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 decide the current state of internationa1 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 143-0 vote, despite the abstentions of the United States, Britain and France. The court was 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 the elimination of nuclear weapons. The court declared that the threat or use of nuclear weapons is "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 certain specific circumstances, the court may consider it permissible to use nuclear weapons for self-defence or collective self-defence to avoid an existential threat to a state, but such a use would have to be in accordance with international law and with the principles and norms contained in the international law of armed conflict and the law applicable in international armed conflict".

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

The judge Shi stated that in his opinion the court's decision is "in the foundation of the rights of the 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 under international law 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 not now effectively in the same category as chemical and biological weapons. They need to know that the court cited the Nuremberg principles 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 Crime Tribunal before the Second World War. 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 Besjakow said: "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 self-evident 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 provides 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 the 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?"