NUCLEAR THREATS UNDER INTERNATIONAL LAW PART II: APPLYING THE LAW



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ANNA HOOD AND MONIQUE CORMIER

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I. INTRODUCTION

Anna Hood and Monique Cormier analyse the legality of certain threats under the *jus ad bellum*

regime of international law that regulates recourse to war between states, before turning to consider specific threat examples in the context of the *jus in bello* regime, which applies to regulate the conduct of hostilities during an armed conflict. They identify a number of complexities and deficiencies in how *jus ad bellum* and *jus in bello* apply to nuclear threats in practice.

Anna Hood is an Associate Professor at the University of Auckland Faculty of Law a.hood@auckland.ac.nz Monique Cormier is Senior Lecturer at the Monash University Faculty of Law monique.cormier@monash.edu.au

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Banner image: Judges at the International Court of Justice delivering its July 8 1996 advisory opinion on LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS in response to the December 15 1994 UN General Assembly resolution 49/75 K asking the Court: "Is the threat or use of nuclear weapons in any circumstance permitted under international law ?" from Court footage at 19:11 in the 1996 documentary film *The People v The Bomb: Judgment at the Hague*, produced by Kevin Sanders, viewable here.

II. NAPSNET SPECIAL REPORT BY ANNA HOOD AND MONIQUE CORMIER

NUCLEAR THREATS UNDER INTERNATIONAL LAW PART II: APPLYING THE LAW

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Abstract

Throughout the nuclear age, states have made a wide array of threats to use nuclear weapons. There is, however, often little clarity as to whether such threats are legal or illegal under international law. This article is the second in a two-part series, and in this piece we examine how two specific sets of international legal rules apply to select examples of past nuclear threats. In particular we analyse the legality of certain threats under the *jus ad bellum* regime of international law that regulates recourse to war between states, before turning to consider specific threat examples in the context of

the *jus in bello* regime, which applies to regulate the conduct of hostilities during an armed conflict. Throughout the article, we identify a number of complexities and deficiencies in the ways that the rules of *jus ad bellum* and *jus in bello* apply to nuclear threats in practice.

I INTRODUCTION

No state has deployed a nuclear weapon against an adversary since the United States dropped nuclear bombs on Hiroshima and Nagasaki in 1945, but many states have threatened to use them. Nuclear threats have been made in a variety of ways and for a multitude of reasons. Some threats have been issued in a bid to prevent states from starting or entering a war, while others have been made in the heat of war to get the other side to surrender. Nuclear threats have been made with the aim of preventing non-nuclear weapon states from developing nuclear weapons or to prevent nuclear weapon states from transferring their stocks to others. There are also threats embedded in states' nuclear deterrence policies. While it is not unusual for the targets of nuclear threats to declare that such a threat is illegal under international law, the question of whether nuclear threats breach international law is not a straightforward one. This article is the second in a two-part series that seeks to shed some light on the international legality of nuclear threats.

In the first article, we identified the framework of international laws and other agreements that govern nuclear threats, and discussed the tensions, controversies and uncertainties that characterise this space. In this article, we turn to examine how two specific sets of international legal rules might apply to a range of nuclear threats that have been made over the last eight decades. We begin in Part II by analysing a selection of prominent examples of nuclear threats to determine whether such threats were lawful under the *jus ad bellum* regime of international law. This regime is embodied in article 2(4) of the *UN Charter* and governs when states can lawfully use force against one another. In Part III, we consider specific threat examples in the context of the *jus in bello* regime (primarily international humanitarian law (IHL)), which applies to regulate the conduct of hostilities during an armed conflict.[1] Across the course of both Parts II and III we identify a number of complexities and deficiencies in the ways that the rules of *jus ad bellum* and *jus in bello* apply to nuclear threats in practice. We briefly conclude in Part IV by reflecting on these concerns and suggesting that there is a need to strengthen the international norms surrounding nuclear threats.

Before commencing it is helpful to explain three preliminary matters. First, we provide an overview of the relevant laws at the start of each Part before exploring how they apply to various threats that states have made in the past. We do not, however, repeat the detailed discussions set out in our first article about the interpretive debates and legal uncertainties that exist. Instead we provide an overview of the key elements of the tests so that readers can then follow how they apply to particular nuclear threats.

Second, it is not possible in the space of a short article to consider the legality of every nuclear threat that has been made in the atomic age. Instead, we examine how the *jus ad bellum* and *jus in bello* legal regimes apply to a representative sample of the threats that have been issued across the course of the last eight decades. These examples were also chosen on the basis of publicly available and readily accessible information about the factual circumstances surrounding the threats. This article is intended to be a preliminary analysis which highlights the complexities (and deficiencies) of the law in this space. Our hope is that this exercise will enable readers to see how different types of nuclear threats can trigger different components of the existing laws.

Third, a note on terminology: we use the term 'nuclear weapon states' to refer to the five states that are permitted to possess nuclear weapons under the Nuclear Non-Proliferation Treaty (China, France, Russia, United Kingdom and the United States); we use the term 'nuclear weapon

possessing states' to refer to the four states outside the NPT framework that have nuclear weapons (India, Israel, North Korea and Pakistan); and we employ the term 'nuclear-armed states' to refer collectively to all nine states that have nuclear weapons.

II APPLYING ARTICLE 2(4) OF THE UN CHARTER TO EXAMPLES OF NUCLEAR THREATS

The general prohibition on states from threatening to use all forms of force under *jus ad bellum* (be it nuclear or non-nuclear) is embedded in article 2(4) of the *UN Charter*. Article 2(4) provides that 'All Members [of the United Nations] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'. It is widely agreed that a nuclear threat will be illegal under article 2(4) if:

- A state has made an explicit or implicit promise to use nuclear weapons (Roscini 2007);
- That promise has been communicated to a specific entity being threatened (that is, it cannot be directed generally to the world at large) (Roscini 2007);
- The threat to use nuclear weapons is credible (this is a low bar that requires an assessment as to whether a state might use nuclear weapons based on whether it has the capacity to launch a nuclear attack and whether it has some level of intention to carry out the threat) (Jain and Seth 2018; Stürchler 2007); and
- The threatened use of nuclear weapons:
  - Would not have the support of the UN Security Council (UN Charter 1945, chapter 7); or
  - Would not satisfy the conditions of self-defence in article 51 of the *UN Charter* which require that force only be deployed in the event of an armed attack or an imminent armed attack and that the use of force must satisfy the necessity and proportionality tests (Shaw 2021).[2] The necessity test dictates that the use of force must be necessary to halt the armed attack while the proportionality test provides that the use of force deployed must be proportionate to the threat being faced.[3]
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Throughout the nuclear age, a significant number of nuclear threats have been made in *jus ad bellum* contexts. In this Part we examine whether a representative sample of these threats were unlawful under the prohibition in article 2(4) and not otherwise allowed in self-defence under article 51 of the *UN Charter*.[4] The threats we analyse are:

- The doctrine of nuclear deterrence embedded in the national security policies of nuclear-armed states;
- The Soviet Union's actions in the 1962 Cuban missile crisis and the US response;
- The Soviet Union's threat to use nuclear weapons during the 1956 Suez Crisis against Britain, France and Israel;
- The US threat to use nuclear weapons against Iran in 2006;
- Russia's threat to use nuclear weapons against NATO during the Russia-Ukraine conflict in 2022.

There is a deep division in the international community and among legal commentators as to whether it would ever be possible for a nuclear threat that is being assessed under article 2(4) to satisfy the requirements of self-defence under article 51 of the *UN Charter*. Some argue that the immensely destructive and indiscriminate nature of nuclear weapons means they could never be

used in a proportionate way and/or that it would never be necessary to deploy nuclear weapons to end an armed attack (UN 2022, 4). Others maintain that there are situations when the threat to a state would be so great that the use of (and threat to use) nuclear weapons would be warranted and would satisfy the elements of article 51.[5]

We are not seeking to enter the debate about whether nuclear threats (or nuclear weapon use) could *ever* be legal under article 2(4) of the *UN Charter*. Instead, we are using a sample of nuclear threats that states have issued historically as examples to determine how the current international law framework applies to different types of threats. As discussed in our first article, threats to use nuclear weapons come in a variety of forms, including rhetorical bluster from state leaders, operational activities that signal nuclear threats, and formal state policies or doctrines. Any of these could theoretically meet the criteria for 'threat' for the purposes Article 2(4). As one of our examples demonstrates, there are some situations where it seems a state made a nuclear threat but where the words uttered or actions taken did not actually qualify as a 'threat' for the purposes of article 2(4) and thus could not be classified as illegal. However, of those nuclear threats that satisfied the requirements of a 'threat' under article 2(4), none of them satisfied the requirements of self-defence in article 51 of the *UN Charter*. We thus conclude that all of the nuclear threats we examine here that met the article 2(4) threshold were likely illegal under *jus ad bellum*.

A. The Legality of Threats Underpinning Nuclear Deterrence Policies

A key part of the national security policies of many nuclear-armed states is nuclear deterrence. At the heart of the doctrine of nuclear deterrence is the threat that a state will deploy nuclear weapons if attacked. The precise parameters of states' deterrence policies vary: some states specify that they will only use nuclear weapons in response to nuclear attacks (The State Council PRC, 2015). Other state policies suggest that they will also use nuclear weapons to respond to chemical and biological weapon attacks (HM Government 2015), conventional attacks to which they are unable to respond with conventional weaponry,[6] or any attack that threatens their 'vital interests'.[7] What is key to all deterrence doctrines though is that they contain threats: states aim to deter particular attacks by threatening to use nuclear weapons in response.

As doctrines of deterrence are designed to prevent conflicts (rather than govern what happens within conflicts), the relevant international law is *jus ad bellum* as articulated in article 2(4) of the *UN Charter*. This means there must be a credible promise to use nuclear weapons that is conveyed to a specific target state and no justification of the threat in self-defence under article 51. Whether the simple existence of a doctrine of nuclear deterrence falls foul of the prohibition on threats in article 2(4) has been a subject of debate.[8] In our view, most states' nuclear deterrence policies do not violate article 2(4). This is because although they contain explicit promises to use nuclear weapons, and those promises can be deemed credible as the states making the threats have nuclear weapons and have exhibited some intent to use them, those promises are not (for the most part) directed at a specific state. To the contrary, they are issued to the world at large. As we explained in the first article in this series, article 2(4) as it is currently understood does not prohibit generic threats; it only bars threats made against specific entities.

Interestingly, however, Isha Jain and Bhavesh Seth have identified an example of a state whose nuclear deterrence policy can be deemed to be targeted at a specific state. They argue that India's policy differs to others as it is in fact targeted at a particular entity (2018). On its face, however, this is difficult to see. India's Official Nuclear Doctrine, developed in 2003, provides that 'nuclear weapons will only be used in retaliation against a nuclear strike on Indian territory or Indian forces anywhere' and that the retaliation 'will be massive and designed to inflict unacceptable damage' (Ministry of External Affairs 2003). This appears to be general in nature and not directed at any specific state. However, Jain and Seth argue convincingly that when one considers India's

relationship with Pakistan over the last few decades, it becomes apparent that India's doctrine of deterrence exists specifically to deter Pakistan's use of nuclear weapons. They base this conclusion on statements made by the two states' Foreign Ministries and the fact that India's nuclear deterrence doctrine operates against a backdrop of a low-intensity conflict between the two states (Jain and Seth 2018).

Adopting Jain and Seth's interpretation, India's deterrence doctrine can be said to amount to a credible threat against a specific target and therefore falls within the article 2(4) definition of a threat. The question then becomes whether that threatened use of nuclear weapons complies with the dictates of self-defence set out in article 51 of the *UN Charter*. The doctrine of self-defence provides that a state may use force in response to an armed attack or imminent armed attack providing the use of force is necessary to repel the attack, and that the amount of force used in self-defence is proportionate to the aim of repelling the attack. We agree with Jain and Seth's assessment that while India's nuclear deterrence doctrine makes it clear that it will only use nuclear weapons in response to an armed attack (a nuclear strike), and it is arguable that the use of a nuclear weapon may be necessary to repel another state's nuclear attacks, the doctrine as it is currently worded violates the proportionality test (Jain and Seth 2018). India's doctrine states that its nuclear retaliation in response to a nuclear strike 'will be massive and inflict unacceptable damage'. Under the proportionality test, it is only permissible for a state to use as much force as is necessary to repel an attack. India's hyperbolic promise to inflict massive and unacceptable damage on Pakistan therefore fails the proportionality test required for self-defence under article 51. Consequently, India's nuclear deterrence policy is unlawful under *jus ad bellum*.

It is worth reiterating here that the only reason why nuclear deterrence policies of other states are not considered unlawful under *jus ad bellum* is because they do not amount to threats for the purposes of article 2(4) of the *UN Charter*. If there was any evidence to suggest that the deterrence policies of other states were directed at specific entities then they would amount to article 2(4) threats and many would also likely fail the self-defence test. For example, it is highly questionable whether deterrence doctrines that promise nuclear retaliation in response to chemical and biological weapon attacks would satisfy the necessity test. While it is potentially conceivable that a nuclear weapon might be needed to repel a nuclear attack, it is hard to see how a nuclear strike would be necessary to repel the use of chemical or biological weapons. Further, there are a number of nuclear deterrence policies that contain language that echoes India's desire to 'inflict unacceptable damage' and thus would violate the proportionality requirement of self-defence. For example, China's deterrence policy promises to generate 'unendurable damage to the opponent' (Jain and Seth 2018, 112). As long as such nuclear deterrence policies remain directed to the world at large, however, they do not fall foul of the rules of *jus ad bellum.*

B. The Soviet Union's Nuclear Threats Against Britain, France and Israel during the Suez Crisis

In 1956, Britain, France and Israel invaded Egypt in response to President Nasser's decision to nationalise the Suez canal. In a bid to get the three invading states to end the conflict and withdraw their troops, the Soviet premier, Nikolai Bulganin, sent a series of 'menacing dispatches' (Smolansky 1965, 598) to the prime ministers of each nation, containing the explicit threat that the Soviet Union was 'fully determined to crush the aggressors and restore peace in the East through the use of force' (Bulganin 1956a). Implicit in each of the messages was also the threat that the Soviet Union was prepared to use nuclear weapons to achieve its aim. For example, to French Premier Mollet, Bulganin asked the rhetorical question '[w]hat would be the position of France if she were attacked by other States having at their disposal modern and terrible means of destruction?' and addressed a similar threatening question to the British Prime Minister (Bulganin 1956a). In the dispatch to Prime

Minister Ben-Gurion of Israel, Bulganin accused Israel of 'toying… with the fate of its own people' and warned that Israel's actions 'will place in jeopardy the very existence of Israel as a State' (Bulganin 1956b). This was interpreted at the time as an outright threat of nuclear annihilation against Israel (Smolansky 1965).

As the Soviet Union was not a party to the conflict, its nuclear threats need to be assessed under article 2(4) of the *UN Charter* and not the rules of IHL. *Prima facie,* the Soviet threats violated article 2(4): they threatened the territorial integrity of France, Britain and Israel, they were communicated to the target states, and they were credible. Further, it is difficult to see how such threats could be justified under the doctrine of self-defence. An argument could be made that the Soviet Union was exercising the right of collective self-defence which allows states to act in defence of other states that have been subject to armed attacks in certain situations (ICJ 1986). However, threats to Israel's 'very existence' and to use nuclear weapons against Britain and France almost certainly failed both the necessity and proportionality limbs of the self-defence doctrine. The Soviet threats made during the Suez Crisis were therefore a breach of article 2(4) of the *UN Charter*.

C. Nuclear Threats During The Cuban Missile Crisis

In 1962, the Soviet Union quietly began to instal nuclear missiles in Cuba. When the United States eventually became aware of what was happening in mid-October that year, it demanded the Soviets withdraw the nuclear warheads and imposed a naval blockade.[9] These events gave rise to an incredibly tense few weeks that brought the Cold War adversaries to the brink of nuclear war. In this section, we examine whether two aspects of the Cuban Missile crisis violated the prohibition on threats in article 2(4) of the *UN Charter*: the Soviets placing nuclear missiles in the US backyard; and a statement by President John F Kennedy on 22 October that 'any nuclear missile launched from Cuba against any nation in the Western Hemisphere [would be regarded as] an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union'.

Between July and October 1962, the Soviet Union constructed a number of sites for launching nuclear missiles in Cuba and transported 158 nuclear warheads to the Caribbean state. The militarisation of an area can, in certain circumstances, amount to a threat of force for the purposes of article 2(4) of the *UN Charter*. There is no need for an explicit threat to accompany the militarisation; the build-up of weapons and/or troops alone can convey an implicit threat that force may be used (Green and Grimal 2011). Whether a particular instance of militarisation does constitute a threat depends on whether it credibly conveys a state's readiness to use force to the target state (Stürchler 2007). Other issues to consider include whether the military activities are occurring in a context where there is a dispute or hostile intent between two states, as well as factors such as the scale, location, timing and intensity of the militarisation (Stürchler 2007).

In the Cuban Missile context, the Soviet Union's actions occurred at time when there was significant tension between Moscow and Washington D.C. and the warheads were geographically close to US territory. However, the United States was not initially aware that the nuclear warheads were stationed in Cuba[10] and so their mere presence at that time did not amount to a threat for the purposes of article 2(4). When, however, the United States became aware of the stockpiles, the situation changed: the US awareness of the nuclear warheads combined with the tension between the two states and Moscow's hostile intent towards the United States transformed the situation into a threat.[11] In our view, this satisfies the criteria for the Soviet actions to amount to a threat under article 2(4) of the *UN Charter* (Kennedy 1962; US 1962).[12] This threat could not be justified under the doctrine of self-defence because neither Cuba nor the Soviet Union were under armed attack or facing imminent armed attack from the US.[13] Further, there was nothing to indicate that the Soviet Union would only use the weapons in a self-defence context. Our conclusion is that the Soviet build-up of nuclear weapons was an unlawful nuclear threat under article 2(4) from the moment the

stockpile was discovered by the United States.

The Soviet Union was not the only state to issue a nuclear threat during the Cuban missile crisis. Kennedy's statement on 22 October in response to the Soviet militarisation *prima facie* amounted to a threat in violation of article 2(4). Although Kennedy did not explicitly threaten to use nuclear weapons, there was no question in anyone's minds that when he said a nuclear attack from the Soviet Union would result in a 'full retaliatory response', he was indicating that the United States would deploy nuclear weapons.[14] Consequently the need for an explicit or implicit promise to use nuclear weapons was satisfied. Further, the statement was broadcast publicly and we know that a copy of the text reached Moscow the following day meaning the threat was communicated to the Soviet Union (Colman 2016). Finally, it is clear that the threat satisfied the credibility requirement: the United States possessed nuclear weapons and Kennedy's speech made it clear that he was prepared to use them in response to a Soviet attack.

The question then becomes whether Kennedy's *prima facie* violation of article 2(4) can be excused because it was made in self-defence. If the President had been more specific and said that he would only use nuclear weapons to repel a Soviet nuclear attack that imperilled the very survival of the United States, then his threat could potentially have been deemed legal under the doctrine of self-defence as formulated by the ICJ in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ 1996). However, Kennedy's remarks differed from this formulation in two problematic ways. First, he indicated he would use nuclear weapons not only if the Soviet Union deployed them against the United States but also against any state in the Western Hemisphere. The doctrine of self-defence does not allow a state to use force in response to an attack on another state unless it has the explicit permission of the targeted state (ICJ 1986). Second, by stating that he would engage in a 'full retaliatory response', Kennedy suggested that the United States may go further than simply repelling the Soviet Union's attacks and instead use nuclear weapons to take revenge on its Cold War rival. As discussed above, the proportionality component of self-defence requires that states only use the amount of force necessary to repel or reverse an armed attack. The US broad nuclear threat in response to the Soviet threat was thus also a breach of article 2(4) of the *UN Charter*.

D. US Nuclear Threat against Iran in 2006

In 2006, a rising number of states were concerned about the direction of Iran's nuclear program. Specifically, there were concerns about Iran's uranium enrichment activities and its development of a heavy water reactor. While Iran maintained that it was only interested in cultivating a domestic nuclear power industry, other states were concerned that Iran was undermining the Nuclear Non-Proliferation Treaty and possibly pursuing nuclear weapons. Against this backdrop, US President George W. Bush was asked at a press conference on 18 April 2006 about the steps he was prepared to take to get Iran to halt its activities. The journalist asked, 'when you talk about Iran and you talk about how you have diplomatic efforts, you also say all options are on the table. Does this include the possibility of a nuclear strike?' Bush responded, 'All options are on the table' (Markey 2006; Branigin 2006).

Bush's response amounted to an illegal threat under article 2(4) of the *UN Charter*. Publicly stating that all options were on the table in relation to Iran conveyed a clear message to Iran that the United States was willing to use nuclear weapons to halt the Iranian nuclear program.[15] It is important to appreciate that in the context of article 2(4), there does not need to be a high probability that a threat will be carried out (Stürchler 2007). A threat will be deemed credible if there is a risk that it could be carried out as evidenced by the fact that the state has the means to carry it out and has exhibited some level of intention that it might do so. In this situation, the United States possessed the nuclear capability to act on the threat and the fact that Bush publicly declared that a nuclear

strike was an option indicated he was actively considering it.

Further, Bush's threat could not be justified under the doctrine of self-defence. States can only use force in self-defence if they are under armed attack or at imminent risk of suffering an armed attack. Any threat to use force, therefore, must make it clear that the threat would only be actioned if those circumstances exist (Shaw 2021). Here, there was no evidence that the United States was under an armed attack or at imminent risk of an armed attack from Iran. Nor did Bush suggest he would only use nuclear weapons if faced with an armed attack or an imminent armed attack from Iran in the future. The fact that Iran was possibly developing nuclear weapons does not satisfy this test and nor does the possibility that Iran might one day succeed in developing nuclear weapons and launch them at the United States; in neither categorisation of the situation is there an imminent risk of armed attack.[16] It is thus clear that Bush's statement was an illegal nuclear threat under article 2(4) of the *UN Charter*.

E. Russia's Nuclear Threat against NATO in 2022

On 24 February 2022, Russia invaded Ukraine. In the context of this conflict, Russia has issued multiple threats to use nuclear weapons. Some of those threats have been targeted at NATO states to deter them from joining the war while others have been directed at Ukraine. As explained above, different sets of international laws apply depending on whether the threat is made in the context of *jus ad bellum* or *jus in bello*. The NATO states are not parties to the Russia-Ukraine conflict, so the threats made against them are assessed under the *jus ad bellum* paradigm in article 2(4) of the *UN Charter*. As Ukraine is a party to the conflict, the threats against it are considered under the *jus in bello* rules of IHL. In this section we examine one of the threats directed against NATO states in 2022 and consider whether it violated article 2(4) of the *UN Charter*. We discuss whether a threat made against Ukraine in September 2022 violated the rules of IHL in Part III below.

The first nuclear threat that Russia issued against NATO states was made by President Putin on the day Russia invaded Ukraine:

> Russia remains one of the most powerful nuclear states. Moreover, it has a certain advantage in several cutting-edge weapons. In this context, there should be no doubt for anyone that any potential aggressor will face defeat and ominous consequences should it directly attack our country (Putin 2022a).

In our view this statement amounted to a threat for the purposes of article 2(4). While Putin does not explicitly threaten to use nuclear weapons, he makes it clear that Russia is a powerful nuclear state, refers to the country's 'cutting-edge weapons' and the fact that any aggressor will face 'defeat' and 'ominous consequences'. This combination of words was widely interpreted at the time as amounting to an implicit nuclear threat.[17] What is more, the threat is credible as Russia has nuclear capabilities and the public statement evidences an openness to using them. It could perhaps be argued that the threat is not directed at a sufficiently specific target because it refers to 'any potential aggressor' and not particular states. However, the context in which the statement was delivered made it clear that the threat was targeted at NATO states as it was this group of states that Putin wanted to deter from coming to Ukraine's aid (Daniszewski 2022; Dougherty 2022).

It is not possible for this threat to be excused under the doctrine of self-defence. While Putin's statement indicated that he would not use nuclear weapons unless Russia had suffered an armed attack, it is highly questionable whether this threatened use of nuclear weapons would comply with the necessity and proportionality limbs of the self-defence doctrine. Putin's statement suggested that nuclear weapons would be used in response to any form of attack. This would violate the principle of necessity as nuclear weapons would not be necessary to repel the vast majority of armed attacks,

especially if they were conventional in nature. The fact that Putin referred to aggressors suffering 'ominous consequences' also suggests that the use of nuclear weapons would unlikely be proportionate to the scale and nature of any attack Russia faced. Russia's nuclear threat against NATO was therefore, in our view, unlawful.

III APPLYING INTERNATIONAL HUMANITARIAN LAW TO EXAMPLES OF NUCLEAR THREATS

When a threat is made between parties to a conflict that is already under way, it is a matter for *jus in bello* and the rules of IHL apply. There are two different positions as to the application of IHL to nuclear threats made during a conflict. The first was set out by the ICJ in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. The Court held that whether one state's threat to use a nuclear weapon against an adversary in an armed conflict is legal turns on whether the envisaged use of the nuclear weapon would comply with the rules of IHL relating to the methods and means of warfare (ICJ 1996).

The second position rejects the notion that IHL regulates threats generally, asserting instead that IHL is concerned only with two narrow rules in relation to specific types of threats that occur during armed conflict (Nystuen 2014). The first is that it is a breach of IHL to threaten an adversary that there will be no survivors (UN 1977, art 40).[18] The second is that there is a prohibition against 'threats of violence the primary purpose of which is to spread terror among the civilian population' (UN 1977, art 51(2)).[19] Consequently, a threat to use nuclear weapons during an armed conflict will only be illegal if it involves a threat that there will be no survivors or if the threat has been made to spread terror amongst civilians.

As we argue in our first article, it is the second position — IHL does not in general prohibit threats — that is more legally defensible. We are conscious, however, that the status of an ICJ Advisory Opinion carries considerable weight, and the ICJ's conclusion in 1996 has received broad acceptance over the last 30 years. There is thus an argument to be made that it represents the state of the law. But without further clarification of the legality of nuclear threats in a *jus in bello* context, our view is that the law in this area is unsettled: it simply is not possible at this time to say whether the ICJ's broad interpretation or the focus on the two specific IHL rules represents the correct approach. In light of this, we turn in this Part to show how both approaches could be applied to two nuclear threats that have been made during armed conflict: a threat made by the United States against North Korea in the Korean War, and a threat made by Russia against Ukraine during the Russian-Ukraine conflict in 2022.

A. Applying the ICJ's Legality Test for Nuclear Threats in Conflict

As noted above, the ICJ stated that a nuclear threat in an armed conflict will be legal if the envisaged use of the nuclear weapon would be compatible with the rules of IHL. As detailed in the first article, there are three broad IHL principles that would apply to any use of nuclear weapons. The first is the principle of distinction which requires any attack to be focused on military, not civilian, targets (UN 1996, para 95; UN 1977, art 48). Second is the principle of proportionality which prohibits causing incidental harm to civilians or civilian objects in excess of what is required to achieve a military objective (UN 1996, para 95; UN 1977, art 51(5)(b)). Third is the rule that prohibits means and methods of warfare that would cause superfluous injury or unnecessary suffering (UN 1996, para 95; UN 1977, art 35(2)). In a nuclear threat context, it would be illegal under the ICJ's formulation to threaten to use nuclear weapons if the intended nuclear strike would fall foul of any one of those fundamental principles of IHL (International Committee of the Red Cross 2022).

Similarly to the debate over whether a nuclear threat could ever be permissible under articles 2(4) and 51 of the *UN Charter*, it is keenly contested whether a nuclear threat issued during a war could ever realistically satisfy the tests of legality under IHL. Some argue that nuclear weapons are indiscriminate by nature and therefore incapable of distinguishing between civilians and combatants. They contend that nuclear weapons will always cause superfluous injury and unnecessary suffering meaning it will never be lawful to threaten to use them during an armed conflict (International Committee of the Red Cross 2022). Others insist that in certain situations — for example, a threat to deploy a tactical nuclear weapon against a military vessel on the high seas — it is possible that a nuclear threat could come within the rules of IHL (UK 1996). As with our discussion of article 2(4), our purpose in this Part is not to offer a view on the merits of this debate. Instead we consider how the law as interpreted by the ICJ applies to nuclear threats made during the Korean War and Russia-Ukraine conflict.[20]

During the Korean War, US President Truman threatened to use nuclear weapons against North Korea. At a press conference in November 1950 Truman said, 'We will take whatever steps are necessary to meet the military situation, just as we always have' (National Resources Defense Council 2006, 70). When asked to clarify whether this included using atomic bombs, Truman responded, 'That includes every weapon we have' (National Resources Defense Council 2006, 70). To determine whether this nuclear threat would have been legal under the ICJ's approach, we need to assess whether the envisaged use of nuclear weapons would have violated the principle of distinction, the principle of proportionality and the prohibition on superfluous injury and unnecessary suffering. The problem is that Truman's threat was so vague and generic that it is nigh impossible to evaluate whether it would have satisfied these IHL tests. While one could infer that 'meet[ing] the military situation' might have meant that civilian and civilian objects would not have been targeted, it is a long bow to draw. Without further information about how, when and where this threat might have been carried out (including how many and what type of nuclear weapons would have been used) there is simply not enough information to make even an educated guess as to whether such use would have complied with IHL. The fact of the matter is that threats made during armed conflict are very unlikely to ever be specific enough because there is no strategic value in providing concrete details about a potential nuclear strike to the adversary. This makes it extremely difficult to determine if the threatened use of nuclear weapons would be permissible.

The same is true of the nuclear threat Russia made against Ukraine in 2022. On 30 September 2022, President Putin delivered a speech where he claimed that four Ukrainian territories — Donetsk, Luhansk, Zaporozhye and Kherson — were now part of Russia. In a bid to prevent Ukraine from reclaiming the territories, he said:

> And today's Kiev authorities should treat this free will of the people [of the four territories] with respect, and nothing else. This is the only way to peace. We will protect our land with all forces and means at our disposal and will do everything to ensure the safe life of our people. (Putin, 2022b)

Later in the speech Putin referred to the US atomic bombing of Hiroshima and Nagasaki as 'precedents' .

The fact that Putin suggested he would use 'all forces and means at our disposal' and referenced Hiroshima and Nagasaki means that the statement is a clear nuclear threat. As with the Truman's declaration during the Korean War, the lack of specificity in Putin's threat makes assessing its legality under the principles of IHL impossible. There is nothing in his statement that gives any indication that his proposed nuclear strike would, or would not, have satisfied the principles of distinction and proportionality and the prohibition on unnecessary suffering and superfluous injury.

There is little guidance in the literature or case law as to how threats such as those made in the Korean War and Russia-Ukraine war should be evaluated for the purposes of the ICJ's formulation of legality in a *jus in bello* context. Our sense is that there are three possible approaches that could be taken. The first would be to give state leaders who make general nuclear threats like this the benefit of the doubt. We could assume that Truman and Putin were only threatening to deploy nuclear weapons in a manner that would comply with IHL. Just as easily, however, we could take a different approach that assumes any vague nuclear threat would not meet the IHL requirements. This would mean that unless a threat clearly conveys that the envisaged use of nuclear weapons would comply with the principles of distinction, proportionality and the prohibition on unnecessary suffering and superfluous injury, it would be unlawful.

A third possible approach would be to require threats made during armed conflict to meet a specificity criterion before they can be considered threats for the purposes of IHL. Just as a threat can be too general to amount to an article 2(4) 'threat' under the *UN Charter*, it may be that threats such as Truman's and Putin's should be deemed too general to be legally assessed under IHL. However, this seems somewhat unsatisfactory. While those threats were broad and generic, they were more targeted than the general deterrence threats discussed above that fell short of engaging the rules of article 2(4). Truman and Putin's threats were, for example, directed at specific states and made in a context where there was active conflict between the threatening state and the state being threatened.

Given the lack of clarity on this issue, we are left with the conclusion that the ICJ's test for the legality of threats made in armed conflicts is ill-suited for assessing the types of nuclear threats made from early in the nuclear age to very recent times

B. Applying Specific IHL Rules to Nuclear Threats in Conflict

If we take the second approach to assessing threats in armed conflict – that IHL does not generally prohibit threats – we have to ask whether Truman and Putin's threats violated the two specific IHL rules against threats: the prohibition on issuing a threat that there will be no survivors, and the prohibition on 'threats of violence the primary purpose of which is to spread terror among the civilian population'. It is quite clear cut in this situation that neither Truman nor Putin's threats violated these specific rules. With respect to the first rule, there is nothing in the declarations by Truman or Putin to suggest that their threatened nuclear strikes would leave no survivors. In terms of the second, it is not possible to conclude that the 'primary purpose' in either situation was to instil terror in civilians. Truman states that he wants to 'meet the military situation' and Putin suggests that his primary purpose in issuing the threat is to protect land he considers to be Russia's and to safeguard the lives of people. While it is likely that both threats incidentally caused some level of terror among civilian populations in the targeted states, this is not sufficient to breach the IHL rule.

IV CONCLUDING REFLECTIONS

The above discussion reveals some of the complexities of applying the rules prohibiting threats in article 2(4) of the *UN Charter* and in IHL to a sample of real-life nuclear threats. With respect to article 2(4), certain statements or actions that appear threatening in nature will not be prohibited if they are issued to the world at large rather than to a specific entity. For threats made during war, it is extremely difficult to apply the ICJ's underdeveloped test that a threat to use nuclear weapons in an armed conflict will be illegal if the envisaged use would be illegal under IHL, given that states threatening nuclear attacks in conflicts frequently provide very few details of exactly what is contemplated. If, however, we only rely on the two narrow prohibitions on specific threats in IHL then we are left with a situation where there is no general rule preventing states from threatening to use nuclear weapons during conflicts. When these complexities are coupled with the gaps and

uncertainties in the broader web of international laws that govern nuclear weapon threats outside the *jus ad bellum* and *jus in bello* contexts,[21] real doubts about the strength and appropriateness of the laws in this area emerge.

In light of these concerns, we suggest that there is a need for the international community to engage more closely with the laws surrounding nuclear threats and consider ways that they could be developed to provide more clarity and protection. Some possibilities that could be explored include: the development of a treaty that sets out standardised negative security assurances forbidding the use of nuclear threats against non-nuclear weapon states; the development of a no-first threat norm that would see all nuclear-armed states agree not to be the first to threaten to use nuclear weapons; or the development of a norm that would prevent threats to use nuclear weapons in any circumstances. It is beyond the scope of this piece to explore these ideas in any detail, but we hope the explanation of the current state of the law and the difficulties with applying it provides the foundation and impetus for further work to be undertaken in this space.

V REFERENCES

Boothby, Bill, and Wolff Heintschel von Heinegg. 2021. "Nuclear Weapons Law: Where Are We Now." *Cambridge University Press*, November. https://doi.org/10.1017/9781009052634.

Branigin, William. 2006. "Bush Says 'All Options Are on the Table.'" The Washington Post. April 18, 2006. https://www.washingtonpost.com/archive/business/technology/2006/04/18/bush-says-all-options-are-on-the-table-with-iran/084b3876-78d2-489d-b448-9fc9dd5632f4/.

Bulganin, Marshal. 1956a. Messages to Mr Ben-Gurion, November 1956, https://web.stanford.edu/group/tomzgroup/pmwiki/uploads/200-1956-11-KS-f-LIZ.pdf

Bulganin, Marshal. 1956b. Messages to Sir Anthony Eden and M Mollet, November 1956, https://web.stanford.edu/group/tomzgroup/pmwiki/uploads/200-1956-11-KS-f-LIZ.pdf

Colman, Jonathan. 2016. *The Cuban Missile Crisis*. Edinburgh University Press.

Daniszewski, John. 2022. "Putin Waves Nuclear Sword in Confrontation with the West." AP NEWS. February 25, 2022. https://apnews.com/article/russia-ukraine-vladimir-putin-europe-poland-nuclear-weapons-2503c0d7696a57db4f437c90d3894b18.

Dougherty, Jill. 2022. "Analysis: Putin Lashes out with Ominous Threat to Ukrainians and Other Countries." CNN. February 24, 2022. https://edition.cnn.com/2022/02/24/europe/putin-ukrain-address-threat-intl/index.html

Drummond, Brian. 2019. "UK Nuclear Deterrence Policy: An Unlawful Threat of Force." *Journal on the Use of Force and International Law*, September, 1–49. https://doi.org/10.1080/20531702.2019.1669323

Green, James, and Francis Grimal. 2011. "The Threat of Force as an Action in Self-Defense under International Law." *Vanderbilt Journal of Transnational Law* 44 (2): 285-329.

HM Government. 2015. "National Security Strategy and Strategic Defence and Security Review 2015 a Secure and Prosperous." https://www.gov.uk/government/publications/national-security-strategy-and-strategic-defence-and-security-review-2015.

ICJ. 1986. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America). https://www.icj-cij.org/sites/default/files/case-related/70/070-19841126-JUD-

01-00-EN.pdf

ICJ. 1996. “Legality of the Threat or Use of Nuclear Weapons.” https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

International Committee of the Red Cross. 2022. “The ICRC’s Legal and Policy Position on Nuclear Weapons’ .” *International Review of the Red Cross*, June. https://international-review.icrc.org/articles/the-icrcs-legal-and-policy-position-on-nuclear-weapons-919.

Jain, Isha, and Bhavesh Seth. 2018. “India’s Nuclear Force Doctrine: Through the Lens of Jus Ad Bellum.” *Leiden Journal of International Law* 32 (01): 111–30. https://doi.org/10.1017/s0922156518000596.

Kennedy, John F. 1962. “Address during the Cuban Missile Crisis | JFK Library.” Jfklibrary.org. October 22, 1962. https://www.jfklibrary.org/learn/about-jfk/historic-speeches/address-during-the-cuban-missile-crisis

Markey, Ed. 2006. “Bush Admin Backs off Threat of Pre-Emptive Nuclear Strike against Iran in Letter to Markey.” August 2, 2006. https://www.markey.senate.gov/news/press-releases/2006/08/02/august-3-2006-bush-admin-backs-off-threat-of-pre-emptive-nuclear-strike-against-iran-in-letter-to-markey

Ministry of External Affairs. 2003. “Cabinet Committee on Security Reviews Operationalization of India’s Nuclear Doctrine.” https://www.mea.gov.in/press-releases.htm?dtl/20131/The+Cabinet+Committee.

R. Norris et al, Norris et al, "U.S. Nuclear Threats Then and Now," Bulletin of the Atomic Scientists, 62:5, September/October 2006, https://thebulletin.org/2006/09/u-s-nuclear-threats-then-and-now/

Nystuen, Gro. 2014. "Threats of Use of Nuclear Weapons and International Humanitarian Law," pp. 148-170, in Edited by Gro Nystuen, Stuart Casey-Maslen, and Annie Golden Bersagel, *Nuclear Weapons Under International Law,* Cambridge. https://doi.org/10.1017/CBO9781107337435.

Perry, William James. 2015. *My Journey at the Nuclear Brink*. Stanford University Press.

Putin, Vladimir. 2022a. “Address by the President of the Russian Federation.” February 24. http://en.kremlin.ru/events/president/news/67843.

Putin, Vladimir. 2022b. “Full Text of Putin’s Speech at Annexation Ceremony.” Mirage News. September 30, 2022. https://www.miragenews.com/full-text-of-putins-speech-at-annexation-866383/.

Roscini, Marco. 2007. “Threats of Armed Force and Contemporary International Law.” *Netherlands International Law Review* 54 (02): 229-277. https://doi.org/10.1017/s0165070x0700229x.

Shaw, M.N. 2021. *International Law*. 9th ed. Cambridge: Cambridge University Press.

Smolansky, O. M. 1965. “Moscow and the Suez Crisis, 1956: A Reappraisal.” *Political Science Quarterly* 80 (4): 581-605. https://doi.org/10.2307/2147000

Stürchler, Nikolas. 2007. *The Threat of Force in International Law*. https://doi.org/10.1017/CBO9780511494338.

The State Council PRC. 2015. “China’s Military Strategy.” May 27,

2015. http://english.www.gov.cn/archive/white_paper/2015/05/27/content_281475115610833.htm

UK. 1996. “Statement of the Government of the United Kingdom in the Legality of Threat of Nuclear Weapons Advisory Opinion .” June 1996. https://www.icj-cij.org/case/95/written-proceedings.

UN. 1945. *UN Charter*. https://www.un.org/en/about-us/un-charter

UN. 1977. “Of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.” June 8, 1977. https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0.

UN. 1996. “Legality of the Threat or Use of Nuclear Weapons.” https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

UN. 2022. *Draft Vienna Declaration of the 1st Meeting of States Parties of the Treaty on the Prohibition of Nuclear Weapons*. https://documents.unoda.org/wp-content/uploads/2022/06/TPNW.MSP_.2022.CRP_.8-Draft-Declaration.pdf.

US. 1962. “Statement of A Stevenson (US Ambassador to the United Nations).” UN Security Council Official Records. Presented at the 1022nd meeting, "Complaints by Cuba, Union of Soviet Socialist Republics and United States (22-23 October 1962)", page 2, document S/PV.1022, October 23, 1962, at: https://research.un.org/en/docs/sc/quick/meetings/1962

III. ENDNOTES

[1] In the first article in this series we discussed unilateral negative assurances against nuclear threats and the prohibitions on threats in nuclear weapon free zone treaties. In this piece we do not apply these to any practical examples because, as far as we are aware, no state has made a nuclear threat that has violated these obligations. We also do not discuss the prohibitions on threats in the Budapest Memorandum because those prohibitions are substantively the same as the prohibition on threats in article 2(4) of the *UN Charter*. There is consequently little to be gained from providing additional discussion about the scope of this prohibition beyond what is set out in Part II.

[2] In a nuclear threat context, a threat will satisfy this limb of the self-defence test if there is an armed attack or imminent armed attack underway, or the state making the threat is clear that they will only deploy their nuclear weapons in the event that they are under armed attack or at risk of an imminent armed attack.

[3] The tests set out in these dot points are a summary of the key points we discuss at length in the first article in this series. For more information about them, see Part IV of the first article.

[4] As far as we are aware no state has made a nuclear threat and said that they would only act on it with the approval of the Security Council. Consequently, we do not discuss this exception to the rule in article 2(4) in this article.

[5] Arguments along these lines were made by nuclear armed states in ICJ (1996).

[6] This is Russia’s policy (Jain and Seth 2018, 115).

[7] This is France’s policy (Jain and Seth 2018, 114).

[8] For example, Brian Drummond has argued that deterrence policies are never permitted under

article 2(4) (Drummond 2019), while others such as Jain and Seth (2018) and Bill Boothby and Heintschel von Heinegg (2021) disagree.

[9] Note that the United States classified this measure as a quarantine, not a blockade.

[10] In fact, the Soviet Union went to great lengths to keep the entire operation a secret (Colman 2016, chapter 2).

[11] Note that '[i]t is not relevant how threats reach their target, as long as they are able to be perceived: they can consist of explicit declarations or result implicitly from certain actions' (Roscini 2007, 238).

[12] Compare Stűrchler, (2007, 264-5).

[13] Note that in 1961 the United States had moved intermediate-range 'Jupiter' nuclear missiles to Italy and Turkey. The missiles, however, were immobilised, took a long time to prepare to launch and were never fired. Consequently, it cannot be argued that their stationing in Italy and Turkey amounted to an armed attack or an imminent armed to justify self-defence.

[14] See, eg, Perry (2015). Had anyone had any doubt about Kennedy's intent, the fact that the United States moved its forces around the world to DEFCON-3 at the same time as the speech, put 66 B-52 bombers equipped with nuclear weapons in the air and ensured these facts were leaked would have clarified the situation (Colman 2016, 96-97).

[15] The statement was widely understood as a threat to use nuclear weapons against Iran. For example, 15 US senators and representatives believed that Bush's response 'suggested that the US might be considering the option of a pre-emptive nuclear attack against Iran' and wrote to Bush in attempt him to dissuade him from this course of action (Markey 2006).

[16] At most it could be said to amount to a form of pre-emptive self-defence but this does not fit within the bounds of article 51 of the *UN Charter*.

[17] Indeed media reports said in response to this passage that '[i]t has been a long time since the threat of using nuclear weapons has been brandished so openly by a world leader' (Daniszewski 2022).

[18] This is also acknowledged to be a rule of customary international law (Nystuen 2014, 163-166).

[19] This is also acknowledged to be a rule of customary international law (Nystuen 2014, 166-168).

[20] It is arguable that the test identified by the ICJ in 1996 did not exist at the time of the Korean War. We are nonetheless applying it here to show how the threat that arose during that war would be regarded under the test today.

[21] As explored in the first article in this series.

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Nautilus Institute
608 San Miguel Ave., Berkeley, CA 94707-1535 | Phone: (510) 423-0372 | Email: nautilus@nautilus.org