CASD50: A view from the other side


Summary
The Government correctly views the Trident nuclear weapon system as political, not military, and claims full responsibility for authorising its use. It is therefore the Prime Minister (PM) who must establish the political need for, and legal implications of, authorising targeting and ordering the launch of the missiles. However, the PM does not ‘press the nuclear button’: it is the SSBN Commanding Officer (CO) who has the ultimate responsibility of turning his ‘permission to fire’ key authorising the missile launch sequence to proceed. Like all military commanders, before doing so he has to make a personal decision as to whether this is justified, morally acceptable and compliant with international and military law. Due to the operational circumstances of being on patrol, dived and with no two-way communications, the deployed SSBN CO will not know - or be able to question - all the parameters that the PM has had to take into consideration, which will include specific targets remotely assigned to his missiles and the effect of his missile warheads on them; yet Nuremberg Principle IV states that unquestioning obedience to a superior’s order is not enough.

From MAD to Sub-Strategic Flexible Response (SSFR)

During the Cold War, as far as the deployed UK Polaris SSBN command team were concerned, the policy of Mutually Assured Destruction (MAD) was based on a single premise. If the USSR launched a strategic nuclear strike against the UK or other NATO State, then the PM would authorise an order to respond with a retaliatory Second Strike. A deployed SSBN Commanding Officer (CO) could therefore make a pre-patrol judgement as to whether he felt he could justifiably and legally obey such an order. My CO and I were prepared to do this, because we understood that it would only be received if a nuclear attack was underway. Though probably a futile last resort response, we accepted that such extreme circumstances would justify an act which probably contravened international humanitarian law, but by then deterrence would have failed and we might still prevent further launches by the USSR.

By contrast, in 2000 a new policy of Sub-Strategic Flexible Response (SSFR) was introduced, which remains in force. The exact meaning of SSFR has never been spelt out, but it has much more complex implications for both the hostile State and the deployed SSBN, as illustrated by this MoD statement: “...[W]e have neither a ‘first use’ nor a ‘no first use’ policy as it is essential that we do not simplify the calculations of our potential adversaries by defining exactly when, how and at what scale we would contemplate the use of our nuclear weapons.” This deliberate uncertainty was partially explained in 2002 in the run-up to the 2003 US-UK invasion of Iraq. The Secretary of State for Defence, Rt Hon Geoff Hoon MP, stated: “The UK is prepared to use nuclear weapons against rogue states such as Iraq if they ever used weapons of mass destruction against British troops in the field.” The clear implication was that the Government was fully prepared to carry out a first use, pre-emptive strike – possibly with a single warhead as a ‘shot across the bow’ – in support of UK troops deployed outside NATO if they were subject to attack with chemical or biological weapons: ironically, these are banned internationally while nuclear weapons are not. No statement to deny, rescind or change this policy has been made since.
While SSFR may be at a far lower destruction level than full-scale MAD, it opens up a raft of complex moral and legal questions because it is so much closer to being a military action. Sir Michael Quinlan, discussing NATO strategy, recognised the dangers of this policy when he wrote: "...[T]he Alliance’s strategic concept of flexible response... did not rule out first use or early use of nuclear weapons... NATO authorities continually urged member countries... to improve their contribution of conventional forces, so as to reduce the likelihood or rapidity of the Alliance’s having to confront such hugely difficult options." This uncertainty is designed to keep potentially threatening States guessing. It also, of course, keeps the SSBN CO guessing – yet he needs to know the facts if he is to make an assessment of the situation in relation to international law, given that the legal norms governing the threat or use of nuclear weapons have been significantly strengthened.

**International Law**

The examples that follow are the main legal instruments that govern the Law of Armed Conflict applicable to the threat or use of nuclear weapons. The UK, along with the other P5 States to varying degrees, has adopted legal positions on them which are strongly disputed by many respected international lawyers and the overwhelming majority of non-nuclear weapon States. Thus, the deployed SSBN CO should not accept compliance as a given without knowing all the factors behind an order to launch.

**Additional Protocol (AP) 1 to the 1949 Geneva Conventions** is a revision to the Geneva Conventions negotiated at an International Conference in 1977 chaired by the Red Cross. This Protocol enshrines the principles of ‘Distinction’ and ‘Proportionality’ for the protection of civilian property and personnel over and above existing precautions regarding the use of weapons which might cause indiscriminate and disproportional damage. At the insistence of the P5, there was no discussion as to which weapons might breach these rules. On ratifying AP1 in 1998, the UK attached a Reservation asserting that the new rules introduced apply only to conventional, not nuclear, weapons. This contradicted the International Court of Justice (ICJ), which had observed in its 1996 Advisory Opinion on the Threat or Use of Nuclear Weapons that all States are bound by the rules in AP1 which are merely the expression of pre-existing customary law. In layman terms: the rules are the rules however they are breached.

The rationale for this very contentious interpretation is particularly hard to comprehend. When I asked MoD for the basis for the UK Reservation, the answer was simply that the 1977 Conference had not discussed whether nuclear (or other) weapons might be in breach but only the rules themselves; therefore, nuclear weapons had not been proscribed by the conference. The UK Reservation is then repeated in the advice given to military commanders in The Joint Services Manual of The Law of Armed Conflict (JSP383) as an apparent justification for the use of nuclear weapons.

**The 1996 ICJ Advisory Opinion** was given in response to a UN General Assembly question “Is the threat or use of nuclear weapons in any circumstances permitted under international law?” The ICJ decided that “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.” However, it could not “…conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.” The clear deduction is that in any circumstances other than an existential nuclear weapon attack on the UK homeland, the use of nuclear weapons in response would indisputably be unlawful. The President of the Court
emphasised that this caveat did not mean that the Court was “...leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.”

**The Rome Statute of 1998** establishing the International Criminal Court (ICC) states: “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly be excessive in relation to the concrete and direct overall military advantage anticipated...” is a war crime within the ICC’s jurisdiction. When ratifying it, the UK drew the Court’s attention to its Reservation to AP1; but the Rome Statute prohibits reservations, so its war crime provisions are unaffected and therefore the threat or use of nuclear weapons is not excluded from the ICC’s jurisdiction. Reference to the environment is of particular relevance to the use of nuclear weapons.

**2017 Treaty on the Prohibition of Nuclear Weapons (TPNW).** Frustrated by lack of progress by the P5 to proceed in good faith with their disarmament obligation under Article VI of the 1968 Nuclear Non-Proliferation Treaty (NPT), so far 70 non-nuclear States have signed the TPNW prohibiting the threat, let alone use, of nuclear weapons. It will enter into force once 50 States have ratified it; so far 23 have done so. While the P5 boycotted the negotiations and have refused to sign the Treaty, entry into force will further stigmatise the threat or use of nuclear weapons and show that non-nuclear weapon States are prepared to hold them accountable.


JSP 383 states that the legality of nuclear weapon use “...depends upon the application of the general rules of international law, including those regulating the use of force and the conduct of hostilities.” Against this general statement the SSBN CO must then test the specific circumstances in which he receives a launch order to decide whether he can lawfully obey that order. The following extracts from the Manual define the tests he must apply:

**Level of Responsibility**

“Those who plan or decide upon attacks are the planners and commanders and they have a duty to verify targets, take precautions to reduce incidental damage, and refrain from attacks that offend the proportionality principle. Whether a person will have this responsibility will depend on whether he has any discretion in the way the attack is carried out and so the responsibility will range from commanders-in-chief and their planning staff to single soldiers opening fire on their own initiative.”

**Comment:** An SSBN CO has this discretion by way of granting or withholding permission to fire by use of the ‘Captain’s Key’ available only to him. Nuremberg Principle IV states that he is under a duty not to obey a manifestly unlawful order.

**Proportionality**

“...civilian immunity does not make unlawful the unavoidable expected incidental civilian casualties and damage which may result from legitimate attacks upon military objectives, provided that the incidental casualties and damage are not excessive in relation to the concrete and direct military advantage anticipated. This is the principle of proportionality.” (my emphasis added)

**Comment:** The need to observe the rule of proportionality in war is the subject of a Chatham House Research Paper. In the open forum following its recent launch, I
asked whether it applied to nuclear weapons, and how an SSBN CO could make a
judgement on this. A former RN officer on the panel who had served in a legal capacity
in the MoD’s Nuclear Policy Department avoided my question by simply claiming that
the UK always complied with international law, implying that the SSBN CO could
therefore unquestioningly trust the PM’s authorisation to launch Trident.

**Distinction/Discrimination**

“The principle of distinction separates those who may be legitimately the subject of
direct attack, namely combatants and those who take a direct part in hostilities, from
those who may not be so subject. It also separates legitimate targets, namely military
objectives, from civilian objects. This principle, and its application to warfare, is given
expression in Additional Protocol I 1977.”

**Comment:** This may well explain the UK Government’s Reservation to AP1 claiming
that it does not apply to nuclear weapons. Also, while JSP 383 references the 1998
Rome Statute, it does not comment on how the use of nuclear weapons would be
-treated by the ICC in the same way that it comments on AP1.

Because of their indiscriminate nature, it is difficult to see how nuclear weapons could be
used without violating these principles. At the very least, to meet the criteria of JSP 383, the
SSBN CO would need details of his assigned targets and of the expected effects on military
objectives and on civilians to be able to make an informed decision. However, unless the
circumstances had arisen before going on patrol - when access to planners and legal advice
could be obtained – it is most unlikely that he would be able to communicate once on patrol
in a satisfactory manner with all the sources he would need to consult.

In February 2017, the UK repudiated the authority of the ICJ in contentious cases
concerning nuclear weapons following the Court’s judgment in a case brought by the
Marshall Islands concerning the obligation to negotiate in good faith towards nuclear
disarmament. The UK amended its declaration recognising the jurisdiction of the Court in
order to exclude “…any claim or dispute that arises from or is connected with or related to
nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States
Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the
jurisdiction of the Court and are party to the proceedings in question.”

This ‘opt out’ effectively removed the UK from the ICJ’s jurisdiction over nuclear weapons / nuclear
disarmament cases, and can only be interpreted as a self-serving defensive measure in the
face of increasing international legal objections to the threat or use of nuclear weapons.

**The Good Operation - MoD handbook for military planners**

This planning handbook was published by the MoD in 2017 following the Chilcot
Inquiry into the 2003 US-UK Iraq invasion. It re-iterates the Government’s assertion that it
complies at all times with international law, and that advice to military commanders on the
law is contained in JSP 383. However, if its advice is followed, it is hard to see how first use
of nuclear weapons could possibly be considered lawful.

In summary, the Government’s SSFR policy does not comply with the international
laws applying to nuclear weapons because it is based on unilateral assertions of very
contentious legal justification. This means that the advice given to SSBN COs in JSP 383 is
also highly contentious. The implication is that they are neither in a position to know all the
facts to make the personal decision they are required to make, nor can they unquestioningly
trust that the order they receive is legally – and morally – justified.
Mindful of these findings, I made a written submission to this very apposite Inquiry, which took evidence from senior Government representatives, military, academics and members of the public between 12 March and 20 May 2019. My submission was accepted, and reference was made to it in questions to two witnesses who are specialists in constitutional codes and practices. They were patently surprised to learn that the UK might launch _Trident_ in circumstances other than as a retaliatory second strike. Admiral Lord West, First Sea Lord at the time of the 2003 Iraq invasion, supported the thrust of my submission, of which he had previously received a copy, by expressing concern that SSBN COs were wrongly carrying final responsibility for political decisions, and that this should be rectified.

**The PM’s ‘Letter of Last Resort’**

To my knowledge, my CO in _HMS Repulse_ was not given a so-called ‘Letter of Last Resort’ from the PM; and no such letter is provided by the US President to USN SSBN COs. I feel the need to question whether it is appropriate for the PM to write their own personal and secret instructions to SSBN COs, only to be opened when all communications have failed. Should not the various circumstances be discussed before deploying, when the CO has time to question and resolve his approach to the various options, and the PM can state their position?

**Summary**

The policy of Sub-Strategic Flexible Response, embracing as it does the possible First Use of a single _Trident_ warhead in support of UK troops in the field, not last-ditch defence of the homeland, would almost certainly be unlawful. It therefore places SSBN COs in the extremely invidious position of legal jeopardy in having to make a personal judgement, without adequate sources to consult, as to whether an order to launch missiles (which would have been remotely re-targeted) is lawful. This problem is exacerbated by the unhelpful ritual that every PM is put through to write a ‘Letter of Last Resort’ for the CO.

**Conclusions**

In this, and the foregoing two articles, I have explained why I have concluded that successive Governments have misled the RN and British public regarding the utility of, and justification for, _Trident_ and now the _Dreadnought_ programme. The reality is that nuclear deterrence is counterproductive to true security yet has been deliberately employed to prop up the UK’s privileged status as a P5 member State, and to avoid the prospect of France becoming the sole European nuclear power. However, unlike France, the UK is fundamentally dependent upon the US for its nuclear capability, for which the payback is uncritical support for US foreign and defence policy.

The financial and operational costs of sustaining nuclear deterrence are now so high that they have dangerously degraded the UK’s ability to conduct conventional military, and especially naval, operations. This has created an ironic counter-reality to the illusory political mantra that “the UK’s independent nuclear deterrent keeps us safe”. It is extremely debatable, to say the least, what and whether nuclear weapons ‘deter’ and, in any case, the US has the means, if it so wishes, to prevent the UK using its _Trident_ weapon system.

Having examined the justification for, and implications of, the UK sustaining Continuous At Sea Deterrence, I conclude that it no longer makes political, military or
financial sense. This is not in any way to decry those who, with considerable skill and
dedication, have carried out the extraordinarily difficult role demanded of the Royal Navy
for over 50 years. Times, and with them international law and perceptions, have changed.

Furthermore, by going ahead with modernisation of the UK nuclear arsenal,
successive Governments have failed to comply in good faith with the obligation to disarm
under Article VI of the Nuclear Non-Proliferation Treaty.

My final conclusion, and the one that has caused me most personal concern as a
former CO and Teacher, is that current UK nuclear weapon policy places SSBN COs in moral
and legal jeopardy if they loyally, but inadvisedly, obey the PM’s order to launch their
missiles without question.

Acknowledgement:
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are entirely my responsibility.

1 As Executive Officer, Starboard Crew, HMS Repulse 1970-72.
2 MoD letter to the author, 7 November 2018,
http://picat.online/wp-content/uploads/2019/03/Correspondence-between-Cdr-R-Forsyth-MOD_Dec-2017-
3 Evidence to the Parliamentary Defence Select Committee, 20 March 2002,
4 Michael Quinlan, Thinking about Nuclear Weapons: Principles, Problems, Prospects (Oxford University Press,
2009), p. 35.
5 International Committee of the Red Cross data base: “Rule 1: The parties to the conflict must at all times
distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks
must not be directed against civilians”, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.
6 AP1 Article 51(5)(b) prohibits an “... attack which may be expected to cause incidental loss of civilian life,
injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to
the concrete and direct military advantage anticipated.”
Article 85(3)(b) regards as a grave breach of this Protocol “...[l]aunching an indiscriminate attack affecting the
civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to
civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii)”.
7 UK Reservation on ratifying AP1 to Geneva Conventions,
https://ihl-databases.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D27OpenDocument.
9 MoD letter to the author, 7 November 2018.
10 Amended up to and including May 2013.
11 International Court of Justice Advisory Opinion 1996, para. 105.2(E).
12 Judge Bedjaoui, ICJ President, Declaration on pronouncing Advisory Opinion, 8 July 1996, https://www.icj-
cij.org/files/case-related/95/095-19960708-ADV-01-01-EN.pdf, para.11.
15 United Nations https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-
9&chapter=26&clang=_en.
16 JSP 383 para. 6.17.
17 Ibid, para. 5.32.9.
18 Nuremberg Principle IV states: “The fact that a person acted pursuant to order of his government or superior
does not relieve him from responsibility under international law, provided a moral choice was in fact possible
for him.”
19 JSP383, para. 2.4.2.

21 JSP 383, paragraph 2.5.1.

22 On patrol the SSBN must remain undetected. The need to communicate would reveal its position and make it vulnerable to attack.


