

II

THE CONTROL OF ARMAMENTS AND THE SALE OF ARMS

THE LEGAL REGULATION OF ARMAMENTS AND THE CONTROL OF FORCE

*Adrian S. Fisher**

Any discussion of the legal regulation of armaments and the control of force must begin with an analysis of the strength of international legal institutions as they are now developed. Such an analysis must be directed to the question of whether those legal institutions are strong enough to deal with the problems of national security implicit in any attempt to regulate armaments and control force.

A good start can be made by examining one of our oldest international legal institutions, the treaty or international agreement. As a part of this analysis it might be advisable to analyze the negotiations that led to article IV of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Under Water (Limited Test Ban Treaty).¹

When the U.S. Delegation, headed by Governor Harriman, arrived in Moscow in July 1963 to work out a limited test ban on nuclear weapons, there were two draft treaties before the negotiators for discussion. The U.S. draft was very similar in its provisions to the draft treaty which had been submitted to the Geneva Disarmament Conference the previous August.² It had a complex and detailed clause providing for the conditions of withdrawal and the procedure for calling a conference to make withdrawal possible.³ The Soviet draft, on the other hand, made

*Dean, Georgetown University Law Center.

¹Aug. 5, 1963, [1963] 2 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 [hereinafter cited as Limited Test Ban Treaty]. Article IV provides:

This Treaty shall be of unlimited duration.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.

²The text of the August 1962 draft treaty appears in 47 DEP'T STATE BULL. 415-16 (1962).

³Article III of the 1963 draft treaty was identical in its language to the withdrawal provision of the 1962 draft. Article III provided:

no provision for withdrawal.

In the two weeks of negotiations during which the U.S. Delegation was in Moscow, it became clear that the Soviets did not think that such a withdrawal clause was necessary. They took the position that a nation has the right to disregard a treaty that is contrary to its supreme national interests. Accordingly, the Soviets took the initial position that a withdrawal clause in the treaty was not acceptable since its inclusion might suggest that the right is not inherent. The U.S. Delegation insisted that the treaty be clear on its face regarding this point. A compromise was reached whereby the right of withdrawal was spelled out, but was less specific than in the original U.S. draft. The provision for withdrawal from the Treaty was described as a right to which the parties would be entitled in the exercise of their "national sovereignty."⁴

Under this formulation there was agreement on the result, and each of the parties to the negotiation could claim that it had "won" in securing acceptance of its theory of the basis on which the right of withdrawal exists. This illustration is not cited as an example of "papering-over" a theoretical difference to reach a practical result. It is cited to show that no matter what theory is adopted with respect to the nature of an international legal obligation, there is a consensus in the present world

-
1. If any Party to this Treaty determines
 - a. that any other Party has not fulfilled its obligations under this Treaty,
 - b. that nuclear explosions have been conducted by a State not a Party to this Treaty under circumstances which might jeopardize the determining Party's national security, or
 - c. that nuclear explosions have occurred under circumstances in which it is not possible to identify the State conducting the explosions and that such explosions, if conducted by a Party to this Treaty, would violate the Treaty, or, if not conducted by a Party, might jeopardize the determining Party's national security, it may submit to the Depositary Government a request for the convening of a conference to which all the Parties to this Treaty shall be invited, and the Depositary Government shall convene such a conference as soon after its receipt of the request as may be practicable. The request for the determining Party to the Depositary Government shall be accompanied by a statement of the evidence on which the determination was based.
 2. The conference shall, taking into account the statement of evidence provided by the determining Party and any other relevant information, examine the facts and assess the significance of the situation.
 3. After the conclusion of the conference or after the expiration of a period of sixty days from the date of the receipt of the request for the conference by the Depositary Government, whichever is the earlier, any Party to this Treaty may, if it deems withdrawal from the Treaty necessary for its national security, give notice of such withdrawal to the Depositary Government. Such withdrawal shall take effect on the date specified in the notice, which shall in no event be earlier than sixty days from receipt of the notice of the Depositary Government. The notice shall be accompanied by a detailed statement of the reasons for the withdrawal.

⁴Limited Test Ban Treaty, art. IV. The text of article IV is reproduced in note 1 *supra*.

structure that there are very definite limits to the capacity of an international legal obligation to force a country to act contrary to its supreme national interests. This is putting the matter negatively, as the pessimist describes the glass as half-empty. The optimist, who describes the glass as half-full, would state the matter positively by declaring a treaty, or an international legal document, to be most effective when it formalizes and institutionalizes the long-range, mutual self-interest of the parties. To state the capacity of a treaty in these limited terms is not to denigrate treaties, but to describe them realistically.

On the positive side, the formal nature of a treaty gives it the strength that a tacit understanding might not have. For one thing, the formality tends to increase the time period during which the parties may determine that the arrangement operates in their long-range self-interests, whereas the more informal arrangement may be repudiated in the short run for its seeming disadvantages. Another positive feature of the formal treaty is that it tends to provide a legal basis for control mechanisms which neither we nor the Soviets would be prepared to verify in a tacit arrangement.

A good illustration of the latter point is found in the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty).⁵ Article III provides for the verification of the obligation of the Treaty by a system of safeguards "as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency (IAEA) in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system." If this Article is implemented (and there is every reason to believe it will be), it will result in the application of IAEA safeguards to the nuclear activities of the non-nuclear weapon states in the Warsaw Pact. The Soviet Union has agreed not to supply nuclear assistance to its Warsaw Pact allies unless it is subject to these safeguards. This is a real step forward in the acceptance of international controls by the Soviet Union and will be the direct result of a treaty. This development probably would not have been possible if we had merely arrived at a tacit understanding to prevent the spread of nuclear weapons.

Notwithstanding these incremental values of a formal treaty, and the differences in legal theory as to the nature of a treaty obligation, the inclusion of the withdrawal clause⁶ in the Limited Test Ban Treaty reflects a realistic appraisal as to what can be expected of a treaty

⁵July 1, 1968, [1970] 1 U.S.T. 483, T.I.A.S. No. 6839 [hereinafter cited as Non-Proliferation Treaty].

⁶Limited Test Ban Treaty, art. IV.

dealing with matters of national security. A similar clause is in the Non-Proliferation Treaty⁷ and in the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof.⁸ It is clear that a similar provision will have to be included in any agreement which may emerge from the Strategic Arms Limitation Talks. In fact, the extremely high stakes involved in any such agreement make such a provision critical. A distinguished, former Secretary of State has stated that any such agreement will have to be subject to renegotiation every day.

This brings us squarely to the question of what are our perceived long-range mutual self-interests in the field of the regulation of force and the control of arms. There follows a Table on the Number of Fatalities in an All-out Strategic Exchange with the Soviet Union. It was prepared some time ago by Secretary McNamara, but it is still considered essentially accurate by the present Administration. Indeed, it is probably "conservative" (if one may use that term in this context), since it is limited to the deaths that would result immediately from the explosion. It does not include the deaths which would result from pestilence or famine, or from the fifth horseman of the Apocalypse, radioactive fallout.

⁷Non-Proliferation Treaty, art. X.

⁸Feb. 11, 1971, art. VIII (not yet effective). For the text of the treaty, see 63 DEP'T STATE BULL., pt. 2, at 365-66 (1970).

TABLE

Numbers of Fatalities in an All-out Strategic Exchange, mid-1970's ^{a)}
(In Millions)

U.S. Program	Soviet Response	Soviets Strike First Against Military and City Targets; U.S. Retaliates Against Cities		U.S. Strikes First at Military Targets; Sov- iets Retaliate Against U.S. Cities; U.S. Re- taliate Against Sov- iet Cities	
		U.S. Fat.	Soviet Fat.	U.S. Fat.	Soviet Fat.
No ABM	None	120	120	120	80
Sentinel ^{b)}	None	100	120	90	80
	Pen-Aids	120	120	110	80
Posture A ^{c)}	None	40	120	10	80
	MIRV, Pen-Aids	110	120	60	80
	+100 Mobile ICBM's	110	120	90	80
Posture B ^{d)}	None	20	120	10	80
	MIRV, Pen-Aids	70	120	40	80
	+550 Mobile ICBM's	100	120	90	80

These figures are truly ghastly. They show that in the event of the most likely "scenario," that is, a U.S. retaliatory strike after absorbing a first strike, both the U.S. and the U.S.S.R. would receive 120 million casualties. They show that if we take certain defensive measures substantially greater than anyone has proposed, *and* if the Soviets do nothing to counter them, the figures can be reduced substantially. On the other hand, they show that if the Soviets react to our defensive measures in a way that does not appear to be unlikely (in view of our reaction to much less substantial Soviet defensive steps), U.S. fatalities are back up almost to the same level. On some assumptions the U.S. casualties are estimated to be 100 million, as opposed to 120 million, but any comfort obtained from the reduction is quickly dispelled by the footnote which advises us that with casualties at this level, differences of 10 to 20 million are less than the margin of error in the estimates.

a) At fatality levels of approximately 100 million or more, differences of 10 to 20 million in the calculated results are less than the margin of errors in the estimates.

b) SAFEGUARD fully deployed would be similar to SENTINEL in its effectiveness.

c) An area defense of the entire continental United States and a relatively low-density SPRINT defense of 25 cities.

d) A heavier defense with the same area coverage, but with much greater sophistication in its electronics and a higher-density SPRINT defense for 52 cities. Postures A and B would also require some improvement in our defense against manned bomber attack in order to preclude the Soviets from undercutting the ABM defense; we would also want to expand and improve our anti-submarine warfare forces to help defend against Soviet missile-launching submarines.

There is, however, a strong measure of perceived long-range, mutual self-interest in these figures. They are equally intolerable on both sides. Both nations have a substantial, mutual self-interest in keeping these figures only as mere estimates on a piece of paper.

The second mutual self-interest is that both nations want to restrict the number of "fingers on the button" that can start a nuclear war. Both want to prevent the spread of nuclear weapons.

The third mutual self-interest is that both sides would prefer to make allocations for purposes other than weapons buildup. The United States sometimes questions whether the economy can stand the shock of reduced expenditures on armaments. This may seem paradoxical since the Soviet Union (which originally held to the Marxist dogma that a capitalistic system needs armaments expenditures to survive) appears to have more confidence in the flexibility of the capitalistic system than does the United States. But seriously speaking, both nations would prefer to spend the money for other purposes.

There are at least two aspects in which the two nations' perceived long-range self-interests are not similar, indeed are antithetical. The first is that their respective views on the development of the future world order are quite inconsistent. When a former Chairman of the Council of Ministers said he hoped and believed that our grandchildren would grow up under communism, he meant what he said. But if, as it appears to be the case, the U.S.S.R. is prepared to carry out its fight against our system by economic and political means, rather than by war, a challenge is raised from which we Americans should not shrink.

The second aspect of the dissimilarity is the difference between the open and the closed society, a difference which is often exaggerated, but which nevertheless exists. It is very hard for Soviet leaders to accept the idea of foreign inspectors roaming the Soviet Union to check up on whether the leaders are doing what they have promised to do. It is hard enough for the United States, but we operate under a system of checks and balances. The Soviets operate under a system in which checking on those in authority assumes quite a different role. The fear that permitting such checks on an international scale might spread to the domestic front makes it difficult for the Soviets to accept outside verification, particularly when the verifiers are acting under the authority of an international organization.

The success that has been achieved so far is not, surprisingly, in areas where mutual interests are great and adverse interests are few. In the case of the Limited Test Ban Treaty the major source of adverse interests, *i.e.*, the problem of verification, was absent because the treaty could be effectively verified by national means without on-site inspec-

tions. There were major sources of long-range, mutual self-interest. Both sides were prepared to give up further development of the super-weapons, which could not be tested underground; both sides were interested in restraints on testing by others; and both sides were interested in preventing radioactive fall-out.

An analysis of the Non-Proliferation Treaty is slightly more complex. Although both sides have a common objective to prevent the further spread of nuclear weapons, different geographic interests underlie the objective. The United States interest is concentrated primarily in areas outside of Europe, and its interest in the treaty is in setting up a worldwide system of control which will limit the immense amounts of fissionable materials produced to meet the growing needs for nuclear energy. The Soviet interests were more sharply focused on a desire to ensure that the Federal Republic does not acquire nuclear weapons or control over them. In order to assure a workable treaty commitment to this effect, the Soviets were prepared to accept inspection of the peaceful, nuclear activities, including Soviet-sponsored activities, in all the other Warsaw Pact countries. Indeed, the last months of the negotiations presented the paradoxical situation in which the Soviets were urging a more rigid verification clause than the United States proposed or considered acceptable.

One can pass rather swiftly over the Treaty on Outer Space,⁹ which prevents the stationing of nuclear weapons or other weapons of mass destruction in outer space, and the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof.¹⁰ These two treaties, like the Antarctic Treaty¹¹ which was enacted before them, have as their objective preventive disarmament in that they prevent deployments for which neither side has any plans in the foreseeable future. Their value is not inconsiderable, however, since they probably operate to prevent either side from convincing itself that it should deploy nuclear weapons to prevent the other side's doing so first.

This brings us, of course, to the Strategic Arms Limitation Talks, which at the date of our meeting are at something very close to a state

⁹Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, Jan. 27, 1967, [1967] 3 U.S.T. 2410, T.I.A.S. No. 6347.

¹⁰Feb. 11, 1971 (not yet effective). For the text of the treaty, see 63 DEP'T STATE BULL., pt. 2, at 365-66 (1970).

¹¹The Antarctic Treaty, Dec. 1, 1959, [1961] 1 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

of crisis. Because the negotiations are still in progress, it is a little hard to say with precision what our perceived, mutual long-range self-interests are. This speaker feels, however, that it might be accurate if both nations perceive their mutual interests in this setting: Both have more than enough offensive missiles; neither has deployed a really effective ABM system; so why shouldn't further deployment simply be stopped?

A complicating factor is introduced by the relationship between our respective national-verification capabilities and the disparate way in which these can be brought to bear on defensive systems. These capabilities are more than acceptably high with respect to defensive systems deployed, and only slightly less with respect to the *number* of offensive *launchers* deployed. They are substantially less with respect to the quality of the warheads on the offensive missiles. In the case of advanced offensive warheads, particularly the multiple independently targetable reentry vehicles (MIRV's), it might be difficult to verify restrictions on deployment with sufficient confidence to support a formal agreement. A possible solution would be the limitation of the formal agreement to defensive systems alone, but with an understanding that substantial improvements by either side in offensive capabilities would be grounds for withdrawal. A somewhat more complicated solution might be to extend the formal agreement to both defensive systems and the number of offensive systems deployed, but have the understanding limited to substantial improvements in the quality of the warheads. Due to the asymmetric positions of the two powers with respect to future developments in offensive systems, this solution may be somewhat harder to work out than the first. Either solution, however, would break the deadly spiral of the offensive-defensive race and would increase the security of both sides.

The pressure of time has prevented my dealing with three areas which are on all of our minds: the question of China, the supply of conventional arms to third countries, and the balance of conventional forces between NATO and the Warsaw Pact. I would like to deal briefly with the first two.

Any lasting arms-control arrangement, particularly one which involves substantial cuts, will have to deal with the problem of China. We should reject the concept, however, that China should only be willing to talk on the basis of a meeting of the five nuclear powers. Agreement to this procedure would add substance to the Indian fears that the development of a nuclear-weapon capability is a *sine qua non* to great-power status. This procedure in addition would be a great barrier to achieving the objectives of the Non-Proliferation Treaty and should

therefore be avoided. The Chinese should be denied veto power over arrangements which the U.S. and the Soviets might work out in their long-range mutual interests, because such a veto would not be justified by the realities of power.

I have very little to say on the subject of restrictions on conventional arms to other areas, which is dealt with in Professor Forsythe's paper. I think it appropriate to point out that the comparison of our experience in the Mid-East with that on the Indian sub-continent makes it clear that our chances of success, or failure, in this area are a direct function of the extent to which we and the Soviets perceive that we have a mutual long-range interest.

I have dealt with this analysis of the impact of treaties in the field of arms control, not because I am attempting to play down the role of treaties in this field. I believe that a realistic appraisal of the strength of treaties, rather than a mere refutation of *pacta sunt servanda*, is an essential element in approaching arms control in the interests of national security and a lasting peace.