

LEGALITY UNDER INTERNATIONAL LAW OF THE UNITED KINGDOM'S NUCLEAR POLICY AS SET OUT IN THE 2021 INTEGRATED REVIEW

JOINT OPINION

Introduction

1. We are asked to advise the Campaign on Nuclear Disarmament (CND) on the legality under international law of the United Kingdom's assertion in the 2021 *Integrated Review on Security, Defence, Development and Foreign Policy* [*Integrated Review*] that it 'will move to an overall nuclear weapon stockpile of no more than 260 warheads' and replace its existing nuclear warhead to ensure continued deterrence with modern nuclear systems. (*Integrated Review*, p 76-77) This announcement in effect denotes an increase in the UK's overall nuclear weapon stockpile from 180 to 260 warheads representing a rise of more than 40%.

2. We are also asked to advise on the legality under international law of the following statement set out in the *Integrated Review*:

'The UK will not use, or threaten to use, nuclear weapons against any non-nuclear weapon state party to the Treaty on the Non-Proliferation of Nuclear Weapons 1968 (NPT). This assurance does not apply to any state in material breach of those non-proliferation obligations. However, we reserve the right to review this assurance if the future threat of weapons of mass destruction, such as chemical and biological capabilities, or emerging technologies that could have a comparable impact, makes it necessary.' (*Integrated Review*, p 77)

3. More specifically advice is sought on:
 - (i) Whether the announcement by the UK government of the increase in nuclear warheads constitutes a breach of the NPT article VI;

- (ii) Whether the UK would be in breach of international law were it to use or threaten to use nuclear weapons against a state party to the NPT that is in material breach of its non-proliferation obligations;
- (iii) Whether the UK would be in breach of international law were it to use or threaten to use nuclear weapons in self-defence where the future threat of weapons of mass destruction, such as chemical and biological capabilities or emerging technologies, could have comparable impact to nuclear weapons.

Conformity of the increase in nuclear warheads with the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

- 4. The UK became a party to the NPT in 1968 and the Treaty came into force in 1970. As a party to a treaty in force the UK is legally bound by its provisions.
- 5. The NPT is founded on three normative pillars corresponding to the object and purpose of the Treaty: non-proliferation (Articles I, II and III); peaceful use of nuclear energy (Articles IV and V); and disarmament (Article VI). These three pillars are reproduced in the preamble. The Treaty's *travaux préparatoires* show that the three pillars of the NPT should be understood to be presumptively juridically equal (D. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, 2011, 32, 76)
- 6. Disarmament is addressed in article VI which states:

'Each of the parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective control.'
- 7. Article VI thus sets out obligations on states parties to pursue negotiations in good faith on effective measures relating to three specific results:
 - cessation of the nuclear arms race at an early date;
 - nuclear disarmament; and
 - a treaty on general and complete disarmament under strict and effective control.

8. Article VI is applicable to all states parties to the NPT, but it is primarily directed at the obligations of the nuclear weapon states. The NPT negotiation history shows that these obligations were the subject of much discussion, but it can be briefly summarised. The first drafts of the Treaty prepared by the US and USSR addressed only non-proliferation. This did not satisfy other (non-nuclear weapon) states including Italy, India, Brazil, Scandinavian states, Canada, the then UAR and Germany who sought a provision within the Treaty relating to disarmament.
9. Eight non-aligned states together produced a statement of their conviction ‘that measures to prevent the spread of nuclear weapons should, therefore, be coupled with or followed by tangible steps to halt the nuclear arms race and so limit, reduce and eliminate stocks of nuclear weapons and the means of their delivery.’ In 1967 Mexico produced a draft text that included the obligation to pursue negotiations in good faith toward nuclear disarmament outside the framework of general and complete disarmament.
10. In the General Assembly debate on the draft Treaty further objections were made to the lack of any tangible commitment to nuclear disarmament by the nuclear weapon states. Article VI was further revised before its inclusion in the adopted Treaty. Ultimately the US and USSR had in effect ‘no choice’ but to heed these views if they wanted a treaty. (E. Firmage, ‘The Treaty on the Non-Proliferation of Nuclear Weapons’, 63 *American Journal of International Law* (1969) 711, 733; International Law Association, Committee on Nuclear Weapons, Non-Proliferation and Contemporary International Law, 2nd report, 2014; G. Bunn, R.M. Timerbaev and J. Leonard, ‘Nuclear Disarmament: How Much Have the Five Nuclear Powers Promised in the Non-Proliferation Treaty?’ (1994) at https://cisac.fsi.stanford.edu/publications/nuclear_disarmament_how_much_have_the_five_nuclear_powers_promised_in_the_nonproliferation_treaty).
11. The negotiation history makes it clear that article VI is a core component of the NPT, reflecting a ‘strategic bargain’ between those (many) states that renounced acquisition of nuclear arms and those states that then possessed them. (T. Graham, Correspondence, ‘The Origin and Interpretation of Article VI’, 15 *Nonproliferation*

Review (2008) 7, 9). Its inclusion has been described as ‘a testament to the tenacity of the non-nuclear-weapon States in demanding some form of quid pro quo for their renunciation of nuclear weapons.’ (E. Firmage, ‘The Treaty on the Non-Proliferation of Nuclear Weapons’, 63 *American Journal of International Law* (1969) 711, 732). It means that ‘the NPT is the only existing international treaty under which the major nuclear powers are legally committed to disarmament.’ (T. Rauf, ‘Nuclear Disarmament: Review of Article VI’, in J. Simpson and D. Howlett (eds), *The Future of the Non-Proliferation Treaty*, 1995, 66, 67). Article VI is the ‘only treaty provision in which NWS have undertaken a legal obligation to negotiate nuclear disarmament agreements’. (M. Marin Bosch, ‘The Non-Proliferation Treaty and its Future’, in L. Boisson de Chazournes and P. Sands, eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 375).

12. It is necessary to determine the extent of UK obligations under article VI and whether its two-fold stated intention to increase its overall nuclear weapon stockpile from 180 to 260 warheads and to update its nuclear deterrent system by replacing its existing nuclear warheads with modern nuclear systems constitute breaches of the obligation to pursue negotiations to disarmament.
13. Although in 2021 the NPT has been in force for over 50 years and nuclear disarmament has not transpired, it is important to note at the outset that it has not terminated through desuetude. The 1995 Review and Extension Conference extended the Treaty’s duration indefinitely in accordance with article X (2) and the Review Conferences held at 5 yearly intervals have maintained its continuing validity.
14. The UN General Assembly and Security Council have both reiterated the continued applicability and centrality of the NPT. For instance, in recalling the advisory opinion of the ICJ on nuclear weapons, the General Assembly has adopted an annual resolution reminding states of their nuclear disarmament obligations pursuant to the NPT (UNGA Resolution 75/66, 7 December 2020). Likewise, the Security Council has repeatedly recalled Resolution 1887 in which it underlined ‘the need to pursue further efforts in the sphere of nuclear disarmament, in accordance with Article VI of the NPT’ and calls on states parties ‘pursuant to Article VI of the Treaty, to undertake to pursue negotiations in good faith on effective measure relating to nuclear arms

reduction and disarmament' (UNSC Resolution 1887, 24 September 2009.) The Security Council has 'recalled' Resolution 1887, most recently in Resolution 2569, 26 March 2021.

15. The UK itself accepts the continued applicability of the NPT to itself (UK [draft] *National Report Pursuant to Actions 5, 20, and 21 of the Nuclear Non-Proliferation Treaty 2010 Review Conference*, NPT/CONF.2020/PC.III/7, 25 April 2019, 4; see also Government Response to item 13 of the House of Lords Select Committee on International Relations Report, *Rising nuclear risk, disarmament and the Nuclear Non-Proliferation Treaty*, 26 June 2019). In conjunction with the other nuclear weapon states under the Treaty (the five permanent members of the UN Security Council) the UK has reaffirmed its '*commitment to the Treaty, in all its aspects fifty years since its signature.*' (emphasis added). The P 5 recognised the NPT as providing '*the essential foundation for international efforts to stem the threat that nuclear weapons would spread across the globe*' and asserted their continuing commitment '*under the Treaty to the pursuit of good faith negotiations on effective measures related to nuclear disarmament.*' (P5 Joint Statement on the Treaty on the Non-Proliferation of Nuclear Weapons, 24 October 2018 at <https://www.gov.uk/government/news/p5-joint-statement-on-the-treaty-on-the-non-proliferation-of-nuclear-weapons>). The UK reiterated its commitment to the NPT in its 2021 Integrated Review: '*We are strongly committed to full implementation of the NPT in all its aspects, including nuclear disarmament, non-proliferation, and the peaceful uses of nuclear energy; there is no credible alternative route to nuclear disarmament.*' (Integrated Review, p 78).
16. Determination of whether the UK is in breach of its obligations under NPT article VI requires:
 - determination of the scope of those obligations through interpretation of article VI in accordance with principles of treaty interpretation; and
 - determination of whether increasing its arsenal of nuclear warheads and modernising its nuclear systems are in conformity with those obligations.

The Vienna Convention on the Law of Treaties

17. The principles relating to the law of treaties are largely codified in the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS (VCLT). The UK is a party to the VCLT (ratified 25 June 1971), which came into force on 27 January 1980. The VCLT does not have retroactive effect (article 4) and therefore does not apply to the NPT, which came into force on 5 March 1970.
18. Some provisions of the VCLT have however been explicitly accepted by the International Court of Justice (ICJ) as constituting customary international law, including those on treaty interpretation and on material breach of a treaty, which thus provide the legal framework for interpretation of the NPT.

Principles of Treaty Interpretation

19. The VCLT, articles 31-33 provide the basic principles of treaty interpretation that have been consistently accepted by the ICJ as reflective of customary international law (*Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* 2017 ICJ Reports 3, para 63; see also International Law Commission (ILC), Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018, conclusion 2). Interpretation of the NPT, article VI must therefore be in accordance with these articles.
20. The VCLT, article 31 (1) provides that: ‘*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*’ The ICJ has asserted that the ‘*elements of interpretation — ordinary meaning, context and object and purpose — are to be considered as a whole.*’ (*Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* 2017 ICJ Reports 3, para 63).
21. The VCLT, article 31 (2) explains that: ‘*The context for the purpose of the interpretation of a treaty*’ includes ‘*its preamble and annexes*’. In the case of the NPT, article VIII (3) makes explicit that the purposes of the Treaty are to be found in the preamble: five yearly reviews must take place ‘*with a view to assuring that the*

purposes of the Preamble and the provisions of the Treaty are being realised'. This brings the preamble directly into the obligatory provisions of the Treaty.

22. The VCLT, article 31 (3), specifies that: *'There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;'*

23. The NPT, article VIII (3) provides for Review Conferences to be held at five yearly intervals in order to review the Treaty's operation *'with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realised.'* Declarations and decisions of the Review Conferences do not constitute Treaty amendments (which are separately provided for in article, VIII (2)). The International Law Commission (ILC) determined that the legal effect of decisions of Conferences of States parties depend upon their applicable rules of procedure but that *'such a decision may embody, explicitly or implicitly, a subsequent agreement under article 31, paragraph 3 (a), or give rise to subsequent practice under article 31, paragraph 3 (b), or to subsequent practice under article 32.'* (ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018, conclusion 11). The ILC also noted that such decisions *'often provide a non-exclusive range of practical options for implementing the treaty.'* This is precisely what the 2000 Review Conference did with its *'practical steps for the systematic and progressive efforts to implement article VI'* that were reaffirmed by the 2010 Review Conference and added to by the Action Plan on Disarmament. These should thus be taken into account in the interpretation of the NPT.

24. The VCLT, article 32 allows for recourse to the preparatory work (*travaux préparatoires*) of a treaty and the circumstances of its conclusion *'in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'*

State Obligations under NPT, article VI

25. As outlined above, the *travaux préparatoires* of the NPT make clear the linkage between the commitment to non-proliferation and the obligations of all states to pursue negotiations towards nuclear disarmament. The importance of article VI has been recognised by commentators. It has been called ‘*the single most important provision of the treaty, however, from the standpoint of long-term success or failure of its goal of proliferation prevention*’. (E. Firmage, ‘The Treaty on the Non-Proliferation of Nuclear Weapons’, 63 *American Journal of International Law* (1969) 711, 732).
26. Article VI was thus an integral part of the NPT package, not just an ‘add-on’ and must be ‘*interpreted in light of the object and purpose of the Convention and taking into account other provisions of the Convention*’ (*Whaling in the Antarctic* (Australia v Japan) 2014 ICJ Reports, 226 at para 55).
27. As stated above, the objectives of the NPT are found in the preamble. A number of preambular paragraphs make explicit the objective of disarmament:
- *Declaring their intention to ... undertake effective measures in the direction of nuclear disarmament,*
 - *Urging the co-operation of all States in the attainment of this objective,*
 - *Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control.*
28. These paragraphs highlight the importance of article VI to the object and purpose of the Treaty and make clear that the ordinary meaning of the wording is that parties will ‘*undertake effective measures in the direction of nuclear disarmament.*’ To this end they undertake ‘*to pursue negotiations in good faith.*’

Obligation to Negotiate in Good Faith

29. In 1996, the ICJ confirmed that the obligation contained in article VI, as reaffirmed by the 1995 Review Conference ‘*remains without any doubt an objective of vital importance to the whole of the international community today.*’ (*Legality of the Threat or Use of Nuclear Weapons*, AO 1996 ICJ Reports, 226, para 103). The Court unanimously asserted that: ‘*There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control.*’ (*dispositif* paragraph 105. 2. F).
30. The Court asserted that this obligation goes beyond that of a ‘mere’ obligation of *conduct* for it is an obligation to achieve a precise *result*: ‘*nuclear disarmament in all its aspects ... by the pursuit of negotiations on the matter in good faith.*’ (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports, 226, paras 99 and 102; see also M. Marin Bosch, ‘The Non-Proliferation Treaty and its Future’, in L. Boisson de Chazournes and P. Sands, (eds), *International Law, the International Court of Justice and Nuclear Weapons*, 1999, 375).
31. The obligation under NPT, article VI is thus not to disarm as such, but a positive obligation to pursue in good faith negotiations towards this end, and to bring them to a conclusion. The ICJ has observed that even without any express agreement to negotiate in good faith, such obligation would be implicit. (*Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v Greece) 2011 ICJ Reports 644, para 131).
32. The principle of good faith is unarguably a ‘fundamental principle of international law.’ (R. Kolb, *La bonne foi en droit international public: contribution à l’étude des principes généraux du droit*, 2001, 112-113). Member states of the UN agree to ‘fulfil in good faith’ their obligations under the Charter. (UN Charter, article 2 (2)). The Declaration on Friendly Relations affirmed that states have the duty to fulfil in good faith their obligations under international agreements valid under ‘generally recognized principles and rules of international law’ (UNGA Resolution 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly

Relations and Co-operation among States in accordance with the Charter of the United Nations).

33. Good faith is a basic principle governing the creation and performance of legal obligations, core to the *'trust and confidence that are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.'* (*Nuclear Weapons (Australia v France)* 1974 ICJ Reports, 253, para 46). It is spelled out in the VCLT, which in article 26 requires states to perform in good faith treaties to which they are parties and in article 31 to interpret those treaties in good faith.
34. The obligation of good faith has been described as not being one *'which obviously requires actual damage. Instead its violation may be demonstrated by acts and failures to act which, taken together, render the fulfilment of specific treaty obligations remote or impossible.'* (G. Goodwin-Gill, 'State Responsibility and the 'Good Faith' Obligation in International Law', in M. Fitzmaurice and D. Sarooshi (eds) *Issues of State Responsibility before International Judicial Institutions*, 2004, 75, 84).
35. The ICJ and its predecessor, the PCIJ, have on many occasions stated that good faith with respect to negotiations requires states *'not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements.'* (*Railway Traffic between Lithuania and Poland*, AO, 1931, PCIJ, Series A/B, No. 42, 116; *Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v Greece) 2011 ICJ Reports 644, para 132).
36. The Court has examined the requirements for good faith negotiations. It has explained that failure to reach agreement even after a long period of time is not of itself evidence of lack of good faith but there must be meaningful attempts. (*Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v Greece) 2011 ICJ Reports 644, para 134). Negotiation in good faith requires *'at the very least — a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute.'* (*Application of the International Convention on the Elimination of All Forms of Racial*

Discrimination (Georgia v Russian Federation) 2011 ICJ Reports 70, para 157). Parties should pay reasonable regard to the interests of others. (*Application of the Interim Accord of 13 September 1995* (the former Yugoslav Republic of Macedonia v Greece), 2011 ICJ Reports 644, para 132). Taking no action that would make a successful outcome impossible, or unlikely, would constitute a breach of the obligation to negotiate in good faith

Obligation to take Effective Measures toward Disarmament

37. The Final Document of the Review Conference 2000 (NPT/CONF.2000/28 Parts I and II) agreed a landmark series of practical steps for systematic and progressive efforts to implement NPT, article VI and paras 3 and 4 (c) of the 1995 Decision on ‘Principles and Objectives for Nuclear Non-Proliferation and Disarmament’. Step 6 encompasses: *‘An unequivocal undertaking by the nuclear weapon states to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States parties are committed under article VI.’* Step 9 provides the basis for *‘Steps by all the nuclear weapon States leading to nuclear disarmament in a way that promotes international stability, including:*
- Further efforts by the nuclear weapon states to reduce their nuclear arsenals unilaterally;
 - Concrete agreed measures to further reduce the operational status of nuclear weapons systems;
 - A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination. (Final Document of the Review Conference 2000, Part I, Article VI and paras 3 and 4 (c) of the 1995 Decision on ‘Principles and Objectives for Nuclear Non-Proliferation and Disarmament’, para 15.9).
38. These measures were intended as practical steps for parties to the NPT, specifically the nuclear weapons states, to achieve implementation of the Treaty and as such they come within the VCLT, article 31 (3). (ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 2018, conclusion 11).

39. In 2010 the Review Conference reaffirmed ‘*the commitment of States parties to the effective implementation of the objectives and provisions of the Treaty, ... and the Final Document of the 2000 Review Conference, adopted by consensus*’ building upon and reaffirming the validity of the practical steps for *implementation* of article VI agreed in 2000. The Conference agreed an action plan for nuclear disarmament. It reaffirmed the ‘*unequivocal undertaking of the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament*’ and the ‘urgent need’ to implement the nine steps agreed in 2000. It called upon ‘*all nuclear-weapon States to undertake concrete disarmament efforts*’ and resolved that ‘*nuclear-weapon States commit to accelerate concrete progress on the steps leading to nuclear disarmament*’ as agreed in 2000. (2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document Volume I Part I, NPT/CONF.2010/50 (Vol. I), Conclusions and recommendations for follow-on actions, 19-21).
40. The 2015 Review Conference did not adopt a Final Document. To the extent that in 2019 the UK released a draft report, pursuant to the 2010 NPT Review Conference Action Plan, in preparation for the 2020 Review Conference, it recognises the continued applicability of the agreements reached in 2000 and 2010. Due to COVID-19 the 2020 Conference was postponed until August 2021.

Breach of Treaty

41. The legal regimes governing treaty breach are found in the VCLT and the secondary rules determining state responsibility for an international wrongful act attributable to the state.

The VCLT, article 60

42. The VCLT, article 60 dealing with material breach of a treaty has long been accepted by the ICJ as constituting customary international law. (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970)*, AO, 1971 ICJ Reports 16, 47; *Fisheries*

Jurisdiction Case (United Kingdom v Iceland) 1974 ICJ Reports 3, para 36; *Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, para 4).

43. The VCLT, article 60 (3) defines a material breach as occurring in one of two ways: ‘A material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.’
44. Repudiation of a treaty involves the rejection of the treaty as a whole. (*In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009* (Croatia v Slovenia), Partial Award, 30 June 2016, para 213). The UK has not repudiated the NPT and has indeed repeatedly reaffirmed it for instance in the words of the 2018 Joint Statement by the P5 and in its 2021 *Integrated Review*, as cited in para 15 above.
45. Any determination of material breach must therefore be under VCLT, article 60 (3) (b), that is whether there is behaviour that violates a provision ‘essential to the accomplishment of the object or purpose of the treaty.’
46. Article 60 (3) rests upon the importance of the provision violated, not on the intensity or gravity of the breach; it requires that the ‘provision breached be essential for the accomplishment of the treaty’s object and purpose’. (*In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009* (Croatia v Slovenia), Partial Award, 30 June 2016, para 215). Accordingly, article 60 (3) ‘does not permit responses against grave breaches of treaty provisions that are not essential’ (B. Simma and C. Tamms, ‘Reacting against Treaty Breaches’, in D. Hollis, *Oxford Guide to Treaties*, 2nd ed, 2020, 568).
47. As discussed above, the NPT preamble describes the Treaty’s objects and purposes. VCLT, article 31 (1) allows these to be considered in interpreting the ordinary meaning of the Treaty text. Preambular paragraph 8 declares the parties’ intention ‘to undertake effective measures in the direction of nuclear disarmament’. The linkage

between the principles of non-proliferation and the obligation to negotiate towards nuclear disarmament is confirmed by the NPT negotiation history (discussed in paras 8-11 above) and the Final Documents of the 2000 and 2010 Review Conferences. Their applicability in interpretation of the Treaty is in accordance with the VCLT, articles 31 (3) (subsequent agreement or practice) and 32 (*travaux préparatoires*) and the ILC Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties. Article VI is thus a provision '*essential to the accomplishment of the object or purpose of the treaty.*'

Law of State Responsibility

48. In addition to the VCLT, article 60, the International Law Commission has addressed breach in its Articles on Responsibility of States for Internationally Wrongful Acts (UNGA Resolution 56/83, 12 December 2001). Article 12, defines the existence of a breach of an international obligation as occurring '*when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.*' The ICJ has asserted that such breach includes '*failure to comply with treaty obligations.*' (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, para 57). Unlike the VCLT, article 60 the ILC does not differentiate between material breach and non-material breach and article 12 applies to any non-conforming behaviour.
49. Article 13 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts spells out that there is a breach of an international obligation only if the '*State is bound by the obligation in question at the time the act occurs.*' As a party to the NPT the UK is bound by article VI.
50. Whether there has been such failure is determined by asking whether the behaviour in question '*was in conformity*' with the treaty requirements. '*This is flexible enough to encompass all forms of breach – whether the underlying obligation requires compliance with strict and detailed requirements or whether it merely sets a minimum standard of conduct; whether the breach completely disregards the obligation or is only partly contrary to what is required; whether the conduct amounts to acts, omissions or a combination of both. A determination of whether there has been a*

breach is achieved in all cases by comparing the conduct in fact engaged in by the state with the conduct legally prescribed by the relevant primary obligation. (J. Crawford, *State Responsibility*, 2013, 217).

51. An internationally wrongful act, including breach of a treaty, incurs state responsibility. (Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, 12 December 2001, article 1).

UK Actions constituting Breach of NPT, article VI

52. Is a UK policy with respect to increasing its nuclear warheads in accordance with its obligations under NPT, article VI and more generally its obligation to act in good faith?
53. In 2010 the UK Government stated that it would ‘reduce the number of operational launch tubes on the submarines from 12 to eight, and the number of warheads from 48 to 40, in line with our commitment vigorously to pursue multilateral global disarmament...[and] reduce our overall nuclear warhead stockpile ceiling from not more than 225 to not more than 180 by the mid 2020s.’ (*Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review*, 2010, 4, 38-39). At the 2015 NPT Review Conference the Head of the UK Delegation stated that ‘the United Kingdom remains firmly committed to step-by-step disarmament, and our obligations under Article VI’ (https://www.un.org/en/conf/npt/2015/statements/pdf/GB_en.pdf). In the 2019 draft National Report in preparation for the 2020 Review Conference, the UK stated that ‘the UK, as a responsible Nuclear Weapon State, has been pursuing a step-by-step approach to nuclear disarmament consistent with the NPT and our other treaty commitments ... [w]e have committed to reducing our [nuclear weapon] stockpile to no more than 180 by the mid-2020s, and have achieved our target of reducing the number of operationally available warheads to no more than 120’. However, in March 2021, using the ‘evolving security environment’ as its justification, it changed this position to ‘move to an overall nuclear weapon stockpile of no more than 260 warheads.’ (*Integrated Review*, p 78). This complete reversal in policy represents the first time since the end of the Cold War that the UK has sought

to *increase* its stockpile (C. Mills ‘Nuclear weapons at a glance: United Kingdom’, House of Commons Library Briefing Paper, Number 9077, 22 March 2021)

54. This unilateral announcement of an increase in the stockpile of nuclear weapons is at variance with the conduct legally prescribed by NPT article VI, to undertake effective measures toward nuclear disarmament, a provision ‘*essential to the accomplishment of the object or purpose of the treaty.*’ (VCLT, article 60 (3) (b)). Nor is it in conformity with the expressed step of a ‘diminishing role for nuclear weapons in security policies’. (Review Conference, 2000, step 9, para 37 above).
55. Further, states parties to the NPT undertake to pursue negotiations towards nuclear disarmament; this is an obligation to be performed in good faith and has been characterised by the ICJ as an obligation of result. (*Legality of Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 99). Over 50 years after the coming into force of the NPT the UK has not undertaken such negotiations and its unilateral assertion of intent to increase its stockpile of nuclear warheads and to modernise its weapons system indicate a contrary position.
56. The increase of nuclear warheads and looking to modernise the weapons system – while reaffirming the validity of the NPT do not constitute a good faith intention to negotiate. The assertion of commitments that are then disregarded apparently at will is not in accordance with good faith. The UK is therefore in breach of NPT, article VI. This assessment corresponds with the statement made by the Office of the UN Secretary-General which described the UK’s decision to increase its stockpile as ‘contrary to its obligations under article VI of the NPT’ (Daily Press Briefing by the Office of the Spokesperson for the Secretary-General, 17 March 2021 <https://www.un.org/press/en/2021/db210317.doc.htm>)
57. The breach of NPT article VI by the UK incurs state responsibility. In this context, it should be noted that in 2017 the UK made a further reservation to its Declaration accepting the compulsory jurisdiction of the ICJ under article 36 (2) of the Statute of the ICJ. It states that the UK does not accept the jurisdiction of the Court in ‘any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the

Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question.’ This seeks to ensure that its obligations under the NPT, article VI cannot be objectively adjudicated upon by the ICJ. This also runs counter to the obligation to pursue in good faith negotiations toward effective disarmament.

Consequences of a material breach of the NPT

- 58.** We now turn to the second question as to **whether the UK would be in breach of international law were it to use or threaten to use nuclear weapons against a state party to the NPT in material breach of their non-proliferation obligations.**
- 59.** Non-proliferation obligations are set out in articles 1-3 of the NPT. Obligations of nuclear weapon states are elaborated in article 1; those of non-nuclear weapon states in article 2.
- 60.** There is no specific provision within the NPT itself that elaborates on the consequences that may arise in the event of a material breach. As noted above (paras 41-50) the legal regimes governing treaty breach are found in the VCLT and the secondary rules determining state responsibility for an international wrongful act attributable to the state.
- 61.** Under the former, the VLCT sets out the right of a state party to a treaty to invoke a material breach of that treaty by another party and to enable the injured state to lawfully suspend or terminate the obligations it has with that state pursuant to the treaty in question. VCLT, article 60 (2) sets forth three possible consequences of a material breach of a multilateral treaty as:
- other states parties may by unanimous agreement suspend or terminate in whole or in part the treaty either vis-à-vis only the defaulting state or between all the parties;
 - a party specially affected by the breach may invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state;

- any party other than the defaulting state may invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty

62. It follows that a material breach of the non-proliferation obligation by another state party to the NPT may give the UK the right to terminate or suspend the Treaty in whole or in part under (a), (b) or (c) (ILC, Articles on Responsibility of States for Internationally Wrongful Acts, article 42). However this right is subject to the VCLT, article 60 (5) which states that the options of termination or suspension ‘*do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.*’
63. The preamble to the NPT recognises ‘*the devastation that would be visited upon all mankind by a nuclear war*’. More recently the preamble to the 2017 Treaty on the Prohibition of Nuclear Weapons affirms the ‘*the catastrophic humanitarian consequences that would result from any use of nuclear weapons*’. The NPT objective to avert such consequences and ‘*to take measures to safeguard the security of peoples*’ arguably characterise it as a treaty of a humanitarian character and in conformity with the VCLT, article 60 (5) not subject to suspension or termination.
64. The UK does not in fact seek to terminate or suspend the NPT with respect to any non-complying state. The UK’s assertion that the assurance that it will not use, or threaten to use, nuclear weapons against any state party to the NPT ‘does not apply to any state in material breach of those non-proliferation obligations’ appears to be a statement elaborating on the countermeasures that the UK asserts it may take in the event of a material breach by another state party.
65. Under the secondary rules of state responsibility, countermeasures are a lawful response to an international wrongful act (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, paras 82-87; ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Chapter II). They are actions or omissions

by an injured state directed at a state which is responsible for a prior breach. The measures taken by the injured state would violate an obligation owed to the latter but for qualification as a countermeasure (M. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, 111).

66. Countermeasures may *only* be conducted by an injured state to induce or cause the responsible state to resume compliance with its international legal obligations (ILC, Articles on Responsibility of States for Internationally Wrongful Acts, article 49). In that countermeasures give rise to actions that would otherwise be unlawful, international law places strict restrictions on their use (M. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, 112).
67. It follows that the UK may be entitled to take countermeasures – actions that would otherwise be deemed unlawful – to induce a state party to the NPT which is in material breach of its non-proliferation obligations, to comply with their obligations pursuant to the Treaty.
68. However, the ILC makes clear that there are certain international legal obligations that may **not** be impaired by countermeasures. These include the obligation to refrain from the threat or use of force as embodied in the UN Charter; obligations for the protection of fundamental human rights; obligations of a humanitarian character prohibiting reprisals; and other obligations under peremptory norms of general international law (ILC, Articles on Responsibility of States for Internationally Wrongful Acts, article 50). In other words, an injured state is required to continue to respect these obligations in its relationship with the responsible state, notwithstanding the international wrongdoing by the latter, including a material breach of a treaty obligation, and may *not* rely on a prior breach to preclude the wrongfulness of the measures it seeks to take.
69. The prohibition of forcible countermeasures is expressly addressed in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations which proclaims that ‘*States have a duty to refrain from acts of reprisal involving the use of force*’. The Declaration was adopted by the UN General Assembly pursuant to

resolution 2625 and is considered to be customary international law. (ILC, Articles on Responsibility of States for Internationally Wrongful Acts, article 50, commentary). The preamble to the NPT itself also reiterates the UN Charter prohibition on the threat or use of force.

70. The UK may indeed be entitled under international law to take countermeasures as a means by which to induce a state party to comply with their non-proliferation obligations. The UK is also entitled to withdraw its assurance that it will not use, or threaten to use, nuclear weapons against any state party to the NPT. However, it does not follow that it may use or threaten to use nuclear weapons against a state party for a material breach of the NPT.
71. It follows that the UK would be in breach of international law were it to use or threaten the use of nuclear weapons against a state party to the NPT in response to a material breach by that state of their non-proliferation obligations. A material breach of the non-proliferation obligation does not give rise to the right to use or to threaten the use of force. The right of a state to resort to the lawful use of force is governed exclusively by international law relating to the *jus ad bellum*, as discussed below in the context of the third question posed.

The use of force and self-defence

72. We turn to the third question on **whether the UK would be in breach of international law were it to use or threaten to use nuclear weapons in self-defence where the future threat of weapons of mass destruction, such as chemical and biological capabilities or emerging technologies, could have comparable impact to nuclear weapons.**
73. The UN Charter, article 2 (4) prohibits the threat or use of force. The prohibition is a norm of customary international law and widely regarded as *jus cogens*. (*Military and Paramilitary Actions in and against Nicaragua* (Nicaragua v United States) 1986 ICJ Reports 14, para 190).

74. UN Charter, article 51 provides that self-defence is an exception to the prohibition of the use of force. It is also an exception to the prohibition under customary international law. The ILC Articles on Responsibility of States for Internationally Wrongful Acts, article 21 reiterates that: *'The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence in conformity with the Charter of the United Nations.'*
75. UN Charter, articles 2 (4) and 51 apply to *'any use of force, regardless of the weapons employed'* (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 39).
76. The condition precedent for the lawful use of force in self-defence is an 'armed attack' (UN Charter, article 51). The ICJ has repeatedly noted that the exercise of the right of self-defence, in treaty and customary international law, is *'subject to the State concerned having been the victim of an armed attack'*. (*Military and Paramilitary Actions in and against Nicaragua* (Nicaragua v United States) 1986 ICJ Reports 14, para 195). A state confronted by an armed attack – irrespective of the means and methods used – is entitled to resort to the use of force to repel the attack or to bring an attack under way to an end. The means and methods used may be relevant as *facts* to determine whether the force constitutes an armed attack to give rise to the lawful use of force in self-defence.
77. Only an 'armed attack' gives rise to the right of a states to use of force in self-defence. As elaborated by the ICJ to qualify as an armed attack, the 'scale and effects' of a use of force must be 'grave' but precisely what that threshold is remains unsettled (*Military and Paramilitary Actions in and against Nicaragua* (Nicaragua v United States) 1986 ICJ Reports 14, para 191; *Oil Platforms* (Islamic Republic of Iran v US) (Merits), 2003 ICJ Reports 161, paras 51, 62). The ICJ has considered the concept of armed attack in a series of cases. However, as Professor Gray notes, the Court has generally taken a cautious approach to the right of self-defence and has been 'careful to avoid pronouncing on the most contentious issues where this was not necessary for its decision' (C. Gray, *International law and the use of force*, 4th ed. 2018, 136).

Necessity and proportionality

- 78.** The right to use force in self-defence is restricted by the conditions of necessity and proportionality (*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) (Merits), 1986 ICJ Reports 14, para 194; *Oil Platforms* (Islamic Republic of Iran v US) (Merits), 2003 ICJ Reports 161, para 43; *Armed Activities on the Territory of the Congo* (DRC v Uganda) 2005 ICJ Reports 168, para 147; *Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 41).
- 79.** These requirements have been confirmed by the ICJ to constitute customary international law: ‘For example it [the UN Charter] does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.’ (*Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) (Merits), 1986 ICJ Reports, 14 para 176; *Oil Platforms* (Islamic Republic of Iran v US) (Merits), 2003 ICJ Reports 161, para 76; *Legality of the Threat or Use of Nuclear Weapons*, AO. 1996 ICJ Reports 226, para 41).
- 80.** Necessity requires that a use of force is only such force ‘needed to successfully repel an imminent armed attack or [to bring to an end] one that is underway’ and that ‘non-forceful measures [are] insufficient’ to do so (M. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, Commentary to Rule 72). In other words, ‘the requirement that no alternative response to an armed attack be possible’ (C. Gray, *International law and the use of force*, 4th ed. 2018, 159).
- 81.** The assessment of necessity must be made at the time the decision is made to use force. In the *Legality of Nuclear Weapons* advisory opinion the ICJ did not elaborate on the requirement of necessity, perhaps because of the abstract nature of the question put to it. In the *Oil Platforms* case the Court construed necessity strictly and objectively with specific application to the facts in question. It determined that US attacks on the oil platforms could not be justified as acts of self-defence and also were not necessary to that state’s security interests under the Treaty of Amity, 1955, article XX (1) (d).

82. The assessment of proportionality is ongoing throughout any use of force. The criterion limits the scale, scope, duration and intensity of force that can be legitimately used to achieve the goal, once force is deemed necessary. The ICJ also assessed the requirement of proportionality strictly in the *Oil Platforms case*. In determining the proportionality of the US attacks the Court held that it could not ‘close its eyes to the scale of the whole operation, which involved inter alia the destruction of two Iranian frigates and a number of other naval vessels and aircraft.’ (*Oil Platforms* (Islamic Republic of Iran v US) (Merits), 2003 ICJ Reports, para 77). The Court followed the same approach in *Armed Activities on the Territory of the Congo* (DRC v Uganda) 2005 ICJ Reports 168, para 147).

Imminence

83. Opinions continue to differ on whether self-defence is permissible only once an attack has been launched or whether a state may resort to force in self-defence once an armed attack is *imminent* (for former view, see I. Brownlie, *International Law and the Use of Force between States*, 1963, 275-278 and for the latter, see D. Bowett, *Self-Defence in International Law*, 1958, 188-189). Professor Gray notes, ‘it is clear that states remain fundamentally divided on this question. Many writers assert that the dominant view is that anticipatory self-defence is lawful, but those who study state practice are more cautious.’ (C. Gray, *International law and the use of force*, 4th ed. 2018, 175). Some experts suggest that the criterion of imminency denotes the ‘last feasible window of opportunity’. (M. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, Commentary to Rule 73). However, as those who subscribe to this standard have maintained, the longer the time gap, the more likely it is that options other than the use of force will be available to responding states, thus foreclosing the right to self-defence. Pre-emptive self-defence, sometimes referred to as the ‘Bush doctrine’, has been roundly rejected. (T. Gill ‘The Temporal Dimension of Self-Defense: Anticipation, Pre-emption, Prevention and Immediacy’ in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines*, 2007, 113).

84. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ clarified some aspects of the application of the prohibition of the use of force and self-defence to the use or threat of nuclear weapons.

85. The Court coupled the threat of force with its use and stated that:

‘Whether a signalled intention to use force if certain events occur is or is not a ‘threat’ within Article 2, paragraph 4 of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. ... no State, whether or not it defended the policy of deterrence suggested to the Court that it would be lawful to threaten force if the use of force contemplated would be illegal.’ (Legality of the Threat or Use of Nuclear Weapons, AO, 1996 ICJ Reports 226, para 47).

86. It follows that where a use of force is prohibited under UN Charter, article 2 (4), a threat to use that same force is also prohibited.

87. If a use of force in self-defence would violate the principles of necessity and proportionality so too would the threat of use of such force. *‘In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.’ (Legality of the Threat or Use of Nuclear Weapons, AO, 1996 ICJ Reports 226, para 48).*

The use or threat to use nuclear weapons in self-defence by the UK

88. In the 2021 *Integrated Review* the UK has singled out the threat of ‘chemical and biological capabilities’ and ‘emerging technologies’ as triggering the right to use or threaten to use nuclear weapons in self-defence. As elaborated above, the right to use force in self-defence is *not* contingent on the type of weapon that a potential adversary may deploy. The condition precedent is an ‘armed attack’ irrespective of the means and methods used. The UK would be in breach of international law were

it to use or threaten to use nuclear weapons in self-defence if the threat confronted did not constitute an armed attack. The UK's practice supports this understanding.

89. The UK government's response to the use of chemical weapons ('Novichok') by agents of the Russian Federation in March 2018 in Salisbury indicate that while such force was deemed to be in violation of UN Charter, article 2 (4) it did not necessarily reach the threshold of an armed attack (<https://www.gov.uk/government/speeches/pm-commons-statement-on-salisbury-incident-12-march-2018>). This is evidenced by the measures taken by the UK in response, which included diplomatic expulsions; a formal statement condemning the attack as a 'breach of international law and a violation of the Chemical Weapons Convention' (<https://www.gov.uk/government/news/g7-foreign-ministers-statement-on-the-salisbury-attack>); the issuing of arrest warrants; and the imposition of targeted sanctions (<https://www.gov.uk/government/news/eu-imposes-sanctions-against-salisbury-suspects>).
90. In the *Integrated Review*, the UK also states that '[w]e would consider using our nuclear weapons only in extreme circumstances of self-defence, including the defence of our NATO Allies.' (*Integrated Review*, 76) The language of 'extreme circumstances of self-defence' is taken from the ICJ's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* in which the Court emphasises that the exercise of the right of self-defence is constrained by the conditions of necessity and proportionality whatever the means of force employed (*Legality of the Threat or Use of Nuclear Weapons*. AO, 1996 ICJ Reports 226, para 41).
91. Although the ICJ does not elaborate on the condition of necessity in its advisory opinion, the contemplated use of force would have to be the only means to successfully repel an imminent armed attack or to bring to an end one that is under way. Insofar as proportionality is concerned, the Court notes that '*the very nature of all nuclear weapons and the profound risks associated therewith are ... considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality*' (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 43). The devastating effects of nuclear weapons in terms of scale, scope, duration

and intensity, are such that it is highly unlikely that the criterion of proportionality would be satisfied.

92. It should be recalled that in its advisory opinion the ICJ did not determine that the threat or use of such weapons would be lawful or unlawful but said that it could not definitively rule on the subject. The most that the Court could conclude, by the President's casting vote, was that: '*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;*' (Legality of the Threat or Use of Nuclear Weapons, AO, 1996 ICJ Reports, *Dispositif*, para 105. 2. E).
93. Moreover, President Bedjaoui took pains to further emphasise that para. 105. 2. E of the *dispositif* must not '*in any way be interpreted as leaving the way open to the recognition of the lawfulness of the threat or use of nuclear weapons.*' (Legality of the Threat or Use of Nuclear Weapons, AO, 1996 ICJ Reports, Declaration of President Bedjaoui, para 11).
94. The *Integrated Review* also refers to a 'future threat'. Notwithstanding existing differences over the imminence criterion, the existence of an undefined 'future threat' does not give rise to the lawful use of force in self-defence. At a minimum, the anticipated armed attack must be imminent.
95. Although the ICJ was unable to agree to a definitive position on the use of nuclear weapons in an '*extreme circumstance of self-defence, in which the very survival of a State would be at stake*' it cautioned that the *dispositif* could not be read alone and that its reply to the question put to it '*rests on the totality of the legal grounds set forth by the Court ... each of which is to be read in the light of the others.*' (Legality of the Threat or Use of Nuclear Weapons, AO, 1996 ICJ Reports 226, para 104).
96. Included within the legal grounds analysed by the ICJ was the affirmation that for the threat or use of force to be lawful it must not be contrary to either the laws regulating the lawfulness of recourse to force (*jus ad bellum*) or the international laws of war (*jus*

in bello). It stated that: ‘a use of force that is proportionate under the law of self-defence, must, in order to be lawful also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.’ (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 42; see also paras 39, 91 and *dispositif*, paras 2. C and D).

97. The UK did not challenge this legal principle and stated before the Court that: ‘*The legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and conduct of hostilities, as is the case with other methods and means of warfare.*’ (cited *Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 91).
98. It follows that the use or threat of use of nuclear weapons in self-defence by the UK must also be in compliance with its international legal obligations including, but not limited to, international humanitarian law, international human rights law and environmental law.
99. Any threat or use of nuclear weapons will constitute a threat to international peace and security. As a permanent member of the UN Security Council, the UK is committed to maintain international peace and security, which is the primary purpose of the UN and for which the Security Council has primary responsibility. (UN Charter, articles 1 (1) and 24).

The UK’s obligations under International Humanitarian Law

100. International humanitarian law [IHL] is a body of law that applies in situations of armed conflict. The UK is state party to the core IHL treaties including the 1907 Hague Conventions, 1949 Geneva Conventions and 1977 Additional Protocols. Although the rules contained therein apply as a matter of treaty law, on ratification, the UK entered the following declaration to Additional Protocol I (AP I): ‘It continues to be the understanding of the United Kingdom that the rules *introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules*

so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.'

101. Notwithstanding the reservation, the vast majority of IHL treaty rules are recognised as being of customary international law status and thus apply irrespective of the relevant treaty.
102. The ICJ has described the principle of distinction and the prohibition of unnecessary suffering as 'cardinal' and 'intransgressible' principles of customary international humanitarian law. As the Court noted, *'these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.'* (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, AO (2004) ICJ Reports 136, para 157).
103. The expression 'intransgressible' is not part of the usual vocabulary of customary international law and the ICJ appears to be bestowing these principles with some especially weighty status. Vincent Chetail argues that: *'the Court intended to emphasize the importance of humanitarian norms for international law and order as a whole and the particularity of such norms in comparison with the other ordinary customary rules of international law.'* (V. Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law', 850 *International Review of the Red Cross* (2003) 235, 251).
104. Condorelli argues that *'the solemn tone of the phrase, and its wording, show that the Court intended to declare something much more incisive and significant, doubtless in order to bring the fundamental rules so described closer to jus cogens'*. Condorelli continues that: *'In other words, the circumstances eliminating unlawfulness that apply in other sectors of the international legal order (such as the victim's consent, self defence, counter-measures or a state of necessity) cannot be invoked in this particular case.'* (L. Condorelli, 'Nuclear weapons: a weighty matter for the International Court of Justice', 316 *International Review of the Red Cross* (1997) 9). Professor Cassese has said in this context that *'intransgressible' means 'peremptory*

in nature as the ICJ held in Threat or Use of Nuclear Weapons (at para. 79)'. (A. Cassese, *International Law*, 2nd ed. 2005, 206).

105. Clearly the Court regarded the relevant principles of international humanitarian law as of extreme significance. President Bedjaoui stated from this that a use of force even exercised in the extreme circumstances in which the survival of a state is in question cannot allow a state to exonerate itself from compliance with these intransgressible norms of international humanitarian law. (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports, Declaration Judge Bedjaoui, para 22).
106. Further in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ affirmed the greater authority of these rules by noting that they '*incorporate obligations which are essentially of an erga omnes character.*' (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, AO, 2004 ICJ Reports, 136, para 157). Obligations owed *erga omnes* are the '*concern of all states*' and all states have a '*legal interest in their protection.*' (*Barcelona Traction, Light and Power Company, Ltd, Second Phase*, (Belgium v Spain) 1970 ICJ Reports 3, para 33).

Principles of distinction and proportionality

107. The customary international law principle of distinction is codified in article 48 of Additional Protocol I: '*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives*'.
108. The principle ungirds a large proportion of IHL's rules pertaining to the protection of specific persons and objects. It is also the basis from which the rule of proportionality and the requirement to take precautions in attack arise and is the principle that regulates both the means and methods of warfare. Professor Schmitt argues '*since the principle of distinction is intransgressible, any rationale or justification for an attack*

not permitted by the law of armed conflict is irrelevant in determining whether the principle has been violated.' (M. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, Commentary to Rule 93, Distinction, para 6)

109. The principle of distinction is at the core of the prohibition of indiscriminate attacks (AP I, article 51 (4) (a) to (c)). This prohibition outlaws attacks that are of a nature to strike military objectives and civilians or civilian objects without distinction. Such attacks include the use of weapons that cannot be directed at a specific military objective or that have effects that cannot be limited as required by IHL (AP I, article 51 (4) (b) and (c)). Each of these rules represents customary international law.
110. There are serious doubts as to whether nuclear weapons can be used in accordance with these rules. They are designed to disperse high heat, blast effects and radiation, and in most scenarios their effects could not be restricted in time or in space. As the ICJ noted, *'the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and maritime ecosystem, and to cause genetic defects and illness in future generations.'* (*Legality of the Threat or Use of Nuclear Weapons*. AO, 1996 ICJ Reports 226, para 35). Based on these *'unique characteristics of nuclear weapons'* the ICJ noted that the use of such weapons *'seems scarcely reconcilable with the respect for [the principle of distinction or prohibition on unnecessary suffering]'* and *'generally be contrary to the principles and rules of humanitarian law'*. (*Legality of the Threat or Use of Nuclear Weapons*. AO, 1996 ICJ Reports 226, para 95 and *dispositif* para 105. 2. E)
111. The rule of proportionality is accepted as customary international law and codified pursuant to AP I, articles 51 (5) (b) and 57 (2) (iii). The rule requires that for an attack to proceed, the foreseeable incidental impact on civilian and civilian objects may not be excessive in relation to the concrete and direct military advantage anticipated. In practice this means calculating the immediate civilian deaths and injury, damage and destruction to civilian objects that are expected to result from the use of a nuclear weapon as well as the *foreseeable long-term effects of its use*, such as radiation, impact

on other critical infrastructure essential for the survival of the civilian population and eco-system.

112. Since 1996, the body of scientific evidence of the immediate and longer-term humanitarian effects of nuclear weapons use and testing has grown steadily. This data reinforces the evidence originally put before the ICJ that the use of nuclear weapons would be incompatible with the principle of distinction (International Committee of the Red Cross (ICRC), *Humanitarian impacts and risks of use of nuclear weapons*, 29 August 2020). Moreover, given the scientific evidence that is now available, it is highly unlikely that the direct and indirect effects of the use of nuclear weapons would not be excessive to the concrete and direct military advantage anticipated. Thus, any use by the UK would more likely than not violate IHL's proportionality rule.

Unnecessary suffering or superfluous injury

113. IHL prohibits the use of weapons of a nature to cause unnecessary suffering, meaning suffering that is out of proportion to the military advantage sought. The prohibition is both a customary international law rule and treaty rule, which applies to combatants, members of organised armed groups and civilians directly participating in hostilities. (Hague Regulations, 1907, article 23 (e); AP I, article 35 (2)). As Professor Michael Schmitt states: *'the prohibition applies to a situation in which a weapon or use of weapon causes unnecessary suffering without providing any further military advantage to the attacker.'* (M. Schmitt (ed.) *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017, Commentary to Rule 104, para 3). This corresponds to the assessment made by the ICJ that weapons may not *'cause harm greater than that unavoidable to achieve legitimate military objectives'*. (*Legality of the Threat or Use of Nuclear Weapons*. AO, 1996 ICJ Reports 226, para 78).
114. In addition to the immediate suffering caused, scientific studies show that a nuclear explosion will generate high doses of radiation which have devastating immediate and long-term consequences to the health of exposed individuals including damage to the central nervous system, to the gastrointestinal tract and an increased risk of developing certain cancers, such as leukaemia and thyroid cancer. ICRC Director of International Law and Policy, Helen Durham, notes that the short- and long-term illnesses,

permanent disability and suffering caused by radiation exposure ‘raise serious questions about the compatibility of nuclear weapons with the IHL prohibition to cause unnecessary suffering’ (H. Durham, ‘The use of nuclear weapons and international humanitarian law’, Vienna Conference on the Humanitarian Impact of Nuclear Weapons, December 2014).

Martens Clause

- 115.** To the extent that an express IHL rule is lacking, regard should be had to the Martens Clause as set forth in Hague Convention IV, the 1949 Geneva Conventions and Additional Protocol I. In its *Nuclear Weapons* Advisory Opinion, the Court recalled the clause and article 1 (2) of AP I which states: ‘*In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principle of international law derived from established custom, from the principles of humanity and from the dictates of public conscience*’.
- 116.** The clause functions to provide residual protection in cases not covered by a specific rule and, according to the ICJ, forms part of customary international law. (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 84). The ILC’s commentary to the draft principles on the protection of the environment states ‘*the clause ... prevents the argument that any means or methods of warfare that are not explicitly prohibited by the relevant treaties are permitted, or, in a more general manner, that acts of war not expressly addressed by treaty law, customary international law, or general principles of law, are ipso facto legal*’. (ILC report on the work of the seventy-first session, 2019, A/74/10, Chapter VI, 248)
- 117.** In particular, the Martens Clause has often been invoked in the context of the protection of the environment in armed conflict to supplement existing IHL rules (P. Sands et al, *Principles of International Environmental Law*, 4th ed. 2018, 832). For example, the ICRC Guidelines on the Protection of the Environment in Armed Conflict states: ‘In cases not covered by international agreements, the environment remains under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public

conscience’ (ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, 1994, Guideline 7).

Protection of the environment

- 118.** Increasing concern among states for the need to protect the environment from the effects of armed conflict is demonstrated by the inclusion of specific clauses addressing the issue in international environmental instruments; resolutions of the UN; and the on-going mandate of the International Law Commission on ‘Protection of the environment in relation to armed conflicts’ (UNGA, *Report of the International Law Commission: Seventy-first session*, A/74/10, 2019, Chap. VI). The ICJ has held that the protection of the natural environment is an ‘essential interest’. (*Gabcikovo-Nagymaros Project* (Hungary/Slovakia) 1997 ICJ Reports 7, para 53)
- 119.** In addition to IHL’s specific rules on the protection of the environment, customary international environmental law continues to apply in armed conflict (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 33; ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, 1996, para 5; ILC, Draft Articles on the Effects of Armed Conflicts on Treaties (2011), articles 3, 6 and 7; ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, paras 25-36). Importantly, the ICJ has held that states have a general responsibility ‘to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control’. (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 29; Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972, Principle 21; Rio Declaration on Environment and Development, 1992, Principle 2).
- 120.** This general obligation led the ICJ to conclude that ‘respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity’ and that states have a duty ‘to take environmental considerations into account in assessing what is necessary and proportionate in the pursuit of legitimate military objectives’. (*Legality of the Threat or Use of Nuclear Weapons*, AO, 1996 ICJ Reports 226, para 30)

- 121.** Under IHL, the natural environment is a civilian object. As such, it is protected by the principles and rules on distinction and proportionality (paras 107-12 above). It thus enjoys protection from direct attack unless and until it becomes a military objective. (ICRC, *Customary International Humanitarian Law Study*, 2005, Rule 43 A; ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, Rule 5). Moreover, all attacks are subject to the principle of proportionality. It follows that ‘launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited’. (ICRC, *Customary International Humanitarian Law Study*, 2005, Rule 43 C; ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, Rule 7)
- 122.** Article 35 (3) of API specifically prohibits states ‘*from employing means or methods of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment*’. Although the ICRC Customary Study identifies this prohibition as representing customary international law, the Commentary acknowledges that, together with the United States and France, the UK is a ‘persistent objector’ to the application of this prohibition to the use of nuclear weapons. (ICRC, *Customary International Humanitarian Law Study*, Commentary to Rule 45).
- 123.** It is an established customary IHL norm that ‘*methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment*’. (ICRC, *Customary International Humanitarian Law Study*, 2005, Rule 44; ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, 2020, Rule 1). It follows that any use of nuclear weapons must also comply with this obligation.
- 124.** Scientific studies and environmental modelling demonstrate that even ‘small-scale’ use of nuclear weapons would have significant adverse short and long-term effects on the environment and ecological systems. The effects of wildfire, radioactive fallout, enhanced ultraviolet radiation, loss of atmospheric oxygen, gain in atmospheric carbon dioxide, reductions in sunlight and temperature would kill vertebrates, destroy

flora and fauna, make territory uninhabitable to humans – possibly for decades – and cause long-term soil erosion (A. Westing, *Nuclear War: Its Environmental Impact*, 2013). Climate modelling in the event of large-scale use of nuclear weapons predict global cooling - ‘nuclear winter with below freezing temperatures over much of the Northern Hemisphere’. (J. Coupe et al, *Nuclear Winter Responses to Nuclear War*, 2019); potential changes in sea temperature; and ocean acidification that would threaten marine life (N.S. Lovenduski et al, *The Potential Impact of Nuclear Conflict on Ocean Acidification*, 2020). Studies conducted following the Chernobyl accident have shown how the release of radionuclides (radioactive material) adversely affected the agricultural and ecosystems in surrounding countries through changing weather patterns (European Parliament Think Tank, *Chernobyl 30 years on: environmental and health effects*, 2016).

125. Individually and collectively this emerging data suggests that the use of nuclear weapons would violate the principles of distinction, proportionality and the responsibility not to cause damage to the environment of other states or to areas beyond their national jurisdiction. Such use would also be incompatible with principles of humanity and the dictates of public conscience given the increasing value that the international community now places on the need to protect the environment and eco-systems for future generations.

126. Studies conducted over the last two decades have provided a far more comprehensive understanding of both the humanitarian and environmental effects that would likely result with the use nuclear weapons. This evidence reinforces the ICRC’s 1996 statement to the First Committee of the UN General Assembly that it is ‘*difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law*’ (51st session, 1996, agenda items 71 and 75)

The UK’s obligations under International Human Rights Law

127. International human rights law applies in times of conflict as well as non-conflict.

128. Human rights bodies have addressed the legality of nuclear weapons. In 1984 the UN Human Rights Committee (the monitoring body established under the International

Covenant on Civil and Political Rights (ICCPR) 1966) set out the dangers posed by nuclear weapons to the right to life:

'4. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generates a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.' (Human Rights Committee, General Comment, No. 14, The Right to Life, 1984).

129. In 2019 the Human Rights Committee updated its General Comment on the right to life and was no less adamant that states must always comply with their obligations to respect and protect the right to life. It considered that: *'weapon systems should not be developed and put into operation, either in times of war or in times of peace, unless it has been established that their use conforms with article 6 and other relevant norms of international law.* (Human Rights Committee, General Comment No. 36, Right to Life, CCPR/C/GC/36, 3 September 2019, para 65).

130. The Committee directly addresses nuclear weapons: *'The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale, is incompatible with respect for the right to life and may amount to a crime under international law.'* Accordingly states parties to the Covenant:

'must take all necessary measures to stop the proliferation of weapons of mass destruction, including measures to prevent their acquisition by non-State actors, to refrain from developing, producing, testing,

acquiring, stockpiling, selling, transferring and using them, to destroy existing stockpiles, and to take adequate measures of protection against accidental use, all in accordance with their international obligations. They must also respect their international obligations to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control. (Human Rights Committee, General Comment No. 36, Right to Life, CCPR/C/GC/36, 3 September 2019, para 66)

- 131.** The UK is a party to the ICCPR, having ratified in 1976, the year the Covenant came into force. The work of the UN human rights treaty bodies has been recognised by the ICJ as providing an authoritative interpretation of the particular treaty. The Court has described the Human Rights Committee as ‘an independent body established specifically to supervise the application of that treaty’ and that its views should therefore be given ‘great weight’. (*Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo) 2010 ICJ Reports 639, para 66). The Human Rights Committee reinforces the obligation to pursue in good faith negotiations in order to achieve the aim of nuclear disarmament under strict and effective international control as a human rights obligation with respect to the right to life; a positive obligation on states parties to respect and protect life.
- 132.** The Human Rights Committee’s General Comment 36 provides confirmation of growing ‘humanization of arms control’ which, along with the 2017 Treaty on Prohibition of Nuclear Weapons, indicates a ‘new, more human-centered trend towards nuclear disarmament’. (D. Rietiker, ‘The Treaty on the Prohibition of Nuclear Weapons: A Further Confirmation of the Human- and Victim-Centred Trend in Arms Control Law: Human Perspectives on the Development and Use of Nuclear Energy’, 2019). This is absent from the 2021 *Integrated Review*, despite the Government’s professed commitment to universal human rights. The UK Government’s intention to increase its nuclear warheads and modernise its nuclear system are not in conformity with the Human Rights Committee’s understanding that practices contrary to IHL are also inconsistent with the right to life under human rights law and that this requires that weapons systems not be developed.

133. The use of nuclear weapons would also violate the prohibition of discrimination of the grounds of sex and gender and the requirement of equality between women and men as spelled out in many treaties to which the UK is a party. (ICCPR, articles 2 (1) and 26; European Convention on Human Rights, article 14; Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW) 1979).
134. Research has revealed that the effects of nuclear weapons have different and disproportionate effects on women and girls and any threat or use of such weapons would violate the requirements of equality. As expressly recognised in the Treaty on the Prohibition of Nuclear Weapons, *‘the catastrophic consequences of nuclear weapons cannot be adequately addressed, ... and have a disproportionate impact on women and girls, including as a result of ionizing radiation’*. (Treaty on the Prohibition of Nuclear Weapons, 2017, preamble; ICAN, *Gender and Nuclear Weapons* at https://d3n8a8pro7vhm.cloudfront.net/ican/pages/1526/attachments/original/1583450155/Briefing_Paper_Gender_and_Nuclear_Weapons_February_2020-2.pdf?1583450155 <https://unidir.org/publication/gendered-impacts-humanitarian-impacts-nuclear-weapons-gender-perspective>.)
135. The CEDAW Committee has noted the heightened risks of violations to their rights faced by women and girls in situations of disaster. The Committee includes nuclear hazards and risks in its understanding of such disaster. It provides guidelines of the steps states should take in order to comply with their obligations under CEDAW with respect to such risk. (CEDAW Committee, General Recommendation No. 37 on Gender-related dimensions of disaster risk reduction in the context of climate change, CEDAW/C/GC/37, 2018, para 13).
136. Other human rights would also be violated by any use of nuclear weapons, including but not limited to: the right to be free from cruel, inhumane or degrading treatment; the right to health; freedom of movement indeed recognition of the ‘dignity and worth of the human person’ and to live in a *‘social and international order in which the rights and freedoms’* can be realised. (Universal Declaration of Human Rights, UNGA 217 A, 10 December 1948, preamble and article 28).

137. The UK's human rights obligations extend beyond its national borders with respect to all those within its jurisdiction. (European Convention on Human Rights, article 1). The CEDAW Committee has asserted that '*States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.*' (CEDAW Committee. General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 2013, para 8). In a number of decisions, the European Court of Human Rights has considered the application of extraterritorial jurisdiction. It has held that 'in exceptional circumstances the acts of Contracting States which are performed outside their territory or which produce effects there ("extraterritorial act") may amount to the exercise by them of jurisdiction within the meaning of Article 1'. (*Mansur Pad and Others v. Turkey*, ECtHR, Application No. 60167/00, 28 June 2007, para 53). The acts of state agents acting – legally or illegally – make the state accountable for violations of the Convention with respect to persons in the territory of another state, whether or not that other state is within the legal space of the Convention. For instance in *Mansur Pad and Others v. Turkey*, the Court held that it did not need to determine the location of the Turkish helicopter from which people in Iran were killed: the fact that the Government of Turkey acknowledged that 'the fire discharged from the helicopters had caused the killing of the applicants' relatives' meant that they were 'within the jurisdiction of Turkey at the material time.' (*Mansur Pad and Others v. Turkey*, ECtHR, Application No. 60167/00, 28 June 2007, paras 54-5; L. Doswald-Beck, 'Human Rights Law and Nuclear Weapons', in G. Nystuen, S. Casey-Maslen and A. Golden Bersagel (eds), *Nuclear Weapons under International Law*, 2014). Rights violations caused by the UK's use of its nuclear weaponry, whether in wartime or peacetime, would thus engage the UK's responsibility wherever they occurred in the world.

Conclusion

138. In our opinion, for the reasons set out above:

- (i) The announcement by the UK government of the increase in nuclear warheads and its modernisation of its weapons system constitutes a breach of the NPT article VI;

- (ii) The UK would be in breach of international law were it to use or threaten to use nuclear weapons against a state party to the NPT solely on the basis of a material breach of the latter's non-proliferation obligations;
- (iii) The UK would be in breach of international law were it to use or threaten to use nuclear weapons in self-defence solely on the grounds that the future threat of weapons of mass destruction, such as chemical and biological capabilities or emerging technologies, could have comparable impact to nuclear weapons.

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