WOULD THE MILITARY REALLY HAVE TO OBEY A TRUMP COMMAND TO FIRE A NUCLEAR WEAPON?



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I. INTRODUCTION

In this essay Anthony Colangelo concludes: "An order to use a nuclear weapon instead of a conventional weapon when the same military advantage can be gained by either gives rise to a duty to reject that order. To do otherwise and follow the order would constitute a war crime for which the actor could be held liable."

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This essay was also published in the LA Times oped page here. It is the first publication of the Nautilus Institute project on a Global Nuclear Command, Control and Communications or NC3 Code of Conduct. The project is funded by the MacArthur Foundation.

Banner image: Blast parameters section of Nuclear Bomb Effects Computer (Glasstone), here.

II. NAPSNET SPECIAL REPORT BY ANTHONY J. COLANGELO

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At a security conference late last month, the commander of the U.S. Pacific Fleet was asked what he would do if President Trump ordered him “to make a nuclear attack on China.” The commander, Adm. Scott Swift, answered promptly that he would, framing the issue as one of democratic governance and civilian control of the military.

“Every member of the U.S. military has sworn an oath … to obey the officers and the president of the United States as the commander in chief appointed over us,” he said.

But is that quite right? Isn’t there such a thing as an illegal order? And if so, what kind of right or, more accurately, what kind of duty exists to disobey it?

How can, say, the commander of the U.S. Pacific fleet know if an order is so obviously illegal that he’d be held liable?

Second point first: As a matter of fact, it is illegal to obey an obviously illegal order. Indeed, the law clearly rejects the “superior orders” defense. Colloquially put, the defense goes something like this: “I cannot be liable for carrying out an illegal act because I was simply following orders.” At least since the Nazis were prosecuted for war crimes and crimes against humanity at Nuremberg, this defense has largely disintegrated.

If — continuing the Nazi parallel — the “commander in chief appointed over us” tells military officials to commit genocide, they can’t legally go along with it. Legally, they must say no.

But how can, say, the commander of the U.S. Pacific fleet know if an order is so obviously illegal that he’d be held liable?

Under international and U.S. law, the order must be “manifestly” or “clearly” illegal, not just of

debatable or arguable legality. What this means is that the person ordered to launch or to plan the launch knows or should know that the order is illegal. The Department of Defense manual cites as an example firing on the shipwrecked. An order to shoot an innocent civilian in the head also would qualify.

The *kind* of weapon used is, of course, germane as well. The law of war — otherwise known as humanitarian law — is designed to protect civilian life and reduce suffering even though, inevitably, in armed conflict there will be some amount of civilian death and suffering.

Nuclear weapons are obviously more catastrophic than conventional weapons. Therefore, any time the same or similar military advantage can be gained by using a conventional as opposed to a nuclear weapon, the legal thing to do is stick to conventional weapons. Using the nuclear option in such a situation actually constitutes a serious violation of international law. Following such an order is, in turn, a war crime under Additional Protocol I to the Geneva Conventions on the Law of War, which binds all states.

At least five unique characteristics ominously separate nuclear weapons from conventional weapons in ways that promise to increase civilian death and suffering.

First, quantitatively, the blast power, heat and energy generated far outstrip that of conventional weapons. Second, the radiation released is so powerful that it damages DNA and causes death and severe health defects throughout the entire lives of survivors as well as their children exposed in utero. Third, nuclear weapons make impossible humanitarian assistance to survivors at the blast scene struggling to survive, leading to more suffering and death. Fourth, damage to the environment leads to widespread famine and starvation. And fifth, nuclear weapons cause long-lasting multi-generational psychological injury to survivors of the blast.

All of these factors weigh heavily against the humanitarian goals of the law of war, which again is designed chiefly to prevent and reduce civilian death and suffering.

So anyone ordered to plan or launch a nuclear strike is on notice: An order to use a nuclear weapon instead of a conventional weapon when the same military advantage can be gained by either gives rise to a duty to reject that order. To do otherwise and follow the order would constitute a war crime for which the actor could be held liable.

III. NAUTILUS INVITES YOUR RESPONSE

The Nautilus Asia Peace and Security Network invites your responses to this report. Please send responses to: nautilus@nautilus.org. Responses will be considered for redistribution to the network only if they include the author's name, affiliation, and explicit consent.

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