

PEACERIGHTS BRIEFING PAPER

Legality of the Threat or Use of Nuclear Weapons & International Law

This briefing paper highlights the main arguments on the illegality of the threat or use of nuclear weapons in the light of international humanitarian law examined also with regards to the International Court of Justice's Advisory Opinion of July 8th 1996 which is, however, mistakenly relied on as the main argument of the illegality of nuclear weapons. The arguments put forward in this paper will be based on the provisions of international humanitarian law and how they have been considered and highlighted by the ICJ. This paper will also consider the issue of the illegality of nuclear weapons in international law in the specific context of the UK Trident II nuclear system.

This paper is the first of a series of briefings that will be produced by Peacerights on various issues raised in the context of nuclear weapons and international law.

1. Application of the *Jus ad bellum* and *Jus in bello* to Nuclear Weapons

To be lawful, the use of nuclear weapons must comply with both the *jus ad bellum* (law restricting the right to States to resort to force) and the *jus in bello* (law governing the conduct of war):

At the same time a use of force that is proportionate under the law of self-defence, must in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

In relation to the application of the *jus ad bellum* to the use of nuclear weapons, the ICJ stated that

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4 of the United Nations Charter and that fails to meet all the requirements of Article 51 [self-defence], is unlawful.

The ICJ went on to say:

These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.

The Court also reaffirmed that the threat or use of nuclear weapons falls within the scope of the *jus in bello*:

A threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

It is noteworthy that the fact that "threat" is to be equated with "use" (in the sense that a threat to use nuclear weapons must be compatible with principles of international humanitarian law) is fundamental to international law issues raised in the context of the policy of deterrence which involves the question of credibility. As will be examined below, the question of whether deterrence ought to be considered as a threat has been the subject of recent legal debate.

2. Humanitarian Law Principles

The centrepiece of the ICJ's Advisory Opinion is the examination of the use or threat of nuclear weapons in the light of the rules of international humanitarian law which are defined as "[f]undamental to the respect of the human person and 'elementary considerations of humanity' ... [t]hese fundamental rules are to be observed by all States whether or not they have ratified the Conventions that contain them, because they constitute intransgressible principles of international customary law":

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attacks and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

In accordance with these principles, the requirements of international humanitarian law imply that weapons used by states to comply with the rule of discrimination and the rule of proportionality.

The ICJ went on to refer to humanitarian law treaties which reflect those "intransgressible" or "cardinal" principles, in particular the Martens Clause, which was first included in the Hague Convention whose modern version is to be found in Article 1(2) of Additional Protocol I of 1977 and which reads as follows:

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

Paragraph 105 D of the ICJ Advisory Opinion highlights the significance of this discussion. It reads:

Unanimously, a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

As noted by Shiner, in order to establish whether there is a breach of any one of these intransgressible principles, one must test the facts (size and effects of the nuclear weapon in terms of blast, heat and radiation) against the principles. Thus, it is arguable that if a nuclear weapon cannot meet, or is highly unlikely to meet any of these "intransgressible principles", it must necessarily be in breach of international humanitarian law. Furthermore, as will be examined below, if a weapon system cannot comply with these cardinal principles, the apparent "exception" of paragraph 105 (2)(E) of the ICJ's Advisory Opinion does not apply.

3. The Issue of Deterrence as a Threat

It is arguable that in order to act as a deterrent, the threat of using nuclear weapons has to be credible. This was acknowledged by the ICJ which said that "[i]n 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”.

The credibility of the UK and US policy of deterrence has been underlined in various political and diplomatic statements. In particular, the potential threat of the use of chemical or biological weapons by Iraq has led to some fairly clear comments on the intentions of both Governments in relation to their policy of deterrence. In 1998, the then Minister of Defence Robert Cook said:

There has been some recent speculation that Saddam might retaliate with chemical or biological weapons. Our assessment is that the threat of such retaliation is low, and it would be difficult for him to square any such retaliation with his continual claim that he does not possess any such weapons. As in 1991, he should be in no doubt that, if he were to do so, there would be a proportionate response.

To those who want us to rule out military action now, I warn them that that would make it impossible for us to achieve a satisfactory diplomatic solution (...)

The recent statement of Geoffrey Hoon is also very unequivocal about the UK policy of deterrence which is to be considered as being credible and genuine. Talking about the “States of concern”, he said:

They can be absolutely confident that in the right conditions we would be willing to use our nuclear weapons.

Similarly, the recent US Nuclear Posture Review stated that “nuclear weapons, for the foreseeable future, will remain a key element of US national security strategy (...) The United States continues to plan for a massive retaliation or preemptive counterforce attack in response to an actual or imminent nuclear attack (...)” But, in addition, “[t]he new, catch-all category of “surprising military developments” could cover first use of nuclear weapons in a wide range of circumstances”.

The far-reaching consequences of the US statement have been rightly summarised by Burroughs *et al.*:

In addition to violating the NPT commitment to diminishing the role of nuclear weapons in security policies, the US plans undermine the negative security assurance offered by the United States to nuclear weapon states parties to the NPT. Those assurances are at a minimum political commitments essential to the bargain underlying the NPT, and arguably have become legally binding, notably because they were reiterated in connection with the indefinite extension of the NPT in 1995.

As a result, it is arguable that possession and deployment of nuclear weapons as a deterrence ought to be considered as a threat to use nuclear weapons, and thus to be illegal under the rules of customary international law.

One of the arguments that might be put forward is that the possession of nuclear weapons is not a threat if there is no deployment. But then, one can wonder what would be the point in having a nuclear weapon system and not deploying it? It is strongly arguable that the absence of deployment is enough to prevent a nuclear weapon system from being considered to be a threat. This argument seems to be supported by various political and diplomatic statements issued by the Government of NWS, especially the US and the UK. Hoon’s recent statement to the Defence Committee makes it clear that the credibility of the “threat factor” of a nuclear weapon system appears with a deployment policy:

We are constantly looking at the kind of threats (...) We have the equipment, it is constantly trained and exercised, it is something that we have as a very high priority in terms of deploying those forces in particular theatres, as was the case, obviously, during the Gulf War.

In relation to the issue of deterrence, the ICJ has adopted a rather ambivalent and ambiguous approach by first stating that it “does not intend to pronounce here upon the practice known as the “policy of deterrence”, to later note that, as worded by Moxley, “since the policy of deterrence is based on a threat

to use nuclear weapons, the legality of the policy is subject to the rule that it is unlawful to threaten to do that which is unlawful. Thus, the lawfulness of deterrence depends on the lawfulness of use, which brings us right back to where we started”.

Thus, whilst the ICJ stated in paragraph 48 that, in order to be effective, the policy of deterrence has to be credible and as a result, ought to be considered as a threat to use nuclear weapons, it then fails to acknowledge this reasoning later in its judgments, especially in paragraph 95, stating that it cannot determine “the validity of the view that the recourse to nuclear weapons would be illegal in any circumstances owing to their inherent and total incompatibility with the law applicable in armed conflict”.

In this context, it is worth noting that in *Zelter et al.*, the Scottish High Court relied on the limitations of the ICJ’s Advisory Opinion to note that whether the rules of humanitarian law applied in times of peace was uncertain:

...In time of peace, it does not appear to us that [the rules of international law applicable in armed conflict] are either capable of application. That remains true even where a particular State has a policy of deterrence, and deploys nuclear weaponry in execution of that policy. Application of the rules, and the resulting possibility of illegality, will arise only if and when some specific change turns the situation into one of armed conflict.

The limitation of the ICJ’s Advisory Opinion in relation to the issue of deterrence suggests that, as mentioned above, the Opinion cannot be solely relied on to argue the illegality of nuclear weapons and should be only used to support the arguments based on international humanitarian law.

Arguably, the rules of humanitarian law operate in armed conflict and their application in the case of the use of nuclear weapons in this situation is straightforward. However, the situation is less straightforward in the case of the deployment of a nuclear weapon system in a time of peace in the sense that as mentioned above, if the deployment of nuclear weapons is considered as a credible threat, then it is this credibility factor which blurs the distinction between the situation in armed conflict and in a situation of a time of peace as if there was a threat by that deployment policy, one extrapolates from the rules applicable to a time of armed conflict to establish whether that threat is lawful.

The analysis of the High Court in *Zelter* is not realistic because it assumes that States go straight from a “time of peace” to an armed conflict situation when clearly, there is some “transitional” or “intermediate” phases where military tension is building up. The clear-cut reasoning of the court fails to acknowledge this evolving process which supports the argument that any policy of deterrence in a pre-armed conflict situation will inevitably amount to a threat. If not, the possession of nuclear weapons becomes worthless as they would not be a credible deterrent.

It is also worth mentioning still in the context of that the Scottish High Court made a distinction between deterrence and a “threat” of the kind which would amount, on the basis of the rule of international humanitarian law, to actual use:

We are entirely satisfied that the general minatory element in the deployment of nuclear weapons in time of peace ... is utterly different from the kind of specific “threat” which is equated with actual use in those rules of customary international law which make both use and threat illegal (...) [B]roadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practical violence, made to a specific “target”, perhaps coupled with some specific demand or perhaps simply as the precursor of actual attack.

It is arguable that the Court’s argument is false. This point is illustrated in the statement of Hoon in the Defence Committee where the Secretary of State for Defence where he “blurs” these distinctions of

“threats”:

In terms of deterrence, clearly, our nuclear capability deters those who might threaten the United Kingdom with a weapon of mass destruction. I think we would have to have a rather longer discussion about whether that, for example, might work in relation to a failed state or a country like Iraq that, for example, places the lives of its own citizens at little value and might be prepared to contemplate taking on a nuclear power like the United Kingdom and accept the consequences. I think in terms of deterrence there is clearly an effect that our nuclear weapons have, but the reason and justification for the argument about states of concern is that some of those states would not be deterred in the way in which conventional deterrence theory assumes (...) [t]here are clearly some States who would be deterred by the fact that the United Kingdom possesses nuclear weapons and has the willingness and ability to use them in appropriate circumstances. States of concern, I would be much less confident about, and Saddam Hussein has demonstrated in the past his willingness to use chemical weapons against his own people. In those kinds of States the wishes, needs and interests of citizens are clearly much less regarded and we cannot rule out the possibility that such States would be willing to sacrifice their own people in order to make that kind of gesture (...) [As regards States of concern], they can be absolutely confident that in the right conditions we would be willing to use our nuclear weapons (...)

Finally, in relation to the issue of threat, it is arguable that one of the weak points of the respondents in the “Trident cases” has been to contend that the concept of threat as a crime in UK law and what amounts to a breach of international humanitarian law can be compared when those two notions are fundamentally different and have different consequences. This was the case of the Respondents in *Zelter*, but what it is worth noting in this case is that the Court itself made the error.

International humanitarian law provides a legal framework for armed conflict situations. As a result, as examined above, the threat to use force or the actual use of force is breach of international humanitarian law, and by implication, it is arguable that a deterrence policy based on Trident II (bearing in mind its size and effects) amounts to a threat to use unlawful force. Assuming it is, even if the Prime Minister or the Secretary of State for Defence is found guilty of a crime against humanity under international law, there is no mechanism to transpose that consequence into the domestic law of crime. As a result, the condemnation of the Prime Minister or the Secretary of State by an international court would not give a defence to an activist charged for criminal damage.

This was made clear in *Hutchinson* where Buxton LJ rightly pointed out “that the unlawfulness of the United Kingdom Government’s conduct that is established in English law by the transformation of the rule of international law is unlawfulness of a more elusive nature than is to be found in the substantive criminal law”.

4. Nuclear Weapons and Self-Defence

4.1. General Principles and Limited Exceptions

The use of force under international law, prohibited under Art. 2(4) of the UN Charter, is subject to certain exceptions set out in Art. 51 of the Charter and which encompass:

- The use of force in self-defence; and
- A Security Council authorisation of force, on the basis that the Council determines it necessary for the maintenance or restoration of international peace and security.

In relation to the former, certain conditions must be met before resort to force can be justified as self-defence. A few comments may be made as regards the use of force in self-defence.

First, the law of self-defence encompasses the requirements of necessity and proportionality. Thus, for

self-defence to be justified, there must be an imminent threat of force or a continuing attack. Any response must be necessary to prevent that threat and be proportionate to it.

Second, self-defence is only contemplated “if an armed attack occurs against a Member of the United Nations”. Thus, a state does not have a right of armed response to acts which do not constitute an “armed attack”.

Third, anticipatory self-defence is “legally prohibited” though “there may be cases where breaches of the prohibition may be justified on moral and political grounds and the community will eventually condone them or mete out lenient condemnations”. In the *Caroline* case of 1837, the Court set out a test of necessity strictly limiting the circumstances in which the use of self-defence in anticipation of an attack might be permissible. The Court ruled that “[n]ecessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment of deliberation”.

As for the second exception, that is the Security Council authorisation of force, it is constitutionally confined to taking or authorising force in circumstances where doing so is “necessary to maintain or restore peace or security”.

4.2 The “Exception” of Paragraph 105 (2)(E) of the ICJ’s Opinion

After stating that the threat or use of nuclear weapons is scarcely reconcilable with the requirements of international humanitarian law, the ICJ went on to in paragraph 105(2)(E):

...[i]n 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.

Thus, whilst the ICJ states that the threat or use of nuclear weapons is in general contrary to international law, it also leaves a sort of “escape hatch” on which nuclear-weapon states such as the USA and the United Kingdom relied justifying their reliance on a nuclear weapon system as a “deterrent” on the basis that the ICJ had left open the question of its legality.

Yet, the NWS’s assertion must be mitigated by the primacy of the cardinal or intransgressible rules which, as mentioned above, requires that any nuclear weapons system must comply with those principles.

The primacy of the intransgressible principles was reasserted by the President of the ICJ, Judge Bedjaoui who made it clear in his Declaration that even in extreme circumstances (i.e. the survival of the state is at stake), derogations from the cardinal rules of international humanitarian law would not be justified:

[S]elf-defence - if exercised in extreme circumstances in which the very survival of a State is in question - cannot engender a situation in which a State would exonerate itself from compliance with ‘intransgressible’ norms of international humanitarian law. In certain circumstances, therefore, a relentless opposition can arise, a head on collision of fundamental principles, neither one of which can be reduced to the other. *The fact remains that the use of nuclear weapons by a State in circumstances in which its survival is at stake risks in its turn endangering the survival of all mankind*, precisely because of the inextricable link between terror and escalation in the use of such weapons. *It would thus be quite foolhardy unhesitatingly to set the survival of a State above all other considerations, in particular above the survival of mankind itself.*

This view has been endorsed by Professor Christopher Greenwood Q.C. who represented the United Kingdom at the hearings before the ICJ. He notes:

To allow the necessities of self-defence to override the principles of humanitarian law would put at risk all the progress in that law which has been made over the last hundred years or so.

4.3 Nuclear Weapons States and Self-Defence

As noted above, the ICJ stated that it “does not consider that it has a sufficient basis for a determination on the validity” of whether the ““clean” use of smaller, low yield, tactical nuclear weapons” would be legal under certain circumstances, and thus, “cannot conclude definitely 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 (...)”. It is important to note that even in the above circumstances where a low yield clean use of nuclear weapons might be lawful, it is strongly arguable that the nuclear weapon systems possessed by the NWS (for example Trident II) cannot ever reach this apparent limited exception because, given their size and the consequent effects in terms of heat, blast or radiation across time and space these systems cannot possibly comply with the cardinal principles of international humanitarian law, in particular the rule of discrimination.

In the specific context of Trident II, this argument seems to be supported by the facts about the UK nuclear system as highlighted by the High Court in the *Zelter* case:

It is said that the Trident nuclear warheads are 100 to 120 kilotons each, approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki. Emphasis was placed upon the blast, heat and radioactive effects of the detonation of such a warhead, and what were described as the inevitably uncontainable radioactive effects, in terms of both space and time. All these asserted characteristics were relied upon as showing that the damage done, and the suffering caused, could not be other than indiscriminate. *Suggestions that the weapons deployed by the United Kingdom could be used in restricted ways, defensively or tactically or being directed only against specific types of target, were said not to be possible, or if possible not to remove this element of being indiscriminate in the suffering and damage which they would cause. In particular, it was said that they would be inevitably indiscriminate as between military personnel and civilians who could not be excluded from the uncontainable effects which we have mentioned. Even if much smaller warheads were used (and the possibility of this was not accepted in the context of the United Kingdom's deployment of Trident) one was still dealing with weapons of mass destruction, with uncontainable consequences.*

In this case, the LAR lawyers for the Crown came up with a highly unlikely scenario to justify their arguments that in some circumstances Trident II might be lawful. This involved a fleet of Chinese warship steaming across the Pacific Ocean to make an attack on New Zealand, and hit with a nuclear weapon. Duncan Menzies QC said:

[i]f the nuclear power aggressor was threatening the territorial integrity of a non-nuclear victim state, let's take it, the example of China being a nuclear power threatening New Zealand, a non-nuclear power, with a battle fleet armed with nuclear missiles which it was stating it was about to fire at New Zealand and which battle fleet was in the Pacific, approaching the point at which the state of New Zealand was in range of its nuclear missiles, in such a situation I submit that it would be consistent with international law, including humanitarian laws applicable to armed conflict, for another nuclear power to use nuclear force against that battle fleet (...)

Not only is this scenario extremely implausible, but given the characteristics of Trident II, the use of nuclear weapons in these circumstances would not meet the principles of proportionality and necessity. Furthermore, it is clear that other existing non-nuclear weapons could be used as an alternative to achieve the military objective of removing the threat of this fictional fleet.

In any case, it is worth recalling that any weapon systems used to take out the Chinese battle fleet would have to comply with the principles of necessity and proportionality; which is not the case with thermobaric for example.

The United States has been using thermobaric weapons or fuel-air explosives (FAEs) in the caves of mountains of eastern Afghanistan. The use of FAEs by the Russians in Chechnya had already sparked protests from human rights campaigners because they are disproportionate and indiscriminate in their toxic effects on combatants and civilians. Thermobaric weapons- the effects of which have been compared to those of a tactical nuclear bomb- have also caused concern among the military because they render conventional body armour useless.

The definition of FAEs as weapons of mass destruction has been illustrated by Walker in the context of the Gulf War:

Perhaps the most horrifying of all bombs was the Fuel Air Explosives (FAE) which were used to destroy minefields and bunkers in Iraq and Kuwait. These firebombs were directly used against Iraqi soldiers, although military spokesmen and press reports have consistently tried to downplay their role (...) The FAE is composed of an ethelene oxide fuel which forms an aerosol cloud or mist on impact. The cloud is then detonated, forming very high overpressures and a blast or shock wave that destroys anything within an area of about 50,000 square feet (for a 2,000 pound bomb). The US also used "daisy cutters" or the BLU-82, a 15,000 pound bomb containing GSX Gelled slurry explosives (...) President Bush continually warned about Iraqi weapons of mass destruction, but it is clear that US forces alone used weapons of mass destruction against Iraqi troops in both Iraq and Kuwait.

5. Illegality of the Threat or Use of Nuclear Weapons under the NPT & Geneva Protocol

Besides those main arguments, it is noteworthy that two other arguments may be brought forward to sustain the illegality of the threat or use of nuclear weapons.

5.1 Significance of Article VI NPT

Article VI of the Non-Nuclear Proliferation Treaty requires all parties (including all nuclear weapons State (NWS)) "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament..."

That obligation has been re-emphasised and intensified by the ICJ's Advisory Opinion whose paragraph 105 F states:

Unanimously, there exists an *obligation* to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

As noted by Bosch, by broadening the scope of Art. VI of the NPT as a "code of conduct", the ICJ has "interpreted the NPT's nuclear disarmament provisions in such a way that the five NWS could be considered in breach of their Treaty obligations".

The NPT review conference also reaffirmed "that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament and effective international control".

Thus, it is clearly arguable that all nuclear weapons states are in breach of this obligation to conclude negotiations, leading to nuclear disarmament in all its aspects. For example, the recent US Nuclear Posture Review (NPR) “reaffirms that nuclear weapons, for the foreseeable future, will remain a key element of US national security strategy”.

5.2 The Geneva Protocol and the Purposive Interpretation of International Law

Finally, as noted above, the ICJ made specific reference to Additional Protocol I which has been introduced in order to remedy the lacunae of the Fourth Geneva Convention of 1949 which failed to provide protection for civilians in armed conflict.

Part 4 of Protocol 1 states that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants ...”

A certain number of articles “enlighten” the aim of Protocol I and provide arguments to interpret the text as covering nuclear weapons. Art. 2 of the Protocol (definitions) states that “[f]or the purposes of this Protocol (...) [r]ules of international law applicable in armed conflict” means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict (...)”

Art. 35(basic rules) provides that:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

This article is supplemented by Art. 36 on new weapons, which is relevant to the issues examined in this briefing paper:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Arts. 48 and 51 provide further explanation on the implications of the Protocol for the protection of the civilian population. Art. 48 states that “[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. In particular, as stated in Art. 51, “the following rules, which are additional to other applicable rules of international law, shall be observed in circumstances which can be summarized as: (1) the civilian population as such, as well as individual civilians, shall not be the object of attack; (2) civilians shall enjoy the protection afforded by the section on the protection of civilians and civilian populations, unless and for such time as they take a direct part in hostilities; and (3) indiscriminate attacks are prohibited.

Indiscriminate attacks are further defined as:

- (a) Those which are not directed at a specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

The interpretation of Protocol I as exempting nuclear weapons from its scope patently conflicts with its

purpose.

In relation to the issue of nuclear weapons, a bone of contention appeared when the nuclear weapons states entered reservations on the ground that extending the scope of Protocol I would amount to the introduction of new prohibitions into the laws of war. The UK followed this “exclusion approach” but did not put a “reservation” *per se*, issuing instead a Statement of Understanding.

The position of the UK government has been expressly stated in the legislation implementing Protocol I:

It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.

7. The Question of the Legality of Nuclear Weapons in the context of the UK: Trident II

A series of recent cases have explored the arguments as to the legality of Trident II, the UK’s nuclear weapon system.

One of the principal arguments common to the “Trident cases” is the allegation that Trident II is in breach of international humanitarian law, with the underlying issue of the policy of deterrence; that is a policy of deterrence amounts to a policy of threat to use weapons which is unlawful under international law.

Hutchinson

In *Hutchinson*, one of the main issues addressed was whether UK’s possession of Trident nuclear weapons at AWE Aldermaston was contrary to customary international law, in particular, (1) whether the capability or envisaged use of Trident was contrary to the ICJ’s Advisory Opinion; and (2) whether the possession or envisaged use of Trident was contrary to the obligation to pursue in good faith nuclear disarmament by adopting a particular course of conduct contained in the ICJ’s Advisory Opinion and in Article VI of the NPT.

Counsel for the applicant merely relied on the ICJ’s Advisory Opinion, and by wrongly formulating the international law argument, led the Court to highlight and rely on the limitations of the Opinion to dismiss the international law argument. Counsel for the Respondent formulated the rule of international law as follows, contending that this rule was in English law a rule of substantive criminal law:

The threat or use of nuclear weapons for deterrent purposes is contrary to customary international law unless pursuant to a clearly-declared policy of envisaged use which is consistent with international law.

The Court, relying on the ICJ’s Opinion (which was the only material relied upon in support of this rule) held that there was no rule of customary international law that is universally recognised as contended by the applicant. It went on to say, as quoted above, that a breach of international law does not, by transposition into UK law, provide a defence in criminal law.

Zelter et al.

The legality of Trident II was also challenged in *Zelter et al.* where four main issues were raised: (1) the doctrine of necessity; (2) the legality of Trident II under international humanitarian law; (3) justiciability; and (4) the question of whether a breach of international humanitarian law leads to a

defence in criminal proceedings about criminal damage.

In relation to issue 2, as mentioned above in relation to the policy of deterrence, in this case as well, the UK court relied on the limitations of the ICJ's Advisory Opinion to rule that the UK's deployment of Trident warheads under the policy of deterrence was not unlawful under international law in the light of the Opinion where the ICJ failed to make clear that it was addressing the issue of the policy of deterrence as a threat.

The Court concluded, in the context of Trident II, that the deployment of the UK nuclear system "lacks the links between the threat and use, and an immediate target, which are essential to a 'threat' of the kind dealt with by customary international law or in particular international humanitarian law".

Despite assuming significant facts about Trident II, in particular the uncontrollable and indiscriminate effects of nuclear weapons, the High Court went on to hold that, in the light of Head E of the *dispositif* of the ICJ's decision, the use or threat of nuclear weapons (for example Trident II) may potentially be used in extreme self-defence. However, the Court failed to acknowledge that under the ICJ's decision a "particular threat or use" will be unlawful if it "breaches any of the principles and rules of international humanitarian law".

Marchiori

The last "Trident case" is *Marchiori*, recently dealt with by the Court of Appeal and which, as a result, is the leading judgment on the legality of nuclear weapons. The Court of Appeal had to consider, among other issues, the ICJ's Advisory Opinion and the issue of the policy of deterrence under international law in the context of Trident II. This issue was raised as the appellants' argument was that the Environment Agency (EA) had to consider whether Trident II was in breach of international law. The Court of Appeal dealt with this challenge to this EA as the regulator, as if it were a challenge to the Secretary of State for Defence.

The Court of Appeal upheld Turner J's decision (High Court) in finding that the maintenance of nuclear weapons (i.e. Trident II) as a deterrent was not in breach of humanitarian principles of international law.

The appellant's argument that the UK's policy on Trident was in breach of humanitarian law relied on the "intransgressible" or "cardinal" principles set out in paragraph 74 of the ICJ's Advisory Opinion, in particular, the rule of discrimination which requires that "[s]tates must never make civilians the object of attacks and must consequently never use weapons that are incapable of distinguishing between civilian and military targets" before referring to paragraph 105 D in the *dispositif* where the ICJ ruled unanimously that "[a] threat or use of force by means of nuclear weapons should (...) be compatible with the requirements of the international law applicable to armed conflict, particularly those of the principles and rules of international humanitarian law (...)".

The appellants' argument on the illegality of Trident II was "that any use or threat of use of any nuclear weapon needs, at minimum, to comply with the humanitarian laws", emphasising that a policy of deterrence was a threat, and stating that "Trident II was inherently incapable of achieving compliance and particularly discrimination".

In relation to the international law argument, Turner J stated three main points in his judgments:

- (1) The EA would "plainly have been wrong (...) to have concluded that, the Advisory Opinion reached a conclusive view, that the use and deployment of Trident was contrary to international law. This conclusion is consistent with the decision" in *Hutchinson*;

- (2) The submissions as to the illegality of Trident II were beyond the scope of the EA which acts merely as the “regulatory authority” and that “the juridical basis of [the duty to consider the legality of the use and deployment of Trident] was never identified [by the applicants]”; and
- (3) These arguments are consistent with the UK’s policy of deterrence set out in the Strategic Defence Review; namely “that the Government is committed to a policy of deterrence and multilateral disarmament and that it has assessed what is the minimum number of Trident warheads necessary to maintain the deterrent credibly (...)”.

The Court of Appeal did not specifically mention Turner J’s judgment and referred to the High Court’s decision in *Zelter et al.*, at paragraph 342B where, recalling paragraph 67 of the ICJ’s Opinion, it found “that passage unequivocal”.

It is noteworthy that the Court of Appeal did not provide a lengthy discussion of the legality issue (only 2 paragraphs deal with the ICJ’s Advisory Opinion and the humanitarian rule) and as noted above, relied on *Hutchinson*. Laws LJ said:

In my judgment nothing in the Advisory Opinion supports [the Appellant’s] contention that the UK’s policy on Trident (...) is repugnant to humanitarian principles of international law. I conceive this view to be supported by the reasoning of Buxton LJ in the Divisional Court in *Hutchinson v Newbury Magistrates Court* (...) at paragraphs 12-28, which with deference I will not set out.

8. Justiciability

(Phil)

Conclusion