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Sir

Thank you for your letter of 3 October 2018 received by email.

Your explanation of the UK's position with regard to the Reservation attached to Additional Protocol 1 (AP1) confirmed that nothing contained within AP1 specifically states that nuclear weapons – or weapons of any sort for that matter – might comply or not with the rules introduced by this Protocol.

The UK's Reservation is no more than an 'Assertion of Opinion'. The fact that the effects of specific weapons were not discussed does not lead to a conclusion that '*...the rules introduced by the Protocol apply exclusively to conventional weapons...*' or to the follow on statement that '*the rules so introduced do not regulate or prohibit the use of nuclear weapons*'. The use of any weapon which failed to comply with the fundamental rules of non-discrimination and proportionality would be in breach of the Protocol.

My concern throughout the whole of my correspondence with your Department has always been 'how does the SSBN Commanding Officer (CO) at sea decide if an order to fire first is lawful¹? Firing first invokes a whole complexity of decision making not incurred by the second strike policy of 'if you fire nuclear weapons at us then we will fire back' that prevailed when I was second in command (and temporarily in command) of an SSBN.

I have therefore closely examined the one source that a CO will certainly look to for guidance, namely **JSP 383 THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004)**. Two extracts are particularly relevant to my concerns:

Responsibility - extract para 5.32.9

'Commanders...have a duty to verify targets, take precautions to reduce incidental damage, and refrain from attacks that offend the proportionality principle.'

So a CO will need at least to know the targets, war yields and an assessment of the likely effects - including blast, heat and radiation - on civilian populations. And, of course, he will need to know the reason for firing. As nuclear weapons are inherently indiscriminate, he will also look for guidance in the section on Nuclear Weapons where para 6.17 is particularly relevant.

¹ 'The UK has neither a first use nor a no first use policy' (Mr Newman's letter of 12 April 2018) so firing first is an option.

6.17 There is no specific rule of international law, express or implied, which prohibits the use of nuclear weapons.² The 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. Those rules cannot be applied in isolation from any factual context to imply a prohibition of a general nature. Whether the use, or threatened use, of nuclear weapons in a particular case is lawful depends on all the circumstances. Nuclear weapons fall to be dealt with by reference to the same general principles as apply to other weapons. **However, the rules introduced by Additional Protocol I apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.**
(my emphasis)

Any hesitancy he might feel would be dispelled by the ultimate sentence of para 6.17 which selectively quotes the UK's Reservation attached to AP1 with no caveat that this is an 'assertion' or 'opinion' or 'understanding'. It is written as fact. Furthermore, the use of the word 'However' at sentence start would lead him to think that, despite the more cautionary preceding sentences, there are no constraints on the use of nuclear weapons at all in the case of the rules to be found in AP1 . This not only contradicts the preceding articles but is seriously misleading in the context in which it is presented.³

If the words I have emphasised were to be removed, then the remainder of the preceding paragraph would be a more accurate representation of the nuclear weapon situation with respect to International Law. As it stands, SSBN COs who followed its advice would be placed in a position of legal jeopardy in view of the principle of individual criminal responsibility.

I therefore urge your Department to amend JSP 383 in the way I have suggested in order not to mislead Commanding Officers on the factors affecting the use of nuclear weapons.

Yours faithfully

Robert Forsyth



² This is technically correct as it stands today. However, when the UN Treaty on Prohibition of Nuclear Weapons enters into force, this will need to be amended. Ratification by 50 signatories is required; to date 69 States have signed and 19 have ratified the Treaty.

³ It is my understanding that the UK reservation to AP1, even if permissible, would not affect the UK's obligations under customary international law such as the rule prohibiting indiscriminate attacks.