Re-targeting Trident: Parliament must be involved.

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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 non-compliance 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 side steps 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 re-target 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[8] 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*."
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> 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...
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> 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*."
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> 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.
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> 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 re-targeting. 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 re-targeting 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.

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[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

[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-deterrence-what-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

**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).*

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