

UK Nuclear Deterrence Policy and The UK Trident Nuclear Weapon System

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Part 3 – UK Nuclear Weapon Policy, International and Military Law, the UK Government's Position, and Consequences for *Trident* SSBN Commanding Officers

Summary

This, the final article of three, discusses the UK's current nuclear policy and recent US developments, before reviewing international and military law on the threat or use of nuclear weapons, the UK Government's position, and consequent concern that this could place Trident submarine Commanding Officers in legal and moral jeopardy.

From MAD to Non-Strategic Flexible Response (NSFR)

During the Cold War, the UK *Polaris* SSBN command teams understood that 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 Prime Minister (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 had been briefed it would only be received if a nuclear attack was underway.¹ Though probably a futile last resort response, we accepted that such extreme circumstances would justify an act which probably contravened international humanitarian law, but which might still have prevented further launches by the USSR.

By contrast, in the late 1990s a new non-strategic option of variable numbers of low-yield warheads was incorporated into the existing 'Flexible Response' policy. For convenience I term this 'Non-Strategic Flexible Response' (NSFR); and it remains in force.² Designed to shore up the credibility of nuclear deterrence, it has much more complex implications for both the hostile State and the deployed SSBN CO. This was clarified in the run-up to the 2003 US-UK invasion of Iraq by the Secretary of State for Defence, Rt Hon Geoff Hoon MP: "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."³ The PM could now authorise first use – possibly with just a single low-yield warhead as a warning 'shot across the bow' – in support of deployed UK troops if they were subject to attack with chemical or biological weapons.⁴ Ironically, these are banned internationally while nuclear

¹ As Executive Officer, Starboard Crew, HMS *Repulse* 1970-72.

² [Professor Paul Rogers, Memorandum to Select Committee on Defence, 15 January 2007.](#)

³ [Evidence to the Parliamentary Defence Select Committee, 20 March 2002.](#)

⁴ [Professor Paul Rogers, Britain's Other Nuclear Weapons, openDemocracy, 22 March 2018.](#)

weapons are not. No statement to deny, rescind or change this posture has been made since. This is deliberate, as MoD explained in this 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."⁵

While the Government views *Trident* as a political weapon, and NSFR may be at a far lower destruction level than full-scale MAD, it opens up a raft of complex moral and legal questions, because NSFR is much closer to being a military action. Sir Michael Quinlan recognised the dangers of this: "...[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."⁶

Ambiguity is designed to create uncertainty for threatening States. However, this also affects the SSBN CO, because he needs to assess the situation in relation to international law, especially as the legal norms governing the threat or use of nuclear weapons have been significantly strengthened since the Cold War ended. More importantly, although the PM authorises weapon release, he or she does not 'press the nuclear button'. The SSBN CO has this ultimate responsibility by turning his 'Captain's Key' to give permission to fire.

US Developments in Nuclear Posture

In 2018, a new US Nuclear Posture Review included the following statement: "Expanding flexible U.S. nuclear options now, to include low-yield options, is important to preserve credible deterrence against regional aggression..."⁷ To implement this, in June 2019 the Pentagon released joint nuclear planning guidance, including this claim: "Employment of nuclear weapons can radically alter or accelerate the course of a campaign. A nuclear weapon could be brought into the campaign as a result of perceived failure in a conventional campaign, potential loss of control or regime, or to escalate the conflict to sue for peace on more-favorable terms. The potential consequences of using nuclear weapons will greatly influence military operations..."⁸ First use of low-yield warheads could constitute nuclear warfighting which arguably lowers the nuclear threshold. Because of UK nuclear dependence on the US, the Government will probably come under pressure to support and emulate it.

Prompted by widespread concerns following US President Donald Trump's nuclear threats to North Korea's President Kim Jong-un, in February 2019 the Middlebury Institute of International Studies at Monterey, a US think tank of similar status to Chatham House, published a report comparing who is authorised to initiate the use of nuclear weapons and

⁵ [MoD letter to the author, 7 November 2018](#),

⁶ Michael Quinlan, *Thinking about Nuclear Weapons: Principles, Problems, Prospects* (Oxford University Press, 2009), p. 35.

⁷ [US Nuclear Posture Review, February 2018, *Enhancing Deterrence with Non-Strategic Nuclear Capabilities*, p.XII](#), By low-yield the Trump Administration means less than 10 kilotons – see Congressional Research Service, [A Low-Yield, Submarine-Launched Nuclear Warhead: Overview of the Expert Debate, 21 March 2019](#).

⁸ [Joint Chiefs of Staff Joint Publication 3-72, *Nuclear Operations*, 11 June 2019, Chapter V, p. V-3, para 3e.](#)

procedures in each of the nine nuclear-armed States.⁹ It includes reports that US SSBN COs are expected to challenge an unexpected launch order that seems out of place or character, and refers to recent public statements by current and ex-Chiefs of US Strategic Command that they would challenge an illegal firing order.

International Law

An overview follows of the main legal instruments governing the Law of Armed Conflict applicable to the threat or use of nuclear weapons. The UK, along with the other permanent members of the UN Security Council (known as the P5), 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 1 (AP1) to the 1949 Geneva Conventions is a treaty negotiated at an International Conference chaired by the International Committee of the Red Cross which came into force in December 1978. AP1 enshrines the principles of proportionality¹⁰ and distinction¹¹ for the protection of civilians and civilian objects. At the insistence of the P5, there was no discussion as to which weapons might breach these rules; but this did not mean that the Conference agreed they were exempt. Nonetheless, on ratifying AP1 in 1998, the UK attached a reservation asserting that the rules introduced by it apply only to conventional, not nuclear, weapons.¹² However, as the International Court of Justice (ICJ) emphasised in its 1996 Advisory Opinion on the Threat or Use of Nuclear Weapons, all States are bound by the rules in AP1 which are merely the expression of pre-existing customary law.¹³

When asked for the basis for the UK Reservation, the MoD replied that the 1977 Conference “...did not discuss the legality of nuclear weapons.”¹⁴ This is correct because AP1 focuses on the rules, not what might breach them. The reservation is cited in the advice

⁹ [Jeffrey G. Lewis and Bruno Tertrais, *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 Occasional Paper 45, February 2019,](#)

¹⁰ [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 “...launching 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)”,

¹¹ [AP1 Article 48](#): “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”,

¹² [UK Reservation on ratifying AP1 to Geneva Conventions, 28 January 1998,](#)

¹³ [International Court of Justice Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 84,](#)

¹⁴ MoD letter to the author, 7 November 2018.

given to military commanders in *The Joint Service Manual of The Law of Armed Conflict (JSP383)* as a purported justification for the use of nuclear weapons.¹⁵

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 circumstance 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.”¹⁶ The clear implication is that in any circumstances other than an existential nuclear weapon attack on the UK, the use of nuclear weapons in response would indisputably be unlawful. Regarding the *in extremis* uncertainty, the ICJ President emphasised that this did not mean that the ICJ was “...leaving the door ajar to recognition of the legality of the threat or use of nuclear weapons.”¹⁷

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 excessive in relation to the concrete and direct overall military advantage anticipated...” is a war crime within the ICC’s jurisdiction.¹⁸ 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 added significance in light of recent updated research on the effect of extended nuclear warfighting in South Asia, which found that the smoke alone from firestorms would cause sufficient temperature drop to lead to global famine.¹⁹

2017 Treaty on the Prohibition of Nuclear Weapons (TPNW). Frustrated by lack of P5 compliance with their disarmament obligations in the 1968 Nuclear Non-Proliferation Treaty (NPT), to date 80 non-nuclear weapon States have signed the TPNW, 34 have ratified it and 21 are in process.²⁰ As mentioned in Part 2, the P5 boycotted the negotiations and have refused to sign the Treaty. Nonetheless, once the necessary 50 States have ratified, its 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.²¹ This trend will

¹⁵ Amended up to and including May 2013.

¹⁶ International Court of Justice Advisory Opinion 1996, para. 105.2(E).

¹⁷ [Judge Bedjaoui, ICJ President, Declaration on pronouncing Advisory Opinion, 8 July 1996, para. 11,](#)

¹⁸ [Rome Statute of the International Criminal Court, Article 8 \(2\)\(b\)\(iv\).](#)

¹⁹ [Alan Robock et al, Nuclear winter revisited with a modern climate model and current nuclear arsenals: Still catastrophic consequences, Journal of Geophysical Research, Vol 112, 6 July 2007,](#)

²⁰ [International Campaign to Abolish Nuclear Weapons, ‘Signature/ratification status of the Treaty on the Prohibition of Nuclear Weapons,’ and ‘Progress towards Ratification’,](#)

²¹ The TPNW will enter into force 90 days after the fiftieth instrument of ratification, acceptance, approval or accession has been deposited.

intensify as evidence emerges that the US is planning to modernise *Trident* missiles to sustain deployment in the *Columbia* class SSBNs through to the 2080s.²²

Joint Service Manual of the Law of Armed Conflict (JSP 383)

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.”²³ 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 it. The following extracts from JSP 383 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.”²⁴

Comment: As already mentioned, an SSBN CO has discretion, 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.²⁵

Proportionality

“...[C]ivilian 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.”²⁶ (my emphasis in italics)

Comment: The need to observe proportionality is the subject of a Chatham House Research Paper.²⁷ In the open forum following its launch, I asked whether the principle of proportionality 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, claiming that the UK always complies with international law, implying that the SSBN CO could therefore unquestioningly trust the PM’s authorisation.

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

²² [Megan Eckstein, ‘Navy Beginning Tech Study to Extend Trident Nuclear Missiles into the 2080s’, *USNI News*, 14 November 2019,](#)

²³ JSP 383 para. 6.17.

²⁴ *Ibid*, para. 5.32.9.

²⁵ 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.”

²⁶ JSP383, para. 2.4.2.

²⁷ <https://www.chathamhouse.org/sites/default/files/publications/research/2018->

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 1 1977.”²⁸

Comment: 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 JPS 383, the SSBN CO would need details of his assigned targets and expected effects on military objectives and 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 with them once on patrol.

Therefore, the advice given to SSBN COs in JSP 383 should not be accepted without question if first use is ordered.

The UK no longer accepts the ICJ’s jurisdiction regarding nuclear weapons

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 by excluding “...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.”²⁹

This ‘opt out’ effectively removed the UK from the ICJ’s jurisdiction over contentious cases involving nuclear weapons, but it does not affect the Court’s *advisory* jurisdiction. It can only be interpreted as a defensive measure in the face of increasing international legal objections to the threat or use of nuclear weapons. This, together with the reservation attached to AP1, undermines the PM’s statement that “...we need to stand up for the global rules and standards that keep us safe...” made in the 2018 Parliamentary debate justifying bombing a Syrian chemical warfare facility.³⁰ The need to observe a rules-based system is also frequently cited in the 2018 *National Security Capability Review*.³¹

The Good Operation MoD handbook for military planners.

Published by the MoD in 2017 following the Chilcot Inquiry into the 2003 US-UK Iraq invasion, this reiterates the Government’s assertion that it complies at all times with

²⁸ JSP 383, para 2.5.1.

²⁹ [Sir Alan Duncan, Minister of State for Foreign and Commonwealth Affairs, Amendments to the UK’s Optional Clause Declaration to the International Court of Justice: Written Statement HCWS489, 23 February 2017,](#)

³⁰ [Prime Minister’s statement on Syria, House of Commons, 16 April 2018, Column 44,](#)

³¹ [HM Government, National Security Capability Review, March 2018,](#)

international law, and that legal advice to military commanders is in JSP 383.³² However, if its advice is followed, it is hard to see how first use of nuclear weapons could possibly be considered lawful.

Public Administration and Constitutional Affairs Select Committee (PACAC) Inquiry: Authorising the Use of Military Force

Mindful of these findings, I made a written submission to this apposite and timely Inquiry, convened to examine how to implement the Chilcot Report's recommendation that Parliament should be more involved in a decision to go to war. It took evidence from senior Government representatives, military, academics and members of the public between 12 March and 20 May 2019.³³ My submission was accepted, and reference was made to it in oral questions to two specialists in constitutional codes and practices. They were surprised to learn that the UK might launch *Trident* in circumstances other than as a retaliatory second strike.³⁴ Another witness, Admiral Lord West, First Sea Lord during the 2003 Iraq invasion, supported the thrust of my submission of which he had received a copy, expressing concern that SSBN COs should not "...be held responsible for taking illegal action in international law..." and that this should be rectified.³⁵

Parts 1-3 Conclusions

The absence of major war between nuclear weapon States probably owes more to avoidance of inadvertent or mistaken use, or sheer luck, than nuclear deterrence. What is undisputed is that the financial and operational costs of sustaining *Trident* have dangerously degraded the RN's core role of providing graduated conventional maritime deterrence. This has created an ironic counter-reality to the political mantra that "...the UK's independent nuclear deterrent keeps us safe".

The Government's determination to sustain its nuclear weapon capability has less to do with guaranteeing UK security than a desire to maintain its status as a P5 member, sustain strong strategic links with the US, and avoid France becoming the sole European nuclear power. Although successive Governments have claimed nuclear independence from the US, the UK's nuclear capability relies heavily upon US goodwill and technical expertise, and entails uncritical support of US foreign policy. Furthermore, since mutual de-targeting of UK and Russian warheads in 1994, followed by relaxing the notice to fire of UK *Trident* to several days in 1998, Continuous At Sea Deterrence no longer makes operational sense, and amounts to misemployment of scarce military assets for contentious political purposes.

The UK's current option of 'Non-Strategic Flexible Response' embraces first use with low-yield warheads against military threats well short of existential homeland defence. Moreover, the UK will probably come under pressure to support and emulate recent disturbing US developments reviving nuclear warfighting. Contravening military and international humanitarian law, these changes introduce uncertainty for the SSBN CO, who

³² [MoD, *The Good Operation: A handbook for those involved in operational policy and its implementation*, January 2018.](#)

³³ [Written submission by the author to PACAC Inquiry,](#)

³⁴ [Professor Gavin Philipson & Dr James Strong in oral evidence to PACAC Inquiry, 12 March 2019, answers to Questions 79-88.](#)

³⁵ [Oral Evidence by Senior Military Officers to PACAC Inquiry, 26 March 2019, answers to Questions 157 -158.](#)

(unlike the PM) has the ultimate responsibility of initiating missile launch. Despite claims of championing a rules-based international order, the Government has resorted to dubious declarations to avoid legal compliance, which will become increasingly untenable following entry into force of the 2017 Treaty on the Prohibition of Nuclear Weapons. This could place SSBN COs in legal and moral jeopardy, not least because Nuremberg Principle IV states that unquestioning obedience to a superior's order is not enough.

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Biography

Robert Forsyth: born 1939, joined the Royal Navy 1957, served in submarines 1961-81, commanding conventional and nuclear submarines, including *Polaris*; he also commanded the Submarine Commanding Officer's Qualifying Course (Perisher), which provided a unique insight into the responsibilities of military commanders. After retirement he worked in industry at a senior level from 1981-1999.

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