

BOOK REVIEW

Lawyers and the Nuclear Debate. COHEN, Maxwell and Gouin Margaret E. eds. Ottawa: University of Ottawa Press, 1988. Pp xv, 419. \$65 clothbound ISBN 0-7766-0209-8; \$35 paperback ISBN 0-7766-0199-7.

This book is the proceedings of the Canadian Conference on Nuclear Weapons and the Law which was held in Ottawa, Ontario in 1987. It is edited by Judge Maxwell Cohen, OC, QC, Judge ad hoc of the International Court of Justice (who co-chaired the Planning Committee of the Conference) and Margaret E. Gouin, who together have not only presented a good coverage of the proceedings but have also included two appendices on a list of Conference participants and a selected bibliography in Appendix D and Appendix E respectively.

The list of panelists at the Conference is impressive and they provided a wide representation, including panelists from Yugoslavia, Argentina, Israel, South Africa, UK, Sweden, FRG, GDR, USA, China and USSR. Organisations which were represented were the UN Institute for Training and Research, the International Atomic Energy Agency and the International Committee of

the Red Cross. It would appear that every continent was represented at the Conference as the list of Conference participants included those who came from Japan, Kenya, Australia and so forth.

This extensive list of representation shows the concern of both east and west in relation to the nuclear weapons debate. It also contributed to a well balanced discussion throughout. The importance of such a debate, especially on the role of lawyers and the timely scheduling of the Conference, is reflected in the following extract from Judge Cohen's welcome speech:

That assemblage from all cultures and all continents was extremely difficult to work out. When you think that at this moment the world has environmental problems, food and water problems, development problems, desertification problems and a population explosion on several continents, with interdependence and state sovereignty trying to wrestle with these, you might ask what is the priority of the nuclear question. In my view it has an undoubted priority, and that is why -- for the first time, in my knowledge -- we have a group of lawyers from all over the world, aided by some scientists, who will try to come to grips with the issue of nuclear weapons and the law.¹

Further, the Conference was anticipating the important nuclear arms reduction agreement by the superpowers which became a reality in 1989, albeit in a slightly restricted form.

The Conference centred on three main questions: what the state of the law is, what the law can do and what the ultimate responsibility of lawyers is.

To address these questions, the agenda was divided into various sessions (panels) and inter alia dealt specifically with issues relating to mass destruction by nuclear weapons, existing legal constraints and arms control arrangements at both national and international levels, the role of international humanitarian law and the role of the legal profession. Needless to say, such a debate would not have been complete without a discussion of the use of outer space and the impact of star wars.

The reality of the ability of nuclear weapons to wreak the mass annihilation of the universe is brought home by Professor Yury Davydov, a political scientist from the USSR who stated early in the Conference that although "the development of science actually makes it possible to overcome the problems of scarce resources on our planet" and is beneficial in the interest of civilisation,² simultaneously,

contemporary science has discovered still more means for the extermination of humanity. The greatest twentieth century achievements were utilised primarily for the creation of mass-destruction weapons. Now outer space has entered into the agenda.

This statement, to me, established the setting for the rest of the Conference. Besides the discussion on the role of lawmakers to provide the framework within which nuclear weapons may be used and their responsibility to ensure that there is compliance at both national and international levels, there was discussion on the role which humanitarian law plays. In spite of its critics,³ humanitarian law remains important as can be illustrated by this statement of Professor Leslie Green from Canada:⁴

When we talk about humanitarian law and its failure, I am reminded of a statement made by some of my students, "Why do we even talk about a law of war?" My usual answer is, "Ask the prisoners of war, and the wounded and the sick. They'll tell you why we talk about a law of war." And that is where much of it still rests, even today.

During the course of this discussion on "International Humanitarian Law and the Law of Armed

Conflict. Its Relevance to the Nuclear Challenge", Professor Charles Van Doren of the USA had this to say:⁵

.... I will identify myself as one who was on the assault team in 1945 that was scheduled to make the invasion of the mainland of Japan. Notwithstanding the fact that the war very suddenly after the dropping of those two bombs probably saved my life, I have always believed and I still strongly believe that it was a drastic mistake to have dropped those bombs the bomb should have been demonstrated rather than dropped on human populations....

If I heard [Professor Green] correctly, I thought he said that a legal justification could be made of those bombings as meeting the test of proportionality and not being indiscriminate, or possibly as a justified reprisal. I find this a perfectly astonishing claim, just as I would find that a claim that the mass bombings of the cities that have been named were legally justified. However, I do not think that the decision of the United States to drop those bombs - wrong as I think it was - was made with international legal principles a major factor in the decision. But I find it astonishing that [he is] trying to justify them legally, at least theoretically.

Standing by his statement, Professor Green in reply stated:⁶

The fact that [Professor Van Doren] and I have different views on the problem of proportionality or the problem of what the consequences would have been is irrelevant I have nothing to apologise for. Like him, I was out there. Having served five years without being wounded, let me be perfectly frank and honest, I could not have cared what happened to the enemy if I was going home in one piece at that stage.

Be that as it may, one should not lose sight of the fact that the use of nuclear weapons today in armed conflict would result in untold and irreparable destruction. The consequences will affect everyone, not only those in the respective belligerent states. As such, no justification should ever exist for its use. The setting today would be extremely different to that which existed at the time of the atomic bombing of Japan. There is no comparison. Japan was taken by surprise; the atomic bomb was not freely available; it could not retaliate except surrender in the circumstance.

Today, nuclear weapons are quite freely available in spite of the limitations and restrictions which exists

and once fullscale nuclear warfare takes place, one can only imagine what the devastation will be like, if one is still around to ponder this question. No legal framework exists for the total banning of nuclear weapons and the other controls which exist may not work. The Martens Clause of Hague Convention IV of 1907 and Art.22 of the Regulations⁷ have done little to alleviate the unnecessary pain and suffering which are already heaped on the population in belligerent states engaged in conventional warfare today. The same can be said for the Geneva Protocols of 1949 and 1977. It is almost not imaginable what the result would be if the conventional warfare of today becomes nuclear in the future.

Therefore, the statement of Professor Green should be treated with extreme caution and should always be restricted to the context within which it was made. No doubt human survival is the most base of all human instincts, there should never exist any justification for a fullscale nuclear war as the risks to humankind are much too great. Therefore, like Professor Van Doren, I cannot accept these concluding remarks of Professor Green in his paper:

Provided these requirements, and particularly the rule on proportionality, are met it would seem that in the eyes of the law of armed conflict the nuclear weapon is as much a

legitimate weapon of war when properly used as any conventional weapon.

Finally, why is the legal profession embroiled in the nuclear weapons debate? After all, lawyers are not the lawmakers; the creation of laws is generally left to the politicians. Therefore, what is the responsibility of the legal profession as a whole?

In answer, an extract from the article of Professors McDougal and Lasswell of the Yale Law School⁸ quoted by Professor Burns Weston,⁹ is here reproduced:

The question may be asked whether the lawyer can be held responsible in any significant degree for the plight in which we find ourselves.¹⁰ For a moralist, the question is whether the lawyer can be blamed; for a scientist, whether he is an important causal variable; for a reformer, whether he can be acted upon to produce change. The answer to all of these questions is, most assuredly, yes. It should need no emphasis that the lawyer is today, even when not himself a maker of policy, the one indispensable adviser of every responsible policy-maker of our society -- whether we speak of the head of a government department or agency, of the executive of a corporation or a labor union, of the secretary

of a trade or other private association, or even of the humble independent enterpriser or professional man. As such an adviser the lawyer, when informing his policy-maker of what he can or cannot legally do, is as policy-makers often complain in an unassailably strategic position to influence if not to create policy.

In conclusion, if one wishes to be brought up to date on the nuclear weapons debate and the role of the legal profession, this book is indispensable. Not only is the treatment of the main issues adequate, the insertion of Appendix E on the bibliography, albeit selected, is an invaluable and convenient starting point. Further, at the Conference, debate in parts was heated, and this made the reading of the proceedings that little bit more enjoyable. Technically, the book is well presented and the views expressed during the Conference represented a good cross-section of the views of the international community. It is established fact that our futures rest with the proper use of anything that is nuclear and as such it is heartening to know that the lawyers of the world are aware of their responsibility as a whole and are sufficiently concerned and willing to come together to openly discuss this concern, the threat

imposed, the checks and balances which exist or ought to exist, and the overall responsibility of individuals and states. We now hope that the views expressed at the Conference somehow permeate to all governments existing today.

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FOOTNOTES

- 1 p.9
- 2 p.23
- 3 e.g Professor Smilja Avramov of Yugoslavia; see p. 123.
- 4 p.126
- 5 p.122-123.
- 6 p.125
- 7 Art. 22 provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited"
- 8 "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 Yale LJ 203, 208-209
- 9 p 291-292
- 10 The article was written during the Second World War.