

Navy Commanders' Public Brawl over Legality of Nuclear Attack Orders

By John LaForge

In a rare, publicly aired dispute between Naval command officers over responsibility for nuclear weapons attacks, two retired British submarine commanders have openly attacked each other's views in writing. The online confrontation opened a window to the tortured thinking inside high-level preparations for attacks using thermonuclear weapons.

The headline in *The Ferret* in Scotland: "Trident commanders 'not legally responsible' for nuclear attack."

The very public verbal brawl — between Rear Admiral John Gower, a former submarine commander and retired leading ministry official, and retired submarine Commander Robert Forsyth — appeared on the website of the Nautilus Institute, a British military think tank, in an exchange of six lengthy letters between September 2019 and January 2020.

What caused the uproar was Adm. Gower's claim that British submarine captains do not have any right to question, much less refuse, an order to launch their nuclear weapons.

Adm. Gower wrote: "The military has no formal role in the advice or decision upon whether to launch" nuclear-armed ballistic missiles, which are all on its Trident submarines. "There was then, and there is now, no latitude for a CO (or XO) [commanding officer or executive officer] to delay or refuse a launch order on any basis," he wrote.

Gower's position creates — in the phrase coined by Professor Robert J. Lytton — an "atrocious producing situation" by institutionalizing blind obedience. And the world knows what this led to in Hitler's fascist regime. The claim that submarine commanders have no choice but to obey when ordered to attack with nuclear weapons is a clear violation of the Nuremberg Charter, Principles and Judgment.

It was Gower's shocking assertion that such orders cannot be disobeyed that forced Cdr. Forsyth to publicly lambast his comrade in arms.

"We knew our missiles were targeted to take out Moscow — the so called 'Moscow Criterion' — and that this would cause appallingly disproportionate and indiscriminate deaths to millions of the civilian population by blast and fire immediately and, for decades to come, through radiation," Cdr. Forsyth wrote. "We knew that such a strike would be well outside any accepted international humanitarian law."

"This is factually wrong," Adm. Gowers replied, although he admitted that authoritative warnings about unlawful indiscriminate destruction have existed for

decades, writing, "Although the ICRC [International Committee of the Red Cross] made statements in 1945 and 1950 on the consequences of atomic weapons use, these were not legal judgments."

Cdr. Forsyth answered explicitly pointing to the law imposed by the Allies on the defeated Nazis:

"Nuremberg Principle IV states, 'The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law.' Unquestioning obedience to a superior's order is not enough. The UK Joint Service Manual of the Law of Armed Conflict itself states that military commanders '... have a responsibility to cancel or suspend the attack if it turns out that the object to be attacked is going to be such that the proportionality rule would be breached.' So it is the CO himself who must make a considered and informed decision as to whether he should obey the order."

To this Adm. Gower rejoined: "Successive Attorneys General ... have maintained confidence in their judgment that in the extreme circumstances where



A view of the Holocaust Memorial in Berlin.

the employment of the nuclear weapons might be justified, they can be so employed in ways consistent with IHL" [International Humanitarian Law].

Cdr. Forsyth rejected this claim writing, "Rear Admiral Gower states that he is prepared to put his faith in the Attorney General's infallibility, and that a *Trident* CO can similarly assume that any order to fire will be fully compliant with International Humanitarian Law. He suggests that as a 'lay' person I should not question the Government's legally obtained position. To which I say, 'What about Iraq 2003 and the Chilcot Inquiry?'" The reference is to the July 2016 House of Commons report that castigated and condemned the UK's role in the US-led military bombardment and occupation of Iraq.

Forsyth continued: "Rear Admiral Gower suggests that the COs of [nuclear-armed subs] are absolved

of any responsibility because they do not have knowledge of the targets or other specifics of the attack nor have any discretion in carrying out the order. However, there is no reference to such words in the Nuremberg Principles." Cdr. Forsyth reminded Gower of military personnel's responsibility under international law to disobey unlawful orders "provided a moral choice was in fact possible." He wrote, "The CO needs to know the facts to make a moral choice; moreover, he has discretion by virtue of his Captain's Key which must be turned to give his permission to fire. ... The CO could well be placed in involuntary legal jeopardy if he obeys without question not knowing the facts."

Adm. Gower then resorted to name calling, having lost the argument on the legal basis. Gower wrote, "Those who seek unilateral disarmament of the UK have begun to use this personal threat against the [commanding officer] as a means of undermining the moral component of the deterrent."

But Cdr. Forsyth wasn't distracted. "The crucial question," he concluded, "is whether Adm. Gower's statement that a military commander with the responsibility and discretion to withhold fire is, as he asserts, uniquely exempt from the provisions of the Nuremberg Principles and Article 33 of the Rome Statute of the International Criminal Court."

In an email, Professor Francis Boyle at the University of Illinois provided one answer to the crucial question: "The Nuremberg Charter and Judgment were unanimously approved by a UN General Assembly Resolution making them customary international law."

To read the full exchange see: <https://nautilus.org/napsnet/napsnet-special-reports/united-kingdom-nuclear-weapon-command-control-and-communications/>

Nukewatch Staffer to Appeal Protest Conviction in Germany

— Continued from page 2

Germany by the WW II allies, with US Supreme Court Justice Robert Jackson as chief prosecutor leading the charge. Nuremberg law declares that planning and preparing indiscriminate attacks is criminal before the fact. Our actions were taken to prevent the illegal preparations for massacres using US nuclear weapons that take place at the base."

In the May 31 trial, Attorney Busl read John's written testimony and introduced several supporting documents including formal declarations by international law expert Anabel Dwyer of Ann Arbor, Michigan, and by retired German judges Bernd Hahnfeld and Ulf Panzer. Judge Fleckenstein said international law was irrelevant to the charges and was better suited for consideration by higher courts.

After similar convictions in the campaign against the "sharing" of US nuclear weapons in Germany, gravity bombs known as B61s, appeals to higher courts have not been successful. Germany's highest judicial body, the Constitutional Court has ruled that addressing the question of whether deployment is lawful "is not in the public interest."

In view of the court system's refusal to consider international treaty law as a defense to the protest charges, several resisters intend to appeal to the European Court of Human Rights in Strasbourg, France. The ECHR can hear cases of unfair trials under certain circumstances, and the resisters argue that refusing to consider their international law defense constitutes trial court unfairness or judicial bias.

Nukewatch, and the German group Nonviolent Action Abolish Nuclear Weapons (GAAA) coordinated three delegations of US peace activists — in 2017, 2018, and 2019 — to the annual peace encampments near the Büchel Air Base. The delegations participated in vigils, blockades, and "go-in" actions together with resisters from Germany, The Netherlands, Italy, France, and the UK.

Scores of similar actions have taken place at the base over the last 25 years, and over 90 court trials in Cochem have resulted from the long-running campaign which demands: 1) removal of the US H-bombs, 2) cancellation of their replacement with the new bomb, and 3) German ratification of the 2017 Treaty on the Prohibition of Nuclear Weapons.

German High Court Refuses to Hear Appeal by Nuclear Resisters

Germany's Federal Constitutional Court issued a blunt rejection of an appeal from nuclear weapons resisters, on May 4, 2021, without presenting any explanation of its decision. The court did note that under federal law, "reasons need not be given for a decision refusing to accept a constitutional complaint."

Stefanie Augustin of Dortmund, Marion Küpker of Hamburg, and Margriet Boss of Amsterdam were convicted last year in Cochem District Court of property damage and trespass at the Büchel Air Force Base, charges that came after the 18-person go-in action of July 15, 2018. Stefanie and Marion appealed, first to the Regional Court in Koblenz which ruled against them, then to the Constitutional Court in Karlsruhe, the Germany equivalent of the US Supreme Court.

The high court said that its judges unanimously agreed that "the constitutional complaint is not accepted for decision" and that there is "no longer any legal remedy at national level." This finality means the two may now appeal to the European Court of Human Rights in Strasbourg, France, on the grounds that German courts have all unfairly refused to consider the international humanitarian laws and other treaties that forbid any planning and preparations for unlawful, indiscriminate military attacks. The European Court strictly limits the number of appeals it agrees to hear using a stringent set of judicial requirements.

Compensation Proposed for Vets Harmed in Palomares Plutonium Disaster

A proposed federal law would see over 1,600 veterans exposed to plutonium dust while responding to a 1966 US nuclear weapons disaster in Palomares, Spain become eligible for VA benefits and health care. Senator Richard Blumenthal, D-Conn., and Representative Jahana Hayes, D-Conn., introduced the Palomares Veterans Act April 15 to remove barriers to benefits and compensation for the vets who responded to the 1966 disaster. Most of the 1,500 service members were sent to the site without protective clothing or warnings of the radiological hazards. They were exposed to internal and external alpha radiation, after two of the B52's nuclear warheads were blown to pieces dispersing as much as 22 pounds of highly radioactive pulverized plutonium. (See Spring Nukewatch *Quarterly*.)

The Palomares Veterans Act would amend current law and add the cleanup operations at Palomares to the Pentagon's list of its "radiation risk activities." Since many of the veterans of the dangerous cleanup duty have already died, the law would also make surviving spouses and their children eligible for Dependency and Indemnity Compensation — a monetary benefit paid to eligible survivors of veterans whose death resulted from a service-related injury or disease.

In January 1966, a US Air Force B-52 bomber collided with an Air Force KC-135 tanker aircraft over the Spanish village of Palomares, resulting in one of the largest plutonium disasters in history.