

INLAP/ World Court Project UK

The Public Conscience in Action



INLAP/WORLD COURT PROJECT SUBMISSION TO THE BASIC TRIDENT COMMISSION:OCTOBER 2011

The INLAP/World Court Project UK will address only one of the questions to be raised: (1) Should the UK remain a nuclear weapon state? Most of the argument applies to nuclear weapons in general as well as to Trident, or its replacement.

The World Court Project Argument

World Court Project's position is that we cannot imagine any plausible scenario in which Trident, or its successor, could be used with any certainty that it would comply with the principles of International Humanitarian Law. To ensure that this argument is secure and that it addresses the United Kingdom's view of the legality of the use of nuclear weapons, we must examine the sources.

The UK Government's Position

On 4 December 2006 the Government published its White Paper on "The Future of the United Kingdom's Nuclear Deterrent". This announced its decision to replace the current Trident-carrying Vanguard-class submarines with new ballistic missile submarines. It remains to be seen which warheads will be deployed on whatever replaces Trident, what its yield would be and its likely effects.

This is what the White Paper has to say on the UK's obligations regarding nuclear weapons under international humanitarian law: (IHL) (Para 2-11).

In 1996 the International Court of Justice[ICJ] 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.

From the point of view of a citizen concerned with IHL, the White Paper is not very helpful. It pre-empts discussion of the issues by stating that the legality of use could only be assessed in an actual situation when they might be used. It follows that legal considerations can be dismissed as "hypothetical". The infrastructure and the contingency plans for the use of British nuclear weapons exist in the present, not in some hypothetical future. The same is true of the legal assessment for their use

World Court Project UK is a project of INLAP, the Institute for Law, Accountability and Peace



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The World Court Project is working to abolish nuclear weapons through the law because they violate our human values.

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which the Ministry must have made. We have not seen the details of any such assessment referred to by the UK Government beyond the broad claim that UK nuclear weapons would never be used unlawfully and only in self-defence. This is assertion, not argument.

Uniqueness of Nuclear Weapons

There are several IHL principles we could address. We shall concentrate on the principles of discrimination and proportionality. 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.

The heat and explosive effects of nuclear weapons are immensely destructive. However this level of devastation can be achieved by a sufficient concentration of conventional weapons. More died in the fire bombing of Tokyo than in Hiroshima. What makes nuclear weapons unique is their radioactive fallout. This can cause widespread death and suffering over a wide area and affect many future generations.

The best evidence of Government thinking on this issue is in the 1995 UK written and oral pleadings 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 therefore 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 argument about the relationship of intention to the use of nuclear weapons may owe something to the thinking of Sir Michael Quinlan, former Permanent Secretary at the Ministry of Defence. A recent expression of this can be found in *The Morality of Nuclear Deterrence*. His conclusions are summarised and disputed by Brian Wicker of Pax Christi in a paper on *Double Effect* which argues that a correct analysis of the concepts of action and intention makes proportionate and discriminate use of nuclear weapons impossible.

Nuclear Weapons Cannot be Contained

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.

Weapons like the 100 kiloton Trident warhead are designed to detonate as air bursts to cause the maximum damage. Smaller 1-5 kiloton weapons may well be exploded on the ground in order to destroy precise targets. They 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, possibly in neutral states, then and well into the future.

Furthermore, there is insufficient experience in this area. Nuclear weapons have only been used on populations twice. That was sixty five years ago. Furthermore, there have been no atmospheric tests for some decades. There is also the element of pure contingency including human error. All this suggests that the effects of launching any nuclear weapons would not merely be unpredictable on any particular occasion, but that the unpredictability may well be of the essence. Certainty of outcome, of course, is not possible in any human situation; but it is difficult to see how even a probabilistic assessment could be made. With so many unknown variables the chain of causation could only be constructed after the event; and then it would

be too late. The effects of a nuclear strike may be so catastrophic that the criteria for assessing their effects would need to be correspondingly rigorous.

The unpredictability of the effect of nuclear weapons is explored in detail by Louise Doswald-Beck in her paper, *The International Humanitarian Law Aspects of the Advisory Opinion*.

A Duty of Care

Before ratifying the 1977 Protocol 1 Additional (to the 1949 Geneva Conventions) the UK issued a *Statement of Understanding* which stated that the UK did not accept that new parts of the treaty apply to nuclear weapons: *"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."*

In 1995 the UK's oral statement to the International Court of Justice in the nuclear weapons case said much the same thing: *"... any new provisions introduced into the law of armed conflict by the Additional Protocols would apply only to conventional weapons."* but added *"We fully accept, however, that the use of nuclear weapons is subject to the principles of customary international law, and it is plain that some of the provisions of Additional Protocol I did no more than reaffirm and codify principles of the customary law of armed conflict which already existed and which apply to the use of all weapons, including nuclear weapons."* We can therefore assume that the sections of the Protocol we are concerned with are part of the pre-existing legal principles accepted by the UK.

Article 57/1 of Additional Protocol 1 says: *"In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."* Article 57 (iii) (Precautions in attack) says that states must *"refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."*

Anyone launching a nuclear strike therefore has a duty of care as laid down in the Additional Protocol. A commander in the field, or his or her political superiors, would have to decide whether the immediate military advantage of a nuclear strike would outweigh the likely civilian suffering it would entail. This is the Principle of Proportionality. The commander has a Duty of Care to ensure that non-combatant casualties are minimised.

The UK sees the Duty of Care as a binding rule of IHL. *The Manual of the Law of Armed Conflict*, is the most authoritative possible expression of official UK opinion. It refers explicitly to the language of Protocol 1. Thus: *"(5.32.1) Additional Protocol 1 lays down a general obligation on the parties to the conflict to take care in the conduct of military operations to spare civilians."* and *(5.32.1 .c) [those who plan or decide upon an attack shall]: refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [the rule of proportionality]*

Missing the Point

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 displayed a similar tendency to assume that, as a matter of course, any use of a nuclear weapon will inevitably violate the principles of the law of war designed to protect the civilian population."* (UK oral pleading page 40).

However, our view is a more nuanced two-step one than this. We do not claim that any conceivable nuclear strike would necessarily result in disproportionate civilian casualties. Anything is empirically possible. However the vagaries of atmospheric conditions *at the moment* of a nuclear launch would make

any valid assessment of the balance between military advantage and civilian harm impossible. Chemical weapons suffer in the same way. Thus it is the impossibility of exercising the Duty of Care, as required by Additional Protocol 1 and the Manual, that we claim to be the source of illegality, rather than any violation of discrimination in every imaginable nuclear strike. Nuclear weapon use is not merely unlawful; it makes the application of the law impossible.

The ICJ's Failure to Pronounce

We note the claim in the White Paper that the International Court of Justice (ICJ) "rejected the argument that such use would necessarily be unlawful in all circumstances." A decision not to pronounce is not the same as a rejection.

In fact, the Court decided not to pronounce on the matter because it did not have enough information to formulate a ruling based on IHL.

".....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).

We do not have the relevant facts about Trident or its replacement at our disposal – although the Ministry does. But we can safely assume that the heat, blast and radiation effects of both of them are considerably in excess of the Hiroshima and Nagasaki bombs. The ICJ could not "*conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful*" in certain restricted circumstances. At the same time, it was unable to find any plausible circumstance in which the threat or use of nuclear weapons would be lawful. Neither have we seen any such circumstance referred to by the UK Government.

Conclusion

We conclude that the UK accepts the Duty of Care, as elaborated in the Protocol, as part of IHL and that this applies to nuclear weapons as much as to any other weapon. But the unpredictability of nuclear effects makes it impossible to carry out this duty.