Correspondence between Commander Robert Forsyth RN (Ret'd) and Ministry of Defence (Nuclear Policy) December 2017 - November 2018.

Preamble.

The attached exchange of letters and emails between myself and the MOD arose from my personal concern (as a former Executive officer of a Polaris missile carrying submarine) as to whether the Commanding Officer (CO) of a Trident missile carrying submarine could be placed in legal jeopardy should they be called upon to fire. My reasons being:

(a) The legality of HMG general policy for nuclear weapons is highly questionable at best – even for self defence (c.f. documents 1-6) and so complying with an order to fire requires the CO to make a positive and personal decision that the order is a legal one. It is not sufficient merely to carry out because it is authenticated correctly as having been authorised by the Prime Minister.

(b) The advice provided on the Law of Armed Conflict (LOAC) to military commanders is specifically misleading in one critical area regarding Additional Protocol 1 (AP1) to The Geneva Conventions applying to the protection of civilians. (c.f. documents 7-10)

At the end of the exchange any doubts I might have had as to whether my concerns are justified have been dispelled. MOD have avoided answering my questions and responded with flat statements of policy and assertions of legality. In only instance do they drop this line of response and admit that the Reservation HMG placed on AP1 is based not on the fact that the International Committee of the Red Cross (ICRC) led negotiators stated that AP1 did not apply to nuclear weapons but that nuclear weapons (or any weapons for that matter) were not discussed in the negotiations (c.f. Document 8). The Reservation is based on a highly specious 'assertion' or 'opinion' and is then presented to military commanders in the manual on LOAC as if it is a hard fact coming out of the AP1 negotiations.

Commander R Forsyth RN (retired)

1 December 2018

List of Documents following:

1. 28 December 2017 - my letter to Admiral Weale (Rear Admiral Submarines)
2. 12 February 2018 - MOD reply to my 28 December letter
3. Email Exchange with MOD regarding no attributable author to their 12 February letter.
4. 7 March - my reply to MOD's 12 February letter
5. 12 April - MOD reply to my 7 March letter
6. 12 April - my email to MOD
7. 11 September – my email to MOD regarding a Parliamentary Question by Caroline Lucas MP
8. 3 October - MOD reply to my email of 11 September
9. 8 October - my reply to MOD's letter 3 October
10. 7 November – MOD reply to my letter 8 October

There are no security restrictions or limitations on use of the material contained in these documents

From Commander R Forsyth RN

The Stile House
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Telephone: 01869 338384

Rear Admiral J Weale OBE RN
Rear Admiral Submarines
Northwood Headquarters
Sandy Lane
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Middlesex
HA6 3HP
28 December 2017

1. You may be aware from tribal gossip and my article in *The Naval Review* (Feb '16) and subsequent letters that I have been questioning the value of Trident in the light of the present parlous state of the RN and the absence of any present or realistically foreseeable threat requiring the use of the Trident weapons system and, in particular, Government statements about willingness to conduct pre-emptive First Strikes. My concerns are such that I feel I must express them directly to yourself and would welcome your response by discussion or letter as you wish. I will try to be brief but I have realised that the subject of Trident is not a simple one easily discussed in sound bites as it too often is in the media and by the Government

2. Post leaving the service and whilst healthy budget environments generally prevailed I continued to subscribe to my serving day's view as to whether we should have nuclear weapons? The answer being No of course in an ideal world - but I accepted the concept of deterrence so long as the Soviets threatened world peace. I was encouraged that the UK was committed by the **Non-Proliferation Treaty** (NPT) of 1968 to reducing - and hopefully eliminating completely - nuclear weapons. The UK decision, following *Glasnost*, to reduce the onboard load to 8 missiles and 40 warheads seemed to me to be a good start.

3. However, as budget have been cut again and again, our ASW capability above, on and under the water has declined to the point of being not quite meaningless but certainly well below the level of defence an island nation dependent on sea trade deserves and needs. I have in the last year or so taken the matter very much more seriously. Would you expect an ex Teacher to do anything less? My conclusion is that today Trident does not keep us safe as the Government avers, but, quite the contrary, makes us significantly less safe by becoming perilously close to being a weapon of near first resort rather than one of very last resort at the end of a long chain of political and military options. But I hear a lot of very dangerous talk of it now being used as a First Strike against rogue states. Both Geoffrey Hoon as Secretary of State as long ago as 20 March 2002 stated this and, more recently, on 18 July last year in

Parliament, the Prime Minister publicly supported the concept of First Strike thereby bringing Trident into play as a military weapon rather than the political one of deterrence for which it was originally intend

.

4. This alarmed me and I so I explored the implications of First Strike. Militarily I could not find any circumstance in which we would intentionally launch even a single nuclear war head deliberately at a rogue state. It would have such enormous political, humanitarian and geo-physical repercussions as to be completely self defeating and, in any case, deny anyone the opportunity to occupy the ground afterwards. However, on paper, First Strike is now a UK military option and one that Trident CO's may therefore be required to respond to. Having now researched the development of International Humanitarian Law since my time in service on the issue of use of nuclear weapons this has caused me to fear for the legal position that *Vanguard* COs (and *Dreadnought* COs idc) may be placed in.

5. In 1972, when I was Executive Officer of *Repulse (Stbd)* and prior to going on our first patrol, my CO (Tom Green now deceased) and I discussed the legality of accepting an order to fire observing that the **Nuremberg Charter Principle 3** states: '*The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.*' We wished to be clear that we were both were of the same thinking; not only was I a key member of the firing chain but I would assume command should he be out of action - as indeed occurred for medical reasons on one patrol.

6. We well understood that **The Geneva Conventions** require that the methods and means used in military actions 'must be proportionate to the military objective and that tactics or the excessive use of force that cause unnecessary death or destruction among civilians is prohibited'. The indiscriminate nature of nuclear weapons - and UK Polaris ones in particular - was such that, although they could be accurately targeted on military installations, we were well aware that the subsequent blast and radiation effects could kill thousands, if not millions, of civilians because the Soviets located military installations near heavily populated areas. Furthermore the radiation would continue to be dispersed over considerable distances by wind direction and force.

7. However, we were absolutely confident that we would only be ordered to fire should a Soviet nuclear attack already be in progress (Second Strike). Whilst any such response meant that the policy of deterrence had failed and it might be a futile gesture, the circumstances would so far transcend any normal warfare - the physical survival of the UK and Europe and more might well be at stake - that we were agreed that we could and would obey such an order. Several of our contemporaries were unable to reach the same conclusion and declined to serve in SSBN's.

8. Nonetheless, in order to confirm that we would only be responding to an attack in progress, we agreed that were we to receive an order to fire with no corroborating indication to support this then we would hold the firing sequence while we examined and discussed the situation. Monitoring the BBC 24 hours a day was an important aspect of this. We were not alone in this and, interestingly, Lord Peter Hennessy refers to it in his book *The Silent Deep.* The corollary was that we were prepared <u>not</u> to fire unless it was assuredly as a Second Strike.

9. A more recent affirmation of the need to be sure of the legality of an order to fire was a statement by the current CINC US Strategic Command, General John Hyten USAF. In answer to a question about receiving an illegal order from the President to launch nuclear weapons, he responded "If you execute an unlawful order, you will go to jail. You could go to jail for the rest of your life." *(The Guardian 19.11.2017*). General Hyten was clearly speaking on behalf of his military subordinates who would execute the order. In so doing, he acknowledged that there were scenarios where launching nuclear weapons would be unlawful.

10. The problem here lies in how to satisfy the officers with responsibility for obeying that command that the order is legal. If the CINC has a responsibility to question it's legality then so do his subordinates - including the COs at sea.

11. My research shows that pre-emptive (First Strike) use of nuclear weapons is now clearly stated to be illegal by the international community via:

a. **Protocol 1 to The Geneva Conventions** (8 June 1977)

b. an **International Court of Justice** ruling (8 July 1996)

c. **Rome Statute of the International Criminal Court** (17 July 1998).

d. In July 2017, 122 of the 186 countries not in possession of nuclear weapons went even further and adopted a **Treaty on the Prohibition of Nuclear Weapons** banning not only the use but also the threat of their use completely, thereby bringing nuclear weapons in line with other chemical and biological weapons banned since 1925.

12. The UK Government has sought to ascribe legality to nuclear weapons by a variety of means including:

(a) appending a **Reservation to the Geneva Conventions** stating: *'It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol (1) apply exclusively to conventional weapons ...In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons'*

(b) not signing the recent **UN Nuclear Weapon Ban Treaty.**

Such actions may satisfy the Attorney General's view of legality but the 122 nations party to the UN ban and its previous IHL treaties and laws will not, particularly if used as a First Strike.

13. I am therefore very concerned as to how much consideration today's Fleet Commanders, *Vanguard* COs and their command teams have given to this and whether they appreciate the legal jeopardy they will be in if ordered to launch a Trident missile attack. I would be interested to know how you and they reconcile International Humanitarian Law with an order from the Prime Minister which the rest of the world outside of the nuclear powers will consider to be illegal and from which there will be no defence of obeying superior orders under the terms of **The Nuremberg Charter**.



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Commander (Rtd) Robert Forsyth
The Stile House
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Our Reference: TO2018/02132

Date: 12 February 2018

Dear Cdr Forsyth,

Thank you for your letter dated 28 December addressed to Rear Admiral Weale, Assistant Chief of Naval Staff Submarines, regarding the Nuclear Non Proliferation Treaty (NPT) and the United Kingdom's (UK) nuclear posture. As my department is responsible for the policy on this important matter, I have been asked to respond on behalf of Rear Admiral Weale.

As I am sure you will appreciate, we cannot un-invent nuclear weapons. Indeed, we have to acknowledge that nuclear weapons have undoubtedly contributed to global security and stability since the end of World War II. Nevertheless, the UK looks forward to a nuclear weapon free world, when all nuclear-armed states feel able to relinquish them.

The purpose of the UK's nuclear weapons is to deter and prevent nuclear blackmail and acts of aggression against our vital interests that cannot be countered by other means. I should emphasise, the UK views its nuclear weapons as political not military weapons – their purpose is to deter aggression (a political role), rather than to be used on the battlefield to gain (military) advantage. It is essential, however, that we don't define precisely when, how and at what scale we would contemplate employing them, otherwise we make it easier for our adversaries. Deterrence works and to underpin that I can confirm the UK has neither a first use nor a no first use policy. Essentially, if you believe that the nuclear deterrent is our ultimate security guarantee, then you must accept there are circumstances in which its use would be justified. To give any other answer undermines the credibility of our deterrent and our national security.

The Government agrees with you that the use of nuclear weapons – like all weapons – would be subject to the requirements of international humanitarian law. The UK would not use any of our weapons, whether conventional or nuclear, contrary to international law. Our nuclear deterrent is fully compliant and compatible with our international treaty and legal obligations. The 1996 International Court of Justice Advisory Opinion did not conclude that the threat or use of nuclear weapons would be necessarily unlawful in an extreme circumstance of self-defence in which a State's very survival would be at stake. The International Court of Justice concluded that legality can only be determined in the light of the specific circumstances applying when such use is being contemplated and the application of the general rules of international law, including those regulating the use of

force and the conduct of hostilities. We would only consider using our nuclear weapons in the most extreme circumstances of self-defence, including the defence of our NATO allies.

As you acknowledge we have a good record on disarmament. The UK has in fact been a leading nation, having unilaterally reduced our nuclear forces by over half from their Cold War peak in the late 1970s. We are also the only nuclear weapon State recognised under the NPT to have reduced its deterrent capability to a single nuclear weapon system. In addition to dismantling our maritime tactical nuclear capability and the WE177 free fall bomb, and the reductions that you mention to missiles and warheads on board patrols, we have achieved our commitment to reduce the number of operationally available warheads to no more than 120. The UK also remains committed to reducing our overall nuclear weapon stockpile to no more than 180 warheads by the mid-2020s as set out in the 2010 Strategy and Strategic Defence and Security Review. The UK now possesses approximately 1% of the total global stockpile of nuclear weapons, the smallest of all the NPT nuclear weapon States. It is unfortunate that our actions have not been followed by other States and we have not yet been able to create the conditions where nuclear weapons are no longer necessary to guarantee our security. We are now at the minimum level of nuclear capability that is required to credibly deter threats or coercion by nuclear-armed States. To reduce our capability further would undermine UK security and that of our NATO allies.

Nevertheless, the UK Government continues to work with partners across the international community to prevent proliferation and to make progress on multilateral nuclear disarmament. Trust and confidence need to be built between states for tangible steps to be taken towards a safer and more stable world in which countries with nuclear weapons feel able to relinquish them. We, along with our NATO allies, do not believe that the treaty prohibiting nuclear weapons (or Ban Treaty) will bring us closer to this goal. A ban on nuclear weapons will not in itself improve the international security environment or increase trust and transparency between nuclear weapon possessor states, nor will it address the considerable technical and procedural challenges involved in nuclear disarmament verification. The NPT is the cornerstone of the global non-proliferation and disarmament regime. A ban treaty would shift focus from the step-by-step approach on disarmament addressed by the NPT, which includes working towards next steps on banning nuclear testing and ending fissile material production – steps the UK has supported to help achieve the goal of a nuclear weapon free world.

I trust that this broad explanation of the UK's extant defence nuclear posture helps with your continued understanding and puts into context the position the Prime Minister took in Parliament during the Nuclear Deterrent debate on 18 July 2016.

Yours sincerely,

Director General Nuclear Secretariat

From: Rob Forsyth [mailto:robert.s.forsyth@gmail.com]

Sent: 28 February 2018 13:13

To: DGNuc-Secretariat-Parliamentary (MULTIUSER) <DGNuc-Secretariat-Parliamentary@mod.gov.uk>

Subject: RE: Reference: Letter your ref: TO2018/02132 dated 12 February 2018

I received the reference letter recently. It has no name of writer or a signature. Please could you advise the name/position of the sender.

Regards Robert Forsyth

Cdr RN (Ret'd)

The Stile House

Deddington

From: **DGNuc-Secretariat-Parliamentary (MULTIUSER) <DGNuc-Secretariat-Parliamentary@mod.gov.uk>**

Sent: 28 February 2018 15:07

To: Rob Forsyth

Cc: DGNuc-Secretariat-Parliamentary (MULTIUSER)

Subject:RE: Reference: Letter your ref: TO2018/02132 dated 12 February 2018

Good afternoon Robert,

Due to the sensitive nature of our work, it is our policy not to release names of individuals below 1* level.

Kind Regards,

Defence Nuclear Organisation Secretariat

From: Commander R Forsyth RN (Ret'd)
The Stile House
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OX15 0SR
robert.s.forsyth@gmail.com

Mr Julian Kelly
Director General Nuclear Secretariat
MOD Main Building
London SW1A 2HB

7 March 2018

Dear Mr Kelly

Nuclear Weapons Policy

Your Reference: TO2018/02132 dated 12 February 2018

I am writing in response to the reference which bore no signature or name. I understand that " *Due to the sensitive nature of our work, it is our policy not to release names of individuals below 1* level.".*

In the first instance, I would have thought that my letter, being from a former Executive Officer of an SSBN, Commanding Officer of two submarines (including an SSN) and Commanding Officer (Teacher) of the Commanding Officer's Qualifying Course (Perisher), deserved a response from at least 1* star level on such a serious subject.

Secondly, for a Government Department to hide behind anonymity comes across as somewhat 'Orwellian' and suggests that no one is prepared to accept responsibility for its contents even though the reference was written in the first person. I consider that the staff of the Nuclear Secretariat should be as publicly accountable by name as any other Government Department.

Your department's reply laid out the Government's position and, in doing so, made some sweeping assumptions. I would like to comment on two of these:

1. The fact that nuclear weapons have never been used since 1945 is no proof of deterrence having worked; it is an opinion. Others have different opinions and would say that it is entirely possible that no nation, aware of the devastating consequences, ever seriously intended to use nuclear weapons but felt driven to keep up with the nuclear arms race.

2. It is a truism to say that you cannot uninvent nuclear weapons; no more can you uninvent chemical and biological weapons or any other form of warfare. You can, however, decide to prohibit them in the same way that chemical and biological weapons have been by international agreements – to which the UK is party. The UN Treaty on the Prohibition of Nuclear Weapons seeks to do just that but the UK has elected not to sign it.

   I note also that the Government added a Reservation to Protocol 1 of the Geneva Conventions when they signed it. The Protocol includes a large number of provisions for the protection of civilians in warfare. The UK Reservation reads in part "*... the rules...do not have any effect on and do not regulate or prohibit the use of nuclear weapons."* This Reservation was repeated in 1998 and clearly is an attempt to provide legal cover for the use of nuclear weapons while continuing to comply with the ban on the much less lethal chemical and biological weapons.

One Government policy the reference did confirm, however, was that it was prepared to pre-empt an attack employing First Use of nuclear weapons if it ever considered this necessary. The reference clearly states that this option is not ruled out - so by definition it can also be ruled in. The Secretary of State for Defence, in a 2002 BBC interview, also said that the UK was prepared to use nuclear weapons against rogue states such as Iraq if they used "*weapons of mass destruction"* i.e. including non-nuclear ones. This was also implicit in the Prime Minister's answer to a question from the Opposition in the Parliamentary Debate on 18 July 2016 in which she also said that anyone who did not support her view was 'a traitor'. This comment places the CO of an SSBN on patrol in an invidious position faced with a personal decision as to whether an order to fire is legal, observing that blind obedience to a superior's order, even under coercion, is not a defence. One hopes that it was political hyperbole.

In justification of Government policy, and thereby implying SSBN COs would be legally safe, the reference paraphrased the 1996 International Court of Justice's (ICJ) Advisory Opinion, para 96 here quoted in full:

> "*..the court cannot 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."*

The logical interpretation of this, as the reference correctly said, is '*that legality can only be determined in the light of the specific circumstances..'* Bearing in mind that the Opinion also says elsewhere:

> '*self-defence... would warrant only measures which are* ***proportional*** *to the armed attack*' (My emphasis. Paras 41 & 42)
>
> *"....In the view of the vast majority of States there can be no doubt as to the applicability of humanitarian law to nuclear weapons...The Court shares that view… In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons. "* (Paras 85 & 86)
>
> "*A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law..."* (Paras 105.2d)

…then it is apparent that the full opinion, taken together with the Geneva Conventions and the Rome Statute of the ICC (2002), means that confirming compliance with International Humanitarian Law for <u>any</u> use of nuclear weapons is likely to be unsuccessful. In any case it will be an extremely difficult, complex and time consuming process. The introduction of policies of First use and/or against threats not necessarily from nuclear weapons has made the legal position even more complex, even less likely to be approved and one which an SSBN CO on patrol cannot possibly resolve legally for himself. As I asked in my original letter, how is the CO at sea protected from potential legal jeopardy?

Under these circumstances, should the Government not revert, at the very least, to a policy of No First Use and even then only in response to an attack with nuclear weapons? This would allow the CO to know before sailing what the sole criteria would be for ordering missile launch. He can then make a personal decision as to whether he can accept responsibility to authorise the launch.

Yours sincerely

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Our Reference:
TO2018/03750

12 April 2018

Dear Commander Forsyth

Thank you for your letter of 7 March to Julian Kelly, Director General Nuclear. I have been asked to respond on his behalf, as I am the head of the Defence Nuclear organisation's secretariat team.

As I am sure you will understand, the Ministry Of Defence receives a high volume of correspondence, particularly regarding the United Kingdom's (UK) nuclear deterrent, and as such it is not possible for each to have a response at One-Star level. Also, in the context of nuclear matters, it is normal practice to not release the names of junior staff hence the reason for no individual's name appearing in the signature block. This information is considered personal information and is protected under the Freedom of Information Act 2000 as well as the Data Protection Act 1998.

I am sorry that you felt that the response from the Department, dated 12 February, fell short of answering the points you made. That was certainly not the intent and I will now endeavour to respond to them. I must, however, first address your assertion that the Prime Minister said in Parliament that anyone who did not support her in the use of nuclear weapons was a "traitor". That is not the case. The Prime Minister was asked if she would authorise a nuclear strike. Hansard records the exchange and the point being made, also highlighted in the letter of 12 February, was that if one believed the nuclear deterrent to be our ultimate security guarantee, as successive governments have, then it must be accepted there are circumstances in which its use would be justified. Therefore, to provide any other answer than that given by the Prime Minister would undermine the credibility of our deterrent and our national security.

I note your view that it is an opinion to suggest that deterrence is working as a nuclear weapon had not been used since 1945. Nevertheless, the UK has long been clear that our independent nuclear deterrent exists to deter the most extreme threats to our national security and way of life, and that of our allies. It has done so for over 60 years and, with the Government's decision to maintain the deterrent, will help guarantee our security into the 2050s and beyond. To be clear we hope never to employ nuclear weapons but to deliver a deterrent effect under all circumstances.

The UK remains committed to creating the conditions for a world without nuclear weapons. However, as previously stated, we do not believe the United Nations treaty on the prohibition of nuclear weapons will bring us closer to this goal. We consider the step by step approach to

multilateral nuclear disarmament delivered through the nuclear Non-Proliferation Treaty as the cornerstone of efforts to pursue the goal.

The use of nuclear weapons – like all weapons – would be subject to the requirements of international humanitarian law. Therefore, only the Prime Minister can authorise the firing of these weapons, even if employed as part of a NATO response, and the Commanding Officer of the ballistic missile submarine must confirm the authorisation to fire meets the rigorous confirmation processes in place - these I am sure you will understand I cannot discuss.

Although we keep our nuclear posture under constant review in the light of the international security environment and the actions of potential adversaries, I shall however if I may, reaffirm that the UK has neither a first use nor a no first use policy. I am sure you will understand why it is essential that we would want to avoid making it easier for our adversaries' calculations by defining precisely when, how and at what scale we would contemplate employing nuclear weapons. As previously stated, we judge that our nuclear deterrent is fully compliant and compatible with our international treaty and legal obligations - the UK would not use any of its weapons, whether conventional or nuclear, contrary to international law.

Yours sincerely,

Mark Newman
Defence Nuclear Secretariat

Rob Forsyth

From: Rob Forsyth <robert.s.forsyth@gmail.com>
Sent: 12 April 2018 16:20
To: 'Nuclear-Secretariat Team (MULTIUSER)'
Subject: RE: 20180326_Forsyth-Nuclear Weapons_Legality

Dear Mr Newman

I will, if I may respond, but realistically do not expect you to respond back.

1. The PM definitely used the word Traitor because I was watching the debate on TV and my wife recalls me storming out of the room in anger. Why it is not recorded in Hansard I know not although I have been told that it is not necessarily 100% verbatim.

2. A policy of not saying whether First Use is IN or OUT means that it can be IN. It is specious to try and say otherwise. There is world of moral and legal difference between the two and I note that there is a large body of opinion among those who do support Deterrence to say that this does not require First Use as part of the policy. It is immoral, unethical and illegal.

3. You say that UK meets all International and Treaty obligations - but I consider that this is only because UK has placed a Reservation on the Geneva Conventions and, I now find post my letter of 7 April, that last year UK amended its Declaration of Consent to ICJ's Authority to say (inter alia) that UK will only recognise it if all 5 NPT states are simultaneously involved with respect to nuclear weapons and disarmament. The chances of this happening, of course, are near zero; so UK has effectively withdrawn from ICJ's Authority and compliance with Geneva Conventions on any nuclear or disarmament matter?

4. With respect to the point about the Commanding Officer - you have completely missed my point. I am quite sure today's COs follow the correct procedures to verify the authority of an order to fire - I did so myself for many WSRTs in 1974/75. However, the CO has a personal responsibility under Nuremberg Charter and Military Law to satisfy himself that the authenticated order is in itself a lawful order. The fact that it emanates from the PM (or her authorised deputy) does not absolve him from this. There are many documented cases of war crimes conducted by a junior in response to a senior's order in which obedience to a superior was not a defence. The Commanding Officer therefore has to take reasonable steps to assure himself of his position. I am merely pointing out that an increasingly complex military, political and legal scenario has developed since I was faced with the single simple question " Can I legally respond to an order to fire (second strike) in response to a massive nuclear attack underway from Soviet Russia" . This has complicated today's CO's position such that I cannot see how he can resolve it at sea on patrol.

I therefore stand by my opinions and continue to be concerned at HMG policy. Sir Michael Quinlan, who was the codifier of UK Nuclear policy and supported UK compliance with the policy of M.A.D. would also be concerned I am sure.

Yours sincerely

Robert Forsyth

From: "Rob Forsyth" <robert.s.forsyth@gmail.com>

Date: 11 September 2018 at 14:54:02 BST

To: "'Nuclear-Secretariat Team \(MULTIUSER\)'" <Nuclear-SecretariatTeam@mod.gov.uk>

Subject: RE: Parliamentary Question by Caroline Lucas MP

Dear Sir

Reference the following Q & A :

> Question by Caroline Lucas Co-Leader of the Green Party
>
> To ask the Secretary of State for Defence, what assessment he has made of the effect of the 1998 Reservation on Protocol 1 (1977) to the Geneva Conventions on the Government's policy that Trident is compliant with International and Humanitarian Law; and if he will make a statement.
>
> And Reply by Gavin Williamson The Secretary of State for Defence
>
> The position of the United Kingdom remains that the rules introduced by the Protocol 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."

I would be interested to know on what grounds does UK consider that the rules do not apply to nuclear weapons. I can find no such reference to this in AP1 so presume this is a legal opinion; if so, how is it derived?

Yours faithfully

Robert Forsyth

Commander RN (Ret'd)

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Our Ref: TO2018/11838

Your Ref:

Commander (Rtd) Forsyth
Via email: robert.s.forsyth@gmail.com

3 October 2018

Dear Commander Forsyth,

Thank you for your email dated 11 September 2018, relating to the Parliamentary Question asked by Caroline Lucas MP about the 1998 Reservation on Protocol 1 to the Geneva Conventions, which was answered by the Secretary of State for Defence on 10 September 2018.

Protocol 1 Additional to the four 1949 Geneva Conventions was adopted in 1977 and was ratified by the United Kingdom in 1998. In a letter to the Swiss Government, as the depository of Protocol 1 for ratification, the UK outlined a number of reservations in respect of the ratification by the UK of that Protocol. The first of these reservations was as follows, and you will note that the text is almost exactly the same as that in the Secretary of State's answer to Caroline Lucas's question:

> *"It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol 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."*

The Diplomatic Conference on the Development of Humanitarian Law, 1974-1977, which adopted Protocol 1 to the Geneva Conventions of 1949 did not discuss the legality of nuclear weapons. In submitting the draft Protocol 1 (and Protocol 2) to the Diplomatic Conference, the International Committee of the Red Cross (ICRC) stated:

> *"Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Additional Protocols the ICRC does not intend to broach those problems."*

During the four sessions of the Diplomatic Conference, the UK and a number of other States (including some which are non-nuclear weapons States) made statements to the effect that the subject of nuclear weapons should not be discussed by the Conference. A number of other States made clear that they shared the view of the ICRC that nuclear weapons were best dealt with in the context of disarmament negotiations and that the Conference should do nothing to prejudice such negotiations. Some States did maintain that the Conference should consider a ban on some or all uses of nuclear weapons, but the records of the Conference show that this was not done. Discussion of specific weapons was limited to certain conventional weapons.

You will appreciate that, as nuclear weapons were excluded from discussions during the Diplomatic Conference which adopted Protocol 1, the UK considers that Protocol 1 does not apply to nuclear weapons, and ratified Protocol 1 in 1977 with a reservation to that effect.

Yours sincerely,

Defence Nuclear Organisation Secretariat

From: Commander R Forsyth RN (Ret'd)
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OX15 0SR
robert.s.forsyth@gmail.com
07770 533513

Defence Nuclear Organisation Secretariat
MOD Main Building
London SW1A 2HB

8 October 2018

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 lawful[1]?' 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.

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Commander (Rtd) Forsyth
Via email: robert.s.forsyth@gmail.com

7 November 2018

Dear Commander Forsyth,

Thank you for your emails dated 9 and 10 October 2018, relating to our earlier response (Our Ref. TO2018/11838) explaining the United Kingdom's view of Protocol 1 to the Geneva Conventions and how it relates to nuclear weapons.

As you allude to in the letter attached to your emails, there is now a series of correspondence between yourself and the Ministry of Defence relating to your underlying concern that using a nuclear weapon may be unlawful and render the Commanding Officer of the submarine subject to legal proceedings.

I appreciate that you hold very strong opinions on this matter, which differ from the Government's view, and I note your request for the Ministry of Defence to amend the content of Joint Service Publication (JSP) 383: The Joint Service Manual of the Law of Armed Conflict.

I should like to start by emphasising that, as we have stated previously, we hope never to employ nuclear weapons but to deliver a deterrent effect under all circumstances. We would only consider using our nuclear weapons in the most extreme circumstances of self-defence, including the defence of our NATO allies, and that we 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.

The Government is clear that the use of nuclear weapons - like all weapons - would be subject to the requirements of international humanitarian law. As we have previously stated, the 1996 International Court of Justice Advisory Opinion could not reach a definitive conclusion on the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake. Legality could only be determined in light of the specific circumstances applying when such use is being contemplated and the application of the general rules of law, particularly those regulating the use of force and the conduct of hostilities. I note your opinion that the United Kingdom's nuclear reservation on our ratification of Protocol 1 Additional to the Geneva Conventions is an "Assertion of Opinion". Nevertheless, for the reasons which we outlined in our letter to you dated 3 October 2018, it continues to be the understanding of the United Kingdom that the rules introduced by the Protocol 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. As this continues to be the Government's view, it would not be appropriate to remove this section of the text from JSP 383 as you have requested.

Should the circumstances arise in which use of nuclear weapons needs to be considered, legal aspects would be a contributing factor in the decision-making process. Only the Prime Minister can authorise the use of nuclear weapons, even if employed as part of a NATO response. As we have

previously stated, the Commanding Officer of the submarine must confirm that the authorisation to fire meets the rigorous authentication processes in place.

I hope that you will understand that, as we have now written to you on several occasions regarding your concern about the legality of nuclear weapons, I feel we have now reached a point where further correspondence on this matter can serve no purposeful outcome.

Yours sincerely,

Defence Nuclear Organisation Secretariat