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THE ROLE OF LAW STUDENTS AND LAWYERS IN THE DEBATE OVER NUCLEAR ARMS

ROBERT F. DRINAN*

Permit me to express our deepest thanks to Professor Myres McDougal. We stand in admiration of all of the things he has written. He is the one force which, more than anything else, has brought us together here.

I want to commend the students and the faculty of this fine law school. Just this morning I thought that if this symposium were happening in all of the law schools all over the country, we would have a moral revolution in the land.

Let me also commend Ambassador Smith, the architect of SALT I, for sharing his transcendent wisdom with us. He was kind enough to speak recently to my class on Arms Control and Disarmament at Georgetown University Law Center. He is one of the heroes of this conference and, truly, of Western culture.

This is a new moment for lawyers. We should note, however, that we are lagging in our concern about nuclear proliferation. Individuals and groups interested in social responsibility have been out in the forefront, struggling for the control of nuclear weapons.¹ Among these groups are some of the religious leaders of this country, especially the Catholic bishops.²

I was very proud to have played some small part in the statement issued by the American Bar Association in August 1982 in San Fran-

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1. "Twenty-six national organizations with a combined membership at 18 million have formed a coalition, (to be known as Citizens Against Nuclear War), to campaign for a reduction in nuclear arms." N.Y. Times, Oct. 17, 1982, at 44, col. 3. According to Terry Herndon, executive director of the National Education Association, the group would aim for a "bilateral, verifiable arms reduction with a freeze as a start." *Id.* See also *infra* note 5.

2. A committee of Roman Catholic bishops recently drafted a major statement on nuclear arms. On May 2, 1983, the Roman Catholic bishops of the United States ratified the pastoral resolution by a resounding 238 to 9 votes. In the conclusion of the letter, the bishops stated: "In simple terms, we are saying that good ends, defending one's country, protecting freedom, etc., cannot justify immoral means, the use of weapons which kill indiscriminately and threaten whole societies. We feel that our world and nation are headed in the wrong direction." N.Y. Times, May 4, 1983, § I, at 1, col. 5. See also J. CASTELLI, *THE BISHOPS AND THE BOMB* (1983).

cisco.³ It was the first time in twenty-seven years that the ABA spoke about the nuclear arms race. Although its position was not exactly world shattering, at least the American Bar Association recognized that the rule of law has to be extended to the area of arms control.

Law students everywhere are going to meet again on November 11, 1982 to focus on this topic in events orchestrated by the Union of Concerned Scientists.⁴ I think, furthermore, that on November 2, 1982, something very important is going to happen. One-fourth to one-third of the electorate will have the opportunity to vote on the nuclear freeze.⁵ I would assume that these voters would do more or less what Wisconsin did—approve the nuclear freeze by a vote of two or three to one.⁶

We wonder more and more about this question: Could the nuclear arms race become the number one issue in the presidential race of 1984? I think that it could, if enough people are concerned and angry, and that, of course, could change the history of the world. This possibility was apparent when I was in New York City on June 12, 1982, at the anti-nuclear demonstration.⁷ Speaking before 700,000 people was a

3. The ABA's House of Delegates passed a resolution calling for "serious negotiations to end the nuclear arms race" and an end "to conduct and rhetoric that invite nuclear confrontation." The resolution, however, was not meant to endorse either a nuclear freeze or a unilateral nuclear disarmament. *N.Y. Times*, Aug. 11, 1982, at A11, col. 5.

4. One year before, on November 11, 1981, a teach-in on the threat of nuclear war was staged on 151 college campuses. The purpose of the program was to provide national awareness to the problems of nuclear war and to encourage multinational nuclear arms reduction. The two themes stressed most often were the common interests shared by both Soviet and United States citizens in limiting nuclear arms, and the concern that the Reagan Administration appears to believe that a limited nuclear war can be fought and won. *N.Y. Times*, Nov. 12, 1981, at A18, col. 1.

5. On Tuesday, November 2, 1982, voters in 8 states and several major cities voted on a worldwide nuclear freeze resolution. Combined, the voters amounted to one-fourth of the nation's population. The resolution was defeated in only one state, Arizona, and in two small counties in Arkansas and Colorado. It was the largest referendum on a single issue in the nation's history.

The states of Massachusetts, Michigan, Montana, New Jersey, North Dakota, Oregon, Rhode Island and California passed the resolution. Joining them were the District of Columbia, Chicago, Philadelphia, Denver, New Haven and 25 smaller cities and counties. The purpose of the resolution was to pressure the Reagan Administration to reach an arms accord with the Soviet Union more quickly. *N.Y. Times*, Nov. 4, 1982, at A22, col. 4.

6. Seventy-six percent of the voters in that state voted for a "material nuclear weapons moratorium and reduction, with suitable verification," between the United States and the Soviet Union. *N.Y. Times*, Sept. 16, 1982, at B17, col. 1.

7. "The demonstration was far larger than any during the antiwar movement of the late 1960's and early 70's, and was possibly the largest ever in the city. The organizers said that it was the biggest disarmament gathering in the nation's history." The rally, which started in Dag Hammarskjöld Plaza and proceeded to the Great Lawn in Central

thrilling experience. It was the largest demonstration in the history of the country and paralleled demonstrations which, as you know, have been going on all over Europe.⁸

Allow me to make three points with regard to the nuclear debate and the role of lawyers in this debate. First, let us touch on some of the victories which we have had in the area of arms control. Second, let us look at what might happen in the future and what part lawyers can play. Third, and most important, let us discuss what law students and lawyers should do in the immediate future about the nuclear arms race.

I think that guilt is building in America on this question. It is perceptible among students, among others and particularly among church leaders. Jonathan Schell has taught us to be frightened, ashamed and terrified.⁹ The nuclear freeze movement came about because the people saw that the Reagan Administration was doing virtually nothing to control nuclear weapons. The nuclear freeze concept, though, is still very ambiguous and very indefinite.

What is the future of the freeze? Although I recently wrote a book entitled *Beyond the Nuclear Freeze*,¹⁰ even I do not know precisely what to recommend to you. That is why this conference is more important than you may realize; lawyers, and the rest of us, do not know what the next step is.

In the light of this fact, we should go back and ask ourselves where arms control advocates have succeeded in the past. The United States signed the Test Ban Treaty.¹¹ People were horrified in the 1950's that the United States was detonating nuclear weapons in the atmosphere. I recall a story that Dr. Jerome Weisner, then-president of MIT, told about his conversations with President Kennedy when he was his science advisor. During that period, women were constantly demonstrating outside of the White House against the possible presence of strontium in the milk of their children.¹² President Kennedy made Dr. Weisner aware of the demonstrations on more than one occasion. Both of them knew that the mothers were increasing the pressure and that

Park, was to mark the United Nations Second Special Session on Disarmament, which had just begun. N.Y. Times, June 13, 1982, at A1, col. 2.

8. See, e.g., N.Y. Times, June 8, 1982, at 2, col. 4 (rally in Hyde Park, London where British citizens demonstrated against nuclear weapons).

9. J. SCHELL, *THE FATE OF THE EARTH* (1982).

10. R. DRINAN, *BEYOND THE NUCLEAR FREEZE* (1983).

11. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water (Test Ban Treaty), Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

12. See N.Y. Times, Nov. 25, 1961, at 2, col. 2; *id.*, June 4, 1963, at 9, col. 1; *id.*, May 8, 1963, at 17, col. 1.

all over the world people were disturbed about the explosions in the Pacific, in New Mexico and in Nevada. Eventually, President Kennedy signed the Test Ban Treaty.

Unfortunately, the treaty did not go far enough. It did not ban underground testing.¹³ It is my understanding that every administration up to that of President Reagan has been in favor of a comprehensive ban on all nuclear testing.

The nuclear arms problem is without doubt the greatest moral issue in the history of the world. Obviously, it is going to be solved by law. Consequently, it is up to the lawyers to devise a system by which treaties and other international covenants can prevent a holocaust. In addition, somehow the United States, which initiated nuclear warfare, has to stop it.

I commend to you something that Henry Stimpson wrote many years ago to President Truman. Stimpson was the Secretary of War, and he predicted that something dreadful could happen if the United States went forward with the nuclear weapon. Stimpson, in a long letter to Harry Truman, urged that we should trust the other side. He wrote that if the United States does not trust the Soviet Union, that nation would obtain the nuclear weapon. Stimpson was right; the Soviet Union obtained nuclear weapons sooner than was anticipated—in 1949.¹⁴ Ever since that time, the two superpowers have been scorpions in a bottle.

The United States developed the H-bomb.¹⁵ I think we should note in all candor that the United States developed mutual assured destruction or MAD. The United States was the first to develop the concept of massive retaliation. The United States has been a leader, with a few exceptions, in nuclear escalation.

The second victory of arms control advocates was regarding the deployment of the anti-ballistic missile. I recall that in the 1960's the Pentagon wanted to put ABMs in a community in Massachusetts.¹⁶

13. See *supra* note 11. The treaty banned testing in the atmosphere, outer space and under water. *Id.*

14. From 1945 until 1949, the United States had a monopoly of nuclear weapons. By 1949, the United States arsenal consisted of approximately 100-200 bombs. In 1949, the Soviets detonated their first atomic explosive. During the early 1950's, the Soviet Union had to rely on a relatively small number of TU-4 and Badger bombers, which could reach the United States from Soviet bases but could not then return home. THE HARVARD NUCLEAR STUDY GROUP, *LIVING WITH NUCLEAR WEAPONS* 79 (1983).

15. *Id.* at 79, 105. The 1949 detonation of the first Soviet atomic explosive led the United States to develop a much more powerful weapon; the hydrogen bomb, which was a thermonuclear device. The first United States H-bomb was exploded in November 1952; the corresponding Soviet test took place a few months later. *Id.*

16. N.Y. Times, June 15, 1968, at 19, col. 6.

The people of that community rose up and made it very clear that the ABM was not going to be located in their community.¹⁷ All over the country, other people rebelled against the ABM.¹⁸ The Congress, in effect, refused to fund it, and President Nixon went forward with SALT I. With Ambassador Smith's help, SALT I came about.

It seems to me that we have to go back and note that the "people" were involved in the two occasions when something important came about in the field of nuclear arms control. We should, therefore, be delighted that the "people" are once again involved with the nuclear freeze movement. I cannot predict what is going to happen to the freeze. All I know is that people, working together, can bring about change. If enough people understand the hideousness of nuclear war, then something might happen at the national and international levels. I feel certain that President Reagan understands this possibility because he sought to undermine the motivation of those who believe in the nuclear freeze. He indicated that these people are being manipulated, not by good Americans, but by people on the other side.¹⁹ This allegation by the President is particularly unfortunate. It is a statement that harkens back to the McCarthy era. The President's assault on the nuclear freeze movement, and on the integrity of those who believe in it, may be the best thing that ever happened to the movement.

After the invasion of Afghanistan, President Carter withdrew his support for SALT II.²⁰ I think that history may record that President Carter's withdrawal was a mistake. Perhaps he did not have the votes for SALT II in the Senate. Perhaps his motivation was political since Mr. Reagan was campaigning throughout 1980 on the proposition that SALT II was fatally flawed.²¹ In any event, it is to be hoped that SALT II is still a viable option. I am inclined to think that the nuclear freeze, however desirable, is far less desirable than the ratification of SALT II. After all, Brezhnev signed SALT II.²² What do you think the Kremlin's reaction has been to the United States walking away from an agreement reached after what had to be much anguish on the part of the

17. See, e.g., N.Y. Times, Feb. 6, 1969, at 1, col. 7.

18. N.Y. Times, Mar. 7, 1969, at 39, col. 1.

19. Addressing a gathering of five veterans' groups in Columbus, Ohio, President Reagan criticized the National Movement for a Freeze on Nuclear Weapons as a group of "honest and sincere people" who want peace, but who were being manipulated by "some who want the weakening of America." N.Y. Times, Oct. 5, 1982, at A22, col. 1.

20. N.Y. Times, Jan. 3, 1980, at A1, col. 6.

21. N.Y. Times, Mar. 18, 1980, at B8, col. 1.

22. On June 18, 1979, after six years of negotiations, President Carter and Leonid Brezhnev signed an arms control treaty. President Carter returned to the United States immediately to attempt to get congressional approval for the treaty. N.Y. Times, June 19, 1979, at A1, col. 6.

Soviet Politburo? How can we expect trust from the other side when we walked away from an agreement that was hammered out over a period of six years by both Democratic and Republican administrations?

So we come to the key question: Is the nuclear freeze a good idea? It is a good idea in the sense that it is the only idea around—it is the only game in town. The Council for a Livable World, Common Cause and many other public interest lobbies are heavily involved with the nuclear freeze issue. Nuclear disarmament is the number one priority of Common Cause. Is the nuclear freeze the only viable option? The freeze failed in the House by two votes.²³ It never got out of the Foreign Relations Committee of the United States Senate. What should the next step be?

I would urge all law students to become very knowledgeable in this area. You should know whether or not you favor START. It seems to me that START is a very inadequate concept. In any comparison between SALT II, the freeze and START, START comes out a distant third.

Despite the present mood of profound discouragement, I think that we, as lawyers, should be hopeful that a victory is possible. Mankind scored a victory when it abolished chemical and biological warfare. Once again, it was the revulsion of mankind after World War I that abolished these hideous weapons. Humanity in the 1920's formed an international convention banning biological and chemical devices forever.²⁴ Recently, the Reagan Administration asked the Congress to appropriate \$54 million for the production of biological and chemical devices—a practice abandoned by the United States in 1969.²⁵ The Senate went along, but the House did not.²⁶ The question will again be

23. By a vote of 204 to 202, the House of Representatives rejected a call for an immediate freeze in Soviet and American nuclear arsenals. Instead, an alternative arms-reduction resolution, favored by the Reagan Administration, was approved. The substitute measure called for cuts in strategic forces, followed by a freeze. 128 CONG. REC. H5339-59 (daily ed. Aug. 5, 1982) (debate and vote on nuclear freeze).

24. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65.

25. In 1969, President Nixon renounced the use of chemical weapons as well as biological weapons. He also ordered the production of chemical and biological weapons ceased. Since that time, several Congresses and Administrations have denied Pentagon requests that the United States resume production of chemical weapons. Small amounts of money had, however, been allotted to research and development. The Reagan Administration contends that chemical weapons are necessary to deter what intelligence agencies have reported to be the Soviet Union's large chemical warfare capability. N.Y. Times, Jan. 15, 1982, at A1, col. 1.

26. The Senate, by a vote of 49 to 45, approved a \$54 million allocation to produce chemical weapons. 128 CONG. REC. S5198-5212 (daily ed. May 13, 1982). The House,

raised in the next Congress²⁷ since the Administration insists that the United States must have an arsenal of biological and chemical weapons as a deterrent to the other side. The Administration has consistently stated that these devices are being used by the Soviets in Afghanistan and elsewhere.²⁸ Even if that is true, and it may be, I do not feel that the United States should return to something that mankind had abolished as being an immoral method of conducting warfare.

Another question to which law students must devote their attention is the issue of the United States banning the first-use of nuclear weapons. In the Spring 1982 issue of *Foreign Affairs*,²⁹ four eminent foreign policy experts, including Ambassador Smith, set forth the thesis that the United States should forego the first-use of atomic devices.³⁰ The adoption of such a policy would, of course, reverse a long-standing commitment by the United States to use nuclear devices should this become necessary as a result of a conventional attack on members of NATO.³¹ If the United States did abandon its commitment to the first-use of nuclear weapons, it would have to calculate very carefully the necessary increase in the strength of American and NATO conventional forces in Europe.

Let me pull this matter together by stating that the United States was the prime mover in initiating nuclear war. The United States invented the bomb, used the bomb, escalated the arms race, invented the triad and created the process of "MIRVing" the bombs. The United States, in addition, now has the cruise missile, while the Soviet Union is five or ten years away from the possession of that weapon. A momentous decision will be made by the United States if it deploys some 8,000 cruise missiles in Europe. The Soviet Union is desperate for some method by which it can persuade the United States to withdraw the cruise missile. This missile is not strategic and consequently, is not involved in the SALT process.

It is impossible to predict with any accuracy what might happen in a world where five or more nations possess 50,000 nuclear weapons. Let us, nonetheless, look at some possible scenarios. Obviously, everyone

however, by a vote of 251 to 159, barred funds for starting production of binary chemical weapons. 128 CONG. REC. H4498-4503 (daily ed. July 22, 1982).

27. Subsequent to the writing of this article, the House again voted to prohibit the Reagan Administration from starting production on a new form of chemical weapons. 129 CONG. REC. H4000-4015 (daily ed. June 15, 1983).

28. See N.Y. Times, Sept. 15, 1982, at A1, col. 5; see also *id.* Nov. 24, 1982, § 3, at 1, col. 4.

29. Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 FOREIGN AFF. 754 (1982).

30. *Id.*

31. *Id.*

hopes that the status quo, in terms of nuclear stability, will continue. The professionals assert that we have had peace for the thirty-seven years of the nuclear age and predict that this peace will continue. Indeed, many experts state that the relatively long period of peace in Europe since the end of World War II is attributable to the deterrent effect of nuclear weapons possessed by each of the superpowers.³² The dream of nuclear stability might, however, at any moment turn into a nightmare. Jonathan Schell once again has reminded us that we cannot really hope for peace by a continuation of the status quo.³³

Furthermore, the continuation of the present situation involves basic moral issues. Is it right to hold the other side hostage? Is it right to say that we are going to wipe out 257 cities in the Soviet Union if they attack us? The proponents of the nuclear freeze recognize that they do not have all of the answers to these questions, but simply propose that there be a mutual and verifiable freeze on the deployment and development of all nuclear devices.

A second possible scenario could involve the congressional defunding of all nuclear weapons. This type of congressional action is what brought about the end of the Vietnam War. If the American people become increasingly angry over the nuclear situation, a defunding of the nuclear arsenal possessed by the United States could be a possibility. Congress could simply attach a rider to an appropriation bill mandating that not a single dollar be used for nuclear weapons. The bill would, in all probability, be vetoed; Congress would need two-thirds of both houses to defund nuclear weapons. Even the most vehement nuclear pacifist might not want this particular scenario to develop.

The funding of nuclear weapons might become a political question. It is conceivable that one party in the presidential elections in 1984 could commit itself to the termination of all nuclear weapons. The American people, in fact, might well approve of that position. The Harris poll in June 1982 found that the American people, by a proportion of three-to-one, desire to eliminate all nuclear weapons.³⁴

A third scenario involves the possible renunciation by the Soviet Union of nuclear war. In the world after Brezhnev, the Kremlin might come to the conclusion that it cannot possibly keep up with the United States. The Soviet leaders know that the window of vulnerability does not exist and that the United States is mounting its nuclear weapons in ways with which the Soviet Union could hardly compete. The Soviet

32. See, e.g., Kaiser, Leber, Mertes & Schulze, *Nuclear Weapons and The Preservation of Peace*, 61 FOREIGN AFF. 1157 (1982).

33. J. SCHELL, *FATE OF THE EARTH* (1982).

34. For a discussion of the role of public opinion in the nuclear debate, see THE HARVARD NUCLEAR STUDY GROUP, *LIVING WITH NUCLEAR WEAPONS* 6-11 (1983).

leaders might conclude that if they want to remain in power, their only way to achieve that result would be to renounce nuclear weapons. The leaders of the Soviet Union could then claim a tremendous propaganda victory.

Another scenario involves a nuclear cataclysm. The American people are absolutely riddled with fear and guilt about this possibility. The nuclear cataclysm could easily happen by miscalculation, by a computer malfunction or by a simple mistake.

Suppose that the United States detonated a series of bombs and killed 200 million Russians. For the rest of human history, the United States would be remembered as a nation of barbarians. The United States, history would record, killed 200 million people! When a nation is even capable of that, should there not be a basic reconsideration of what that nation stands for? Suppose, on the other hand, that the Soviet Union killed 100 million Americans. Suppose that we did not retaliate for some reason. This nation would be reduced to feudalism. Is anything worth that risk? George Kennan has told us repeatedly that there is nothing in the entire world which is worth the risk of allowing this particular scenario to happen.³⁵

A fifth scenario would involve massive civil disobedience in the United States. Could something like the freedom movement be initiated by those who desire to avoid a nuclear holocaust? Blacks who refused to go to the back of the bus brought about a moral revolution in this nation. Could nuclear pacifists mount such a campaign of massive civil disobedience? Could people who are opposed to nuclear weapons proclaim that they agree with Thoreau who said "dissent without civil disobedience is consent"?³⁶

A last scenario would involve the development of a policy by the United States which would be designed to contain communism, but would accomplish it in an entirely different way. It would be a policy in conformity with the words of the late Pope Paul VI, that the modern word for peace is development. The United States would evolve policies which would feed 800 million people who are chronically malnourished. The United States would provide for those 2 billion new people who will be added to the present world population of 4.2 billion in the

35. George F. Kennan, Professor Emeritus at the Institute for Advanced Study at Princeton University, was United States Ambassador to the Soviet Union in 1952 and to Yugoslavia from 1961-63. He has authored several books on United States foreign policy, including *AMERICAN DIPLOMACY: NINETEEN HUNDRED TO NINETEEN FIFTY* (1969); *THE CLOUD OF DANGER: CURRENT REALITIES OF AMERICAN FOREIGN POLICY* (1977); *MEMOIRS: NINETEEN FIFTY TO NINETEEN SIXTY-THREE* (1972) and *SOVIET-AMERICAN RELATIONS, 1917-1920* (1958).

36. See H.D. THOREAU, *WALDEN and CIVIL DISOBEDIENCE* (O. Thomas ed. 1966).

next seventeen years. The United States, in other words, would evolve a policy which would be designed to bring all of the people in the underdeveloped world to us rather than allow them to be attracted to the other side. This policy would be humanitarian and would coincide with the aims of President Carter, who said these words to the United Nations in 1977: "Last year the nations of the world spent more than 60 times as much equipping each soldier as we did educating each child."³⁷

Everybody knows that mankind spends over \$600 billion a year on arms, almost \$2 billion a day. It is well known that the United States deserves much of the blame for this arms race. It is well known that the arms race has impoverished the poor and that one of the fundamental reasons for poverty, malnutrition and illiteracy in the Third World is the arms race.³⁸

Let me come to my third and most important point: What should lawyers do? Once again, I wish I had the ten commandments here for you. I would urge, first of all, that you know whatever law exists with respect to the nuclear arms race. You have heard at this symposium arguments about the present state of international law on nuclear weapons. I urge you to understand the implications of the *Shimoda*³⁹ decision, in which a district court in Tokyo held in 1963 that the bombing of Hiroshima did in fact violate international law. That result is contrary to the *Lotus*⁴⁰ decision of the Permanent Court of International Justice. The *Lotus* decision apparently is the law that is set forth in the manuals of the United States military services.⁴¹

I was humiliated when the United States in November of 1961 voted the wrong way, in my judgment, in the United Nations.⁴² The

37. N.Y. Times, Oct. 5, 1977, at A12, col. 1.

38. See Thorsson, *Study on Disarmament and Development*, 38 BULL. OF THE ATOMIC SCI. 41 (1982).

39. Judgment of Dec. 7, 1963, District Court of Tokyo, *translated into English and reprinted in full in* 8 JAP. ANN. INT'L L. 212 (1964).

40. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J., ser. A, No. 10—ser. C, No. 13-II, at 343 (Judgment of Sept. 7).

41. See Weston, *The Des Moines Register*, Mar. 27, 1982, (Opinion), at 1. "There is at present no rule of international law expressly prohibiting states from the use of nuclear weapons in warfare. In the absence of any express prohibition, the use of nuclear weapons against enemy combatants and other military objectives, is permitted." (quoting from Article 613, United States Naval Instructions of 1955).

42. Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons, G.A. Res. 1653 (XVI), 16(1) U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1962). The resolution states in part:

The General Assembly,

...

1. Declares that:

question before the General Assembly was whether nuclear war violated the Charter of the United Nations. Fifty-five nations voted for that proposition, twenty voted no and twenty-six abstained.⁴³ The United States voted no. The Soviet Union voted yes.

There is, of course, a growing concern in the legal profession as to the precise meaning of the four Geneva conventions.⁴⁴ These conventions were adopted in 1949 after Hiroshima. They appear to condemn nuclear weapons. The Nuremberg principles⁴⁵ are also clearly relevant. Professor Hans Morgenthau, one of my idols, was quoted at this symposium as saying that: "Nuclear war is not really war at all; it is open massacre; it is uncontrolled by any restraints."⁴⁶

As lawyers, we must consider the basic question of whether or not all of the terms made applicable to war by international law have any relevance to nuclear war. Is nuclear war really war at all in any classical, traditional sense?

Despite all of the difficulties facing lawyers working in the area of

(a) The use of nuclear and thermo-nuclear weapons is contrary to the spirit, letter and aims of the United Nations and, as such, a direct violation of the Charter of the United Nations;

(b) The use of nuclear and thermo-nuclear weapons would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity;

(c) The use of nuclear and thermo-nuclear weapons is a war directed not against an enemy or enemies alone but also against mankind in general, since the peoples of the world not involved in such a war will be subjected to all the evils generated by the use of such weapons;

(d) Any State using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization . . .

Id.

43. *Id.*

44. Convention No. I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Convention No. II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Convention No. III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; and Convention No. IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

45. The Nuremberg Charter declares that the extermination of a civilian population, in whole or in part, is "a crime against humanity." Charter of The International Military Tribunal, Oct. 6, 1945, art. 6(c), 59 Stat. 1555, 1556, E.A.S. No. 472, 13, 14 (1945); see also Wright, *The Law of The Nuremberg Trial*, 41 AM. J. INT'L L. 38-72 (1947).

46. See Papers Delivered at New York Law School Symposium on Nuclear Arms and World Public Order (Oct. 22, 1982) (available at New York Law School Journal of International and Comparative Law).

arms control, I have a great deal of hope for their success because the appeal of law in the United States is enormous. Someone has said recently that the United States, though divided by religion and ethnic background, is united by its adherence to law and to American legal institutions. If the lawyers, therefore, can come forward and enunciate clear principles applicable to nuclear war, a great deal of progress could be made.

It must be remembered, furthermore, that lawyers specialize in diminishing animosity. Bringing people together to bargain with each other and compromise is the essential work of lawyers. In addition, lawyers should note that our adversaries are not the Russian people, but the Soviet leaders. The Russian people are highly regarded by us. We love Tolstoy, we listen to Tchaikovsky and we grew up on the novels of Dostoevski.

In addition, the people of the United States were the allies of the people of the Soviet Union in World War II. Consequently, the present animosity is not one of long historic standing, as is the hostility between Vietnam and China, but a recent development. Let us hope, therefore, that it is something that can be overcome and that the diminishing of hostility can be brought about by lawyers who have the training necessary to dissolve the hysteria which sometimes arises when the word "Communism" or "Marxism" is employed.

Lawyers have yet another legal puzzle to contemplate. Is the nuclear weapon in the possession of the President contrary to the letter or the spirit of the War Powers Act?⁴⁷ It was mentioned at this symposium that in a democracy, we diffuse the power to declare war so that Congress, and Congress alone, has this solemn responsibility. Nonetheless, in the nuclear age we have given that power to but one individual, the President of the United States. He has the power to devastate half of the world. Is that consistent with American tradition and with the overall purposes of the War Powers Act which was passed by Congress over the veto of President Nixon?

Lawyers in this country have had a fantastic influence. We all should be proud of what lawyers have done in the history of the United States. Despite all the criticisms of the legal profession, some justified

47. War Powers Act, 50 U.S.C. §§ 1541-1548 (1973).

(a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Id.

and some not, lawyers have been symbol-makers in the history of the United States. Lawyers wrote the Declaration of Independence and fashioned the United States Constitution. Lawyers, over a period of eight centuries, have hammered out Anglo-American law. This system of justice is the most widely employed and the most influential body of jurisprudence ever devised in the history of man.

The Soviet Union, to some extent, shares some of our basic legal principles. Can lawyers from these two superpowers reconcile the differences of both sides? Lawyers in this country after the Civil War put together the 13th, 14th and 15th Amendments. More recently, lawyers wrote the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968. Lawyers also incorporated into our legal institutions the environmental revolution of the 1970's. No leader at any time has repudiated the great role that lawyers have played in the history of the United States.

Nuclear proliferation is the third of three great crises in the history of the United States. First, there was the question of what we should do about England. This nation very bravely decided to break off our connection with England and have a revolution. People predicted dire consequences, but the result was very constructive. The second great revolution and moral crisis was the Civil War. It tore the country apart. Eventually, the nation came together again and proclaimed equality for all people. The third crisis is, obviously, the one involving nuclear weapons. How can the United States extricate itself from this terrible situation in which it possesses 30,000 nuclear weapons and manufactures 3 more every day, 1,300 every year?

For the first time in the history of the nuclear era, the legal profession is deeply concerned. Throughout the legal profession in the United States there is anxiety and apprehension about the nuclear arms race. From my point of view, this concern is a grace of God that has come for the benefit of us all. I would urge that we not allow this moment of grace to pass.

Scientists and educators, indeed all people, are anxious to do something. This is a time of desperation, as was noted in August of 1982 at the 22nd Pugwash Council that convened in Warsaw.⁴⁸ This council is a group of scientists and public figures that has been meeting to discuss disarmament issues for more than thirty years.⁴⁹ One hundred sixty scientists from thirty-seven nations came together in War-

48. Pugwash Council, *Statement From The Council*, 38 BULL. OF THE ATOM. SCI. 2 (1982).

49. *Id.*

saw⁵⁰ and all agreed that the present is the most terrifying moment in the history of the nuclear era.⁵¹ As a result, these eminent world citizens updated the manifesto of Einstein and Russell of twenty-seven years ago. One section states: "There lies before us, if we choose, continual progress in happiness, knowledge, and wisdom. Shall we, instead choose death, because we cannot forget our quarrels? We appeal, as human beings to human beings; Remember your humanity and forget the rest."⁵²

As lawyers, we have expertise in helping people keep their contracts and fulfill their promises. Mankind made a promise that is written in stone at the mass grave of 200,000 people at Hiroshima. On that tombstone is a promise which lawyers can help humanity carry out: "Sleep well for we will not repeat this evil."

50. *Id.*

51. Pugwash Council, *We now appeal*, 38 BULL. ATOM. SCIENTISTS 4 (1982).

52. *Id.*