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14 October 2009

Dear Mr Farebrother

Let me begin by thanking you again for arranging for me to speak at the 'Is Government Listening' conference last month. It was, of course, a challenging occasion but it is the duty of Government to listen to the concerns of the public and be held to account by them. As I said then, it is precisely the sort of forum that I believe Ministers should go to. Certainly, I was pleased to have the opportunity to engage with such an informed group and felt that the event went well.

You mentioned to me at the conference that you would write with some further concerns and thank you for the recent e-mail that you sent to my office doing so.

It is extremely important to me that the Ministry of Defence is effective at communicating and explaining the Government's policies clearly. Given the nature of the Department's business, it will of course be more constrained by security concerns than others would be. But wherever we can provide information openly, we should and must do so. As we discussed at the conference, the sheer bulk of correspondence received means that they must in the first instance be handled by someone relatively junior. But that person should be in a position to consult with the appropriate experts to ensure the response provides you with the most considered, relevant and informed advice available including engaging with senior officials where this is necessary. I know that you take great care over the letters you write in to us; and I expect and require the Department to take great care in writing the replies it sends back to you.

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INVESTOR IN PEOPLE



Turning now to the particular issue of our nuclear deterrent, I would like to emphasise to you that the decision to proceed with steps to develop a replacement for Trident was not taken lightly. The UK has been at the forefront of moves to reduce the number of nuclear weapons and I encourage you to read "Lifting the Nuclear Shadow" (available at <http://www.fco.gov.uk/en/fco-in-action/counter-terrorism/weapons/nuclear-weapons/nuclear-paper>) and "The Road to 2010" (available at <http://www.cabinetoffice.gov.uk/reports/roadto2010.aspx>), which set out the Government's vision of a world without nuclear weapons and our plans to make further progress towards that goal.

We have already taken a large number of unilateral steps to ensure we retain only the absolute minimum capability required to provide effective deterrence and the UK is widely recognised as the most forward leaning Nuclear Weapon State on the disarmament agenda. For instance, we have cut the explosive power of our nuclear weapons by 75 per cent since the end of the Cold War and we now have fewer than 160 operationally available nuclear warheads. As and when discussions between the US and Russia have progressed to the level at which our involvement would prove useful, we stand willing to include our system in broader multilateral arms reduction negotiations. In addition, as the Prime Minister recently told the United Nations Security Council, he has asked our national security committee to report on the technical possibility of a future reduction of our nuclear weapon submarines from four to three.

However, my view is that the time is not right for the UK to unilaterally disarm. Prior to the Parliamentary vote in March 2007, which approved the development of a replacement for Trident, the Ministry of Defence carefully analysed the current and likely international security environment. This work was published in a White Paper "The Future of the UK's Nuclear Deterrent" (available at <http://www.official-documents.gov.uk/documents/cm69/6994/asp>) in December 2006. We concluded that there were still risks to UK security from emerging nuclear weapons states and through state sponsored terrorism and that the UK's security was best guaranteed through the continued operation of a nuclear deterrent. However, this is a policy that we keep under constant review.

Let me now turn to the specific issues you raise in your letter.

Firstly, you asked about how the principles of proportionality, necessity and discrimination are applied in general. You may be interested to read our Manual of the Law of Armed Conflict, or Joint Service Publication (JSP) 383, which is a published and publicly available document. I enclose what I feel is the most relevant extract, which explains each of the basic principles and how they link together.



Secondly, you asked whether Trident could ever be used lawfully. As the White Paper sets out, maintaining our nuclear deterrent capability is fully consistent with all of our international obligations. The Advisory Opinion of the International Court of Justice 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. I know that you wish for us to speak about general principles but the fact is that 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. I enclose a further extract from JSP 383 specifically related to nuclear weapons. But as the White Paper states, we deliberately maintain ambiguity about precisely when, how and at what scale we would contemplate use of our nuclear deterrent. Doing otherwise could serve to assist a potential aggressor by enabling it to predict the circumstances in which we might or might not consider the use of our nuclear capabilities. Although we will not define more precisely the circumstances in which we might consider the use of our nuclear deterrent, the UK would not use our weapons, whether conventional or nuclear, in ways which were inconsistent with our international obligations.

At the conference, a further query was raised about the definition of thermobaric weapons. You have kindly provided the contact details of the lady who asked the question, Ms Lesley Docksey, and I have sent a separate reply to her.

I would be pleased to meet with a small group from the conference to discuss your concerns in more detail and have asked my office to get in touch to arrange this.

I hope that this letter is helpful and thank you again for the opportunity to speak at the conference.

Yours sincerely

Bill Rammell MP



## 2

# *Basic Principles of the Law of Armed Conflict*

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### INTRODUCTION

At the outset of any consideration of the law of armed conflict, it must be emphasized that the right of the parties to the conflict to choose methods or means of warfare is not unlimited.<sup>1</sup> Despite the codification of much customary law into treaty form during the last one hundred years, four fundamental principles still underlie the law of armed conflict. These are military necessity, humanity, distinction, and proportionality. The law of armed conflict is consistent with the economic and efficient use of force. It is intended to minimize the suffering caused by armed conflict rather than impede military efficiency. 2.1

### MILITARY NECESSITY

Military necessity permits a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial<sup>2</sup> submission of the enemy at 2.2

<sup>1</sup> This general principle is firmly rooted in the law of armed conflict, see Hague Regulations 1907 (HR) Art 22, Additional Protocol I 1977 (AP I), Art 35(1). AP I, Art 36 also places an obligation on states party to recognize this principle in the development of new weapons.

<sup>2</sup> The traditional wording omits 'partial'. However, armed conflict can have a limited purpose, as in the termination of the occupation of the Falkland Islands in 1982 or of Kuwait in 1991.

the earliest possible moment with the minimum expenditure of life and resources.

2.2.1 The principle of military necessity contains four basic elements:

- a. the force used can be and is being controlled;
- b. since military necessity permits the use of force only if it is 'not otherwise prohibited by the law of armed conflict', necessity cannot excuse a departure from that law;
- c. the use of force in ways which are not otherwise prohibited is legitimate if it is necessary to achieve, as quickly as possible, the complete or partial submission of the enemy;
- d. conversely, the use of force which is not necessary is unlawful, since it involves wanton killing or destruction.

2.2.2 Military necessity was defined as long ago as 1863 in the Lieber Code as 'those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'.<sup>3</sup> The principle is encapsulated in the Preamble to the St Petersburg Declaration 1868 that the only legitimate object which states should endeavour to accomplish in war is to weaken the military forces of the enemy and that for this purpose it is sufficient to disable the greatest possible number of men.

2.2.3 The practical application of the principle of military necessity has been described, in the context of belligerent occupation, as follows:

Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operation. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication, or any other property that might be utilized by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit the wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.<sup>4</sup>

<sup>3</sup> Lieber Code, Art 14.

<sup>4</sup> *The Hostages Case (United States v List and others)* (1980) 8 WCR 34.

### Military necessity cannot justify departure from the law of armed conflict

It was formerly argued by some that necessity might permit a commander to ignore the laws of war when it was essential to do so to avoid defeat, to escape from extreme danger, or for the realization of the purpose of the war.<sup>5</sup> The argument is now obsolete as the modern law of armed conflict takes full account of military necessity.<sup>6</sup> Necessity cannot be used to justify actions prohibited by law. The means to achieve military victory are not unlimited. Armed conflict must be carried on within the limits of international law, including the restraints inherent in the concept of necessity.<sup>7</sup> 2.3

### HUMANITY

Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes. 2.4

The principle of humanity is based on the notion that once a military purpose has been achieved, the further infliction of suffering is unnecessary. Thus, if an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action. 2.4.1

However, civilian immunity does not make unlawful the unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military objectives, provided that the incidental casualties and damage are not excessive in relation to the concrete and direct military advantage anticipated. This is the principle of proportionality.<sup>8</sup> 2.4.2

The principle of humanity can be found in the Martens Clause in the Preamble to Hague Convention IV 1907.<sup>9</sup> It incorporates the earlier rules of 2.4.3

<sup>5</sup> These arguments were mainly advanced by German theorists, such as Lueder, between 1871 and 1914, and are summed up in the translated maxim 'The purpose of war overrides its exigencies'.

<sup>6</sup> There are numerous examples of allowances for military necessity in the Geneva Conventions 1949, the Hague Cultural Property Convention 1954, and AP I, see the list in WA Solf and J Ashley Roach (eds), *Index of International Humanitarian Law* (1987) 152.

<sup>7</sup> See J Cameron (ed), *The Peleus Trial* (1948) where the defendant claimed unsuccessfully that he was under an operational necessity to protect his boat and crew. Similarly, self-preservation or military necessity can never provide an excuse for the murder of prisoners of war. See also para 8.32.

<sup>8</sup> Which is explained in paras 2.6 and 5.33.

<sup>9</sup> '[I]n cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the

chivalry that opposing combatants were entitled to respect and honour. From this flowed the duty to provide humane treatment to the wounded and those who had become prisoners of war.

## DISTINCTION

- 2.5 Since military operations are to be conducted only against the enemy's armed forces and military objectives, there must be a clear distinction between the armed forces and civilians, or between combatants and non-combatants, and between objects that might legitimately be attacked and those that are protected from attack.
- 2.5.1 The principle of distinction, sometimes referred to as the principle of discrimination or identification, separates combatants from non-combatants and legitimate military targets from civilian objects. This principle, and its application to warfare, is given expression in Additional Protocol I 1977.<sup>10</sup>
- 2.5.2 Only combatants<sup>11</sup> are permitted to take a direct part in hostilities.<sup>12</sup> It follows that they may be attacked. Civilians may not take a direct part in hostilities and, for so long as they refrain from doing so, are protected from attack.<sup>13</sup> Taking a direct part in hostilities is more narrowly construed than simply making a contribution to the war effort. Thus working in a munitions factory or otherwise supplying or supporting the war effort does not justify the targeting of civilians so doing. However, munitions factories are legitimate military targets and civilians working there, though not themselves legitimate targets, are at risk if those targets are attacked. Such incidental damage is controlled by the principle of proportionality.<sup>14</sup>
- 2.5.3 As with personnel, the attacker also has to distinguish between civilian objects and military targets. This obligation is dependent on the quality of the information available to the commander at the time he makes decisions. If he makes reasonable efforts to gather intelligence, reviews the intelligence available to him and concludes in good faith that he is attacking a legitimate military target, he does not automatically violate the principle of distinction if the target turns out to be of a different and civilian nature.

usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.' A more recent version of this clause can be found in AP I, Art 1(2) and AP II, Preamble.

<sup>10</sup> AP I, Arts 48 and 49(3). Although the application of AP I to naval warfare is somewhat limited, the principle of discrimination is inherent in customary law.

<sup>11</sup> AP I, Art 43(1), (2).

<sup>12</sup> AP I, Art 43(2).

<sup>13</sup> AP I, Art 51(2), (3).

<sup>14</sup> See paras 2.6 and 5.33.

## PROPORTIONALITY

The principle of proportionality requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage. 2.6

Additional Protocol I is the first treaty to set out the principle of proportionality specifically. Despite its importance, proportionality is not the subject of a separate article but is to be found in two different references. In the first, it features as an example of an attack that is prohibited because it is indiscriminate.<sup>15</sup> In the second, it appears in almost identical language in the article dealing with precautions in attack.<sup>16</sup> That article requires commanders to cancel, suspend, or re-plan attacks if they may be expected to offend the proportionality principle. 2.6.1

The principle of proportionality is a link between the principles of military necessity and humanity. It is most evident in connection with the reduction of incidental damage caused by military operations. 2.6.2

A munitions factory may be such an important military objective that the death of civilians working there would not be disproportionate to the military gain achieved by destroying the factory. A more significant factor may be the number of incidental casualties and the amount of property damage caused among civilians living nearby if the factory is in a populated area. The explosion of a munitions factory may cause serious collateral damage but that is a risk of war that would not automatically offend the proportionality rule. In such a case, the likely civilian casualties must be weighed against the military advantages which are expected to result from the attack. 2.6.3

### Applying the principle of proportionality

Modern, smart weaponry has increased the options available to the military planner. He needs not only to assess what feasible precautions can be taken to minimize incidental loss but also to make a comparison between different methods of conducting operations, so as to be able to choose the least damaging method compatible with military success. 2.7

The application of the proportionality principle is not always straightforward. Sometimes a method of attack that would minimize the risk to civilians may involve increased risk to the attacking forces. The law is not 2.7.1

<sup>15</sup> [A]n 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': API, Art 51(5)(b).

<sup>16</sup> API, Art 57(2)(a)(iii) and (b).



clear as to the degree of risk that the attacker must accept. The proportionality principle does not itself require the attacker to accept increased risk. Rather, it requires him to refrain from attacks that may be expected to cause excessive collateral damage. It will be a question of fact whether alternative, practically possible methods of attack would reduce the collateral risks. If they would, the attacker may have to accept the increased risk as being the only way of pursuing an attack in a proportionate way.

- 2.7.2 Even where human shields are being used,<sup>17</sup> the proportionality rule must be considered. However, if the defenders put civilians or civilian objects at risk by placing military objectives in their midst or by placing civilians in or near military objectives, this is a factor to be taken into account in favour of the attackers in considering the legality of attacks on those objectives.
- 2.7.3 It is reported that, during the Gulf War of 1991, Iraq pursued a deliberate policy of placing military objectives near protected objects, for example, near mosques, medical facilities, and cultural property. Examples included dispersing military helicopters in residential areas, storing military supplies in mosques, schools, and hospitals, including a cache of Silkworm missiles in a school in Kuwait City, placing fighter aircraft near the ancient site of Ur and chemical weapons production equipment in a sugar factory.<sup>18</sup>

#### **Proportionality in the use of force in international relations**

- 2.8 It is also necessary to take account of the legal basis on which force is exercised as this may impose additional constraints on the level of force used. It is generally accepted that the use of force must be proportionate to its overall objective. In this respect, it is important to distinguish between the limitations on the level of force which is required to achieve the overall objective of the armed conflict (for example, national self-defence) and the legal limitations on the level of force required to achieve a particular military objective.
- 2.8.1 Self-defence may also place limitations upon the choice of targets and weaponry. Even an attack on a legitimate military target may be an unjustifiable escalation of the conflict. Thus a minor frontier incursion by infantry may not be sufficient to justify an artillery barrage against a concentration of units well away from the area of incursion. However, what is proportionate can only be judged in the particular circumstances of the case.
- 2.8.2 In the Falklands conflict, 1982 and the Gulf conflict, 1991, there were defined and limited goals: to re-take the occupied territories, not to pursue a war of conquest against Argentina or Iraq.

<sup>17</sup> Such use is, in any event, unlawful, see API, Art 51(7).

<sup>18</sup> US Department of Defense, *Conduct of the Persian Gulf War*, Final Report to Congress (1992) (Department of Defense Report) 613.

is not limited to such devices nor is it limited to weapons that kill or injure by explosion.

#### NUCLEAR WEAPONS

There is no specific rule of international law, express or implied, which prohibits the use of nuclear weapons. The legality of their use depends upon the application of the general rules of international law, including those regulating the use of force<sup>81</sup> and the conduct of hostilities.<sup>82</sup> Those rules cannot be applied in isolation from any factual context to imply a prohibition of a general nature.<sup>83</sup> 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'.<sup>84</sup> 6.17

The threshold for the legitimate use of nuclear weapons is clearly a high one.<sup>85</sup> The United Kingdom would only consider using nuclear weapons in self-defence, including the defence of its NATO allies, and even then only in extreme circumstances. 6.17.1

The United Kingdom has given a unilateral assurance that it will not use nuclear weapons against non-nuclear weapons states parties to the Treaty on the Non-Proliferation of Nuclear Weapons 1968. The assurance does not apply in the case of an invasion or any other attack on the United Kingdom, its Overseas Territories, its armed forces, its allies, or on a state towards which it has a security commitment, carried out by a non-nuclear weapon state in association or alliance with a nuclear weapon state. An assurance 6.17.2

<sup>81</sup> See para 1.3 onwards. <sup>82</sup> See Ch 5.

<sup>83</sup> For example, the argument that attacks with nuclear weapons are necessarily indiscriminate.

<sup>84</sup> Statement made by UK on ratification of AP I to reflect the terms on which the negotiations leading to AP I were entered into. See also the statements relating to nuclear weapons made on ratification of AP I by Belgium, Canada, Germany, Italy, The Netherlands, and Spain and on signature by the USA: Roberts and Guelff, *Documents*, 499–512. France made a similar statement when it acceded to AP I on 11 April 2001.

<sup>85</sup> In its Advisory Opinion of 8 July 1996, (1974) 110 ILR 163, 165–166, the International Court of Justice declared (unanimously) that 'there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such' but (by a majority) that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict'. The court stated, however, that it could not definitively conclude 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 was at stake.

in virtually identical terms has been given in memoranda signed with Belarus, Kazakhstan, and Ukraine. Further, the United Kingdom has given treaty-based assurances in the same terms to the states in Latin America and the South Pacific which are parties to the treaties establishing nuclear weapons-free zones in those regions.<sup>86</sup> The Antarctic Treaty<sup>87</sup> prohibits any nuclear explosion in Antarctica. There are various other prohibitions, for example on installing or testing nuclear weapons on the seabed<sup>88</sup> and in outer space.<sup>89</sup>

#### NON-LETHAL WEAPONS

- 6.18 There is no treaty dealing specifically with non-lethal weapons as such and so the general principles enunciated in paragraphs 6.1 to 6.4 apply. When assessing their legality, each device and its effects would need to be examined to establish whether its use was in accordance with existing international law.
- 6.18.1 Non-lethal weapons are weapons that are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment.<sup>90</sup>
- 6.18.2 Devices such as water cannon, plastic bullets, CS gas, stun grenades, electronic jammers, and laser weapons would fall within this category. So would acoustic devices or those causing metal embrittlement or entanglement. CS gas and laser weapons are dealt with in paragraphs 6.8 and 6.15.<sup>91</sup>
- 6.18.3 Generally speaking, devices that temporarily incapacitate combatants or that have only anti-materiel applications are, from the legal point of view, to be preferred to lethal weapons or those that cause permanent harm to individuals.

<sup>86</sup> Once Protocol 1 to the African Nuclear-Weapon-Free-Zone Treaty comes into force, a similar assurance will be in place for states party to that Treaty.

<sup>87</sup> Antarctic Treaty 1959.

<sup>88</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof 1971.

<sup>89</sup> Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies 1967.

<sup>90</sup> Annex to C-M (99) 44 dated 14 September 1999, Final Report of the Non-Lethal Weapons Policy Team (NLWPT), approved by the North Atlantic Council under the silence procedure on 27 September 1999.

<sup>91</sup> Electronic and computer warfare is not considered to be part of non-lethal warfare but is separately addressed as information warfare (IW).