

**Unlawfulness of the United Kingdom’s Policy of Nuclear Deterrence—  
Invalidity of the Scots High Court’s Decision in *Zelter***

by

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There is a sense in which the policy of deterrence presents the greatest barrier to the broad recognition of the unlawfulness of the use of nuclear weapons. It seems to be widely recognized that nuclear weapons, at least strategic nuclear weapons and probably virtually all nuclear weapons, are not reasonably useable. Yet many thoughtful and sincere people, leaders and populace alike, widely believe that the policy of deterrence makes sense: we have these weapons so no one else will use such weapons or commit acts of extreme violence against us.

Hence, the welcome nature of the recent decision of the Scots High Court of Justiciary (“High Court”) in the *Zelter* case addressing the policy of deterrence. The Court, if my analysis is correct, got it wrong—but the decision serves to focus our thinking and hopefully the creative efforts of leaders of all persuasions throughout the world on the severe risks inherent in the policy of deterrence.

The purpose of this article is to address what I believe to be deficiencies in the High Court’s analysis and to demonstrate that, under facts and law recognized by the Court, the United Kingdom’s policy of nuclear deterrence is unlawful.

Following are the facts and procedural history of the case, as described by the High Court.<sup>1</sup>

Angela Zelter, Bodil Roder, and Ellen Moxley (“respondents”) were indicted at Greenock Sheriff Court for causing damage on June 8, 1999 to the vessel *Maytime* and certain property on board the *Maytime*, then moored in the waters of Loch Goil in Scotland. They were charged with malicious damage and theft.<sup>2</sup>

Respondents defended on the bases that the *Maytime* played a support role in connection with submarines carrying Trident II missiles with nuclear warheads; that the deployment of such nuclear weapons by the United Kingdom under the policy of deterrence is in breach of customary international law, and, as such, illegal and criminal under Scots law; and accordingly that the otherwise criminal actions of the respondents to prevent or obstruct a crime were justified and hence not criminal.

After trial, the sheriff directed the jury to return a verdict of not guilty as to each of the respondents.<sup>3</sup> Proceeding under Section 123(1) of the Scots Criminal Procedure Act 1995, the Lord Advocate thereafter petitioned the High Court to decide points of law that had arisen in the matter below.<sup>4</sup>

**The High Court’s Decision**

The High Court found the Greenock sheriff wrong on the law, determining that the United Kingdom’s deployment of Trident warheads under the policy of deterrence is not unlawful and

that respondents' actions were not justified under the doctrine of necessity or under international law. Although the Crown had not objected to the justiciability of the legal issues as to Trident and deterrence, the Court added that, if such an objection had been made, the Court would likely have upheld it on the basis that such questions were for the executive not the courts to decide.<sup>5</sup>

This article sets forth my appraisal of the High Court's resolution of the international law issues as to Trident and deterrence.

The High Court stated at the outset that it was not its role, in addressing the Lord Advocate's Reference, to make factual findings as to Trident or deterrence, but rather to decide the questions presented based on a "broader approach" than "any single or established view of the facts."<sup>6</sup> The Court went on to state, however, that, while the Crown disputed respondents' version of such matters,<sup>7</sup> the Court regarded it as "appropriate" to answer the Lord Advocate's Reference based on such facts which it characterized as "hypothetical."<sup>8</sup> It becomes important to remember this point: that the Court purportedly undertook to evaluate the legality of Trident use and the policy of deterrence based on the facts as presented by respondents.

### **The High Court's "Hypothesized" Facts as to Trident and U.K. Nuclear Policy**

As to the characteristics of the Trident nuclear warheads, the Court thus proceeded on the basis of the following facts:<sup>9</sup>

- that the warheads are "100 to 120 kilotons each, approximately eight or ten times larger than the weapons used at Hiroshima and Nagasaki;"
- that the blast, heat and radioactive effects of detonation of such a warhead would be extreme, with "inevitably uncontainable radioactive effects, in terms of both space and time;"
- "that the damage done, and the suffering caused, could not be other than indiscriminate;"
- that it was not possible to use the weapons "in restricted ways, defensively or tactically" or to direct them "only against specific types of targets;"
- that it was not possible to use the weapons in such a way as "to remove this element of being indiscriminate in the suffering and damage which they would cause;"
- that the weapons would be "inevitably indiscriminate as between military personnel and civilians who could not be excluded from the uncontainable effects;"
- that even if much smaller warheads were used (and the possibility of this was not accepted in the context of the United Kingdom's deployment of Trident) "one was still dealing with weapons of mass destruction, with uncontainable consequences;" and

- that the foregoing effects of the Trident would be “inevitable and indiscriminate.”

As to the U.K.’s nuclear policy and intentions, the Court proceeded on the basis of the following facts:<sup>10</sup>

- the Government’s actual willingness and intention to use Trident nuclear weapons;
- “the familiar facts of deterrence (round-the-clock deployment, permanent preparedness to fire at a few minutes notice, long-term targeting and deployments related to particular trouble spots and the like) and also statements in various forms from high Government sources indicating a willingness and intention to use these weapons in response not only to nuclear attack but in certain other circumstances;”
- the risk that if certain circumstances were to emerge there would be a risk of threat and actual use; and
- the continuing and continuous risk of actual use and indiscriminate consequences that are inherent in deployment of Trident nuclear weapons.

### **The High Court’s Reliance on the ICJ Decision**

The High Court stated that it was its role to reach “its own conclusions as to the rules of customary international law, taking full account of, but not being bound by, the conclusions reached by the International Court of Justice [in its July 8, 1996 advisory opinion on the Legality of the Threat or Use of Nuclear Weapons]” (the “Nuclear Weapons Advisory Opinion”).<sup>11</sup>

In support of its conclusions, the High Court relied on two sources, the ICJ decision in the Nuclear Weapons Advisory Opinion, and a speech delivered at Oxford in October 1998 by Ronald King Murray (Lord Murray), former Lord Advocate of Scotland and Senator of the Scots College of Justice, and a subsequent article by Murray.<sup>12</sup>

### **The High Court’s View of the Two Flaws in Respondents’ Arguments: The Inapplicability of International Humanitarian Law in Time of Peace and the Absence of Specific Threat in the Policy of Deterrence**

Based on its reading of the ICJ’s decision, the High Court concluded that there were two “fundamentals flaws” in respondents’ contention that the United Kingdom’s deployment of Trident is in breach of customary international law:

First, the submissions advanced on behalf of the respondents appear to us to ignore the fact that the relevant rules of conventional and customary international law, and in particular the rules of international humanitarian law, are not concerned with regulating the conduct of States in time of peace. They specifically related to warfare and times of armed conflict, and are designed to regulate the conduct of belligerents, against one another or against some neutral State.<sup>13</sup>

Quite apart from the fact that the relevant rules of international humanitarian law appear to be restricted to situations of armed conflict, a question arises in relation to any rule which is concerned with the 'threat or use' of force or of nuclear weapons, as to whether there is indeed a "threat" of the kind which the rule equates with actual use. ... And we are entirely satisfied that the general minatory element in the deployment of nuclear weapons in time of peace, even upon the respondents' hypothesis as to the United Kingdom Government's policies and intentions, is utterly different from the kind of specific 'threat' which is equated with actual use in those rules of customary international law which make both use and threat illegal.<sup>14</sup>

The High Court concluded:

But broadly deterrent conduct, with no specific target and no immediate demands, is familiarly seen as something quite different from a particular threat of practicable violence, made to a specific "target", perhaps coupled with some specific demand or perhaps simply as the precursor of actual attack. The deployment of Trident II, however far one goes in adding hypotheses as to the immediacy with which it could be used against some potential and arguably identifiable target State, in our opinion in general lacks the links between threat and use, and an immediate target, which are essential to a "threat" of the kind dealt with by customary international law or in particular international humanitarian law. A State which has a deployed deterrent plainly could and might take some step which turned the situation into one of armed conflict, and involved a sufficiently specific threat to constitute a breach of customary international law. But that is another matter.<sup>15</sup>

The Court quoted Lord Murray's statement as to the ICJ decision:

"The court, I think rightly, proceeded on the basis that threat is equivalent to use. In this context threat means a practical warning directed against a specific opponent. So a general display of military might, such as a Red Square parade in Soviet days or a routine Trident submarine patrol, would not alone constitute a threat at law."<sup>16</sup>

Agreeing, the High Court stated:

In relation to ordinary deployment, and routine patrols, that appears to us to be plainly right. In so far as they have a minatory element, it is so general and conditional that it is quite simply not a threat of the kind that is "equivalent to use". Whether that general position would be transformed into such a "threat" in some particular circumstances depends entirely upon those circumstances. According to the respondents, there have been occasions when specific circumstances would alter the general position, and give rise to a specific argument that what the United Kingdom was doing had on that occasion moved beyond general deterrence to specific "threat". These would be questions of fact; but one can have regard to this as an hypothesis. Even so, we see no basis for a contention that the general deployment of Trident in pursuit of a policy of deterrence constitutes a continuous or continuing "threat" of the kind that might be illegal as equivalent to use. In both of these respects, it appears to us that the respondents' contention is baseless, and that the conduct of the United Kingdom Government, with which they sought to interfere, was in no sense illegal.<sup>17</sup>

The High Court characterized respondents' argument as moving "from a claim that if certain circumstances were to emerge there would be a risk of threat and actual use, to a portrayal of the risk as already present."<sup>18</sup> Illustrating its thinking, the High Court drew a distinction between two situations:<sup>19</sup>

- "a youngster brandishing a knife at another a foot away from him, and perhaps indicting by word and action that he intends to stab him there and then," and
- "all the multifarious situations in which a person may say or show, perhaps very convincingly, that in some circumstances, specified or not, he would have recourse to violence against another or others."

### **Invalidity of the High Court's Decision**

In my view the High Court's above conclusions are insupportable under international law and controverted by the very authorities upon which the High Court relied. The High Court misinterpreted the ICJ's decision as to the circumstances in which the policy of deterrence constitutes an unlawful "threat" under international law. The High Court erred in finding that under the ICJ decision there are no restrictions on the threat or use of force in time of peace. The High Court further overlooked the very facts it said it was hypothesizing.

### **The ICJ's View as to Circumstances in Which Deterrence Would Be Unlawful**

The ICJ held that it is unlawful under international law for a State to threaten to use—or even to signal its readiness to use—force which it would be unlawful to use. The ICJ identified a wide range of circumstances in which the policy of deterrence would be unlawful:

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. *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. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given 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.*

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. *Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.* In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.<sup>20</sup>

### **The High Court's Overlooking of the ICJ's Conclusion that Deterrence Would Be Unlawful If It Threatened a Use of Force that Would Violate the Principles of Necessity and Proportionality**

In its description of these pivotal paragraphs of the ICJ decision,<sup>21</sup> the High Court glossed over the ICJ's conclusion that a State's implementing the policy of deterrence would constitute a "threat" under the Article 2, paragraph 4 of the UN Charter not only if "the particular use of force envisaged would be directed against the territorial integrity or political independence of a State" but also if it would be "against the Purposes of the United Nations"<sup>22</sup> or "in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality."<sup>23</sup>

Rather than identifying the ICJ's articulation of the requirement that the exercise of self-defence must comply with the principles of necessity and proportionality, the High Court referred only to the ICJ's having recognized "*certain other considerations whereby the use or threat of force would be unlawful*,"<sup>24</sup> and then simply assumed compliance of Trident and deterrence with such requirements. The Court stated, "In the absence of these other circumstances, therefore, it is directing a particular use of force against a particular 'target' State's integrity or independence which is seen as possibly amounting to a 'threat' in the sense of Article 2, paragraph 4."<sup>25</sup>

In so doing, the High Court assumed in the Crown's favor a central issue it was called upon to decide.

This approach is invalid as a matter of legal analysis. It also ignores the hypothetical facts the Court said it was assuming—that the effects of Trident warheads would inevitably be uncontrollable and indiscriminate. Effects that cannot be contained and cannot discriminate cannot be limited to what is necessary or proportionate, and hence the use that would cause such effects and the threat thereof are unlawful.

#### The Invalidity of the High Court's Finding of the Inapplicability of International Humanitarian Law in Times of Peace

The fact that the threat is made in time of peace is immaterial. Under the ICJ's analysis, a State may no more threaten unlawful military action in time of peace than in time of war. Article 2, paragraph 4 of the UN Charter prohibits such threats at any time if the use of force in self-defence would exceed the limits of permissible self-defence.

The High Court also gave inadequate weight to the ICJ's determination that force used in self-defence would be unlawful if "against the Purposes of the United Nations." The High Court stated, "It is not suggested that the general Purposes of the Charter throw any particular light upon the legality of nuclear as opposed to other weapons."<sup>26</sup>

Articles 1 and 2 of the United Nations Charter set forth such purposes of the United Nations as the following: maintaining international peace and security; prevention and removal of threats to the peace; adjustment or settlement of international disputes or situations which might lead to a breach of the peace; development of friendly relations among nations; achieving international co-operation in solving international problems of an economic, social, cultural, or humanitarian character; promoting and encouraging respect for human rights and for fundamental freedoms; and fostering of international peace, security and justice.<sup>27</sup>

It is difficult to see how the use of nuclear weapons—with the inordinate and indiscriminate effects assumed by the High Court (described above)—could be anything but contrary to such purposes.

Similarly, it is difficult to imagine how the inordinate effects of Trident warheads used in an excessive act of self-defence could fail to be directed against the "territorial integrity" and in effect the "political independence" of the target State.

## **The High Court's Erroneous Conclusion that under the ICJ Advisory Opinion States May Violate International Humanitarian Law in Circumstances of Extreme Self-Defense**

The High Court concluded in ¶ 86 of its opinion that uses of nuclear weapons that violate humanitarian law could be lawful under the ICJ's decision if done in an act of extreme self-defense.<sup>28</sup> In the High Court's view, if a State is in a position of great peril, there are under the ICJ decision no definitive international law restraints on the level of force the State may use, regardless of the effects on non-combatants, neutrals and other protected persons and objects.

Interpreting Head E of the *dispositif* of the ICJ's decision, the High Court stated, "Even if Trident is to be seen as inevitably indiscriminate, head E does not in our opinion show that the court saw use or threat of such a weapons (as distinct from some small or tactical nuclear weapons) as always illegal."<sup>29</sup> Apparently inevitably indiscriminate weapons may potentially be used in extreme self-defence.

I submit that this reading by the High Court of the ICJ decision misses the central thrust of the decision and fails to take into consideration the specific provisions quoted above finding all uses of forces—including defensive ones—to be subject to the restraints of international law.<sup>30</sup> The High Court's reading is also contrary to the ICJ's admonition that the various grounds set forth in the ICJ decision are to be read not in isolation but rather in light of one another.<sup>31</sup> It also fails to take into consideration the High Court's recognition in the same paragraph that under the ICJ decision a "particular threat or use" will be unlawful if it "breaches any of the principles and rules of international humanitarian law."<sup>32</sup>

The applicability of the law of armed conflict even to extreme circumstances was noted by the United States Military Tribunal in the *Krupp* trial:

It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.<sup>33</sup>

Contrary to the High Court's reading of the ICJ decision, the ICJ determined that the exercise of self-defence is subject to humanitarian law:

40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self-defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (I.C.J. Reports 1986, p. 94, para. 176): "there is a 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". This dual condition

applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. *But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.*<sup>34</sup>

The ICJ described the scope of humanitarian law:

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

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

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

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. 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.<sup>35</sup>

If a weapon is unlawful, the fact that it is used for lawful self-defence or other lawful purpose does not immunize the unlawfulness. The ICJ stated:

39. [Articles 51 and 42] do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly

prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter.<sup>36</sup>

Ironically, Great Britain, in its defense of nuclear weapons before the ICJ, acknowledged that the self-defensive use of nuclear weapons would be subject to humanitarian law. The U.K. attorney stated to the ICJ, “Assuming that a State’s use of nuclear weapons meets the requirements of self-defense, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities.”<sup>37</sup>

In addition, if an attack were serious enough for the U.K. to respond with Trident warheads, it would be serious enough that the U.K. would declare, or there would clearly exist, a state of war, making humanitarian law applicable even under the High Court’s truncated view of the matter. The use of nuclear weapons would be unlawful if it would violate such law, and, if it did, then the threat of such use would likewise be unlawful.

While I do not think this point to be controversial, the High Court, by its apparent assumption that a state of peace might still exist when a State exercised its right of self-defence, seemed to be assuming that a state of armed conflict might not exist until some later point in time. In any event, the bifurcation of time frame, if it is assumed that the threat is made in time of peace but relates to an action to be taken in the exercise of self-defence or as a combatant in armed conflict, would not seem to be a basis to distinguish the ICJ’s conclusion, ostensibly not questioned by the parties before the ICJ, that it is unlawful under international law to threaten to do that which it would be unlawful to do.

Bowett, in his treatise, “Self-Defense in International Law,” confirms the limitations on the exercise of the right of self-defense, “[E]ven assuming a breach of one of the substantive rights to which self-defence applies, the actual use of self-defence is confined within limits imposed by general international law.”<sup>38</sup> He further states, “The legal order of a particular state cannot, of itself, justify measures of protection except in so far as these are sanctioned by the international legal order, for the question of jurisdiction is one which by its very nature falls within the province of international law.”<sup>39</sup> He also emphasizes the significant restraints imposed by the principles of necessity and proportionality.<sup>40</sup>

Similarly, Brownlie, in his treatise, “International Law and the Use of Force by States,” concludes, “An illegal threat is a conditional promise to resort to force in circumstances in which the resort to force will be itself illegal.”<sup>41</sup> He further states, “A threat of force consists in an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government. If the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.”<sup>42</sup> He too emphasizes the significant restraints imposed by the principles of necessity and proportionality.<sup>43</sup>

Lord Murray himself, in the very next sentence following the one quoted by the High Court, stated:

What, then, of nuclear deterrence—is it a threat in law if missiles are targeted at key military installations of an opponent? On the face of it that would be a threat in law.<sup>44</sup>

In a sense, the High Court’s distinction between the “youngster” threatening specific action here and now and the situation of a person describing the situations in which he would have resort to violence reveals the Court’s failure to apprehend the nature of the threat conveyed by deterrence.

In reality, deterrence—based on the High Court’s own statement of the “hypothetical” facts, the evidence of record in the case, and matters of public record—is far more like the youngster making the threat to another a foot away than the vague toothless statement of general intent the High Court seems to believe.

The targets of the U.K. deterrence may not be a foot away, but realistically—in light of the physical capabilities of the weapons, the speed of potential delivery, the detailed nature of the targeting, and the computer programs for targeting and delivery—the targets, in the old sense of physical danger, might as well be in the room with the person pushing the button, the strike will be so swift and devastating. The nuclear warheads are directable at specific targets within minutes and can reach such targets half way across the world with great speed and statistical accuracy.

### **Potential Significance of a Finding of Unlawfulness**

The United States, in its written and oral arguments to the ICJ, acknowledged that deterrence would be invalidated if the use of nuclear weapons would be unlawful. U.S. lawyer Michael J. Matheson, in his oral argument to the Court, stated:

[E]ach of the Permanent Members of the Security Council has made an immense commitment of human and material resources to acquire and maintain stocks of nuclear weapons and their delivery systems, and many other States have decided to rely for their security on these nuclear capabilities. *If these weapons could not lawfully be used in individual or collective self-defense under any circumstances, there would be no credible threat of such use in response to aggression and deterrent policies would be futile and meaningless.* In this sense, it is impossible to separate the policy of deterrence from the legality of the use of the means of deterrence. Accordingly, any affirmation of a general prohibition on the use of nuclear weapons would be directly contrary to one of the fundamental premises of the national security policy of each of these many states.<sup>45</sup>

### **Threatening Nature of Trident and the Policy of Nuclear Deterrence**

Trident warheads ranging between 100 and 120 kilotons are not the kind of putative “smaller, low yield tactical nuclear weapons” whose legality the U.K., the U.S. and other nuclear States defended before the ICJ,<sup>46</sup> but rather are strategic weapons of the kind the ICJ found to be generally unlawful.<sup>47</sup>

The Trident missiles have a range of about 5000 miles or 7,400 kilometers,<sup>48</sup> which they can apparently traverse in under thirty minutes.<sup>49</sup> While they have been “de-targeted” in the limited sense that they are not currently pointed at any particular adversary,<sup>50</sup> this de-targeting is more symbolic than real. Real de-targeting, physical separation of the warheads from the missiles and storage of the respective units in separate places at a distance, was considered but rejected.<sup>51</sup> The actual targets are set forth in computer programs, which remain in effect.<sup>52</sup> The re-targeting towards the pre-programmed targets can be accomplished in a matter of 10–15 minutes.<sup>53</sup>

The targets are largely not even selected by the United Kingdom but rather by NATO<sup>54</sup> and the United States.<sup>55</sup> Such targeting has been perceived by Russia<sup>56</sup> and other countries, including Iraq,<sup>57</sup> to be threatening and has on a number of occasions been the subject of step-ups in alerting by targeted States, included a notable instance as recently as 1995, when Russia apparently believed a nuclear attack against it was in process from a point near Norway where the U.S. patrolled Trident boats.<sup>58</sup>

The threatening nature of the U.K. policy of deterrence is also evident from the substantial integration of the U.K.'s Trident II missiles with the U.S. arsenal. The U.K. reportedly has "title" to submarine ballistic missiles at a Georgia, U.S. base, "but does not own them outright."<sup>59</sup> The British submarines can sail into Kings Bay, Georgia, arm themselves with the American Trident missiles, and take them back to Britain to be mated there with British nuclear warheads.<sup>60</sup>

While the United Kingdom's promulgation of its policy of deterrence appears to be somewhat more restrained than that of the United States,<sup>61</sup> it still threatens the actual use of such weapons.<sup>62</sup> The United States is particularly aggressive in its projection of its nuclear weapons capability as integrated with its conventional weapons capability and espouses numerous types of situations in which it, at least as a matter of military policy, regards nuclear weapons as useable and indeed preferable to conventional weapons.

According to U.S. statements:

Our military planning for the possible employment of U.S. nuclear weapons is focused on deterring a nuclear war rather than attempting to fight and win a protracted nuclear exchange. We continue to emphasize the survivability of the nuclear systems and infrastructure necessary to endure a preemptive attack *and still respond at overwhelming levels.*<sup>63</sup>

As to the purpose for using nuclear weapons, The Joint Chief of Staff's *Doctrine for Joint Theater Nuclear Operations*, issued in February 1996, states:

The purpose of using nuclear weapons can range from producing a political decision at the strategic level of war to being used to influence an operation in some segment of the theater. Operations employing nuclear weapons will have a greater impact on a conflict than operations involving only conventional weapons.<sup>64</sup>

Nuclear operations can be successful in achieving US military objectives if they are used in the appropriate situation and administered properly.<sup>65</sup>

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Nuclear weapons have many purposes, but should only be used after deterrence has failed.<sup>66</sup>

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The purpose of using nuclear weapons can range from producing a political decision to influencing an operation.<sup>67</sup>

The manual identifies types of situations where the use of nuclear weapons may be "favored over a conventional attack" or otherwise preferred:

- Level of effort required for conventional targeting. If the target is heavily defended such that heavy losses are expected, a nuclear weapon may be favored over a conventional attack.
- Length of time that a target must be kept out of action. A nuclear weapon attack will likely put a target out of action for a longer period of time than a conventional weapon attack.
- Logistic support and anticipation of delays caused by the “fog and friction” of war. Such delays are unpredictable and may range from several hours to a number of days.<sup>68</sup>

The manual states:

Should deterrence fail, our forces must be prepared to end the conflict on terms favorable to the United States, its interests, and its allies. Units capable of delivering nuclear weapons should be integrated with other forces in a combined arms, joint approach.<sup>69</sup>

Given the heavy integration of the U.K.’s Trident capabilities and policy of deterrence to the U.S.’s corresponding weaponry and policies, it seems questionable in the extreme that, in exigent circumstances, and hence on an ongoing basis in terms of risk factors, there would be any appreciable difference in the U.K.’s application of its policy and the U.S.’s application of its corresponding policy.

For the foregoing reasons, the “general” practice of deterrence—contrary to the High Court’s decision—ostensibly constitutes a sufficient level of “threat” under the ICJ decision to cross the threshold of unlawfulness if the threatened use of force would itself be unlawful.

It should also be noted that the more specific level of threat with a “specific target” and an “immediate demand” which the High Court recognized *could* or possibly *would* be “equivalent to use” has existed at various points of time and unfortunately no doubt will exist again in the future.<sup>70</sup> In a sense, this is the most interesting point of the High Court’s decision—the Court’s ostensible recognition of the potential unlawfulness of the practice of deterrence in circumstances when it is directed at a particular situation.

### **Unlawfulness of the Use of Weapons Whose Effects Cannot be Controlled**

Interestingly, the United States has expressly acknowledged that it is unlawful to use weapons whose effects are uncontrollable and indiscriminate. *The Air Force Commander’s Handbook* states that weapons that are “incapable of being controlled enough to direct them against a military objective” are unlawful.<sup>71</sup> *The Air Force Manual on International Law* defines indiscriminate weapons as those “incapable of being controlled, through design or function,” such that they “cannot, with any degree of certainty, be directed at military objectives.”<sup>72</sup>

In its military manuals the United States has acknowledged that the scope of this prohibition extends to the *effects* of the use of a weapon. *The Air Force Manual on International Law* states that indiscriminate weapons include those which, while subject to being directed at military objectives, “may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage.”<sup>73</sup> The manual states that “uncontrollable” refers to effects “which escape in time or space from the control of the user as to necessarily create risks to civilian persons or

objects excessive in relation to the military advantage anticipated.”<sup>74</sup> It is noteworthy that this prohibition encompasses the causing of risks, not just injury.

As a “universally agreed illustration of ... an indiscriminate weapon,” *The Air Force Manual on International Law* cites biological weapons, noting that the uncontrollable effects from such weapons “may include injury to the civilian population of other states as well as injury to an enemy’s civilian population.”<sup>75</sup> *The Naval/Marine Commander’s Handbook* states that such weapons are “inherently indiscriminate and uncontrollable.”<sup>76</sup>

*The Air Force Manual on International Law* further cites Germany’s World War II V-1 rockets, with their “extremely primitive guidance systems” and Japanese incendiary balloons, without any guidance systems.<sup>77</sup> The manual states that the term “indiscriminate” refers to the “inherent characteristics of the weapon, when used, which renders (*sic*) it incapable of being directed at specific military objectives or of a nature to necessarily cause disproportionate injury to civilians or damage to civilian objects.”<sup>78</sup>

As an example of an indiscriminate weapon, *The Air Force Commander’s Handbook* similarly cites the use of unpowered and uncontrolled balloons to carry bombs, since such weapons are “incapable of being directed against a military objective.”<sup>79</sup>

The extreme and disproportionate effects threatened by nuclear weapons are acknowledged by the U.S. military in their operational policy, training, and planning. The *Nuclear Weapons Joint Operations* manual states:

US nuclear forces serve to deter the use of WMD [“weapons of mass destruction,” including chemical, biological, and nuclear weapons] across the spectrum of military operations. From a massive exchange of nuclear weapons to limited use on a regional battlefield, US nuclear capabilities must confront an enemy with risks of unacceptable damage and disproportionate loss should the enemy choose to introduce WMD into a conflict.<sup>80</sup>

Similarly:

[S]omeday a nation may, through miscalculation or by deliberate choice, employ these weapons. ... [A]n opponent may be willing to risk destruction or disproportionate loss in following a course of action based on perceived necessity, whether rational or not in a totally objective sense. In such cases deterrence, even based on the threat of massive destruction, may fail.<sup>81</sup>

The United States has also recognized the potential uncontrollability of the effects of nuclear weapons. This can be seen from the Chairman of the Joint Chiefs’ *Joint Pub 3-12, Doctrine for Joint Nuclear Operations*, setting forth the current operational planning for the integrated use by U.S. forces of nuclear weapons in conjunction with conventional weapons.<sup>82</sup>

[T]here can be no assurances that a conflict involving weapons of mass destruction could be controllable or would be of short duration. Nor are negotiations opportunities and the capacity for enduring control over military forces clear.<sup>83</sup>

The manual emphasizes the extremely short periods of time—often matters of minutes or even seconds—that would be available for crucial decision making in nuclear confrontations:

- Decision Timelines. The decisionmaker may be required to review and select defensive and offensive actions within severely compressed timelines. Consideration must be given to procedures and equipment allowing informed decisions in this environment. Predelegated defensive engagement authority should be considered under certain conditions to permit efficient engagement of ballistic missile threats. The commander must evaluate the situation, weigh the options, and execute the optimum offense-defense force in a relatively short period of time. The time is limited because of the relatively short flight time of tactical missiles and potential increased uncertainty of mobile offensive force target locations. Deployment of air defenses should be accomplished early enough to send an unmistakable signal of NCA concern and resolve, thereby maximizing the deterrent potential of these forces.<sup>84</sup>

Noting that the joint force commander should have access to “near-real-time tradeoff analysis when considering the execution of any forces,”<sup>85</sup> the *Joint Nuclear Weapons Operations* manual further states:

Very short timelines impact decisions that must be made. In a matter of seconds for the defense, and minutes for the offense, critical decisions must be made in concert with discussions with NCA.<sup>86</sup>

The U.S. military in its manual *Doctrine for Joint Theater Nuclear Operations* further emphasizes the potential time constraints—and the need for quick ad hoc judgments as to targeting:

Because preplanned theater nuclear options do not exist for every scenario, CINCs must have a capability to plan and execute nuclear options for nuclear forces generated on short notice during crisis and emergency situations. During crisis action planning, geographic combatant commanders evaluate their theater situation and propose courses of action or initiate a request for nuclear support.<sup>87</sup>

The *Doctrine for Joint Nuclear Weapons Operations* manual notes the need for decisive strikes, once the decision to go nuclear has been made:

- Responsiveness. Some targets must be struck quickly once a decision to employ nuclear weapons has been made. Just as important is the requirement to promptly strike high-priority, time-sensitive targets that emerge after the conflict begins. Because force employment requirements may evolve at irregular intervals, some surviving nuclear weapons must be capable of striking these targets within the brief time available. Responsiveness (measured as the interval between the decision to strike a specific target and detonation of a weapon over that target) is critical to ensure engaging some emerging targets.<sup>88</sup>

The UK government has itself recently reaffirmed the validity of the High Court’s assumption as to the uncontainable and indiscriminate effects of nuclear weapons. In a letter dated March 25, 2001, Dr. Lewis Moonie MP, the Parliamentary Under-Secretary of State for Defence, wrote to Dr. Kim Howells MP, in defending the putative lawfulness of Depleted Uranium (DU) weapons, that “Nuclear, biological and chemical weapons are indiscriminate weapons of mass destruction specifically designed to incapacitate or kill large numbers of people.”<sup>89</sup>

## War Crimes

Nor is the potential unlawfulness of deterrence limited to the threat that the policy conveys. The Army's *Law of Land Warfare* defines the term "war crime" as "the technical expression for a violation of the law of war by any person or persons, military or civilian," and states that "[e]very violation of the law of war is a war crime."<sup>90</sup> The manual describes crimes under international law as encompassing crimes against peace and crimes against humanity.<sup>91</sup>

To the same effect, the Nuremberg Charter defined "war crimes" as follows:

[V]iolations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill treatment, or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>92</sup>

## **Crimes against the Peace**

As noted in *The Naval/Marine Commander's Handbook*, the Charter of the International Military Tribunal at Nuremberg defined “crimes against the peace” as follows:

planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy the accomplishment of any of the foregoing.<sup>93</sup>

## **Crimes against Humanity**

The Nuremberg Charter defined “crimes against humanity” as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>94</sup>

## **Conclusion**

One can wonder and dispute whether law is relevant—whether Great Britain the United States, or other nuclear States care about the requirements of law. But the requirements of the law, at least as defined by the ICJ, are beyond reasonable dispute. Yet now the Scots High Court comes along and, purporting to apply the ICJ decision, emasculates it.

If the policy of deterrence were simply innocent threatless possession of weapons whose use was recognized as irrational and not tenable, perhaps the risk of use would diminish. But it is not; deterrence is a policy of threatening overwhelming, disproportionate, and indiscriminate damage—threatening that, to be effective, must be credible, backed up by weapons procurement, personnel training, contingency planning, pre-targeting, and weapons placement and alertness evidencing the resolve, on a virtually instantaneous basis, to actually use these weapons.

The notion that deterrence may be unthreatening because we independently recognize the unuseability of these weapons is contrary to the nature of deterrence and hence illusory. Deterrence is a Faustian bargain promising at best only delay of the suicidal apocalypse it portends.<sup>95</sup>

Deterrence requires the communication of the intent to do the irrational, as reflected in the July 1995 U.S. STRATCOM report “Essentials of Post-Cold War Deterrence,” recommending that the United States project an “out of control,” irrational, and vindictive willingness to use nuclear weapons in certain circumstances:

If “some elements ... appear potentially ‘out of control,’” it would create and reinforce fears and doubts within the minds of an adversary’s decision-makers. “That the U.S. may become irrational and vindictive if its vital interests are attacked should be a part of the national persona we project.”<sup>96</sup>

The effects of nuclear weapons are not reasonably subject to dispute and were assumed by the High Court. So too, the nature of the policy of deterrence is beyond reasonable dispute. The

only real question is whether it is unlawful to threaten to do that which it is unlawful to do. The ICJ answered in the affirmative. The Scots High Court of Justiciary is in error—and does damage to the rule of law—by its abnegation of this restraint.

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<sup>1</sup> See *Lord Advocate's Reference No. 1 of 2000* [March 30, 2001] Misc 11/00 H.C.J. (Scot.), also available at <<http://www.gn.apc.org/tp2000/lar/laropin.html>> (Oct. 25, 2001). A substantial portion of the record in the case is available on the Trident Ploughshares website at <<http://www.gn.apc.org/tp2000/lar/index.html>> (Oct. 25, 2001).

<sup>2</sup> Attempted theft was also charged but not pressed by the Crown. See *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶ 1.

<sup>3</sup> See Greenock 1999 Summary of Sheriff Gimblett's Ruling <<http://www.gn.apc.org/tp2000/greenock/crruling.html>> (Oct. 25, 2001) (“I have to conclude that the three accused in company with many others were justified in thinking that Great Britain in their use of Trident, not simply possession, the use and deployment of Trident allied with that use and deployment at times of great unrest, coupled with a first strike policy and in the absence of indication from any government official then or now that such use fell into any strict category suggested in the ICJ opinion .. the threat or use of Trident could be construed as a threat, has indeed been construed by others as a threat and as such is an infringement of international and customary law.”)

<sup>4</sup> Such a petition is not an appeal and does not affect the acquittal below. See *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶ 13.

<sup>5</sup> See *id.* at ¶¶ 56–60.

<sup>6</sup> *Id.* at ¶ 62.

<sup>7</sup> Based on its position that evidence was not properly admitted as to the substantive international issues raised by respondents, the Crown had not submitted its own evidence on the points. See *id.* at ¶ 64.

<sup>8</sup> *Id.* at ¶ 62.

<sup>9</sup> See *id.* at ¶¶ 63–64.

<sup>10</sup> See *id.* at ¶ 64.

<sup>11</sup> *Id.* at ¶ 66, referencing *Legality of the Threat or Use of Nuclear Weapons*, International Court of Justice, Advisory Opinion, General List at pt. VI, 35–36, No. 95, 1996 I.C.J. Reports 226, 35 ILM 809 (July 8, 1996) available at <<http://www.icj-cij.org/icjwww/icsases/iunan/>>

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iunan\_judgment\_advisory%20opinion\_19960708/iunan\_judgment\_toc.htm> (Oct. 25, 2001) [hereafter, “The ICJ Nuclear Weapons Advisory Opinion”].

<sup>12</sup> *Id.* at ¶ 98, citing Lord Ronald King Murray, “Nuclear Weapons and the Law,” based on a speech given by Murray at Oxford in October 1998 and published in “Medicine, Conflict and Survival”, vol. 15 (1999) at pages 126-37, available at <<http://www.gn.apc.org/tp2000/legal/dmurray.html>> (Oct. 25, 2001).

<sup>13</sup> *Id.* at ¶ 95.

<sup>14</sup> *Id.* at ¶ 96.

<sup>15</sup> *Id.* at ¶ 97.

<sup>16</sup> *Id.* at ¶ 98, quoting Lord Murray, *supra* note 12.

<sup>17</sup> *Id.* at ¶ 98.

<sup>18</sup> *Id.* at ¶ 64.

<sup>19</sup> *Id.* at ¶ 97.

<sup>20</sup> The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶¶ 47–48 (emphasis supplied). The ICJ further stated in ¶ 67 of its opinion that it did not intend to pronounce upon the practice known as the policy of deterrence.

<sup>21</sup> The High Court recognized these sections of the ICJ decision as “more directly relevant for present purposes.” *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶ 72.

<sup>22</sup> The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶ 48.

<sup>23</sup> *Id.*

<sup>24</sup> *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶ 72. (emphasis supplied).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> U.N. CHARTER arts. 1 & 2, UNTS XVI, USTS 993 (June 26, 1945).

<sup>28</sup> See *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶ 86.

<sup>29</sup> *Id.* The High Court’s emphasis on the narrow reading of the *dispositiv* sections of the ICJ decision largely ignores the substantive sections of the decision.

<sup>30</sup> It must be acknowledged that the ICJ decision contains equivocal language on this point, although, I submit, the ICJ’s determination, in light of the totality of its opinion, is that even the exercise of self-defence in circumstances of extreme danger is subject to humanitarian law. See CHARLES J. MOXLEY, JR., NUCLEAR WEAPONS AND INTERNATIONAL LAW IN THE POST COLD WAR WORLD 174-84 (Austin & Winfield, Lanham, Maryland 2000).

<sup>31</sup> The Court stated “that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all of their importance.” The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶ 104.

<sup>32</sup> See *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶ 86; see also ¶ 93 which implied the existence of an apparently unprincipled relative standard whereby some uses of substantial nuclear weapons might be lawful and others unlawful based on unarticulated bases of distinction. Note that, unlike the ICJ, the High Court was in the position of addressing a specific weapons system, and one assumed to involve high yield strategic nuclear weapons, not low-yield tactical weapons of the type the ICJ found itself without sufficient facts to evaluate. See *id.* at 86; The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶¶ 96-97.

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<sup>33</sup> *The Krupp Trial* (Trial of Alfred Felix Alwyn Krupp Von Bohlen und Halbach and Eleven Others), 10 LRTWC 139 (1949), *quoted in* UNITED STATES DEPARTMENT OF THE NAVY ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 5-6 n.5 (Naval Warfare Publication 9, 1987) (With Revision A (5 October 1989), this handbook was adopted by the U.S. Marine Corps as FLEET MARINE FORCE MANUAL (FM FM) 1-10) [hereinafter THE NAVAL/MARINE COMMANDER'S HANDBOOK].

<sup>34</sup> The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶¶ 40–42 (emphasis supplied).

<sup>35</sup> The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶ 78 (emphasis supplied). Inexplicably, the High Court in ¶ 80 of its decision construed the law as to threats to be limited to threats arising in the context of Article 2, paragraph 4 of the United Nations Charter, as if the law of armed conflict and humanitarian law do not apply to threats to use force prohibited under such law, although at ¶ 86 the High Court acknowledged that a threat to use force will be unlawful “if the particular threat or use breaches any of the principles and rules of international humanitarian law.” *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶¶ 80 and 86. *See also*, J. BURROUGHS, THE (IL)LEGALITY OF THREAT OR USE OF NUCLEAR WEAPONS 32-37 (Lit Verlag, Münster Germany 1997).

<sup>36</sup> The ICJ Nuclear Weapons Advisory Opinion, *supra* note 11, at ¶ 39.

<sup>37</sup> *Id.* at ¶ 91 (citing the written statement of the United Kingdom ¶ 3.44, at 40, available at <[http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_ipleadings/iunan\\_ipleadings\\_199506\\_WriStats\\_17\\_UK.pdf](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_17_UK.pdf)> (Oct. 25, 2001).

<sup>38</sup> D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 9 (Fredrick A. Praeger, New York 1958).

<sup>39</sup> *Id.* at 61.

<sup>40</sup> *See id.* at 58–60 (need for self-defence must be instant and overwhelming, leaving no choice of means and no moment for deliberation and exercise of self-defence must be limited by the threat and kept clearly within it, with no excess) *citing* Parl. Papers (1843), Vol. LXI; Brit. and For. State Papers, Vol. XXX, p. 193; and The Caroline Case, Moore's *Dig.*, Vole II, 409; *Int. Arb.*, Vol. III, 2419. *See also* BOWETT at 142–144.

<sup>41</sup> IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 431 (Oxford University Press, New York 1963, reprinted 1991)

<sup>42</sup> *Id.* at 364, *citing* OPPENHEIM INTERNATIONAL LAW, vol. ii pp. 133, 295–298; *U.K. Manual of Military Law*, Part iii (1958), ¶ 11; and Jiménez de Aréchaga, pp. 83–84.

<sup>43</sup> *See id.* at 261-64.

<sup>44</sup> Lord Murray, *supra* note 12. Lord Murray goes on to state:

It is arguable, however, that a deterrent nuclear threat against a nuclear rival is not a threat in that sense, for it is intended only to neutralise the potential nuclear threat of that opponent. There is something specious about this reasoning, as General Lee Butler discerns. Neutralisation demands balance and balance, parity. An inherent escalation of arms is built in. In the end it is hard to see what is the distinction between this and an overt arms race between competing aggressor nations.

*Id.*

<sup>45</sup> ICJ Hearing, November 15, 1995, at 62 (emphasis supplied), available at <<http://www.icj-cij.org/>> (Oct. 25, 2001), under “Decisions,” “Legality of the Threat or Use of Nuclear Weapons (1994-1996),” “Oral Pleadings,” “CR/95/34 - 15 November 1995;” or <[http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_cr/iUNAN\\_iCR9534\\_19951115.PDF](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_cr/iUNAN_iCR9534_19951115.PDF)> (Oct. 25, 2001); *see also*, U.S. ICJ Memorandum/GA App. at 14 available at <<http://www.icj-cij.org/>> (Oct. 25, 2001), under “Decisions,” “Legality of the Threat or Use of Nuclear Weapons (1994-1996),” “Written Decisions,” “18. Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America;” or <[http://www.icj-cij.org/icjwww/icasess/iunan/iunan\\_](http://www.icj-cij.org/icjwww/icasess/iunan/iunan_)

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ipleadings/iunan\_ipleadings\_199506\_WriStats\_18\_USA.pdf> (Oct. 25, 2001) (citing Report of the U.N. Secretary-General on Nuclear Weapons, A/45/373, 18 September 1990, pp. 19–24); ICJ Hearing, November 15, *supra*, at 95.

<sup>46</sup> See *The ICJ Nuclear Weapons Advisory Opinion*, *supra* note 11, at ¶ 91.

<sup>47</sup> See *id.* ¶ 95 and *dispositif* ¶¶ 105(2)D & E. Indeed, the Greenock Sheriff noted that the Crown had offered no “indication” to the contrary. Sheriff Gimblett’s Report on the Greenock Trial for the LAR (21 Aug 2000) <<http://www.gn.apc.org/tp2000/greenock/largimb.html>> (Oct. 25, 2001).

<sup>48</sup> See Evidence Given by Professor Paul Rogers, Professor of Peace Studies at Bradford University, U.K., on October 15 1999, at the trial of H.M. Advocate v. Zelter, Roder, and Moxley (Sheriff Court, Greenock Scot. 1999), appearing at <<http://www.gn.apc.org/tp2000/greenock/rogersgk.html>> (Oct. 25, 2001); Trident II D-5 Fleet Ballistic Missile, Federation of American Scientists, Nov/Dec 1996 <<http://www.fas.org/nuke/guide/usa/slbm/d-5.htm>> (Oct. 25, 2001) Bulletin of the Atomic Scientists, British, French, and Chinese Nuclear Forces 1996 <<http://www.bullatomsci.org/issues/nukenotes/nd96nukenote.html>> (Oct. 25, 2001) (reporting on the Trident II, a.k.a. Trident D5, the U.K.’s current SLBM, Submarine Launched Ballistic Missile).

<sup>49</sup> See UGM-133A “Trident II” D-5 <<http://home.netcom.com/~chadeast/missiles/ugm133a.html>> (Oct. 25, 2001) (noting the missiles’ top speed is approx. 15,000 miles per hour, or Mach 23, after its three rocket stages have burned out, a process that takes less than three minutes of rocket burning.)

<sup>50</sup> See President William Jefferson Clinton, quoted in Show Transcript: Military Leaders for the Abolition of Nuclear Weapons (Aug 17, 1997), at <<http://www.cdi.org/adm/1049/transcript.html>> (Oct. 25, 2001); Bruce G. Blair, Harold A. Feiveson and Frank N. Von Hippel, Taking Nuclear Weapons Off Hair-Trigger Alert, *Scientific American*, at <<http://www.sciam.com/1197issue/1197vonhippel.html>> (Oct. 29, 2001); Evidence Given by Professor Paul Rogers, *supra* note 48.

<sup>51</sup> See Adm. Shanahan and Adm. Eberle, quoted in Military Leaders for the Abolition of Nuclear Weapons, *supra* note 50.

<sup>52</sup> See Blair, Feiveson and Von Hippel, *supra* note 50.

<sup>53</sup> Evidence Given by Professor Paul Rogers, *supra* note 48; Evidence Given by Professor Francis Boyle Professor of Law at the University of Illinois College of Law, on Oct. 1<sup>st</sup> 1999, at the trial of H.M. Advocate v. Zelter, Roder, and Moxley (Sheriff Court, Greenock Scot. 99), appearing at <<http://www.gn.apc.org/tp2000/greenock/boylegk.html>> (Oct. 25, 2001).

<sup>54</sup> See Evidence Given by Professor Paul Rogers, *supra* note 48; NATO’s Strategy Review: A Litmus Test for NATO–Russia Relations, Berlin Information Center for Transatlantic Security Research Note 97.5 December 1997 <<http://www.basicint.org/natostra.htm#NATO>> (Oct. 29, 2001).

<sup>55</sup> See Evidence Given by Professor Paul Rogers, *supra* note 48; Evidence Given by Professor Francis Boyle, *supra* note 53.

<sup>56</sup> See Evidence Given by Professor Paul Rogers, *supra* note 48; Blair, Feiveson and Von Hippel, *supra* note 50.

<sup>57</sup> See Defence of Angie Zelter, at Argyll & Bute District Court, Victoria Halls, Helensburgh, 22nd September 1998 <<http://www.gn.apc.org/tp2000/legal/dzelter.html>> (Oct. 25, 2001).

<sup>58</sup> See Evidence Given by Professor Paul Rogers, *supra* note 48, Blair, Feiveson and Von Hippel, *supra* note 50.

<sup>59</sup> WILLIAM M. ARKIN, ROBERT S. NORRIS AND JOSHUA HANDLER, TAKING STOCK, WORLDWIDE NUCLEAR DEPLOYMENTS 1998 40–41 (Natural Resources Defense Council, New York 1998), (available at <<http://www.nrdc.org/nuclear/tkstock/download.asp>> (Oct. 29, 2001) cited in MOXLEY, *supra* note 30, at 559 n.5.

<sup>60</sup> See *id.*

<sup>61</sup> See U.K. Strategic Defence Review ¶¶ 60–68 (1998); U.K. Strategic Defence Review Supporting Essay Number Five, ¶¶ 2–3 *et passim*.

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<sup>62</sup> See U.K. Strategic Defence Review ¶ 63 (1998); U.K. Strategic Defence Review Supporting Essay Number Five, ¶ 12.

<sup>63</sup> PRESIDENT WILLIAM J. CLINTON, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 12 (The White House, Oct. 1998) (emphasis supplied).

<sup>64</sup> JOINT CHIEFS OF STAFF, JOINT PUB 3-12.1, DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS I-2 (Feb. 9, 1996) (prepared under direction of the Chairman of the Joint Chiefs of Staff), as set forth at <[http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_12\\_1.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12_1.pdf)> (Oct. 25, 2001) [hereinafter, “DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS”] (emphasis omitted).

<sup>65</sup> *Id.* at v (emphasis omitted).

<sup>66</sup> *Id.* at vi (emphasis omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at III-4 (emphasis omitted).

<sup>69</sup> *Id.* at I-2

<sup>70</sup> See *Lord Advocate's Reference No. 1 of 2000*, *supra* note 1, at ¶¶ 97- 98. On the facts of the *Zelter* case, evidence was presented that June 8, 1999, the time of the actions which were the subject of respondents’ arrest, was a time of considerable international unrest, crisis and concern, in light of wars in Iraq and Kosovo and Russian counterthreats of possibly using nuclear weapons. See, e.g., Greenock 1999 Joint Statement of ‘Loch Goil Three,’ of Zelter, Roder and Moxley, available at <<http://www.gn.apc.org/tp2000/greenock/goilstmt.html>> (Oct. 25, 2001); Evidence Given by Rebecca Johnston, Greenock 1999, in *H.M. Advocate v. Zelter, Roder and Moxley*, on October 18, 1999, available at <<http://www.gn.apc.org/tp2000/greenock/johnsgk.html>> (Oct. 25, 2001) see also, Zelter quoting from her written statement at 10(5), in *Lord Advocate's Reference No. 1 of 2000*, Transcript of Day Three, Wed. October 11, 2000 available at <<http://www.gn.apc.org/tp2000/lar/larday3.html>> (Oct. 25, 2001); Report of Sheriff Gimblett to Lord Justice General et al, Justicial Office Lodged in 21 August 2000 p. 151 A-B available at <<http://www.gn.apc.org/tp2000/greenock/largimb.html>> (Oct. 25, 2001).

<sup>71</sup> UNITED STATES DEPARTMENT OF THE AIR FORCE, COMMANDER’S HANDBOOK ON THE LAW OF ARMED CONFLICT 6-1 (Air Force Pamphlet 110-34, 25 July 1980) [hereinafter, “THE AIR FORCE COMMANDER’S HANDBOOK”].

<sup>72</sup> THE UNITED STATES DEPARTMENT OF THE AIR FORCE, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 6-3 (Air Force Pamphlet 110-31, 19 November 1976) [hereinafter “THE AIR FORCE MANUAL ON INTERNATIONAL LAW”].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> THE NAVAL/MARINE COMMANDER’S HANDBOOK, *supra* note 33, at 10-21

<sup>77</sup> THE AIR FORCE MANUAL ON INTERNATIONAL LAW, *supra* note 72, at 6-3.

<sup>78</sup> *Id.* at 6-9 n.7.

<sup>79</sup> THE AIR FORCE COMMANDER’S HANDBOOK, *supra* note 71, at 6-1.

<sup>80</sup> JOINT CHIEFS OF STAFF, JOINT PUB 3-12, DOCTRINE FOR JOINT NUCLEAR OPERATIONS I-2 (Dec. 15, 1995), available at <[http://www.dtic.mil/doctrine/jel/new\\_pubs/jp3\\_12.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp3_12.pdf)> (Oct. 25, 2001).

<sup>81</sup> *Id.* (emphasis omitted).

<sup>82</sup> See *id.* at i (emphasis omitted). See MOXLEY, *supra* note 30, Chapters 26, 27; Chapter 2, note 75, Chapter 17, notes 38–53, Chapter 18, note 56, and accompanying text.

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<sup>83</sup> DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 80, at i, I-6–7 (emphasis omitted).

<sup>84</sup> *Id.* at III-8 (emphasis omitted).

<sup>85</sup> *Id.* at III-8.

<sup>86</sup> *Id.* at III-8 (emphasis omitted).

<sup>87</sup> DOCTRINE FOR JOINT THEATER NUCLEAR OPERATIONS, *supra* note 64, at III-10 (emphasis omitted).

<sup>88</sup> DOCTRINE FOR JOINT NUCLEAR OPERATIONS, *supra* note 80, at II-3–4 (emphasis omitted).

<sup>89</sup> *Copy on file with author.*

<sup>90</sup> UNITED STATES DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE 178 (FM27-10/18 July 1956) with Change No. 1 (15 July 1976).

<sup>91</sup> *See id.*

<sup>92</sup> The Naval/Marine Commander’s Handbook, *supra* note 33, at 6-27 n.49, quoting Charter of the International Military Tribunal at Nuremberg, U.S. Naval War College, International Law Documents 1944–45, at 254 (1945); Air Force Pamphlet 110-20, at 3-183. *See also* The Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 (A/CONF.183/9 <<http://www.un.org/law/icc/statute/romefra.htm>> (Oct. 25, 2001)), Part 2. Jurisdiction, Admissibility and Applicable Law Art. 8 War Crimes. The United Kingdom signed the Statute of the International Criminal Court on Nov. 30, 1998. <<http://www.un.org/law/icc/statute/status.htm>> (Oct. 25, 2001).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> For an analysis of the principles of probability portraying the risk of actual use, whether intentional, misconceived, or accidental, that is implicit in the policy of deterrence over time, *see* MOXLEY, *supra* note 30, at 540–553.

<sup>96</sup> Hans Kristensen, *Targets of Opportunity: How Nuclear Planners Found New Targets for Old Weapons*, BULL. OF ATOMIC SCIENTISTS, vol.55, no. 5, Sep./Oct. 1997, quoting U.S. Strategic Command, *Essentials of Post–Cold War Deterrence*, [n.d., probably April 1995], at 3, 4 (partly declassified and released under the Freedom of Information Act) (available at <<http://www.nautilus.org/nukestrat/USA/Advisory/Essentials95.pdf>> (Oct. 29, 2001)).

As expressed by Henry Kissinger, “The dilemma never resolved [by the doctrine of assured destruction] was psychological. It was all very well to threaten mutual suicide for purposes of deterrence, particularly in case of a direct threat to national survival. But no President could make such a threat credible except by constructing a diplomacy that suggested a high irrationality—and that in turn was precluded by our political system, which requires us to project an image of calculability and moderation.” HENRY KISSINGER, *WHITE HOUSE YEARS* 215–220, 216 (Little, Brown 1979).