ARMS CONTROL AND THE RULE OF LAW

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presented by

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1 INTRODUCTION

Many who speak of the end of the Cold War emphasize the "warming" of international relations when they speak of the momentous consequences of this event. According to this image, the half century since Trinity has been a period of sparse international communication during which the Eastern and Western blocs hibernated in their isolated dens of security alliances. The emphasis has been on the word "cold."

Yet it is equally valid to consider the implications of the end of the war footing that has underlain the policies of all of the major military powers during the last fifty years. While meaningful international dialogue was in a state of relative lethargy during much of this period, the military establishments of the Great Powers were actively engaged in using as much force as possible in their efforts to control world affairs, short of triggering a nuclear holocaust. International discourse, at least in English, was rife with such military images as "appeasement," "containment," "crisis stability," and "tripwires."

Much has been written about the deterrence strategies that justified the arms race. Walter Slocombe explained that "[t]he dominant problem of U.S. nuclear strategy is credibly using U.S. nuclear power to deter and if necessary resist nonnuclear as well as nuclear threats to America's allies, forces, and interests overseas."1 As a result, the "flexible response" doctrine was developed to declare "that the United States, in consultation with its allies, is prepared to use nuclear weapons should other means of protection from Soviet attack threaten to fail."2 In contrast, Freeman Dyson pointed out the Soviet Union was committed to the concept of "counterforce," which meant that "if the Soviet Union sees a nuclear attack coming or has reason to believe that an attack is about to be launched, the Soviet Union will strike first at the attacker's weapons with all available forces, and will then do whatever is necessary in order to survive."3 Out of these military postures a tense peace ironically emerged, but the terms by which decisions were made about controlling weapons of mass destruction (i.e., nuclear, chemical, and biological weapons) were the terms of war.


2. Id.

3. F. DYSON, WEAPONS AND HOPE 250 (1984). "It is important to understand two facts about the Soviet concept of counterforce. First, that the Soviet Union intends to survive, if the worst comes to the worst, by striking first. And second, that this intention does not imply that the Soviet authorities believe they could come through a nuclear war without immense losses and catastrophic damage." Id.
The thesis of this paper is that the end of the Cold War marks a shift away from reliance on military might toward an international commitment to control weapons of mass destruction through the "rule of law." John Rawls wrote that "[a] legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. . . . [T]he regular and impartial administration of public rules, becomes the rule of law when applied to the legal system."\[4\] Among the characteristics of a society governed by the rule of law are "its comprehensive scope," "a well-defined territory," "the fundamental nature of the interests it is defined to secure," and "the exclusive legal right to at least the more extreme forms of coercion. . . ." In short, "the law defines the basic structure within which the pursuit of all other activities takes place."\[5\] If arms control is increasingly a subject of the rule of law, then these qualities should be evident in the means by which arms control initiatives are implemented.

The progression of agreements during this century to limit weapons of mass destruction testifies to this new development. A review of arms control agreements to which the United States is a party shows clear growth of the rule of law. A structure of international weapons regulation that is contrary in its vocabulary and in its methods to the rule of military force is emerging. The remainder of this discussion will briefly illustrate this development, which is also pictured in Figure 1.

2 EARLY ARMS CONTROL AGREEMENTS

Early arms control agreements were unverifiable and unenforceable declarations of mutual self-interest. For example, the Geneva Protocol of 1925\[6\] declared a ban on the wartime use of chemical and biological weapons, but contained neither a definable scope nor an implementation structure. Similarly, the Limited Test Ban Treaty of 1963\[7\] simply states a ban on nuclear test explosions that result in radioactive debris escaping the territory of the testing


5. Id. at 236.


nation. Even the Biological Weapons Convention of 1972\(^8\) (BWC), which defines the conduct it prohibits with greater specificity and requires States Parties to take the affirmative step of destroying or diverting their existing stockpiles, lacks the definition or structure that corresponds to the rule of law. The unimportance of the rule of law to these kinds of arms control agreements is perhaps best illustrated by the fact that during World War II "[a]t no point was the fact that chemical weapons were banned under international law a major consideration in the decision not to go ahead and use them..."\(^9\)

This is not to argue by any means that these treaties are unimportant. The fact that these agreements were negotiated successfully communicated to the world that certain military activities were outside international norms. The 1972 BWC, for example, showed progress towards more legal structure, including that agreement’s specific reference to the United Nations as a venue for resolving disputes and its establishment of a Conference of States Parties to the Convention to review its operation. But the hallmarks of these treaties are their simplicity and unenforceability; their success or failure cannot be ascribed to their legality.

3 NUCLEAR NONPROLIFERATION MODEL SAFEGUARDS AGREEMENT

The Nuclear Nonproliferation Model Safeguards Agreement of 1972\(^10\) was a watershed in establishing legal regulation of weapons of mass destruction. Building on the structure established by the International Atomic Energy Agency (IAEA) Statute of 1956\(^11\) and the Nuclear Nonproliferation Treaty of 1968 (NPT),\(^12\) the Model Safeguards Agreement combined for the first time a comprehensive system of compliance "verification," with an international organization — the IAEA — to implement it. The list of regulated activities is comprehensive and detailed. An international inspector corps was assembled. The threat of sanctions for

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9. R. HARRIS & J. PAXMAN, A HIGHER FORM OF KILLING 136 (1982). "Gas was not used because at any given stage in the war there were sufficient military disincentives to stay the hand of the belligerent who reached for the gas weapons." Id.

10. IAEA Doc. INFCIRC/153.


noncompliance was included in the form of limitations on technical assistance, in the possibility of exclusion from the benefits of membership in the IAEA, and in a procedure for referral of violations to the United Nations Security Council. In contrast to earlier arms control agreements, the NPT regime as elaborated through the Model Safeguards Agreement took on the trappings of the rule of law; recent responses to NPT violations by Iraq and North Korea indicate that this system is growing stronger.

4 POST-COLD WAR ARMS CONTROL AGREEMENTS

Arms control agreements that coincide with the end of the Cold War are notable for their extensive and complex legal structures. Although they apply only to a few States Parties and to only a portion of the nuclear stockpiles, the Intermediate-Range Nuclear Forces Agreement of 1987\textsuperscript{13} and the Strategic Arms Reduction Agreement of 1991\textsuperscript{14} spell out their destruction obligations with mind-numbing specificity and spell out their compliance verification processes in painstaking detail. In stark contrast to the brief and broad-minded declarations of the early arms control agreements, the major part of the text of these treaties is occupied with the procedures for their implementation and for resolving disputes.

The Chemical Weapons Convention of 1993\textsuperscript{15} (CWC) will, upon entry into force, become the high water mark to date of arms control through the rule of law. The CWC bans possession of chemical weapons and chemical weapons production facilities and creates a regulatory system for dual use chemicals and production facilities. It contains extremely detailed substantive obligations and the most extensive verification declaration and inspection scheme ever included in an arms control agreement, as well as establishing a new Organization for the Prohibition of Chemical Weapons to carry out its terms, which include the threat of international sanctions. Furthermore, it goes beyond any prior arms control agreement in requiring explicit domestic implementing measures to assure that private persons observe its requirements in addition to national governments. For example, the CWC requires each State Party to enact "penal legislation" to "prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction . . . from undertaking any activity prohibited to a State Party . . .


under this Convention.16 The CWC, which is now universally acknowledged as the model for future multilateral arms control agreements, unambiguously brings the rule of law to chemical weapons regulation.

5 CONCLUSIONS

Only history will tell whether the movement toward arms control under the rule of law will be a successful one. It is clear from the scope and complexity of recent arms control agreements that the world is making an enormous investment of faith and resources in building legal institutions to control weapons of mass destruction. Rawls points out that legal rules "constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled."17 If, over time, this norm becomes applicable to international discourse involving weapons of mass destruction, then the rule of law will constitute a stable basis for world peace.

16. Id. art VII, ¶ 1(a).
17. J. RAWLS, supra, at 235.
Figure 1: Rule of Law Attributes of Arms Control Treaties

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