

DISCUSSION ON THE CONTROL AND SALE OF ARMS

*Henry C. Lauerman**

*Robert E. Clute***

REMARKS OF PROFESSOR LAUERMAN

Dean Fisher's discussion of the regulation of armaments and the control of force reflects a world order dominated by the Soviet Union and the United States, a state of affairs which has existed since World War II. This image is consistent with the view taken by many decision-makers of the United States and Russia that the world is essentially two nuclear superpowers around which lesser powers cluster. I am not suggesting, however, that Russian and American statesmen are blind to what Dean Fisher called the "problem of China" and to that nation's insistence that worldwide nuclear arms control can be achieved only by multilateral discussions. Both nations know that China refuses adamantly to accept any plan that would freeze the present nuclear arms distribution pattern; such a plan would ensure Russian-United States domination of the world and would naturally meet with China's objection. Indeed, most of the world's great powers have shown no enthusiasm for such a bipartite disposition of ultimate power. And, unless all portents are misleading, the post-war transcendency of the United States and the Soviet Union is on the wane. The Nuclear Non-Proliferation Treaty and the SALT talks indicate that the United States and Russia are experiencing a growing fear of nuclear arms competition from lesser powers. Now the two so-called superpowers are trying to snuff out nuclear arms competition in the interest of world peace; they want to break up the game when they have almost all of the chips.

A scheme of nuclear arms control based on the "realities of power" must reflect and adapt to changes in the world power structure that are now occurring with unprecedented rapidity. In this connection I do not completely share Dean Fisher's view. He observed that India, for example, fears that development of nuclear weapons capability is a sine qua non to great-power status and that if the United States and Russia accede to China's demand to participate in nuclear power talks, India's fear will be confirmed. Therefore, according to Dean Fisher, to permit China to participate in the nuclear arms talks would be a barrier to the

*Professor of Law, Wake Forest Law School.

**Professor of Political Science, University of Georgia.

nonproliferation of weapons and should be avoided. Neither do I reach Dean Fisher's position that the Chinese should be denied veto power over arrangements that the United States and the Soviets might work out in *their* long-range *mutual* interest because he believes such a veto would not be justified by the realities of power.

The realities of power today necessitate the inclusion of China, India, the European Community, Latin America, and possibly Japan and representatives from Africa, Australia, and other states at a very early stage. No first-rate nation will voluntarily accept strategic-weapon thralldom, and the hope for meaningful arms control will remain as bleak as Dean Fisher pictures it, as long as decision-makers of the United States and Russia persist in assuming their countries to be as dominant as they were twenty years ago. That was the best time for cooperation between the two superpowers—the period between 1945 and 1950. The United States and Russia might then have established a viable system of world government under their mutual hegemony. For whatever reasons, good or bad, they chose instead to fight the cold war, and the blood-bought opportunity for a durable world peace died aborning.

In a nutshell, the SALT talks are too little and too late. They are a part of the same old game of power politics, being played by antiquarians who have not seen the great light that burst over Hiroshima and Nagasaki. The words of the prophet Jeremiah are of particular relevance:

How long must I see the standard and hear
the sound of the trumpet?
For my people are foolish, they know me not;
They are stupid children, they have no understanding.
They are skilled in doing evil, but how to
do good they know not. *Jer.* 4:21-22

Of course a start in strategic-arms limitation and control must be made by someone at sometime. On this all are agreed. I am convinced, however, that a U.S.S.R.-U.S.A. conspiracy to preserve their world dominion by means of a monopoly of strategic weapons is not a promising direction for the talks to take; the realities of power will not permit it. The bomb has made all nations brothers, and all are entitled to play appropriate, though not necessarily identical, roles in determining the processes by which strategic arms will be regulated. Only then will the mutual self-interests of the United States, the Soviets, and the rest of the world be well served.

Professor Forsythe's paper has marshalled the conflicting claims of

the Arabs and Israelis and the positions by which these ancient adversaries seek to justify resort to non-nuclear violence. Each party along with its allies contends righteously that its actual or threatened use of force is justified as a measure of self-defense or defense of others. In my estimation, however, the two nations apparently pay little heed to article 2(4) of the United Nations Charter which provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.

Professor Forsythe concluded that all law and all restraints on forceful coercion tend to be ignored when threats to a state's existence and security exist and that law is therefore destined to play a small role in arms control. In fact, I might add, there is no possibility of world peace or arms control if each state has an unlimited right to decide for itself that its action against another state is in "self-defense" or "in defense of its vital interest." Unregulated and unlimited discretion in each state to determine when and how it should act in self-defense is the antithesis of law and legal order.

In any political community each individual member recognizes limitations on its right to defense in exchange for effective guarantees by the community that its vital interests will be reasonably protected by public officers. The U.N. Charter in article 51 recognizes the relevance of analogous restrictions on a member state's right to self-defense:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

On its face this provision drastically curtails the right of self-defense and permits its exercise in the event of armed attack only as an interim measure until the Security Council has acted. Unfortunately, the cold war has so polarized the nations of the world that the Security Council has often been unable to take the measures necessary to maintain international peace and security. As a consequence, actions of self-defense, once begun, are often unduly protracted, and the lengthened conflict is therefore subject to further complication by the intervention of other states whose interests originally were affected only incidentally. Also, the phrase "armed attack" arguably includes immediate threats of force as well as direct applications, and a threat against a member of a regional organization may, pursuant to article 52, result in the pro-

longed involvement of other member states. It is nevertheless encouraging that although article 51, like other peace-keeping provisions of the U.N. Charter, has not proved to be reliably effective, it signifies an acknowledgment by more than 125 member states that a state's right of self-defense is not an unrestricted license to react violently to any state which contests the former's vital interests. Such a consensus is tantamount to a rule of international law.

The principle of an *unrestricted* right of self-defense to justify the actual and threatened use of force is exemplified by the Arab-Israeli conflict and the arms race that it has engendered. Another example is the recent armed skirmishes along the Indian-Pakistani border. One might also consider the Soviet Union and the People's Republic of China poised on their borders, each ready to strike in response to the slightest movement of the other which threatens the integrity of its boundary. And the United States is fighting in Vietnam because most of its citizens, in the decades of the Fifties and Sixties, believed that its vital interests demanded that the world-wide Red Conspiracy be checked, by force if necessary, in Vietnam at the 17th parallel.

If the Arab-Israeli conflict is primarily a question of self-defense, it seems strange to me that Professor Forsythe described the conflict as "revolutionary." Although this characterization derives from the fact that the Soviet Union hopes to change the previous status quo that was favorable to the West, most wars may in that sense be termed revolutionary because they are fought at least in part to change a political power structure within a region. Since the term "revolutionary" usually connotes an attempt by a people to achieve a more equitable and viable political order within established territorial boundaries, there is apparently little in the Arab-Israeli struggle that is revolutionary in the ordinary sense of the word.

The true revolution in the Middle East and elsewhere will come when states disclaim an unlimited right to use force against their neighbors in self-defense and choose instead to rely upon the competency and integrity of the International Court of Justice, the Security Council, or some other broadly representative and authoritative decision-maker to enforce their rights. In all candor, however, I would not like to see the United States make the first disclaimer if its vital interests remain situated as they are today. But sooner or later the nations of the world must live by the letter and spirit of articles 2(4) and 51 of the U.N. Charter. Nuclear and non-nuclear powers alike must disavow self-defense by violence if the world is to survive the birth of the atomic age and live on to enjoy the blessings nuclear power can bring. Until such a

revolutionary world order has evolved, law will not only be "extremely marginal in producing formal constitutionalized commitments to arms control in the Arab-Israeli conflict," as Professor Forsythe concluded; but indeed, no just and effective arms control whatever will be likely.

The world revolution to which I have referred has possibly begun. The vast majority of states, comprising nine-tenths of the world's population, are members of the United Nations and pay lip service, at least, to the Charter's principles. While there may be cause for Professor Forsythe's pessimism over the role of international law in arms control, there is also good cause for optimism. The light of world law and order glows faintly, providing a hope for salvation from the consuming fire of nuclear war and the pestilence of conventional war. The internationalization of armaments of all kinds may be nearer to realization than most of us dare to dream.

REMARKS OF PROFESSOR CLUTE

Current attempts to define aggression are not unlike the medieval philosophers' contemplation of the number of angels that can dance on the head of a pin. Scholars sometimes lose themselves in their efforts to define aggression while the general population has little difficulty in recognizing it.

I agree with Dean Fisher on the role of law in arms control. It is encouraging that treaties on the control of armaments, like those on the law of outer space, have developed further in recent years than I expected. Success in these areas might be attributed largely to the self-interest of nations. In this sense the treaty negotiations have served two significant purposes. They have imposed at least some limitation on world armaments, and, perhaps equally important, they have given psychological assurance to a panicky world populace.

A very real question here is whether the self-interest that motivates some developed countries to negotiate these agreements also exists in the case of Communist China. We must recognize that the major powers are in various stages of development. The national goals and policies of countries with a high degree of technological development are in many ways different from those of mainland China. Therefore, it cannot be assumed that simply because it is a large power, mainland China will react to armaments questions in the same way as the Soviet Union. Communist China's developmental policies are in many respects akin to those of the Soviet Union between World Wars I and II. The Soviet Union has now become more developed and less adventuresome, whereas Communist China is still in the stages of rapid growth and an

adventuresome, aggressive foreign policy.

Some authorities take the view that a satisfactory method of nuclear weapons control might result from voluntary abstention, even in the absence of formal treaties. Their position is based on the belief that nations simply will not use nuclear weapons because of their horribly destructive power. The voluntary restriction of the use of poisonous gases since World War I is an example of how this type of restraint has proved effective.

In my estimation the greatest problem area now is not the restriction of a nuclear buildup, but the control of *conventional* armaments. I am speaking of not only national armament, but also the supply of arms by a nation to other governments or discordant groups. Neither formal legal controls nor informal, voluntary controls seem to have been productive. Some of the most dangerous world situations of our time may be traced to the supply of conventional arms by foreign powers. One might consider the Arab-Israeli conflict, the Biafran war, Cuba, Pakistan, and Vietnam. None of these conflicts would have reached their heights of escalation had it not been for arms supply by the major powers. Both the Soviet Union and the United States nevertheless continue to ship armaments and military supplies to countries that never had a military establishment of any consequence before the aid began. Foreign powers are creating military establishments in Africa and Asia where they have never before existed, and international conflicts may likely follow as a direct result.

Continued efforts to arm other nations are not in the best interests of the world's major powers. Many of the developing nations have been induced to espouse neutralism or nonalignment to avoid involvement in the East-West struggle. In addition, the arms supplier often suffers considerable embarrassment. For instance, the United States has found itself in the rather dubious position of supplying arms to both India and Pakistan. In the case of the supply of arms to Cuba, the Soviet Union discovered itself in an extremely embarrassing position when the missiles had to be withdrawn. This incident certainly did not help Soviet-Cuban relations, just as the Indian-Pakistani affair did little to help American relations with Pakistan. Communist China's supply of arms to Africa for use in guerrilla warfare against Portugal and other colonial powers has likewise backfired. Illegal caches of Chinese arms found in a number of independent African countries were obviously for use against the legal regimes of those countries. Some African governments subsequently stopped the flow of arms and ordered the expulsion of Chinese diplomats from their countries. Another negative feature of arms supply is that even after currently intensified conflicts are settled,

a residue of military power is left behind to encourage violence in future disputes. Nigeria had a negligible military establishment before the Biafran war. Now, it is doubtful, however, that the Nigerian military establishment will ever decline to the level at which it was maintained before the conflict. A large Nigerian military establishment could greatly affect future relations between African states.

Where development succeeds in the Third World, social stress and the possibility of conflict increase. As people become healthier and better educated, and achieve higher standards of living, they are more inclined to enter the political process. If the political system does not satisfy their needs and demands, they may turn to guerilla warfare and revolution. The developing world is ripe for this sort of conflict, and providing these peoples with arms is like throwing a match into a tinder box. Even small conventional armament shipments to a small country with smoldering social discord could create a situation sufficient to upset the social system of that country as well as the balance of power in the surrounding region.

I am not as pessimistic about the value of formal commitments for arms control as some might be. The time is right to make strenuous efforts to negotiate treaties on both conventional arms and nuclear weapons. These negotiations must include more than the so-called major powers, for a number of nations have now achieved the technological capacity to create atomic weapons. The exclusion of these nations, including Communist China, from the bargaining process diminishes considerably the prospects of enduring success.