened force would also (in the hypothetical event that it were actually used) comply with the other categories of international law identified subsection 2.1.[158] In this context, the category which the ICJ opinion specifically highlights is international humanitarian law.

The ICJ opinion concludes, at paragraph 105(2)E:

> 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.[159]

The word 'generally' in the first sentence can be interpreted in three ways: (1) 'always',[160] (2) 'usually, but with several possible exceptions',[161] or (3) 'almost always with only one possible exception, given in the following sentence'.[162]

[157]See subsection 2.2.

[158]This is explicitly confirmed in the *Nuclear Weapons* (advisory opinion) (n 2) para 47: 'if the use of force itself in a given case is illegal – *for whatever reason* – the threat to use such force will likewise be illegal' (emphasis added).

[159]*Nuclear Weapons* (advisory opinion) (n 2) para 105(2)E.

[160]David (n 49) 33–4, takes this view: 'the Court starts by clearly affirming that the threat or use of nuclear weapons is unlawful (first sub-section of para 105 E), then it adds that it does not know how matters stand in the particular hypothesis of self-defence on the part of a State whose survival is at stake

The first interpretation does not appear to command wide support in the literature and so will not be considered further here. Those advocating the second interpretation fail to explain why any of the exceptions need be singled out for further comment.[163] If there are several exceptions to the 'general' rule, then the only plausible reason for the inclusion of the second sentence of paragraph 105(2)E would be to indicate that violation of international humanitarian law might be permitted in extreme circumstances of self-defence.[164] The possibility of exceptions to the application of international humanitarian law has given rise to an extensive literature.[165] Reviewing that literature suggests that most authors continue to reject that possibility.[166] It is rejected even by some who hold that some aspects of the law governing the conduct of hostilities do not apply to states acting in self-defence.[167] Some appear to allow for a possible unresolved conflict

(second sub-section of para 105 E). … the second sub-section … neither adds to nor detracts from the general illegality affirmed in the first sub-section'.

[161]Matheson (n 114) 429–30: 'the Court … reached no conclusion about three fundamental aspects of the problem: (1) … extreme circumstance of self-defence; (2) the policy of deterrence; and (3) the use of nuclear weapons in belligerent reprisal'; Christopher Greenwood, '*Jus ad bellum* and *Jus in Bello* in the Nuclear Weapons Advisory Opinion' in Boisson de Chazournes and Sands (eds) (n 52) 247, 262: 'even without the qualification in the second part of the paragraph, the Court was not saying that the use of nuclear weapons would be contrary to the law of armed conflict in all cases'.

[162]Akande (n 3) 205, 211; Peter Weiss, 'Notes on a Misunderstood Decision: the World Court's Near Perfect Advisory Opinion in the Nuclear Weapons Case' (1997) 4 *Medicine & Global Survival* 19, 19; Weston (n 152) 385, 388; Murray (n 39) 132; Nagan (n 53) 517, 526; Malcolm N Shaw, 'International Law, Nuclear Weapons and Nuclear Non-Proliferation' (2004) *Inter Alia: University of Durham Student Law Journal* 2, 3.

[163]Akande (n 3) 210–11: 'why would the Court single out this one circumstance for mention … ? … if the Court is unable to reach a definitive conclusion of legality in this circumstance … , how then can it admit that the use of nuclear weapons could be lawful in the more doubtful circumstances? The manifest absurdity of this interpretation is a sufficient ground for rejecting it'.

[164]Matheson (n 114) 430, and Greenwood (n 161) 264, who take the second interpretation (as noted at n 161), both reject the idea that the second sentence of 105(2)E can be read as permitting violation of international humanitarian law in extreme circumstances.

[165]J H H Weiler and Abby Deshman, 'Far Be It from Thee to Slay the Righteous with the Wicked: an Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between *Jus ad Bellum* and *Jus in Bello*' (2013) 24 *European Journal of International Law* 25, reviews this literature: it deals, 45–9, with the specific debate arising from the *Nuclear Weapons* (advisory opinion) (n 2); it notes, 49, that the view that there might be exceptions to the application of international humanitarian law is 'no longer … maverick, but mainstream'.

[166]Yoram Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 6th edn 2017) 183; Richard (n 54) 949; Marco Roscini, 'On the "Inherent" Character of the Right of States to Self-Defence' (2015) 4 *Cambridge Journal of International and Comparative Law* 634, 653, including reference to the Draft Articles on the effects of armed conflicts on treaties, adopted by the ILC in 2011; Weiler and Deshman (n 165) 49–51; Keiichiro Okimoto, 'The Cumulative Requirements of *Jus ad Bellum* and *Jus in Bello* in the Context of Self-Defense' (2012) 11 *Chinese Journal of International Law* 45, 46; Gabriella Venturini, 'Necessity in the Law of Armed Conflict and in International Criminal Law' (2010) 41 *Netherlands Yearbook of International Law* 45, 74; Robert D Sloane, 'The Cost of Conflation: Preserving the Dualism of *Jus ad Bellum* and *Jus in Bello* in the Contemporary Law of War' (2009) 34 *Yale Journal of International Law* 47, 104; Greenwood (n 161) 264; Schmitt (n 131) footnote 55; Matheson (n 114) 430; *Nuclear Weapons* (advisory opinion) (n 2) dissenting opinion of Judge Higgins, para 29; Schwarzenberger (n 93) 40.

[167]Alexander Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*' (2007) 12 *Journal of Conflict & Security Law* 157, 159–61, 196.

between international humanitarian law and other legal principles,[168] but there does seem to be scope to resolve any such conflict.[169] Thus the second interpretation remains difficult to sustain.

On this basis, the analysis in this article is based on the third interpretation: the only possible exception to the general rule that the threat or use of nuclear weapons would be contrary to international law, is in an extreme circumstance of self-defence, in which the very survival of a state would be at stake. It follows that any use of any nuclear weapon in any other circumstance will be unlawful under international humanitarian law.

A further important conclusion also now emerges from the combination of three principles. (1) As noted in the last but one paragraph, there are no exceptions to the application of international humanitarian law.[170] (2) As noted in subsection 3.1, the legality of a threat under Article 2(4) depends on the threatened force being lawful if (hypothetically) it were actually used. (3) As also noted in subsection 3.1, the lawfulness of the threatened force, if (hypothetically) it were actually used, depends on it complying with all six categories of law identified in subsection 2.1. A clear consequence of these three principles is that, although humanitarian law does not prohibit threats,[171] threats of force, in which the threatened force would not, were it (hypothetically) to be actually used, comply with humanitarian law, are prohibited under the law relating to the use of force.[172]

It has been suggested that the degree of influence, of an ICJ judgment or opinion, depends on the degree of consensus within the Court.[173] Thus paragraph 105(2)E might not be an authoritative interpretation of the law, but rather a useful source of possible arguments.[174] This is a relatively unexplored proposition,[175] and so, pending further exploration, it will not be taken into

[168]Luigi Condorelli, 'Nuclear Weapons: A Weighty Matter for the International Court of Justice – *Jura Non Novit Curia*?' (1997) 316 *International Review of the Red Cross* 9, 18; Paul W Kahn, 'Nuclear Weapons and the Rule of Law' (1999) 31 *New York University Journal of International Law and Politics* 349, 402–13.

[169]International Law Commission (ILC), 'Report of the Study Group: Fragmentation of International Law' (2006) UN Doc A/CN.4/L.682, paras 14, 492; ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law' in (2006) II(2) *Yearbook of the International Law Commission* 177, paras 251(4), 251(31)–(42); on the possible conflict between international humanitarian law and the right to self-defence, in the specific context of nuclear weapons, Drummond (n 10) 131–3, applies the principle of the physical survival of the peoples and concludes that this principle could never render the use of nuclear weapons lawful, because such use threatens, due to the risk of escalation, the physical survival of the peoples.

[170]See n 165 – n 167 and accompanying text.

[171]Nystuen (n 118).

[172]Bagheri (n 49) 70–72, combines this conclusion with statements in the 2010 NPT Review Conference, Final Document, NPT/CONF.2010/50 v1 (2010) 9 [A v], to suggest that the deterrence policies of France and the UK are currently unlawful on this basis.

[173]Hemi Mistry, '"The Different Sets of Ideas at the Back of Our Heads": Dissent and Authority at the International Court of Justice' (2019) 32 *Leiden Journal of International Law* 293, 301–2.

[174]*Ibid*, 309–10.

[175]*Ibid*, 294, notes that only one writer, in 1984, had previously dealt with this proposition.

account in this article.[176] Even if this view were to be accepted, its application to paragraph 105(2)E would require care. As highlighted by several authors, the equal split of votes on this paragraph does not accurately reflect the degree of consensus on each of the two clauses taken separately.[177]

In summary: (a) most authors continue to reject the possibility of exceptions to the application of international humanitarian law; (b) the most coherent reading of the ICJ opinion implies that, in any circumstance other than an extreme circumstance of self-defence, in which the very survival of a state would be at stake, any use of any nuclear weapon will be unlawful under international humanitarian law; (c) in an extreme circumstance of self-defence, in which the very survival of a state would be at stake, for any use of any nuclear weapon to be lawful, it must comply with international humanitarian law; and (d) threats of force, in which, the threatened force would not, were it (hypothetically) to be actually used, comply with humanitarian law, are prohibited under Article 2(4).

3.5. Reprisals

There is a widespread view that a customary right to belligerent reprisals exists.[178] It has been suggested that at least some of the provisions of the 1977 Geneva Protocol 1[179] do not restrict this customary right.[180] On this view, for example, there is no customary prohibition of reprisals against the environment. There is, however, dissent from this view.[181]

UK deterrence policy states that nuclear weapons would only ever be used in self-defence,[182] but the UK argued in its 1995 submission to the ICJ, that

[176]That said, Hugh Thirlway, 'The Nuclear Weapons Advisory Opinion, the Declarations and Separate and Dissenting Opinions' in Boisson de Chazournes and Sands (eds) (n 52) 390, 396, notes that '[t]he Court itself has always insisted that its decisions consist of the judgment (or advisory opinion) *and* the opinions annexed'. The content of the annexed opinions in *Nuclear Weapons* (advisory opinion) (n 2) that relates to the analyses in this article is considered in Drummond (n 10).

[177]Richard Falk, 'Nuclear Weapons, International Law and the World Court: A Historic Encounter' (1997) 91 *American Journal of International Law* 64, 67; Weiss (n 162) 20–22; Murray (n 39) 132; Christine Gray, 'The Use of Force to Prevent the Proliferation of Nuclear Weapons' (2009) 52 *Japanese Yearbook of International Law* 101, 105.

[178]Frits Kalshoven, *Belligerent Reprisals* (Sijthoff, 1971); Derek Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 *American Journal of International Law* 1; Françoise J Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949' (1988) 37 *International and Comparative Law Quarterly* 818; Hearn (n 108) 214–20; *Nuclear Weapons* (advisory opinion) (n 2) para 46.

[179]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977) 1125 UNTS 3; the extent to which this protocol applies to nuclear weapons is reviewed in: Frits Kalshoven, 'Arms, Armaments and International Law' (1985) 191 *Recueil des Cours* 183, 270–83; Koppe (n 40) 366–71, 378–81; and Richard (n 54) 937–46.

[180]Christopher Greenwood, 'The Twilight of the Law of Belligerent Reprisals' (1989) 20 *Netherlands Yearbook of International Law* 35; UK Written Statement 1995 (n 46) para 3.81; Akande (n 3) 186–7, referring to *Nuclear Weapons* (advisory opinion) (n 2) para 31.

[181]Oral submissions on behalf of Samoa, the Marshall Islands and Solomon Islands, *Nuclear Weapons* (advisory opinion) (n 2) CR 95/32, 67–8, paras 21–2.

[182]UK White Paper 2006 (n 27) para 2-11.

the use of nuclear weapons in reprisals could be lawful.[183] This argument continued to be made after 1996.[184] Based on the analysis in subsection 3.4, however, there is no scope for lawful use of nuclear weapons in a belligerent reprisal. As argued in subsection 3.4, the only possible exception to the general rule that the threat or use of nuclear weapons would be unlawful, is in an extreme circumstance of self-defence. A belligerent reprisal, however, has 'nothing to do with the "circumstances of extreme self-defence where the very survival of a State is at stake". … In fact, it is not self-defence at all but a reprisal'.[185]

Thus the use of nuclear weapons in a belligerent reprisal would be unlawful,[186] regardless of whether or not belligerent reprisals are still possible in general.

4. First use

4.1. Terminology

UK nuclear deterrence policy allows for first use.[187] This may mean (a) the use of nuclear weapons in response to a non-nuclear attack or (b) 'anticipatory' self-defence in response to the threat of a nuclear attack which has not yet been suffered. Some suggest that the term 'first strike' would have been used if the 'anticipatory' meaning was intended.[188] Given that the statement about first use is presented as part of the UK's policy of deliberate ambiguity,[189] and recent comments which appear to imply that the UK does not rule out 'first strike',[190] both possibilities will be considered here.

There is some inconsistency in the terms used to describe a policy which rules out the use of nuclear weapons in response to a non-nuclear attack.

[183]UK Written Statement 1995 (n 46) para 3.79; this view is also taken in: Singh and McWhinney (n 54) 194–9; and Hearn (n 108) 214–20.

[184]Matheson (n 114) 429–30 and 432–3; Dunlap (n 48) 163; Richard (n 54) 974–5; Matthias Ruffert, 'Reprisals' in Lachenmann and Wolfrum (eds) (n 53) 1091, para 15; Anthony J Colangelo, 'The Duty to Disobey Illegal Nuclear Strike Orders' (2018) 9 *Harvard National Security Journal* 84, 109–10.

[185]Akande (n 3) 210. The same view appears in Stefan Kadelbach, 'Nuclear Weapons and Warfare' in Lachenmann and Wolfrum (eds) (n 53) 836, para 42, and Corwin (n 49) 283.

[186]Each of Brownlie (n 54) 445–6; Griffith (n 99) 168; and Stuart Casey-Maslen, 'The Use of Nuclear Weapons as a Reprisal under International Humanitarian Law' in Nystuen, Casey-Maslen and Bersagel (eds) (n 3) 171, 190 reaches a similar conclusion on different grounds; those continuing to argue otherwise (n 184) seem not to have considered the arguments in subsection 3.4.

[187]UK Policy Paper 2015 (n 27) app 1, principle 3: 'we will not rule in or out the first use of nuclear weapons'.

[188]Quinlan (n 12) 17; Kadelbach (n 185) para 46.

[189]See subsection 2.2, bullet 2; Marc Trachtenberg, 'The Question of No-First-Use' (1986) 29(4) *Orbis* 753 explores the claimed benefits of US ambiguity on first use.

[190]UK HL International Relations Committee, *Rising Nuclear Risk, Disarmament and the Nuclear Non-Proliferation Treaty* (HL 2017–19, 7th Rep, 338, 2019) 113, links to oral evidence from Alan Duncan, Sarah Price and James Franklin: Q155 appears to imply that the UK does not rule out 'first strike': 'So we reserve the right to strike a country with nuclear weapons'? [Franklin, Head of Nuclear Policy, UK Ministry of Defence:] 'Absolutely'. [Question:] 'Before they have attacked us'. [Franklin:] 'We are deliberately ambiguous about precisely … ' [Duncan, Minister of State, Foreign and Commonwealth Office:] 'Yes'. [Franklin:] ' … on what scale, when and how we would use nuclear weapons'.

Some policies and authors refer to 'sole purpose' rather than 'no first use'. The terms are often used interchangeably. Strictly speaking, however, they have slightly different meanings. A 'no first use' policy does not necessarily have any effect after the first use of nuclear weapons in any given context. A 'sole purpose' policy arguably continues to apply even after the first use of nuclear weapons in any given context.[191]

The term 'anticipatory' self-defence itself is ambiguous. It can refer to responding to the threat of an attack which has not yet been suffered, but which (i) is being mounted ('interceptive'), or (ii) is assessed to be imminent based on objectively verifiable indicators ('pre-emptive'), or (iii) is not assessed to be imminent based on objectively verifiable indicators ('preventive').[192] To avoid confusion in the following analysis, the term 'anticipatory' will not be used, and the discussion will concentrate on 'pre-emptive' self-defence as defined in the previous sentence. Care is however needed because there is not consistency among other writers in the way these terms are used.[193]

4.2. Other states' policies on first use

This subsection briefly considers some other nuclear-armed states that have published policies in relation to first use of nuclear weapons.[194]

China's long-standing policy is that it will 'not be the first to use nuclear weapons at any time and under any circumstance',[195] and has made significant efforts in recent decades to achieve a multilateral treaty on mutually agreed no first use of nuclear weapons.[196]

France does not rule out a nuclear response to conventional attacks if such attacks threaten their vital interests.[197]

India has a 'limited' no first use policy: nuclear weapons will only be used in response to a nuclear attack against Indian territory or Indian forces outside India. Nuclear weapons may also be used in response to a major attack on

[191]Abe (n 106) 144, which also notes that the terms may differ in political acceptability, depending on context.

[192]Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010) 253–4. Daniel Bethlehem, 'Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors' (2012) 106 *American Journal of International Law* 769, 773 notes that there is 'little scholarly consensus on what is properly meant by "imminence" in the context of contemporary threats'. The reference to 'objectively verifiable indicators' follows International Law Association, 'Sydney conference, Use of Force, Final Report on Aggression and the Use of Force' (2018) s B.2.b, www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf.

[193]*Ibid*, 251–3, catalogues the differing uses of various labels.

[194]Louka (n 102) 38–64, summarises these and other aspects of the strategies of nuclear-armed states; UK HL Committee (n 190) 22–3, sets out a much briefer such summary.

[195]Jain and Seth (n 54) 112; Zhenqiang Pan, 'A Study of China's No-First-Use Policy on Nuclear Weapons' (2018) 1 *Journal for Peace and Nuclear Disarmament* 115, 115; Gareth Evans, 'Nuclear Deterrence in Asia and the Pacific' (2014) 1 *Asia & the Pacific Policy Studies* 91, 95.

[196]Pan (n 195) 125–7.

[197]Jain and Seth (n 54) 114.

Indian forces by biological or chemical weapons.[198] India has expressed willingness to make this policy legally binding.[199] There are conflicting views within India on the question of first use, and it has been suggested that the current official policy might not accurately predict how India might actually use nuclear weapons.[200]

Pakistan does not rule out a nuclear response to a conventional attack.[201]

Prior to 1993, Russia had a no first use policy,[202] although doubt has since arisen on whether this policy would have been honoured in practice.[203] Russia's current stated posture is that

> Russia reserves the right to use nuclear weapons in response to the use of nuclear and other types of weapons of mass destruction against it or its allies, and also in case of aggression against Russia with the use of conventional weapons when the very existence of the state is threatened.[204]

The US has never had a no first use policy.[205] In 2016, the US came close to implementing a no first use policy but was dissuaded from doing so by other states, including the UK.[206] The 2018 Nuclear Posture Review explicitly allows for a nuclear response to 'significant non-nuclear strategic attacks', although only 'in extreme circumstances'.[207]

4.3. Response to a non-nuclear attack

As argued in subsection 3.4, the only possible exception to the general rule that the threat or use of nuclear weapons would be unlawful, is in an extreme circumstance of self-defence in which the 'very survival of a State' would be at stake. Several authors have explored the possible legal concepts which might underlie the phrase 'very survival of a State',[208] such as a

[198] *Ibid*, 118; Global Zero, 'Commission on Nuclear Risk Reduction: De-alerting and Stabilizing the World's Nuclear Force Postures' (2015) Global Zero, www.globalzero.org/wp-content/uploads/2018/10/Global-Zero-Commission-on-Nuclear-Risk-Reduction-Full-Report.pdf, 24.

[199] Jain and Seth (n 54) 118; Rajiv Nayan, 'Focusing the Debate on the Humanitarian Consequences of Nuclear Weapons: An Indian Perspective' (2015) 97(899) *International Review of the Red Cross* 815, 827.

[200] Frank O'Donnell and Debalina Ghoshal, 'Managing Indian Deterrence: Pressures on Credible Minimum Deterrence and Nuclear Policy Options' (2018) 25 *Nonproliferation Review* 419, 422–5; Kumar Sundaram and M V Ramana, 'India and the Policy of No First Use of Nuclear Weapons' (2018) 1 *Journal for Peace and Nuclear Disarmament* 152; Nayan (n 199) 824.

[201] Evans (n 195) 96; Global Zero (n 198) 26.

[202] *Ibid*, 19.

[203] Abe (n 106) 141–2.

[204] Quoted in Evans (n 195) 94–5; Andrey Baklitskiy, 'Written Evidence to UK HL' (2019) paras 12–13, linked from UK HL Committee (n 190) 113, confirms that this remains official current policy.

[205] Steve Fetter and Jon Wolfsthal, 'No First Use and Credible Deterrence' (2018) 1 *Journal for Peace and Nuclear Disarmament* 102; Evans (n 195) 94.

[206] Abe (n 106) 145–6.

[207] *Ibid*, 146.

[208] Daniel H Joyner and Marco Roscini, 'Is there Any Room for the Doctrine of Fundamental Rights of States in Today's International Law?' (2015) 4 *Cambridge Journal of International and Comparative Law* 467, 473 acknowledges this phrase to have partly motivated the special issue which it introduces.

fundamental right of states,[209] 'self-preservation',[210] necessity,[211] or 'supreme emergency'.[212] Each of these authors concludes that no such concepts should be used to interpret the phrase,[213] so this article takes the phrase to refer to a purely factual situation.

On this basis the 'very survival of a State' may, in theory, refer to any of (i) the political survival of the government of a state, (ii) the survival of the state as an independent entity, or (iii) the physical survival of the population.[214] In most self-defence contexts, one of the first two of these readings of 'very survival' would be at stake. On this basis, it has been suggested that the most natural reading here appears to be the physical survival of the state – population and infrastructure.[215] A non-nuclear attack would not put the physical survival of a state at risk.[216] The use of nuclear weapons in response to a non-nuclear attack would, therefore, be contrary to international law, because it is not a circumstance in which the very survival of a state would be at stake.[217] Some phrases in UK policy statements raise the concern that risks other than physical survival might be taken as grounds for a UK nuclear response.[218]

[209]Marcelo G Kohen, 'The Notion of "State Survival" in International Law' in Boisson de Chazournes and Sands (eds) (n 52) 293, 294.
[210]James A Green, 'Self-Preservation' in Lachenmann and Wolfrum (eds) (n 53) 1139, paras 6, 11.
[211]Venturini (n 166) s 3.5
[212]Sloane (n 166) 76.
[213]Kohen (n 209) 294, 312–13; Green (n 210) paras 11, 16; Venturini (n 166) ss 3.2.2, 3.5; Sloane (n 166) 92, 104; Similar conclusions are drawn in Maria Agius, 'The Invocation of Necessity in International Law' (2009) 56 *Netherlands International Law Review* 95, s 3.1; Timothy J Heverin, 'Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense' (1997) 72 *Notre Dame Law Review* 1277, 1304–8; John H E Fried, 'The Nuclear Collision Course: Can International Law be of Help?' (1985) 14 *Denver Journal of International Law & Policy* 97, 111–12; Peter A Ragone, 'The Applicability of Military Necessity in the Nuclear Age' (1984) 16 *New York University Journal of International Law and Politics* 701, 702–4; Schwarzenberger (n 93) 41–2.
[214]Matheson (n 114) 430; Weston (n 152) 386; Schmitt (n 131) 107; Nagan (n 53) footnote 197, citing Weiss.
[215]Drummond (n 10) 123; this view appears to underlie the analysis in Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press, 2009) 84; Weston (n 152) 387, appears to take a different view.
[216]Joyner (n 215) 84; Drummond (n 10) 123.
[217]Nanda and Krieger (n 104) 165, appear to share this view; Green (n 67) 93 allows that this is a possible reading of *Nuclear Weapons* (advisory opinion) (n 2).
[218]UK Policy Paper 2018 (n 31) 'Threat', bullet 6: 'the government is committed to maintaining the UK's independent nuclear deterrent to deter the most extreme threats to our national security *and way of life*' (emphasis added), and the same language is used at 'Myth 1'; UK White Paper 2006 (n 27): 'The UK's continued possession of a nuclear deterrent provides an assurance that we cannot be subjected in future to nuclear blackmail or a level of threat which would put at risk our vital interests or *fundamentally constrain our foreign and security policy options*' (emphasis added); the recurring phrase 'vital interests' in the UK statements quoted in subsection 2.2 raises a similar concern, as illustrated in Chayes (n 48) 2–4; Falk, Meyrowitz and Sanderson (n 47) 551 identifies corresponding concerns about US policy; Léonie Allard, Mathieu Duchâtel and François Godement, 'Pre-empting Defeat: in Search of North Korea's Nuclear Doctrine' (2017) European Council on Foreign Relations Policy Brief, ECFR/237, November 2017, 2–6, www.ecfr.eu/publications/summary/pre_empting_defeat_in_search_of_north_koreas_nuclear_doctrine notes that DPRK appears to threaten to use nuclear weapons first, if it detects the preparation of an attack to end the current regime; this circumstance, of the political survival of the current DPRK government being at stake, would not necessarily be 'extreme' in the relevant sense.

An alternative reading of 'very survival of a State' might emphasise that states are primarily legal, rather than physical, entities:[219] if the state is a legal entity then its survival must be understood in legal terms. 'Statehood rests on the notion of effectiveness of a government over a certain territory and the population inhabiting that territory'.[220] On this basis, if the existence of any effective government at all was at stake, then the survival of the state would be at stake. (Such survival would not necessarily be at stake if it was only (a) the existence of a particular government or (b) the degree of independence of that government which was at stake.) Even if a non-nuclear attack could risk the survival of the state in this sense, it seems unlikely that a nuclear response to such an attack could be lawful. A nuclear response, which is intended to end a non-nuclear attack, might instead lead to further use of nuclear weapons. The latter result is (at least) as likely as the former. On this basis, a nuclear response to a non-nuclear attack would fail the self-defence necessity test.[221] This has been illustrated in at least one US planning exercise.[222]

In summary, there appears to be consensus among authors that the phrase 'very survival of a State' refers to a factual situation rather than an underlying legal concept. No plausible understanding of this phrase appears to allow for a lawful use of nuclear weapons in response to a non-nuclear attack.

4.4. Response to the threat of a nuclear attack

States, and authors, differ on the general question of 'pre-emptive' self-defence.[223] As noted in subsection 4.1, pre-emptive here means responding to a threatened attack which has not yet been suffered, but is assessed to be imminent based on objectively verifiable indicators. The basis in law for any pre-emptive self-defence has to be separately considered for nuclear weapons because of their unique characteristics.[224] Some consider the risk of waiting for an actual attack to be too great; for others, there is too great a risk that an assessment of the imminence of an attack (based on objectively

[219]Jure Vidmar, 'The Concept of the State and Its Right of Existence' (2015) 4 *Cambridge Journal of International and Comparative Law* 547, 551.
[220]*Ibid*, 548.
[221]Gordon (n 54) 709–10; n 232 gives citations on escalation risk in general; n 319 – n 323 and accompanying text outlines the necessity (and proportionality) requirements of self-defence.
[222]Gordon (n 54) 710–11.
[223]Ruys (n 192) ch 4 and s 6.1.5; Corten (n 116) 401–16; Christine Gray, *International Law and the Use of Force* (Oxford University Press, 4th edn 2018) 175; International Law Association (n 192) s B.2.b.
[224]Abdul Ghafur Hamid, 'The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Reappraisal' (2007) 54 *Netherlands International Law Review* 441, 485–6; Albrecht Randelzhofer and Georg Nolte, 'Article 51' in Bruno Simma and others (eds), *The Charter of the United Nations – A Commentary* (Oxford University Press, 3rd edn 2012) vol 2, 1397, 1424; Waxman (n 59) 159–62; Henderson (n 132) s 4.2.2.

verifiable indicators) might subsequently (with the benefit of hindsight) be seen to have been misleading.[225]

As argued in subsection 3.4, the only possible exception to the general rule that the threat or use of nuclear weapons would be unlawful, is in an 'extreme circumstance of self-defence'. An imminent attack, which has not yet been suffered, is not an extreme circumstance, relative to the extremity of the circumstance in which an actual attack has been suffered. This is vividly seen in frequent documented circumstances in which a threatened attack was assessed to be imminent.[226] On this basis, use of a nuclear weapon in response to a threatened attack which has not yet been suffered, but is assessed to be imminent based on objectively verifiable indicators, would be unlawful, because it is not an extreme circumstance of self-defence.[227]

This conclusion has itself been challenged on legal grounds.[228] The suggestion is that applying an absolute rule (such as 'no first strike') in some situations, might lead to a consequence that the rule was intended to avoid (such as a nuclear first strike by a lone submarine on major population centres).[229] The argument is that, in such situations, the rule should not be applied, and that this should be dealt with by exceptions and broadly formulated standards. The rule would then cease to be absolute.[230] Those arguing in this way admit that 'an exception to the absolute rule … tends to devour the rule altogether',[231] but there are two flaws in the main argument which are more fundamental. (1) It does not acknowledge the significant risk of escalation arising even from a single nuclear strike on a lone submarine. The significance of the risk of escalation is highlighted by many authors.[232] (2) It does not acknowledge the frequency of documented circumstances in which a threatened attack was assessed to be imminent, but did not in fact happen: a recent report analyses 13 cases (from 1962 to 2002) in which nuclear weapons use was contemplated, and nearly occurred, owing to misjudgement and misperception.[233] Taking these two factors into account suggests that a first strike on a lone submarine might be as likely to lead to nuclear strikes

[225]Gray (n 177) 103–4; Ruys (n 192) 358–67.
[226]Patricia Lewis and others, *Too Close for Comfort* (Chatham House, 2014).
[227]Drummond (n 10) 121.
[228]Martti Koskenniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons' (1997) 10 *Leiden Journal of International Law* 137, 147–9.
[229]*Ibid*, 147.
[230]*Ibid*, 148–9.
[231]*Ibid*, 149; McGeorge Bundy and others, 'Nuclear Weapons and the Atlantic Alliance' (1982) 60 *Foreign Affairs* 753, 762.
[232]Brownlie (n 54) 450; Lee (n 40) 511; Falk, Meyrowitz and Sanderson (n 47) 544, 591; Bundy and others (n 231) 757; Weston (n 54) 583–4; Arbess (n 54) 119–21; Fried (n 213) 110; Gray (n 11) 105; Murray (n 39) 136; Dakota S Rudesill, 'Regulating Tactical Nuclear Weapons' (2013) 102 *Georgetown Law Journal* 99, 150; Global Zero (n 198) 21; Duncan, Price and Franklin (n 190) Q165. See, however, Kalshoven (n 179) 287, for a challenge to this view.
[233]Lewis and others (n 226); these cases do not include nuclear weapons accidents or near-accidents; they also exclude cases of fissile material accidents, or fissile material being unaccounted for.

on population centres, as compliance with the international law which renders a first strike unlawful.

Thus the original conclusion stands: pre-emptive self-defence,[234] also known as 'first strike', (nuclear response to a threatened attack which has not yet been suffered, but is assessed to be imminent based on objectively verifiable indicators) would be unlawful.

UK deterrence policy envisages one or other, or both, of (a) pre-emptive self-defence;[235] (b) a nuclear response to a non-nuclear attack. Either type of first use is unlawful.[236] Thus, in at least this respect, UK deterrence policy constitutes an unlawful threat.[237] To comply with international law in this respect, the UK should explicitly state that nuclear weapons would never be used other than in response to a nuclear attack which has begun.

4.5. Consequences of a no first use policy

Nuclear-armed states are generally thought to have the ability to respond with nuclear weapons even after an initial nuclear attack has been suffered. It has been suggested that this 'second strike' capacity removes any rational basis for pre-emptive self-defence, so that the idea of a 'no first strike' policy is redundant.[238] Whether or not that conclusion follows from the premise, more recent work raises doubt about the premise: the 'second strike' capacity may be less certain than normally assumed.[239] In this context the credibility of the 'second strike' capacity is crucial.[240]

[234]The final paragraph of subsection 4.1 gives the context for the choice of the term 'pre-emptive'.

[235]As defined in the previous sentence; see the final paragraph of subsection 4.1 on the choice of this term.

[236]Fairley and Crann (n 54) 19 suggest that 'a formidable majority of international law experts hold the view that first-use of nuclear arms would contravene the law of nations'; these include John H E Fried, 'International Law prohibits the First Use of Nuclear Weapons' (1981) 16 *Revue Belge de Droit International* 33; Rosas (n 71) 201; Boyle (n 49) 1438–43; Singh and McWhinney (n 54) 194–9; Weston (n 152) 389–91; Pierre-Marie Dupuy, 'Between the Individual and the State: International Law at a Crossroads?' in Boisson de Chazournes and Sands (eds) (n 52) 449, 452, Falk (n 96) 43; the opposite view is taken in Lee (n 40).

[237]Subsections 3.2 and 3.3: deterrence is a threat, and deterrence is unlawful if use of the threatened force would be unlawful. Green and Grimal (n 113) 324–5 consider a threat of a nuclear response to an actual non-nuclear attack which is happening when the threat is made; it suggests that this might be a lawful threat, even if an actual nuclear attack in such circumstances would be unlawful and comment that '[t]his result is logical because a threat – even the threat of nuclear devastation – is not as onerous as an actual attack'; it is, however, hard to reconcile this conclusion with the ICJ opinion, even based on their alternative reading (n 145 – n 146 and accompanying text) of the relevant paragraphs in that opinion.

[238]Istvan Pogany, 'Nuclear Weapons and Self-Defence in International Law' in Istvan Pogany (ed), *Nuclear Weapons and International Law* (Avebury, 1987) 63, 63–5; Adam Roberts, 'Law, Lawyers and Nuclear Weapons' (1990) 16 *Review of International Studies* 75, 79. See subsection 4.1 on terminology.

[239]Austin Long and Brendan Rittenhouse Green, 'Stalking the Secure Second Strike: Intelligence, Counterforce, and Nuclear Strategy' (2015) 38 *Journal of Strategic Studies* 38; the particular relevance of this point to DPRK is outlined in Allard, Duchâtel and Godement (n 218) 2, 7–8.

[240]Ramesh Thakur, *Nuclear Weapons and International Security, Collected Essays* (Routledge, 2015) ch 14, sub-s 'no first use'.

The previous subsections suggest that the legal arguments against first use, are stronger than the legal arguments against any use at all. That said, it has been argued that in military or strategic terms there is no significant difference between ruling out first use of nuclear weapons and ruling out any use at all of nuclear weapons.[241] Such an argument has been strongly countered.[242] Either way, those arguing for no first use of nuclear weapons need to consider the extent to which adopting a no first use policy might create a need to revise other aspects of defence policy[243] – either in terms of conventional defence forces,[244] or transarmament.[245]

Views differ on whether or not a no first use policy would be honoured in a crisis situation.[246] Clarity on the fact that no first use is a legal obligation, as argued in this article, makes it more likely to be respected.[247] Consistent with this view are international efforts over the past 60 years, including by states, to achieve a legally binding, comprehensive and unqualified no first use agreement.[248] The UK has regularly been encouraged to contribute to these efforts,[249] but so far it has not done so.

The strategic rationale for, and implications of, ruling out first use are thus complex. This does not excuse states from their legal obligation to rule out first use, but states adopting a no first use policy might need to revise other aspects of their foreign and defence policies at the same time.

5. Other specific policies which have given rise to legal challenge

5.1. Low level, high power use: the law of neutrality

In this article, use of a nuclear weapon at 10 kilotons or more of explosive power, at a height of less than 200 m above land, is described as 'low level,

[241]Trachtenberg (n 189) 759–60.
[242]Bruce Blair, 'The flimsy case against no-first-use of nuclear weapons', *Politico* (28 September 2016) www.politico.com/magazine/story/2016/09/nuclear-weapons-no-first-use-debate-214300.
[243]Stanley C Brubaker, 'The Frail Constitution of Good Intentions' (1982) 7 *Nova Law Review* 65, 73.
[244]Bundy and others (n 231) 759–61; Thomas M Franck, 'The President, the Constitution and Nuclear Weapons' in Miller and Feinrider (n 14) 363, 368; Michael S Gerson, 'No First Use – the Next Step for U.S. Nuclear Policy' (2010) 35(2) *International Security* 7, 40.
[245]Arbess (n 54) 137–41.
[246]Bundy and others (n 231) 766; Ivan A Vlasic, 'Raison d'État v. Raison de l'Humanité – the United Nations SSOD II and Beyond' (1983) 28 *McGill Law Journal* 455, 506; Trachtenberg (n 189) 764–5; Quinlan (n 12) 101; Gerson (n 244) 45–7; Thakur (n 240) ch 14, sub-s 'no first use'; Fetter and Wolfsthal (n 205) 102.
[247]See subsection 2.6.
[248]Nick Ritchie, 'Waiting for Kant: Devaluing and Delegitimizing Nuclear Weapons' (2014) 90 *International Affairs* 601, 610–12.
[249]Malcolm Rifkind and others, *The Trident Commission: An Independent, Cross-Party Inquiry to Examine UK Nuclear Weapons Policy – Concluding Report* (British American Security Information Council, 2014), 30, www.files.ethz.ch/isn/181759/trident_commission_finalreport.pdf; Des Browne, 'Written Evidence to UK HL' (2019) para 22, linked from UK HL Committee (n 190) 114, (Browne is Vice-Chair of the Nuclear Threat Initiative and former UK Secretary of State for Defence).

high power'. This subsection considers the application of the law of neutrality to such explosions.

The 1907 Hague Convention (No V) states that '[t]he territory of neutral Powers is inviolable',[250] and this is now customary international law.[251] Referring to the comments in subsection 2.4, this rule involves a 'bright line', in that any damage at all is prohibited.[252] Research suggests that it is reasonable to expect that the direct effects of the use of a single UK warhead, set at 10 kilotons or more of explosive power and when the explosion was at a height of less than 200 m, would include long term and widespread damage to the environment.[253] Any such low level, high power use will almost certainly lead to adverse effects in a state other than the target.[254]

UK deterrence policy is deliberately ambiguous about precisely 'how and at what scale we would contemplate use of our nuclear deterrent'.[255] It therefore makes no mention of the power or height at which nuclear weapons might be exploded. This implies possible use at 10 kilotons or more of explosive power, at a height of less than 200 m above land. Any such low level, high power use would violate the territory of neutral states and so be unlawful. This conclusion is consistent with several more general comments on the implications of the law of neutrality for deterrence.[256] In this respect, UK nuclear deterrence policy is unlawful.[257]

The following alternative views on neutrality have been expressed which suggest differing conclusions. These alternative arguments are, however, less than persuasive.

In applying the law of neutrality to nuclear weapons, some have suggested that incidental effects in neutral states might be lawful, if they

[250]Hague Convention (No V) Respecting the Rights and Duties of Neutral Powers in War on Land (1907) 205 CTS 299, Art 1.

[251]Malcolm N Shaw, 'Nuclear Weapons and International Law' in Pogany (ed) (n 238) 1, 6; Kritsiotis (n 71) 109.

[252]Michael Bothe, 'Neutrality, Concept and General Rules' in Lachenmann and Wolfrum (eds) (n 53) 786, para 31; Akira Mayama, 'Combat Losses of Nuclear-Powered Warships: Contamination, Collateral Damage and the Law' (2017) 93 *International Law Studies* 132, 139; Koppe (n 40) 382.

[253]Drummond (n 10) s II.C, which cites a range of research published in the years 1979–2009 in support of this conclusion. This conclusion is also consistent with, although not necessarily explicitly supported by, presentations at the three international Conferences on the Humanitarian Impact of Nuclear Weapons held in 2013 and 2014 in Oslo, Nayarit and Vienna.

[254]*Ibid*, s III.H.

[255]See n 189 – n 190.

[256]Bothe (n 252) para 31; Koppe (n 40) 382; Christian Dominicé, 'La Question du Droit de la Neutralité' in Boisson de Chazournes and Sands (eds) (n 52) 199, 208; Fairley and Crann (n 54) 34; McFadden (n 49) 328–9; Corwin (n 49) 279–80; Adam Roberts, 'The Relevance of the Laws of War in the Nuclear Age' in John Dewar and others (eds), *Nuclear Weapons, the Peace Movement and the Law* (Palgrave Macmillan, 1986) 25, 28; Fried (n 213) 102–4; Griffith (n 99) 167–8; Fried (n 236) 42; Falk, Meyrowitz and Sanderson (n 47) 567; Brownlie (n 54) 444.

[257]See subsections 3.2 and 3.3: deterrence is a threat, and deterrence is unlawful if use of the threatened force would be unlawful.

are deemed proportionate to the military objective secured.[258] This suggestion has been specifically countered.[259] Although there is agreement that concepts such as proportionality may apply to neutral property outside neutral territory, they do not apply to damage within neutral territory.[260] Since 1945 a community-interest approach to neutrality has gained support,[261] based on the right to self-defence as one of the only two permissible uses of force under the UN Charter[262] (the other being under Article 42 of the UN Charter). The traditional law of neutrality remains in effect,[263] and is applied in some situations.[264] In other situations, the community-interest approach is used to argue for different standards, including the acceptance of collateral damage to third party states (in this context referred to as 'non-belligerent' rather than 'neutral') in the context of self-defence under wider international law.[265] This is a possible source of differing views.[266] If a conflict between the two approaches does arise in any context, however, there should be scope to resolve it without violating either body of law.[267]

Another suggestion has been that the rights of neutral states have historically been regarded more as a basis for intervention, or of liability for reparations, than as a basis for prohibiting certain activity.[268] Again, such a view is refuted by more recent analyses.[269]

Thus the original conclusion stands: low level, high power use of nuclear weapons would violate the territory of neutral states and so be unlawful. In this respect, the deliberately ambiguous UK nuclear deterrence policy is

[258]Hearn (n 108) 247; UK Written Statement 1995 (n 46) para 3.78; Schmitt (n 131) 105; Greenwood (n 161) 262; Kadelbach (n 185) para 44; McFadden (n 49) 329, makes a similar point by reference to the right of self-preservation, but Kohen (n 209) and Roscini (n 166), suggest that any such right can now not extend beyond self-defence under the UN Charter.

[259]Mayama (n 252) 139, footnote 21, 154. See also n 252.

[260]Mayama (n 252) 155; Wolff Heintschel von Heinegg, 'Neutrality and Outer Space' (2017) 93 *International Law Studies* 526, 531–2.

[261]Stephen C Neff, *The Rights and Duties of Neutrals* (Manchester University Press, 2000) 192.

[262]Patrick M Norton, 'Between the Ideology and the Reality, the Shadow of the Law of Neutrality' (1976) 17 *Harvard International Law Journal* 249, 249–53, 310–11; Neff (n 261) 191; Peter Hilpold, 'How to Construe a Myth: Neutrality Within the United Nations System Under Special Consideration of the Austrian Case' (2019) 17 *Chinese Journal of International Law*, advanced access, https://doi.org/10.1093/chinesejil/jmz013, paras 57–8.

[263]Norton (n 262) pt I.A; Hearn (n 108) 247 and footnote 301; Neff (n 261) 198–9; Roberts and Guelff (n 61) 29; Bothe (n 252) para 9; Hilpold (n 262) para 72.

[264]Norton (n 262) pts I.B, II.

[265]*Ibid*, 308–10; Neff (n 261) 210–1.

[266]In the sources cited in n 258, Hearn explicitly refers to both the UN Charter approach and the traditional approach, the UK and Schmitt explicitly refer to the traditional approach, and Greenwood and Kadelbach refer to neither approach explicitly.

[267]See n 169; it is likely that, as before, in the context of a proposed use of a nuclear weapon, the resolution of any conflict in law will render the proposed use unlawful (due to the risk of escalation).

[268]Hearn (n 108) 247; Singh and McWhinney (n 54) 183–8, in considering neutrality, focus on compensation aspects.

[269]Kadelbach (n 185) para 44; Peter Hostettler and Olivia Danai, 'Neutrality in Land Warfare' in Lachenmann and Wolfrum (eds) (n 53) 775, para 9; Bothe (n 252) para 29; Heintschel von Heinegg (n 260) 536.

unlawful. To comply with international law in this respect, the UK should explicitly state that nuclear weapons would never be used at 10 kilotons or more of explosive power, at a height of less than 200m above land.

5.2. Action to maintain deterrence policy indefinitely: the obligation to negotiate on disarmament

In 2014, the Republic of the Marshall Islands (RMI) began proceedings at the ICJ against the UK. One of RMI's claims was that the UK has violated and continues to violate its obligations under the NPT, specifically under Article VI, by (a) failing to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament and (b) acting to qualitatively improve its nuclear weapons system and to maintain it for the indefinite future.[270] In 2016, the ICJ upheld one of the UK's preliminary objections to jurisdiction, and so the case did not proceed to the merits.[271] The judgment has attracted both approval[272] and criticism,[273] which, like the judgment itself, do not comment on the substance of RMI's original claim.

Wider analyses appear both to contribute to RMI's case, and to work against it. There seem to be strong arguments that the obligation to negotiate in good faith on nuclear disarmament has always had, and retains, an importance equal to the other two main themes of the NPT: peaceful use of nuclear energy and non-proliferation.[274] There also, however, appears to be significant doubt as to whether or not the ICJ statement that there is an 'obligation to … bring to a conclusion negotiations leading to nuclear disarmament' is an

[270] *Marshall Islands* (preliminary objections) (n 46) para 11.

[271] *Ibid*, para 59; Gray (n 66) 423–32, gives an overview of the judgment and the fourteen separate opinions.

[272] Ori Pomson, 'The *Obligations Concerning Negotiations* Cases and the "Dispute" Requirement in the International Court of Justice' (2017) 16 *Law and Practice of International Courts and Tribunals* 373; Hugh Thirlway 'Establishing the Existence of a Dispute: A Response to Professor Bonafé's Criticisms of the ICJ' (2017) 45 *QIL–Questions of International Law* 53; Aniruddha Rajput, 'Necessity of "Objective Awareness" for the "Existence of Dispute"' (2018) 58 *Indian Journal of International Law* 85.

[273] Béatrice I Bonafé, 'Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications' (2017) 45 *QIL–Questions of International Law* 3; Meenakshi Ramkumar and Aishwarya Singh, 'The Nuclear Disarmament Cases: Is Formalistic Rigour in Establishing Jurisdiction Impeding Access to Justice?' (2017) 33 *Utrecht Journal of International and European Law* 128; Lorenzo Palestini, 'Forget about Mavrommatis and Judicial economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament' (2017) 8 *Journal of International Dispute Settlement* 557; Federica I Paddeu, 'Multilateral Disputes in Bilateral Settings: International Practice Lags Behind Theory' (2017) 76 *Cambridge Law Journal* 1; Devesh Awmee 'Nuclear Weapons before the International Court of Justice: A Critique of the *Marshall Islands v United Kingdom* Decision' (2018) 49 *Victoria University of Wellington Law Review* 53.

[274] Daniel H Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, 2011) 32–4, 95–103; Nigel D White, 'Interpretation of Non-Proliferation treaties' in Daniel H Joyner and Marco Roscini (eds), *Non Proliferation Law as a Special Regime: A Contribution to Fragmentation Theory in International Law* (Cambridge University Press, 2012) 87, 111–15.

accurate statement of the law.[275] Even if it is, the fact that no process or timescale is specified makes it hard to assess compliance.[276]

Regardless of whether or not there is an obligation to conclude negotiations, the obligation to 'pursue negotiations in good faith', as required by Article VI of the NPT itself, undoubtedly remains.[277] Several authors have argued that the NPT nuclear-armed states collectively have not done enough towards this obligation.[278]

A further concern relates to whether or not an obligation to pursue nuclear disarmament negotiations is now part of customary international law. In 2014, RMI also began proceedings against the other eight states known to possess nuclear weapons. Four of these states are not party to the NPT. Only two of these cases led to judgments, and neither proceeded to the merits. In relation to these states, RMI's claims depended on the view that there existed a customary international law obligation identical to the NPT disarmament negotiation obligation. Again, several authors have expressed significant doubt on this view,[279] and no-one yet appears to have done the necessary work to establish the existence of such a customary law obligation.[280]

Overall, although there is doubt on some elements of RMI's claims, there are strong grounds for that part of RMI's claim which states that the UK, as a state party to the NPT, is in ongoing breach of its obligations under Article VI, by acting to maintain its nuclear deterrence policy indefinitely.

[275] *Nuclear Weapons* (advisory opinion) (n 2) para 105(2)F. Both Daniel H Joyner, 'The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty' in Nystuen, Casey-Maslen and Bersagel (n 3) 397, 405; and Marco Roscini, 'On Certain Legal Issues Arising from Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons' in Ida Caraccioli, Marco Pedrazzi and Talitha Vassalli di Dachenhausen (eds), *Nuclear Weapons: Strengthening the International Legal Regime* (Eleven International Publishing, 2015) 15, 17–20, express doubt; Alessandra Pietrobon, 'Nuclear Powers' Disarmament Obligation under the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty: Interactions between Soft Law and Hard Law' (2014) 27 *Leiden Journal of International Law* 169, 179–83, argues for the ICJ view.

[276] Matheson (n 114) 434; Daniel Rietiker, 'The Meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Analysis under the Rules of Treaty Interpretation' in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law – vol I* (TMC Asser Press, 2014) 47, 53.

[277] Joyner (n 215) 56–8; Rietiker (n 276) 52–4; Roscini (n 275) 17–19.

[278] This view is taken by Joyner (n 215) 64–6; and Rietiker (n 276) 64–5. The same view is discussed, with no clear view expressed, in Roscini (n 275) 16–20.

[279] Rukmini Das and Shubhangi Bhadada, 'India and Nuclear Disarmament: A Discussion in Light of the Application by the Republic of the Marshall Islands before the International Court of Justice' (2014) 56 *Journal of the Indian Law Institute* 550; Roscini (n 275) 20–1; Katherine Maddox Davis, 'Hurting More than Helping: How the Marshall Islands' Seeming Bravery Against Major Powers Only Stands to Maim the Legitimacy of the World Court' (2016) 25 *Minnesota Journal of International Law* 79, 93–4.

[280] Daniel H Joyner, 'Can Five Treaty Violators and Two Non-Parties Keep a Treaty Rule from Becoming Custom?: A Reply to Roscini', *Arms Control Law* 27 May 2014, https://armscontrollaw.com/2014/05/27/can-five-treaty-violators-and-two-non-parties-keep-a-treaty-rule-from-becoming-custom-a-reply-to-roscini/.

5.3. 'Moscow Criterion' and city targets: crimes, proportionality and human rights

UK nuclear strategy was originally based on the so-called Moscow Criterion. This stated that the UK must be able to destroy Moscow and some other USSR cities, if the UK was ever attacked by the USSR.[281] Despite subsequent changes to UK strategy, and the transition from the USSR to Russia, the Moscow Criterion effectively remained in place.[282] In 1993, the UK formally stated that the Moscow Criterion was no longer operative, but appeared to imply that, while Russia was no longer the named target, 'the Moscow Criterion still served as a benchmark for the UK's nuclear capability'.[283] Since then there has been little official comment on how the UK's minimum deterrence is quantified.[284]

In 2016, a group called Public Interest Case against Trident (PICAT) sought the Attorney General's consent to proceedings against the UK Prime Minister and the UK Secretary of State for Defence.[285] This was based on public comments, in 2012, by senior UK politicians and former senior defence staff which suggested that there was still an agreed, though unpublished, 'policy … at the highest levels of the British government … to maintain the capability to launch a nuclear strike on targets in Moscow, and an agreement that such an attack will be carried out under certain conditions'.[286]

PICAT took this as evidence that UK Government Ministers have committed, and are committing, the crime of conspiracy to commit war crimes, identified as a conspiracy to cause excessive incidental death, injury or damage contrary to Article 8(2)(b)(iv) of the Rome Statute.[287] In 2017 the

[281]Ritchie (n 26) 11; Juliette Jowit and Patrick Wintour, 'Trident Submarine Missiles Review to Suggest "Stepping Down Nuclear Ladder": Ousted Defence Minister Nick Harvey Claims Military and Whitehall Backing for Cheaper Alternatives', *The Guardian* (26 September 2012) www.theguardian.com/uk/2012/sep/26/trident-nuclear-missiles-review-downgrading; Roberts (n 256) 35, notes that both France and the UK had this policy.

[282]Ritchie (n 26) 11; David Omand, Kevin Tebbit and Franklin Miller, 'UK Cannot Afford to be Complacent in the Face of Russian Threats', *Financial Times* (22 May 2012) www.ft.com/content/553053ec-a34f-11e1-ab98-00144feabdc0.

[283]Ritchie (n 26) 12.

[284]*Ibid*, 11, 13.

[285]Application for Judicial Review, *R (Manson) v HM Attorney General and others* [2018] EWHC (QB) CO/569/2018, Summary Grounds of Resistance of the Attorney General and the Secretary of State for Defence, 7 March 2018, para 1, http://picat.online/wp-content/uploads/2018/04/CO_569_2018-Manson-v-AGO-SSD-Summary-Grounds-of-Resistance-1.pdf; (Annexes 1, 2 and 3: http://picat.online/combined-groups/a-gs-grounds-of-resistance/).

[286]Kirsty Brimelow, Megan Hirst and Nicholas Grief, 'Letter to the Attorney General's Office on behalf of 5 PICAT Groups' (1 October 2016) http://picat.online/wp-content/uploads/2016/10/PICAT-letter-to-AGO_1Oct16_final.docx, paras 32–9; James Blitz, 'Future of Trident Splits Coalition', *Financial Times* (29 October 2012), www.ft.com/content/87fea150-21e1-11e2-9ffd-00144feabdc0; Jowit and Wintour (n 281); Omand, Tebbit and Miller (n 282).

[287]EWHC Summary Grounds of Resistance (n 285) para 1; Brimelow, Hirst and Grief (n 286) para 43: 'Destruction on such a scale would be clearly excessive to any military advantage which could be anticipated'; this follows detailed evidence on the 'destruction' but no corresponding evidence on 'any

Attorney General decided not to give consent to the proceedings.[288] In 2018, PICAT's application for judicial review of this decision was refused.[289] PICAT's interpretation of the evidence and the law was not explored in any detail by the Attorney General, nor in the course of the judicial review refusal.[290] There does not yet appear to have been much exploration in the literature of the full legal case argued by PICAT,[291] and this subsection is written in the hope that it may prompt such analysis. The conspiracy element of PICAT's case depended on domestic law.[292] The Rome Statute includes planning aggression as a crime, but not the planning of an unimplemented war crime. Regardless of the domestic legal position, if a specific actual use of nuclear weapons, which is envisaged in a particular deterrence policy, would be a crime[293] and, therefore, unlawful, then the deterrence policy would itself be unlawful.[294] Such a policy might also constitute a crime under the Nuremberg Principles, on the basis that the planning or preparation of a war crime is itself a crime under the Nuremberg Principles.[295]

The facts highlighted by PICAT are relevant to another legal argument that UK deterrence policy may be unlawful. It has recently been argued that India's deterrence policy could constitute an unlawful threat of force.[296] This is based on the fact that India's threatened 'massive retaliation', if it actually occurred, would be unlikely to be proportionate for the purposes of Article 51 of the UN Charter.[297]

The standards set by different categories of law are distinct, even where they share the same terminology. For example the principle of proportionality

military advantage'; it is perhaps unsurprising that, EWHC Summary Grounds of Resistance (n 285) para 9, 'the Attorney General concluded that the material provided was insufficient to show that any offence has been committed and that there was no realistic prospect of conviction of any of the proposed defendants. The burden rests on the person proposing to bring the prosecution to identify *adequate evidence in respect of each of the elements* of the alleged crime' (emphasis added).

[288]EWHC Summary Grounds of Resistance (n 285) para 3.

[289]Application for Judicial Review, *R (Manson) v HM Attorney General and others* [2018] EWHC (QB) CO/569/2018, Notification of decision, 25 April 2018, http://picat.online/wp-content/uploads/2018/05/Notice-of-Refusal-Formal_001-May2018.pdf.

[290]As discussed further in subsection 6.2.

[291]Stuart Casey-Maslen, 'Use of Nuclear Weapons as Genocide, a Crime Against Humanity or a War Crime' in Nystuen, Casey-Maslen and Bersagel (eds) (n 3) 193, 208–9, reaches the same conclusion as PICAT on international criminal law: 'targeting … a city with nuclear weapons would clearly be unlawful and there would be little difficulty in proving the requisite mens rea' and, like PICAT, cites Rome Statute, Art (2)(b)(iv).

[292]International Criminal Court Act 2001, ss 50–55; Criminal Law Act 1977, s 1.

[293]Several authors suggest this would be true of most such uses: Griffith (n 99) 170; Brownlie (n 54) 443; Sack (n 49) 175; James Molony Spaight, *The Atomic Problem* (Arthur Barron Ltd, 1948) vii.

[294]See subsections 3.2 and 3.3: deterrence is a threat, and deterrence is unlawful if use of the threatened force would be unlawful. The particular case of crime was identified in Boyle (n 49) 1408, and again highlighted in Francis A Boyle, 'The Criminality of Nuclear Deterrence Today: International Law as Anchoring Ground' *Speech to XVIIIth conference "Mut Zur Ethic", Direct Democracy, Feldkirch* (4 September 2010) 3, www.globalresearch.ca/the-criminality-of-nuclear-deterrence-today/28588.

[295]Falk, Meyrowitz and Sanderson (n 47) 584, 592; Boyle (n 49) s II.A, 1418.

[296]Jain and Seth (n 54) 130.

[297]*Ibid*, 126–8; both: Grimal (n 11) 97–8; and Brownlie (n 54) 446–7, reach similar conclusions.

for the purposes of Article 51 differs from the principle of proportionality in international humanitarian law.[298] Proportionality has been described as 'infinitely malleable concept both in the context of self-defence and in IHL',[299] the 'exact content [of which] remains elusive',[300] and which international law fails to explain 'except in terms so abstract as to border on the tautological'.[301] It seems hard to deny that 'the two fields interact with each other and sometimes even converge – the crucial question being how and to what extent do they interact and converge'.[302]

It seems plausible that PICAT's reading of the evidence is correct, and UK policy does plan for a nuclear strike on targets in Moscow to be carried out under certain conditions.[303] The then UK deputy prime minister is quoted in 2012 as referring to the UK's continuing deployment of nuclear weapons as 'a nuclear missile system designed with the sole strategic purpose of flattening Moscow at the press of a button'.[304] Any such action is likely to be unlawful,[305] although some continue to suggest that it would not necessarily be unlawful.[306] Further work on both the facts and the law may therefore be needed before reaching a conclusion that, in this respect, UK deterrence policy is unlawful.[307]

In this context, it is also worth considering human rights law. Although the right to life in this context is widely agreed to be assessed by reference to international humanitarian law,[308] other elements of human rights law may in themselves constrain, if not prohibit, the use of nuclear

[298]Okimoto (n 166) para 52; Sloane (n 166) 75–6.

[299]Judith Gardam, 'Necessity and Proportionality in *Jus ad Bellum* and *Jus in Bello*' in Boisson de Chazournes and Sands (eds) (n 52) 275, 292; Corwin (n 49) 282, and Green (n 67) 107, make similar comments.

[300]Theresa Reinold, 'State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11' (2011) 105 *American Journal of International Law* 244, 248.

[301]Sloane (n 166) 108.

[302]Orakhelashvili (n 167) 164; Manfred Mohr, 'Advisory Opinion of the International Court of Justice on the Legality of the Use of Nuclear Weapons under International Law – A Few Thoughts on its Strengths and Weaknesses' (1997) 316 *International Review of the Red Cross* 92, 97; Rostow (n 50) 171–3; Mushkat (n 152) 22–4; Roberts and Guelff (n 61) 1–2; James A Green and Christopher P M Waters, 'International Law: Military Force and Armed Conflict' in John Buckley and George Kassimeris (eds), *The Ashgate Research Companion to* Modern Warfare (Ashgate 2010) 239, 292.

[303]Wilson (n 19) 422–3.

[304]Brimelow, Hirst and Grief (n 286) para 36; Blitz (n 286).

[305]Feinrider (n 53) 119: 'nuclear incineration of Moscow or Washington, D.C., or the capital of any permanent or non-permanent member of the Security Council also would violate the letter and spirit of article 51'; Jain and Seth (n 54) 126–8, conclude that 'massive retaliation' is unlawful, principally by reference to proportionality under the UN Charter law of self-defence, but briefly note, 128, that such action would also violate international humanitarian law; the latter point was made in Roberts (n 256) 35, in relation to the declaratory policies of both the UK and France (see n 281) at that time.

[306]Lewis and Sagan (n 54) 67.

[307]See subsections 3.2 and 3.2: deterrence is a threat, and deterrence is unlawful if use of the threatened force would be unlawful.

[308]This view is challenged by Mohr (n 302) 95; and Liz Heffernan, 'The Nuclear Weapons Opinions: Reflections on the Advisory Procedure of the International Court of Justice' (1998) 28 *Stetson Law Review* 133, 106.

weapons.[309] These include civil, economic, social and cultural rights, including specifically the right to water,[310] and the prohibition of inhuman treatment.[311] Even by those who argue that such rights only constrain, rather than prohibit, any use of nuclear weapons,[312] the use of such weapons against a city like Moscow would probably be seen as a violation of human rights law.

In summary: (a) it seems plausible that UK policy does plan for a nuclear strike on targets in Moscow to be carried out under certain conditions, although this is necessarily speculative; (b) many authors suggest that, regardless of the circumstances, such a strike would be unlawful, either as a war crime, or as failing the proportionality test under Article 51, or as a violation of human rights law; (c) if an actual nuclear strike on targets in Moscow would be unlawful in any of these ways, then a deterrence policy which threatens such use would itself be unlawful; (d) further work on both the facts and the law may be needed to establish that, in this respect, UK deterrence policy is unlawful.

5.4. Unnecessary use: 'necessity' in humanitarian law and in the law of self-defence

A further concern arising from the deliberate ambiguity of UK nuclear deterrence policy[313] follows from a recent legal analysis of US nuclear targeting practice.[314] That analysis identified the need for relevant military guidance explicitly to rule out a nuclear weapon being used unnecessarily,[315] such as the use of a nuclear weapon to destroy a target which could be destroyed by a conventional weapon.[316] Any such use would fail the requirement of necessity[317] in international humanitarian law:

> Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied.[318]

[309]Stuart Casey-Maslen, 'The Right to a Remedy and Reparation for the Use of Nuclear Weapons' in Nystuen, Casey-Maslen and Bersagel (eds) (n 3) 461–80; Louise Doswald-Beck, 'Human Rights Law and Nuclear Weapons' in Nystuen, Casey-Maslen and Bersagel (eds) (n 3) 435–60; Rietiker (n 49) 340–5.
[310]*Ibid*, 343–5.
[311]Doswald-Beck (n 309) 452–4.
[312]Casey-Maslen (n 309) uses the phrases, 461, 'highly likely' and, 479, 'very hard to imagine'.
[313]See n 189 – n 190.
[314]Lewis and Sagan (n 54).
[315]Abe (n 106) 147, notes that the 2014 Hiroshima Round Table made the same recommendation on the same basis.
[316]Lewis and Sagan (n 54) 68–9.
[317]*Ibid*, 64.
[318]Roberts and Guelff (n 61) 10; Kennedy (n 20) 54.

Use of a nuclear weapon to destroy a target which could have been destroyed by a conventional weapon might possibly also fail the requirements implicit in the law of self-defence. These requirements are widely agreed to be necessity and proportionality, and often analysed as two separate requirements.[319] There appears to be less agreement on how each is defined. The requirement that the defending state use no more force than is necessary is seen by some as part of the necessity requirement.[320] Others limit the meaning of 'necessity' to restricting self-defence to only those circumstances where no peaceful alternative exists,[321] and take the level of force to be part of the proportionality requirement.[322] Any practical application 'inexorably links the criteria of necessity and proportionality' because 'proportionality is to be calculated by reference to the necessity of defence'.[323]

Two further difficulties arise. One is that 'the notions of necessity … and proportionality are fraught with conceptual ambiguity and are notoriously difficult to apply in practice'.[324] The other is that 'there is still a conflation between necessity elements under the self-defence doctrine, the circumstances precluding wrongfulness and the international humanitarian law',[325] or at least a claim that necessity under international humanitarian law is not a 'free-standing concept, but is linked to the very cause of the relevant conflict and thus' to the self-defence analysis.[326]

Despite the UK's deliberately ambiguous policy,[327] it does appear to explicitly rule out any unnecessary use of nuclear weapons.[328] If this is an accurate reading of UK policy, then the 'necessity concern' would not apply to the UK.

[319] *Nuclear Weapons* (advisory opinion) (n 2) para 41; Christopher Greenwood, 'Self-Defence' in Lachenmann and Wolfrum (eds) (n 53) 836, para 26; International Law Association (n 192) 12.

[320] This view is expressed in International Law Association (n 192) 12; it also appears to be the view taken by Lewis and Sagan (n 54) 69, in discussing the *Nuclear Weapons* (advisory opinion) (n 2).

[321] Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004); Green (n 67) 76–80; Green and Grimal (n 113) 300–1; Reinold (n 300) 248; Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defense' (2013) 107 *American Journal of International Law* 563, 564, 567.

[322] Akande and Liefländer (n 321) 567.

[323] Green (n 67) 89–90.

[324] Akande and Liefländer (n 321) 569. The same point is made in Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities The Incidental Harm Side of the Assessment* (Chatham House, 2018), para 2.

[325] Agius (n 213) 123; Venturini (n 166) argues against any such conflation.

[326] Orakhelashvili (n 167) 164. Likewise, Gardam (n 321) 107, quotes with apparent approval *Nuclear Weapons* (advisory opinion) (n 2) dissenting opinion of Judge Higgins, para 21, that 'military advantage' might relate to the very survival of a state.

[327] See n 189 – n 190.

[328] UK Policy Paper 2018 (n 31) 'Myth 1': 'Our nuclear deterrent is there to deter the most extreme threats to our national security and way of life, *which cannot be done by other means*' (emphasis added); UK Policy Paper 2015 (n 27) app 1, principle 1: 'the UK's nuclear weapons are not designed for military use during conflict but instead to deter and prevent nuclear blackmail and acts of aggression against our vital interests *that cannot be countered by other means*' (emphasis added); the same statement also appeared in UK White Paper 2006 (n 27) para 3-4.

6. How best can changes be achieved?

6.1. What changes are needed to UK deterrence policy?

Sections 4 and 5 have highlighted two specific aspects of UK policy which are unlawful: the refusal to rule out first use, and the possibility of low level, high power use. Sections 4 and 5 have also noted that, to comply with international law in these respects, the UK should explicitly state that its nuclear weapons (a) would never be used other than in response to a nuclear attack which has begun; and (b) would never be used at 10 kilotons or more of explosive power, at a height of less than 200m above land.

The following two subsections consider strategies for achieving these changes: subsection 6.2 reviews strategies which are currently unlikely to succeed and subsection 6.3 considers strategies which are more likely to succeed.

6.2. Strategies which are unlikely to achieve change

In 2017, the UK amended its Optional Clause Declaration, to exclude from ICJ jurisdiction, any cases related to nuclear weapons, unless the other NPT nuclear weapons states also accept ICJ jurisdiction with respect to the case.[329] In practice this is unlikely to happen.[330] In effect, therefore, it is now impossible for any other state to challenge UK nuclear weapons policy at the ICJ.

A treaty-based approach to ICJ jurisdiction might allow states like the UK, which do not accept the general jurisdiction of the court in a given instance, to be brought before the ICJ.[331] Even if such an approach to jurisdiction were to succeed, however, significant difficulties might still arise in producing adequate evidence that particular uses were envisaged in a deterrence policy.[332]

A further UK court case is also unlikely to succeed. In 2018, in refusing permission for judicial review of the decision to refuse PICAT's proposal,[333] the judge claimed that 'it is not possible to contend that the possession of a nuclear deterrent is prohibited under international law'.[334] This was based on the 'summary grounds of resistance' filed by the Attorney General:

[329]ICJ: Declarations recognizing the jurisdiction of the Court as compulsory United Kingdom of Great Britain and Northern Ireland 22 February 2017; this amendment was in response to *Marshall Islands* (preliminary objections) (n 46). See subsection 5.2.
[330]Becker (n 66) 20.
[331]Gordon (n 54) 716–19.
[332]*Ibid*, 719–20. These difficulties are in addition to the ICJ's 'inherent problems in terms of the collation of reliable evidence in the context of any of the cases on its docket': Green (n 67) 194, and the fact that 'evidentiary standards applicable to the law on the use of force … remain extremely unclear': James A Green, 'Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice' (2009) 58 *International and Comparative Law Quarterly* 163, 163.
[333]See subsection 5.3.
[334]EWHC Notification of decision (n 289).

> The suggestion that it is prohibited under international law even to maintain a nuclear deterrent is an extraordinary and untenable one. It is also contrary to the conclusions of [the ICJ opinion]. There is a plain and fundamental distinction between the maintenance of such a deterrent, on the one hand; and its use, or a decision as to its use, in circumstances that are or would be, in summary, excessive on the other.[335]

This statement by the Attorney General is misleading in at least three respects. The first sentence misrepresents the facts of the case. PICAT claimed that one aspect of UK deterrence policy resulted in it being prohibited, the Moscow Criterion,[336] not that any nuclear deterrence policy would be prohibited. The second sentence misrepresents the ICJ opinion. On this point, the ICJ implied that it was 'unable to conclude definitively'.[337] The third sentence misrepresents the law.[338] This incoherence in dealing with the PICAT's proposal, when combined with the failure of earlier national law challenges to nuclear weapons issues,[339] indicates the ongoing reluctance of courts in the UK and elsewhere to challenge nuclear deterrence policies, and the low chance of success in these courts.[340]

Other theoretically possible routes to enforce international law include: UN Security Council action such as countermeasures and sanctions;[341] using the UN Security Council as a dispute settlement forum for multilateral disputes with security implications;[342] or submitting such disputes to the UN General Assembly.[343] Given the relative power of the NPT nuclear weapons states, compared with other states, including their permanent, veto-holding

[335]EWHC Summary Grounds of Resistance (n 285) para 13.
[336]See subsection 5.3.
[337](1) *Nuclear Weapons* (advisory opinion) (n 2) para 48: 'whether [a typical deterrence policy] is a "threat" contrary to Article 2, paragraph 4, depends upon … whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality'; (2) *ibid*, para 47: 'if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise be illegal'; (3) as outlined in subsection 3.4, the only possible exception to the general rule that the threat or use of nuclear weapons would be unlawful, is in an extreme circumstance of self-defence, and the ICJ was unable to conclude definitively on whether use of a nuclear weapons in this circumstance would be lawful or unlawful; (1), (2) and (3) together imply (4): the ICJ was unable to conclude definitively on whether a typical deterrence policy would be lawful or unlawful.
[338]See subsections 3.2 and 3.3: deterrence is a threat, and deterrence is unlawful if use of the threatened force would be unlawful.
[339]Jane Hickman, 'Greenham Women Against Cruise Missiles and Others v. Ronald Reagan and Others' in Dewar and others (eds) (n 256); Peter Weiss, 'Nuclear War in the Courts' in Dewar and others (eds) (n 256); Singh and McWhinney (n 54) ch 29; Matthew Lippman, 'Civil Resistance: Revitalizing International Law in the Nuclear Age' (1992) 13 *Whittier Law Review* 17, ss V, VI; Francis A Boyle, *The Criminality of Nuclear Deterrence* (Clarity Press, 2002) 208; Drummond (n 10) 116; RMI also pursued its claim (see subsection 5.2) in the US domestic courts without success (US Court Of Appeals opinion, *RMI v USA et al*. Appeal from US District Court for the Northern District of California, July 31, 2017, No. 15-15636 D.C. No. 4:14-cv-01885-JSW).
[340]Gordon (n 54) 722–6.
[341]Dino Kritsiotis, 'International Law and the Relativities of Enforcement' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 245, 248–58.
[342]Proulx (n 67) 925–46.
[343]Pomson (n 272) 396.

position on the UN Security Council, most of these routes are likely to be unavailable or ineffective in prompting changes to the nuclear deterrence policies of these states.[344] That said, when the medium term effect of the TPNW becomes clearer,[345] this may reveal greater effectiveness of the UN General Assembly to influence the NPT nuclear-armed states.

In summary, further contentious cases, either at the ICJ or domestically, are currently unlikely to achieve the necessary changes to UK deterrence policy. Similarly, routes involving the UN Security Council or the UN General Assembly currently appear unlikely to succeed.

6.3. Strategies which are more likely to achieve change

Both before and since 1996, there have been suggestions that the UN General Assembly seek an ICJ advisory opinion on specific aspects of nuclear weapons policies. An early example of a suggested question was whether or not first use of a nuclear weapon could ever be lawful.[346] A more recent suggested question is: 'Are the Nuclear Weapons States parties to the [NPT], through their acts or omissions, individually or collectively in breach of their obligations under Article VI of the same?'[347]

Some suggest that the ICJ is unlikely ever to give a clear ruling on any aspect of nuclear weapons policy, given its previous history in this area.[348] There are, however, grounds to hope that the previous lack of clarity by the ICJ in this area might not necessarily continue. One relevant fact is that two of the more recent judgments reflected the casting vote of the president, in the context of an equal split of the judges.[349] This suggests that the changing composition of the Court over time may result in greater clarity in future decisions. Another is the shared conclusion of recent analyses that reject any simple suggestion that the votes of ICJ judges necessarily reflect their countries of origin.[350] An alternative longer term suggestion is to set up

[344]E.g. UNSC Res 2397, UN Doc S/RES/2397 (22 December 2017) described DPRK actions as a 'threat to international peace and security' and 'in violation and flagrant disregard of the Security Council's resolutions' but not as unlawful; this approach was consistent in the previous 18 UNSC resolutions on DPRK's nuclear activities; this contrasts with the statement by a UK Minister of State referring to 'North Korea's basically illegal nuclear and ballistic missile programmes': Duncan, Price and Franklin (n 190) Q155.

[345]See subsection 2.5.

[346]Singh and McWhinney (n 54) 294. See also Schwarzenberger (n 93) 57.

[347]Joyner (n 215) 67; a very similar question is also one of those suggested in Anastassov (n 72) s 6.

[348]See, e.g. *Nuclear Weapons* (advisory opinion) (n 2); *Marshall Islands* (preliminary objections) (n 46). See also n 66.

[349]*Nuclear Weapons* (advisory opinion) (n 2) para 105(2)E; *Marshall Islands* (preliminary objections) (n 46) para 59.

[350]Awmee (n 273) 80 suggests that 'judges vote in favour of the national interests of their home state' citing Venzke (n 67) and Bonafé (n 273); Venzke (n 67) 73 suggests that the 'mode of reasoning does not make the difference, judges and their preferences do'; Bonafé (n273) 19 notes Venzke's suggestion but does not comment further on it; Becker (n 66) 20–24, however, analyses this suggestion in detail and concludes that 'considerable caution is warranted before jumping to conclusions about what factors may have influenced how judges have decided a case, or issues within a judgment'; Becker's caution is

an international tribunal specifically to give legal rulings on questions relating to nuclear weapons.[351]

Further formal proceedings may not be necessary. As noted in subsection 2.6, the UK might be persuaded to change aspects of its current nuclear deterrence policy which fail to comply with international law if there are sufficient negative reactions, by other states and by UK domestic society, to these current failings.

Articles in peer-reviewed literature can influence governments in assessing how international law applies to the design and implementation of national defence policies.[352] A possible example of this was a 2012 journal article,[353] and the subsequent adoption by several governments,[354] including the UK,[355] of one or more of the principles set out therein.[356] Such articles can also influence the views of ICJ judges,[357] and public opinion.[358] In this context, clear language, clear conclusions, clear formats, and practical recommendations are crucial,[359] as are independence, integrity and responsibility.[360]

consistent with an earlier detailed analysis in Green (n 67) 178–81, 185, which concludes that a 'naked realist vision of judges using the veil of "the law" as a mask for political decision-making simply does not fit the reality of the decisions of the ICJ'. See also Mistry (n 173) 301, last para.

[351]Colangelo and Hayes (n 48).

[352]Feinrider (n 53) 112; Winston P Nagan and Erin K Slemmens, 'Developing U.S. Nuclear Weapons Policy and International Law: The Approach of the Obama Administration Changing Course' (2010) 19 *Tulane Journal of International and Comparative Law* 1, ss III–IV; the citations in UK Written Statement 1995 (n 46) also demonstrate the influence of peer-reviewed articles.

[353]Bethlehem (n 192).

[354]Henderson (n 132) 299.

[355]Jeremy Wright, 'The Modern Law of Self-Defence', UK Attorney General's Speech at International Institute for Strategic Studies (11 January 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583171/170111_Imminence_Speech_.pdf.

[356]Craig Martin, 'Challenging and Refining the "Unwilling or Unable" Doctrine' (2019) 52 *Vanderbilt Journal of Transnational Law* 387, explores the background to the 2012 article, the degree to which it goes beyond existing law, the debate that it generated, and the inappropriate way in which governments used it.

[357]Rosalyn Higgins, 'Reflections from the International Court' (2003) 1, https://oup-arc.com/protected/files/content/file/1523266985456-evans5e_insights_12piece1.pdf, referring to ICJ judges, notes 'being elected to this high office does carry with it … the responsibility to … continue systematically to read the literature in field … '.

[358]Feinrider (n 53) 112; Vlasic (n 246) 515–18; this is particularly true if conclusions are distributed through mainstream or alternative media: e.g. Scottish National Party (SNP), 'SNP Autumn Conference 2017 – Tuesday Session 5' (2017) www.periscope.tv/w/1ypKdlZkeqRKW, at 36:00–39:30 and 47:59–49:00.

[359]Ramesh Thakur, 'Nuclear Nonproliferation and Disarmament: Can the Power of Ideas Tame the Power of the State?' (2011) 13 *International Studies Review* 34, 43: 'practitioners need policy-relevant advice … , shorn of confusing caveats, … in clear and concise language and format. … It is up to scholars to link theories to actor behavior and make policy recommendations on that basis'; examples of such an approach are the flowchart, diagrams and table in Drummond (n 10) 134–5, 138, 113.

[360]Martti Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in UN Office of Legal Affairs, *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations, and Practitioners in the Field of International Law* (UN, 1999) 495, 521–2: 'the academic'.

There are often opportunities for formal questions in,[361] and submitting evidence to,[362] domestic legislatures.[363] In this context, again, there is a need for clear and concise language and format.[364] Political party conferences offer the opportunity to influence party policy through conference resolutions.[365] Even where the party concerned does not have power over defence, the influence can still be significant.[366] That said, 'converting this assessment of the illegality and criminality of nuclear weapons into a political project is a difficult undertaking'.[367]

Influencing wider public opinion on issues of law is also challenging. Can the general public be persuaded to insist to their political representatives that they 'wish to live under a government that acts on the basis of the Rule of Law in world affairs as well as in domestic life'?[368] Again there is a need for integrity and responsibility among those applying and promoting international law with this aim.[369] The commitment must be to establish the result of applying international law in the relevant context, even if this turns out to differ from the result expected at the outset. The comments on the nature of international law in subsection 2.4 will be relevant here.

Civil society, and in particular transnational NGOs, can be effective in the process of holding states accountable in terms of their compliance with international law.[370] This has been very evident in the context of nuclear weapons.[371]

[361]UK HC, 'Written Question 222573 by Martyn Day, and Answer by Gavin Williamson, (18 and 26 February 2019): Question: 'To ask the Secretary of State for Defence, what assessment his Department has made of the implications for his policies of the conclusions of the New Zealand Yearbook of International Law article entitled Is the UK nuclear deterrence policy lawful? Published in Vol. 11, 2013; and if he will make a statement'; response by the Secretary of State for Defence: 'I can reassure the House that the United Kingdom's nuclear deterrent is fully compliant and compatible with our international legal obligations', www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-02-18/222573/.

[362]Brian Drummond, 'Written evidence to UK HL' (2019), linked from UK HL Committee (n 190) 114.

[363]Elliott L Meyrowitz, 'The Laws of War and Nuclear Weapons' (1983) 9 *Brooklyn Journal of International Law* 227, 258; Nanda and Krieger (n 105) 170.

[364]See n 359.

[365]Scottish National Party, 'Annual National Conference Agenda' (2017) 19: Resolution 15: 'Conference welcomes and supports the [TPNW (n 82)] … Conference also urges the UK Government to implement a policy of no first use of nuclear weapons, as a first step towards compliance with international law', https://d3n8a8pro7vhmx.cloudfront.net/thesnp/pages/3923/attachments/original/1507283291/10_06_SNP_83rd_Conference_A5_low-res.pdf?1507283291; Holyrood Magazine (10 October 2017) https://twitter.com/HolyroodDaily/status/917695774930165760: 'The resolution on nuclear weapons is passed unanimously'; SNP Autumn Conference (n 358) is the related conference speech video.

[366]Nick Ritchie, 'Nuclear Identities and Scottish Independence' (2016) 23 *Nonproliferation Review* 653.

[367]Falk (n 96) 45.

[368]Falk (n 93) 233.

[369]Koskenniemi (n 360) 518–21: 'the activist'.

[370]Falk, Meyrowitz and Sanderson (n 47) 542, 592–4; Richard Falk, 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of the Global Civil Society' (1997) 7 *Transnational Law & Contemporary Problems* 333, 338, 351; Charnovitz (n 9) 354–5; Roberts and Guelff (n 61) 14–15; Martine Beijerman, 'Conceptual Confusions in Debating the Role of NGOs for the Democratic Legitimacy of International Law' (2018) 9 *Transnational Legal Theory*, 147, s 2.

[371]Falk (n 370) 338–42; John Burroughs and Jacqueline Cabasso, 'Confronting the Nuclear-Armed States in International Negotiating Forums: Lessons for NGOs' (1999) 4 *International Negotiation* 457; Borrie, Spies and Wan (n 83); Ritchie and Egeland (n 84).

In summary, the strategies which appear most likely to achieve changes to UK policy are (a) a further ICJ advisory opinion, this time on a more specific question about nuclear policies, and (b) work to influence opinion at all levels.

7. Conclusions

It has been argued in this article that two specific aspects of UK nuclear deterrence policy fail to comply with international law. These are the UK's explicit refusal to rule out first use of nuclear weapons, and the UK's implied threat of low level, high power use. This conclusion rests on four foundations: (a) deterrence is a threat, (b) a threat is unlawful if use of the threatened force would be unlawful, (c) the only possible exception to the general rule that the use of nuclear weapons would be unlawful is an extreme circumstance of self-defence, and (d) use of nuclear weapons in a belligerent reprisal would be unlawful.

Two other aspects of UK nuclear deterrence policy have recently been challenged. These are the UK action to maintain its deterrence policy indefinitely, and the UK's apparent plan to use nuclear weapons on cities. Further work might reveal that these aspects are also unlawful. An additional concern raised for deterrence policies generally does not appear to apply to the UK, given the UK's explicit ruling out of the unnecessary use of nuclear weapons.

Several strategies are available to hold the UK to account,[372] for its failure to make the necessary policy changes, but only some of these strategies are likely to succeed. These are a further ICJ advisory opinion, this time on a more specific question about nuclear policies, and work to influence opinion at all levels. At least some of these conclusions will apply more widely, given that much of the analysis in this article also applies to the deterrence policies of other states.

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[372] In the sense outlined in subsection 2.1.

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Appendix: annotated ICJ *Nuclear Weapons* advisory opinion, paragraphs 47–8

The following text sets out paragraphs 47 and 48 of the ICJ opinion in full. The text in square brackets has been added (there are no deletions) to clarify some moods (indicative or subjunctive), tenses (present or future), forms (continuous or perfect), and degrees of reality (actual, conditional, or hypothetical).[373] The footnotes give some reasons for the views taken in these clarifications.

> 47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence[374] against any State violating their territorial integrity or political independence. Whether a [hypothetical] signalled intention to use force if certain events occur [i.e. a conditional threat] is or is not [hypothetically] a 'threat' within [that is, 'prohibited by'][375] Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is [hypothetically, if it happened,[376]] itself unlawful, the [hypothetical] stated readiness to use it would be [whether or not any force is ever used] a threat prohibited under Article 2, paragraph 4. Thus [hypothetically] it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given [hypothetical, future] case is illegal – for whatever reason – the [assumed, actual, current, (typically) conditional,[377]] threat to use such force will [now] likewise be illegal.[378] In short, if it is to be lawful, the [actual, current] declared [conditional] readiness of a State to use force [depending on how the state(s) threatened respond(s) to the threat] must be [a declared readiness to use force which refers to[379]] a use of force that is ['is' in the

[373]For a full range of moods, tenses and forms, see Nesfield (n 141) 57–66.

[374]Sets the context of paras 47–8 to 'signalled intentions' to use force in self-defence; that said, the principles in the two paras seem applicable to all threats: both short term threats in a crisis and long term deterrence policies; and both (typical) conditional threats and (far less typical) unconditional threats.

[375]This understanding is based on the wording of the following sentence.

[376]This understanding is based on the following logic. Neither a merely envisaged (but not actual) use of force, nor an intended use of force, can be, now, an unlawful use of force. This is because neither is an actual use of force at all. At most envisaged and intended uses of force can be threats of force. The threat element cannot be intended here, as this would result in the whole sentence being a tautology: 'if the threat of force is unlawful then the threat of force is unlawful'.

[377]Based on the definitions noted in n 135 – n 136.

[378]An alternative reading is theoretically possible: 'if the use of force itself in a given [hypothetical, future] case is illegal – for whatever reason – the [hypothetical, future] threat to use such force will [hypothetically, in the future] likewise be illegal. Green and Grimal (n 113) 322 notes that such a 'strict reading of the Nuclear Weapons dictum creates a paradox: a state may make a threat only once it is clear that a threat will not suffice and that a use of force is the only reasonable defensive option'. Such a reading appears hard to reconcile with the discussion of current actual ongoing nuclear deterrence policies in paragraph 48.

[379]This construction is necessary to avoid incoherence. The unannotated sentence, but with emphasis added, reads 'if it is to be lawful, *the declared readiness of a State to use force must be a use of force* that is in conformity with the Charter'. A threat of force is not itself a use of force (otherwise there would be no reason for Art 2(4) to mention both threat and use). Expressed differently, a threat of force is non-forcible: Green and Grimal (n 113) ss IV–V. On this basis, in no sense or circumstance

sense 'would be, in the hypothetical, future event of it being used'[380]] in conformity with the Charter. For the rest, no State – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful [now] to threaten to use force if the [(typically) conditional, future] use of force contemplated would [at that future time, and (typically) assuming that the state(s) threatened had responded to the threat in a way that triggered the use of the force,] be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself [now, actually, continually] an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek [now, actually, continually] to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is [now, actually, continually] a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would [hypothetically, if it were to be used, in future] be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were [(typically) conditionally] intended as [at the time of its future use] a means of defence, it would [hypothetically, if it were to be used, at that future time] necessarily violate the principles of necessity and proportionality. In any of these [future] circumstances[381] the use of force, and the threat [now, ahead of that future use] to use it [conditional on uncertain future events],[382] would be [that is: (a) the use then, hypothetically, in the future, would be; and (b) the current threat now, actually, in the present, would be] unlawful under the law of the Charter.

could it ever be true, that 'the declared readiness of a State to use force' could be 'a use of force' of any description.

[380]Based on the same reasoning as set out in n 379.

[381]That is, the circumstances just referred to in which a use of force is (a) directed against a state's territorial integrity or political independence, or against the Purposes of the UN or (b) intended to be self-defence, but necessarily violates [by reference to circumstances at the time of actual use] the principles of necessity and proportionality.

[382]E.g. in a deterrence policy which envisages a use in the circumstances just mentioned; this construction follows from the context of the paragraph as a whole which is dealing with whether or not current, ongoing, deterrence policies are, now currently, unlawful.