

## Memorandum from Steven Haines

### The Scope of the Question

In looking at the legality of British nuclear weapons one needs first to identify the nature of the weapons we are considering and the likely uses to which they are to be put. Britain no longer has tactical nuclear weapons and is unlikely to procure them again. So the nuclear weapons we need to consider are not tactical - they are strategic in nature. .

At the heart of British strategic thinking is the notion of deterrence (which has both nuclear and conventional dimensions). *British Defence Doctrine*[\[1\]](#) distinguishes between deterrence and coercion. The former is about persuading an opponent (either actual or potential) not to follow a course of action that they may be considering. Coercion is about persuading an opponent to take action that they might otherwise not consider. Essentially, deterrence is by its nature principally defensive - the aim being to persuade an opponent not to take military action against you - while coercion is understandably assumed to be rather more offensive in character (though it is by no means exclusively so). Britain has long regarded its nuclear weapons as a means of deterrence and not as a means of coercion. They are maintained for defensive purposes rather than offensive ones.

So the basic assumptions concerning British nuclear weapons are that they are strategic systems used for defensive purposes. There are two legal questions we need to address. The first is to do with the legality of the possession of strategic nuclear systems. The second is to do with the legality of their use. However, the question of 'use' needs to be considered on two levels. The first of these is their use in deterrence by the *threat* they pose, a threat which itself needs to be broken down into inherent and specific forms. The second is the *actual* physical use of the weapons against strategic targets. Possession and use are linked, in the sense that the very fact of possession creates the inherent threat - and the specific threat is only meaningful because it is backed up by the possession of a system actually capable of delivering the destructive power being threatened.

### The Legality of Possession

There is no treaty of general prohibition (of nuclear weapons) as there is for biological and chemical weapons. There are a number of 'nuclear free zones' but the only states that are legally prohibited from possessing nuclear weapons in such areas are those that are parties to the treaties establishing them.[\[2\]](#)

During its deliberations in the *Nuclear Weapons Case*, the International Court of Justice (ICJ) found no evidence of a

customary norm containing the essential element of *opinio juris* necessary for there to be an established customary prohibition.<sup>[3]</sup> The only conclusion that one can possibly reach is that the possession of nuclear weapons is not forbidden under international law. Indeed, while the ICJ addressed the specific issue of possession within the main text of its Advisory Opinion, it did not bother to include a statement on possession in the formal *dispositif* (summary of its opinion) because possession was not something on which the Court had been asked to express an opinion.

### **Obligations under the Nuclear Non-Proliferation Treaty**

There is, of course, treaty law dealing with both possession and acquisition, in the form of the *Nuclear Non-Proliferation Treaty* (or *NPT*). Possession of nuclear weapons by the established nuclear powers is expressly permitted under the *NPT*. The established nuclear powers are defined as those that had tested a nuclear device prior to 1 January 1967. Britain meets that condition. The only caveat that one ought to acknowledge is that, as parties to the *NPT*, even the nuclear powers are under an obligation to move towards disarmament. Article 6 places an obligation on the parties to "...undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.....under strict and effective control". As a party, the UK accepts this and I shall return to this obligation once I have addressed the legality of 'use'.

### **The General Inherent Threat of Use**

It is frequently the case that opponents of nuclear weapons quote Article 2(4) of the *UN Charter* and in so doing imply that the threat or use of nuclear weapons would contravene it. It is my contention that this is by no means necessarily so - and is emphatically not the case in relation to Britain's position. Article 2(4) provides that:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations."

In the particular sense of a general inherent deterrent threat, achieved in substance by the mere possession of a strategic nuclear capability, there is no necessary consequent threat against the territorial integrity or political independence of any state. Britain is not now threatening, nor ever has threatened, the territorial integrity or political independence of any state by the mere possession of such systems. To do so there would need

to be or have been an intention either to seize territory from another state or to reduce that state to a condition of subservience. Arguably, at no time during the atomic/nuclear era has Britain ever had designs of that nature on other states' territory or political independence - it has certainly never pursued such aims by threatening the use of nuclear weapons.

As this is being written, Britain's nuclear deterrent is deployed on patrol and is therefore actively maintaining an inherent deterrent posture. However, no single state is being directly threatened and it would be nothing short of absurd to suggest, for example, that Britain has designs on any territory as a consequence. One can only conclude that, despite the presence at sea of British strategic nuclear weapons at a reasonably short state of readiness, there is no breach of Article 2(4) of the *UN Charter*.

The regular deployment of the strategic nuclear deterrent force, far from threatening the degree of instability within the international system that a breach of another state's territorial integrity or the denial of its political independence would represent, is maintained as a means of ensuring general stability. Indeed, far from applying nuclear pressure, even in the face of an opponent's actual seizure and determination to establish control of British territory (the Falkland Islands) against the legitimate wishes of that territory's inhabitants, Britain emphatically rejected the use of nuclear weapons against Argentina as a means of restoring the sovereignty of its temporarily lost territory.

### **A Specific Threat of Use**

Since the end of the Cold War, Britain has made it clear that it no longer regards its previous specific threat against Russia (more correctly the erstwhile Soviet Union) as any longer as necessary as it was during the Cold War. However, since Russia and other nuclear weapon states retain nuclear weapons, Britain has not ruled out the possibility that at some point in the medium to long term future the current general condition of relative stability in 'great power' relations may change for the worse. This brings us on to the central question of the legality of mutual nuclear deterrence.

The ICJ in its Advisory Opinion in the *Nuclear Weapons Case* did not state clearly what its view was as to the legality of mutual nuclear deterrence. Indeed, it completely dodged the issue, first by stating that it did "not intend to pronounce...upon the practice known as the 'policy of deterrence'" [\[4\]](#) and then by going on to state that:

"...in view of the current state of international law, and of the elements of facts at its disposal, 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 the state would be at stake." [\[5\]](#)

This statement was added to the Advisory Opinion by the President's casting vote. Two of those judges who felt unable to support it appended dissenting opinions to the Court's opinion. Judge Higgins, in particular, objected to the Court's unwillingness to reach a conclusion on the matter, arguing that despite the apparent paucity of law on the subject the Court had a responsibility to use its collective judgement as to how the law should be applied in relation to the facts at its disposal and that "the concept of *non liquet* - for that is what we have here - is no part of the Court's jurisprudence...".<sup>[6]</sup> Vice-President Schwebel went on in his own Dissenting Opinion to argue forcefully that the evidence associated with 'deterrence' rendered it inconceivable that it could be regarded as contrary to customary law and that the Court should have stated as such.<sup>[7]</sup>

Since the Court abdicated its responsibility in this important respect, it is worthwhile examining briefly why it is that 'nuclear deterrence' is a legitimate strategic option. Essentially we are here concerned with the law relating to self-defence, since that is the purpose of 'nuclear deterrence'.

### **Deterrence and the Law relating to Self Defence**

Article 51 of the *UN Charter* states that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member...."

Self defence has attached to it two essential conditions: necessity and proportionality. No action should be taken unless it is necessary to give effect to the right of self defence. In other words, if there is no threat of attack and no likelihood of it occurring it would be demonstrably unlawful to respond with either force or the threat of its use using self defence as a justification. It would be unlawful, therefore, for a state to threaten to use nuclear weapons against another particular state if that state was not posing a threat to it.

There is also an obligation on states either threatening the use or deploying actual force in self-defence to limit their response to what would be proportionate under the circumstances. It is not altogether unreasonable to argue that the threat of the use of nuclear weapons should not be employed to counter a mere conventional threat - for reasons of proportionality. However, if a state is threatened by nuclear weapons, it is also not unreasonable for it to counter that threat with its own nuclear threat. This is the essence of nuclear deterrence. One state possessing nuclear weapons and apparently posing a threat to

another is legitimately countered by an opposing nuclear threat. There is nothing necessarily disproportionate about this. Indeed, there is an essential symmetry about it. Beyond that, the threat of nuclear retaliation made by a state may be its only realistic means of ensuring that a nuclear opponent does not use its nuclear weapons against it. Here there is the essential component of necessity. The only sure way of defending oneself from attack or the threat of attack by nuclear weapons is to possess those weapons oneself and offer a corresponding counter threat. In the case of a mutual threat - a significant feature of nuclear strategy during the Cold War resulting in the so-called condition of Mutual Assured Destruction (or MAD) - each side is justified in threatening in anticipation of attack in order to deter that attack from materialising. Although it is entirely understandable for this mutually influencing combination of opposing nuclear threats to be regarded as an extremely unfortunate aspect of the modern strategic environment, it may be an absolute necessity if nuclear powers are to be effectively deterred from actually using their weapons against those with whom they have profound disagreement.

### **Nuclear Weapons and the Law of Armed Conflict**

It is often argued that the threat of the use of a weapon must be unlawful if the actual use would lead to an essential breach of the laws of armed conflict (or international humanitarian law). This is certainly true. However, what is not true is that the actual use of nuclear weapons would necessarily breach that body of law in every case.

There is a fundamental requirement in the laws of armed conflict to distinguish between civilians and combatants, the latter being legitimate targets of attack, the former not. Clearly, the sheer destructive potential of nuclear weapons is such that distinguishing between civilians and combatants is virtually impossible (except in the case of tactical nuclear devices deployed at sea - which are not the subject of this paper). However, there are two ways in which civilian casualties are permitted in the law.

The first is when a military objective is targeted and there are civilians killed as a consequence. This is permitted if the civilian casualties are of a proportionate scale to the expected military advantage. However, this is by no means the most important exception in relation to strategic nuclear weapons. Indeed, it is extremely difficult to imagine any real military advantage to be gained as a consequence of a strategic nuclear exchange. Nuclear weapons are not regarded as militarily useful in 'war-fighting' terms. The second instance in which civilian casualties are permitted - the more important in this context - is in the case of reprisals.

The first point that needs to be made about reprisals is that they are profoundly controversial and the undeniable trend in

international law in recent years is towards their abolition as a legitimate method of ensuring compliance with the law. One should also distinguish between 'defensive armed reprisals' used to deter states from illegal resort to force and 'belligerent reprisals' employed during conflict. While controversial, it is emphatically not the case that reprisals are already manifestly unlawful.

Reprisals are not, it should be stressed, about either revenge or retribution; they are not punishment. Rather, they are about the use of otherwise illegitimate means of warfare as a method of ensuring compliance with the law following the breach of that law by an opposing belligerent. Although Article 51(6) of the 1977 *Additional Protocol I to the 1949 Geneva Conventions* forbids the targeting of civilians in reprisal, Britain, in ratifying the protocol, stated that it reserved the right to use reprisals involving the targeting of civilians in response to breaches of Article 51(6) by an opposing belligerent "to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations" under that Article.<sup>[8]</sup> In relation to nuclear weapons, if a state were to use them against Britain, the British government would in turn regard it as lawful to use them against that state as a form of lawful belligerent reprisal. Of course, there remains absolutely no intention on the part of Britain to launch a strategic nuclear attack on anyone - but if others launch a strategic nuclear attack on Britain then they must consider the consequences of so doing, which might include the use of nuclear reprisals by the British as a means of dissuading the belligerent from further use.

## **Conclusions**

Possession of nuclear weapons is not contrary to international law, although the nuclear weapon states are under an obligation to move towards disarmament. Britain is not threatening the territorial integrity or the political independence of other states through its possession of nuclear weapons or through its policy of deterrence. It is, therefore, not guilty of a breach of Article 2(4) of the *UN Charter*. Britain has an inherent right to exercise proportionate and necessary measures in pursuit of its own and collective self defence, in accordance with Article 51 of the *UN Charter*. The only possible rational response to a threat posed to Britain by another state with nuclear weapons is for Britain to possess a capability itself. The threat of use that sits at the heart of the policy of deterrence is fully in accordance with Article 51 of the *UN Charter*. While the use of nuclear weapons as a war-fighting weapon seriously risks the breach of the law of armed conflict relating to the principle of distinction, if another state so breaches Britain might legitimately use nuclear weapons in the context of belligerent reprisals in order to persuade its opponent to comply with the law. It follows from all of this that the British strategic nuclear deterrent capability is lawful; it is fully in accordance

with international law and does not represent a breach of that law in any way. There has never been a persuasive argument deployed to establish illegality. The ICJ certainly did not declare nuclear weapons illegal..

There is, of course, one other question that might usefully be considered. In deciding on the future of its nuclear strategic capability, what might the British Government consider it to be under an obligation to do that is different from what it is doing at present? It may be useful to close with a very brief foray into these areas in order to place the continuing legality in some strategic context.

I am as convinced as I can be that the reasons for the absence of great power war in the sixty years since the end of the Second World War include the presence of an atomic or nuclear dimension to the strategic environment. Nuclear weapons have made a major contribution to maintaining relatively stable conditions as between the 'great powers'. Other factors are, of course, also clearly of some significance, not least the vast array of developments that are collectively described by the word 'globalisation'. States are becoming more interdependent and this has to be a significant influence, as too must be the development of global institutions including the United Nations. Arch-Realists may dismiss the UN as an ineffective product of idealist thinking, but they are wrong entirely to dismiss its impact on the development of norms of behaviour and the need for some measure of international accountability. I am sure that as the processes of globalisation and interdependence continue and as international institutions come to play a greater role within the international system, the chances of great power conflict will further recede. But the possibility has not yet disappeared altogether and, until we can be sure that it has, I feel there will be a need for the precautionary retention of some measure of nuclear capability to balance that of others who may have less benign objectives. That is not to say that Britain's needs are as great today as they were two decades ago when Trident D5 was chosen as a successor system to Polaris.

Whatever the outcome of the forthcoming vote and other decisions within Westminster and Whitehall on the future of the British nuclear strategic deterrent, one option that ought to be considered very seriously indeed is a scaling down of capability. The White Paper implies a reduction in capability. Britain might sensibly reduce, for example to just two submarines and a longer period of readiness, to fewer missiles and to a downgraded (if modernised) warhead arrangement. This would go some way to meeting the obligations on disarmament contained in the *NPT* - but it would also ensure the maintenance of a legitimate strategic deterrent for the foreseeable future, as the international system develops further and we become increasingly confident of the likely absence of great power conflict.

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[1] UK Ministry of Defence, *British Defence Doctrine* (2<sup>nd</sup> Edition), Joint Warfare Publication 0-01, October 2001.

[2] Nuclear weapons free zones have been established by the 1967 *Treaty of Tlatelolco* (Latin America and the Caribbean) the 1986 *Treaty of Rarotonga* (South Pacific), the 1995 *Treaty of Bangkok* (Southeast Asia) and the 1996 *Treaty of Pelindaba* (Africa).

[3] *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion (1997), in *International Legal Materials*, Vol.35 at pages 809-1343. See in particular Paras.57-63

[4] *Nuclear Weapons Case*, Advisory Opinion Paragraph 67.

[5] *Nuclear Weapons Case*, Advisory Opinion, *Dispositif* Paragraph 2E

[6] *Nuclear Weapons Case*, Judge Higgins, Dissenting Opinion, Paragraph 36.

[7] *Nuclear Weapons Case*, Vice-President Schwebel, Dissenting Opinion, Paragraphs 5 and 6.

[8] UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, pp.420-421 (Paragraph 16.19.1).