WHY NUCLEAR WEAPONS ARE ILLEGAL

by

Leon Vickman, Esq.

Booklet 20

WAGING PEACE SERIES

NUCLEAR AGE PEACE FOUNDATION

Peace through Informed Action
WAGING PEACE SERIES

As far as is known, the term "Waging Peace" originated with Warren Wells, late husband of Ethel Wells of Santa Barbara, in a letter to President Eisenhower. It was a long-standing practice of Mr. Wells to keep in close touch with key national figures and give them his views on peace issues as well as other vital matters. This series is dedicated both as a memorial to him and in gratitude to Mrs. Wells for her continued efforts in this cause.

Just as peace is more than the absence of war, waging peace is more than supporting arms reductions. In addition, it embraces positive steps toward genuine harmony. In this series the Foundation publishes and distributes short booklets stressing ideas for attaining peace. Concepts expressed will include views of many authorities, and will not necessarily be those of the Foundation.

Suggestions for topics and your reactions to this issue are welcome. Booklets in this series are available from the Nuclear Age Peace Foundation.

NUCLEAR AGE PEACE FOUNDATION
1187 Coast Village Road, Suite 123
Santa Barbara, CA 93108

Copyright ©1989 Nuclear Age Peace Foundation
Desktop Publishing by Laura Lynch
First Printing, August 1989

WHY NUCLEAR WEAPONS ARE ILLEGAL

by
Leon Vickman, Esq.

Booklet 20
WAGING PEACE SERIES

Nuclear Age Peace Foundation
INTRODUCTION

We know that nuclear weapons are immoral, their purpose being to threaten the death of hundreds of millions of innocent people. We can also deduce that nuclear weapons are undemocratic because they focus power in the hands of a small number of persons. Many argue that these weapons undermine the U.S. Constitution by effectively removing the war making power from the Congress. Military leaders, including Douglas MacArthur, have concluded that nuclear weapons are also suicidal. Philosophers have gone further and reasoned these weapons are “omnicidal,” having the power to destroy all.

To these arguments in opposition to developing and maintaining nuclear arsenals, legal scholars add the proposition that nuclear weapons are illegal under international law. The author of this issue of Waging Peace, Leon Vickman, a California attorney, has summarized the three judicial opinions of a trial he organized under the auspices of a Provisional District World Court, on the issue of the legality of nuclear weapons. The name of the case is “In re: More than 50,000 Nuclear Weapons; The People of the Earth versus China, et al. [The Nuclear Power].” The judicial opinions expressed in this case are not enforceable, but they tell us clearly that international law prohibits the use or threatened use of weapons of indiscriminate mass destruction. Thus, these legal conclusions will only have effect to the extent they influence public opinion — the court of last resort.

I urge you to study this issue of Waging Peace, and judge for yourself the legality of nuclear weapons. As citizens of a nuclear armed nation, each of us bears the responsibility to take necessary actions to bring government military policies into line with international law.

For copies of the Complaint and the full Opinions discussed in this issue of Waging Peace, please write to the Foundation.

David Krieger
President
Nuclear Age Peace Foundation
### WHY NUCLEAR WEAPONS ARE ILLEGAL
by Leon Vickman, Esq.

Let us assume that we have learned of a planet, Alpha, in a distant galaxy, where intelligent life abounds. We have also learned that Alpha is divided into two major military powers, each of which possesses a weapon so powerful that, if used, would destroy all life for thousands of years. Further, we have learned that the power to use the terrible weapons ultimately resides in the hands of one person in each military domain. Finally, we have learned that the highly developed legal system on Alpha has never rendered an opinion as to the legality or illegality of the weapons, since the courts defer, in matters of military decision making, to the military leaders themselves.

What could be said about such a planet:
1) The living things on Alpha are 'crazy.'
2) More information is needed to know how this situation came to pass before a value judgment can be stated.
3) Such a situation is understandable and justifiable.
4) The legal system on Alpha needs to be developed further, so the issues concerning these weapons can be judicially reviewed.

Obviously, just such considerations trouble many persons on our planet, but it is not as easy to discuss as Alpha's situation since we have become numb to the presence of nuclear weapons. Indeed, a majority of the humans on Earth were born after the Hiroshima detonation, and know only the world view of nuclear standoff.

Much has been written about the horrors of nuclear war. An estimated 2.2 billion persons could be killed outright by a major nuclear war, according to the World Health Organization. Can any attorney truly argue that this is not a case for an injunction against such an unbelievable horror?

Surprisingly, until the author undertook to bring such a case before a judicial tribunal, not a single lawsuit squarely addressed the issues of the legality or illegality of the threat of use or actual use of nuclear weapons, and the research, development, production, stockpiling, transporting and support functions related to such weapons. The result was exciting. The people of Earth won.

### The Provisional District World Court

It became clear, after some research, that bringing a lawsuit in a state
or federal court in the United States would not result in a ruling on the merits, since domestic courts consider such issues as the legality of nuclear weapons to be “political questions” which require abstention. Turning to the International Court of Justice in the Hague, under the United Nations Charter, likewise seemed futile, since defendants in any suit must agree to the jurisdiction of the Court, and only nations can sue.

How then to do it? It was necessary to search for a court that was empowered to hear such matters. And it came to pass that such a court was in a formative stage, within a provisional world government, called the Federation of Earth. Under its Constitution, a complete court system could be formed. Upon the author’s urging, a Bill was passed at the Federation’s First Provisional World Parliament in Brighton, England, in 1982, establishing such a court in Los Angeles. The lawsuit was filed soon thereafter, on behalf of all of the persons of Earth, against 28 “nuclear” nations. The defendants were divided into three groups: the superpowers, the nuclear host nations, and the nuclear-capable nations.

Every step of the process was conducted with meticulous care to conform to generally accepted legal procedures. The defendant nations were served numerous times with legal pleadings. (India was the only state to file a responsive pleading, stating it was against the use of nuclear weapons.) Attorney Gaither Kodis of Bellevue, Washington, was appointed to serve as an amicus to the Court, representing the viewpoint of the defendants in briefs and oral argument.

Prestigious Three-Judge Panel Appointed

During the almost six-year duration of the lawsuit, perhaps the most dramatic event other than the court hearing itself, was the appointment of three highly qualified judges to the panel that was to decide the case: Judge Francis A. Boyle, Professor of International Law at the University of Illinois Law School at Champagne, Judge Alfred P. Rubin, Professor of International Law at the School of Law and Diplomacy at Tufts University, and Judge Burns H. Weston, Professor of International Law at the University of Iowa School of Law. The fact that the three judges are leading experts in the field of nuclear weapons law resulted in the three lengthy written opinions by the judges having a far reaching legal effect. As Judge Boyle stated in his Opinion:

Under article 38(1)(d) of the Statute of the International Court of Justice, this Opinion constitutes a “subsidiary means for the determination of rules of law.” It could therefore be relied upon by some future international war crimes tribunal.

The article 38(1)(d)\(^5\) impact of the three opinions cannot be overemphasized, since, as the only legal proceeding on the subject, \textit{In re More than 50,000 Nuclear Weapons} stands as the seminal case in the field.

Indeed, the three judges saw no impediment to hearing the case, though considerable oral argument was devoted to the question of the power or jurisdiction of the Court. When their written opinions were issued on July 1, 1988, they simply stated that: “This tribunal has the necessary jurisdiction,” and went on to discuss the merits of the case in three separate opinions.

The primary purpose of this booklet is to examine the views of each of the Judges, particularly as to those important holdings in which all three concurred.

Injunction Granted; Most Presently Planned Uses Of Nuclear Weapons Found Illegal

The essence of the area of major agreement among the three Judges was that each found that the rules of war do indeed govern nuclear weapons, and these rules prohibit their use or threat of use under virtually all conditions presently contemplated by the superpowers. To support these holdings, all three judges granted the injunction requested by plaintiffs, prohibiting such use and threat of use of nuclear weapons. Two of the three judges also stated that planning for a nuclear war was prohibited.

Initial reactions from the international legal community were quite favorable.\(^6\) It now remains to be seen how the Opinions influence military policy of the defendant nuclear nations.

Although a complete analysis of the three Opinions is beyond the scope of this booklet, a survey of the highlights of each will be presented, with emphasis on the significant areas of agreement among the Judges.

The Boyle Opinion

Judge Boyle, in the most responsive opinion for plaintiffs, began by finding that “The atomic bombings of Hiroshima and Nagasaki constituted crimes against humanity and war crimes as defined by the Nuremberg Charter . . . .” He went on to say:

Article 2(4) of the United Nations charter of 1945 prohibits both the threat and the use of force except in cases of legitimate
self-defence as recognized by article 51 thereof. But although the requirement of legitimate self-defence is a necessary precondition for the legality of any threat or use of force, it is certainly not sufficient. For the legality of any threat or use of force must also take into account the customary and conventional international laws of humanitarian armed conflict.

Thereunder, the threat to use nuclear weapons (i.e. nuclear deterrence/terrorism) constitutes ongoing international criminal activity: Namely, planning, preparation, solicitation and conspiracy to commit crimes against peace, crimes against humanity, war crimes, genocide, as well as grave breaches of the Four Geneva Conventions of 1949, Additional Protocol I of 1977, the Hague Regulations of 1907, and the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948, inter alia. These are the so-called inchoate crimes that under the Nuremberg Principles constitute international crimes in their own right.

The conclusion is inexorable, therefore, that the design, research, testing, production, manufacture, fabrication, transportation, deployment, installation, maintenance, storing, stockpiling, sale, and purchase as well as the threat to use nuclear weapons together with all their essential accouterments are criminal under well recognized principles of international law. Thus, those government decision-makers in the nuclear weapons states with command responsibility for their nuclear weapons establishments are today subject to personal criminal responsibility under the Nuremberg Principles for this criminal practice of nuclear deterrence/terrorism that they have daily inflicted upon all states and peoples of the international community.9

Judge Boyle went on to examine the broad implications of the existence of nuclear weapons:

When nuclear weapons were first developed and used, there was absolutely no consideration given to the rule of law. Thus, nuclear weapons represent the absolute negation of a rule of law both at home and abroad. The very existence of nuclear weapons requires that the rule of law be subverted both at home and abroad.

Furthermore, nuclear weapons are anti-democratic. There has never been any form of meaningful democratic accountability applied to the U.S. nuclear weapons establishment. The American people as individuals or as a whole have never had any significant input into the process of developing nuclear weapons systems except to the extent that Congress has voted blank checks. The very existence of nuclear weapons systems and their requisite degrees of super-secrecy require that our system of government be stealthily anti-democratic.

Finally, the same is true for the Constitution. Constitutional protections became meaningless when nuclear weapons were integrated into the U.S. foreign affairs and defense establishment. Indeed, the U.S. Constitution has become a farce and a facade in the name of national security as a direct result of nuclear weapons. In a similar manner, fundamental principles of legality, democracy and constitutionality have been trampled under foot by all the nuclear weapons states in their mad stampede toward humankind’s nuclear abyss.10

After considerable additional analysis, Judge Boyle concluded by stating: “I would grant the injunctive relief as requested in full by plaintiffs.”11

The Rubin Opinion

Judge Rubin, though taking a quite different legal path than Judge Boyle, came to similar conclusions regarding the applicability of the 1907 Hague Regulations:

The most frequently stated arguments concerning the possible illegality of the use of nuclear weapons focus on their asserted cruelty and indiscriminacy. The basic rules are codified in the 1899/1907 Hague Regulations Respecting the Laws and Customs on War on Land:

Article 22: The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23: In addition to the prohibitions provided by special Conventions, it is especially forbidden —
  a. To employ poison or poisoned weapons;
  e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;
  g. To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.

In addition, bombardment “by whatever means” of “towns, villages, dwellings, or buildings which are undefended is prohibited” (article 25) and in bombardments, all necessary steps must be taken to spare, as much as possible, buildings dedicated to religion, art, science, charitable purposes, historic monuments and the like (article 27). This last article has been further refined and expanded. There are about 60 parties to
either or both of the 1899 and 1907 Regulations, and the articles noted above are usually considered to codify general international law binding even on non-parties.

Despite its generality, article 22 is fundamental. The notion that the means of injuring an enemy is not unlimited—and the obvious implications that such limits as exist are not merely the technological limits on weapons or the policy interest of a belligerent, but relate to “the right” of belligerents—makes legal analysis necessary for the use of any type of weapon. It may seem to be wise policy to ignore the legal considerations involved in proposals to use nuclear weapons, but any state failing to incorporate those considerations in its actual policies would be placed in potential violation of its commitment to the 1899 and 1907 Hague Conventions or the general humanitarian law they reflect.\(^\text{11}\)

Judge Rubin gave to plaintiffs much of what they wanted:

I, therefore, conclude that... both the natural law and the positive law contain major restrictions on the use of nuclear weapons; and that to the degree Defendants structure their military postures in disregard of the legal restraints on the use of nuclear weapons, they risk plunging the world into a political and moral chaos for which they will be answerable before a far higher tribunal than this. Recognizing that no amount of monetary damages can compensate for that injury, and that no threat of earthly punishment is available in the international legal order to deter states as such from such actions, and that the war crimes trials the international legal order permits for individuals’ violations of the laws and customs of war are unlikely to deter even violations of this magnitude by the force-oriented people whom the political systems of the earth tend to put in positions of authority in most militarily capable states part of the Federation of Earth, I conclude that an injunctive remedy is appropriate. Therefore, I would enjoin action by states and political leaders in planning for, and failing to plan feasible alternatives for, the use of nuclear weapons in all circumstances in which that use, including the threat of that use, is forbidden by public international law as set out herein.

Accordingly, with and to the full extent of the power vested in me as Judge of the Provisional District World Court of the Federation of Earth,

I DECLARE that the international humanitarian rules of war apply to nuclear weapons and their use in warfare, and that they severely restrict the use of such weapons in warfare;

I FURTHER DECLARE that the threat or use of nuclear weapons in ways forbidden by those rules in some cases cannot be compensable or properly the subject of reprisal under them, and that in all cases the threat or use of those weapons in ways forbidden by the international humanitarian rules of warfare is of sufficient interest to the general international community to justify that community in taking legal measures to prevent it.

I FURTHER DECLARE that under the view I take of the international legal order, “police action” and other coercive remedies analogous to the remedies the criminal law makes available to nearly all municipal legal orders, is not available in the absence of an international organization realistically capable of carrying out a law enforcement function; that the United Nations Security Council and other organs of the international legal order are not now able to discharge that function; that under the law of the Federation of Earth, an injunctive remedy is available analogous to the remedies many municipal legal orders give to civil claimants.

I, THEREFORE, GRANT to the Plaintiffs, The People of the Earth, an injunction forbidding the threat or use of nuclear weapons in any way violative of international law, including the international humanitarian rules of war.\(^\text{12}\)

The Weston Opinion

Concurring with Judges Boyle and Rubin as to the applicability of the 1907 Hague Regulations, Judge Weston delineated six “core rules” of international law regarding nuclear weapons:

first, that it is prohibited to use weapons or tactics that cause unnecessary and/or aggravated devastation and suffering;

second, that it is prohibited to use weapons or tactics that cause indiscriminate harm as between combatants and non-combatant military and civilian personnel;

third, that it is prohibited to effect reprisals that are disproportionate to their antecedent provocation or to legitimate military objectives, or that are disrespectful of persons, institutions, and resources otherwise protected by the laws of war;

fourth, that it is prohibited to use weapons or tactics that cause widespread, long-term, and severe damage to the natural environment;

fifth, that it is prohibited to use weapons or tactics that violate the neutral jurisdiction of non-participating States;
and sixth, that it is prohibited to use asphyxiating, poisonous, or other gases, and all analogous liquids, materials, or devices, including bacteriological methods of warfare.

"Scorched earth" and "saturation bombing" policies, incendiary and V-weapons, and the tendency generally to interpret the laws of war more in favor of the principle of military necessity than that of humanity naturally lead one to wonder about the vitality of these six core rules. However, despite these policies and practices, it still is correct to conclude that the six core rules continue to count as law and that they are understood juridically to apply to nuclear as well as to so-called conventional weapons.

This conclusion is validated, first, in abundant expressions of legal expectation to the effect that nuclear weapons and warfare do not escape the judgment of these humanitarian rules. Indicative of a far-flung community consensus, they include but are not limited to the following:

- the unanimous adoption by the United Nations General Assembly, on December 11, 1946, after the advent of the nuclear age, of Resolution 95(I), recognizing the principles including the definition of a "war crime" as embracing the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" and of a "crime against civilian population";
- the negotiation and entry into force of the four 1949 Geneva Conventions on the humane conduct of war four years also after the advent of the nuclear age;
- United Nations General Assembly resolutions in 1961 and 1972 declaring the use of nuclear weapons to be "a direct violation of the United Nations Charter," "contrary to the rules of international law and to the laws of humanity," "a crime against mankind and civilization," and therefore a matter of "permanent prohibition";
- the dictum in the 1963 Shimoda Case (the only known judicial tribunal communication on the subject to date) holding that the bombings of Hiroshima and Nagasaki were contrary to international law in general and to the laws of war in particular;
- resolutions of the International Committee of the Red Cross (which has come to play an important and respected quasi-official role in the implementation as well as the clarification and development of the humanitarian laws of war) such as Resolution XXVIII of 1965 declaring: "The general principles of the law of war apply to nuclear and similar weapons"; and
- the writings of publicists highly qualified in the field. 13

Judge Weston later made a "common sense" argument:

There is little in the authoritative literature to indicate, either explicitly or implicitly, that nuclear weapons and warfare should not be subject to the humanitarian rules of armed conflict. As one highly qualified publicist has put it, emphatically:

It would be scurrilous to argue that it is still forbidden to kill a single innocent enemy civilian with a bayonet, or wantonly to destroy a single building on enemy territory by machine-gun fire—but that it is legitimate to kill millions of enemy non-combatants and wantonly to destroy entire enemy cities, regions and perhaps countries (including cities, areas or the entire surface of neutral States) by nuclear weapons.

The world community has in no way consented to the abolition of the humanitarian rules of armed conflict in order to legitimize nuclear war. 14

Judge Weston summarized his position as follows:

In sum, despite an erosion over the years of legal inhibitions regarding the conduct as well as the initiation of war, there remains even in this thermoelectric age an inherent commitment to standards of humane conduct within which the reasonable belligerent can and must operate. Contrary to the repudiated Kriegsraison theory of the German war criminals, which argues that the "necessities of war" override and render inoperative the ordinary laws of war (Kriegsmanier), there remains the fundamental principle from which all the laws of war derive, namely, that the right of belligerents to adopt means and methods of warfare is not unlimited.

It is of course true that there exists a manifest ambiguity regarding the extent to which the humanitarian rules of armed conflict actually could be enforced in the event of a nuclear exchange. Yet it would be error to conclude that for this reason there is no international law placing nuclear weapons and warfare under their [sic] legal scrutiny. The fact that illegal acts sometimes go unpunished does not necessarily amount either to the acceptance of those acts or to the obliteration of the rule of law declaring them to be illegal.
Indeed, if the contrary were true, there would be very little law to point to at any level of social organization.

Furthermore, in view of the horrifying and potentially irreversible devastation of which nuclear weapons are capable, not to mention the very little time their delivery systems allow for rational thought, it is only sensible that all doubts about whether nuclear weapons are subject to the humanitarian rules of armed conflict, as a matter of law, should be answered unequivocally in the affirmative, as a matter of policy. Such a response is mandated, in any event, by a world public order that aspires to the shaping and sharing of values more by persuasion than by coercion; and it is in keeping, too, with the major trends of an evolving planetary civilization, embracing the persistent if uncertain quest for nuclear arms control and disarmament and the accelerating struggle for the realization of fundamental human rights, including the right to life and the emerging right to peace implicitly chartered in Article 28 of the Universal Declaration of Human Rights. Also, it is consistent with the spirit, if not always the letter, of the Nuremberg Charter, the judgment rendered under it, the Convention on the Prevention and Punishment of the Crime of Genocide, and, not least, the Charter of the United Nations itself, together with key General Assembly declarations and resolutions which are widely understood to be the authoritative interpretations of the Charter and, in particular, Article 2(4).

I thus arrive at the conclusion that, while no treaty or treaty provision generally forbids nuclear weapons or warfare per se except in certain essentially isolated or limited circumstances, the conventional and customary laws of war (including the cardinal principle of proportionality that militates between the principles of military necessity and humanity) nevertheless proscribe, at a minimum, any first strike (“strategic,” “theater-level,” or “tactical”) involving either “countervalue” or “counterforce” targeting, any second strike (“strategic,” “theater-level,” or “tactical”) involving “countervalue” targeting, and probably most “strategic” and “theater-level” second strikes involving “counterforce” targeting — that is, almost every standard “strategic,” “theater-level,” and “tactical” option presently dominating at least Soviet and United States nuclear policy. 15

I DECLARE that the international humanitarian rules of armed conflict are not obsolete, that they apply to nuclear weapons and warfare, and that they severely restrict the use of such weapons and warfare in almost all instances, especially in relation to the standard “strategic” and “theater-level” options that dominate Soviet and United States nuclear policy;

I THEREFORE GRANT to the Plaintiffs, The People of the Earth, such injunctive relief as they have requested that is consistent with these findings. 16

The Far Reaching Effect of the Illegality of Nuclear Weapons

Much as in the film Amazing Grace and Chuck, it will only take a few persons to start a peaceful international protest against nuclear weapons that can ultimately impact on the very core of nuclear policy. Remember the pioneering work of Linus Pauling against atmospheric testing, and the crusade of Helen Caldicott against nuclear arsenals. Those who follow can now cite to the authority of the Boyle-Rubin-Weston Opinions. Each person reading these words can pass the message of the illegality to others, and one day those who can press the buttons will refuse to do so, if, for no other reason, out of fear of being tried as war criminals. We are a people of law . . . a planet of law. We now have the law on the most horrible of weapons. Let us observe it.

THE AUTHOR

Leon Vickman is an attorney in Encino, California. He has worked on the nuclear weapons issue as a pro bono effort.

He holds a B.S.E.E. from the California Institute of Technology and a Juris Doctor from Loyola School of Law in Los Angeles. He is a member of the State and Federal Bars in California as well as being admitted to practice before the U.S. Supreme Court.

NOTES


3. The case name is In re: More than 50,000 Nuclear Weapons; The People of the Earth v. China, et al. PDWC No. LA-83-0001; the case can be cited as Los Angeles Daily Journal, August 29, 1988, Section I, Page 1, wherein the case was discussed and briefly quoted; general articles also appeared in the Los Angeles Times, Part II, page 8 (Valley News), November 24, 1984, and July 24, 1988, Part I, page 23.

4. The Boyle Opinion, as issued by the Court, pp. 4-5.

5. Article 38(1) reads as follows: “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” International Court of Justice: Acts and Documents Concerning the Organization of the Court, No. 4, Charter of the United Nations, Statute and Rules of Court and Other Documents (1978), 77.

6. Los Angeles Daily Journal, August 29, 1988, Section I, page 1 et seq.: “James Malone, Navy Chair of International Law at the Naval Postgraduate School in Monterey, said the provisional court decision could be recognized as a secondary source of international law.” Ibid., p. 22. “Professor Edwin M. Smith of the USC Law Center said the provisional court hearing was ‘a good thing to do… There’s absolutely no way to get the issues heard in any existing forum,’ he said.” Ibid.

7. The Boyle Opinion, as issued by the Court, p. 2.

8. Ibid, pp. 5-6.


10. Ibid, pp. 22-23.

11. The Rubin Opinion, as issued by the Court, pp. 12-13.


13. The Weston Opinion, as issued by the Court, pp. 3-4.


15. Ibid, pp. 7-8.