

# Chilcot, Trident and Jeopardy

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*Commander Forsyth submitted this paper, entitled 'Re-targeting Trident: Parliament must be involved', to Westminster's Public Administration and Constitutional Affairs Committee in 2018. Robert Forsyth served in the Royal Navy from 1957 to 1980. Following command of HMS Alliance he qualified as a nuclear submarine officer and had appointments as Executive Officer of an SSBN, Commanding Officer of an SSN and Commanding Officer of the Submarine CO's Qualifying Course (Perisher).*

## Executive Summary

In 1994 the five permanent members of the UN Security Council mutually agreed to de-target their nuclear weapons. This paper lays out the reasons why the findings of the Chilcot Enquiry have made it mandatory that Parliament is directly involved in any proposals to re-target UK's Trident missiles. Failure to do so will place the Prime Minister and Trident submarine Commanding Officers in legal jeopardy.

## Background

1. Arguably, the Cold War ended for the Royal Navy in February 1994 when UK Prime Minister John Major and Russian President Boris Yeltsin signed an agreement mutually to de-target their deployed strategic nuclear weapons, echoing an agreement by US President Bill Clinton and Yeltsin a month earlier.<sup>1</sup> Britain's nuclear posture was further relaxed in 1998, when the Labour Government announced in its Strategic Defence Review that “..our submarines routinely are at a notice to fire measured in days”, thereby removing the immediate threat of destruction from many Russian cities. 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. The UK Government re-affirmed this policy in February 2018.<sup>2</sup>

2. The UK Government determined to legitimise its retention of nuclear weapons following the 1996 Advisory Opinion of the

International Court of Justice (ICJ) that the threat or use of nuclear weapons “*would generally be contrary to the rules of international law*”.<sup>3</sup> In 1998, when ratifying Protocol 1 Additional to the 1949 Geneva Conventions (‘Additional Protocol 1’), the UK attached a reservation stating that the new rules introduced by the Protocol did not apply to nuclear weapons.<sup>4</sup> Then in February 2017, following a case brought by the Marshall Islands accusing the UK of noncompliance with its disarmament obligation in NPT Article VI reinforced by the 1996 ICJ judgment, the British Government drastically restricted and effectively repudiated the authority of the International Court of Justice on nuclear weapon matters.<sup>5</sup>

3. On 7 July 2017, a Treaty on the Prohibition of Nuclear Weapons (TPNW) was adopted by 122 member states of the UN General Assembly.<sup>6</sup> The treaty’s core prohibitions include the threat, let alone use, of nuclear weapons. The nuclear weapon states demonstrated their lack of good faith to comply with NPT Article VI by boycotting the negotiations, and they have refused to sign the TPNW. It will enter into force after 50 states ratify it; at the time of writing, 20 have done so. This is faster than any previous such treaty, and suggests that the fiftieth ratification could occur before the next NPT Review Conference in 2020.

4. Because it incorporates all normative developments outlawing nuclear weapons, the TPNW significantly strengthens the stigmatisation of nuclear deterrence. Yet one Trident-armed Royal Navy submarine (SSBN) is being kept on Continuous at Sea Deployment, which the Government asserts is ‘essential to assure the invulnerability of the deterrent’. Unstated is the need to sustain the option of retargeting and operational efficiency. In practice, such escalation would require the SSBN Commanding Officer to decide if the Prime Minister’s order to fire was lawful, which would entail being informed of the target(s). Without this, he and his command team – who, unlike the Prime Minister, carry the huge responsibility of being required to carry out such an order – would be placed in legal jeopardy.

5. Additionally, the Rome Statute of 1998 (which entered into force in 2002) confirmed that causing excessive incidental death, injury or damage is a war crime.<sup>7</sup> This means that any re-targeting which is liable to cause excessive incidental death...etc to civilian populations would be within the jurisdiction of the International Criminal Court and, since that is not a new rule of International Law, is out-with the legal sidesteps the UK took regarding Additional Protocol 1 (cf. para 2) which it re-iterated on ratifying the Rome Statute. Such re-targeting would constitute a crime under the International Criminal Court Act 2001.

## **The Chilcot Report**

6. When the decision to de-target missiles was made in 1994 this set in motion – almost certainly unintentionally – a potential pathway to disarmament. The actual intent was to follow the US and Russian lead, as described earlier. At that time the Government would have assumed that it could retarget at any time at its discretion. However, Sir John Chilcot’s Inquiry report into the circumstances surrounding Britain’s involvement in the 2003 invasion of Iraq included several significant recommendations relevant to any future decision to go to war. The following extracts from a recent report by the Public Accounts and Constitutional Affairs Committee<sup>8</sup> clearly establish the need for Parliament’s involvement in the process:

58. The Iraq Inquiry reported that the Blair Government did not expose key policy decisions to rigorous review. The failure to open up key decisions to sufficient, high-level challenge is drawn out by Sir John Chilcot in his statement at the launch of the report: “Above all, the lesson is that all aspects of any intervention need to be calculated, debated and challenged with the utmost rigour.”

60. The absence of robust challenge within Government gains particular significance when considering how the legal advice underpinning the Government’s case for war was presented and discussed within Cabinet ...

70... Sir John Chilcot said that he believed there was room for Parliament, “whether on the Floor of the Chamber, in Select Committees or in other respects, to exert more influence on Government and to hold Government more effectively to account.”

71. We believe that the ongoing issue of Parliament’s access to sensitive information underpins the need for an open conversation between Government and Parliament on this matter, so that Parliament can be confident of its full ability to scrutinise Government decisions.

79 ... We, as Parliamentarians, must also reflect upon how Parliament could have been more critical and challenging of the Government at the time. This, we believe, is a vital consideration, not just for the Intelligence and Security Committee, the Foreign Affairs Committee and the Defence Committee but for every Committee of this House. It is a lesson of which we must be consistently mindful, throughout all aspects of our work and scrutiny of Government.

7. These extraordinarily strong recommendations should especially apply to nuclear weapon retargeting. At this point the potential use of nuclear weapons would become stark reality, requiring rigorous assessment against criteria commonly accepted for a 'Just War', including:

- \* All other ways of resolving the problem should have been exhausted first.
- \* The means used must be in proportion to the desired end result.
- \* Innocent people and non-combatants should not be harmed.
- \* Only appropriate and sufficient force to achieve the aim should be used.
- \* Internationally agreed conventions regulating war must be obeyed.

8. As the ICJ observed in 1996, the destructive power of nuclear weapons cannot be contained in space or time. The reality of the use of nuclear weapons – which, by their very nature, are completely disproportionate, incapable of distinguishing between civilians and military, and long-lasting in their effects – makes it inconceivable that any Parliamentary involvement would approve re-targeting requiring, as it does, specific knowledge of the targets and thereby appreciation of the potential to kill unimaginable numbers of civilians. Such a process is especially important for the deployed Trident submarine command team, who have to decide whether to carry out the firing order.

## **Conclusion**

9. Recent developments have strengthened the legal norms stigmatising nuclear deterrence. This means that, despite attempts by the UK Government to bypass them, the process of nuclear weapon retargeting will expose the Prime Minister and the SSBN Commanding Officer to legal jeopardy. The logic of this argument post-Chilcot is so compelling that the process of nuclear weapon re-targeting, together with its legal implications, needs to be subject to Parliamentary approval in an appropriate manner.

## **Notes**

1. Ian Davis, *The British Bomb and NATO* (SIPRI, 2015), pp18-19: [http://www.nucleareducationtrust.org/sites/default/files/NATO%20Trident%20Report%2015\\_11.pdf](http://www.nucleareducationtrust.org/sites/default/files/NATO%20Trident%20Report%2015_11.pdf)
2. 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/uk-nuclear-deterrencewhat-you-need-to-know>

3. ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons, 8 July 1996, p266: <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf>
4. UK Reservation on ratifying AP1 to Geneva Conventions: <https://ihldatabases.icrc.org/ihl/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>
5. Amended UK declaration regarding acceptance of ICJ compulsory jurisdiction, 22 February 2017: <https://www.icj-cij.org/en/declarations/gb>
6. Treaty on the Prohibition of Nuclear Weapons, 7 July 2017: <http://www.icanw.org/wp-content/uploads/2017/07/TPNW-English1.pdf>
7. Article 8 (2) (b) (iv) of the Rome Statute [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be940a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be940a655eb30e16/0/rome_statute_english.pdf)
8. Public Accounts and Constitutional Affairs Committee (PACAC), ‘Lessons still to be learned from the Chilcot Inquiry’, 17 March 2017: <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubadm/656/656.pdf>

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## **Trident SSBN Commanding Officers Discharge of Responsibility Need for re-assurance that Parliament has been involved**

*A Supplement to ‘Re-Targetting Trident – Parliament should be involved’*

### **Introduction**

1. The referenced paper and this supplement to it have both been written in the light of my personal experiences as a former nuclear submarine Commanding Officer (CO) at sea in the 1970s when the Cold War was at its height. This included two years as Executive Officer (and in Command for part of one patrol) of *HMS Repulse*, a Polaris missile equipped submarine. During this period UK policy was very straightforward; if the Soviets launched an attack on the West with nuclear weapons we would retaliate by firing our Polaris missiles – known as Second Strike or, more

popularly, Mutually Assured Destruction (MAD).

2. US policy was also stated publicly to be Second Strike. However, Daniel Ellsberg in his 2017 book *The Doomsday Machine: Confessions of a Nuclear War Planner*, stated that the actual plan was to launch a massive pre-emptive First Strike on military complexes and centres of population in the Soviet Union and China together at the first sign of any form of hostile action against the West – even if nuclear weapons were not involved. The intention was to destroy infrastructure and populations so completely that neither State could launch their own First Strike. Furthermore, Ellsberg reveals a frightening lack of control of local commanders of nuclear weapon forces, such that it was entirely possible they might order an attack on their own initiative, so heightening the prospect of launch on a false warning similar to the recent one in Hawaii.

3. While the control of RN Polaris was nowhere near as lax as the US seems to have been, had the US initiated a First Strike it is almost certain that the UK would have joined with them; thereby undermining my understanding at the time that the UK Polaris would only be used as a Second Strike. This has made me realise that the horrifically disproportionate and indiscriminate nature of nuclear weapons must involve Parliament because Trident is a political not a military weapon.<sup>1</sup> By agreeing overall policy for its use and approving its re-targeting and use (as discussed in the reference paper) against a hostile State, this would be critical to the COs of Trident SSBNs who have to decide if they can rightfully obey a launch order. The factors affecting a Commanding Officer making such a decision are now discussed in more detail.

### **Responsibilities of Trident SSBN Commanding Officers if ordered to launch missiles**

4. *The Joint Services Manual of The Law of Armed Conflict* - JSP 383 (2004) provides advice to military commanders which includes Trident SSBN COs. The circumstances in which they might be ordered to fire are immeasurably more complex than in my day. Since the Cold War ended, international law governing the threat or use of nuclear weapons has become much more, if not totally, restrictive. Yet, at the same time, the UK Government has broadened its policy from the single circumstance leading to a Second Strike to a much more complex set of circumstances encompassing ‘sub-strategic response’. This envisages, for instance, a

First Strike using ‘low yield’ nuclear warheads in support of troops in the field when nuclear weapons have not yet been used – or even possible use of a ‘very low yield warning shot’ to demonstrate resolve. These options seriously challenge the claim that Trident is a ‘Weapon of Last Resort’. While the effects might be relatively limited compared to those of a standard 100 kiloton Trident warhead, the implications would be so complex and serious that an SSBN CO at sea on patrol could not be expected to assess them. Knowing that Parliament supports the order to launch, this might provide him with some re-assurance in deciding how to use his discretion in discharging his responsibility. The relevant extracts from JSP 383 defining his actions are reproduced below.

### **Level of responsibility**

#### **Paragraph 5.32.9**

“The level at which the legal responsibility to take precautions in attack rests is not specified in Additional Protocol I.<sup>2</sup> 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. Those who do not have this discretion but merely carry out orders for an attack also have a responsibility: to cancel or suspend the attack if it turns out that the object to be attacked is going to be such that the proportionality rule would be breached.”<sup>3</sup>

### **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 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 obligation to cancel or suspend attacks only extends to those who have the authority and the practical possibility<sup>3</sup> to do so as laid down in national laws, regulations, or instructions or agreed rules for NATO or other joint operations.”

5. From Paragraph 5.32.10 one can see that, in order to discharge his responsibilities, an SSBN CO will therefore need sufficient information to be satisfied that the effects of the attack will be consistent with the fundamental principles of humanitarian law as set out, in particular, in Part IV of Additional Protocol 1 (Civilian population); bearing in mind that the principle of proportionality ‘cannot ... destroy the structure of the system, nor cast doubt upon the fundamental principles of humanitarian law...’ Thus an attack cannot be justified only on grounds of proportionality if it contravenes the above-mentioned principles.<sup>4</sup>

6. In simple terms, the CO cannot just fire ‘blind’ solely because the order has been verified as emanating from the Prime Minister; to do this would place him in legal jeopardy both by JSP 383 and under Nuremberg Principle IV as it relates to individual responsibility for war crimes.<sup>5</sup> At the very least he would need to know:

\* justification for firing

\* the target(s) and the likely effect of the selected warheads

\* that the Attorney General had categorically stated that the firing would be legal under International Law

7. However, bearing in mind the extreme devastation that a nuclear weapon will cause – they were, after all, designed specifically to kill very large numbers of a population indiscriminately under the policy of MAD - the CO will additionally need to know that Parliament has been involved in the political decision to target a hostile State and subsequently launch nuclear weapon(s).

8. The so called ‘letter of last resort’ should be treated in a similar manner. At present it is a private communication between the Prime Minister and SSBN COs. It is entirely consistent and reasonable to say that its contents, although almost certainly related to extreme existential circumstances, should be approved by Parliament in an appropriate manner.

## **Notes**

1. “ ...the UK views its nuclear weapons as political not military weapons.” Extract from letter to Commander Forsyth from Director General Nuclear Secretariat, 12 February 2018.

2. Protocol 1 Additional to the Geneva Conventions of 1949 (AP1) and Relating to the Protection of Victims of International Armed Conflicts

1977. An HMG Reservation attached to it states that this protocol does not apply to nuclear weapons. As the Protocol does not discuss types of weapons, only the effects to be avoided, the basis for this statement is unclear.

3. The CO has this responsibility and has the discretion to cancel or suspend attacks.

4. ICRC Commentary on Article 57 of API, Precautions in attack, para 2207.

5. Nuremberg Principle IV relates to superior orders and command responsibility and states: 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.'

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