IS THE UNITED KINGDOM NUCLEAR DETERRENCE POLICY UNLAWFUL?

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I. Context and Article Overview

A. Context: All Efforts

In March 2013, 127 states participated in a conference convened by Norway to address the humanitarian consequences of nuclear weapons (the March 2013 Conference).[1] In the general debate session of the 2013 Preparatory Committee for the 2015 Review Conference of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[2] a group of 74 states made a joint statement which referred to the March 2013 Conference and noted that "the catastrophic effects of a detonation are of concern and relevance to all … All efforts must be exerted to eliminate this threat".[3]

The March 2013 Conference was one area of such efforts. Perhaps the largest area of collective effort by states is the NPT itself.[4] A third area of effort relates to the aim to explicitly and specifically, by treaty, render unlawful the development, testing, production, stockpiling, transfer, use or threat of use of nuclear weapons.

A fourth area of effort which must be exerted is that of clarifying how, in addition to NPT obligations, other international law applies to nuclear weapons and promoting compliance with that other law. In October 2012, a group of 34 states made a joint statement to the United Nations General Assembly which affirmed that "[c]ivil society plays a crucial role in raising awareness about the devastating humanitarian consequences as well as the critical international humanitarian law implications of nuclear

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1 Royal Norwegian Ministry of Foreign Affairs *Humanitarian Impact of Nuclear Weapons* Oslo 4-5 March 2013 <www.regjeringen.no> [March 2013 Conference].

2 Treaty for the Non-Proliferation of Nuclear Weapons 729 UNTS 161 (opened for signature 1 July 1968, entered into force 5 March 1970) [NPT].

3 Statement by Ambassador Abdul Samad Minty, Permanent Representative of South Africa to the United Nations in Geneva on behalf of 74 states "Second Preparatory Committee for the 2015 Review Conference of the Parties to the NPT, General Debate" (Geneva, 24 April 2013) [NPT Prepcom 2013 Statement] at [5] and [6].

4 Hine-Wai Loose "2005 – Year of the Nuclear Non-Proliferation Treaty – But What Happened to Nuclear Disarmament?" (2007) 4 NZYIL 135 reviewed the legal obligations arising out of the NPT; Angela Woodward "Weapons of Mass Destruction, Non-Proliferation and Disarmament" (2012) 10 NZYIL 249 at 252-253 outlined New Zealand's continuing active role in securing compliance with the NPT.

weapons".[5] The Final Document of the 2010 Review Conference of the NPT "reaffirms the need for all States at all times to comply with applicable international law, including international humanitarian law".[6] This fourth area of effort is the theme of the rest of this article.

B. Context: Clarifying the Law and Promoting Compliance

A major effort to clarify the law in this area was made in the course of the 1996 International Court of Justice Advisory Opinion (the ICJ Opinion) which considered the threat or use of nuclear weapons generally.[7] One of the operative paragraphs of the ICJ Opinion does not "conclude definitively" in view of "the current state of international law" and "the elements of fact" at its disposal.[8] The seven votes against this paragraph each reflected jurisprudential concern about its indefinite nature[9] and it has been suggested that "[a] majority of judges actually held that the use of nuclear weapons was unlawful".[10] These features of the ICJ Opinion have, in recent years, made promoting compliance with international law less than straightforward.

Another reason why promoting compliance with international law is not straightforward is that, in general, states do not challenge the legitimacy of international law: even when they appear to be violating such law, they will insist that they are acting in full compliance with it.[11] This practice of states continues despite it having long been recognised that "the credit of international law has more to gain by the candid admission of breaches when they occur, than by attempting to throw a cloak of legality over them".[12]

5 Statement by HE Ambassador Benno Lagger, Switzerland "Joint Statement on the humanitarian dimension of nuclear disarmament" 67th session of the United Nations General Assembly First Committee (22 October 2012) A/C.1/67/PV.12 (2012) at 4.

6 2010 Review Conference of the Parties to the NPT Final Document NPT/CONF.2010/50 vol 1 (2010) at 19.

7 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [*Nuclear Weapons*].

8 At [105(2)E], by the President's casting vote.

9 Simon Chesterman "The International Court of Justice, Nuclear Weapons and the Law" (1997) 44 NILR 149 at 160; Richard Falk "Nuclear Weapons, International Law and the World Court: A Historic Encounter" (1997) 91 AJIL 64 at 72.

10 Christine Gray "The Use of Force to Prevent the Proliferation of Nuclear Weapons" (2009) 52 Japanese Yearbook of International Law 101 at 105.

11 Thomas Franck "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100 AJIL 88 at 96-97; Albrecht Randelzhofer and Oliver Dörr "Article 2(4)" in Bruno Simma et al (eds) *The Charter of The United Nations – A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) vol 1 200 at 204; recent possible exceptions to this approach are discussed by Christopher Joyner "Gulliver Unbound: US Foreign Policy and its Implications for International Law" (2004) 1 NZYIL 9 at 39-40 and 46-49; and by Gray, above n 10, at 114 and 121.

12 Andrew Clapham *Brierly's The Law of Nations: An Introduction to the Role of International Law in International Relations* (7th ed, Oxford University Press, Oxford, 2012) at 467 (footnotes omitted); examples of such admissions, relating to Kosovo, are given in Lewis Mills "Bereft of Life? The Charter Prohibition on the Use of Force, Non-state Actors and the Place of the International Court of Justice" (2011) 9 NZYIL 35 at 65.

The United Kingdom has stated, referring to the ICJ Opinion, that "we can find nothing in it to make our deterrence policy … unlawful".[13] As a contribution to the effort to clarify, and promote compliance with, international law relating to nuclear weapons, the analysis in this article aims to establish whether or not this view is well founded. If it is not, then the United Kingdom should amend its deterrence policy in order to meet the acknowledged "need for all States at all times to comply with applicable international law".[14]

C. Article Overview

This article considers whether or not the deployment by the United Kingdom of nuclear weapons, in the context of its published deterrence policy, is unlawful under international law. Deployment refers to the operational readiness to use nuclear weapons; deterrence refers to the policy intention to use nuclear weapons if subject to attack. The need for a systematic approach to such a question is noted in the dissenting opinion of Judge Higgins:[15]

> At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use or threat of nuclear weapons. It reaches its conclusions without the benefit of detailed analysis. An essential step in the judicial process – that of legal reasoning – has been omitted.

With this in mind, this article approaches its task systematically and in a way that makes clear the reasoning on which the conclusions are based. It does, however, deal with much of the detailed analysis required by way of reference to fuller treatments of the various aspects.

Relevant facts, specific to nuclear weapons deployed by the United Kingdom and its deterrence policies, are outlined in part II which reviews the expected effects of using the United Kingdom's weapons. The law is applied to these facts in part III through the following series of eleven questions, which are considered by reference to the ICJ Opinion in its entirety,[16] the opinions of the individual judges[17] and wider legal analysis of the relevant issues.

A. Does deployment of the weapons under the deterrence policy constitute a threat?

B. Does customary international law specifically render a deterrence threat lawful?

13 Geoffrey Marston "United Kingdom Materials on International Law 1997" (1997) 68 BYIL 467 at 638.

14 NPT/CONF.2010/50 vol 1 (2010), above n 6, at 19.

15 *Nuclear Weapons*, above n 7, Dissenting Opinion at 584 [9].

16 "The Court emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above": *Nuclear Weapons*, above n 7, at [104].

17 "The Court itself has always insisted that its decisions consist of the judgment (or advisory opinion) *and* the opinions annexed": Hugh Thirlway "The Nuclear Weapons Advisory Opinion, the Declarations and Separate and Dissenting Opinions" in Laurence Boisson de Chazournes and Philippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, Cambridge, 1999) at 396.

C. Is the use envisaged in the threat within the scope of article 2(4)?

D. Is the proposed use in "self-defence if an armed attack occurs"?

E. Is the proposed use necessary, proportionate and compliant with article 51?

F. Is the proposed use unlawful under customary international humanitarian law?

G. Is the proposed use unlawful under customary international environmental law?

H. Is the proposed use unlawful under the law of neutrality?

I. Can the proposed use be justified as a lawful belligerent reprisal?

J. If there might be a conflict with the right to self-defence, could this be resolved?

K. Could the resolution of the conflict render the proposed use lawful?

A summary flowchart (at the end of part III) clarifies how each question fits into the overall structure of the relevant international law. The flowchart also makes clear the reasoning leading to the overall conclusions which are drawn in part IV. Part IV summarises the answers to the eleven questions and uses these answers to identify some respects in which United Kingdom deterrence policy is unlawful. It then compares these conclusions with the ICJ Opinion, comments on the conclusions and recommends actions.

Two main difficulties are reflected in the indefinite aspect of the ICJ Opinion: the attempt to cover many hypothetical proposed uses of nuclear weapons[18] and differing views among the judges on the lawfulness of particular proposed uses.[19] Consideration of only the weapons deployed by the United Kingdom, and the particular uses of these weapons envisaged in its deterrence policy, will definitely reduce the first difficulty and may also reduce the second. The questions and flowchart in part III acknowledge the second difficulty: at least in theory, the overall outcome may be unclear for some theoretical proposed uses of some hypothetical weapons. If these cases with unclear outcomes include some that do not relate to the United Kingdom weapons and policies, then limiting consideration to uses proposed by the United Kingdom of its particular weapons will reduce the possibility of an unclear outcome.[20]

18 Jörg Kammerhofer "Gaps, the *Nuclear Weapons* Advisory Opinion and the Structure of International Legal Argument between Theory and Practice" (2009) 80 BYIL 333 at 349; in submissions to the International Court of Justice in 1995, this difficulty was anticipated by several states, including Australia: *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 CR/95/22 at 38 (Verbatim Record 30 October 1995) [*Nuclear Weapons Verbatim Record 30 October 1995*].

19 These views are analysed by Thirlway, above n 17, at 398.

20 Stefan Oeter "Methods and Means of Combat" in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (3rd ed, Oxford University Press, Oxford, 2013) at 156: "legal limits ... may be deduced ... not withstanding that these limits are only relevant as to the concrete fashion in which the weapons are employed"; and at 160: "the repercussions of

In this respect the approach in this article is similar to that taken in the *Shimoda* case which considered the legality of the specific use of nuclear weapons on Hiroshima and Nagasaki but not the legality of the use of nuclear weapons in general.[21] Although the *Shimoda* case was based on the law prior to the United Nations Charter (and was mainly concerned with entitlement to compensation of the victims), the *Shimoda* case conclusion that "the act of atomic bombing of Hiroshima and Nagasaki was contrary to international law" is supported by the ICJ Opinion.[22]

The structured approach used in this article, considering the specific weapons deployed and the particular uses of these weapons envisaged in the deterrence policy statements, may also be relevant more generally. For example, in the context of nuclear weapons deployed by the United States, an equivalent series of questions might be considered in relation to the relevant United States facts. These would include the 2010 Nuclear Posture Review,[23] the United States Government view of the relevant law[24] and specific public statements made by senior United States officials.[25]

II. Relevant Facts

A. United Kingdom Weapons and Policies

Trident is the United Kingdom nuclear weapons system, currently deployed from a base in Scotland. The warheads on a Trident Submarine are estimated to have an explosive power which can be varied between 1kt, 10kt and 100kt.[26] The United Kingdom deterrence policy is set out in a 2006 White Paper (the UK White Paper) and includes the following statements:[27]

customary law rules on the strategic planning of nuclear weapons states … can be discussed in practical terms only concerning the concrete details of … operational planning for the use of nuclear weapons for self-defence purposes, including deterrence".

21 *Shimoda et al v the State (Japanese Government)* (1964) 8 Jap Ann Intl L 212.

22 Falk, above n 9, at 69.

23 This is discussed in Daniel Joyner "Recent Developments in International Law Regarding Nuclear Weapons" (2011) 60 ICLQ 209 at 212-216.

24 This is reviewed in Charles Moxley, John Burroughs and Jonathan Granoff "Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty" (2011) 34 Fordham Intl LJ 595 at 607-675.

25 Some of these are considered in Dino Kritsiotis "Close Encounters of a Sovereign Kind" (2009) 20 EJIL 299 at 318-320.

26 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, Oxford, 2006) at 8-9; Philippe Sands and Helen Law "The United Kingdom'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, Edinburgh, 2011) at 128-129.

27 Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs *The Future of the United Kingdom's Nuclear Deterrent* (Cm 6994, 2006) [*The Future of the United Kingdom's Nuclear Deterrent*]; also relevant are the corresponding NATO (North Atlantic Treaty Organisation) statements: Oeter, above n 20, at 161.

> 2-11 ... We would only consider using nuclear weapons in self-defence (including the defence of our NATO allies), and even then only in extreme circumstances.
> 3-4 we will not rule in or out the first use of nuclear weapons. … 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.
> 3-11 our nuclear deterrent … should influence the decision-making of 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.
> 4-3 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.
> 5-7 ... At present, we achieve this invulnerability by maintaining a submarine permanently on patrol.

B. Characteristic Effects of Using Nuclear Weapons

Legal consideration of the deployment of United Kingdom nuclear weapons should take into account the potential consequences of their use resulting from the "unique characteristics" of these nuclear weapons.[28] The official report of the March 2013 Conference commented on the effects of the detonation of a nuclear weapon which would have serious immediate and longer-term consequences for people, society and the environment:[29]

> … it is possible to make some general predictions on the basis of past experience and accumulated knowledge … The detonation of a nuclear weapon releases enormous amounts of energy. Most of this energy comes in the form of blast (50%) and heat (35%). … Radiation … makes up the remaining 15% of the energy, with 5% as initial ionizing radiation, and 10% as residual nuclear radiation in what is often referred to as the fallout.

The extent of these effects of a nuclear explosion depends on several factors, including the size, height and location of the explosion.[30] The following section will consider the consequences of these effects in terms of deaths, illnesses and environmental damage. Another effect of a nuclear weapon detonation is an electromagnetic pulse which may cause damage to communications and other electrical equipment. The area affected by the pulse is only widespread for very high altitude explosions (above 30km) and the pulse only indirectly affects humans and the natural environment.[31] It is not considered further here.

28 *Nuclear Weapons*, above n 7, at [36]: "in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come".

29 International Law and Policy Institute *Humanitarian Impact of Nuclear Weapons Conference Report* (International Law and Policy Institute, Oslo, July 2013) at 4-5 (footnotes omitted).

30 At 4; Erik Koppe *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict* (Hart Publishing, Oxford, 2008) at 62-105.

31 Koppe, above n 30, at 77-78 gives a brief outline and full references.

C. Quantifying the Effects of Using United Kingdom Weapons

The table below includes four hypothetical explosions from the use of the United Kingdom's Trident weapons, three actual explosions and estimates of the numbers of deaths resulting from these explosions, or from equivalent explosions, where these are available.

	Explosion	Nature of incident	Explosive Power (kt)	Height (m)	Estimated number of deaths
1	Trident: full[32]	potential use	100		
2	Nagasaki[33]	actual use	21	600[34]	74,000[35]
3	Hiroshima[36]	actual use	15	500[37]	140,000[38]
4	Trident: restricted[39]	potential use	10	0	~250,000[40]
5	Trident: restricted	potential use	10	500-600	100,000-800,000[41]
6	Trident: minimum[42]	potential use	1		
7	Chernobyl	Explosion	0.5[43]	0	Several thousand[44] or several hundred thousand[45]

32 See Barnaby; and Sands and Law, above n 26.

33 O B Toon et al "Atmospheric Effects and Societal Consequences of Regional Scale Nuclear Conflicts and Acts of Individual Nuclear Terrorism" (2007) 7 Atmos Chem Phys 1973 at 1978.

34 Barnaby, above n 26, at 9.

35 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 CR/95/27 at 19-20 (Verbatim Record, 7 November 1995) [*Nuclear Weapons Verbatim Record 7 November 1995*].

36 Toon et al, above n 33, at 1978.

37 Barnaby, above n 26, at 9.

38 See *Nuclear Weapons Verbatim Record 7 November 1995*, above n 35. Some possible reasons for the difference in numbers of deaths between Hiroshima and Nagasaki are discussed in Toon et al, above n 33, at 1978.

39 See Barnaby; and Sands and Law, above n 26.

40 The 250,000 figure is for a 12.5kt ground level explosion: Ira Helfand, Lachlan Forrow and Jaya Tiwari "Nuclear Terrorism" (2002) 324 (7333) BMJ 356 at 357.

41 This range is for a 15kt explosion: Toon et al, above n 33, at 1985, Fig 6 and 1999, section 8.

42 See Barnaby; and Sands and Law, above n 26.

43 Herbert Abrams "Chernobyl and the Short Term Medical Effects of Nuclear War" in Karl Bonhoeffer and Dieter Gerecke (eds) *Maintain Life on Earth: Documentation of the Sixth World Congress of the International Physicians for the Prevention of Nuclear War in Cologne* (Jungjohann Verlagsgesellschaft, Neckarsulm and München, 1987) [*Maintain Life on Earth*] at 127.

44 International Atomic Energy Authority [IAEA] *Chernobyl's Legacy: Health, Environment and Socio-Economic Impact and Recommendations to the Governments of Belarus, the Russian Federation and Ukraine* (2nd rev ed, IAEA, Vienna, 2006) [The Chernobyl Forum Report] at 8; the Chernobyl Forum was an initiative of the IAEA in cooperation with the World Health Organisation and others.

45 Alexey Nesterenko, Vassily Nesterenko and Alexey Yablokov "Chernobyl: Consequences of the Catastrophe for People and the Environment" (2009) 1181:1-3 Ann NY Acad Sci 1 at 211.

More than 320,000 people, who survived the bombs used on Hiroshima and Nagasaki, were still suffering from radiation related illnesses in 1995.[46] Published estimates of the effects of the Chernobyl explosion in 1986 indicate that the number of those are suffering from ongoing radiation related illnesses exceeds the number of those who died.[47] The long term health effects of nuclear weapon testing in the Marshall Islands were considered in the course of the ICJ Opinion[48] but are less relevant here as the explosive powers of the United Kingdom's specific weapons are all over 100 times smaller than the 1954 15,000kt surface explosion in the Marshall Islands which "produced the heaviest radioactive fallout ever recorded".[49]

The detonation of a nuclear weapon is likely to "result in widespread radioactive contamination, which in turn could render many sources of food and water useless",[50] and it is "likely that large urban areas around target points would be permanently abandoned, especially following ground bursts or airbursts under rainy conditions".[51] Research has suggested that "in the Chernobyl Exclusion Zone … some restrictions on land-use will need to be retained for decades to come"[52] and that the consequences of Chernobyl may not decline: "contamination has adversely affected … the atmosphere, surface and ground waters, and soil".[53]

The expected extent of long term and widespread damage to the environment from the use of a nuclear weapon is hard to quantify but the Chernobyl research is directly relevant. The table above shows that the power of the Chernobyl explosion was very much less than that of Hiroshima and Nagasaki, but "[e]missions from this one reactor exceeded a hundredfold the radioactive contamination of the bombs dropped on Hiroshima and Nagasaki".[54] In part this was because the explosion caused the release of large amounts of material that was already radioactive, but it was also because much greater fallout arises from explosions at or near the surface. Analysis of fallout from nuclear weapon tests showed that explosions at heights of less than 200m above ground, with explosive power in the range 10kt–50kt, produced levels of fallout hundreds of times greater than the levels arising from the explosions at Hiroshima and Nagasaki which were of equivalent

46 *Nuclear Weapons Verbatim Record 7 November 1995*, above n 35, at 19-20.
47 The Chernobyl Forum Report, above n 44, at 17.
48 *Nuclear Weapons*, above n 7, at [5] and [9]; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Weeramantry at 461-463.
49 Hearings before the Subcommittee on Oversight and Investigations, of the Committee on Interstate and Foreign Commerce, United States House of Representatives, 96th Congress, First Session (96-129), Washington, DC (23 April, 29 May and 1 August 1979) as cited by Carl Johnson "Short and Long Term Effects from Nuclear Bomb Detonations" in *Maintain Life on Earth*, above n 43, at 223; John Andrews "Nuclear Testing in the Pacific: The Biological Consequences" in *Maintain Life on Earth*, above n 43, at 247.
50 International Law and Policy Institute, above n 29, at 9.
51 Toon et al, above n 33, at 1988.
52 Chernobyl Forum Report, above n 44, at 8.
53 Nesterenko et al, above n 45, at 221.
54 At 1.

size but were at heights of over 500m.[55] Thus a single Trident warhead, set at 10kt or more of explosive power, exploded at a height of less than 200m could result in environmental damage on a scale comparable with that caused by Chernobyl.

It is reasonable to expect, therefore, that the direct effects of the use of a single Trident warhead by the United Kingdom, set at 10kt or more of explosive power could result in hundreds of thousands of deaths, even greater numbers of long term illnesses, and (if the explosion was at a height of less than 200m) long term and widespread damage to the environment. These expected consequences are particularly relevant to applying humanitarian law, environmental law and the law of neutrality to United Kingdom nuclear deployment and deterrence policy.

III. Applying International Law to the Facts

A. Does the Deployment of the Weapons under the Deterrence Policy Constitute a Threat?

Article 2(4) of the United Nations Charter requires states to:[56]

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

Thus, if the deployment of Trident under the United Kingdom deterrence policy does not constitute a threat, it will not be prohibited by art 2(4). If the deployment under the deterrence policy does constitute a threat, the lawfulness or otherwise of this threat will follow directly from the lawfulness or otherwise of the use envisaged in United Kingdom deterrence policy under which Trident is deployed.[57]

In submissions to the International Court of Justice, the United Kingdom recognised that deployment could, in principle, in itself constitute a threat, but expressed doubt over whether deployment purely for self-defence would constitute a threat.[58] The ICJ Opinion clarifies this point and specifically confirms that the combination, of a deployment of nuclear weapons and a deterrence policy stating that they would be used only in self-defence, can in itself in principle constitute a threat:[59]

55 Johnson, above n 49, at 223.

56 Charter of the United Nations, art 2(4).

57 *Nuclear Weapons*, above n 7, at [47]: "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".

58 *Nuclear Weapons*, above n 7, written statement of the Government of the United Kingdom 16 June 1995 [UK Written Statement] at [3.118]: "Nor does the deployment of nuclear weapons amount to a threat of their use unless the surrounding circumstances make clear that such a threat is implicit in the fact of their deployment, something which is not lightly to be presumed, since all States have a right to possess and deploy weapons for their own self-defence".

59 *Nuclear Weapons*, above n 7, at [48].

> In order to be effective, the policy of deterrence, 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, necessitates that the intention to use nuclear weapons be credible. 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.

The two Judges who give a view on this point in their individual opinions both take the view that deterrence does constitute a threat, but reach opposite conclusions on the lawfulness of the threat.[60] Sturchler reviews this aspect of the ICJ Opinion and concludes that:[61]

> … it did make important statements on the threat of force … (1) nuclear deterrence *prima facie* amounts to a violation of article 2(4) of the UN Charter; (2) justification … depends on the legality of implementing a deterrent threat.

This is consistent with Falk's conclusion that the ICJ Opinion "does circumscribe the legal right to threaten or use nuclear weaponry in a manner that seems inconsistent with the practice of deterrence in most of its forms".[62]

In the United Kingdom context, a different conclusion was reached in the opinion of the Appeal Court of the High Court of Justiciary in 2001: "deployment of nuclear weapons in time of peace … is utterly different from the kind of specific 'threat' which is equated with actual use".[63] It is hard to reconcile this aspect of the Appeal Court opinion with the ICJ Opinion,[64] but it appears that the High Court of Justiciary interpreted the ICJ Opinion phrase "directed against … a State" as meaning directed "against a particular 'target' State".[65] In 2002, it was argued in the Court of Appeal that the ICJ Opinion could be read to show that deterrence may amount to a threat. The judge noted this and, despite personally disagreeing with the view, went on to consider the question of whether any actual use of nuclear weapons, as envisaged in relevant deterrence policy, would be contrary to international law.[66]

60 *Nuclear Weapons*, above n 7, Dissenting Opinion of Vice President Schwebel at 312 and 314; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Weeramantry at 541.

61 Nikolas Sturchler *The Threat Of Force In International Law* (Cambridge University Press, Cambridge, 2007) at 89.

62 Falk, above n 9, at 70.

63 *Lord Advocate's Reference (No 1 of 2000) in terms of Section 123 of the Criminal Procedure (Scotland) Act 1995* (2001) HCJAC 143 [*Lord Advocate's Reference*] at [96]; Stephen Neff "Idealism on Appeal: the Lord Advocate's Reference on British Nuclear Policy" (2001) 5 Edin LR 355 at 358.

64 Charles Moxley "The Unlawfulness of the United Kingdom's Policy of Nuclear Deterrence – the Invalidity of the Scots High Court's Decision in Zelter" (2001) Jur Rev 319 at 322-327.

65 *Lord Advocate's Reference*, above n 63, at [72].

66 *Marchiori v Environment Agency & Anor* [2002] EWCA (Civ) 03 at [46-47]; Roger O'Keefe "Decisions of British Courts During 2002 Involving Questions of Public International Law" (2002) 73 BYIL 387 at 387-389; Katherine Reece Thomas "The Changing Status of

The United Kingdom had cited the view that "[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".[67] Sturchler suggests that, for there to be a threat a state must "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".[68]

The UK White Paper 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".[69] This statement appears to constitute a threat by reference to the definitions mentioned above. 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".

On this basis, the deployment of Trident under the United Kingdom deterrence policy, as outlined in the UK White Paper, constitutes a threat of force.

B. Does Customary International Law Specifically Render a Deterrence Threat Lawful?

In theory, nuclear deterrence policies may have given rise to a new rule of customary international law. If so then the active threat of use of nuclear weapons, under the United Kingdom deterrence policy, would necessarily be lawful and no further analysis would be required.

Customary international law has been defined as "general practice accepted as law"[70] but there are significant controversies arising over, and a wide range of approaches to, customary international law. In the context of nuclear weapons, these controversies are well illustrated by the range of views on whether or not deterrence has affected customary international law. The ICJ Opinion does not give any definite view on how the "policy of deterrence"

International Law in English Domestic Law" (2006) 53 NILR 371 at 383-384; the specific policy being considered in the 2002 case was that set out in the July 1998 Strategic Defence Review (Secretary of State for Defence *Strategic Defence Review* (Cm 3999, 1998)) [*Strategic Defence Review*] which differs significantly from the 2006 UK White Paper (Cm 6994, 2006, above n 27): in particular, there appear to be no statements in the 1998 document which are equivalent to [2-11], [3-4], [3-11] and [4-3] in the 2006 document (*The Future of the United Kingdom's Nuclear Deterrent*, above n 27).

67 Ian Brownlie *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1963) at 364; Romana Sadurska "Threats of Force" (1988) 82 AJIL 239 at 242; *Nuclear Weapons* UK Written Statement, above n 58, at [3.118].

68 Sturchler, above n 61, at 273; see also Marco Roscini "Threats of Armed Force and Contemporary International Law" (2007) 54 NILR 229 at 235.

69 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].

70 Statute of the International Court of Justice, art 38(1)(b).

affects the legal analysis,[71] but several of the Judges give their own views.[72] Thirlway's comment that "[i]f it is not always easy to see why a given act was done, it is still more difficult to see why a given act was not done"[73] appears to apply to the inactive aspect of deterrence – since 1945 no state has launched a nuclear attack on another state. Deterrence also has an active aspect – since 1945 several states have, implicitly if not explicitly, threatened to launch such an attack. Two questions arise. Does this amount to a "general practice" of states? If so, is the practice "accepted as law"?

In the wider context of customary international law, Bethlehem suggests that "in principle, a recently formed view of custom may prevail over an older, inconsistent treaty rule".[74] The relevance of state practice varies among Kolb's suggested elements of customary international law:[75]

> (1) … constitutional norms containing supreme principles of law … (2) … areas where *opinio iuris* … has more weight than practice, e.g., in the field of humanitarian law and … the non-use of force ..., where practice is difficult to weigh … (3) ... areas where the requirement of practice is softened in the face of quite urgent social needs, e.g., … environmental law.

Even if, in theory, the practice of deterrence could give rise to a new rule of customary law, a further question arises. Could a new rule of customary international law override art 2(4) of the United Nations Charter? Charney notes that:[76]

> Charter law may very well not be subject to change by new general international law. … Because the Charter restrictions on the use of force are themselves *jus cogens* norms it would take a new norm of that quality to override them.

The comments of Thirlway, Kolb and Charney suggest that nuclear deterrence policies have not given rise to a new rule of customary international law on nuclear weapons. On this basis, the United Kingdom's threat of use of nuclear weapons is not necessarily lawful under customary international law. The legality of the threat then depends on whether the threat envisages an unlawful use of force.

71 *Nuclear Weapons*, above n 7, at [96].

72 *Nuclear Weapons*, above n 7, Declaration of Judge Shi at 277; *Nuclear Weapons*, above n 7, Declaration of Judge Bravo at 285-286; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Shahabuddeen at 380, 413 and 415; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Koroma at 563 and 579.

73 Hugh Thirlway "The Law and Procedure of the International Court of Justice 1960 – 1989 Supplement, 2005: Parts One and Two" (2005) 76 BYIL 1 at 96.

74 Daniel Bethlehem "The Methodological Framework of the Study" in Elizabeth Wilmshurst and Susan Breau (eds) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2007) at 7-8; a similar point is made by Albrecht Randelzhofer and Georg Nolte "Article 51" in Bruno Simma et al (eds) *The Charter of the United Nations – A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) vol 2 at 1400-1401.

75 Robert Kolb "Selected Problems in the Theory of Customary International Law" (2003) 50 NILR 119 at 129 (footnote omitted).

76 Jonathan Charney "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 AJIL 834 at 837.

C. Is the Use Envisaged in the Threat Within the Scope of Article 2(4)?

There appears to be general agreement that the scope of art 2(4) is not restricted by the use of the terms "territorial integrity" and "political independence"[77] and hence that arts 42 and 51 provide the only current exceptions to the prohibition of the use of force set out in art 2(4).[78]

Referring to art 42 of the United Nations Charter,[79] the ICJ Opinion noted that a "further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter".[80] The art 42 exception could only contribute to the lawfulness of the deterrence policy of a single state, if that state were to identify the possibility of using its weapons in Security Council enforcement measures. The UK White Paper does not mention such potential uses and so the art 42 exception is not considered further here. The following two sections consider the exception under art 51.

D. Is the Proposed Use in "Self-defence if an armed attack occurs"?

Article 51 of the United Nations Charter provides that:[81]

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

The ICJ Opinion is silent on the question of whether the right of self-defence can only be exercised once an armed attack has at least begun.

It is not clear that the UK White Paper reference to "attack on UK vital interests"[82] implies the use of armed force, and so such an attack may not give rise to valid grounds for self-defence.[83] The ambiguity may be lessened by the statement earlier in the document: "[w]e would only consider using nuclear weapons in self-defence".[84] For the remainder of this article the phrase "attack on vital interests" will be construed to imply the use of armed force, so that all of the uses proposed in the UK White Paper would be in self-defence.

The UK White Paper statement "we will not rule in or out the first use of nuclear weapons"[85] is also ambiguous. It may be construed to imply the use of nuclear weapons in response to a non-nuclear attack or to contemplate anticipatory self-defence or both. The remainder of this section considers

77 Brownlie, above n 67, at 268; Randelzhofer and Dörr, above n 11, at 215-216.
78 Charney, above n 76, at 835-836; Mills, above n 12, at 37 and 64; Yoram Dinstein *War, Aggression and Self-Defence* (5th ed, Cambridge University Press, Cambridge, 2012) at 90-92.
79 Charter of the United Nations, art 42.
80 *Nuclear Weapons*, above n 7, at [38].
81 Charter of the United Nations, art 51.
82 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].
83 *Strategic Defence Review*, above n 66, at [8] refers to "vital economic interests" and [19] notes "our vital interests are not confined to Europe. Our economy is founded on international trade".
84 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [2-11].
85 At [3-4].

whether use of a nuclear weapon in anticipatory self-defence may be unlawful. Whether the use of nuclear weapons in response to a non-nuclear attack is unlawful is considered in the following section.

The ongoing controversy, not specific to nuclear weapons, on anticipatory self-defence has been regularly analysed in recent years.[86] Some argue, on the basis of the wording, object and purpose of article 51 of the United Nations Charter, that anticipatory self-defence in the face of an imminent attack is prohibited.[87] Frequent reference is made to the correspondence exchanged by the United States and the United Kingdom in the period from 1838 to 1842 relating to the *Caroline*, although such references to customary law formulations a century before the drafting of the United Nations Charter were described by Brownlie as "anachronistic and indefensible" on the basis that "it is far from clear that in 1945 the customary law was so flexible".[88] Those presenting the case that international law still recognises a right of anticipatory self-defence[89] refer to the conclusions of the United Nations sponsored reports in 2004 and 2005,[90] two of which explicitly recognised this right. Although, as Gray notes, "states remain fundamentally divided on this question",[91] the International Court of Justice appears to have implicitly indicated that it would not accept pre-emptive action as self-defence.[92] The United Kingdom Government view recognises a right of anticipatory self-defence.[93]

In applying art 51 to nuclear weapons, however, the arguments that anticipatory self-defence is unlawful are stronger because the basis for any such right has to be separately considered for nuclear weapons taking

86 John Yoo "International Law and the War in Iraq" (2003) 97 AJIL 563 at 571-574; Richard Gardner "Neither Bush Nor the 'Jurisprudes'" (2003) 97 AJIL 585; Dapo Akande and Thomas Liefländer "Clarifying Necessity, Imminence and Proportionality in the Law of Self-Defense" (2013) 107 AJIL 563.

87 Michael Reisman and Andrea Armstrong "The Past and Future of the Claim of Preemptive Self-Defense" (2006) 100 AJIL 525 at 532-533; Randelzhofer and Nolte, above n 74, at 1422; Abdul Ghafur Hamid "The Legality of Anticipatory Self-defence in the 21st Century World Order: a Re-Appraisal" (2007) 54 NILR 441 at 448-449; Dinstein, above n 78, at 194-198.

88 James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 750-751 (footnote omitted); See also Ian Brownlie *International Law and the Use of Force by States – Revisited* (Europaeum, Oxford, 2001) at 7-8.

89 Roscini, above n 68, at 273.

90 Peter Hilpold "Reforming the United Nations: New Proposals in a Long-lasting Endeavour" (2005) 52 NILR 389 at 393-403; Randelzhofer and Nolte, above n 74, at 1423.

91 Christine Gray *International Law and the Use of Force* (3rd ed, Oxford University Press, Oxford, 2008) at 165.

92 Reisman and Armstrong, above n 87, at 534-537 referring to *Armed Activities on the Territory of the Congo (Dem Rep Congo v Uganda)* [2005] ICJ Rep 168 at [119], [143] and [146]; this implication is also noted in Gray, above n 91, at 216.

93 Daniel Bethlehem "Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors" (2012) 106 AJIL 770 at 771-773; Elizabeth Wilmshurst and Michael Wood "Self Defense Against Nonstate Actors: Reflections on the 'Bethlehem Principles'" (2013) 107 AJIL 390 at 392, n 14; Reisman and Armstrong, above n 87, at 541-544.

"account" of their "unique characteristics".[94] The potential for abuse of discretion is often referred in the wider context.[95] In the context of any nuclear weapon, the consequences of any such abuse are incomparably greater than such consequences in relation to conventional weapons. At the very least, to avoid such abuse, Frowein suggests it necessary that "in front of the world community the danger can … in the Security Council … with high plausibility be established" before any anticipatory self-defence action begins.[96] Greenwood, considering the drafting history of the United Nations Charter, argues that a "change in the ambit of the right of self-defence" is unlikely to have been intended.[97] The Charter was drafted, however, at the same time as the final stages of development of the first nuclear weapons and this development might have prompted a wish, late in the negotiations and specifically considering nuclear weapons, for such a change.

Use of a nuclear weapon in anticipatory self-defence being unlawful would be consistent with the ICJ Opinion which only leaves doubt on the lawfulness of nuclear weapons in an "extreme circumstance of self-defence":[98] the circumstance of an imminent attack is less "extreme" than the circumstance of an armed attack having already begun. The use of a nuclear weapon in self-defence before a nuclear attack had begun would also be directly contrary to one of the aims of a nuclear deterrence strategy: to prevent nuclear weapons from ever being used.[99]

Overall, it appears that any use of any nuclear weapon in anticipatory self-defence would be unlawful. On this basis, if the UK White Paper statement "we will not rule in or out the first use of nuclear weapons"[100] is construed to contemplate anticipatory self-defence then it appears to constitute an unlawful threat of force.

94 *Nuclear Weapons*, above n 7, at [36]; Ghafur Hamid, above n 87, at 485-486; Randelzhofer and Nolte, above n 74, at 1424. The conflicting views on this point are noted in Gray, above n 10, at 103-104: "Some argued that there was a right to use nuclear weapons in anticipatory self-defence against an imminent nuclear attack because the risk of waiting for an actual nuclear attack was too great … Others replied that it was precisely because the stakes were so high that no self-defence was allowed until there was an actual armed attack" (footnote omitted).

95 Randelzhofer and Nolte, above n 74, at 1422-1424; Bethlehem, above n 93, at 772; Jackson Nyamuya Maogoto "New Frontiers, Old Problems: the War on Terror and the Notion of Anticipating the Enemy" (2004) 51 NILR 1 at 25-39.

96 Jochen Frowein "Is Public International Law Dead?" (2003) 46 GYIL 9 at 13.

97 Christopher Greenwood "Self-defence" in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (online looseleaf ed, Oxford University Press) at [45].

98 *Nuclear Weapons*, above n 7, at [105(2)E]; Dapo Akande "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court" (1997) 68 BYIL 165 at 205 and 211.

99 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3]-[4]. Strategic Defence Review, above n 66, at [60].

100 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].

E. Is the Proposed Use Necessary, Proportionate and Compliant with Article 51?

The ICJ Opinion acknowledges that the requirements for an act of self-defence to comply with art 51[101] are greater than the requirements "inherent" in the customary law of self-defence[102] and that the "submission of the exercise of the right of self-defence to the conditions of necessity and proportionality … applies … whatever the means of force employed".[103] The ICJ Opinion does not expand on these conditions. Greenwood, summarising both requirements, notes that:[104]

> … the victim of an armed attack is entitled, inter alia, to halt and repel that attack and to recover territory occupied during the attack. It will satisfy the requirement of necessity only if … it could not have achieved these goals without resort to force and … the degree of force employed did not exceed what was reasonably required for that purpose. … The requirement of proportionality is … assessed not by reference to the degree of force … in the initial armed attack but rather the threat posed by the armed attack.

Akande and Liefländer broadly agree with Greenwood on necessity, and suggest that there is "a profound lack of clarity and consensus as to the test to be applied with regard to the proportionality requirement"; they conclude that "the notions of necessity … and proportionality are fraught with conceptual ambiguity and are notoriously difficult to apply in practice".[105] Reinold notes of proportionality that "its exact content remains elusive, and its specific requirements have been neglected in the scholarly literature".[106]

The uses in self-defence proposed in the UK White Paper would only be in "extreme circumstances".[107] In the United Kingdom in 2009, the Court of Appeal considered the omission, in the UK White Paper, of the words "in which the very survival of a State would be at stake", which qualify "extreme circumstance of self-defence" in the ICJ Opinion. The Court decided that, in this specific respect, "there is really no significant difference between what the White Paper says and what the International Court of Justice had to say".[108] On this basis the United Kingdom's proposed uses may potentially be "necessary".

As already noted the UK White Paper statement "we will not rule in or out the first use of nuclear weapons"[109] may be construed to imply the use of nuclear weapons in response to a non-nuclear attack. The ICJ Opinion has,

101 Charter of the United Nations, art 51.
102 *Nuclear Weapons*, above n 7, at [40]; Randelzhofer and Nolte describe this as the "prevailing view": above n 74, at 1403.
103 *Nuclear Weapons*, above n 7, at [41].
104 Greenwood, above n 97, at [27]-[28].
105 Akande and Liefländer, above n 86, at 566 and 569; Mills, above n 12, at 43-45 expresses a similar view.
106 Theresa Reinold "State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11" (2011) 105 AJIL 244 at 248.
107 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [2-11].
108 *R (Nuclear Information Service) v Secretary of State for Defence and War* [2009] EWCA (Civ) 213 at [10].
109 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].

however, now clarified that the proportionality principle will be violated by the use of nuclear weapons in response to a threat which does not put the "very survival of a State" at risk.[110]

Matheson suggests that what the ICJ Opinion means by the "very survival of a State" is unclear and suggests that the phrase may refer to any of "the political survival of the government of a state, the survival of the state as an independent entity, or the physical survival of the population".[111] Considering typical contexts in which the right to self-defence might be invoked, it seems that, in most such contexts, at least one of the first two of Matheson's readings of "very survival" would be at stake. On this basis, in the context of the sentence in which "very survival" appears,[112] the most natural reading would be "the physical survival of the state - both population and infrastructure". This appears to be the understanding underlying Joyner's comment on an alleged right of retaliation with nuclear weapons in response to an attack by exclusively chemical or biological weapons (CBW):[113]

> As held by the [ICJ Opinion], the proportionality principle … would likely render all imaginable exercises of this proclaimed right … violative of international law as … it is difficult to conceive of an exclusively CBW attack … the result or threatened result of which would produce "an extreme case of self-defense, in which the very survival of a state would be at stake".

Hard as it is to conceive of a CBW attack which would put the very (physical) survival of a state at risk, it is even harder to conceive of any other non-nuclear attack, even on a large scale, which would put the very survival of a state at risk. Following Joyner's reasoning, therefore, in all imaginable circumstances the use of Trident by the United Kingdom in response to any non-nuclear attack would not be proportionate and therefore not compliant with art 51 of the United Nations Charter.[114] On this basis, if the UK White Paper statement "we will not rule in or out the first use of nuclear weapons"[115] is construed to imply the use of nuclear weapons in response to a non-nuclear attack then it constitutes an unlawful threat of force.

Despite the ambiguity over the meaning of "first use", one or other of anticipatory self-defence or use of nuclear weapons in response to a non-nuclear attack is envisaged in the UK White Paper. The use of Trident in either of these ways appears to be unlawful and so the UK White Paper appears to constitute an unlawful threat of force. Before exploring two

110 Akande, above n 98, at 205 and 211.

111 Michael Matheson "The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons" (1997) 91 AJIL 417 at 430.

112 *Nuclear Weapons*, above n 7, at [105(2)E].

113 Daniel Joyner *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press, Oxford, 2009) at 84 (footnotes omitted), discussing the United States *National Strategy to Combat Weapons of Mass Destruction* (December 2002).

114 An opposite view on this point, based on giving greater weight to an earlier comment on proportionality in the ICJ Opinion, is given by Dinstein, above n 78, at 264.

115 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].

possible ways in which such "first use" might still be lawful (in sections I, J and K below) other reasons why the UK White Paper may be unlawful are now considered.

If the deployment and deterrence policy are not unlawful by reference to the United Nations Charter, they might be unlawful under some other international law. Here again, the threat by the United Kingdom to use Trident in self-defence would be unlawful if the use envisaged in that threat would fail to comply with any applicable treaty or customary law.[116] This is considered in the following three sections.

F. Is the Proposed Use Unlawful under Customary International Humanitarian Law?

The application to nuclear weapons of any new provisions introduced by the 1977 Additional Protocol I[117] to the Geneva Convention is controversial[118] but there is general agreement that customary international humanitarian law does so apply:[119] the dual requirements not to "use weapons which are incapable of distinguishing between civilian and military targets" and not "to cause unnecessary suffering to combatants".[120] The ICJ Opinion states that any use of nuclear weapons "seems scarcely reconcilable with respect for such requirements".[121] It goes on to state that:[122]

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

Akande discusses at length the difficulties of interpreting this paragraph and suggests a range of possible interpretations.[123] Akande concludes that an interpretation in which "the first sentence of 2E is a general rule which is complete, with the second sentence being the only conceivable exception" is "the least absurd and the least dangerous" interpretation.[124]

116 *Nuclear Weapons*, above n 7, at [47].
117 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* 1125 UNTS 3 (signed 8 June 1977, entered into force 7 December 1978).
118 Koppe, above n 30, at 366-371 and 378-381; Oeter, above n 20, at 158-160.
119 *Nuclear Weapons*, above n 7, at [86] notes that this was not questioned by any of the member states and was positively affirmed by three of the nuclear weapon states.
120 *Nuclear Weapons*, above n 7, at [78].
121 *Nuclear Weapons*, above n 7, at [95].
122 *Nuclear Weapons*, above n 7, at [105(2)E].
123 Akande, above n 98, at 203-211.
124 At 205 and 211.

Whether the uses proposed by the UK White Paper, of the weapons deployed by the United Kingdom, would be unlawful under customary international humanitarian law depends on the view taken both on the extent to which damage can be regarded as collateral and on whether the proposed use carries a significant risk of escalation.

On the extent of collateral damage, difficulties arise in the practical application of the proportionality principle.[125] Akande asks "is … there some point of damage which is so unacceptable that no military advantage would justify it? … This is a question … of principle".[126] The answer of Gasser and Dörman is that "it must be assumed that there is an upper limit to the extent of acceptable damage to the civilian sector".[127] Judge Shahabudden suggests that the concept of collateral damage may be inappropriate where secondary damage is greater than primary damage, despite the secondary damage being of less military value.[128]

On the risk of escalation, the need to take into account that the use of Trident by the United Kingdom may make further uses of nuclear weapons more likely, whether in response to the proposed use or otherwise, follows from the reasoning in the ICJ Opinion:[129]

> … none of the States advocating the legality of … the 'clean' use of smaller, low yield, tactical nuclear weapons, has indicated … whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

In contrast to this lack of comment on the risk of escalation from those advocating the use of "tactical nuclear weapons", others were forthright in declaring that escalation was almost a certainty rather than a risk. In the oral submissions Australia noted that "if nuclear weapons were ever used, this would be overwhelmingly likely to trigger a nuclear war" and that the claim to be able to "maintain escalation control ... is without credibility".[130] It is, however, difficult to find consensus in assessing this risk in relation to any proposed use.

The Martens Clause refers to "principles of international law derived … from the principles of humanity and from the dictates of public conscience".[131] In the view of some involved in the ICJ Opinion, such principles in themselves

125 Hans-Peter Gasser and Knut Dörmann "Protection of the Civilian Population" in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (3rd ed, Oxford University Press, Oxford, 2013) at 243-245; Thomas Franck "On Proportionality of Countermeasures in International Law" (2008) 102 AJIL 715 at 766; Michael Wells-Greco "Operation 'Cast Lead': *Jus In Bello* Proportionality" (2010) 57 NILR 397 at 398-400, 405-408, 411-414 and 416-419.

126 Akande, above n 98, at 205.

127 Gasser and Dörman, above n 125, at 245.

128 *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Shahabuddeen at 382.

129 *Nuclear Weapons*, above n 7, at [94]; Matheson, above n 111, at 431.

130 *Nuclear Weapons Verbatim Record 30 October 1995*, above n 18, at 42 and 49.

131 *Nuclear Weapons*, above n 7, at [78], citing Additional Protocol I to the Geneva Convention, above n 117, art 1 [2].

can "exert legal force".[132] Analysts of this clause since the ICJ Opinion argue, however, that this clause is merely an aid to interpreting other sources of law and that the considerations it refers to do not represent law in themselves.[133] The Martens clause therefore appears to be of limited assistance either in setting an upper limit to acceptable collateral damage or in assessing the risk of escalation.

In this context, it is hard to find general agreement beyond the conclusion that any use of Trident by the United Kingdom would "seem scarcely reconcilable" with, and "would generally be contrary to", international humanitarian law. More generally a similar conclusion was reached in 2011 by the Council of Delegates of the International Red Cross and Red Crescent Movements which found it "difficult to envisage how any use of nuclear weapons could be compatible with the rules of international humanitarian law … distinction, precaution and proportionality".[134]

A similar result arose in the oral submissions made by New Zealand for the ICJ Opinion which began by stating that they would contend that the principles of international humanitarian law "forbid the use, in any circumstances, of nuclear weapons and likewise the threat of their use" but concluded more tentatively that:[135]

> … no realistic scenario or case ... can be mounted to support the proposition that the threat or use of nuclear weapons under any circumstance – and their testing – would be in conformity with international law.

This conclusion mirrored that of the New Zealand's written submission which acknowledged that "it may not yet be possible to say that, in every circumstance, international law proscribes the threat or use of nuclear weapons".[136]

G. Is the Proposed Use Unlawful under Customary International Environmental Law?

The ICJ Opinion references to environmental law[137] were made in relation to the specific environmental provisions of Additional Protocol I of 1977.[138]

132 *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Shahabuddeen at 408; Australia based most of its oral submissions on this view: *Nuclear Weapons Verbatim Record 30 October 1995*, above n 18, at 38 and 51.

133 Theodor Meron "The Martens Clause, Principles of Humanity and Dictates of Public Conscience" (2000) 94 AJIL 78 at 87-88; Antonio Cassese "The Martens Clause: Half a Loaf or Simply Pie in the Sky?" (2000) 11 EJIL 187 at 208; Thirlway, above n 73, at 78 and 79.

134 Council of Delegates Resolution 1 *Working Towards the Elimination of Nuclear Weapons* (26 November 2011) <www.icrc.org/eng/resources>; the rules referred to are detailed in International Committee of the Red Cross *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005) vol 1 at 37-76.

135 *Nuclear Weapons* CR/95/28 at 24, 31 and 48-49 (Verbatim Record, 9 November 1995). [*Nuclear Weapons Verbatim Record 9 November 1995*].

136 *Nuclear Weapons*, above n 7, written statement by the Government of New Zealand at [101].

137 *Nuclear Weapons*, above n 7, at [30].

138 Protocol Additional to the Geneva Conventions, above n 117.

The difficulties arising from this aspect of the ICJ Opinion are explored by Akande.[139] Due to the controversy over the Additional Protocol I provisions,[140] Koppe concludes that:[141]

> … the customary prohibition to use means and methods of warfare that cause excessive damage to the environment and the customary obligation to observe a duty of care or show due regard will probably provide the best protection and the strongest impediments to the potential use of nuclear weapons.

Whether the use contemplated in the UK White Paper would be unlawful under the customary law of the environment needs to be considered in the light of the comments in part II above. Research was cited there into the fallout levels from nuclear weapon explosions of this magnitude, and into the effects of the Chernobyl explosion. Taken together, this research demonstrates that a Trident warhead, set at 10kt or more of explosive power, exploded at a height of less than 200m, will probably lead to long term and widespread effects. Such effects are likely to be excessive in relation to the objectives of the initial use.

The existence of customary international law on the environment, and its applicability to nuclear weapons, is acknowledged by the United Kingdom and more generally[142] but the precise content of such law, such as the no transboundary harm principle, is disputed.[143] In the wider context of international law on the environment, Horbach and Bekker note that the precautionary principle "dictates that certain (lawful) activities be abandoned until the state of origin can assure that, in the face of scientific uncertainty, no significant transboundary harm can occur",[144] but whether the precautionary principle has achieved the status of customary international law remains a matter of contention.[145]

Koppe suggests that a fundamental principle of "ambituity … reflects the common understanding of States that the environment must be protected during armed conflict, and provides for an absolute limitation to the necessities of war".[146] That "the rights of future generations … have woven

139 Akande, above n 98, at 182-189.

140 See Koppe and Oeter, above n 118.

141 Koppe, above n 30, at 384.

142 *Nuclear Weapons* UK Written Statement, above n 58, at [3.113]; Dieter Fleck "The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules" (2013) 82 Nord J Intl L 19; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Weeramantry at 491, citing Report of the International Law Commission on the Work of its 28th Session [1976] vol 2 YILC 109 at [33].

143 Dirk Hanschel "Prevention, Preparedness and Assistance Concerning Nuclear Accidents – Effective International Legal Framework or Patchwork?" (2012) 55 GYIL 217 at 235.

144 Nathalie Horbach and Pieter Bekker "State Responsibility for Injurious Transboundary Activity in Retrospect" (2003) 50 NILR 327 at 371; see also Jaye Ellis "Overexploitation of a Valuable Resource? New Literature on the Precautionary Principle" (2006) 17 EJIL 445.

145 Alexander Proelss "International Environmental Law and the Challenge of Climate Change" (2010) 53 GYIL 65 at 74.

146 Erik Koppe "The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict" (2013) 82 Nord J Intl L 53 at 53 and 60 (footnote omitted).

themselves into international law"[147] is reflected in the ICJ Opinion.[148] Das suggests that the "environment should not be damaged or destroyed to such an extent that it restricts both present and future generations from having access to it for their security, livelihoods and well-being".[149]

Again, in this context, it would be difficult to find general agreement in this area beyond the statements that any use of Trident by the United Kingdom, at 10kt or more of explosive power and at a height of less than 200m, would probably cause excessive damage to the environment and so probably be unlawful.

H. Is the Proposed Use Unlawful under the Law of Neutrality?

The principle of neutrality is reflected in both conventional and customary international law. The 1907 Hague Convention (No V) states 'The territory of neutral Powers is inviolable,'[150] and Neff notes the "general consensus" that this law "remains in effect".[151] The principle is recognised in the ICJ Opinion:[152]

> … the principle of neutrality, whatever its content, which is of a fundamental character … is applicable (subject to the relevant provisions of the United Nations Charter) to all international armed conflict, whatever type of weapons might be used.

Matheson's interpretation is that the reference to the United Nations Charter implies that lawful self-defence under art 51 would not violate neutrality and consequently that collateral damage in a neutral state resulting from such self-defence is not prohibited.[153] Matheson accepts, however, that the ICJ Opinion does not clearly say this.[154] Dinstein gives an alternative interpretation, suggesting that the reference to the United Nations Charter means that states cannot remain neutral if a United Nations Security Council resolution requires them to do otherwise.[155] Akande notes that the ICJ Opinion neither accepts nor rejects the view that the principle of neutrality involves an absolute prohibition of adverse effects in neutral states.[156]

147 *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Weeramantry at 455-456.
148 *Nuclear Weapons*, above n 7, at [29]; Said Mahmoudi "The International Court of Justice and Nuclear Weapons" (1997) 66 Nord J Intl L 77 at 84, n 31.
149 Onita Das "Environmental Protection in Armed Conflict: Filling the Gaps with Sustainable Development" (2013) 82 Nord J Intl L 103 at 122 (footnote omitted).
150 Hague Convention (No V) Respecting the Rights and Duties of Neutral Powers in War on Land 18 October 1907 205 CTS 299 (opened for signature 18 October 1907, entered into force 26 January 1910), art 1.
151 Stephen Neff *The Rights and Duties of Neutrals* (Manchester University Press, Manchester, 2000) at 198-199.
152 *Nuclear Weapons*, above n 7, at [89].
153 Matheson, above n 111, at 428; the background to the development of the type of proposition mentioned by Matheson is outlined in Neff, above n 151, at 211 and 219.
154 Matheson, above n 111, at 428.
155 Dinstein, above n 78, at 176; see also Michael Bothe "The Law of Neutrality" in Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (3rd ed, Oxford University Press, Oxford, 2013) at 552-553.
156 Akande, above n 98, at 203, citing *Nuclear Weapons*, above n 7, at [93].

The United Kingdom has denied that damage to neutrals is an inevitable consequence of the use of a nuclear weapon.[157] On this point Koppe concludes that:[158]

> it seems almost unavoidable that the use of nuclear weapons will violate the territorial inviolability of neutral states as prohibited in Article 1 of Hague Convention V in the case of war on land … only the effects of a deep underground burst may not be felt in the territory of neutral states. In all other cases, it is probable that …some of the fallout will somehow come down in the territory of a neutral state. This fallout does not have to be significant … the term inviolability … seems to imply a level of protection that verges on immunity".

Koppe's understanding of the term "inviolable" is consistent with that of Bothe:[159]

> … neutral states must not be affected by collateral effects of hostilities … there is no rule of admissible collateral damage to the detriment of the neutral state .... If the effects of attacks … are felt on neutral territory, they are unlawful. … The fact that the use of … nuclear weapons would thus be rendered illegal ... may render respect for this rule difficult. … However, this fact has … not resulted in a change of practice and legal opinion which would have modified the traditional rule of the inviolability of the neutral territory.

On this basis, it appears that the use of Trident, set at 10kt or more of explosive power and exploded at a height of less than 200m above land, would be inconsistent with the 1907 Hague Convention (No V). Part II above cited research into the fallout levels from nuclear weapon explosions of this magnitude, and into the effects of the Chernobyl explosion. Taken together, this research demonstrates that a Trident warhead, set at 10kt or more of explosive power and exploded at a height of less than 200m above land, will almost certainly lead to adverse effects in a state other than the target state.

I. Can the Proposed Use be Justified as a Lawful Belligerent Reprisal?

If an envisaged use of Trident would fail to meet the article 51 requirements, or would be contrary to humanitarian law, environmental law or the law of neutrality (see discussion above), there are two possible ways in which such use might still be lawful. The first relates to belligerent reprisals and is considered in this section. The second relates to a possible fundamental conflict of principles and is considered in the following two sections.

A reprisal is an action, which would normally constitute a violation of international law, but which may be lawful if it is taken in response to a prior violation of that law. The ICJ Opinion distinguishes between "reprisals in time of peace, which are considered to be unlawful", and "belligerent reprisals", on which it does not "have to pronounce".[160] Underlying this distinction is

157 *Nuclear Weapons*, UK Written Statement, above n 58, at [3.78].

158 Koppe, above n 30, at 382 (footnote omitted); NPT Prepcom 2013 Statement, above n 3: "The effects of a nuclear weapon detonation are not constrained by national borders"; *Nuclear Weapons*, above n 7, at [35]: "The destructive power of nuclear weapons cannot be contained in either space or time."

159 Bothe, above n 155, at 559-560.

160 *Nuclear Weapons*, above n 7, at [46].

the view that self-defence may involve engaging in armed conflict, hostilities or war, in the context of which any reprisals would be "belligerent". A belligerent reprisal can only be lawful for a state which can demonstrate that its participation in any such armed conflict was initially, and continues to be, a reasonable act of self-defence.[161] The ICJ Opinion comments that "any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality".[162]

At first sight this question does not appear to be relevant on the basis of the United Kingdom statement that use of Trident would only be in self-defence: no mention is made of the use of Trident in reprisals.[163] It is however dealt with now because of the regular references to belligerent reprisals in the context of nuclear weapons.[164] In particular the United Kingdom made such a reference in its written submission to the International Court of Justice.[165]

The scope for lawful use of even a conventional weapon in a belligerent reprisal is already heavily constrained.[166] Whether or not there is a right to reprisals using conventional weapons, the ICJ Opinion suggests that the use of nuclear weapons in belligerent reprisals could not be lawful as it could never meet the test of proportionality. This is implied by the fact that the only circumstance in which the Court was unable to reach a clear conclusion was a circumstance of self-defence.[167] Akande notes that "the use of belligerent reprisals … 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".[168]

There are two reasons why it makes sense for the use of nuclear weapons in belligerent reprisals to be unlawful. Securing compliance with the laws of armed conflict is not a sufficiently important military objective to justify the use of a nuclear weapon as "proportionate".[169] Reprisals are generally recognised as being more likely to lead to escalation of law breaking rather than to a return to compliance.[170]

161 Christopher Greenwood "The Relationship between *Ius Ad Bellum* and *Ius In Bello*" (1983) 9 Rev Int Stud 221 at 223; Jost Delbrück "The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on the International Legal Implications of the 'War Against Terrorism'" (2001) 44 GYIL 9 at 19.

162 *Nuclear Weapons*, above n 7, at [46].

163 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [2-11].

164 *Nuclear Weapons*, above n 7, written statement by the Government of New Zealand 20 June 1995 at [57]-[59]; Matheson, above n 111, at 429-430 and 432-433; Oeter, above n 20, at 230.

165 *Nuclear Weapons*, UK Written Statement, above n 58, at [3.79].

166 Christopher Greenwood "The Twilight of the Law of Belligerent Reprisals" (1989) 20 NYIL 35; Frits Kalshoven "Belligerent Reprisals Revisited" (1990) 21 NYIL 43.

167 *Nuclear Weapons*, above n 7, at [105(2)E]; Akande, above n 98, at 205 and 211.

168 Akande, above n 98, at 210.

169 Akande, above n 98, at 210.

170 Kalshoven, above n 166, at 60; Oeter, above n 20, at 228.

J. If there Might be a Conflict with the Right to Self-Defence, Could this be Resolved?

If an envisaged use of Trident would fail to meet the art 51 requirements, or would be contrary to humanitarian law, environmental law or the law of neutrality (see discussion above), this may conflict with the right of the United Kingdom to self-defence. The ICJ Opinion appears implicitly to accept that, in principle, a conflict of this nature might arise and that it may be impossible to resolve it. The possibility of such a conflict is explicitly suggested both by Judge Fleischhauer[171] and by President Bedjaoui[172] but denied by Judge Shahabuddeen.[173] The right to self-defence will not always give rise to such a conflict: for example, in some situations the right to self-defence may be exercised by an alternative means which does not involve the unlawful use of a nuclear weapon.

The International Court of Justice may have been forced to accept the view that it was not possible to conceive of all circumstances in which a conflict between rules or principles and the right to self-defence might arise, and so may have been forced to refrain from holding that any such conflict could always be resolved. Thirlway acknowledges that, in this area, the International Court of Justice's "articulation … is unclear" and that the Court's difficulty may arise from the "question that has been posed".[174]

A conflict between the right to self-defence and one of the other aspects of international law might be reconciled by reference to the general principles of law recognised in all legal systems.

Judge Fleischhauer, noting such principles as "the third category of law which the Court has to apply",[175] proposes as a reconciling principle that "no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects"[176] but the existence of such a principle is elsewhere denied.[177] Judge Weeramantry suggests it should not be legal to eliminate a member of the international community.[178]

Judge Higgins suggests that the reconciling principle should be "the physical survival of the peoples".[179] Judges Ranjeva, Shahabuddeen and Weeramantry suggest slight variants on this principle.[180] The ICJ Opinion

171 *Nuclear Weapons*, above n 7, Separate Opinion at 308.
172 *Nuclear Weapons*, above n 7, Declaration at 273 [22].
173 *Nuclear Weapons*, above n 7, Dissenting Opinion at 419, citing *List* (1950) XI Trials of War Criminals before the Nurernberg Military Tribunals under Control Council Law No 10 at 1272, 1236 and 1254.
174 Thirlway, above n 73, at 49 and 52.
175 *Nuclear Weapons*, above n 7, Separate Opinion at 308; Thirlway, above n 73, at 111; Akande, above n 98, at 215.
176 *Nuclear Weapons*, above n 7, Separate Opinion at 309.
177 Clapham, above n 12, at 465-467.
178 *Nuclear Weapons*, above n 7, Dissenting Opinion at 521.
179 *Nuclear Weapons*, above n 7, Dissenting Opinion at 592.
180 *Nuclear Weapons*, above n 7, Separate Opinion of Judge Ranjeva at 296; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Shahabuddeen at 381; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Weeramantry at 447-448.

refers to "the stability of the international order" which is clearly dependent on the physical survival of the peoples.[181] In considering any potential use by the United Kingdom of Trident, the physical survival of the peoples appears to be an appropriate principle to apply because any such use could, in the event of escalation, put the physical survival of the peoples of the world at risk.

K. Could the Resolution of the Conflict Render the Proposed Use Lawful?

Agreement on the principle to apply may still leave disagreement on whether the proposed use can be lawful. For example, accepting that the physical survival of the peoples of the world, and of civilisation, is an appropriate principle to apply, Judge Higgins implies that there are conceivable lawful uses of nuclear weapons,[182] Judges Ranjeva and Weeramantry conclude that no such use can ever be lawful,[183] and Judge Shahabuddeen says only that a conclusion can be reached.[184]

The UK White Paper states "[a]ny 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".[185] This may reflect a view that the threat of use of Trident in self-defence is lawful in order to reduce the use of nuclear weapons by any other state, and so contribute to the physical survival of the peoples of the world. Such an argument seems incompatible with the clear ICJ Opinion confirmation that the lawfulness of any threat of force directly depends upon the lawfulness of the particular use of force.[186]

A recent statement by the International Committee of the Red Cross noted that the "existence of nuclear weapons poses some of the most profound questions about the point at which the rights of States must yield to the interests of humanity".[187] This appears to support the view that the principle of the physical survival of the peoples, would prevent the United Kingdom's right to self-defence from overriding a conflicting obligation (for example, under the principle of neutrality) not to use Trident set at 10kt or more and at a height of less than 200m above land. Further support for this view appears in the New Zealand Government statement at the March 2013 Conference that "the survivability of … our populations … remind us all that any use of nuclear weapons comes at a cost none of us should be prepared to pay".[188]

181 *Nuclear Weapons*, above n 7, at [98].

182 *Nuclear Weapons*, above n 7, Dissenting Opinion at 593; Falk, above n 9, at 66.

183 *Nuclear Weapons*, above n 7, Separate Opinion of Judge Ranjeva at 296; *Nuclear Weapons*, above n 7, Dissenting Opinion of Judge Weeramantry at 553.

184 *Nuclear Weapons*, above n 7, Dissenting Opinion at 428.

185 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-11].

186 *Nuclear Weapons*, above n 7, at [47].

187 Jakob Kellenberger, President of the International Committee of the Red Cross (speech to the Geneva Diplomatic Corps, Geneva, 20 April 2010) <www.icrc.org/eng/resources>.

188 March 2013 Conference, above n 1, Statement by New Zealand Final session; NPT Prepcom 2013 Statement, above n 3, at [6]: "It is in the interests of the very survival of humanity that nuclear weapons are never used again, under any circumstances"; *Nuclear Weapons Verbatim Record 30 October 1995*, above n 18, at 42, gives a similar view from Australia.

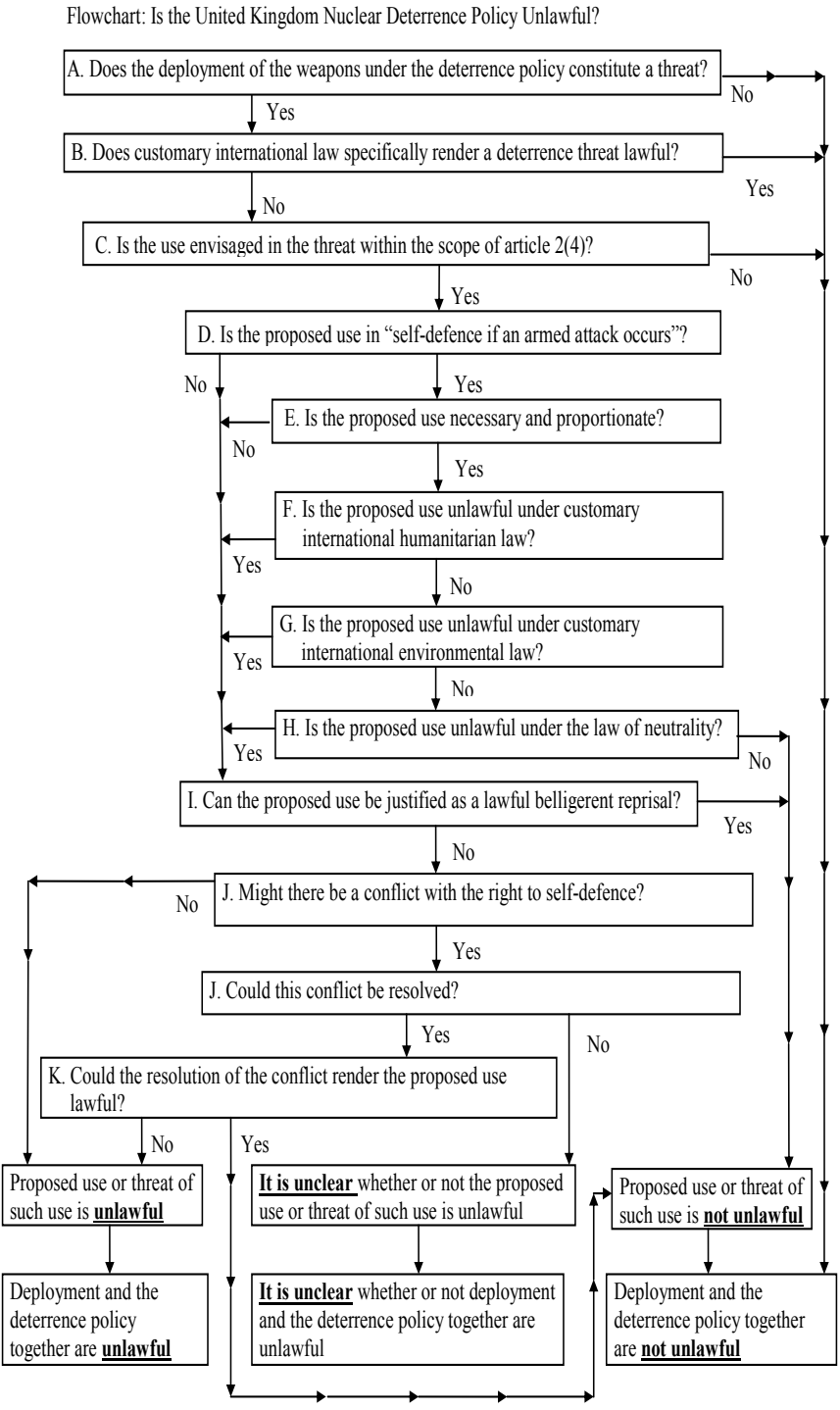
The ICJ Opinion supports the equivalent view, in relation to the United Kingdom obligations under humanitarian law. It suggests that even in an "extreme circumstance of self-defence", use of a nuclear weapon is expected to be unlawful, although no definite view is given. This follows from the ICJ Opinion statements that any use of nuclear weapons "seems scarcely reconcilable" with, and "would generally be contrary to", international humanitarian law.[189] This understanding of "generally" in the ICJ Opinion, while differing from that of Matheson,[190] is consistent with the views of Akande,[191] Greenwood,[192] Dinstein[193] and Wells-Greco.[194] Greenwood's warning is severe: "[t]o allow the necessities of self-defence to override the principles of humanitarian law would put at risk all the progress in that law which has been made in the last hundred years or so and raise the spectre of a return to theories of the 'just war'".[195]

Thus, despite the apparent implication of Judge Higgins' comments,[196] and those in the UK White Paper,[197] it seems that applying the principle of the physical survival of the peoples (to resolve any conflict with the right to self-defence) could never render lawful the use of Trident by the United Kingdom. This is because such use threatens, due to the risk of escalation, the physical survival of the peoples and so is at variance with the principle of such survival. This is true even if the use of Trident is intended to defend the United Kingdom from a nuclear attack.

L. Summary of the Relevant Law

The above structured application of the relevant law to the deployment of Trident nuclear weapons by the United Kingdom under the United Kingdom deterrence policy is summarised in the following flowchart. Assuming that the questions have 'yes' or 'no' answers, the flowchart indicates which question should be asked next, so clarifying how the relevant principles interact, and how conclusions are reached.

189 *Nuclear Weapons*, above n 7, at [95] and [105(2)E].
190 Matheson, above n 111, at 429.
191 Akande, above n 98, at 203-211.
192 Christopher Greenwood "*Jus Ad Bellum* and *Jus In Bello* in the Nuclear Weapons Advisory Opinion" in Laurence Boisson de Chazournes and Philippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, Cambridge, 1999) at 264.
193 Dinstein, above n 78, at 173.
194 Wells-Greco, above n 125, at 413.
195 Greenwood, above n 192, at 264.
196 *Nuclear Weapons*, above n 7, Dissenting Opinion at 593.
197 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-11].


Flowchart: Is the United Kingdom Nuclear Deterrence Policy Unlawful?
A. Does the deployment of the weapons under the deterrence policy constitute a threat?
No
Yes
B. Does customary international law specifically render a deterrence threat lawful?
Yes
No
C. Is the use envisaged in the threat within the scope of article 2(4)?
No
Yes
D. Is the proposed use in "self-defence if an armed attack occurs"?
No
Yes
E. Is the proposed use necessary and proportionate?
No
Yes
F. Is the proposed use unlawful under customary international humanitarian law?
Yes
No
G. Is the proposed use unlawful under customary international environmental law?
Yes
No
H. Is the proposed use unlawful under the law of neutrality?
Yes
No
I. Can the proposed use be justified as a lawful belligerent reprisal?
Yes
No
J. Might there be a conflict with the right to self-defence?
No
Yes
J. Could this conflict be resolved?
Yes
No
K. Could the resolution of the conflict render the proposed use lawful?
No
Yes
Proposed use or threat of such use is **unlawful**
It is unclear whether or not the proposed use or threat of such use is unlawful
Proposed use or threat of such use is **not unlawful**
Deployment and the deterrence policy together are **unlawful**
It is unclear whether or not deployment and the deterrence policy together are unlawful
Deployment and the deterrence policy together are **not unlawful**

IV. Conclusions

A. Summary of the Answers to the Questions in Part III

Questions A-K in part III, as summarised in the flowchart in section III.L, fall into four groups by reference to whether or not they have a clear 'yes' or 'no' answer in relation to the United Kingdom nuclear deterrence policy.

Questions A-C and I-K have a clear 'yes' or 'no' answer for any use of Trident envisaged in the UK White Paper, regardless of the specific circumstances and regardless of the explosive power or height of blast occurring on such use.

- A: Yes – deployment of Trident nuclear weapons by the United Kingdom in the context of the policy of nuclear deterrence outlined in the UK White Paper is a threat of force.
- B: No – there is no specific customary international law which would make this deployment and deterrence lawful.
- C: Yes – any use of Trident in self-defence would fall within the scope of art 2(4).
- I: No – the use of Trident by the United Kingdom could not be justified as a lawful belligerent reprisal.
- J: Yes – if there is a conflict between the right to self-defence and another law or principle which renders unlawful the proposed means of self-defence, this can be resolved.
- K: No – applying the principle of the physical survival of the peoples to resolve such a conflict could never render lawful the use of Trident, due to the risk of escalation.

Questions D and E have a clear 'yes' or 'no' answer in relation to any use in anticipatory self-defence or in response to a non-nuclear attack, regardless of the explosive power or height of blast occurring on such use.

- D: No – use of Trident in anticipatory self-defence would not be "self-defence if an armed attack occurs"
- E: No – any use of Trident in response to a non-nuclear attack would not be necessary, proportionate and compliant with art 51.

Questions F and G might not have a clear 'yes' or 'no' answer, regardless of the circumstances of any use and regardless of the explosive power or height of blast.

- F: It is "difficult to envisage" how any use of Trident by the United Kingdom could be compatible with the rules of international humanitarian law.
- G: Any use of Trident by the United Kingdom would "probably" be unlawful under customary international environmental law, particularly if set at 10kt or more of explosive power and used at a height of less than 200m.

Question H has a clear 'yes' or 'no' answer for any use where blasts of 10k or more are at heights of less than 200m, regardless of the circumstances of any use such use.

- H: Yes - any use of Trident, set at 10kt or more of explosive power and a height of less than 200m above land, would be unlawful under the law of neutrality.

B. The Respects in Which United Kingdom Nuclear Deterrence Policy is Unlawful

Applying the reasoning set out in part III, and in the flowchart in section III.L, the answers to A-C and I-K show that the United Kingdom nuclear deterrence policy will be unlawful unless the answers to D and E are both 'yes' and the answers to F, G, and H are all 'no'.

Despite an ambiguity over the meaning of "first use", one or other of use in anticipatory self-defence or use in response to a non-nuclear attack is envisaged in the UK White Paper. For such "first use", one or other of questions D and E would have the answer 'no'. In this respect, the United Kingdom nuclear deterrence policy is unlawful.

In relation to a deterrence policy which envisages use with blasts of 10kt or more at a height of less than 200m above land, question H would have the answer 'yes' and so the policy would be unlawful. The UK White Paper makes no mention of at what setting or at what height Trident might be used and so implies possible use at 10kt or more of explosive power at a height of less than 200m above land. This implication is underlined by the following United Kingdom statements about potential uses of Trident: "the legality of any such use would depend upon all the circumstances of the case"[198] (which appears to deny that certain factors may render some uses unlawful in all cases); and "we deliberately maintain ambiguity about precisely when, how and at what scale we would contemplate use of our nuclear deterrent" (which appears to confirm that the UK White Paper threat is wide enough to include these unlawful threats).[199] Again, in this respect, the United Kingdom nuclear deterrence policy is unlawful.

The position is less clear for uses envisaged in the UK White Paper which do not involve any blast of 10kt or more at a height of less than 200m, and which are in response a nuclear attack which has begun. For such uses the answers to D and E are 'yes', but it harder to answer F, G and H without using phrases such as "probably" and "difficult to envisage". More definite answers for F, G and H for such uses might arise from a review of (a) estimates of the number of deaths and the extent of environmental damage resulting from such uses and (b) evidence on the extent of the escalation risk (the risk that such uses would lead on to uses of nuclear weapons with blasts of 10kt or

198 Marston, above n 13, at 637; *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [2-11] repeats this statement with the omission of the word "all".

199 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].

more at heights of less than 200m). Because this article has not reviewed such estimates or such evidence, it is unable to conclude whether or not, in this respect, the United Kingdom nuclear deterrence policy is unlawful.

The conclusions can also be expressed in simpler terms.[200]

1. All "first use" is unlawful and low-altitude 10kt-plus use in response to a nuclear attack is also unlawful.
2. Because it is a threat which envisages such uses, the United Kingdom nuclear deterrence policy is unlawful in these respects.
3. It is "difficult to envisage" how a low-altitude sub-10kt use in response to a nuclear attack, or any high-altitude use in response to a nuclear attack, could be lawful, and such uses would "probably" be unlawful. This article, however, has not been able to conclude whether such uses would be definitely unlawful.
4. Because it is a threat which envisages such uses, it is "difficult to envisage" how United Kingdom nuclear deterrence policy could be lawful in these respects and it is "probably" unlawful in these respects.

C. Diagram to Illustrate the Conclusions and Comparison with the ICJ Opinion

The following two diagrams summarise these conclusions by reference to the ICJ Opinion. The UK White Paper does not envisage any use of Trident other than in extreme circumstances of self-defence.[201] The ICJ Opinion held that any such use would be unlawful.[202] At first sight, the uses envisaged by the UK White Paper appear to correspond to the uses for which the ICJ Opinion does not conclude (so that, in the following diagrams, the rectangle in the right hand diagram corresponds to the inner rectangle in the left hand diagram). This apparent correspondence is, however, subject to which of the possible meanings of "first use" is intended in the UK White Paper,[203] and what meaning of "very survival of a State" is intended in the ICJ Opinion.[204] The shaded areas in each diagram represent uses which are considered, by the ICJ Opinion and this article respectively, to be unlawful. The unshaded areas represent uses for which the ICJ Opinion and this article respectively cannot conclude.

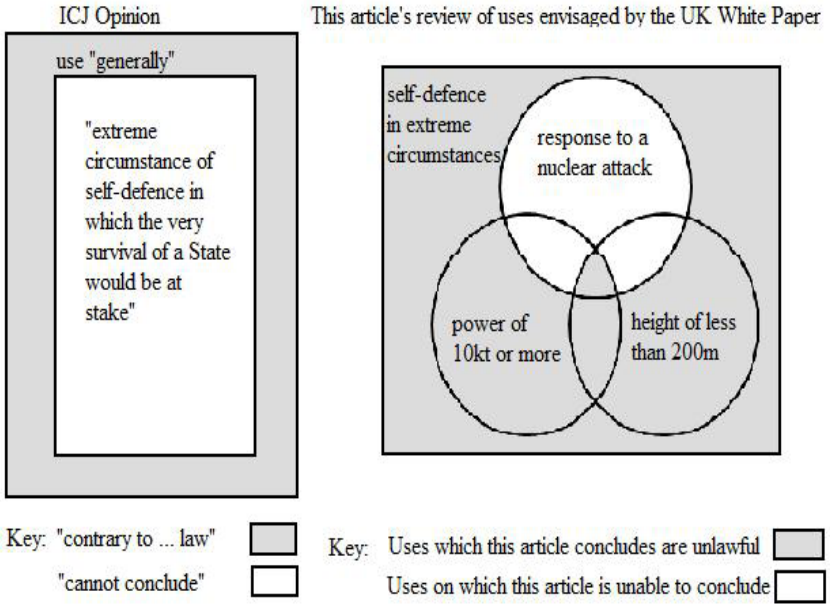
200 In these simpler terms "low-altitude" indicates "at a height of less than 200m", "high-altitude" indicates "at a height of 200m or more", "sub-10kt use" indicates "a blast of less than 10kt" and "10kt-plus use" indicates "a blast of 10kt or more.

201 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [2-11].

202 Akande, above n 98, at 205 and 211.

203 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [3-4].

204 *Nuclear Weapons*, above n 7, at [105(2)E].



In the right hand diagram, the area enclosed by the upper circle represents uses in response to a nuclear attack which has already begun. Conversely, all the area outside the upper circle represent uses which are either in response to a non-nuclear attack or are in anticipation of a nuclear attack which has not yet begun. All such uses are unlawful and so the entire area outside the upper circle is shaded. Any "first use" would fall in this shaded area.

Again in the right hand diagram, the lower two circles represent, respectively, uses with a blast of 10kt or more, and uses where the blast is at a height of less than 200m. The intersection, or overlap, of the three circles reflects the fact that any particular use may fall into more than one of the categories they represent. All the area of intersection between the lower two circles reflects uses which involve blasts of 10kt or more at heights of less than 200m. Such uses are unlawful and so this entire area is shaded.

The remaining unshaded areas in the right hand diagram represent uses which are in response to a nuclear attack which has begun, and which involves any one of

1. a blast of less than 10kt at a height of less than 200m (the lower right unshaded area);
2. a blast of less than 10kt at a height of 200m or more (the upper unshaded area); or
3. a blast of 10kt or more at a height of 200m or more (the lower left unshaded area).

It is possible that a review of the relevant estimates and evidence would demonstrate that some or all of these other uses are also unlawful.

D. Comment on the Conclusions and Recommended Actions

Thus at least some of the uses envisaged in the UK White Paper are unlawful: "first use" (anticipatory self-defence or in response to a non-nuclear attack) and any use with a blast of 10kt or more at a height of less than 200m above land.[205] On this basis, and at least to this extent, the current United Kingdom deployment of Trident and the published United Kingdom deterrence policy on its possible use together constitute an unlawful threat of force. While this may appear surprising, it is consistent with the United Kingdom's public response to the ICJ Opinion:[206]

> Advisory Opinions are not binding. … The Government always pays due regard to Opinions from the Court but naturally cannot be bound by the outcome of a procedure which is in its essential nature advisory only.

It is also consistent with the UK White Paper's reference to the ICJ Opinion having "rejected the argument that … use [of nuclear weapons] would necessarily be unlawful".[207] It would be more accurate to say that the ICJ Opinion was "unable to conclude definitively" on this argument.[208]

As a first step towards compliance with applicable international law, the United Kingdom should therefore amend its deterrence policy (a) to explicitly state that Trident will not be used other than in response to a nuclear attack which has begun and (b) to confirm that Trident will never be used, set at 10kt or more, at a height of less than 200m above land.[209] The threat of the "catastrophic effects of detonations" resulting from the United Kingdom using Trident in anticipatory self-defence, or in response to a non-nuclear attack, or set at 10kt or more at a height of less than 200m above land, is "of concern and relevance to all"; working to achieve the necessary change in the United Kingdom's deterrence policy is one of the "efforts [that] must be exerted to eliminate this threat".[210]

205 The phrase 'at least' is used to allow for the possibility that, in relation to other uses envisaged in the UK White Paper, a review of the relevant estimates and evidence may demonstrate that some or all of these other uses are also unlawful.

206 Marston, above n 13, at 637-638.

207 *The Future of the United Kingdom's Nuclear Deterrent*, above n 27, at [2-11].

208 *Nuclear Weapons*, above n 7, at [105(2)E].

209 The phrase 'first step towards' is used to allow for the possibility that estimates and evidence relevant to other uses envisaged in the UK White Paper might indicate that the United Kingdom should take further steps, and make further amendments to policy, to fully comply with international law.

210 NPT Prepcom 2013 Statement, above n 3, at [5] and [6].