



World Court Project UK

LEGAL ASPECTS OF THE SUCCESSOR TO TRIDENT

The Public Conscience in Action

The World Court Project is an international citizens' network which is working to publicise and have implemented the 8 July 1996 Advisory Opinion of the International Court of Justice on the legal status of the threat or use of nuclear weapons

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On 4 December 2006 the Government published its White Paper on "*The Future of the United Kingdom's Nuclear Deterrent*". This stated its decision to replace the current Trident-carrying Vanguard-class submarines with new ballistic missile submarines. This information sheet will consider some of the legal implications of the White Paper.

THE NUCLEAR NON-PROLIFERATION TREATY

Article VI of the Nuclear Non-Proliferation Treaty (NPT) says:

Each of the Parties to the Treaty undertakes 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, and on a treaty on general and complete disarmament under strict and effective international control.

The Government claims to stand by "*our unequivocal undertaking to accomplish the total elimination of nuclear weapons.*" As a nuclear weapon state "*recognised under the NPT*" it now has only one "deterrent" system, Trident, with only 160 deployed warheads, untargeted, and under several days' notice to fire. Only one submarine is on patrol at a time. The UK has ratified the Comprehensive Test Ban Treaty. Holdings of fissile materials are transparently recorded and their production has ceased. The UK supports a universal ban on their production.

Para 2-9, of the White Paper (partially repeated in .Box 3-1,

The UK's retention of a nuclear deterrent is fully consistent with our international legal obligations. The NPT recognises the UK's status (along with that of the US, France, Russia and China) as a nuclear weapon State.

In Para 2-10 the White Paper goes on to say:

Article VI of the NPT does not establish any timetable for nuclear disarmament, nor for the general and complete disarmament which provides the context for total nuclear disarmament. Nor does it prohibit maintenance or updating of existing capabilities. ...

Initially we should draw attention to the repeated claim in the White Paper that the UK's nuclear status is "recognised under the NPT". This is not accurate. Words like "recognise", which suggest some sort of diplomatic acceptance, are not used in the Treaty. The Nuclear Weapon States (NWS) are just defined (in Article IX) "for the purposes of this treaty" as those who tested before 1967. The treaty does not give special status to the NWS. It calls upon them to disarm.

In future can the language of "definition", not "recognition" be used to describe the UK's NPT status?

Crucial elements are missing from the White Paper's account of the UK's disarmament obligations. According to this "*general and complete disarmament ... provides the context for total nuclear disarmament.*" This is perilously close to saying that nuclear disarmament is *dependent* on general and complete disarmament - which would postpone nuclear disarmament indefinitely.

However, the interpretation of any treaty must accord with its purposes, and the NPT is about nuclear weapons. It is only incidentally about "general and complete disarmament". The preamble is full of commentary such as:

*"Considering the devastation that would be visited upon all mankind by a nuclear war ...", and
" Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament".*

Any doubt about Article VI was dissipated in 1996 when the International Court of Justice (ICJ) ruled unanimously that "*There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control*". The obligation is about nuclear weapons and nuclear weapons only. The Programme of Action adopted unanimously at the 2000 NPT Review Conference confirmed this by separating nuclear from "general" disarmament. We accept that mutual confidence in general disarmament is needed for progress in nuclear disarmament. Even so, there is a legal obligation to achieve nuclear disarmament in and for itself.

In view of the evidence from the sources, would the Government accept that nuclear disarmament and complete and general disarmament are legally independent?

The White Paper makes no comment on the issue of "Good Faith" emphasised in both the NPT and the 1996 ICJ Opinion. The latter rules that nuclear disarmament negotiation should be brought to a conclusion, not just pursued. "Good Faith" means negotiating sincerely, and not operating from entrenched positions. The objective must be pursued consistently and involve real political will. The conclusion must be reached "with all deliberate speed". The White Paper correctly points out that the NPT has no timetable for nuclear disarmament. However, the Treaty entered into force in 1970. Thirty six years is not compatible "with all deliberate speed".

The White Paper claims that the UK continues to make progress on the "13 practical steps" towards nuclear disarmament agreed at the 2000 NPT Review Conference (Box 2-1). These practical steps are a natural and detailed extension of NPT Article VI and should be seen as legally binding. The essential element was "*an unequivocal undertaking by the Nuclear-Weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament.*" This applies to each nuclear state. They are to "*reduce their nuclear arsenals unilaterally*".

The basic requirement of Good Faith is that the parties must not adopt policies which contradict the very purpose of negotiations. Can Trident replacement comply with this? One of the basic assumptions of the White Paper undermines the Good Faith obligation. The Executive Summary says: "*It is not possible accurately to predict the global security environment over the next 20 to 50 years. On our current analysis, we cannot rule out the risk either that a major direct nuclear threat to the UK's vital interests will re-emerge ...*" This sort of speculation, repeated throughout the White Paper, cannot qualify as an imminent need for nuclear assurance. Such possibilities can always be invoked. The UK could well use the same arguments for an even longer extension when the new system itself becomes obsolete.

An upgraded warhead would certainly violate our NPT obligations. However, The White Paper is not forthcoming on this. The Executive Summary says: "*We do not yet have sufficient information to know whether it can, with some refurbishment, be extended beyond that point [the 2020s ...]*"

Does the proposed 20% reduction in warheads meet requirements of the NPT? A scenario in which the warheads were progressively reduced could be compliant with the NPT if progress in this direction were fairly brisk. Such a process should be accompanied by indications that

nuclear weapons will continue to play a diminishing role in the UK's security policy. These might include such steps as storing warheads ashore, abandoning constant submarine patrols and a pledge not to use nuclear weapons first.

However, the White Paper does not seem to be moving in this direction. Para 4-2, refers to *"holding the system continuously at a sufficiently high level of readiness... .."* The new class of boats may well incorporate "radical changes". Although there will be *"no enhancement of the capability of the missile ... it will not be possible to retain our existing Trident D5 missiles in service much beyond 2020"* (White Paper 1.8-9). The Government insists that *"... we will not rule in or out the first use of nuclear warheads"* (White Paper 3-4) and refers to *"the continued availability of a lower-yield from our warheads..."*, thus ensuring indefinitely the "flexibility" of UK nuclear weapons.

The measures listed in the White Paper, such as reducing the number and variety of nuclear weapons and the lengthening of notice to fire, are necessary for full compliance with the NPT; but not sufficient. Britain will retain nuclear weapons fully deployed and ready for a variety of uses indefinitely. This negates the 13 Practical steps of the NPT 2000 Review Conference which include a *"diminishing role for nuclear weapons in security policies ..."* Negotiations cannot be carried out "in good faith" whilst projecting an upgraded nuclear weapon system indefinitely. This casts doubt on the White Paper's claim that it stands by *"our unequivocal undertaking to accomplish the total elimination of nuclear weapons"*. Furthermore Trident Renewal. means building more submarines and developing their support structure.. Could such work in progress be easily reversed if disarmament negotiations made significant progress? It may well inhibit the resolve of UK diplomats in their Good Faith negotiations.

Does the Government accept our account of the requirements of Good Faith negotiations. Do the measures for Trident renewal outlined in the White Paper meet these requirements?

Attempting to forestall objections, the White Paper considers the claim that *"If the UK unilaterally gave up its nuclear deterrent, this would encourage others to follow suit"* Its response is that there is *"no evidence or likelihood that others would follow the UK down a unilateralist route."* (White Paper Box 3-1). Objections, however, are more sophisticated than this. Firstly, there is the reaction of nuclear-capable states who may well take Trident renewal as a signal to go down the nuclear weapons path. Article X of the treaty allows a state to withdraw *"if it decides that extraordinary events, ... have jeopardized the supreme interests of its country."* - a path already taken by North Korea.

Furthermore the UK could fulfil its *"unequivocal undertaking to accomplish the total elimination of nuclear weapons."* by adopting a policy of "constructive non-renewal" in which nuclear weapons are seen to become less central to our security policy. The UK could take a leading role in several groupings in the UN such as the New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand, South Africa and Sweden), states belonging to Latin America and Caribbean Nuclear-Free Zone, and some NATO states. One possibility is mentioned in Annex A of the White Paper. This is the Seven Country Initiative which includes Australia, Chile, Indonesia, Norway, Romania, South Africa and the United Kingdom. It contains modest disarmament proposals. Observers report that this would make more progress if one of its members, the UK, were willing to reduce its dependence on nuclear weapons.

Disarmament negotiations, however, have a low priority. Mike Gapes MP recently asked the Prime Minister whether he remains committed to public consultation on Trident renewal. and if he *"will make renewed efforts to secure international negotiations as called for under article VI of the non-proliferation treaty?"*. The reply avoided any commitment to negotiations. He constantly emphasises the right to renew Trident but says nothing about negotiations. **Would UK diplomats be better able to provide leadership in Good Faith negotiations if a policy of "constructive non-renewal", outlined above, were to be adopted?**

INTERNATIONAL HUMANITARIAN LAW

This is the sum total of what the White Paper has to say on the UK's obligations regarding nuclear weapons under international humanitarian law:

(Para 2-11). In 1996 the International Court of Justice delivered an Advisory Opinion which confirmed that the use, or threat of use, of nuclear weapons is subject to the laws of armed conflict, and rejected the argument that such use would necessarily be unlawful. The threshold for the legitimate use of nuclear weapons is clearly a high one. We would only consider using nuclear weapons in self-defence (including the defence of our NATO allies), and even then only in extreme circumstances. The legality of any such use would depend upon the circumstances and the application of the general rules of international law, including those regulating the use of force and the conduct of hostilities.

First of all, the claim that the International Court of Justice (ICJ) "rejected the argument that such use would necessarily be unlawful in all circumstances." is incorrect and disingenuous. In fact, the Court decided not to pronounce on the matter because it did not have enough information.

"However, in view of the current state of international law, and of the elements of fact 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 a State would be at stake" Para 105, 7 (2) E.

The President of the Court said that *this "cannot in any way be interpreted as a half-open door to the recognition of the legality of the threat or use of nuclear weapons"*. (Judge Bedjaoui, Separate Statement, para 11).

In addition it pronounced that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.'

This is not a "rejection" The Government should withdraw its claim that the ICJ "rejected" the necessary illegality of nuclear weapons.

The White Paper says it would use nuclear weapons only "in extreme circumstances". It should also have added the ICJ's additional criterion: ... "in which the very survival of a State would be at stake". Some Government statements suggest that the threshold for use falls well below that of an extreme circumstance involving state survival. For example, the Government has often referred to nuclear weapons defending our "vital interests". These could refer to conventional UK forces overseas under threat from biological or chemical warfare.

We need to know why this vital element is consistently missing from Government statements and what it means by "the very survival of a state", and explain precisely what it means by "vital interests".

The Government accepts that *"The use of nuclear weapons is governed by the same principles of law that govern the use of other weapons, namely the principles of international humanitarian law."* These principles apply to all countries, even if their survival is at stake, and no state can claim immunity from them. The Government should therefore show that UK nuclear weapons can comply with these principles. Mere assertion is not good enough.

It also remains to be seen which warheads will be deployed on whatever replaces Trident, what its yield would be and its likely effects. Only then can Trident's replacement be matched against the principles of international humanitarian law.

There are several IHL principles we could address. We shall concentrate on the principle of discrimination. This says that it is unlawful to direct an attack against the civilian population or civilian objects as such; and only military objectives are legitimate targets of attack. Furthermore even a military target must not be attacked if civilian death or injury is excessive in relation to the concrete and direct military advantage anticipated from the attack.

Our starting point is that nuclear weapons are unique because of their radiation effects. The best evidence of Government thinking on this issue is in the 1995 UK written and oral pleading before the ICJ. The UK argued that if nuclear weapons were used the *intention* would be to destroy military targets through their heat and blast. Radiation, said the UK, is only a side effect. There would therefore be no actual intention to "poison" the enemy through radiation (UK oral pleading 1995 para 3.60).

However, nuclear weapons are "*explosive devices whose energy results from the fusion or fission of the atom.*" (ICJ 1996 Advisory Opinion, para 35). Radiation is of the essence.

The UK might believe that consequences which are inevitable and necessary, but unintended, are not relevant to the legal argument. If this is so, it has to be argued, not merely asserted.

The UK pleadings emphasised the accuracy of small nuclear weapons detonated in isolated areas. These may not violate the IHL principle of discrimination. This, it is argued, would depend on the circumstances prevalent at the time.

We accept that targeting may well be accurate. However, the likely *effects* of a weapon must also be taken into account when assessing discrimination. No one could reliably forecast the complex atmospheric conditions and the direction of the wind at any given moment. The effects would be so unpredictable that accurate targeting would be irrelevant. No nuclear launch could be made with any assurance that its effects would fall within the bounds of legality.

Weapons like the 100 kiloton Trident warhead are designed to detonate as air bursts to cause the maximum damage. Smaller 1-5 kiloton weapons would be exploded on the ground in order to destroy precise targets. It would throw up enormous quantities of radioactive dust which would be sucked into the stratosphere and come down anywhere - even thousands of miles away. This would irradiate unpredictable numbers of people then and well into the future.

Both the UK and the US have consistently asserted that those arguing for illegality claim that all nuclear weapons have certain "inherent" characteristics which inevitably make their threat or use incompatible with international humanitarian law. "*Many of the submissions made to the Court have [assumed] any use of a nuclear weapon will inevitably violate the principles of the law of war ...*" (UK oral pleading page 40).

However, the ICJ stated that because of the "*unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with respect for [the principles and rules of law applicable in armed conflict].*"? (Opinion, para 95). Although nothing can be predicted with certainty we do not have to prove that any threat or use would be inherently illegal under *any* circumstance. We only need to argue the *improbability* of lawful use in any *plausible* scenario.

We know from the UN Charter (Article 2, paragraph 4.) that if an action is unlawful then it is also unlawful to threaten it. It might be argued that mere possession does not count as a threat. However, the UK not only possesses but deploys Trident-armed submarines on permanent patrol and has repeatedly stated that it would use them under certain circumstances.

The Government should explain in what way the deployment of Trident's successor with the stated conditional intention to use it differs from a threat to use it.

Finally our most crucial question is:

Given the unpredictable and widespread effects of nuclear radiation, is there any plausible scenario in which Trident's successor could be used with any certainty that it would comply with the principles of international humanitarian law, in particular the principle of discrimination?