Nuclear Weapons, the Military and the Law: Reflections on the World Court Decision

Robert Green, Commander, Royal Navy (Retired)

Nuclear weapons," so the saying goes, "cannot be disinvented." Yet the present policy of the declared nuclear weapon states of trying to impose nuclear apartheid by force provokes the spread of nuclear weapons, rather than supporting the stated goal of non-proliferation. The only way out of this lethal spiral is to accept global nuclear disarmament by consistent use of the law -- as the world is already doing with chemical and biological weapons.

For the British pronuclear establishment, the belief in the role of nuclear weapons is as much a matter of theology as it is a political creed -- a kind of nuclear fundamentalism. This may help to explain the deep taboo against challenging nuclear weapons in the British military, which is very conservative and very tribal. Nevertheless, we need to think carefully about how we approach the military in the nuclear weapon states because, particularly in the U.S. and the UK, military leaders may hold the key to whether we are going to get rid of nuclear weapons within the next ten years.

RG is the first former British Navy Commander with nuclear weapons experience to have spoken out against nuclear weapons and, at the time of publication, was the UK Chair of the World Court Project, an international citizens' network that persuaded the UN to ask the International Court of Justice for an advisory opinion on the legal status of nuclear weapons. This article is based on his address to the International Physicians for the Prevention of Nuclear War 12th World Congress, in Worcester, Massachusetts USA, on 25 July 1996.

The Essence of the World Court Decision

The terms of the World Court decision [1], though complex, are straightforward. First, it has already made the world safer. The window of opportunity for nuclear disarmament created by the end of the Cold War will not last. But the Court's advisory opinion has given us a new, legal stop to keep that window open for a while longer. The opinion has also strengthened the political and military inhibitions against the actual use or threatened use of nuclear weapons.

Second, the Court has implicitly confirmed that to oppose nuclear weapons is lawful. This has huge implications for domestic courts dealing with nuclear protesters, for those military professionals involved in deploying nuclear weapons, and for the political leaders who issue orders to the military. Antinuclear campaigners who consider nonviolent direct action an appropriate response now have a powerful new defence.

Third, the Court has effectively placed nuclear weapons in the stigmatised category of chemical and biological weapons. That is very important for the military. What is at stake here is a crucial distinction between military professionals and hired killers or terrorists: military professionals need to be seen as acting within the law. Even before chemical and biological weapons were banned by specific conventions, military professionals

shunned chemical or biological weapons, which are too repulsive and indiscriminate in their consequences. The Court confirmed that, as far as destructive power and radiation effects are concerned, nuclear weapons are far worse. Indeed, Court President Mohammed Bedjaoui called them "the ultimate evil" [1].

The Court also determined that "a threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict," particularly those of humanitarian law [1]. In so doing, it confirmed that the Nuremberg Principles apply to nuclear weapons [1].

The Court added a caveat:

> "However, 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."

Nonetheless, even in such an extreme case, threat or use must comply with the principles and rules of humanitarian law [1].

No attempt was made to separate use from threatened use. The Court thereby endorsed the view that the Law of Peace and Security (jus ad bellum), as it has evolved since the adoption of the UN Charter, treats "threat or use" as a single, indivisible concept. Moreover, the Court stated that the notions of "threat" and "use" of force under Article 2, paragraph 4 of the Charter stand together in the sense that if the use of force is illegal, the threat to use force will likewise be illegal [1].

The very concept of deterrence is meaningless without a credible willingness to use nuclear weapons. Thus nuclear weapon operators now must be advised that the Nuremberg Principles require them to consider whether to obey an order even to threaten to use nuclear weapons. This has immediate implications for the new UK-France joint nuclear doctrine of threatening "rogue" states, nuclear-armed or not, with a low-yield warning strike if British or French "vital interests" anywhere in the world are at risk [2]. That policy is now clearly illegal. So are both the U.S. doctrine of "counter-proliferation sub-strategic deterrence" and the insistence by all the nuclear states except China on the option to use nuclear weapons first.

To take a particular example, the legal position of Trident ballistic missile submarine (SSBN) patrols should be urgently reviewed. Despite the fact that all UK SSBN-deployed warheads are currently targeted on some hapless spot in the Atlantic following a detargeting agreement with Russia, the Commanding Officer of one SSBN recently said: "Unless we are ready to do it, and people know we will, deterrence cannot work" [3]. Warheads can be retargeted in seconds.

If, as one may now argue based on the Court's decision, these patrols are now unlawful, then they should be stopped, the missiles offloaded, and the warheads separated from them and put into storage. This is recommended by the Canberra Commission on the Elimination of Nuclear Weapons [4]. The Commission argues that such decommissioning

> "would reduce dramatically the chance of an accidental or unauthorised nuclear weapon launch. It would have a most positive influence on the political climate among the nuclear weapon states and help set the stage for intensified cooperation. Taking nuclear forces off alert could be verified by national technical means and nuclear weapon state inspection arrangements. In the first instance, reductions in alert status could be adopted by the nuclear weapon states unilaterally."

SSBN crews could still train without missiles embarked, using computer simulation.

Finally, the Court unanimously agreed that "there exists an obligation 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" [1]. This went further than Article VI of the Non-Proliferation Treaty by omitting reference to a treaty on general and complete disarmament -- behind which the nuclear states have hidden until now.

The Practical Impact of the Court Opinion

How best can those working for the abolition of nuclear weapons use the Court's decision? The first priority is to spread the word about it. Provided that the public are informed, the Opinion will undermine the common perception in the NATO nuclear states -- especially among the military -- that nuclear weapons are a security asset and a "necessary evil." It will help politicians who support nuclear disarmament take the legal high ground against the pronuclear lobby,

1. 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, provided a moral choice was in fact possible for him."

who are now vulnerable to accusations of flouting the law.

With a majority of public opinion in the U.S. and the UK -- but not yet in France -- now against nuclear weapons, the Opinion can be used in a new drive for nuclear disarmament that can be presented as responsible, upholding the law, and discrediting nuclear weapons as political symbols of virility . Central to this struggle for compliance will be the challenge to the persisting assumption among NATO decision-makers that "nuclear might is right."

The central aim of Abolition 2000, the network of citizen groups worldwide into which the World Court Project has merged, is to have in place by the beginning of the new millenium a global treaty, comparable to the Chemical Weapons Convention, that sets a firm timetable for the complete elimination of nuclear weapons. The overwhelming majority of antinuclear states should have the courage of their convictions and offer the Court decision to the nuclear states as a golden bridge across which they can retreat from their unsustainable position.

The British Reaction: Official and Unofficial Resistance

So far, the British government has offered only the following response:

> "The Court's advisory opinion is long and complex and we are studying it. But we note that, amongst other things, the Court concluded by a large majority that there is in international law no comprehensive and universal prohibition of the threat or use of nuclear weapons as such" [5].

Had there been such a prohibition, of course, there would have been no need for the UN General Assembly to ask the question!

This response fails to acknowledge that, "amongst other things," the Court stated in its preceding sentence that "(t)here is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons." Moreover, the Court did not find any lawful circumstance for the threat, let alone use, of nuclear weapons. Yet the British government added:

> "We do not believe that the Opinion gives rise to any new factors affecting the fundamentals of UK and NATO defence policy, including the continuing importance of nuclear deterrence in maintaining peace and stability in Europe. Nor do we believe that the Court's Opinion imposes any new disarmament obligations on us."

To a more specific challenge, the government replied: "We do not believe the Court's advisory opinion will have any implications for the Commanding Officers of our SSBNs" [6].

The Royal Navy operates the half-completed British Trident force. A supporter of the World Court Project asked a retired Admiral (for whom the author worked as his Staff Intelligence Officer) what he thought the effect of a Court decision for illegality might be on a commanding officer of a Trident submarine. The admiral wisely replied: "I don't know. I'll find out." He went to the British Chief Naval Judge Advocate -- the UK's chief naval lawyer -- who rather unwisely sent him the following statement, obtained legally by the author:

> "If the ICJ (International Court of Justice) were to give an adverse opinion, a repudiation of the ICJ's view by the nuclear powers would attract some adverse publicity and the opprobrium of some members of the international community; but it is inconceivable, given their existing policies, that the nuclear powers would be presently prepared to relinquish possession of nuclear weapons.
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> "Much will depend on the rationale of the ICJ's interpretation of the law, but if the Court were to deliver an adverse opinion, it would be ignored by the nuclear powers; and the servants of the states concerned, including SSBN Commanding Officers, would not be acting illegally in obeying the orders and carrying out the policies of the state of which they were citizens" [7].

Where is Nuremberg? Make no mistake: the Nuremberg Principles are fundamental to the reputation of the Royal Navy as upholders of the law. When challenged about the Chief Naval Judge Advocate's statement, the government replied that this was "a strictly personal opinion given in response to a private enquiry." The statement was not repudiated. Getting the British government to rethink its position and bringing the Chief Naval Judge Advocate back onto the right side of the Nuremberg Principles are important priorities (1). The interest being shown in this by some influential journalists is encouraging.

When former U.S. Navy Rear Admiral Eugene Carroll was briefed about the British

statement, he suggested that this question had never been asked of the Pentagon, let alone answered. Perhaps the moment has come for the growing antinuclear contingent of former U.S. military leaders to take on this task.

Of course, the Nuremberg Principles apply to civilian citizens, too. Principle VII prohibits "complicity in the commission of a crime against peace, a war crime, or a crime against humanity." So the struggle is now really beginning to generate the political will to bring political and military leaders -- particularly those of the three NATO nuclear states -- into line with both the law and majority public opinion about nuclear weapons.

Analogies with the Anti-Slavery Movement

There are some fascinating parallels between the nuclear abolition movement and the campaign to abolish slavery. Slavery was called a "necessary evil"; it was considered "cost- effective"; slaveholders said there was "no alternative"; and that it was "not against the law." The anti-slavery campaign began in Britain. This was one of the few times that the British stood up first for a human rights issue, mobilised the public, and won. Surprisingly, the campaign focused on the illegality of slavery -- not just the cruelty. The recognition of the illegality of slavery and the pressure of public opinion finally forced the politicians to vote against a system that underpinned their wealth. The law and public conscience can again be harnessed to rein in the three former great slaving nations: the U.S., the UK, and France.

Abolishing slavery took about fifty years. The campaign began in 1785 and the equivalent of a Convention was in place by 1833. The antinuclear movement is considered by some to have begun around 1958. Therefore we have about another ten years to match the pace of the antislavery campaign. The slavery abolitionists accomplished their goal on horseback without telephones, faxes, email, photocopiers, or the UN.

The World Court Project exploited the General Assembly's ability to by-pass the Security Council veto. The World Court is the UN's judicial body. The General Assembly used it not just to clarify the legal status of nuclear weapons. What the Court also did was to assert its vital responsibility to call to account the permanent Security Council members and to check their tendency to disregard, and even violate, international law [8].

As with the abolition of slavery, it is necessary to persuade decision makers not merely that the current policy is counterproductive, but also that the proposed replacement should work at least as well. This is where the Canberra Commission's report comes in. The Commission rightly warned that legal agreements can only support political negotiations towards a nuclear weapon-free world [4]. "We the peoples," however, must use the law to generate the necessary political will. ❧

References

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