

The Debate

Legality of Nuclear Deterrence

Sir, Commander Green makes the comment that the International Court of Justice's (ICJ) Advisory Opinion on nuclear weapons 'constituted a historic breakthrough by implicitly confirming that nuclear deterrence is unlawful.' This is emphatically not the case. Indeed, the Court actually made it very clear in Paragraph 67 of its Opinion that it did not 'intend to pronounce ... on the practice known as the "policy of deterrence".'

The problem with the Advisory Opinion is that it can be used by both sides in the debate over nuclear weapons to claim that the Court either accepted legality or declared nuclear weapons illegal. That said, it is remarkably misleading for anyone to make the claim that Commander Green makes. Indeed, much to the obvious annoyance of the anti-nuclear lobby, the Court went on in its *dispositif* to state that it was not able to 'conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme

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circumstance of self defence, in which the very survival of the state would be at stake'. This was the reason why Judge Higgins, in her Dissenting Opinion, took issue with the majority opinion, criticising the Court for effectively avoiding a clear opinion on legality. Vice President Schwebel, in his own Dissenting Opinion, then included a robust defence of nuclear deterrence, pointing out a number of vital points that would have made a declaration of illegality based on practice inconceivable.

It does no side in this particular debate any service for its advocates deliberately to distort what the Court actually said – as Commander Green has done. Nuclear deterrence is a legitimate means of defence against the threat or use of those very weapons by a potential

opponent; indeed, it is the only defence that has obtained any evidence to support claims of effectiveness and is, therefore, fully in tune with the right acknowledged in Article 51 of the UN Charter. Arguably, the denial of the legality of nuclear deterrence would merely serve to undermine the very right to which Article 51 alludes.

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Sir, The International Court of Justice (ICJ), wishing to avoid a direct conflict with the five recognised nuclear weapon states – all of which subscribe to nuclear deterrence policies – stated that it would not specifically comment on the legal status of nuclear deterrence. This could have been linked to pressure from the nuclear weapon states. For example, at the Oral Proceedings on the case in 1995 the French delegate warned 'against any pronouncement which, directly or indirectly, might imply judgment being passed on a defence policy based on deterrence'. The UK echoed the US when it said that 'to call in question now the legal basis of the system of deterrence on which so many states have relied for so long for the protection of their peoples could have a profoundly destabilising effect.'

Dr Haines cites US Judge Schwebel in support. Yet Schwebel's main argument was that, because nuclear deterrence apparently worked in the 1991 Gulf War (a highly contentious claim), it was justified in law! This revealed an unacceptable attitude for a supposedly impartial judge, whereby he had allowed his evidently pro-nuclear views to take precedence over the law. No doubt for this reason, his was not a majority ICJ view.

Despite such pressures, the ICJ did not shrink from stating in paragraph 36 of its main Opinion that it took account of the 'unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human

suffering, and their ability to cause damage to generations to come.' The next paragraph reads: 'The Court will now address the question of the legality or illegality of recourse to nuclear weapons in light of the provisions of the [UN] Charter relating to the threat or use of force.' The subsequent discussion was clearly about nuclear deterrence, as in the following extract from paragraph 47: 'In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, *no State – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.*' (emphasis added)

The ICJ determined unanimously that any threat or use of nuclear weapons must conform to international humanitarian law. It also confirmed that the principles of the law of armed conflict apply to nuclear weapons. Then in paragraph 95 it concluded: 'In view of the

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unique characteristics of nuclear weapons ... the use of such weapons in fact seems scarcely reconcilable with such requirements.' There is no scenario where the use of even a single 100 kiloton UK Trident warhead – eight times the explosive power of the Hiroshima bomb – could be lawful. Thereby, the Court cleverly affirmed the general illegality of the fundamental practice which constitutes nuclear deterrence, while offering a face-saving way for the nuclear weapon states to extract themselves from a policy upon which they remain needlessly impaled.

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