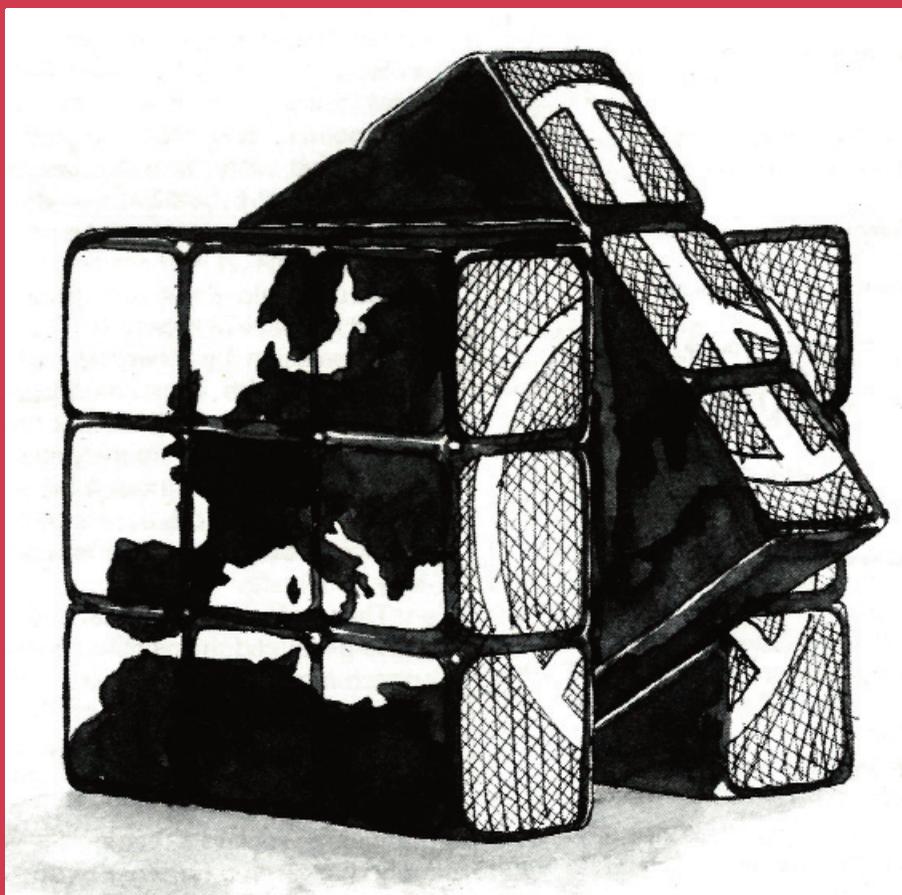


END Papers 3

European Nuclear Disarmament

The Case Against Trident

Commander Robert Forsyth RN (Ret'd)



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The Case Against UK Trident

A Naval Officer's Perspective

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such, was one of the front
line custodians of the UK's
nuclear weapons at the
height of the Cold War
confrontation between the
Soviet Union and the West.*

In common with a number of my peers, I have in recent times grown increasingly concerned about the state into which the Royal Navy has declined.

It now seems to be so small that it will be unable to offer much more than an escort group for one of the new strike carriers. This will severely affect its ability to conduct Anti-Submarine Warfare (ASW) and other operations at a time when Russian activity is returning to Cold War levels. There are also numerous other demands on its people and units, not least in the waters of Arabia, Asia-Pacific and around UK sovereign territories scattered across the globe.

The RN's decline has unquestionably been caused by successive cuts in public spending. Yet it is noticeable that there is one part of the defence budget that is not only protected but continues to grow – the proportion devoted to the Continuous at Sea Deterrent (CASD). The UK's conventional war-fighting capability is being sacrificed to preserve its nuclear one. Some £2 billion a year is needed to maintain CASD and the cost of the four new Dreadnought Class ballistic submarines (SSBNs) will likely exceed £40 billion.

For the same money the UK could have had at least another eight attack submarines (SSNs) or – better still – a mix of conventional and nuclear boats and 15 (or more) extra frigates.

However, the issues at stake stretch beyond the numbers game and also include the worrying state of the UK Government's strategic nuclear defence policy.

Some serious questions need to be asked (and answered) by the national political and

military leadership about not only the affordability of CASD, but also its necessity at all and/or – if it is retained – the moral context of its use. It is often said that the UK retains its nuclear weapons to remain one of the five nuclear weapon power players – colloquially known as the P5 – and to retain the UK’s seat at the United Nations Security Council (UNSC). The reality is that, as a signatory to the 1968 Nuclear Non-Proliferation Treaty, each of the ‘P5s’ retains their seat even if they give up nuclear weapons.

Also, just whom is the UK trying to deter? Where is the massive state based strategic threat to Europe today that replicates the Cold War Soviets? Where is the nuclear-armed rogue state with direct hostile military intent towards the UK? Neither Iran, North Korea nor Syria currently have military designs on the UK and no one in their right mind would consider Trident an appropriate weapon to use against terrorist organisations such as ISIL. The logic of spending £2 billion a year to sustain Trident on CASD duties ‘just in case’ therefore has to be questioned, especially when the patrolling submarine’s missiles are not targeted, nor are they even held at 15 minutes to fire. It also uses scarce ships, submarines and air assets to sustain its invulnerability.

Also, is it really independent? When we purchased and managed our own Polaris missiles, the UK could make some claim to possessing an independent deterrent in that the weapons could be deployed and fired under total UK control; albeit we were heavily dependent in the long run on US support for supply of spares (and also for missile testing and satellite guidance facilities).

Today the UK uses the shared Trident missile facility at Kings Bay, Georgia and is even more heavily dependent on the USA. The Americans could deny us access to their stock of missiles if it suited them. The British American Security Information Council (BASIC) report to Parliament in 2014 pointed out: “If the US were to withdraw their cooperation completely the UK nuclear capability would probably have a life expectancy measured in months...”

The UK remains closely integrated with the US Navy’s nuclear propulsion and weapon programmes – even to the point of the Royal Navy and US Navy today designing a common submarine missile module for their respective next generation ballistic missile submarines (SSBNs). I cannot conceive Britain would ever fire its Trident missiles without the Americans’ political support and, if they so wished, I am fully confident they would find a way to frustrate the UK. The Government assertion that the UK operates an independent deterrent is no more than national hubris.

The next item of intellectual ‘emperor’s new clothes’ frequently worn by avid supporters of maintaining and replacing the UK’s CASD is the

contention that ‘you cannot un-invent nuclear weapons’. Neither can you uninvent chemical weapons of course, but they are internationally outlawed as unacceptable Weapons of Mass Destruction (WMD). That is why the USA, UK and France attacked Syrian chemical warfare facilities in April 2018. Chemical or biological weapons are so stigmatised that there is no thought of using them by the UK to deter. Ironically, nuclear weapons, which are orders of magnitude more destructive, lethal and longer lasting in their poisoning effects, are also called WMD but are not banned. Where is the logic in that?

But war is an ugly business, some would say, to which rules do not apply. The legendary WW2 submarine captain Alastair Mars, on patrol in the Java Sea in his boat *HMS Thule* in 1945, would have disagreed. For example, on the occasion that he had an enemy hospital ship in his sights - an easy kill after many frustrating weeks trying to sink warship targets - he simply lowered *Thule’s* periscope. He later wrote of this moment that he made the decision not to attack because ‘if a man is to remain civilised he must have rules’.

As a former captain of both a diesel-electric patrol submarine and nuclear-powered hunter-killer, and a one-time teacher of the perisher course, I found what Mars wrote a good example of fine moral judgement in a situation where temptation may have been great. To that end, in the process of investigating the current state of affairs with regard to the UK’s nuclear deterrent force, I took a close look at how national nuclear policy conforms to International Humanitarian Law.

The Nuremberg Charter and Geneva Conventions have long governed the conduct of war and, before the first of my four Polaris patrols, my Commanding Officer and I formally discussed whether we were totally in agreement that an order to fire our missiles as a SECOND strike was lawful – i.e. enacting the policy of Mutually Assured Destruction (MAD).

We agreed it was, but we added that, if there was no other indication that a nuclear attack by the foe was under way, we would pause the countdown, discuss and even possibly phone home (so to speak). Since 2002 the UK has followed a policy of sub-strategic, so-called Flexible Response, that entails potentially using a single warhead – this being still eight times the power of the Hiroshima bomb – on each Trident missile. The UK has also reduced the number of missiles/warheads embarked in an SSBN.

This at least shows willingness by the UK to take the lead in reducing weapons stocks; but not all is as it seems. Various statements have made it clear that the policy is now one of deliberate uncertainty as to when and how the UK’s nuclear missiles would be used. For example:

- “[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.”

Defence Secretary’s statement to MPs, March 20, 2002

- “...the Government) will not rule in or out the first use of nuclear weapons.” Government White Paper, May 8, 2015

That represents a significant shift away from the certainty of last resort/second strike of my days at sea. It also seems to ignore the fact that the Geneva Conventions and the more recent International Criminal Court Statute (2002) of Rome - which refers to their use as a ‘war crime’ – do not countenance the use of any form of WMD and certainly not in first use. I was therefore concerned as to how the Prime Minister could provide certainty to SSBN Commanding Officers that they would not be called upon to carry out what might be viewed as a war crime. A CO has a personal responsibility under Military Law to assure himself he is not obeying an illegal order. This is a matter a number of US senior officers have publicly addressed, stating that they may not obey an order to fire if they think it might not be legal.

So, earlier this year, I wrote to the UK Ministry of Defence (MoD) Nuclear Policy department and asked them the legal position for British SSBN captains. I received a response in writing that stated, among other things: ‘Our nuclear Deterrent is fully compliant and compatible with our international treaty and legal obligations’. More surprising were actions the UK Government has taken to enable the MoD to say that.

In 1977 the UK signed a new Protocol attached to the Geneva Conventions. It contained stringent provisions for the protection of civilians from the use of WMD. In 1998 the Government attached a Reservation to this Protocol which stated ‘the rules ...do not have any effect on and do not regulate or prohibit the use of Nuclear Weapons’. They repeated this Reservation again in 2002.

So, while on the one hand the UK was actively negotiating international agreements outlawing chemical and biological weapons, on the other hand it was absolving itself from any restriction on using nuclear ones. I wonder just how many people know about this?

Certainly the vast majority of the general public are probably unaware of it and I wonder if SSBN Commanding Officers are too?

As further support for legality, in its response to me the MoD selectively quoted the 1996 International Court of Justice’s Advisory Opinion on a

question from the UN General Assembly (as to whether the threat or use of nuclear weapons complied with International Humanitarian Law). The MoD suggested it ‘was not necessarily unlawful in extreme circumstance’.

In fact, the 14 Judges that sit on the Court were evenly divided in their opinion as to whether, in the very extreme circumstance of the existence of a state being threatened, their use in self-defence – i.e. second use – might be justified. France, the USA and UK voted for it being lawful but, interestingly, Russia and China voted it unlawful.

The President of the court made a separate Declaration that this vote should not be interpreted as leaving the door open to an interpretation that their use *was* lawful.

Also, what the MoD did not mention to me was that all 14 Judges had, in a previous opinion, unanimously confirmed that ‘the threat or use of nuclear weapons should be compatible with the requirements of international law applicable in armed conflict’ e.g. The Geneva Conventions.

On the face of it this means that the threat of second use, never mind first, would always require considerable debate and legal consideration beforehand.

In its response to me the MoD also said that legality could, in the end, only be decided on a case-by-case basis. This further underscored my concern for the position of SSBN captains – the MoD seems to be trying to ensure the buck stops with the submarine captain, who may well be the person least qualified to decide that firing nuclear missiles is appropriate. Last year the UK Government took a further step away from being accountable for its own nuclear policy by revising the declaration, which accepts the compulsory jurisdiction of the International Court of Justice. According to BASIC ‘the revised Declaration also includes a reservation excluding from the Court’s jurisdiction any cases related to Nuclear Weapons and/or nuclear disarmament unless the other four Nuclear Non-Proliferation Treaty (NPT) nuclear-weapons States also accept the Court’s jurisdiction with respect to the case’. The chances of all P5 states agreeing to accept jurisdiction simultaneously is, of course, just about zero.

The UK holds itself up as a protector of international standards – even to the extent of going to war in Iraq and supporting strikes on Syrian chemical weapon sites. The current Prime Minister, in justifying the bombardment of Syria in Parliament on April 16 this year, echoed Alastair Mars when she said, “we need to stand up for the global rules and standards that keep us safe”.

Should not the standards that legislate against us (or anyone else) using

chemical and biological WMD also apply against us (or anyone else) using nuclear WMD?

The rest of the non-nuclear weapons world certainly thinks this should be the case. One hundred and twenty-two nations, fed up with the lack of action by the P5, last year put in place a Treaty to Prohibit Nuclear Weapons. The UK chose not to be associated with this in any way, nor did the UK send a senior government representative to the Nobel Peace Prize ceremony last year to honour the *International Campaign to Abolish Nuclear Weapons* group who were largely responsible for achieving the Treaty. SSBN operators France and the USA also only sent junior officials, though Russia and China did send senior representatives.

It's worth noting that in its letter to me, of April 12 this year, the MoD stated: 'We consider the step by step approach to multilateral nuclear disarmament delivered through the Nuclear Non-Proliferation Treaty (signed 1968) as the cornerstone of efforts to pursue the goal'.

Actually, the UK has not actively participated in or encouraged multilateral disarmament negotiations since the Comprehensive Nuclear Test Ban Treaty in 1996 – 22 years ago. Why does the UK ignore treaty obligations, reject International Humanitarian Law, and follow a policy of uncertainty as to when and in what circumstances it might use nuclear weapons? Could it be because the weakness of UK conventional forces is recognised and possessing the nuclear deterrent force is seen to be a counter-balance to such inferiority? Why else would the UK Government take all these actions – or not take in the case of multilateral negotiations – all while simultaneously insisting that other countries observe the ban on the lesser evil of chemical and biological weapons?

I think the UK should immediately do the following:

- Say NO to First Use under any circumstances.
- Revoke the Reservation regarding use of nuclear weapons placed on Protocol 1 to The Geneva Conventions.
- Recognise the authority of the International Court of Justice on all matters relating to the use of nuclear weapons.

These actions would re-establish the moral standing of the UK in world affairs and, in so doing, resolve the problem for today's SSBN captains whom, I believe, could otherwise be placed in legal jeopardy. In addition we can stand down from CASD.

There is no threat that justifies such an aggressive posture at present. The immediate cost benefit would be only three boats required to maintain

the operational capability and still be capable of reverting to CASD if an existential threat appears.

Taking the argument in an even more radical direction, as there is no credible strategic threat to our nation – and the UK cannot afford CASD anyway and would not actually lose its seat on the UNSC – it should offer to cancel the Dreadnought submarine programme as a significant bargaining tool in multilateral negotiations.

For it is now clear that the 1968 Nuclear Non Proliferation Treaty, far from limiting the spread of nuclear weapons is actually having the reverse effect – they are proliferating at an alarming rate in the hands of states not signed up to the NPT. There must be a major global multilateral disarmament initiative. UK support for the Treaty to Ban Nuclear Weapons would be a good start to the process. This would also demonstrate to the rest of the world that UK is taking multilateral disarmament seriously – for the first time in more than two decades.

Once the decision has been taken to denuclearise the UK then scarce surface warship, submarine and air assets could be usefully deployed elsewhere. There would be the funds to construct UK Armed Forces of sufficient size and capability to play a key role in conventional deterrence in NATO.

In 2016, during a Parliamentary debate on replacing the current Trident submarines, Prime Minister Theresa May stated that anyone who did not support the national deterrent was a traitor. I would suggest that is far from being the case. This patriot – who has served at the coal face of the at-sea deterrent – is merely asking the UK's leaders to start thinking hard about the nation's strategic choices and introduce some bold moves. The UK would be showing true global leadership at a time when the whole of humanity could so easily topple over the edge into a nuclear annihilation abyss.

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Chilcot, Trident and Jeopardy

Commander Robert Forsyth, RN (Ret'd)

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.¹ 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 2018.²

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*”.³ 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.⁴ 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.⁵

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.⁶ 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 re-targeting 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.⁷ 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 Committee⁸ 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%202015_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://ihl.databases.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
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.¹ 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.² 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.”³

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 possibility³ 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.⁴

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.⁵ 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 AP1, 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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