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Commentary

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COMMENTARY

PETER WEISS*

The fate of the earth is too important a subject to be left to generals or, for that matter, to bishops, physicians, politicians or lawyers. If there is one group to whom it might properly be left, it is the people who inhabit this earth. Unfortunately, we are still far away, even under the most democratic systems, from developing and implementing techniques for ascertaining the general will and from translating it into action. In the meantime, all professional groups, whether they be specialists of the slide rule, the microscope, the game plan, the written word or the manipulation of ideas, have their role to play.

The role of each professional group must always be predicated on interaction, not only with their colleagues in other disciplines, but with the people at large. Any approach based on the theory "trust us, we know best" is doomed to fail. Most professionals, of course, know better than to trust generals and secretaries of defense. We forget sometimes, that when it comes to large topics, like the survival of the human race, excessive trust in men with white frocks or women with J.D.'s is equally misplaced. Nothing will work unless it gets translated into an irresistible movement of masses of citizens in every corner of the globe, saying to their leaders "Enough! Out of our way! We want to live in peace and justice."

Lawyers should be part of such a movement as citizens. As lawyers, they have a number of things to contribute.

1. *Saying what the law is.* The Lawyers Committee on Nuclear Policy has developed and is continuing to refine legal analyses in support of the following positions:

a. Under international law, the use of nuclear weapons violates the laws of war,¹ the United Nations Charter and the most fundamental

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1. See generally Geneva Convention No. I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces of the Field, August 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, August 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, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Convention No. IV Relative to the Protection of Civilian Persons in

human right of all—the right to life—and constitutes a crime against humanity under the Nuremberg judgment.²

b. The manufacture and possession of such weapons is *per se* illegal and constitutes a crime, or should be criminalized, because there is no conceivable legal use to which nuclear weapons can be put.

c. Under the Constitution, the use—at least the first use—of nuclear weapons at the discretion of the President or his delegates violates the War Powers Clause³ as well as the clause protecting the states against invasion.⁴

Pronouncements by lawyers on the state of the law, or what they believe is the state of the law, do not necessarily result in obedience to the law, any more than moral pronouncements by religious leaders automatically result in ethical behavior. Law and morality, though, are important forces shaping public opinion and public action.

2. *Saying what the law should be.* There is an enormous amount of technical work to be done, both in translating general legal principles into specific legislation and in creating the machinery needed to enforce such legislation. An example of the first approach would be the enactment of municipal legislation or treaties applying the general prohibition of cruel and indiscriminate warfare against civilian populations to the specific case of nuclear weapons. This first approach does not accept the position that nuclear weapons are legal until such legislation is enacted. An example of the latter approach would be the criminalization of the manufacture of nuclear weapons, or the passage of bills cutting off Congressional funds for their testing or manufacture.

3. *Getting judges to say what the law is.* The suggestion of litigation concerning nuclear weapons, whether based on international law, constitutional law or municipal law is often greeted with skepticism. But so, in their times, were efforts to overturn the child labor laws, the separate-but-equal doctrine and the Presidential immunity from suit.

Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Declaration on the Prohibition of the Use of Nuclear and Thermonuclear Weapons, para. 1(a), G.A. Res. 1653 (XVI), 16 U.N. GAOR Supp. (No. 17) at 4, U.N. Doc. A/5100 (1961); The Shimoda Case, Judgement of Dec. 7, 1963, District Court of Tokyo, *translated into English and reprinted in full in* 1964 JAP. Y. B. INT'L L. 759 (1965).

2. 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).

3. U.S. CONST. art. I, § 8.

4. U.S. CONST. art. IV, § 4.

More often than not the law proceeds by baby steps. Unwillingness to take the first step in a suit where the legal theories are tenuous is tantamount to permanent resignation to the *status quo*, because a suit based on sound legal theories is not necessarily one in which a judge has the courage to make a controversial decision in the prevailing political climate.

4. *Offering legal services to fighters for peace.* These services can range from advice on incorporation and tax exemption, to providing assistance in placing nuclear freeze referenda on the ballot, to defending tax resisters and Trident demonstrators. During the Vietnam period, microlitigation in support of draft card burners was as important as the kind of macrolitigation that furnished the decisions in *Massachusetts v. Laird*⁵ and *Holtzman v. Schlesinger*.⁶

5. *Applying legal skills to arms control.* Our estimable sister organization, Lawyers Alliance for Nuclear Arms Control (LANAC), makes a persuasive case for the relevance of legal skills to the analysis of arms control agreements. I salute it for its pioneering and essential work.

6. *Forging an international legal network against nuclear arms.* The survival of humanity is, by definition, a task requiring organization at the transnational level. In recognition of this fact, the Lawyers Committee on Nuclear Policy has a consultative council drawn from a number of countries and is in touch with like-minded groups abroad, such as Lawyers for Nuclear Disarmament in the United Kingdom. In 1982, we organized a major international conference in New York in cooperation with The International Peace Bureau. This conference produced two draft treaties, which were submitted to the United Nations' Second Special Session on Disarmament,⁷ one prohibiting the use of nuclear weapons and the other, their manufacture. We are now beginning work on a second major conference that we hope will bring together legal representatives of the five nuclear powers to discuss some of the questions of common concern.

There is plenty for lawyers to do in the courtroom, in the classroom, in the halls of legislatures and on the barricades. One word of caution, however: the subject before us today is, to put it mildly, the most important subject ever to come before anyone. Peace must be

5. 451 F.2d 26 (1st Cir. 1971).

6. 414 U.S. 1304 (1973).

7. For the record of the Second Special Session of the U.N. General Assembly (SSOD II), see *Concluding Document of the Twelfth Special Session*, U.N. Doc. A/S-12/32 (1982).

“waged” with the last ounce of energy at our command and not merely treated as another project consuming some portion of our 5% *pro bono* time. On the other hand, it would be fatal, I think, to let the battle for nuclear survival become an object in itself, divorced from the web of life and society. As Saul Mendlovitz has said, what we are talking about is the prevention or abolition of war.⁸ Wars start over perceived grievances and grievances are caused by a sense of injustice. It is a fact that many people in this world are more concerned about where their next meal is coming from, whether they will have a roof over their heads tomorrow and whether they can call their countries—or their lives—their own, than about when or where the “big one” will go off. When, at his recent Nobel Prize acceptance speech, Gabriel Garcia Marquez, echoing William Faulkner some thirty years earlier, refused to accept the end of humanity, he was not just talking about nuclear weapons, or about survival, but about survival with justice and dignity. Some lawyers have also been in the forefront of that fight. We cannot win one fight without the other.⁹

8. See Mendlovitz, *Nuclear Arms and World Public Order: A Transformational Perspective*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 419 (1983).

9. Since this speech was delivered there have been a number of judicial decisions involving nuclear weapons issues, one of which is particularly noteworthy. In *Commonwealth v. Berrigan*, 472 A.2d 1099 (Pa. Super. Ct. 1984), the court held that the defense of “justification” in a criminal trial involving symbolic infliction of damage to missile components should have gone to the jury. A second suit, *Greenham Women Against Cruise Missiles v. Reagan*, No. 83 Civ. 8154 DNE (S.D.N.Y. filed Nov. 9, 1983), contains the most complete recital to date of the Constitutional and international law arguments against first-strike nuclear weapons. The pleadings in this case are supported by affidavits of legal and scientific experts. Copies can be obtained from the Center for Constitutional Rights, 853 Broadway, New York, New York 10003.