

# Judgement and the Bomb

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**The International Court of Justice in The Hague has come close to ruling out the use of nuclear weapons as illegal. A retired Royal Navy Commander urges Britain to take a lead towards a nuclear-free world.**

A judgement by the International Court of Justice this month could decisively shift the image of nuclear weapons. The World Court's opinion, delivered, fittingly, in the Peace Palace at The Hague on 8 July, may well be remembered as the moment when a nuclear weapon-free world became more than a dream.

The World Court was responding to a resolution of the United Nations General Assembly, adopted on 15 December 1994 by a clear majority, despite desperate counter-moves by the Nato nuclear powers, which asked: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The court came close to answering with a categorical "No".

The Nato nuclear states and Russia (China took no part) warned the court that it would be ruling, in France's words, "not on an innocuous question but on an essential problem . . . one which is at the core of the national defence systems of a large number of states", at public hearings held in November 1995. The United States and Britain added that an advisory opinion from the court "could seriously disrupt current arms control negotiations" – a clear reference to the stalled Comprehensive Test Ban Treaty negotiations in Geneva.

When these talks resume on 29 July, the participants will have to contend with the unanimous demand by the World Court's 14 judges that the nuclear powers honour their obligations under article VI of the Nuclear Non-Proliferation Treaty "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". More remarkably, the court declared that the threat or use of nuclear weapons would be "contrary to the rules of international law applicable to armed conflict" in almost any imaginable circumstance. The only exception, in paragraph E of its advisory opinion (of which more later), was that "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".

The vote on these last two findings was seven to seven, with the court's president – the Algerian judge Bedjaoui – casting a second deciding vote. Since three of the judges dissented because they wanted no such exception, however, the vote for general illegality was, effectively, 10 to 4. The British Government had advised the court to use its

discretion not to answer a "hypothetical and essentially political" question. By declining to do so, the court asserted its function as the UN's judicial organ to uphold the law against the sweeping powers of the five permanent members of the Security Council.

The World Court Project, an international network of lawyers, doctors and peace activists, evolved the novel idea of using the court via a General Assembly resolution. They argued that the 1993 Chemical Weapons Convention outlawed any use of these weapons of mass destruction regardless of size, even in self-defence. Yet there is no such specific prohibition of nuclear weapons, although the effects of the blast and heat they generate are uniquely severe,

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**Britain could lead a powerful new drive for rapid prohibition of nuclear weapons. Such a bold U-turn would be widely welcomed**

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extensive and longlasting, and the genetic damage caused by radioactivity is cumulative through an unknown number of generations.

The project drew upon the anti-nuclear majority of UN member states, and by-passed the declared nuclear weapon states' veto in the Security Council. Also it mobilised the public conscience in a new way. Some 3.7 million individuals, mostly in Japan, signed Declarations of Public Conscience which were presented to the court, contending that nuclear weapons are morally wrong. They invoked the "de Martens" clause of the 1907 Hague Convention, which requires the court to take into account the "dictates of the public conscience" when judging the conduct of war. This was the first time the court had accepted "citizens' evidence" in support of a case.

Forty-five governments participated, twice the number in any previous World Court case. More than two-thirds argued for illegality, and only Germany and Italy testified orally in support of the Nato nuclear trio and Russia at the public hearings. The mayors of Hiroshima and Nagasaki, allowed to testify by the Japanese government after strong public pressure, were eloquent ambassadors for the victims of their cities,

devastated by nuclear bombs in the Second World War.

The implications of the court's decision are far-reaching. For example, the option to use nuclear weapons first, which Nato has insisted on, is now illegal; as is the new sub-strategic deterrence doctrine of Britain and France, threatening "rogue" states with a low-yield warning shot in defence of their "vital interests". Moreover, by voting with the president, the Russian and Chinese judges indicated a split among the permanent five members of the UN Security Council.

The Chinese judge Shi stated that in his opinion deterrence "is within the realm of politics, not that of law", but that it "should be an object of regulation by law". The Italian judge supported him, adding that "the concept of deterrence has no legal value". Most significant of all, the British judge Dame Rosalyn Higgins effectively outlawed any use of Trident, the main British nuclear weapon, when she argued that "a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs . . . To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful".

In my view, as a former operator of nuclear weapons in the Fleet Air Arm, this places a duty on all military professionals in the nuclear states to review their whole attitude to nuclear weapons, which are now effectively in the same category as chemical and biological weapons. They need to know that the court cited the Nuremberg principles as part of the body of customary international law which is now confirmed to apply to nuclear weapons. Ironically, the Security Council unanimously endorsed these principles when setting up the War Crimes Tribunal on Bosnia.

Military leaders who shrug off this court opinion must be reminded that what distinguishes them from hired killers or terrorists is respect for the law: military, international and domestic. In his statement justifying his casting vote, Judge Bedjaoui wrote: "There will be those who will not fail to interpret paragraph E as envisaging the possibility of states having recourse to nuclear arms in exceptional circumstances. I cannot insist strongly enough that the inability of the court to go further than the point it actually reached cannot in any way be interpreted as itself evidence of a [loophole] for the recognition of the legal permissibility of threatening or using nuclear weapons."

Paradoxically, this crisis for the declared nuclear weapon states offers an opportunity for Britain. The moment has come for one of these nuclear powers to break ranks. Britain is well placed to take the lead: it has the smallest nuclear arsenal and is increasingly dependent on the United States, and Trident is a growing embarrassment to the Royal Navy and Treasury. Such a bold U-turn would be widely welcomed by world opinion, following global outrage at Chinese and French tests and the deadlock over the Comprehensive Test Ban Treaty negotiations. Opinion polls last October showed that, even in Britain and France, just over half the people now reject nuclear weapons. How about that for Britain's contribution to the new millennium?