

# Public Administration and Constitutional Affairs Committee (PACAC) Inquiry into ‘The Role of Parliament in the UK Constitution: Authorising the Use of Military Force.’

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## **Submission by Commander Robert Forsyth RN (Ret’d) ‘Authorising the use of the Trident Nuclear Weapon System’**

### ***In response to the Inquiry’s Terms of Reference:***

Q6. *What role if any should Parliament have in the authorisation of military force?*

a) *How should this role be assured?*

Q7. *What can the UK learn from international comparators?*

### ***Executive Summary***

- *Trident is a political weapon system the use of which would be an extreme form of military force.*
- *The Prime Minister alone can authorise the use of Trident but international and military laws impose certain obligations on the Commanding Officer (CO) of every Trident ballistic missile-armed submarine (SSBN).*
- *Because of the complexity of these laws, taken in conjunction with the UK Government’s policy for the use of nuclear weapons, and bearing in mind both his operational circumstances and his duty not to obey a manifestly unlawful order, the deployed SSBN CO will not be in a position to consult the necessary sources of information to ensure that he avoids being placed in legal jeopardy.*
- *The involvement of a suitable Parliamentary body such as a proposed Parliamentary Nuclear Weapons Advisory Committee (PNWAC) would assure an SSBN CO that the justification for, and lawfulness of, Trident’s ordered use had been scrutinised and confirmed by a body independent of Government.*
- *In proposing a PNWAC’s establishment, this submission makes reference to a recent US think tank report which compares procedures for authorising nuclear weapons in each of the nine known nuclear-armed States.*

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### **Introduction**

1. ‘(T)he UK views its nuclear weapons as political not military weapons.’ That short statement, contained in a Ministry of Defence (MoD) letter to me dated 12 February 2018, encapsulates why Parliament should be involved in some way in authorising the use of Trident.

2. This submission has been written in the light of my personal experience as a submarine CO at sea in the 1970s. For two years I was Executive Officer (in command for part of one patrol) of *HMS Repulse*, a Polaris missile equipped SSBN. During this period UK nuclear weapons policy was straightforward: if the Soviet Union launched a nuclear attack on the UK or NATO we would be ordered to fire a retaliatory Second Strike with the intention of so destroying Soviet military infrastructure and cities that it could not respond. This was known as Mutually Assured Destruction (MAD). We went to sea fully prepared to obey such an order

because this would only be received if a nuclear attack was underway. It would be a possibly futile last resort response but we accepted that the circumstances would justify an act which was almost certainly outside international law.

3. In 1994 the UK Prime Minister (PM) John Major and Russian President Boris Yeltsin signed an agreement to de-target their deployed strategic nuclear weapons. In 1998, the Labour Government announced in its Strategic Defence Review that ‘...our submarines routinely are at a notice to fire measured in days’, thereby acknowledging that there was no imminent nuclear threat to the UK or our NATO partners. At the 2000 Nuclear Non-Proliferation Treaty (NPT) Review Conference, all five permanent members of the UN Security Council confirmed that they had mutually de-targeted. This is still the case.<sup>1</sup>

4. In 2000 there was a significant change in UK nuclear weapon policy to one of ‘Flexible Sub-Strategic Response’. The essence of this policy (which remains in place today) is that States threatening UK national security or other vital interests should not know when or how Trident missiles will be fired. It could be as a First Strike in support of UK troops in the field threatened with any form of Weapons of Mass Destruction (WMD) including non-nuclear ones. This could range from one missile with one low yield warhead as a warning ‘shot across the bow’; to eight missiles armed with 40 warheads to meet the ‘Moscow Criterion’ of destroying its missile defences – and inevitably destroy Moscow itself.

5. The act of re-targeting the Trident nuclear weapon system (Trident) cannot be undertaken lightly because it is a declaration of intent akin to the US/UK warnings to President Assad in Syria in 2018 that air and missile attacks would be conducted if he continued to use WMD. Logically, therefore, Trident’s re-targeting should be justified in the same way that any intent to use conventional force requires.

6. The circumstances facing today’s Command chain, from the PM downwards, are therefore significantly more complex than those which prevailed in the Soviet era when decisions on targets and policy for firing were agreed pre-patrol. Today’s deployed SSBN CO will be continuously submerged on patrol, with his missiles de-targeted, possessing no prior knowledge of a specific threat when he receives an order to re-target, possibly followed by an order to fire. He must then fulfil the responsibilities of a military commander under international law as defined in *The Joint Services Manual of The Law of Armed Conflict (2004) JSP 383*. Despite these extremely heavy responsibilities, the SSBN CO currently has no means of assuring himself that the order to fire is lawful.

## **The Chilcot Inquiry <sup>2</sup>**

7. In 1994 the Government would have been wrong to assume that it could re-target its nuclear weapons at any time at its own discretion because, even then, international law imposed constraints, notably through the cardinal principle of distinction. This was subsequently emphasised by the International Court of Justice (ICJ) in paragraph 78 of its advisory opinion in the Nuclear Weapons Case (1996).<sup>3</sup> However, since then, developments in international law, together with Sir John Chilcot’s inquiry into UK involvement in the 2003 invasion of Iraq, have indicated that the complex circumstances surrounding a decision to threaten (target) or initiate military action clearly establish the need for Parliament’s involvement in the process.

8. PACAC’s report *Lessons still to be learned from the Chilcot Inquiry* (HC 656) was in reference to conventional military actions.<sup>4</sup> The threat or use of nuclear weapons requires

even more rigorous assessment to ensure that the deployed SSBN CO is not placed in legal jeopardy.

9. Developments in international law since the 1970s have considerably strengthened the legal norms governing the threat or use of nuclear weapons. The following examples are given not to make a case for or against the use of nuclear weapons but to illustrate some of the contested areas. As JSP 383 states in paragraph 6.17, '(t)he legality of their use depends upon the application of the general rules of international law, including those regulating the use of force and the conduct of hostilities.'

- a. In 1977, Protocol 1 Additional to the 1949 Geneva Conventions (AP1) enshrined the principles of distinction and proportionality for the protection of civilians. The UK attached a reservation at the time of ratification asserting that the rules introduced by AP1 do not apply to nuclear weapons.<sup>5</sup> This reservation is reflected in the advice given to military commanders in JSP 383.

However, the UK's assertion that AP1 applies exclusively to conventional weapons is challenged in many quarters because, as the ICJ observed in paragraph 84 of its 1996 advisory opinion, all states are bound by those rules in AP1 which were merely the expression of pre-existing customary law.

- b. At paragraph 105, point (2)E of its advisory opinion, the ICJ declared: 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.' The UK Government argues that the use of nuclear weapons could be lawful because the Court 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.' However, the President of the Court emphasised that this did not mean that the Court was leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.
- c. The Rome Statute of 1998 confirmed that causing excessive incidental civilian death, injury or damage is a war crime within the jurisdiction of the International Criminal Court.<sup>6</sup> On ratifying the Rome Statute the UK drew the Court's attention to its reservation to AP1, but since the Statute prohibits reservations the war crime provisions are arguably unaffected.
- d. In February 2017, the UK effectively repudiated the authority of the ICJ on nuclear weapon matters in contentious proceedings.<sup>7</sup> However, this would not prevent the UN General Assembly seeking a further advisory opinion from the ICJ on a legal question relating to nuclear weapons.
- e. On 7 July 2017, a Treaty on the Prohibition of Nuclear Weapons (TPNW) was adopted by 122 UN member states.<sup>8</sup> The Treaty prohibits the threat, as well as the use, of nuclear weapons. The nuclear weapon states boycotted the negotiations and refused to sign the TPNW. However, it significantly strengthens the stigmatisation of nuclear

deterrence. The Treaty will enter into force once 50 States have ratified it – 22 of the 70 signatories have done so at the date of this submission.

### **Responsibilities of an SSBN CO as a Military Commander**

10. Military commanders are required to understand the law and to take steps to avoid transgressing it. The following extracts from JSP 383 briefly summarise the key responsibilities that must be observed: \*

- a. **Proportionality - Paragraph 2.4.2** 'However, 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.'

Proportionality is then referenced throughout JSP383. The importance of its rigorous application and observance was recently highlighted by Chatham House in what will undoubtedly become a seminal research paper on the subject.<sup>9</sup> Paragraph 22 emphasises: 'The rule of proportionality must not be considered in isolation. It forms part of a framework that aims to give effect to the general obligation in the conduct of military operations to take constant care to spare civilians and civilian objects. This framework includes the principle of distinction...'

- b. **Distinction/Discrimination - Paragraph 2.5.1** '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.'

Because of their indiscriminate nature, it is difficult to see how nuclear weapons and other WMD could be used without violating those principles.

- c. **Level of Responsibility - Paragraph 5.32.9.** '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.'

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.

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\* Amended up to and including May 2013.

- d. **Assessing Discharge of Responsibility - Paragraph 5.32.10.** 'In considering whether commanders and others responsible for planning, deciding upon, or executing attacks have fulfilled their responsibilities, it must be borne in mind that they have to make their decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time. This means looking at the situation as it appeared to the individual at the time when he made his decision.'

The SSBN CO is under a duty *not* to obey a manifestly unlawful order.\* To meet the criteria of JPS 383, he would need details of his assigned targets and expected effects on military objectives and on civilians. Only then would he 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 in a satisfactory manner with all the sources he would need to consult.†

### **Q6: The role that Parliament could play in authorising the use of Trident**

11. The decision to replace Trident was approved by Parliament in 2016. Parliament, therefore, should be involved in a decision to re-target, let alone use, Trident, which is primarily subject to international political considerations because the consequences would have severe international repercussions.

12. Oversight and approval of the decision to threaten or use nuclear weapons by an appropriate Parliamentary body, independent of Government, would have the additional major benefit of assuring the SSBN CO that the legal and humanitarian implications of using his nuclear weapon system had been properly scrutinised, and that the decision was consistent with the principles of distinction and proportionality in its avoidance of excessive damage to civilian populations and their infrastructure.

13. At the time of the 2016 Parliamentary vote there was much reference to Trident being a weapon of 'last resort'. In the 1970s, when I was serving in *HMS Repulse*, this meant that we would only fire a retaliatory Second Strike if nuclear weapons were launched at NATO/the UK. However, current Government nuclear policy (Flexible Sub-Strategic Response) also encompasses the possibility of a pre-emptive First Strike in support of UK vital interests when available conventional force is considered insufficient. Even in the 1970s, 'last resort' was almost certainly unlawful; but the policy of maintaining Polaris on high alert, and belief in its political effectiveness, were so strong that the need to consider the law was disregarded as unworkable and irrelevant. However, in today's revised legal environment and with Trident de-targeted, even 'last resort' would require a high level of consultation within the UK and with the United Nations.

14. There is a need, therefore, for a new Parliamentary body to be involved in decisions with such grave international repercussions, referred to hereafter as the Parliamentary Nuclear Weapons Advisory Committee (PNWAC).

15. The constitution and *modus operandi* of the proposed PNWAC would require careful consideration and consultation. However, the essence would be that its members should be

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\* JSP 383, para 16.47.3

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

informed of proposed targets and types of warheads with their expected effects, and be briefed on the political, military and legal considerations justifying this. The PNWAC should also be consulted before the PM authorises use.

### **Q7: Lessons for the UK from international comparators**

16. On 18 February 2019, an important report, *Occasional Paper 45: The Finger on the Button - The Authority to Use Nuclear Weapons in Nuclear-Armed States*, was published by the Middlebury Institute of International Studies at Monterey, a US think tank of similar status to Chatham House.<sup>10</sup> Prompted by widespread concerns following US President Donald Trump's nuclear threats to North Korea's President Kim Jong-un, it compares who is authorised to initiate the use of nuclear weapons, and the related procedures, in each of the nine known nuclear-armed States. Its findings are summarised in a table at the end of the report.

17. The report shows strong emphasis by all States on establishing who has authority to initiate the use of nuclear weapons. It omits any mention of re-targeting, however, and there is minimal discussion of accountability, especially the need to justify use and scrutinise its legality. Yet there have been several recent public statements by current and ex-Chiefs of US Strategic Command challenging an illegal firing order.<sup>11</sup> Nonetheless, the need for justification and scrutiny is emphasised in the report's Conclusions:

'The presence of multiple human decision makers in the chain of command raises the possibility that individuals would resist an unlawful order to use nuclear weapons in the case of a completely out-of-the-blue nuclear strike. For example, there are some reports that captains of US SSBNs are expected to make communications contact in the event of an unexpected launch order that seems out of place or character. At least one captain has indicated that, in the event of a peacetime launch, he would insist on confirmation and a justification.'

18. Of particular interest is the report's final Conclusion, which tentatively supports a role for a body such as the proposed PNWAC in a decision to authorise the threat or use of nuclear weapons:

'However, one may question whether decision-making procedures should always be the same, whatever the circumstances. In particular, given the extraordinarily low probability, for most countries, of a fully disarming surprise attack, it seems perfectly legitimate to envision an adjustment of mechanisms (such as launch-on-warning) that were initially devised for such scenarios, without fundamentally altering the logic of deterrence. A deliberative process, such as that which is supposed to happen in India and Pakistan, might be in order for all nuclear-armed states.'

### **Conclusions**

19. Trident was de-targeted in 1994 and has been at several days' notice to fire since 1998. The re-targeting of Trident would follow a political decision to threaten a State with nuclear attack. This would generally be contrary to international law.

20. The UK Government asserts that there are some (unspecified) circumstances in which the threat or use of nuclear weapons could be legal. This is disputed by many non-nuclear States, which could request the Prosecutor of the International Criminal Court to carry out an investigation, the first step in a potential prosecution for war crimes.

21. The UK's present nuclear weapons policy is complex and deliberately designed to create uncertainty in the mind of a potential aggressor. This means that the deployed SSBN CO is also uncertain as to how the PM and advisers might respond to an extreme WMD threat directed at the UK homeland or other vital interests.

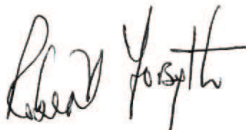
22. An SSBN CO, like all military commanders, has specific responsibilities to permit the threat or use of their weapons only in accordance with international law. Obedience to orders is not enough.\* Due to the operational circumstances of being on patrol, dived, with poor to non-existent communications and in a high state of tension, the deployed SSBN CO could not guarantee access to the necessary information to fulfil his military and legal responsibilities with respect to the threat or use of nuclear weapons and so avoid being placed in a position of legal jeopardy.

23. A lesson learnt from the Chilcot Inquiry, and the basis of this PACAC Inquiry, was for greater Parliamentary involvement in any proposal to use military force. If that force is nuclear, the arguments for such involvement are even more compelling.

24. If the PM were required to involve a Parliamentary body independent of Government, such as the proposed PNWAC, in a decision to authorise the re-targeting or use of Trident, and if that body supported the PM's decision, the SSBN CO could justifiably feel confident in obeying the PM's order knowing that the legal and humanitarian implications of using his nuclear weapon system had been properly scrutinised and confirmed.

### **Recommendation**

25. The Prime Minister, therefore, should be required to consult a Parliamentary body, such as the proposed Parliamentary Nuclear Weapons Advisory Committee, prior to authorising the re-targeting or use of the Trident Nuclear Weapon System.



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**Acknowledgment:** For assistance with aspects of international law - Professor Nick Grief of Kent Law School, University of Kent, and Doughty Street Chambers, London.

**Biography:** Born in 1939. Joined the RN in 1957 and specialised in the Submarine Service in 1961. Served in five submarines including Executive Officer (2<sup>nd</sup> in command) of a Polaris ballistic missile-armed submarine; commanded both conventional and nuclear-powered

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\* 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.'

submarines and also the Commanding Officer's Qualifying Course. On completion of active submarine service served on the Naval Staff in the MoD before taking voluntary retirement in 1981. Subsequently worked in industry completing a second career with 11 years as Marketing Director of Westland Group plc followed by 5 years as an Industrial Consultant.

## References:

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<sup>1</sup> HMG Paper 'The UK's nuclear deterrent: what you need to know' 19 February 2018

<https://www.gov.uk/government/publications/uk-nuclear-deterrence-factsheet>

<sup>2</sup> HMG Paper – 'The Report of the Iraq Inquiry' 6 July 2016

<https://www.gov.uk/government/publications/the-report-of-the-iraq-inquiry>

<sup>3</sup> International Court of Justice's advisory opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) in answer to the UN General Assembly's question 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'

<https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>

<sup>4</sup> Public Administration and Constitutional Affairs Committee Paper 'Lessons still to be learned from the Chilcot Report'

<https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/656/656.pdf>

<sup>5</sup> UK Reservation on ratifying AP1 to Geneva Conventions

<https://ihl-databases.icrc.org/ihl/NORM/OA9E03F0F2EE757CC1256402003FB6D2?OpenDocument>

<sup>6</sup> Rome Statute of 1998

[https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)

<sup>7</sup> Amended UK declaration regarding acceptance of ICJ compulsory jurisdiction, 22 February 2017

<https://www.icj-cij.org/en/declarations/gb>

<sup>8</sup> Treaty on the Prohibition of Nuclear Weapons, 7 July 2017

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt\\_dsg\\_no=XXVI-9&chapter=26&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=XXVI-9&chapter=26&clang=en)

<sup>9</sup> Research Paper presented by the International Law Programme at Chatham House, December 2018. 'Proportionality in the Conduct of Hostilities'

<https://www.chathamhouse.org/publication/proportionality-conduct-hostilities-incident-harm-side-assessment>

<sup>10</sup> Occasional Paper 45 February 2019 'The Finger on the Button: The Authority to Use Nuclear Weapons in Nuclear-Armed States', Middlebury Institute of International Studies at Monterey, James Martin Center for Non-proliferation Studies

<https://www.nonproliferation.org/wp-content/uploads/2019/02/Finger-on-the-Nuclear-Button.pdf>

<sup>11</sup> Danielle Diaz, 'Top general says he'd push back against "illegal" nuclear strike order', CNN, 20 November 2017

<https://edition.cnn.com/2017/11/18/politics/air-force-general-john-hyten-nuclear-strike-donald-trump/index.html>