UK Nuclear Deterrence Policy and International Law: Terrorism with Impunity?

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This article asks: does UK nuclear deterrence policy constitute terrorism under international law? In the context of international law, terrorism refers to activities which (a) involve violence (or threat of violence), fear and coercion, and (b) are unlawful by reference to law which is not terrorism-specific. UK nuclear deterrence policy (a) involves a threat of violence, fear and coercion, and (b) is unlawful in at least some respects (such as its failure to rule out first use). There is widespread agreement in the international law literature that, in principle, activities carried out by a state can constitute terrorism, but the attitudes and actions of states are not consistent on this point. On this basis, UK nuclear deterrence policy might constitute terrorism, but a clear legal answer on this point is not currently possible. The policy would fall within international legal constraints on general and nuclear terrorism, if their scope had not specifically excluded state military activities. UK nuclear deterrence policy is an offence under UK terrorism law, but there is little hope of successfully prosecuting UK Government officials. This overall effective impunity for UK nuclear deterrence policy reflects a wider concern: powerful states often drive the development of international law on terrorism (and on other issues) according to their own priorities. Strategies for change, for example to achieve a UK no-first-use policy, include applying wider, non-terrorism-specific, international law to existing UK policy.

Keywords: nuclear weapons, UK, nuclear deterrence, nuclear terrorism, state terrorism, threat

1. Introduction and Overview

It has been claimed that nuclear deterrence policies in general constitute terrorism in terms of international law.[1] It has also been claimed that nuclear deterrence policies in general constitute terrorism in a wider, non-legal context.[2] Even authors who hesitate to draw such conclusions acknowledge that nuclear deterrence has many of the characteristics which normally appear in definitions of terrorism.[3] The claim that all nuclear deterrence is terrorism, as that term is used in

[1] F. A. Boyle, *Remarks by Francis A. Boyle*, Proceedings of the ASIL Annual Meeting, Vol. 82, 1988, pp. 569-571.

[2] T. C. Schelling, *Thinking about Nuclear Terrorism*, International Security, Vol. 6, No. 4, 1982, pp. 66-68; A. Vanaik, *The Issue of Nuclear Terrorism*, Economic and Political Weekly, Vol. 45, No. 17, 2010, p. 11.

[3] C. Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, Cardozo Law Review, Vol. 27, No. 5, 2006, p. 1997, citing Wellman, and p. 1999, citing Merari; K. J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, Vermont Law Review, Vol. 16, No. 2, 1992, p. 492, citing Stohl; M. Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, European Journal of International Law, Vol. 6, No. 3, 1995, p. 348; J. Poettcker, *Is Deterrence Morally and Legally Permissible and is it a Form of State Terrorism?*, in J. L. Black-Branch & D. Fleck (Eds.), Nuclear Non-proliferation in International Law - Volume IV, T.M.C. Asser

the context of international law, appears to be a claim which few authors have analysed, and none (to my knowledge) in any detail.

Rather than explore these wide claims, this article focuses on the narrower question of whether or not UK nuclear deterrence policy constitutes terrorism in terms of international law. One difficulty arising in the International Court of Justice (ICJ) 1996 *Nuclear Weapons* advisory opinion (the *Nuclear Weapons* opinion),[4] leading to its indefinite outcome, was "the attempt to cover many hypothetical proposed uses of nuclear weapons".[5] Hence, in any consideration of nuclear deterrence in the context of international law, there is merit in focusing on one fact pattern at a time: "limiting consideration to uses proposed by the United Kingdom of its particular weapons will reduce the possibility of an unclear outcome".[6] In this article I focus on the UK, for two reasons.

– Some suggest that "within the wider constitutional order derived from the UN Charter […] 'security' and 'law' are separate but related, and nuclear deterrence sits uneasily between the two".[7] Whether or not this is true, the UK accepts that nuclear deterrence is subject to law. This is clear from the UK's claim that "Maintaining a minimum nuclear deterrent is fully consistent with all our international legal obligations".[8]

– UK nuclear deterrence policy is well documented and has been subject to legal analysis which concludes that it is unlawful, in at least some respects, under international law on the use of force.[9] This conclusion is relevant to the claim that UK nuclear deterrence policy constitutes terrorism, because unlawfulness (under non-terrorism-specific law) is a core characteristic of terrorism, as will be discussed further below.

Although this article focuses on UK policy, its conclusions will apply more widely: much of its analysis is also relevant to the deterrence policies of other states.

The article asks a precise question: does UK nuclear deterrence policy constitute what a "broadly representative" group of international lawyers would consider to be terrorism? If so, then the suggestion that UK policy is terrorism becomes more "credible and authoritative".[10] Subject to

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Press, The Hague 2019. p. 321; I. Primoratz, *State Terrorism and Counterterrorism*, in G. Meggle & A. Kemmerling & M. Textor (Eds.), Ethics of Terrorism & Counter-terrorism, De Gruyter, Berlin, Boston 2013, p. 77.

[4] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226.

[5] B. Drummond, *Is the United Kingdom Nuclear Deterrence Policy Unlawful?*, New Zealand Yearbook of International Law, Vol. 11, 2013, p. 110.

[6] Ibid.

[7] N. D. White, *Understanding nuclear deterrence within the international constitutional architecture*, in J. L. Black-Branch & D. Fleck (Eds.), Nuclear Non-proliferation in International Law - Volume V, T.M.C. Asser Press, The Hague 2020, p. 237.

[8] UK Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs, *The Future of the United Kingdom's Nuclear Deterrent*, White Paper, Cm 6994, 2006, p. 21, point 7, (hereinafter: UK White Paper 2006); a similar statement appears in UK Government Guidance *The UK's Nuclear Deterrent: The Facts*, 16 March 2021, https://www.gov.uk/guidance/the-uks-nuclear-deterrent-the-facts (6 August 2021), sect. 6, (hereinafter: UK Guidance March 2021).

[9] B. Drummond, *UK Nuclear Deterrence Policy: An Unlawful Threat of Force*, Journal on the Use of Force and International Law, Vol. 6, No. 2, 2019, pp. 193-241: see Part 3 below.

[10] O. Schachter, *The Invisible College of International Lawyers*, Northwestern University Law Review, Vol. 72, No. 2, 1977, pp. 219 and 222, uses the phrases quoted in this and the previous and following sentences in suggesting how best to deal with "controversial issues of international law" noting that these "require answers that reflect global positions"; M. Sornarajah, *On Fighting for Global Justice: The Role of a Third World International Lawyer*, Third World Quarterly Vol. 37, No. 11, 2016, pp. 1972-1989, p. 1978, notes "the notion of a college of international lawyers [...] is an ideal. It has never happened that way"; see also L. Leão Soares Pereira & N. Ridi, *Mapping the 'invisible college of*

one serious constraint, this article aims to refer to a body of literature which is "internationally representative […] embracing persons from various parts of the world and from diverse political and cultural groupings".[11] The constraint is that, due to time and resource constraints, this article reflects only English-language literature, and so necessarily largely fails to take into account "all the nuances of this world" which have not "already been expressed in English".[12]

In this context, a necessary first question is: what would a "broadly representative" group of international lawyers consider to be the characteristics of terrorism? To answer that question requires either (i) a survey, for this specific purpose, of a "broadly representative" group of international lawyers; or (ii) an assumption that the views expressed in the literature, by the courts, in international humanitarian law, and among UN member states, on this point reflect the views of a "broadly representative" group of international lawyers. Lacking the resources to design and implement the survey (i), I make the assumption (ii).

Is assumption (ii) plausible? It is possible that the views expressed in the literature, by the courts, in international humanitarian law, and among UN member states reflect the views of only a *minority* of international lawyers. This would, however, require that the *majority* had rarely clearly or publicly expressed their view, let alone their legal reasons for their view. This seems less plausible than assumption (ii), and so supports the plausibility of that assumption, as made in this article.

Many acknowledge the fact that there is no agreement on the definition of terrorism,[13] either in the context of law,[14] or in wider analysis.[15] Some go further and question whether a single coherent definition of the term is possible.[16] Neither of these difficulties is necessarily inconsistent with the existence of general agreement, within international law, on the core characteristics of terrorism. If indeed there is such agreement, then the "complex and significant" difficulties in reaching an agreed definition "should not lead to impunity for clear-cut cases of terrorism".[17] Strictly speaking, without an agreed definition of terrorism in international law, this type of "clear cut case of terrorism" would not in itself be adequate in law for the purposes of responsibility, which is of particular relevance to

international lawyers' through obituaries, Leiden Journal of International Law, Vol. 34. No. 1, 2021, pp. 67–91.

[11] Schachter 1977, p. 222; see also Drummond 2019, p. 201.

[12] The phrases quoted are used in L. Mälksoo, *Civilizational Diversity as Challenge to the (False) Universality of International Law*, Asian Journal of International Law, Vol. 9, No. 1, 2019, p. 164, in recommending that "international law experts [...] in the West [...] tak[e] big non-Western languages seriously in the study of international law […] For example, international lawyers should try to gain a knowledge of either Chinese, Arabic, or Russian".

[13] A. P. Schmid, *The Definition of Terrorism*, in A. P. Schmid (Ed.), The Routledge Handbook of Terrorism Research, Routledge, Abingdon 2011, p. 39.

[14] B. Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, Leiden Journal of International Law, Vol. 24, No. 3, 2011, pp. 683-684.

[15] L. Burns, *Toward a Contemporary Definition of Terrorism*, Forum on Public Policy Online, Vol. 2011, No. 3, 2011, p. 1; C. Card, *Recognizing Terrorism*, Journal of Ethics, Vol. 11, No. 1, 2007, pp. 3-8; V. Held, *Terrorism and War*, Journal of Ethics, Vol. 8, 2004, p. 62; Schmid 2011.

[16] U. Baxi, *The War on Terror and the War of Terror: Nomadic Multitudes, Aggressive Incumbents, and the New International Law; Prefatory Remarks on Two Wars*, Osgoode Hall Law Journal, Vol. 43, No. 1/2, 2005, p. 8; R. Higgins, *The General International Law of Terrorism*, in R. Higgins & M. Flory (Eds.), Terrorism and International Law, Routledge, London 1997, p. 14; J. S. Hodgson & V. Tadros, *The Impossibility of Defining Terrorism*, New Criminal Law Review, Vol. 16, No. 3, 2013, pp. 524-525; R. Jagtap, *Defining International Terrorism: Formulation of a Universal Concept out of the Ideological Quagmires and Overlapping Approaches*, Journal of Philosophy of International Law, Vol. 4, No. 1, 2013, pp. 73-74; A. Richards, *Conceptualising Terrorism*, Studies in Conflict & Terrorism, Vol. 37, 2014, pp. 217-218; A. Tiwari and P. Kashyap, *Countering Terrorism Through Multilateralism: Reviewing the Role of the United Nations*, Groningen Journal of International Law, Vol. 8, No. 1, 2020, pp. 118-119.

[17] M. Gillett & M. Schuster, *Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism*, Journal of International Criminal Justice, Vol. 9, No. 5, 2011, p. 1008.

state actions. Identifying a state activity with such characteristics would, therefore, not necessarily lead to state responsibility. As noted below, however, it may motivate other states and other actors to find other routes in law to constrain the 'offending' state and so bring the activity to an end.

Part 2, therefore, assesses to what extent there is agreement on the core characteristics of activity described as terrorism in international law. Part 3 goes on to consider whether or not UK nuclear deterrence policy has these characteristics. Establishing that UK nuclear deterrence policy has the characteristics of terrorism is, however, quite distinct from assessing whether or not that particular terrorism is constrained by existing terrorism-specific law. Part 4 makes that assessment, and reviews the efforts, in international and UK law, to constrain general and nuclear terrorism. Part 5 notes that these efforts fail to constrain the UK Government. The remaining two parts, respectively, consider the prospects for change and draw conclusions.

The distinctions between (i) unlawfulness, (ii) characteristics of terrorism in an international law context, and (iii) activities within the scope of terrorism-specific international law, are crucial to the analysis in this article.

- If an activity is unlawful (under non-terrorism-specific law) then it has one of the characteristics of terrorism in an international law context (Part 2).

- If such an activity also has other characteristics of terrorism in an international law context, then whether or not it is within the scope of terrorism-specific international law might depend on whether or not the activity is carried out by a state (Parts 2 and 4).

- When unlawful activity, which also has other characteristics of terrorism, is carried out by a state, and is not within the scope of terrorism-specific international law, it may be difficult to enforce the other law under which the state activity is unlawful (Part 5).

This article,[18] therefore, refers to a "broadly representative" group of international lawyers, without claiming that their views might represent "the teachings of the most highly qualified publicists of the various nations" and so be a "subsidiary means for the determination of rules of law" under the ICJ Statute.[19] Assessing which lawyers are "the most highly qualified" might be relevant to establishing the content of international law on terrorism. It is not relevant to establishing the characteristics of activities described as terrorism in the context of international law (the task in Part 2).

The distinctions and facts just noted are also crucial to the motivation of this article. If an activity is unlawful under non-terrorism-specific international law then, at first sight, there might seem no reason to consider whether it is also unlawful as terrorism under international law. The international law analysis of UK nuclear deterrence policy is, however, less straightforward.

- The Treaty on the Prohibition of Nuclear Weapons (hereinafter: TPNW) entered into force earlier this year. The signatories to that treaty consider "that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict" and undertake "never under any circumstances to … threaten to use nuclear weapons".[20]

- There is consensus that, even for states which are not parties to the TPNW, any use or threat of use, of any nuclear weapon, in any circumstance *other* than self-defence, would

[18] In line with Schachter 1977.

[19] ICJ Statute, Art. 38(1)(d).

[20] 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW), UNTC I-56487, Preamble and Article 1(d).

be unlawful.[21]

– There are good arguments that, even for states which are not parties to the TPNW, any use, or threat of use, of any nuclear weapon *even in self-defence* would be unlawful, but there is not consensus on this in the literature, or among states, and the wording of the *Nuclear Weapons* opinion left scope for disagreement on this point.[22]

– The UK is not a party to the TPNW. Current UK policy states that the "UK does not support and will not sign or ratify the Treaty" and claims that the "TPNW risks undermining existing non-proliferation and disarmament efforts, and will not enhance our security". Despite this, there are good arguments that UK nuclear deterrence policy currently constitutes an unlawful threat of force.[23] To date, however, there has been limited engagement with these arguments, and the relevant wording in the *Nuclear Weapons* opinion, while clear on a careful reading, is potentially confusing at first sight.[24]

– Even if, hypothetically, there might be some uses of a nuclear weapon which would be lawful, there are good arguments that the uses of UK weapons contemplated in UK nuclear deterrence policy would be unlawful.[25] These arguments are not currently accepted by the UK,[26] and there is limited scope to hold the UK accountable on this point.[27]

– If, separately from the above arguments, it could be shown that UK policy was unlawful under terrorism-specific international law, then this might be an argument that the UK would accept. The UK could, in theory, do this consistently with denying that the policy is otherwise unlawful: it is true that being otherwise unlawful is a characteristic of terrorism in an international law context; but some activities within the scope of terrorism-specific international law have few of the characteristics of terrorism in international law.[28]

– Even if the UK did not accept an argument that UK policy was unlawful as terrorism under international law, such an argument might persuade some of the authors, states, and other actors who are currently unpersuaded by the arguments that UK policy is otherwise unlawful. If so, this might increase the scope to hold the UK accountable. Pursuing this approach is consistent with a recent analysis which suggests that "no one approach can solve the problem of nuclear weapons" and encourages the pursuit of multiple parallel strategies.[29] The TPNW is one such strategy.[30] Exploring the relevance of terrorism law to nuclear weapons is another.

– In theory, it is more straightforward to consider the actual use of a nuclear weapon, than the threat of such use, both (a) to assess lawfulness, and (b) to prosecute perpetrators of unlawfulness before national or international courts. In practice, however, partly due to the

[21] See second para. of sect. 3.2 below.

[22] Drummond 2019, p. 200.

[23] Drummond 2019.

[24] Ibid. p. 209 and App.

[25] Ibid. pp. 219-232.

[26] Below, nn. 190-191 and related text.

[27] Drummond 2019, pp. 234-239.

[28] Below, Part 4.

[29] P. M. Lewis, *Nuclear weapons as a wicked problem in a complex world*, in N. Bård & V. Steen & O. Njølstad (Eds.), Nuclear Disarmament: A Critical Assessment, Routledge, London 2019, p.57.

[30] Drummond 2019, p. 204.

> significant risk of escalation arising from any use of any nuclear weapon,[31] the consequences of any actual such use are potentially catastrophic. For that reason, it makes sense to do the harder work of assessing the lawfulness of threats such as deterrence and working to achieve compliance with the relevant national and international law applying to such threats.

Thus, the question considered in this paper (does UK nuclear deterrence policy constitute terrorism under international law?) is of practical relevance in the current international context.

Concerns have been raised about what is referred to as 'nuclear terrorism',[32] but again there is not an agreed definition. Having first, in Part 2, considered the characteristics of terrorism in general, subsequent sections of the article will use the phrase 'nuclear terrorism' to refer to activity with these characteristics, which also involves nuclear weapons or materials.

2. Characteristics of Terrorism in International Law

It was suggested in 1997 that terrorism was "a term without any legal significance".[33] Developments in national and international law since then mean that such a view would now be hard to sustain.[34] This Part 2 looks at the activities which are described as terrorism:

- in the international law literature (Section 2.1);
- by the international courts (Section 2.2);
- in international humanitarian law (IHL) (Section 2.3); and
- among UN member states (Section 2.4.).

The limited aim here is to establish what agreement there is within, and between, these communities.[35]

2.1. Descriptions of Terrorism in the International Law Literature

In the international law literature, there is widespread agreement that violence which aims to

[31] Ibid. n. 232 and related text.

[32] A. Arbatov & V. Dvorkin & A. Pikaev, *Nuclear Terrorism: Political, Legal, Strategic, and Technological Aspects*, Russian Politics and Law, Vol. 46, No. 1, 2008, p. 50 (L. Galperin (Tr.), Mirovaia Ekonomika i Mezhdunarodnye Otnosheniia, Vol II, 2006, p. 3); C. C. Joyner, *Countering Nuclear Terrorism: A Conventional Response*, European Journal of International Law, Vol. 18, No. 2, 2007, pp. 227-229; M. K. Khan, *A Pakistani Perspective on WMD Terrorism*, Strategic Studies, Vol. 31, No. 3, 2011, p. 206; X. Liping, *Nuclear Terrorism and International Prevention Regimes*, China International Studies, Vol. 16, 2009, p. 24.

[33] Higgins 1997, p. 28; V.-J. Proulx, *A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty*, Harvard National Security Journal, Vol. 11, No. 1, 2020, p. 172.

[34] J. D. Fry, *The Swindle of Fragmented Criminalization: Continuing Piecemeal Responses to International Terrorism and Al Qaeda*, New England Law Review, Vol. 43, No. 3, 2009, pp. 400, 413-414; P. Hilpold, *The Evolving Right of Counter-terrorism: An Analysis of SC Resolution 2249 (2015) in View of some Basic Contributions in International Law Literature*, QIL Zoom-out, Vol. 24, 2016, pp. 30, 33-34; S. Margariti, *Defining International Terrorism to Protect Human Rights in the Context of Counter-terrorism*, Security and Human Rights, Vol. 29, 2018, p. 185; D. Moeckli, *Emergence of Terrorism as a Distinct Category of International Law*, Texas International Law Journal, Vol. 44, No. 2, 2008, p. 157.

[35] The existence of such agreement is suggested by Gillett & Schuster 2011, p. 1008; and Proulx 2020, p. 160.

create fear in order to coerce constitutes terrorism.[36] Some suggest that not all three are necessarily present in all terrorist acts.[37] Some suggest that terrorism also necessarily involves violence which does not discriminate between combatants and non-combatants,[38] or that it is necessarily targeted at civilians,[39] but there is less agreement on these suggestions.[40] There is also less agreement on

[36] T. Altwicker, *Explaining the Emergence of Transnational Counter-terrorism Legislation in International Law-making*, Finnish Yearbook of International Law, Vol. 24, 2014, p. 4; M. V. Andreev, *International Terrorism as a Key Threat to Security in the XXIst Century*, Bulletin of the Kazan Law Institute of MIA of Russia, Vol. 9, No. 1, 2018, pp. 84-85; M. C. Bassiouni, *Legal Control of International Terrorism: A Policy-oriented Assessment*, Harvard International Law Journal, Vol. 43, No. 1, 2002, p. 84; Begorre-Bret 2006, p. 1995; J. Blackbourn & F. F. Davis & N. C. Taylor, *Academic Consensus and Legislative Definitions of Terrorism: Applying Schmid and Jongman*, Statute Law Review, Vol. 34, No. 3, 2012, pp. 260-261; A. C. Brown, *Hard Cases Make Bad Laws: An Analysis of State-sponsored Terrorism and its Regulation under International Law*, Journal of Conflict and Security Law, Vol. 2, No. 2, 1997, p. 137; N. Gal-Or, *The Formation of a Customary International Crime: Global Terrorism Human (In)Security*, International Criminal Law Review, Vol. 15, No. 4, 2015, pp. 666-669; M. Hanson, *State Sponsorship: An Impediment to the Global Fight against Terrorism*, Groningen Journal of International Law, Vol. 7, No. 2, 2020, p. 133; A. A. Idowu, *Terrorism and Terrorist acts: Revisiting the USA - Nigeria Connection of 25 December, 2009*, KNUST Law Journal, Vol. 6, 2014, p. 49; Institute for Economics & Peace, *Global Terrorism Index 2020: Measuring the Impact of Terrorism*, https://www.economicsandpeace.org/reports/ (6 August 2021), p. 6; R. Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, in A. Bianchi (Ed.), Enforcing International Law Norms against Terrorism, Hart Publishing, Oxford 2004, p. 227, at pp. 238-239 and 277; A. Kuznetcov & V. Kuznetcov, *The Legal Definition of Terrorism in the United States and Russia*, World Applied Sciences Journal, Vol. 28, No. 1, 2013, p. 133; Richards 2014, p. 230; O. Schachter, *The Extraterritorial Use of Force against Terrorist Bases*, Houston Journal of International Law, Vol. 11, 1989, p. 309; B. Van Schaack, *Finding the Tort of Terrorism in International Law*, Review of Litigation Vol. 28, No. 2, 2008, p. 429; R. Värk, *Terrorism, State Responsibility and the Use of Armed Force*, Estonian National Defence College Proceedings, Vol. 14, 2011, p. 81; T. Weigend, *The Universal Terrorist: The International Community Grappling with a Definition*, Journal of International Criminal Justice, Vol. 4, 2006, pp. 916-917; R. Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, Boston College International and Comparative Law Review, Vol. 29, 2006, p. 33; S. Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World*, Hastings International and Comparative Law Review, Vol. 29, No. 2, 2006, p. 217.

[37] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-O1/I (16 February 2011), at [85]; A. K. Amet, *Terrorism and International Law: Cure the Underlying Problem, not just the Symptom*, Annual Survey of International & Comparative Law, Vol. 19, No. 1, 2013, pp. 30-31; D. Blöcher, *Terrorism as an International Crime: The Definitional Problem*, Eyes on the ICC, Vol. 8, No. 1, 2011, pp. 124-125; G. P. Fletcher, *The Indefinable Concept of Terrorism*, Journal of International Criminal Justice, Vol. 4, No. 5, 2006, p. 911; K. Hardy & G. Williams, *What is Terrorism? Assessing Domestic Legal Definitions*, UCLA Journal of International Law and Foreign Affairs, Vol. 16, No. 1, 2011, pp. 92-96; N. Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, Santa Clara Journal of International Law, Vol. 8, 2010, pp. 19-20.

[38] Begorre-Bret 2006, p. 1996; L. M. Olson, *Prosecuting Suspected Terrorists: The War on Terror Demands Reminders about War, Terrorism, and International Law*, Emory International Law Review, Vol. 24, No. 2, 2011, p. 488.

[39] Andreev 2018, p. 84; Blackbourn & Davis & Taylor 2012, pp. 260-261; I. Braber, *The Thorny Nature of a Terrorism Definition in International Law*, IUP Journal of International Relations, Vol. 10, No. 1, 2016, p. 48 and 50; I. I. Chiha, *Redefining Terrorism under the Mubarak Regime: Towards a New Definition of Terrorism in Egypt*, Comparative and International Law Journal of Southern Africa, Vol. 46, No. 1, 2013, p. 91 and 113; F. de Londras, *Terrorism as an International Crime*, in W. A. Schabas & N. Bernaz (Eds.), Routledge Handbook of International Criminal Law, Routledge, London 2010, p. 170; M. Di Filippo, *The Definition(s) of Terrorism in International Law*, in B. Saul (Ed.), Research Handbook on International Law and Terrorism, Edward Elgar Publishing, Cheltenham, Northampton 2014, p. 16; Gal-Or 2015, p. 678; Greene 1992, p. 477; Jagtap 2013, p. 73; Poettcker 2019, pp. 317-319; K. Roach, *Defining Terrorism: The Need for a Restrained Definition*, in C. Forcese & N. LaViolette (Eds.), The Human Rights of Anti-terrorism, Irwin Law, Toronto 2008, p. 98 and 127; J. Satterley, *Terrorism in the Eye of the Beholder: The Imperative Quest for a Universally Agreed Definition of Terrorism*, Kent Student Law Review, Vol. 2, 2015, p. 8 and 16; Young 2006, p. 64; Zeidan 2006, p. 232.

[40] Blöcher 2011, p. 122; A. Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Springer-Verlag, Berlin, Heidelberg 2010, pp. 26-27; Fletcher 2006, p. 904; T. M. Franck & B. B. Lockwood, *Preliminary Thoughts towards an International Convention on Terrorism*, American Journal of International Law, Vol. 68, No. 1, 1974, pp. 80-82; Gal-Or 2015, n. 59; Greene 1992, p. 487; R. Grozdanova, *'Terrorism' – Too Elusive a Term for an International Legal*

whether the coercion must be politically motivated,[41] or done by an organisation.[42]

The inclusion of threats as terrorist acts is also widely recognised in the law literature,[43] though there are some authors who challenge such inclusion.[44] Beyond the international law context, the fact that terrorism includes threats also emerges from the non-legal literature.[45]

There is widespread recognition in the law literature that states can commit terrorist acts,[46] despite

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Definition?, Netherlands International Law Review, Vol. 61, No. 3, 2014, p. 322; Held 2004, pp. 63-68; Higgins 1997, pp. 14-15 and 28; Hodgson & Tadros 2013, pp. 510-517; Kolb 2004, pp. 234-235; R. Lavalle, *A Politicized and Poorly Conceived Notion Crying out for Clarification: The Alleged Need for a Universally Agreed Definition of Terrorism*, Heidelberg Journal of International Law, Vol. 67, 2007, pp. 104-105, 110; M. Mancini, *Defining Acts of International Terrorism in Time of Armed Conflict: Italian Case Law in the Aftermath of September 11, 2001 Attacks*, Italian Yearbook of International Law, Vol. 19, 2009, pp. 118-119; M. O. Ochieng, *The Elusive Legal Definition of Terrorism at the United Nations: An Inhibition to the Criminal Justice Paradigm at the State Level*, Strathmore Law Journal, Vol. 3, 2017, p. 81; A. V. Orlova & J. W. Moore, *Umbrellas or Building Blocks: Defining International Terrorism and Transnational Organized Crime in International Law*, Houston Journal of International Law, Vol. 27, No. 2, 2005, p. 274; J. J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, Santa Clara Journal of International Law, Vol. 8, No. 1, 2010, at p. 59; Richards 2014, p. 221, and 226-227; S. Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, ILSA Journal of International & Comparative Law, Vol. 9, 2002, pp. 361-363 and 379-381; Young 2006, pp. 46, 54 and 94.

[41] M. Aksenova, *Conceptualizing Terrorism: International Offence or Domestic Governance Tool?*, Journal of Conflict and Security Law, Vol. 20, No. 2, 2015, pp. 283-284; M. J. Borgers, *Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences*, New Journal of European Criminal Law, Vol. 3, No. 1, 2012, sect. 3.2; E. C. Ezeani, *The 21st Century Terrorist: Hostis Humani Generis?*, Beijing Law Review, Vol. 3, No. 4, 2012, p. 160.

[42] Di Filippo 2014, p. 5, 17 and 19.

[43] Altwicker 2014, p. 4; Andreev 2018, p. 85; Begorre-Bret 2006, p. 1995; Borgers 2012, p. 70; Brown 1997, p. 137; Ezeani 2012, p. 159; Grozdanova 2014, pp. 311-312; Jagtap 2013, p. 66; Kuznetcov & Kuznetcov 2013, p. 133; Ochieng 2017, pp. 83-84; Orlova & Moore 2005, pp. 290-291, 310; Paust 2010, p. 65; Poettcker 2019, pp. 317-319; Schachter 1989, p. 309; Tiefenbrun 2002, p. 360, 362, 379 and 383; Värk 2011, p. 81; Weigend 2006, pp. 916-917.

[44] Chiha 2013, pp. 105-106, 109; Hodgson & Tadros 2013, pp. 509-510.

[45] Primoratz 2013, p. 70; D. Rodin, *Terrorism without Intention*, Ethics, Vol. 114, No. 4, 2004, p. 756; Schmid 2011, p. 80 and 86; A. Schwenkenbecher, *Terrorism, Supreme Emergency and Killing the Innocent*, Perspectives: Review of International Affairs, Vol. 17, No. 1, 2009, p. 106; T. Shanahan, *The Definition of Terrorism*, in R. Jackson (Ed.), Routledge Handbook of Critical Terrorism Studies, Routledge, London, New York 2016, p. 110; J. Teichman, *How to Define Terrorism*, Philosophy, Vol. 64, No. 250, 1989, p. 511; Vanaik 2010, p. 11.

[46] U. D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, Denver Journal of International Law and Policy, Vol. 37, No. 4, 2009, p. 679; Amet 2013, p. 31; R. Arnold, *The Prosecution of Terrorism as a Crime against Humanity*, Heidelberg Journal of International Law, Vol. 64, 2004, pp. 996-997, 999; A. U. Bâli, *International Law and the Challenge of Terrorism*, Journal of Islamic Law and Culture, Vol. 9, No. 2, 2004, p. 13; Bassiouni 2002, p. 84; Baxi 2005, p. 23; Begorre-Bret 2006, p. 1990 and 2002; Braber 2016, n. 36; B Broomhall, *State Actors in an International Definition of Terrorism from a Human Rights Perspective*, Case Western Reserve Journal of International Law, Vol. 36, No. 2, 2004, pp. 432-433, 437 and 441; Brown 1997, pp. 140-141; L. Donohue, *Terrorism and the Counter-terrorist Discourse*, in V. V. Ramraj & M. Hor & K. Roach (Eds.), Global Anti-terrorism Law and Policy, Cambridge University Press, Cambridge, 2005, p. 16, 17 and 28; E. U. Ejeh & A. I. Bappah & Y. Dankofa, *Nature of Terrorism and Anti-terrorism Laws in Nigeria*, Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol. 10, No. 2, 2019, pp. 190-191; Ezeani 2012, p. 168; Fletcher 2006, p. 905; Franck & Lockwood 1974, p. 90; J. Friedrichs, *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism*, Leiden Journal of International Law, Vol. 19, No. 1, 2006, pp. 69-91; Greene 1992, p. 463 and 482; Grozdanova 2014, pp. 323-326 and 333-334; Hanson 2020, pp. 133-135; Higgins 1997, p. 27; Hodgson & Tadros 2013, p. 524; Jagtap 2013, p. 72; Kolb 2004, p. 235; P. Kovács, *The United Nations in the Fight against International Terrorism*, Miskolc Journal of International Law, Vol. 1, No. 1, 2004, n. 60 and 61; Margariti 2018, pp. 186-187; A. Marsavelski, *The Crime of Terrorism and the Right of Revolution in International Law*, Connecticut Journal of International Law, Vol. 28, No. 2, 2013, p. 266; P. A. Mazandaran, *An International Legal Response to an International Problem: Prosecuting International Terrorists*, International Criminal Law Review, Vol. 6, No. 4, 2006, pp. 511-512; S. Mazzochi, *The Age*

a few authors questioning this idea,[47] and also despite the reluctance of some states to explicitly acknowledge this possibility.[48] Again, the fact that states engage in terrorism also emerges from the non-legal literature.[49]

It is often suggested that a criminal act is a necessary element of terrorism,[50] but the better view appears to be that only an unlawful act is necessary.[51] The nature of the unlawfulness may depend on the legal nature of the person carrying out the act. For example, dealing with state crime or violence under national or international law differs, in many respects, from dealing with non-state crime or

of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and for All, Northern Illinois University Law Review, Vol. 32, No. 1, 2011, p. 89; Ochieng 2017, pp. 71-72; Orlova & Moore 2005, pp. 278-279 and 305-307; Paust 2010, p. 53; S. Peers, *EU Responses to Terrorism*, International and Comparative Law Quarterly, Vol. 52, No. 1, 2003, pp. 234-235; Poettcker 2019, pp. 317-318; Y. Ronen, *Incitement to Terrorist Acts and International Law*, Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 673; J. Santana, *In the Aftermath of Resolution 1373: Tackling the Protective Veil of Counter-terrorism*, Cardozo Journal of International and Comparative Law, Vol. 23, No. 3, 2015, p. 666, and 675; Satterley 2015, pp. 9-11; B. Saul, *Definition of 'Terrorism' in the UN Security Council: 1985–2004*, Chinese Journal of International Law, Vol. 4, No. 1, 2005, p. 147; M. Scalabrino, *Fighting against International Terrorism: The Latin American Response*, in A. Bianchi (Ed.), Enforcing International Law Norms against Terrorism, Hart Publishing, Oxford 2004, pp. 168-169 and 208; Tiefenbrun 2002, n. 113; J. Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, New England Journal of International and Comparative Law, Vol. 8, No. 2, 2002, n. 32; Van Schaack 2008, pp. 439-440; Värk 2011, pp. 75-76 and 82; A. Ware, *Rule of Force or Rule of Law - Legal Responses to Nuclear Threats from Terrorism, Proliferation, and War*, Seattle Journal for Social Justice, Vol. 2, No. 1, 2003, p. 261; Weigend 2006, p. 918; Zeidan 2006, p. 227 and 230-232.

[47] de Londras 2010, p. 168; Lavalle 2007, n. 5; Young 2006, p. 101; other authors, such as Altwicker 2014, p. 4, appear to implicitly rule out state terrorism.

[48] A. R. Ahmad, *The ASEAN Convention on Counter-Terrorism 2007*, Asia-Pacific Journal on Human Rights and the Law, Vol. 14, 2013, p. 104; Donohue 2005, p. 20, citing Stohl; E. Dumitriu, *The EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, German Law Journal, Vol. 5, No. 5, 2004, pp. 600-601; Friedrichs 2006, pp. 71-83; Young 2006, p. 101.

[49] M. I. Balcon, *How Nuclear Deterrence during the Cold War Shaped the Definition of Terrorism*, thesis, De La Salle University, 2017; R. Blakeley, *Bringing the State back into Terrorism Studies*, European Political Science, Vol. 6, No. 3, 2007, pp. 228-235; R. English, *The Future Study of Terrorism*, European Journal of International Security, Vol. 1, No. 2, 2016, p. 136; Held 2004, pp. 62-63; D. Heradstveit & D. C. Pugh, *The Rhetoric of Hegemony: How the Extended Definition of Terrorism Redefines International Relations*, Norwegian Institute of International Affairs, Oslo, 2003, https://nupi.brage.unit.no/nupi-xmlui/handle/11250/2395224 (6 August 2021) p. 12; R. Jackson, *Review: 'Terror in our time' and 'State terrorism and neoliberalism'*, State Crime Journal, Vol. 3, No. 1, 2014, pp. 129-130; A. M. Jaggar, *Responding to the Evil of Terrorism*, Hypatia, Vol. 18, No. 1, 2003, p. 176; V. Medina, *Terrorism Always Unjustified and Rarely Excused: Author's Reply*, Reason Papers, Vol. 41, No. 1, 2019, p. 56; L. Nader, *Rethinking Salvation Mentality and Counterterrorism*, Transnational Law & Contemporary Problems, Vol. 21, 2012-2013, pp. 114-117; Primoratz 2013, pp. 70-71; E. Reitan, *Defining Terrorism for Public Policy Purposes: The Group-target Definition*, in T. Brooks (Ed.), Just War Theory, Brill, Leiden, Boston 2013, p. 205; Rodin 2004, p. 755 and 758-759; Schmid 2011, pp. 68-70 and 86-87; Shanahan 2016, pp. 108-109; J. Sluka, *Introduction: State Terror and Anthropology*, in J. Sluka (Ed.), Death Squad: The Anthropology of State Terror, University of Pennsylvania Press, Philadelphia, 2000; Teichman 1989, pp. 509-510.

[50] STL-11-01/I 2011, [85]; K. Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?*, Leiden Journal of International Law, Vol. 24, No. 3, 2011, p. 673; Borgers 2012, p. 79; Gal-Or 2015, p. 679; Ochieng 2017, p. 78 and 81.

[51] Institute for Economics & Peace 2020, p. 6, citing the Global Terrorism Database; D. Baragwanath, *Responding to Terrorism: Definition and Other Actions*, Nigerian Yearbook of International Law, 2017, p. 45; Blöcher 2011, p. 120; Braber 2016, p. 45; Chiha 2013, p. 103, 105, 109, 114 and 118; Conte 2010, p. 35; Fletcher 2006, pp. 901-902; Gal-Or 2015, pp. 679-680; Grozdanova 2014, p. 333; Hanson 2020, p. 133; Higgins 1997, p. 28; C. C. Joyner 2007, p. 247; Mancini 2009, p. 117; Orlova & Moore 2005, p. 290 and 310; Paust 2010, n. 34; Saul 2011, pp. 689-690 and 697-698; Tiefenbrun 2002, pp. 379-380 and 382; Weigend 2006, pp. 916-917 and 922-923; Young 2006, p. 56, 91 and 96.

violence,[52] and the UN Charter provisions on the use of force only apply to states.[53] Generally an activity which constitutes terrorism will be unlawful by reference to some international or national law which is not specific to terrorism.

In summary, there is widespread consensus in the international law literature that terrorism refers to activities which:

(a) involve violence (or threat of violence), fear and coercion,

(b) are unlawful by reference to law which is not terrorism-specific, and

(c) can, in principle, include state activity.

2.2. Descriptions of Terrorism in International Law Courts

At first glance, the position might appear to be straightforward. In 2011, the Special Tribunal for Lebanon held that:

"a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act […] or threatening such an act; (ii) the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element".[54]

This finding immediately met, however, with a range of criticism, some of it severe, from many authors on multiple grounds.[55] Although the responses of other authors partially address some of these criticisms,[56] it seems premature to accept the decision as a simple statement of customary law. In this context, for the purposes of this article, the decision will be treated as important, but not as a definitive statement of customary international law.

The nature of terrorism also featured in a 2012 Judgement rendered by the Special Court for Sierra Leone. This identified that the required elements of the crime of 'acts of terrorism' included "Acts or threats of violence directed against persons or their property […] with the primary purpose of spreading terror among protected persons", regardless of the existence of other purposes, and regardless of whether or not the acts or threats in fact produced terror.[57] The 2012 judgement

[52] J. Balint, *The 'Mau Mau' Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment*, Critical Analysis of Law, Vol. 3, 2016, pp. 261-285; Di Filippo 2014, p. 4; Dumitriu 2004, pp. 601-602; M. Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention*, Journal of International Criminal Justice, Vol. 4, 2006, pp. 1039-1040; below, nn. 250-258 and related text.

[53] Jagtap 2013, pp. 61-62.

[54] STL-11-O1/I 2011, [85].

[55] Aksenova 2015, p. 297; Ambos 2011; Gillett & Schuster 2011; S. Margariti, *Defining International Terrorism, between State Sovereignty and Cosmopolitanism*, T.M.C. Asser Press, The Hague 2017, pp. 135-138; Proulx 2020, pp. 181-182; Saul 2011.

[56] Gal-Or 2015, p. 677 and 679; Marsavelski 2013, pp. 245-262; L. Moll, *Developments in the Bases of the International Obligation to Repress the Crime of Terrorism*, ISIL Year Book of International Humanitarian and Refugee Law, Vol. 10, 2010, pp. 7-13; M. J. Ventura, *Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?*, Journal of International Criminal Justice, Vol. 9, No. 5, 2011, pp. 1027-1035.

[57] *Prosecutor v. Charles Ghankay Taylor* (Judgement) SCSL-03-01-T (18 May 2012) paras. 403-405.

identified this as a *war* crime of 'acts of terrorism' which "is firmly established in customary international law",[58] and distinguished it from the crime of terrorism in time of *peace*, which had featured in the Special Tribunal for Lebanon decision.[59]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) dealt with the nature of the 'crime of terror,'[60] rather than 'terrorism'.[61] The ICTY is not separately discussed here, partly because terror and terrorism are not necessarily identical,[62] and partly because the Lebanon and Sierra Leone decisions cited above make extensive reference to relevant ICTY cases.

The 2011 Special Tribunal for Lebanon notion of terrorism included threats,[63] and even among those critical of the decision, at least some accept that threats are one form of terrorism.[64] The Special Court for Sierra Leone likewise included threats in its 2012 characterisation of terrorism.[65]

Thus, of the three characteristics of terrorism emerging from the literature, international courts have confirmed the first (violence or threat of violence, fear and coercion), and to a lesser extent the second (unlawfulness by reference to non-terrorism-specific law), but have had no cause to comment on the third (the inclusion, in principle, of state activity).

2.3. Descriptions of Terrorism in International Humanitarian Law

Several areas of international law are potentially affected by, and relevant to activities described as terrorism. Among others, these areas include international human rights law and international refugee law, where the links to terrorism are regularly mentioned in commentaries and UN resolutions.[66] Two areas of law, however, also refer to terrorism in their principal sources and these are considered in this section and the following one.

Several mentions of terrorism appear in the context of international humanitarian law (IHL). Measures of terrorism are prohibited under the 1949 Geneva Conventions,[67] but the term is not defined there. The 1958 International Committee of the Red Cross (ICRC) commentary likewise offers no definition, noting that the term terrorism has "so often been used lightly, and applied to […] trivial offences".[68] It does, however, suggest that terrorism requires unlawful conduct,[69] and that terrorism can refer to state acts.[70] Acts of terrorism are prohibited under the 1977 Additional Protocol II,[71] but again are undefined therein. The 1987 ICRC commentary suggests that "terrorism

[58] Ibid. para. 409.

[59] Ibid. paras. 408-410.

[60] *E.g., Prosecutor v. Dragomir Milošević* (Judgement) IT-98-29/1-T (12 December 2007) paras. 24-41.

[61] A. Kleczkowska, *Why there is a Need for an International Organ to Try the Crime of Terrorism - Past Experiences and Future Opportunities*, Hungarian Journal of Legal Studies, Vol. 60, No. 1, 2019, pp. 57-58.

[62] IT-98-29/1-T 2007, p. 146, Partly Dissenting Opinion of Judge Liu Daqun, paras. 27-28.

[63] STL-11-01/I 2011.

[64] Ambos 2011, p. 672 and 673; Margariti 2017, p. 159.

[65] Above, n. 57 and related text.

[66] Conte 2010, p. 369.

[67] 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, Art. 33.

[68] J. S Pictet (Ed.), *The Geneva Conventions of 12 August 1949, Commentary IV*, International Committee of the Red Cross, Geneva 1958, p. 53.

[69] Ibid. p. 31.

[70] Ibid. p. 341.

[71] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, Art. 4.

is understood to be the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack".[72] It also notes that threats of violence are a type of terrorism.[73]

"Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" by 1977 Additional Protocols I and II.[74] The ICRC commentary suggests that these provisions are intended only to prohibit such threats or acts which do not "offer substantial military advantage".[75]

The IHL understanding of terrorism, and terror,[76] thus confirm the first characteristic of terrorism noted in the wider literature:[77] violence, including threats, and coercion by spreading fear. To a lesser extent, the IHL understanding also confirms the second and third of these characteristics (unlawfulness by reference to non-terrorism-specific law, and the potential for state terrorism).

2.4. Descriptions of Terrorism among UN Member States

In recent decades UN member states have responded collectively in a range of other ways to terrorism,[78] including through international conventions and protocols relating to terrorism.[79]

The wording of a 1994 UN General Assembly declaration describes terrorism as "[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes".[80] Although the declaration was adopted by consensus without a vote, the debate at the time of its adoption makes clear that it does not amount to an agreed definition.[81] That said, a declaration can be taken to carry greater weight than a normal resolution,[82] and creates a "strong expectation" that "Members of the international community will

[72] Y. Sandoz & C. Swinarski & B. Zimmermann (Eds.), *Commentary on the Additional Protocols*, International Committee of the Red Cross, Geneva 1987, p. 526.

[73] Ibid. p. 1375.

[74] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, Art. 51(2); Protocol II 1977, Art. 13.

[75] Sandoz & Swinarski & Zimmermann 1987, p. 618 and 1448.

[76] Above, nn. 60-62 and related text.

[77] Arnold 2004, p. 980.

[78] I. A. Attia, *Do the United Nations' Terrorism-related Conventions Prohibit and Suppress 'Terrorism' Acts Committed by 'Terrorists'?*, Bristol Law Review, Vol. 5, 2018, pp. 171-194; Conte 2010, pp. 19-27.

[79] Below, nn. 194-201 and related text.

[80] GA Res. 49/60, 9 December 1994, Art. 3.

[81] Saul 2011, pp. 697-698.

[82] J. Isanga, *Counter-terrorism and Human Rights: The Emergence of a Rule of Customary Int'l Law from U.N. resolutions*, Denver Journal of International Law and Policy, Vol. 37, No. 2, 2009, pp. 245-246 and sources cited therein; Moll 2010, pp. 2-3.

abide by it".[83] The 1994 declaration followed many previous resolutions on terrorism,[84] and has been recalled and reaffirmed in many subsequent resolutions, most recently in December 2020.[85]

The UN process aiming for a comprehensive convention against terrorism has been ongoing for over 20 years,[86] mainly due to states being unable to agree on a definition of terrorism. This lack of agreement is, however, almost entirely due to only two issues: whether or not the definition should include state actions, and whether or not the definition should explicitly recognise a right, of peoples under foreign occupation, to resistance.[87]

Agreement was reached on a convention to suppress financing of terrorism[88] which (implicitly)[89] describes terrorism as an "act intended to cause death or serious bodily injury [...] when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".[90] High level recommendations[91] that this be adopted as a general definition of terrorism have not been accepted: the definition in the most recent draft of the UN comprehensive convention against international terrorism incorporatessome features of the financing convention definition, but differs from it in several respects.[92]

The 2004 UN Security Council (UNSC) Resolution 1566, often cited in this context,[93] was narrowly limited to acts "which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism".[94] The words immediately preceding that phrase are:

"criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act […]".[95]

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[83] Isanga 2009, p. 246, quoting Office of International Standards and Legal Affairs, *General Introduction to the Standard-Setting Instruments of UNESCO*, at Declarations, http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html (6 August 2021).

[84] Acharya 2009, pp. 664-665, Chiha 2013, pp. 95-97, and Moll 2010, pp. 3-4.

[85] GA Res. 75/145, 15 December 2020, Preamble and Art. 18.

[86] K. Iqbal & N. A. Shah, *Defining Terrorism in Pakistani Anti-terrorism Law*, Global Journal of Comparative Law, Vol. 7, No. 2, 2018, pp. 280-283 and 286; Hmoud 2006; GA Res. 75/145, Art. 5.

[87] A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, paras. 157-161; Ezeani 2012, pp. 158-159; Jagtap 2013, pp. 71-73; Proulx 2020, pp. 159-160.

[88] 2000 International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197, Art. 2.

[89] See below, nn. 197-199 and related text.

[90] Margariti 2017, pp. 147-153; Roach 2008, p. 126; L Turney-Harris, *The Development of a United Nations Counter Terrorism Policy: A Pragmatic Approach to the Problem of a Definition of Terrorism*, Masters thesis, University of Helsinki, 2014.

[91] A/59/565 2004, para. 164; A Global Strategy for Fighting Terrorism: Secretary-General's keynote address to the closing plenary of the International Summit on Democracy, Terrorism and Security, 10 March 2005, https://www.un.org/sg/en/content/sg/statement/2005-03-10/secretary-generals-keynote-address-closing-plenary-international (6 August 2021).

[92] Margariti 2017, pp. 153-156; see also below, nn. 99-101 and related text.

[93] Baragwanath 2018, p. 30; Chiha 2013, pp. 100-101; Hardy & Williams 2011, pp. 92-100.

[94] SC Res. 1566 (2004), 8 October 2004, Art. 3; Iqbal & Shah 2018, p. 279; Lavalle 2007, p. 100; Margariti 2017, pp. 133-134; Saul 2011, p. 686; Värk 2011, p. 80.

[95] SC Res. 1566 (2004), 8 October 2004, Art. 3.

If anything can be implied from these words, in terms of a generic description of terrorism:

- the frequent use of the word 'or' has the effect that the acts need not necessarily have any purpose of intimidation or provoking terror; and
- the word "including" suggests that civilian targets are not necessarily a feature of terrorism.

Subsequent Security Council resolutions give no guidance on the meaning of terrorism,[96] despite their increasing length and frequency.[97]

Several recent UN multilateral terrorism-related treaties include threats among the offences,[98] as does the most recent draft of the UN comprehensive convention against international terrorism.[99] There appears to be no ongoing disagreement on the inclusion of threats within the comprehensive convention definition,[100] although the relevant committee has not met since 2013.[101] Among the 11 regional legal responses to terrorism, six of them include threats,[102] one includes "threat […] withthe intent to […] act",[103] one does not include threats,[104] and the remaining three[105] limit terrorist acts to those specified in worldwide UN instruments.[106]

Wording in the 1994 declaration, echoed in other instruments, suggests that terrorism acts can be committed by states:[107] "all acts, methods and practices of terrorism […] wherever and by whomever committed".[108] Some Security Council resolutions explicitly acknowledge that states can commit acts of terrorism.[109] In April 2019 the US and Iran each officially designated the armed forces of the other as terrorist organisations.[110] All that said, the delay in finalising a comprehensive terrorism

[96] Ochieng 2017, pp. 71-72; Tiwari & Kashyap 2020, pp. 117-118.

[97] D. McKeever, *Revisiting Security Council Action on Terrorism: New threats; (a Lot of) New Law; Same Old Problems?*, Leiden Journal of International Law, Vol. 34, No. 2, 2021, pp. 441–470.

[98] See below, nn. 214, 218 and related text.

[99] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Sixteenth session (8 to 12 April 2013) A/68/37, Ann. I, draft Art. 2(2).

[100] Ibid.

[101] https://legal.un.org/committees/terrorism/reports.shtml (6 August 2021).

[102] 1999 African Union Convention on the Prevention and Combating of Terrorism, 2219 UNTS 179, Art. 1(3)(b); 1998 Arab Convention for the Suppression of Terrorism, Art. 1(2); European Parliament and of the Council Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, OJ L 88, 31.3.2017, Art. 3 , No. 1,(i); 1999 Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 2867 UNTS, Art. 1; 1999 Convention of the Organisation of the Islamic Conference on Combatting International Terrorism, Art. 1(2); 2009 Convention of the Shanghai Cooperation Organization against Terrorism, 2815 UNTS, Art. 2,1.(2).

[103] 1999 OAU (Organization of African Unity) Convention on the Prevention and Combating of Terrorism, 2219 UNTS 179, Art. 1,3.(b), and 2004 Protocol thereto.

[104] 1987 SAARC (South Asian Association for Regional Cooperation) Regional Convention on Suppression of Terrorism, Art. 1(e)-(f), and 2004 Additional Protocol thereto.

[105] 2007 ASEAN (Association of Southeast Asian Nations) Convention on Counter-Terrorism; 2005 Council of Europe Convention on the Prevention of Terrorism, 2488 UNTS, 2015 Additional Protocol thereto; 2002 Inter-American Convention Against Terrorism.

[106] See below, nn. 194-201 and related text.

[107] Baxi 2005, p. 20; Margariti 2017, p. 151; Norberg 2010, pp. 24-25; Paust 2010, p. 53 and 58; Turney-Harris 2014, pp. 25-26.

[108] GA Res. 49/60, Art. 1.

[109] SC Res. 687 (1991), 3 April 1991; SC Res. 748 (1992), 31 March 1992; SC Res. 1189 (1998), 13 August 1998; Baxi 2005, pp. 22-23; Hodgson & Tadros 2013, p. 522; Saul 2005, p. 147 and 149.

[110] J. Galbraith, *The State Department Designates Iran's Islamic Revolutionary Guards Corps as a Foreign Terrorist Organization*, American Journal of International Law, Vol. 113, No. 3, 2019, pp. 609-612.

convention partly reflects disagreement on whether or not the definition of terrorism should include state acts.[111] Several terrorism treaties explicitly exclude state military action from their scope.[112]

Of the three agreed characteristics of terrorism from the literature, UN member states agree on the first (violence or threat of violence, fear and coercion), and to a lesser extent the second (unlawfulness by reference to non-terrorism-specific law) but are in ongoing disagreement on the third (the inclusion, in principle, of state activity).

2.5. Characteristics of Terrorism: Conclusions

At this stage it appears clear that activities which:

(a) involve violence (or threat of violence), fear and coercion, and

(b) are unlawful by reference to international or national law which is not specific to terrorism,

(c) when carried out by a non-state actor,

are widely seen to constitute terrorism. There is also widespread agreement in the literature that state activities with the first two of these characteristics will constitute terrorism. Despite this, some UN member states argue, in some contexts, that activities do not constitute terrorism if they are undertaken by states.[113] These same states show, however, in other contexts, that they accept that some state activity constitutes terrorism.[114] This inconsistency among states, despite the otherwise widespread consensus, currently prevents a clear conclusion that state activity can constitute terrorism under international law.

3. UK Nuclear Deterrence has these Characteristics of Terrorism

Only some aspects of UK nuclear deterrence policy, as expressed in official UK Government statements, are relevant to, and quoted in, the analysis that follows. Other aspects of the policy and weapons are well analysed and documented elsewhere.[115]

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[111] Above, n. 87 and related text.

[112] Broomhall 2004, p. 431; Greene 1992, p. 468, 480-481, and 483; see below, nn. 222-228 and related text.

[113] Above, n. 87 and related text.

[114] Above, nn. 109, 110 and related text.

[115] Drummond 2013, pp. 111-115; Drummond 2019, sect. 2.2; R. Johnson & A. Zelter (Eds.), *Trident and International Law, Scotland's Obligations*, Luath Press, Edinburgh 2011; R. K. Murray, *Nuclear Weapons and the Law*, Medicine, Conflict and Survival, Vol. 15, 1999, pp. 134-135; N. Ritchie, *A Nuclear Weapons-free World? Britain, Trident and the Challenges Ahead*, Palgrave Macmillan, London 2012, pp. 10–13 and 19–20; UK White Paper 2006; UK Government, Policy Paper *2010 to 2015 Government Policy: UK Nuclear Deterrent*, updated 8 May 2015, http://www.gov.uk/government/publications/2010-to-2015-government-policy-uk-nuclear-deterrent/2010-to-2015-government-policy-uk-nuclear-deterrent (6 August 2021) (hereinafter: UK Policy Paper 2015); UK Prime Minister, *Global Britain in a competitive age: The integrated review of security, defence, development and foreign policy*, Command Paper CP 403 March 2021, pp. 76-78, (hereinafter: UK Command Paper 2021); UK Government Guidance March 2021; UK Government Guidance, *The UK's nuclear deterrent: what you need to know*, 21 April 2021, https://www.gov.uk/government/publications/uk-nuclear-deterrence-factsheet/uk-nuclear-deterrence-what-you-need-to-know (6 August 2021) (hereinafter: UK Guidance April 2021).

3.1. Threat of Violence, Fear, Coercion, and Unlawfulness

Deterrence involves one actor dissuading one or more other actors from taking some form of action, by stating that any such action will lead to an outcome which will be worse for those others than if they had not taken the action.[116] The literal meaning of the word deterrence is 'frightening from'.[117] UK nuclear deterrence policy thus intrinsically involves coercion through fear. This is made explicit in the UK Government statement 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".[118]

UK deterrence policy, in common with other typical nuclear deterrence policies, constitutes a threat of force in general terms.[119] This threat is unlawful, under Article 2(4) of the UN Charter, if the threatened force would be unlawful, were it actually to be used,[120] assuming that the circumstances referred to in the threat have arisen.[121] If Article 2(4) in isolation is taken to render any use of force unlawful, two possible exceptions to this general unlawfulness are generally recognised to arise from other provisions of the UN Charter. The use of force in self-defence under Article 51, or the use of force authorised by the Security Council under Article 42, can (although not necessarily will) be lawful. The scope of Article 2(4) and its interaction with other Charter provisions is, however, open to other readings.[122]

It follows that UK nuclear deterrence policy has the first of the widely agreed characteristics of terrorism noted in Part 2: it involves threat of violence, fear and coercion. In marked contrast, when the UNSC in 2009 expressed concern about nuclear terrorism,[123] it implicitly suggested that the deterrence policies of its permanent members did not constitute nuclear terrorism.

These differing views on whether or not nuclear deterrence policies necessarily constitute terrorism might reflect differing views on whether there could be any lawful use of nuclear weapons.[124] If unlawfulness is a necessary component of terrorism, then UK deterrence policy will amount to terrorism only to the extent that it is unlawful. There are several potential arguments for such unlawfulness.

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[116] M. E. E. McGrath, *Nuclear Weapons: The Crisis of Conscience*, Military Law Review, Vol. 107, 1985, p. 194; M. Quinlan, *Thinking about Nuclear Weapons: Principles, Problems, Prospects*, Oxford University Press, Oxford 2009, p. 20; N. Stürchler, *The Threat of Force in International Law*, Cambridge University Press, Cambridge 2007, p. 46.

[117] S. Wareham, *Nuclear Deterrence Theory – a Threat to Inflict Terror*, Flinders Law Journal, Vol. 15, 2013, p. 260.

[118] UK White Paper 2006, para. 3-4; equivalent statements appear in UK Command Paper 2021, p. 76, in UK Guidance March 2021, sect. 5, and in UK Guidance April 2021.

[119] Drummond 2019, sect. 3.2; F. Grimal, *Threats of Force: International Law and Strategy*, Routledge, London 2013, p. 61; Koskenniemi 1995, p. 348; McGrath 1985, p. 206; Murray 1999, p. 132; Quinlan 2009, p. 26; M. N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, Naval War College Review, Vol. 51, 1998, p. 99; Stürchler 2007, p. 89; Wareham 2013, p. 258.

[120] 1996 ICJ Rep. 226, paras. 47-48; Drummond 2019, p. 211; Stürchler 2007, p. 89.

[121] Drummond 2019, pp. 211-212.

[122] P. M. Butchard, *Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter*, Journal of Conflict and Security Law, Vol 23, No. 2, 2018, pp. 229–267; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries. Yearbook of the International Law Commission, 2001, vol. II(2) (hereinafter: ARSIWA 2001), at Art, 21, Commentary (1).

[123] SC Res. 1887 (2009), 24 September 2009, preamble; J. Black-Branch, *Nuclear Terrorism by States and Non-State Actors: Global Responses to Threats to Military and Human Security in International Law*, Journal of Conflict and Security Law, Vol. 22, No. 2, 2017, pp. 201-248, sect. 11.

[124] Drummond 2019, p. 200, surveys the relevant literature.

In the context of international armed conflict, as noted earlier, "threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" by 1977 Additional Protocol I.[125] The ICRC commentary on this provision notes that it "calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations".[126] This appears directly relevant to nuclear deterrence. Although there is widespread agreement that Protocol I applies to nuclear weapons only to the extent that it codifies pre-1977 law,[127] the UK is among those who recognise that these provisions were a "valuable reaffirmation" of a pre-existing rule of customary international law.[128] It might be possible to establish that the primary purpose of a nuclear deterrence policy is to spread terror among the civilian populations of potential attackers. Even if that could be established, however, there appears scope for a counter-argument that the policy is intended to "offer substantial military advantage" and therefore not subject to the prohibition.[129] (Whether or not nuclear deterrence does offer any such advantage remains a matter of controversy.[130])

It has been suggested, however, that at least two aspects of UK nuclear deterrence policy render it unlawful, by reference to non-terrorism-specific international law.[131] The phrase "at least" (in the previous sentence) recognises that, in relation to other aspects, further review of the law and the facts may reveal that some or all of these other aspects also render the policy unlawful.[132] The unlawfulness of each of these two aspects arises from the treatment of threats of force under international law. Before considering one of these aspects (failure to rule out first use), therefore, the following section considers more generally how international law applies to threats of force.[133]

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[125] Above, n. 74 and related text.

[126] Sandoz & Swinarski & Zimmermann 1987, p. 618.

[127] F. Kalshoven, *Arms, Armaments and International Law*, Recueil des Cours, Vol. 191, 1985, pp. 270–283; E. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict*, Hart Publishing, Oxford 2008, pp. 366–371 and 378–381; T. T. Richard, *Nuclear Weapons Targeting: The Evolution of Law and U.S. Policy*, Military Law Review Vol. 224, No. 4, 2016, pp. 937–946.

[128] J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules*, Cambridge University Press, Cambridge 2005, p. 8, citing UK Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols.

[129] Above, n. 75 and related text.

[130] C. S. Gray, *Gaining Compliance: The Theory of Deterrence and its Modern Application*, Comparative Strategy, Vol. 29, 2010, pp. 278–283; D. T. Hagerty, *Nuclear Weapons and Deterrence Stability in South Asia*, Palgrave Macmillan, Cham, 2020; M. MccGwire, *Nuclear Deterrence*, International Affairs, Vol. 82, No. 4, 2006, pp. 771-784; J. Scouras, *Nuclear War as a Global Catastrophic Risk*, Journal of Benefit Cost Analysis, Vol. 10, No. 2, 2019, p. 292; M. Trachtenberg, *Strategists, Philosophers, and the Nuclear Question*, Ethics, Vol. 95, No. 3, 1985, pp. 731-739; UK Ministry of Defence, *Deterrence: The Defence Contribution*, Joint Doctrine Note 1/19 (7 February 2019), at 1.11, https://www.gov.uk/government/publications/deterrence-the-defence-contribution-jdn-119 (6 August 2021).

[131] Drummond 2019.

[132] This point is visually illustrated in a diagram in Drummond 2013, pp. 137–138.

[133] The second aspect of UK policy which, it has been suggested, renders it unlawful is the failure to explicitly state that nuclear weapons would never be used at 10 kilotons or more of explosive power, at a height of less than 200m above land. Such use would almost certainly lead to adverse effects in a state other than the target state and so be contrary to the law of neutrality: Drummond 2019, sect. 5.1. This aspect is not discussed further here. Equivalent conclusions on how neutrality law constrains nuclear threats have been drawn in relation to other states: R. Chang, *Nuclear Weapons and the Need for a No-first-use Agreement between the United States and South Korea for North Korea*, Southwestern Journal of International Law, Vol. 26, No. 1, 2020, pp. 185-196.

3.2. Threats of Force in International Law

There is not complete consistency among authors on how to identify or label the various categories of international law. This article will follow the *Nuclear Weapons* opinion[134] in identifying six categories: (a) the law relating to the threat or use of force, (b) humanitarian law, (c) neutrality law, (d) criminal law, (e) human rights law, and (f) environmental law. Again following the *Nuclear Weapons* opinion, this article will avoid the terms *ius/jus in bello* and *ius/jus ad bellum*,[135] as again the use of these terms is not entirely consistent among authors.

On the law on the threat or use of force, the *Nuclear Weapons* opinion stated, at paragraph 47:

"The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State - whether or not it defended the policy of deterrence - suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal".[136]

On humanitarian law, the *Nuclear Weapons* opinion stated, at paragraph 78:

"If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law". [137]

Applying the law to threats is not straightforward. The ICJ opinion wording suggests threat of a single use, but UK deterrence policy threatens multiple possible uses. The lawfulness of each such use must be considered separately.

It has been suggested that there is a further complication in assessing the lawfulness of threats of force. For a use of force, compliance with the six categories of law can to some extent be considered separately. As noted above, the use of force in self-defence can (although not necessarily will) be lawful. To be lawful, such use must also (separately) comply with the other five of the six categories of law noted above. A threat to use force in self-defence also can (although not necessarily will) be lawful.[138] All this is widely accepted. Less widely discussed is the relevance of the various categories of law to assessing the lawfulness of threats. Three views are considered here.

1. Only the law on the threat or use of force is relevant to assessing the lawfulness of threats. On this view, a threat is only unlawful if the threatened force would not, if actually used, comply with the law on the threat or use of force. This view takes the second sentence quoted above from paragraph 47 of the *Nuclear Weapons* opinion as describing the only way in which a threat could be unlawful, and takes the "Charter" to refer only to Article 2(4): [139] "if it is to be lawful, [it is sufficient that] the declared readiness of a State to use force must be a use of force that is in conformity with [Article 2(4) of] the Charter". It is not clear how this view understands the sentence quoted above from paragraph 78 of the *Nuclear Weapons* opinion.

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[134] 1996 ICJ Rep. 226, paras. 24, 26, 27, 37, 51 and 74.

[135] Ibid. para. 86 contains, in a quote from the UK submission, the only use of either phrase.

[136] Ibid. para. 47.

[137] Ibid. para. 78.

[138] Stürchler 2007, p. 273; Grimal 2013, pp. 97–98; Butchard 2018, p. 229.

[139] 1996 ICJ Rep. 226, para. 48.

2. All six categories of law noted above are relevant to assessing the lawfulness of a threat. On this view, for a threat to comply with the law relating to the threat or use of force, the threatened force must be such that, if it were used, it would comply with all six categories of law.[140] This view takes: the "for whatever reason" (in first sentence quoted above from paragraph 47 of the *Nuclear Weapons* opinion) to mean "by reference to any of the six categories of law"; and takes "illegal" in the third sentence to have the same meaning. This view emphasises that paragraph 47 is in the part of the *Nuclear Weapons* opinion focusing on the threat or use of force.[141] This view understands the sentence quoted above from paragraph 78 of the *Nuclear Weapons* opinion, to be a succinct expression of a more precise statement: "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to [the law relating to the threat or use of force, because the threatened use would generally be contrary to humanitarian] law".

3. Two or more of the six categories of law noted above are relevant to assessing the lawfulness of a threat. On this view, the first sentence quoted above from paragraph 47 is, despite the context, saying that (for two or more of the six separate categories of law) each category itself stipulates that a threat can only be lawful if the threat, if it were implemented, would comply with that category. The second sentence quoted above from paragraph 47 illustrates this in relation to the law on the threat or use of force. On this view, the sentence quoted above from paragraph 78 of the *Nuclear Weapons* opinion is a precise legal statement: "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to *that* law" (emphasis added).[142]This readingof paragraph 78 finds some support in the literature,[143] although one unusually detailed analysis of this aspect of the opinion concluded that it "seems to be largely without legal support".[144]

The question of how to assess the lawfulness of threats, in relation to humanitarian law, is also raised by one of the main conclusions in the *Nuclear Weapons* opinion, at paragraph 105(2)E:

"the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".[145]

The first part of paragraph 105(2)E appears to imply that threats are contrary to humanitarian law, if the threatened action would itself be contrary to humanitarian law—view (3) above. For those

[140] Drummond 2019, p. 208.

[141] 1996 ICJ Rep. 226, paras. 37, 38, 51.

[142] Ibid. para. 78.

[143] Henckaerts & Doswald-Beck 2005, p. 225: "a threat to commit an illegal act is generally considered to be illegal as well"; B. H. Weston, *Nuclear Weapons versus International Law: A Contextual Reassessment*, McGill Law Journal, Vol. 28, 1983, pp. 587-588; D. J. Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?* McGill Law Journal, Vol. 30, 1984, p.121; S. Haines, *Is Britain's Continued Possession and Threatened Use of Nuclear Weapons Illegal?* in K. Booth & F. Barnaby (Eds), The Future of Britain's Nuclear Weapons: Experts Reframe the Debate, Oxford Research Group, Oxford 2006, p. 54.

[144] G. Nystuen, *Threats of Use of Nuclear Weapons and International Humanitarian Law*, in G. Nystuen & S. Casey-Maslen & A. G. Bersagel (Eds.), Nuclear Weapons under International Law, Cambridge University Press, Cambridge 2014, p. 148.

[145] 1996 ICJ Rep. 226, para. 105(2)E.

unconvinced by view (3), however, it can alternatively be seen as implying that, under the law relating to the threat or use of force, threats of force can only be lawful if the threatened force, if it were used, would comply with all relevant categories of law - view (2) above. Here the relevant category is humanitarian law. This alternative reading assumes that the ICJ chose a succinct form of words ("the threat or use of nuclear weapons would generally be contrary to … humanitarian law") to combine two more precise statements: (i) the *use* of nuclear weapons would generally be contrary to humanitarian law; and (ii) the *threat to use* nuclear weapons would generally be contrary to the law relating to the threat or use of force, because the threatened use would generally be contrary to humanitarian law. I am unaware of how those who are convinced by neither view (3) nor view (2) can make sense of the first part of paragraph 105(2)E. The statement: "the threat … of nuclear weapons would generally be contrary to the … rules of humanitarian law" seems inconsistent with view (1) above.

The relevance of humanitarian law to the lawfulness of threats also arises in one of the possible ways to understand if and how the second part of paragraph 105(2)E relates to the first part. Views differ on how to interpret the paragraph as a whole.[146] Here I consider two possible interpretations; both are consistent with the widely-held view that there are no exceptions to the application of humanitarian law.[147] Other possible interpretations which are inconsistent with that view are not considered here.

A. One possible interpretation is that the two parts of the paragraph do not affect each other. On this interpretation, the word "generally" in the first part implies that there might be specific circumstances in which the threat or use of nuclear weapons would not be contrary to humanitarian law but, on this interpretation, the ICJ makes no further comment on what those circumstances might be. This interpretation then considers that the second part of the sentence is (quite separately) saying that, in "extreme circumstances", it is not clear whether or not threat or use of nuclear weapons would comply with the law on the threat or use of force.

B. Another possible interpretation links the two parts of the paragraph: the general statement in the first part and "the qualification in the second part of the paragraph".[148] On this interpretation, the "extreme circumstance of self-defence" mentioned in the second part of the paragraph is a possible exception to the "general" statement in the first part.[149] On this basis, the clear implication is that both parts of the paragraph are dealing with humanitarian

[146] D. Akande, *Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, British Yearbook of International Law, Vol. 68, 1997, pp. 205-211.

[147] Y. Dinstein, *War, Aggression and Self-defence*, 6th edn., Cambridge University Press, Cambridge 2017, p. 183; Drummond 2019, pp. 214-215; C. Greenwood, *Jus ad bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion*, in L. Boisson de Chazournes & P. Sands (Eds.), International Law, the International Court of Justice and Nuclear Weapons, Cambridge University Press, Cambridge 1999, p. 264; 1996 ICJ Rep. 226, dissenting opinion of Judge Higgins, para. 29; M. J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, American Journal of International Law, Vol. 91, 1997, p. 430; K. Okimoto, *The Cumulative Requirements of Jus ad Bellum and Jus in Bello in the Context of Self-Defense*, Chinese Journal of International Law, Vol. 11, 2012, p. 46; Richard 2016, p. 949; M. Roscini, *On the 'Inherent' Character of the Right of States to Self-Defence*, Cambridge Journal of International and Comparative Law, Vol. 4, 2015, p. 653; Schmitt 1998, n. 55; G. Venturini, *Necessity in the Law of Armed Conflict and in International Criminal Law*, in I. Dekker & E. Hey (Eds.) 41 Netherlands Yearbook of International Law 2010, T.M.C. Asser Press, The Hague 2011, p. 74; J. H. H. Weiler & A. Deshman, *Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello*, European Journal of International Law, Vol. 24, 2013, pp. 49–51.

[148] Greenwood 1999, p 262.

[149] Akande 1997, p. 205 and 211; Drummond 2019, pp. 213-215; Murray 1999, p. 132.

law.[150]

Interpretation (A) raises some difficult questions. How was the court willing to allow that there might be circumstances in which the threat or use of nuclear weapons would comply with humanitarian law? Why did it give no guidance on what these might be? Why did the court not comment on whether the threat or use of nuclear weapons would comply with the law on the threat or use of force in "non- extreme" circumstances? Why was it unable to "conclude definitively" on compliance with the law on the threat or use of force, if no such difficulty arose with humanitarian law? If there is no logical connection between the two parts of the paragraph, why are they linked by the word "however"? There are no obvious answers to these and other questions raised by interpretation (A).

In marked contrast, interpretation (B) raises only two significant questions, and there seem to be good answers to both of them.

- How can self-defence be relevant to humanitarian law, given the widely held view that self-defence does not preclude the wrongfulness of conduct with respect to humanitarian law (as is made clear, for example, in the Commentary on the Articles on Responsibility of States for Internationally Wrongful Acts)?[151] The answer is that the Court here is not stating that, as a general principle of international law, self-defence is relevant to humanitarian law. Instead, it is saying "that the rules of international humanitarian law themselves - particularly the rule of proportionality - allow the weighing of the importance of preserving a state against the very severe damage, injury and suffering that may result [from the use of a nuclear weapon] […] humanitarian law attempts to limit the infliction of damage and suffering to that which is genuinely required to accomplish legitimate military objectives".[152]

- How can there be repeated references to "threat" if both parts of this paragraph are dealing with humanitarian law and none of it is dealing with the law on the threat or use of force? There are two possible answers to this question, each of which takes one of the views described earlier on the relevance of humanitarian law to the lawfulness of threats. On view (3), threats are unlawful under humanitarian law if the threatened action would itself be unlawful under humanitarian law. On view (2), threats are unlawful under the law on the threat or use of force if the threated action would be unlawful under humanitarian law. Thus interpretation (B) of paragraph 105(2)E is consistent with either view (2) or view (3) on the relevance of humanitarian law to the lawfulness of threats.

Based on the above analysis, in my view, interpretation (B) is preferable to interpretation (A) and either of view (2) or view (3) is preferable to view (1). For the limited purposes of the following analysis, however, any combination of these interpretations and views can be adopted.

One point is crucial to the following analysis. Given the difficulty the court had in concluding on the "extreme circumstance", this article agrees with those authors who take this circumstance as the *only* possible exception to the general rule that the threat or use of nuclear weapons is unlawful.[153] This implies that, any threat to use nuclear weapons, where that use might *not* be in an "extreme circumstance of self-defence, in which the very survival of a State would be at stake", would be unlawful, because the threatened use would, if it were actual use, be unlawful.[154] This position is

[150] Matheson, p 430; Akande 1997, p. 208.

[151] ARSIWA 2001, Art, 21, Commentary (3).

[152] Matheson, p 430; the same point is made in Akande 1997, p. 208.

[153] Akande 1997, pp. 205, 211; Drummond 2019, pp. 213-215; Murray 1999, p. 132.

[154] Drummond 2019, pp. 213-216.

obviously consistent with interpretation (B). It is also consistent with interpretation (A), even if the range of possible exceptions to the general rule expressed in the first part of paragraph 105(2)E extends beyond the extreme circumstances mentioned in the second part. This is because any threat or use must comply with all six categories of international law to be lawful.[155] Under interpretation (A), any threat or use of nuclear weapons other than in an "extreme circumstance of self-defence", will not comply with the law on the use of force, and so be unlawful. In particular, if a deterrence policy merely says that nuclear weapons will only ever be used in self-defence, this does not necessarily render the deterrence threat lawful. Other aspects of the policy must be examined to see if they imply possible use other than in the extreme circumstances mentioned in the second part of paragraph 105(2)E.

3.3. One Aspect of UK Policy which Make it an Unlawful Threat of Force

One aspect of UK policy which renders it unlawful is the failure to rule out first use. In general, 'first use' might imply use in the absence of either a threat or an attack. The UK has, however, effectively ruled out such use by stating "We would only consider using nuclear weapons in self-defence (including the defence of our NATO allies)".[156] In this article, therefore, 'first use' will be taken to mean either (a) a nuclear response to a non-nuclear attack or (b) a nuclear response to the threat of a nuclear attack which has not yet begun. Conversely, in this article, 'no-first-use' will denote a policy which rules out both (a) and (b). There have been frequent security-based recommendations that no-first-use policies be adopted.[157]

Despite this, UK deterrence policy is deliberately ambiguous.[158] One aspect of this ambiguity includes an implication that factors other than armed attack on the UK might lead to a nuclear response, as seen in the following official statements:

"The UK's continued possession of a nuclear deterrent provides an assurance that we cannot be subjected in future to nuclear blackmail or a level of threat which would put at risk our vital interests or fundamentally constrain our foreign and security policy options.[159] […] we deliberately maintain some ambiguity about precisely when, how and at what scale we would contemplate use of our nuclear deterrent. We do not want to simplify the calculations of a potential aggressor by defining more precisely the circumstances in which we might consider the use of our nuclear capabilities (for example, we do not define what we consider to be our vital interests), hence, we will not rule in or out the first use of nuclear weapons.[160] […] Our nuclear deterrent is there to deter the most

[155] As illustrated, in relation to human rights law and humanitarian law in ARSIWA 2001, Art. 21, Commentary (3), and in relation to the law of neutrality in ARSIWA 2001, Art. 21, Commentary (5).

[156] UK White Paper 2006, para. 2-11; similar statements appear in UK Command Paper 2021, p. 76, and in UK Guidance April 2021.

[157] A.U. Bâli, *Legality and Legitimacy in the Global Order: The Changing Landscape of Nuclear Non-proliferation*, in R. Falk, M. Juergensmeyer & V. Popovski (Eds.), Legality and Legitimacy in Global Affairs, Oxford University Press, Oxford 2012, p. 332; M. Rifkind & B. of Ladyton & M. Campbell & A. Bailes & J. Greenstock & G of Craigiebank & H. of Nympsfield & R. of Ludlow, *The Trident Commission: An Independent, Cross-Party Inquiry to Examine UK Nuclear Weapons Policy; Concluding Report*, British American Security Information Council, London, Washington, 2014, p. 30, https://basicint.org/portfolio/trident-commission/ (6 August 2021); G. Schultz & J. Goodby (Eds.), *The War that must Never be Fought: Dilemmas of Nuclear Deterrence*, Hoover Institution Press, Stanford, 2015, p. 52, 205, 272, 351-352, 368 and 374-375; N. Tannenwald, *The Vanishing Nuclear Taboo? How Disarmament Fell Apart*, Foreign Affairs, Vol. 97, No. 6, 2018, p. 24; White 2020, p. 256 and 264.

[158] UK Command Paper 2021, p. 77.

[159] UK White Paper 2006, para. 3-10.

[160] UK Policy Paper 2015, App. 1, principle 3; a similar statement appears in UK White Paper 2006, para. 3-4.

extreme threats to our national security and way of life, which cannot be done by other means."[161]

The UK also appears to be willing to use nuclear weapons in response to the threat of a nuclear attack which has not yet begun,[162] and they clearly are willing to use other weapons in the "absence of specific evidence of where an attack will take place or of the precise nature of an attack".[163] Moreover, the specific nuclear weapons deployed by the UK logically increase the likelihood of first use by the UK,[164] and have been described in evidence to a UK Court as an "offensive first strike strategic nuclear weapons system".[165]

The force threatened by UK deterrence policy would not, at least to the extent that it involves 'first-use' of nuclear weapons, were it (hypothetically) to be actually used, comply with international law. This conclusion is based on the following premises:

- the ICJ *Nuclear Weapons* opinion implies that, other than in "an extreme circumstance of self-defence, in which the very survival of a state would be at stake", any nuclear weapon use will be unlawful (see section 3.2 above);[166]

- "the very survival of a State […] be[ing] at stake" refers to a factual situation, not a legal concept,[167] and cannot plausibly be understood to arise in the context of a non-nuclear attack;[168] and

- the circumstance of an imminent attack is not "extreme", relative to the circumstance of an attack which has begun.[169]

The basis of the latter part of the third of these premises is that the phrase "very survival of a State" might, in theory, refer to (i) the state's government surviving politically, (ii) the state retaining its independence, or (iii) the state's population and infrastructure surviving physically.[170] Most self-

[161] UK Guidance March 2021, preamble and sect. 9; similar statements appear in UK Command Paper 2021, p. 76, and in UK Guidance April 2021.

[162] UK HL Select Committee on International Relations, *Uncorrected oral evidence: Nuclear Non-Proliferation Treaty and nuclear disarmament*, 6 March 2019, (A. Duncan & S. Price & J. Franklin), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-relations-committee/the-nuclear-nonproliferation-treaty-and-nuclear-disarmament/oral/97600.html (6 August 2021) at Q155.

[163] J. Wright, *The Modern Law of Self-Defence*, UK Attorney General's Speech at International Institute for Strategic Studies (11 January 2017), p. 17; https://www.gov.uk/government/news/legal-basis-for-striking-terror-targets-set-out (6 August 2021).

[164] Boyle 1988, p. 558 and 560; D. S. Rudesill, *MIRVs Matter: Banning Hydra-headed Missiles in a New START II Treaty*, Stanford Journal of International Law, Vol. 54, No. 1, 2018, pp. 84-86, 92 and 101.

[165] Evidence given by Professor Francis Boyle in Report of Proceedings, Sheriff Court, Greenock, *HM Advocate v. Angela Christina Zelter, Bodil Ulla Roder and Ellen Moxley*, Friday, 1st October 1999, http://tridentploughsharesarchive.org/greenock-1999-evidence-given-by-professor-francis-boyle-2/ (6 August 2021).

[166] Above, nn. 150-159 and related text.

[167] Drummond 2019, pp. 219-220; M. G. Kohen, *The Notion of 'State Survival' in International Law*, in L. Boisson de Chazournes & P. Sands (Eds.), International Law, the International Court of Justice and Nuclear Weapons, Cambridge University Press, Cambridge 1999, p. 294, and 312-313; J. A. Green, *Self-Preservation*, in F. Lachenmann & R. Wolfrum (Eds.), The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law Thematic Series, Vol. 2, Oxford University Press, Oxford 2017, p. 1139, paras. 11 and 16; Venturini 2011, sects. 3.2.2 and 3.5.

[168] Drummond 2019, pp. 220-221; D. H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, Oxford 2009, p. 84.

[169] Drummond 2019, p. 222.

[170] Matheson 1997, p. 430; B. H. Weston, *Nuclear Weapons and the World Court: Ambiguity's Consensus*, Transnatio-

defence situations would put at risk one of the first two senses of 'survival', so it appears to be the third sense that is intended here: the physical survival of the population and infrastructure.[171] No non-nuclear attack would risk the "very survival" of a state in this sense.

As noted in section 3.2 above, assessing the lawfulness of a threat of force is complex because it may require assessment of the lawfulness of the (hypothetical) use of the threatened force. Here the relevant point is that the UK's failure to rule out first use renders unlawful the threat intrinsic to its nuclear deterrence policy.[172] This is because (a) the lawfulness of such a threat, under international law, depends on the (hypothetical) use of the threatened force also complying with international law; (b) a nuclear response to a non-nuclear attack would be unlawful (because the "very survival of a State" is not at stake); and (c) a nuclear response to the threat of a nuclear attack would be unlawful (because the threat of a nuclear attack is not an "extreme circumstance").

UK nuclear deterrence policy, and the application of international law thereto, was analysed in detail in a 2019 article,[173] which also concluded that the policy was unlawful. That 2019 conclusion was based on a uniquely detailed analysis of the relevant paragraphs of the *Nuclear Weapons* opinion,[174] and a reasonably representative body of literature, although subject to the same language constraint as mentioned earlier.[175] I am unaware of any subsequent official consideration of that analysis. In particular, the UK Government was asked, in the UK parliament, what assessment it had made of the implications for its policies of the conclusions of the 2019 article.[176] The Government's one line response merely asserted that UK nuclear deterrence policy is "fully compliant and compatible with our international legal obligations".[177]

It has been suggested that "interpretation is pervasively determinative of what happens to legal rules when they are out in the world" as distinct from "the notion that there is a stable and agreed meaning to a rule, and we need merely to observe whether it is obeyed".[178] Here, however, no alternative interpretations have subsequently been offered, by the UK Government or others, of the law examined in the 2019 article. The following analysis will, therefore, accept the argument in this Part 3, that UK nuclear deterrence policy is currently unlawful. This does not imply that a nuclear deterrence policy ever could be lawful; it merely acknowledges that further work may be needed to rule out that possibility.[179]

On this basis, current UK deterrence policy has the second characteristic of terrorism noted in Part 2 above—unlawfulness. Despite this, as noted at the end of Part 2, a clear conclusion that this state activity constitutes (what a "broadly representative" group of international lawyers would consider to be) terrorism is not currently possible (because a "broadly representative" group would include lawyers acting for states who are currently inconsistent on this point). Even if consistency on this

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nal Law & Contemporary Problems, Vol. 7, 1997, p. 386; Schmitt 1998, p. 107.

[171] Drummond 2013, p. 123; this view appears to underlie the analysis in Joyner 2009, p. 84; Weston 1997, p. 387, appears to take a different view.

[172] Drummond 2019, p. 223; see also White 2020, p. 264.

[173] Drummond 2019.

[174] Ibid. part 3; 1996 ICJ Rep. 226, paras. 47-48.

[175] Above, n. 12, and related text.

[176] UK HC, Written Question 3709 by Martyn Day, and Response by Mark Lancaster, 22 & 28 October 2019, https://questions-statements.parliament.uk/written-questions/detail/2019-10-22/3709 (6 August 2021).

[177] Ibid.

[178] R. Howse & R. Teitel, *Beyond Compliance: Why International Law Really Matters*, Global Policy, Vol. 1, No. 2, 2010, p. 127.

[179] Above, n. 132, and related text.

point were to emerge in future, establishing that UK nuclear deterrence policy is nuclear terrorism is quite distinct from assessing whether or not that particular policy is constrained by existing international law specific to terrorism. Part 4 moves on to that assessment.

4. Legal Efforts to Constrain General and Nuclear Terrorism

4.1. International Constraints

The UN lists 19 international conventions and protocols relating to terrorism.[180] (The list of 19 does not include all worldwide treaties potentially relevant to terrorism.[181] Nor does it include the 11 regional treaties and conventions on terrorism.[182]) None of the 19 in the UN list expressly uses the words 'terrorism' or 'terrorist' other than (at most) in the title or preamble.[183] It follows that none of them define terrorism.[184] At most they define specific offences,[185] and then only partially andinconsistently.[186] Thus, not all activity with the core characteristics of activities described as terrorism in an international law context, is currently covered by international law instruments specific to terrorism. Mathematically: {the set of activities covered by terrorism-specific international law instruments} partially intersects {the set of all activities with the core characteristics of activities described as terrorism in international law literature}. Note that the sets partially intersect, rather than the first being a subset of the second. This is because some activities covered by terrorism-specific international law instruments do not have the core characteristics of terrorism.[187]

[180] List, with links to the texts, at http://www.un.org/counterterrorism/international-legal-instruments (6 August 2021).

[181] Z. W. Galicki, *International Treaties and Terrorism*, Romanian Journal of International Law, Vol. 1, 2003, final sect.; Trahan 2002, n. 32.

[182] Listed in nn. 102-105, above.

[183] Fry 2009, pp. 392-393; C. C. Joyner 2007, p. 245; Värk 2011, p. 75.

[184] Arbatov & Dvorkin & Pikaev 2008, p. 74; Fry 2009, p. 393.

[185] Franck & Lockwood 1974, pp. 89-90; Friedrichs 2006; B. Golder and G. Williams, *What is 'Terrorism'? Problems of Legal Definition*, University of New South Wales Law Journal, Vol. 27, No. 2, 2004, p. 273; Orlova & Moore 2005, pp. 308-309.

[186] Acharya 2009, pp. 662-663; Fry 2009, pp. 381-394 and 401-403; Kovács 2004, pp. 10-12; Mazandaran 2006, pp. 516-517; Trahan 2002, pp. 220-230 and 242; Van Schaack 2008, pp. 414-417.

[187] Below, note 217 and related text.

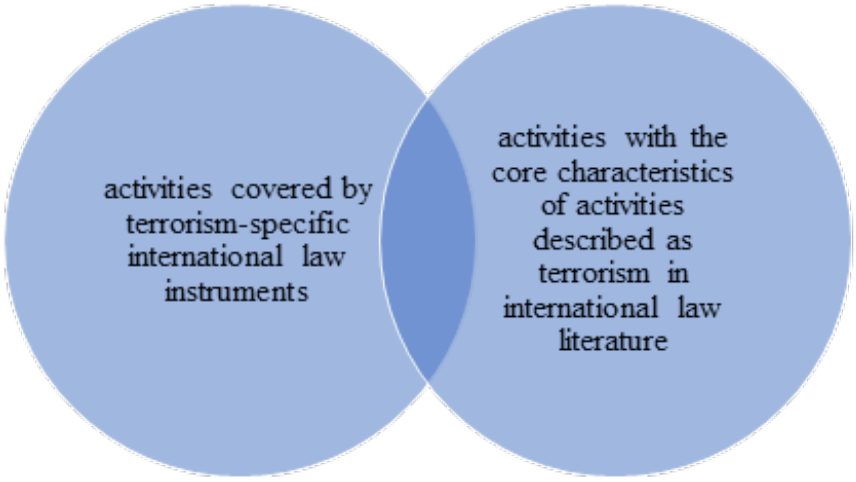

Figure 1. Terrorist activities and international law

Of the 19 instruments, three focus specifically on nuclear terrorism:[188] the 1979 Convention on the Physical Protection of Nuclear Material (CPPNM)[189]; its 2005 Amendment[190] (CPPNM/A denotes the amended convention); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT).[191] Several of the other 16 cover nuclear terrorism within their particular scope.[192]

The 1979 CPPNM required protection only for nuclear material used for peaceful purposes, and not for military nuclear material.[193] This remains true of CPPNM/A,[194] which therefore covers less than a fifth of all nuclear materials in the world.[195] UNSC Resolution 1540[196] requires controls to be

[188] These three are reviewed, in the context of the wider, non-terrorism-specific, nuclear security legal framework, in A. Gioia, *International Atomic Energy Agency, Nuclear Security and the Fight against International Terrorism*, Italian Yearbook of International Law, Vol. 18, 2008, pp. 139-157.

[189] 1979 Convention on the Physical Protection of Nuclear Material (CPPNM), 1456 UNTS 125.

[190] 2005 Amendment to the Convention on the Physical Protection of Nuclear Material ('CPPNM/A' denotes the amended Convention), INFCIRC/274/Rev.1/Mod.1; M. Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, Journal of Conflict and Security Law, Vol. 13, No. 3, 2008, p. 310; Black-Branch 2017, pp. 232-233.

[191] 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT), 2445 UNTS 89; C. C. Joyner 2007; N. Ronzitti, *WMD Terrorism*, Japanese Yearbook of International Law, Vol. 52, 2009, pp. 184-185.

[192] 1997 International Convention for the Suppression of Terrorist Bombings (ICSTB), 2149 UNTS 256, Art. 1(3); 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (PCSUASMN), LEG/CONF.15/21, Art. 4(5); 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (CSUARICA) DCAS2010, Art. 1(1)(g),(h),(i); Ronzitti 2009, p. 176 and 183-184.

[193] CPPNM 1979, Art. 2.

[194] CPPNM/A 2005, Preamble, Art. 2(5).

[195] J. D. Herbach, *Preventing Nuclear Terrorism: International Law and Nuclear Security Governance*, PhD thesis, University of Amsterdam, 2019, p. 201.

[196] SC Res. 1540 (2004), 28 April 2004; on wider aspects of the resolution see: Black-Branch 2017, sect. 10; L. M. Hinojosa-Martínez, *The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits*, International and Comparative Law Quarterly, Vol. 57, No. 2, 2008, pp. 333-359; D. H. Joyner, *Non-proliferation Law and the United Nations system: Resolution 1540 and the Limits of the Power of the Security Council*, Leiden Journal of International Law, Vol. 20, No. 2, 2007, pp. 489-518; C. H. Powell, *The United Nations Security Council, Terrorism and the Rule of Law*, in V. V. Ramraj & M. Hor & K. Roach (Eds.), Global Anti-terrorism Law and Policy, 2nd edn., Cambridge University Press, Cambridge 2012, p. 19; S. Shirazyan, *Building a Universal Counter-proliferation Regime: The Institutional Limits of United Nations Security Council Resolution 1540*, Journal of National Security Law & Policy, Vol. 10, No. 1, 2019, pp. 125-170.

established over weapons-related materials and increases non-proliferation obligations,[197] butdoes not otherwise constrain the military policies or activities of nuclear-armed states. ICSANT[198] requires states to physically protect all radioactive material regardless of whether that material is used for peaceful or non-peaceful purposes.[199]

The main offence specified by ICSANT requires only one or other of violence (or threat of violence) or coercion (or threat of coercion),[200] not necessarily in combination,[201] and not necessarily any element of creating fear.[202] The ICSANT offences thus include many actions which few, if any, would describe as terrorism.[203] CPPNM/A offences include using (or threatening to use) non-military nuclear material to cause death.[204] ICSANT and CPPNM/A provide for indirect suppression of the specified offences through national prosecution and punishment of offenders.[205] They also provide for international cooperation between states in terms of imposing duties to extradite or prosecute.[206]

Despite some disagreement during negotiations,[207] the final text of ICSANT explicitly excludes,[208] from its scope,

– the "activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law",[209] and

– "the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law".[210]

Identical text appears in CPPNM/A.[211] ICSANT also "does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons

[197] SC Res. 1540 (2004), footnote to preamble, Art. 3.

[198] ICSANT 2005.

[199] Ibid. Art. 7; Gioia 2008, p. 151; Herbach 2019, p. 201.

[200] ICSANT 2005, Art. 2: (1)(b), 2(a); threats are not offences under ICSTB 1997, Art. 2, but are under PCSUASMN 2005, Art. 4(5), and CSUARICA 2010, Art. 1(3)(b).

[201] Conte 2010, p. 31.

[202] Gioia 2008, p. 152; Grozdanova 2014, p. 311.

[203] Arbatov & Dvorkin & Pikaev 2008, p. 72; Conte 2010, p. 31, citing UN Special Rapporteur on the promotion and protection of human rights while countering terrorism; Lavalle 2007, n. 66; R. Smith, *Terrorism, Protest and the Law (in a Maritime Context)*, Yearbook of New Zealand Jurisprudence, Vol. 11-12, 2008-2009, pp. 61-73; Weigend 2006, n. 33.

[204] CPPNM/A 2005, Art. 7(1)(a), (g).

[205] C. C. Joyner 2007, p. 246; Margariti 2018, p. 179.

[206] ICSANT 2005, Art. 10; D. P. Fidler, *International Convention for the Suppression of Acts of Nuclear Terrorism Enters into Force*, ASIL Insights, Vol. 11, No. 18, 2007; C. C. Joyner 2007, pp. 239-242; Kolb 2004, pp. 246-255, 257-258 and 261-265; Mazzochi 2011, pp. 94-95; Ochieng 2017, pp. 85-87; Paust 2010, pp. 62-64; P. Willan, *The Convention on the Suppression of Acts of Nuclear Terrorism: An Old Solution to a New Problem*, Georgetown Journal of International Law, Vol. 39, No. 3, 2008, pp. 536-540 and 542-543.

[207] C. C. Joyner 2007, pp. 231-232; R. Perera, *International Convention for the Suppression of Acts of Nuclear Terrorism: Introductory Note*, 2008, United Nations Audiovisual Library of International Law, https://legal.un.org/avl/ha/icsant/icsant.html (6 August 2021).

[208] ICSANT 2005, Art. 4(2).

[209] Ibid.

[210] Ibid; the concerns outlined by Hmoud 2006, pp. 1040-42, and Margariti 2018, p. 196, over the phrase 'inasmuch as' in another context, are equally relevant here.

[211] CPPNM/A 2005, Art. 2(4)(b); identical text also appears in: ICSTB 1997, Art. 19; PCSUASMN 2005, Art. 3; and CSUARICA 2010, Art. 6.

by States".[212] Thus, CPPNM/A and ICSANT only aim to constrain acts and threats by non-state actors[213] who are not "armed forces" in a non-international armed conflict.[214]

A threat by a state to use military nuclear material violently to cause death, such as in UK nuclear deterrence, is thus specifically excluded from the scope of both CPPNM/A and ICSANT (because CPPNM/A only applies to non-military nuclear material, and state military action is excluded from the scope of ICSANT). UK nuclear deterrence policy is therefore an activity which (a) has the characteristics of activities which are described as terrorism in this context but (b) is not currently covered by terrorism-specific international law instruments.

4.2. UK National Law Constraints

Under the UK Terrorism Act 2000, terrorism-related offences include using "money or other property for the purposes of terrorism".[215] The Act's definition of 'terrorism'[216] has been described as "vague, broad and widely criticized by experts, courts and academics".[217] The main definition requires a design to influence a government or intimidate a public, but a threat or use "which involves the use of firearms or explosives is terrorism whether or not" any such design exists.[218] Thus 'terrorism' is so widely defined that it includes any "use or threat of action" where

- "the action involves serious violence against a person",[219]
- the "use or threat is made for the purpose of advancing a political [...] or ideological cause",[220] and
- the "use or threat […] involves the use of firearms or explosives".[221]This means that most, perhaps all, military action is an offence.[222] Ongoing UK action hasbeenrecognised to

[212] ICSANT 2005, Art. 4(4); C. C. Joyner 2007, p. 235.

[213] Arbatov & Dvorkin & Pikaev 2008, p. 74; Margariti 2018, p. 183.

[214] A. Coco, *The Mark of Cain: The Crime of Terrorism in times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in R v. Mohammed Gul*, Journal of International Criminal Justice, Vol. 11, No. 2, 2013, pp. 433-434.

[215] UK Terrorism Act 2000, sect. 16.

[216] Ibid. sect. 1, as amended by Terrorism Act 2006 and Counter-Terrorism Act 2008.

[217] A. Greene, *Defining Terrorism: One Size Fits All?*, International and Comparative Law Quarterly, Vol. 66, No. 2, 2017, pp. p. 41 and 423; similar criticism is noted by: K. Bell, *When Terror and Journalism Collide: A Critique of the UK's Overreach of Power in the Name of National Security*, Indonesian Journal of International & Comparative Law, Vol. 1, No. 4, 2014, pp. 924-926; H. Fenwick & G. Phillipson, *UK Counter-terror Law post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms*, in V. V. Ramraj & M. Hor & K. Roach (Eds.), Global Anti-terrorism Law and Policy, 2nd edn., Cambridge University Press, Cambridge 2012, p. 484; Golder & Williams 2004, p. 290; Hardy & Williams 2011, pp. 115-120; Heradstveit & Pugh 2003, p. 11; Margariti 2018, p. 188; and Roach 2008, pp. 113-116; the UK is by no means unique in this respect: see, *e.g.*: S. B. Adarkwah, *Counter-terrorism Framework and Individual Liberties in Ghana*, African Journal of International and Comparative Law, Vol. 28, No. 1, 2020, p. 62; Idowu 2014, pp. 55-57; and S. Naz & M. E. Bari, *The Enactment of the Prevention of Terrorism Act, 2015, in Pursuance of the Constitution of Malaysia*, Suffolk Transnational Law Review, Vol. 41, No. 1, 2018, pp. 25-27.

[218] UK Terrorism Act 2000, sect. 1, subsects. (1)(b) and (3); J. Blackbourn, *The Evolving Definition of Terrorism in UK Law*, Behavioral Sciences of Terrorism and Political Aggression, Vol. 3, No. 2, 2011, pp. 141-143.

[219] UK Terrorism Act 2000, sect. 1, subsects. (1)(a), (2)(a).

[220] Ibid. subsect. (1)(c).

[221] Ibid. subsect. (3).

[222] Hodgson & Tadros 2013, p. 510, and 522.

> fall within the UK's own definition of terrorism.[223] Offences under the Act also include UK deterrence policy: the threat to use nuclear weapons ("firearms or explosives") for a "political or ideological cause" is clear in the published policy's references to "threat which would put at risk our vital interests or fundamentally constrain our foreign and security policy options",[224] and "threats to our national security and way of life".[225]

The UK went on to render yet more of its own actions, and actions which receive official approval, unlawful under UK terrorism law. On 14 September 2005 the UNSC adopted the UK-sponsored Resolution 1624, which calls upon states to prohibit and prevent incitement to commit terrorist acts.[226] The previous day, the UK had initiated the process leading to the UK Terrorism Act 2006.[227] The 2006 Act creates an offence of encouraging "acts of terrorism" (as defined by the Terrorism Act 2000), such as publishing a statement of "any form of praise" of acts of terrorism, from which "any section of the public" could infer, that what is being praised is "a type of conduct" that "should be emulated by them".[228]

This legislation has been widely criticised.[229] On the basis that most UK military action constitutes terrorism under the Terrorism Act 2000,[230] the 2006 Act makes offences of most military recruitment campaigns, as well as of events in the UK to remember those who participated in previous military action. Offences under the 2006 Act also include publishing official statements of UK nuclear deterrence policy:[231] a "form of praise" of nuclear deterrence, from which the "section of the public" contemplating joining the UK armed forces, could infer that it is a "type of conduct" (serving in the UK armed forces)[232] that "should be emulated by them".

5. Effective Impunity for UK Nuclear Deterrence

The term "impunity" read literally would only ever apply to non-state actors such as individuals, since there are no mechanisms to "punish" states under international law. States may, however, have responsibility for unlawful acts, and such responsibility may have consequences such as liability to make reparations.[233] Unlawful acts by states may also lead to UN Security Council countermeasures and sanctions.[234] In the context of unlawful state activity, the word impunity is used in this article in a non-literal sense to cover both penal consequences for individual officials of the state, and non-penal consequences for the state itself.

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[223] Greene 2017, pp. 428-431.

[224] Above, n. 164 and related text.

[225] Above, n. 166 and related text.

[226] SC Res. 1624 (2005), 14 September 2005, Art. 1(a), (b); Ronen 2010; C. Walker, *The War of Words with Terrorism: An Assessment of Three Approaches to Pursue and Prevent*, Journal of Conflict and Security Law, Vol. 22, No. 3, 2017, pp. 526-527.

[227] Moeckli 2008, pp. 175-176.

[228] UK Terrorism Act 2006, sects. 1(1)-(3), 20(1)-(3) and (7); Walker 2017, pp. 531-532; Blackbourn 2011, p. 144 and 146.

[229] Bell 2014, pp. 899-900 and 905-908; Fenwick & Phillipson 2012, p. 509; Margariti 2018, p. 188.

[230] Above, n. 236 and related text.

[231] *E.g.,* text related to nn. 164-166, above.

[232] Which constitutes terrorism under the 2000 Act: above, nn. 236-239 and related text.

[233] ARSIWA 2001.

[234] D. Kritsiotis, *International Law and the Relativities of Enforcement*, in J. Crawford & M. Koskenniemi (Eds.), The Cambridge Companion to International Law, Cambridge University Press, Cambridge 2012, pp. 248–258.

The existing UN instruments directed at terrorism either expressly exclude (potentially terrorist) actions of states from their scope,[235] or are generally interpreted in that way. In theory, this does not imply impunity for state terrorism, but in practice it can do,[236] often because the non-terrorism-specific law, under which acts of state terrorism are unlawful, is insufficiently enforced.[237] The resultant effective impunity has been defined as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account".[238]

It has been suggested that trials in national courts are appropriate for acts of terrorism.[239] As outlined in Section 4.2 above, UK nuclear deterrence policy is clearly an offence under the UK's own terrorism legislation. There is, however, little hope of successfully prosecuting UK officials in a UK court.[240] Nor is there much hope of prosecuting the UK Government in a non-UK court. In general, no state is entitled unilaterally to prosecute an act of terrorism which has been committed by another state.[241] Indeed, the jurisdiction of a state to prosecute any act of terrorism occurring in another state is limited.[242] The question of whether or not officials of one state could be prosecuted by another state, for official acts of terrorism, is not straightforward,[243] particularly after they cease to be officials.[244]

The International Criminal Court (ICC) would be a possible forum for such a trial, if the act of terrorism was also a crime as defined in the Rome Statute, for example a crime against humanity,[245] a war crime or genocide. Although a proposal to explicitly include terrorism among the crimes within the jurisdiction of the ICC was rejected,[246] there is nothing in the wording of the Rome Statute to prevent a crime against humanity (or a war crime or genocide) from being tried at the ICC merely because it also constitutes an act of terrorism.[247] This is, however, difficult for nuclear deterrence. The ICC definitions of crime against humanity, war crimes and genocide include neither the threat, nor the planning, of an unimplemented crime. That said, there are possible routes, at least in theory, for terrorism in the form a threat to be tried as an international crime.

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[235] Above, n. 112 and 221-228 and related text.

[236] Bâli 2012, p. 334; Broomhall 2004, p. 426, 431, 436, 437 and 441; Brown 1997, pp. 145-146; Margariti 2017, pp. 167-168; Santana 2015, p. 675; Weigend 2006, p. 923.

[237] Franck & Lockwood 1974, p. 74.

[238] N. Kyneswood, *Limits of Law in Ending Impunity for State Crime: Time to Re-Frame the International Criminal Court's Mandate?*, State Crime Journal, Vol. 8, No. 2, 2019, p. 220, quoting the UN Commission on Human Rights.

[239] Aksenova 2015, p. 280 and 298-299; Mazzochi 2011, pp. 101-102; Olson 2011, p. 492, 493 and 496.

[240] Drummond 2019, sect. 6.2; M. Morris, *Terrorism: The Politics of Prosecution*, Chicago Journal of International Law, Vol. 5, No. 2, 2005, p. 407.

[241] Dumitriu 2004, p. 601; Hmoud 2006, p. 1040; O. Fitzgerald, *The Globalized Rule of Law and National Security: An Ongoing Quest for Coherence*, University of New Brunswick Law Journal, Vol. 65, 2014, p. 82, notes potential changes in this area.

[242] C. C. Joyner 2007, pp. 237-239; Kolb 2004, pp. 271-278; M. Kovac, *International Criminalization of Terrorism*, Croatian Annual of Criminal Law and Practice, Vol. 14, No. 1, 2007, pp. 279-281; S. Sibbel, *Universal Jurisdiction and the Terrorism Acts*, Cambridge Student Law Review, Vol. 3, 2007, pp. 13-21.

[243] Hmoud 2006, p. 1040; Morris 2005, pp. 410-411 and 415-418; Proulx 2020, p. 190.

[244] R. Wedgwood, *International Criminal Law and Augusto Pinochet*, Virginia Journal of International Law, Vol. 40, No. 3, 2000, pp. 829-848.

[245] Mazandaran 2006, pp. 529-534; Proulx 2020, pp. 177-181.

[246] Aksenova 2015, p. 279, 281-282, and 296; I. Iqbal, *International Law of Nuclear Weapons Nonproliferation: Application to Non-State Actors*, Pace International Law Review, Vol. 31, No. 1, 2018, pp. 45-46; Kolb 2004, pp. 279-281; Margariti 2017, pp. 10-15; Mazandaran 2006, pp. 527-529; Van Schaack 2008, pp. 421-426.

[247] Arnold 2004, pp. 994-999; de Londras 2010, pp. 170-171; Kolb 2004, pp. 259, 278; Mazandaran 2006, p. 527; Mazzochi 2011, pp. 92-93; Zeidan 2006, p. 224; see, however, Kleczkowska 2019, pp. 48-53, which argues against this idea.

– One possibility is implicit in the existing ICC jurisdiction, if terrorism in the form of a threat is itself seen as a crime against humanity.[248] A broad reading of the reference to "inhumane acts of a similar character intentionally causing great suffering, or serious injury to … mental … health" might include the threat of violence. Although such acts will only be crimes against humanity when they are "part of a widespread or systematic attack directed against any civilian population", such an attack is defined as "conduct involving the multiple commission of acts referred to in paragraph 1 [which include "inhumane acts"] against any civilian population, pursuant to or in furtherance of a State or organizational policy".[249] A nuclear deterrence policy, which caused "great suffering, or serious injury to … mental … health" of the civilian population of the state(s) which the policy aimed to deter, could therefore be a crime against humanity within the jurisdiction of the ICC.

– A second possibility depends on the prohibition of terrorism, or at least nuclear terrorism, having achieved the status of a peremptory norm.[250] A peremptory norm is "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[251] All individuals and states are bound these worldwide norms, regardless of individual nationality or state consent.[252] Among the various consequences of such norms, one consequence is universal jurisdiction over violators of peremptory norms.[253] Specifically, it is well established that breaches of peremptory norms give rise to universal civil jurisdiction (even without a specific provision) and, unless otherwise provided, universal criminal jurisdiction.[254] This means that any State can bring the case to their own national court,[255] (potentially overriding the immunity normally granted to other States and their officials),[256] or to the International Court of Justice if the offending state has consented to ICJ jurisdiction (potentially overriding any reservations to that consent).[257]

On the first point, however, "the ICC offers little hope of ending state impunity" due to the fact that only individuals (not states) can be prosecuted at the ICC.[258] On the second point, even if the prohibition of nuclear terrorism became a peremptory norm, it is unlikely that the relevant understanding of terrorism would include state actions (given the ongoing inconsistencies among states on this point). A further difficulty is that, despite the well-established status of the prohibition of the *use* of force as a peremptory norm, it is "extremely difficult" to conclude that the prohibition of the *threat* of force is also a peremptory norm.[259]

This overall effective impunity for UK nuclear deterrence policy, even were it to constitute terrorism

[248] Arnold 2004, pp. 998-999; de Londras 2010, pp. 170-171.

[249] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 38544, Arts. 7(1)(k) and (2)(a).

[250] Iqbal 2018, pp. 48-51; T. Weatherall, *The Status of the Prohibition of Terrorism in International Law: Recent Developments*, Georgetown Journal of International Law, Vol. 46, No. 2, 2015, pp. 611-616.

[251] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 53.

[252] A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford 2008, pp. 8, 264.

[253] Iqbal 2018, p. 50; Weatherall 2015, pp. 621-622.

[254] Orakhelashvili 2008, p. 308.

[255] Ibid. p. 309.

[256] Ibid. pp. 343-357.

[257] Ibid. pp. 499-508.

[258] Kyneswood 2019, p. 221.

[259] J. A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, Michigan Journal of International Law, Vol. 32, No. 2, 2011, p. 227.

under international law, is concerning but not surprising. It is consistent with the UK's long history of impunity for atrocities. Many atrocities have been committed by states,[260] including the UK,[261] which in aggregate have left millions dead.[262] Many of these fall within common definitions of terrorism,[263] and few have led to any punishment for powerful states.[264] The bombings of cities in Germany and Japan in the 1940s are clear examples.[265] UK action to maintain such impunity is ongoing. This was seen in the UK's obstruction and obfuscation in the context of the 2013 case about UK atrocities in Kenya,[266] and in the UK's attempts to avoid members of its armed forces, in action abroad, being prosecuted for violation of human rights,[267] or commission of war crimes.[268]

6. Prospects for Change

The analysis in this article reflects a more general concern raised by other authors. The emergence of recent international and national law specific to terrorism, often through Security Council action, has been driven by powerful states in order to establish a worldwide approach that reflects their particular priorities.[269] For example, the particular activities covered by, and the timing of

[260] Bassiouni 2002, p. 102; Blakeley 2007, pp. 231-233; B. S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, Melbourne Journal of International Law, Vol. 8, No. 2, 2007, p. 501; R. Falk, *Reviving Global Justice, Addressing Legitimate Grievances*, Middle East Report, Vol. 229, 2003, p. 16; Held 2004, pp. 60-61, citing Honderich; K. Kovarovic, *When the Nation Springs a [Wiki]leak: The 'National Security' Attack on Free Speech*, Touro International Law Review, Vol. 14, No. 2, 2011, pp. 321-322; A. Nuzzo, *Reasons for Conflict: Political Implications of a Definition of Terrorism*, Metaphilosophy, Vol. 35, No. 3, 2004, pp. 340-342; O. C. Okafor, *Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective*, Osgoode Hall Law Journal, Vol. 43, No. 1&2, 2005, pp. pp. 173 and 190; Primoratz 2013, p. 78.

[261] Donohue 2005, p. 16; M. Neocleous, *Air Power as Police Power*, Environment and Planning D: Society and Space, Vol. 31, No. 4, 2013, pp. 578-593.

[262] Blakeley 2007, p. 228; Mazzochi 2011, p. 76; R. J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, UCLA Indigenous Peoples' Journal of Law, Culture, and Resistance, Vol. 5, 2019, pp. 36-37; N. Wittmann, *Reparations—Legally Justified and Sine qua non for Global Justice, Peace and Security*, Global Justice: Theory Practice Rhetoric, Vol. 9, No. 2, 2016, pp. 200, 209.

[263] S. A. Alshdaifat, *International Law and the Use of Force Against Terrorism*, Cambridge Scholars Publishing, Newcastle, 2017, pp. 3-5; Blakeley 2007, p. 231; Card 2007, pp. 10-11 and 22-23; C. Carr, *'Terrorism': Why the Definition must be Broad*, World Policy Journal, Vol. 24, No. 1, 2007, 48-49; English 2016, p. 136; Held 2004, p. 67, citing Means; Hodgson & Tadros 2013, p. 524; Jackson 2014, pp. 129-130; Jaggar 2003, p. 177; Medina 2019, p. 56; C. Miéville, *Multilateralism as Terror: International Law, Haiti, and Imperialism*, Finnish Yearbook of International Law, Vol. 19, 2008, pp. 79-81; S. Perera, *Introduction: Living through Terror: (Post)Conflict, (Post)Trauma and the South*, Social Identities: Journal for the Study of Race, Nation and Culture, Vol. 15, No. 1, 2009, pp. 3-4 and 8; Sluka 2000, pp. 8-10 and 30; Ware 2003, p. 261.

[264] Acharya 2009, p. 671; K. Borrelli, *Between Show-trials and Utopia: A Study of the Tu Quoque Defence*, Leiden Journal of International Law, Vol. 32, No. 2, 2019, pp. 317-318, 320 and 324-331; Paust 2010, p. 60; L. Varadarajan, *The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal*, European Journal of International Relations, Vol. 21, No. 4, 2015, pp. 806-810.

[265] Begorre-Bret 2006, p. 2002; Card 2007, pp. 9-10; Falk 2003, p. 16; Fletcher 2006, p. 905; Franck & Lockwood 1974, p. 73; Held 2004, p. 65; Hodgson & Tadros 2013, p. 512; Jaggar 2003, p. 181; Primoratz 2013, p. 72, and 74-77; Reitan 2013, p. 205; Rodin 2004, p. 770; Schelling 1982, p. 67; Schwenkenbecher 2009, pp. 109-116, 119; Vanaik 2010, p. 10.

[266] Balint 2016.

[267] Margariti 2018, pp. 196-197.

[268] Kyneswood 2019, p. 230; E. van Sliedregt, *One Rule for Them - Selectivity in International Criminal Law*, Leiden Journal of International Law, Vol. 34, No. 2, 2021, pp. 287-288.

[269] Acharya 2009, p. 653 and 678-679; A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge 2005, pp. 306-307; Brown 1997, pp. 167-168; Chimni 2007, p. 509; R. Cry-

the introduction of measures, has often directly related to the effects of the relevant activities on residents of the US and Europe.[270] Here, as in other areas of international law, this imbalance is exacerbated when authors accept, consciously or otherwise, the priorities and perspectives of the powerful states.[271] For those wishing to challenge this dominance of the powerful states, five strategies are worth considering. The first three of these strategies are specific to nuclear deterrence.

1. Including state action, and state military action, in existing or future international terrorism conventions, might allow them to cover some (or all) aspects of nuclear deterrence. For example, defining terrorism in a way that did not exclude state military activity would be a useful first step. This possibility, however, seems unlikely given the failure to reach agreement, after almost fifty years of UN-sponsored debate on this specific issue.[272]

2. The UNSC could "manage nuclear deterrence" though a Resolution which explicitly restricts the use of nuclear weapons to "a response to an armed attack [...] involving nuclear weapons".[273] The calls for a multilateral no-first-use agreement have also been ongoing for over fifty years,[274] with little progress to date.[275] There are, however, two reasons for hope:(i) the growing support for no-first-use policies;[276] and (ii) the pressure on the nuclear-armed states to make some substantial change to their policies ahead of the next Non-Proliferation

er, *Book Review: Myra Williamson, Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001*, Journal of Conflict and Security Law, Vol. 14, No. 2, 2009, p. 384; Ejeh & Bappah & Dankofa 2019, p. 189; Grozdanova 2014, pp. 324-326; B.-V. Ikejiaku, *International Law is Western Made Global Law: The Perception of Third-world Category*, African Journal of Legal Studies, Vol. 6, Nos. 2-3, 2013, p. 341 and 353-354; Koskenniemi 1995, p. 348; Moeckli 2008, pp. 178-180 and 182; C. C. Murphy, *Terrorism and Transnational Law: Rules of Law under Conditions of Globalisation*, in P. Zumbansen (Ed.), Oxford Handbook of Transnational Law, Oxford University Press, Oxford 2021, sect. IV.A; Norberg 2010, p. 49; Satterley 2015, pp. 15-16; P. C. R. Terry, *The Return of Gunboat Diplomacy: How the West has Undermined the Ban on the Use of Force*, Harvard National Security Journal, Vol. 10, 2019, p. 110.

[270] Acharya 2009, p. 657 and 659-660; Anghie 2005, pp. 306-307; Asada 2008, pp. 320-324; Brown 1997, p. 167; Greene 1992, p. 484; Okafor 2005, p. 173 and 181-187.

[271] M. al Attar, *Review of J Linarelli, M E Salomon and Sornarajah: The Misery of International Law: Confrontations with Injustice in the Global Economy*, Leiden Journal of International Law, Vol. 32, No. 4, 2019, pp. 875-876; O. A. Badaru, *The Right to Food and the Political Economy of Third World States*, Transnational Human Rights Review, Vol. 1, 2014, pp. 113-115 and 121-122; H. Charlesworth, *International Law: A Discipline of Crisis*, Modern Law Review, Vol. 65, No. 3, 2002, pp. 377-392; M. Chiam & A. Hood, *Nuclear Humanitarianism*, Journal of Conflict and Security Law, Vol. 24, No. 3, 2019, pp. 490-492; Chimni 2007, pp. 507-508 and 512-513; Miéville 2008, pp. 73-79; A. Orford, *International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment*, Proceedings of the ASIL Annual Meeting, Vol. 113, 2019, pp. 24-25; J. Reynolds, *Disrupting Civility: Amateur Intellectuals, International Lawyers and TWAIL as Praxis*, Third World Quarterly, Vol. 37, No. 11, 2016, p. 2100; Satterley 2015, pp. 9-11 and 13-15; C. Schwöbel-Patel, *Populism, International Law and the End of Keep Calm and Carry on Lawyering*, in J. E. Nijman & W. G. Werner (Eds.), 49 Netherlands Yearbook of International Law 2018, T.M.C. Asser Press, The Hague 2019, p. 97; the same point is also made in the context of international relations: Blakeley 2007, pp. 229-231.

[272] Above, nn. 87, 111 and 221 and related text.

[273] White 2020, p. 265.

[274] Z. Pan, *A Study of China's No-First-Use Policy on Nuclear Weapons*, Journal for Peace and Nuclear Disarmament, Vol. 1, No. 1, 2018, pp. 125-126; N. Ritchie, *Waiting for Kant: Devaluing and Delegitimizing Nuclear Weapons*, International Affairs, Vol. 90, 2014, pp. 610–612.

[275] Global Zero, *Commission on Nuclear Risk Reduction: De-alerting and Stabilizing the World's Nuclear Force Postures*, Global Zero 2015, https://www.globalzero.org/reaching-zero/reports/ (6 August 2021) pp. 38-39.

[276] Above, n. 162 and related text.

Treaty[277] (hereinafter: NPT) Review Conference,[278] now planned for early 2022,[279] to balance their negative response[280] to the development of the Treaty on the Prohibition of Nuclear Weapons.[281]

3. Giving at least equal attention to wider national and international law, not specific to terrorism, which also applies to terrorism,[282] may highlight ways of countering state terrorism.[283] In the context of UK nuclear deterrence, in addition to the law outlined in Section 3 above, other areas to explore include the UK's apparent ongoing breach of its obligations under NPT Article VI[284] in acting to maintain its nuclear deterrence policy indefinitely.[285] That said, the UK Government's current disrespect for the rule of law is demonstrated by (a) its action in 2017 and 2018 to prevent its nuclear deterrence policy being challenged in UK and international courts,[286] and (b) its repeated failure to answer parliamentary questions on how international law applies to its nuclear deterrence policy.[287]

4. A more general strategy is to give increased attention to the application of international law in areas which are of significant concern to the less powerful states.[288] For example powerful

[277] 1968 Treaty for the Non-Proliferation of Nuclear Weapons (NPT), 729 UNTS 161.

[278] White 2020, pp. 264-265.

[279] https://www.un.org/en/conferences/npt2020 (6 August 2021).

[280] UK Guidance April 2021: "the UK [...] will not support, sign or ratify the TPNW".

[281] TPNW 2017.

[282] Amet 2013, p. 18; E. C. Ezeani, *Responding to Homegrown Terrorism: The Case of Boko Haram*, Annual Survey of International & Comparative Law, Vol. 22, No. 1, 2017, p. 23; Moeckli 2008, pp. 178-181; Roach 2008, pp. 99-100.

[283] Amet 2013, p. 33; Bâli 2004, pp. 12-14 and 18-20; Jaggar 2003, p. 178; Tiefenbrun 2002, pp. 378-379.

[284] NPT 1968, Art. VI.

[285] UK Guidance April 2021: "The UK's independent nuclear deterrent […] will remain […] for as long as the global security situation makes it necessary"; Drummond 2019, pp. 227-228 and 236-237; S. Kadelbach, *Possible Means to Overcome Tendencies of the Nuclear Weapons Ban Treaty to Erode the NPT*, in J. L. Black-Branch & D. Fleck (Eds.), Nuclear Non-proliferation in International Law - Volume V, T.M.C. Asser Press, The Hague 2020, pp. 309-310; for an alternative perspective, see P. M. Kiernan, *'Disarmament' under the NPT: Article VI in the 21st Century*, Michigan State International Law Review, Vol. 20, No. 2, 2013, pp. 381-400.

[286] Drummond 2019, sect. 6.2.

[287] UK HC, *Written Question 222573 by Martyn Day, and Response by Gavin Williamson*, 18 & 26 February 2019, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-02-18/222573/ (6 August 2021); UK HC *Written Questions 3709, 3710 & 3711 by Martyn Day, and Responses by Mark Lancaster*, 22 & 28 October 2019, https://questions-statements.parliament.uk/written-questions/detail/2019-10-22/3709 (6 August 2021), https://questions-statements.parliament.uk/written-questions/detail/2019-10-22/3710 (6 August 2021), & https://questions-statements.parliament.uk/written-questions/de-tail/2019-10-22/3711 (6 August 2021).

[288] Badaru 2014; Charlesworth 2002, p. 389 and 391-392; Chimni 2007, p. 503 and 515; M. A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, Tulane Law Review, Vol. 76, No. 4, 2002, p. 847 and 918; H. Elver, *Human Rights Based Approach to Sustainable Agricultural Policies and Food Security*, in H. Ginzky & E. Dooley & I. L. Heuser & E. Kasimbazi & T. Markus & T. Qin (Eds.), International Yearbook of Soil Law and Policy 2018, Springer, Cham 2019, pp. 358-370; C. G. Gonzalez, *International Economic Law and the Right to Food*, in N. C. S. Lambek & P. Claeys & A. Wong & L. Brilmayer (Eds.), Rethinking Food Systems, Springer, Dordrecht, 2014, pp. 188-193; R. L. Johnstone, *Unlikely Bedfellows: Feminist Theory and the War on Terror*, Chicago-Kent Journal of International and Comparative Law, Vol. 9, No. 1, 2009, p. 45; B. Leebaw, *Justice, Charity, or Alibi? Humanitarianism, Human Rights, and 'Humanity Law'*, Humanity, Vol. 5, No. 2, 2014, pp. 261-276; K. Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, Wisconsin International Law Journal, Vol. 16, No. 2, 1998, pp. 383-384 and 393-394; M. Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, African Studies Review, Vol. 51, No. 1, 2008, pp. 17-39; Okafor 2005, p. 173 and 181-187; Orford 2019, pp. 23-26; M. E. Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, International and Comparative Law Quarterly, Vol. 62, No. 1, 2013, p. 49; see also below, notes 307-311 and related text.

states contribute to systematic injustice,[289] including through their undue influence over the development of international law,[290] which undermines the "ultimate goal of law […] to maintain justice by facilitating human dignity and worth".[291]

5. Another general strategy is to use the word 'terrorism' more consistently in an international law context.[292] Such use should acknowledge, at least in principle, that 'terrorism' can potentially refer to some actions of powerful states, such as:

   – some of their recent military action;[293] and

   – some of their ongoing,[294] centuries-long,[295] often violent,[296] structural oppression of other countries.[297]

7. Conclusions

Subject to considering only English-language literature, there is a wide consensus in the international law literature, on some core characteristics of activities described as terrorism. Such activities (a) involve violence (or threat of violence), fear and coercion, (b) are unlawful by reference to some non-terrorism-specific international or national law, and (c) can, in principle, include state activity. The first two of these characteristics are broadly consistent with descriptions of terrorism by international courts, in international humanitarian law, and among UN member states. Inconsistency among states, however, currently prevents a clear conclusion that state activity can constitute terrorism under international law.

At least some aspects of UK nuclear deterrence policy, such as the failure to rule out first use, render it unlawful under non-terrorism-specific international law. UK nuclear deterrence policy

[289] E. Ashford, *The Infliction of Subsistence Deprivations as a Perfect Crime*, Proceedings of the Aristotelian Society, Vol. 118, No. 1, 2018, pp. 83-106; Badaru 2014, pp. 123-133; G. Brock, *Global Health and Responsibility*, in P. T. Lenard & C. Straehle (Eds.), Health Inequalities and Global Justice, Edinburgh University Press, Edinburgh, 2012, pp. 117-118; T. Hayward, *On the Nature of our Debt to the Global Poor*, Journal of Social Philosophy, Vol. 39, No. 1, 2008, pp. 12-18; J. Hickel, *The Imperative of Redistribution in an Age of Ecological Overshoot: Human Rights and Global Inequality*, Humanity, Vol. 10, No. 3, 2019, pp. 420-421; Salomon 2013, pp. 52-54.

[290] R. S. Abella, *International Law and Prospects for Justice*, Emory International Law Review, Vol. 34, 2020, p. 941 and 945; Gonzalez 2014, pp. 169-184; O. C. Okafor, *Poverty, Agency and Resistance in the Future of International Law: An African Perspective*, Third World Quarterly, Vol. 27, No. 5, 2006, pp. 802-805; M. E. Salomon, *Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism*, German Yearbook of International Law, Vol. 51, 2008, pp. 43-44, 51-52, 64 and 72-73.

[291] Acharya 2009, p. 653; Charlesworth 2002, p. 391; Chimni 2007, p. 500.

[292] I. Mgbeoji, *The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International Law's (Dis)Engagement with Terrorism*, Osgoode Hall Law Journal, Vol. 43, No. 1&2, 2005, p. 108; Blakeley 2007, makes the same suggestion in the context of international relations.

[293] R. Blakeley, *Drones, state terrorism and international law*, Critical Studies on Terrorism, Vol. 11, No. 2, 2018, pp. 321-341; Carr 2007, p. 50.

[294] al Attar 2019, p. 878, and 880; Ashford 2018, pp. 91 and 99; Badaru 2014, pp. 124-132; Baxi 2005, p. 12; Blakeley 2007, pp. 229-231; Ikejiaku 2013, pp. 346-347; M. Koskenniemi, *'The Lady doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, Modern Law Review, Vol. 65, No. 2, 2002, p. 172.

[295] Anghie 2005, p. 295; Drumbl 2002, pp. 912-913; Hickel 2019, pp. 419-421; S. Marks, *Human Rights and the Bottom Billion*, European Human Rights Law Review, Vol. 1, 2009, pp. 43-49; Orford 2019, p. 26.

[296] al Attar 2019, p. 876; Anghie 2005, p. 308; Charlesworth 2002, p. 391; Ikejiaku 2013, p. 345.

[297] Baxi 2005, pp. 11-12 and 24-25; Blakeley 2018.

also involves threat of violence, fear and coercion. The suggestion that UK nuclear deterrence policy is terrorism under international law, although "credible" is not yet "authoritative",[298] due to the current legal disagreement on whether or not state activity can constitute terrorism.

Not all activity with the characteristics of terrorism, as currently specified by terrorism-specific international law instruments, is covered by those instruments. In particular, UK nuclear deterrence policy, which would fall within international legal constraints on nuclear terrorism, does not do so, because of their scope restrictions and exceptions. Thus although UK nuclear deterrence policy might be terrorism, that fact alone would not currently render the policy unlawful under international law (nor would that fact prevent the policy being otherwise unlawful).

UK nuclear deterrence policy is an offence under UK terrorism law, but there is little hope of successfully prosecuting UK Government officials in national or international courts.

This overall effective impunity for UK nuclear deterrence policy highlights how powerful states often drive the development of international law on terrorism by reference to their own priorities. Strategies for change include: applying wider, non-terrorism-specific, international law to achieve a UK no-first-use policy; giving more attention to applying international law to worldwide systematic injustices; and aiming for a more consistent use of the word 'terrorism' in an international law context.

[298] Above, n. 10 and related text.