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Gerard C. Smith

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NUCLEAR ARMS CONTROL AND DISARMAMENT

GERARD C. SMITH*

I would like to present some views on nuclear "arms control," and in that term I include *limitations* on weapons, and on their *use*—as well as curbs on their *spread* around the world.

I

As the literature becomes flooded with acronyms like SALT, START, CTB, NPT, IAEA and LTB, it is sometimes forgotten that the United States and the U.S.S.R., as well as other nations, are engaged in a drawn-out process of international law-making by treaty and other agreements, tacit as well as explicit, to control arms—and the record is not all that bad.

In 1972 it appeared as though this process would result in the establishment of a broadly based rule of law for the control of nuclear weapons. A limited test ban treaty¹ was in effect, putting an end to Soviet and American nuclear tests in the atmosphere, in outer space and underwater—a significant environmental anti-pollution measure, if not an effective limitation on nuclear weapons design. A treaty demilitarized the Antarctic continent² and provided for international inspection there, which had repeatedly taken place. A special communications link, the "Hot Line," was set up, and it had proven its worth in times of crises. A treaty banning weapons of mass destruction in space or their installation on celestial bodies³ had been in effect for some time. A treaty setting up a nuclear weapons free zone in Latin America⁴ had received broad, if not total, support and a treaty banning

* Former Director, United States Arms Control and Disarmament Agency; Chief of the SALT I Delegation.

1. Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43.

2. Antarctic Treaty, *opened for signature* Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

3. Treaty on Principles Governing the Activities of States in Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205.

4. Treaty for the Prohibition of Nuclear Weapons in Latin America, *opened for signature* Feb. 14, 1967, 22 U.S.T. 762, T.I.A.S. No. 7137, 634 U.N.T.S. 281.

nuclear weapons on the seabeds was approved in 1971.⁵

Finally, SALT I had been ratified, limiting one-half of the Soviet-American competition in ballistic missiles to a very low ceiling of one hundred ABM launchers.⁶ By this limitation, the American deterrent had been immensely strengthened since it ended the prospect that Soviet defensive systems would be able to stop our missiles from hitting targets in the U.S.S.R. This treaty, the great prize of SALT I, is now in some jeopardy as weaponeers press for ABM defenses for our land-based missiles. SALT I also placed a freeze on the number of offensive missile launchers—both land and sea based. It is still honored, although, by its terms, it expired some five years ago.

II

Two developments in SALT I should be of interest to lawyers. Before that negotiation, it was not clear how the Soviets would view space satellite operations. After they had shot down a U-2 photographic reconnaissance plane, Krushchev aborted a summit meeting with President Eisenhower. Would photography from space be legally different, in their view, from that taken from the atmosphere? The SALT ABM Treaty, in effect, legitimized, some would say mandated, the use of what are euphemistically called "national technical means of verification." Article XII, section 1 reads: "For the purpose of providing assurance of compliance with the provisions of this Treaty, each party shall use national technical means of verification at its disposal in a manner consistent with generally recognized principles of international law."⁷ In section 2, the parties went so far as to agree not to interfere with intelligence operations needed for verification.⁸ In section 3, they agreed not to impede these operations by concealment measures.⁹ In the annals of espionage there has never been such a formal, explicit endorsement of spying.

We realized that, in a novel field like strategic arms control, questions of treaty fulfillment were bound to arise. Accordingly, in article XIII, the Standing Consultative Committee was established to consider compliance questions.¹⁰ I have been told by officials charged with the

5. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, *opened for signature* Feb. 11, 1971, 23 U.S.T. 701, T.I.A.S. No. 7337.

6. Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7503.

7. *Id.* art. XII.

8. *Id.*

9. *Id.*

10. *Id.* art. XIII.

operations of the SCC that it is fulfilling its purpose. They claim that possible violations and ambiguities have been satisfactorily resolved. In addition, three Presidents have certified in writing that the provisions of SALT I are being carried out.¹¹

III

To my mind, the most important objective of arms control is the curbing of nuclear weapons proliferation. The greater risk of nuclear war lies in its origination, not from a Soviet-American crisis in the first instance, but from some confrontation in the now proliferating Third World. The Non-Proliferation Treaty of 1969 (NPT)¹² went a long way toward creating nuclear free zones in parts of the world. This treaty is the central juridical structure supporting hopes that the cancerous spread of nuclear weapons can be stopped. Some important nations continue to reject it, however, notably India, Pakistan, Israel, South Africa, Brazil and Argentina.

The Non-Proliferation Treaty centers on a basic bargain which was explicitly recognized in the preamble to SALT I. Under article II of the NPT, in consideration of the agreement by the superpowers to negotiate for control of their arms and eventual disarmament, the non-weapons signatory nations agreed not to acquire them.¹³ Less than three years after the treaty was ratified, SALT I was concluded, and it appeared that the NPT was on solid ground. But no subsequent nuclear arms treaty has been ratified. At the 1980 Review Conference of the NPT, a number of non-nuclear nations questioned whether there had been a failure of consideration.¹⁴ The next review conference is only three years away. If no progress on strategic arms control is made by then, we face the possibility of nations defecting from the NPT. This danger alone should give sharp urgency to efforts to get on with arms control—an urgency seemingly absent from the Reagan administration's concept of an appropriate tempo for negotiations, now called "START."

11. See 124 CONG. REC. S4961 (daily ed. Feb. 28, 1978) (statement of Sen. Sparkman) which states that "[t]hree successive Presidents of the United States have been appraised in detail as to Soviet compliance with SALT I, and, significantly, none has seen cause in a single instance to charge the Soviet Union with violating the terms of the SALT I agreement."

12. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161.

13. *Id.* art. II.

14. See generally *The Second Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons*, [1980] 5 U.N. DISARMAMENT Y.B. 126, U.N. Doc. NPT/CONF II/22 (the final document of the Second Review Conference).

The NPT was preceded and supplemented by an institution, the International Atomic Energy Agency (IAEA), that has a membership of more than one hundred nations. The IAEA has two functions: to promote the spread of peaceful nuclear technology, equipment and material; and to inspect nuclear facilities around the world in order to deter the diversion of fissionable material to military uses.¹⁵ Although its inspection system has been criticized for being ineffective, especially by Israel which demonstrated its doubts by bombing an Iraqi nuclear plant in 1981, the IAEA system is considered by the United States to be the best available and much more efficient than any system which could now be negotiated. Along with the NPT, it constitutes a modest contribution to a rule of law in this sensitive area where the line between energy requirements and military potential becomes blurred. One unfortunate consequence of the Lebanon crisis is that the United States is now boycotting this agency because it has excluded Israel from its general conference.

The NPT and the IAEA alone, however, are insufficient to guard against the dire threat of proliferation. The major nuclear nations must further coordinate their export policies and employ their political influence in a much greater effort to try to isolate any nation which develops or acquires nuclear weapons. Preventing the further spread of nuclear weapons and fulfilling their part of the basic bargain struck in the NPT by achieving meaningful nuclear weapons controls are the sharpest challenges facing American and Soviet capabilities to cooperate to save the world.

IV

What happened to hinder this process of nuclear weapons control? The SALT process slowly continued, but during the 1970's the great expectations for the easing of tensions that were supposed to have accompanied SALT I were disappointed. The Soviets pushed ahead vigorously with strategic arms programs and some Americans felt that, by doing so, they violated the spirit of SALT I. To my mind, arms control agreements should be recognized as arrangements between adversaries. Their provisions should be clearly spelled out; nothing should be left to unilateral interpretation or "spirit." Contrary to some thinking, the United States in these years also embarked on major modernization programs involving land, sea and air forces of the strategic triad. We are proceeding with these programs, and although we have a substantial lead in warheads, their production is to be increased.

15. Statute of the International Atomic Energy Agency, *opened for signature* Oct. 26, 1956, art. III, 8 U.S.T. 1093, T.I.A.S. No. 3873, 276 U.N.T.S. 3.

After seven years of negotiations during which Soviet-American relations deteriorated, the second SALT Treaty (SALT II) was signed in the Spring of 1979,¹⁶ but by December the prospects for Senate consent seemed so unsure that the Carter administration quickly grasped the opportunity offered by the Afghan invasion to cease pressing for Senate action. The 1980 political campaign made an issue of the alleged fatal flaws in this treaty, and it now remains unratified.

V

In place of SALT II, the new Administration talked of measures aimed at restoring American strategic superiority. It was recognized that public opinion here and abroad required that negotiations to limit strategic arms be continued, but the Administration felt that the timing of these negotiations should be deferred until appropriations for the new defense measures had been secured. There was also talk that, when negotiations started, the American opening positions should be maintained and not eroded by concessions; that the perceived vulnerability of the United States ICBMs should be remedied as quickly as possible, either by new deployments, by agreement with the U.S.S.R., or by both; and that popular opinion should be left in no doubt about the Soviet's malicious purposes.

The responsibilities of office, however, have made our security managers realize that this scenario is not realistic. It is almost two years since the election of President Reagan, and the word "rearm" is less often heard in Washington although the cries for higher defense budgets remain. The word "freeze" is more current. Nuclear policy is becoming democratized, and it has penetrated deeply into the religious consciousness of millions of Americans.

Official statements have renounced strategic superiority as an aim. The Secretary of Defense recently denied that the United States endorses the concept of protracted nuclear war or nuclear "warfighting."¹⁷ He is even reported to have said that he had no idea whether it would be possible to control nuclear forces in the confusion of a protracted nuclear war.¹⁸ Vulnerability of land-based missiles remains a concern, but the chief remedy, an invulnerable method of basing ICBMs, seems as far away as ever. The start of negotiations with the U.S.S.R. seems to have been more a matter of responding to public

16. SALT II, signed June 18, 1979 (not entered into force), reprinted in S. EXEC. Doc. No. Y, 96th Cong., 1st Sess., 37-45.

17. N.Y. Times, Apr. 7, 1982, at A8, col. 1.

18. *Id.*

opinion than of deciding that newly acquired positions of strength warrant a start.

The Reagan administration still appears to have less interest in a nuclear arms control agreement with the U.S.S.R. than have past administrations. It seems to be more at home with a hard-nosed negotiating posture against a background of a general policy resembling economic and psychological cold war.

VI

Accompanied by "bargaining chip" talk, the Administration now negotiates at two Geneva tables. Although physically separated, they are inevitably linked. For Europe, we have proposed a complete ban on intermediate-range missile launchers to be accomplished by the removal of all Soviet launchers of this range and by the termination of the program to deploy American missiles. Although that proposal seems to have smothered European demonstrations against the American missiles, I do not expect it to lead to agreement since it would require complete decommission of all Soviet intermediate-range missiles.

For the longer range strategic forces, we have proposed an initial limitation on ballistic missiles. Other systems, such as cruise missiles and bombers, are left for future negotiation. Our proposal seems intended as a "fix" for the alleged vulnerability of our ICBMs rather than as a genuine effort either to rectify the alleged defects in the SALT II Treaty or to arrive at broad new limits on strategic arms. Since it does not address known Soviet concerns—cruise missiles, forward-based systems and heavy bombers—it seems unlikely to lead anywhere. But there are rumors of interesting Soviet counter-proposals, and it is not inconceivable that the United States is engaged in genuine and secret negotiations. We must wait and see.

VII

It is generally accepted that arms control agreements can only be reached when each side calculates that a condition of parity exists. President Reagan has gone out of his way to declare that the United States is now, in effect, a second-class nuclear power—a conclusion with which I respectfully, but wholeheartedly, disagree. This question of whether we are behind in the nuclear competition is of central importance. If we are behind, the current effort to negotiate in START would be either a cover to provide time to "catch up," a vain effort to persuade the Soviets to concede more than we, or a dangerous process of bargaining from a position of weakness. I think that we are not be-

hind, that we are not a second-class nuclear power and that we presently possess ample bargaining power to assure a fair outcome of a genuine negotiation. I am not sure that we are, as yet, engaged in one.

President Reagan's views would place the impossible burden of restoring a condition of strategic equality on any arms control negotiation. When we were ahead, it would have been inconceivable that we would have entered into such an unequal treaty, or if we had, that the Senate would have consented. The Administration must recognize this obvious fact. Its main interest, therefore, seems less in arms control and more in armaments now with controls later—perhaps. But the Administration does see a use for past arms controls. SALT II, which was labeled “fatally flawed,” is to be respected. That treaty calls for restraints on Soviet forces, which the Administration would like to see maintained as we modernize our forces. We, therefore, have a peculiar legal situation: The United States will not agree to be formally bound by SALT II, but, in the hope of keeping the Soviets bound, we have declared that we will not “undercut” its provisions as long as the Soviets do not.

VIII

Americans quite properly focus on the issue of arms control by asking: “Can you trust the Russians?” I would say, trust them only to do what seems to be in their national interest and nothing more. I sometimes wonder if the Soviets ask themselves a similar question. What does the record look like? While not forgetting that Soviet conduct has been bad, especially in Afghanistan and Poland, it might be useful to consider what the impact on Americans would have been if Soviet arms control conduct had been similar to ours in recent years.

What if after seven years of SALT concessions and counter-concessions a treaty had been signed, and the Soviets refused to ratify it, proposing instead to start a new negotiation? What if after long negotiations the parties had signed treaties limiting nuclear tests, but the Soviets refused to ratify them and, instead, proposed further negotiation? What if both sides had been negotiating a comprehensive test ban for a decade, and with few issues remaining, the Soviets refused to continue? What if after negotiating for controls over anti-satellite weapons systems the U.S.S.R. decided not to proceed? What if the Soviets paralleled arms control negotiations with economic pressures against the United States?

Some responsible Americans would say that you cannot work with a country that does not believe in the norms of the United Nations charter; that may be using biological and chemical weapons contrary to agreements; that is engaged in direct aggression in Afghanistan and in-

direct aggression in Poland; and that is stirring up trouble with the help of surrogates in Africa, Latin America and Southeast Asia.

But the cold fact is that nuclear weapons have placed both superpowers in a common dilemma. Escape from this dilemma should take precedence over other considerations. Building more weapons hardly seems a safe escape route. Nuclear arms control becomes all the more urgent precisely because the Soviets do not behave as we would prefer. Like it or not, we have no realistic alternative other than to try to cooperate with the U.S.S.R. to reduce nuclear war risks through verifiable agreements.

IX

The ultimate aim of nuclear arms control is to reduce the risk that the weapons will ever be fired. That risk may be manageable if a secure deterrent to war can be maintained. Popular confidence in the deterrent has waned recently in Europe. While NATO non-nuclear forces are admittedly inadequate, the margin of Warsaw Pact superiority is much less than many observers assume. Reliance on nuclear weapons to compensate for this relative weakness is a dangerous business—a nuclear thralldom from which the alliance should escape as soon as feasible.

Bob McNamara, George Kennan, Mac Bundy and I, also known as the "Gang of Four," doubting that Europe can be defended in a nuclear war, have proposed reexamination of our present strategy of starting nuclear hostilities if conventional forces were unable to halt a Soviet non-nuclear attack.¹⁹ This proposal has been subject to criticisms ranging from claims that NATO cannot afford sufficient conventional forces to charges that giving up the nuclear threat would make war more likely. The Administration and the governments in Europe are not interested in reexamining our present strategy. They judge that such a change of strategy (or even its examination) would prejudice NATO's deterrent posture.

A recent Soviet unilateral pledge to the United Nations not to be the first to use nuclear weapons²⁰ has been dismissed summarily as without significance. One senses that our officials might have preferred that the Soviets had not made this pledge. Of course it is not to be relied upon, but surely it has political significance around the world. It

19. See Bundy, Kennan, McNamara & Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 *FOREIGN AFF.* 753 (1982).

20. See excerpts of a speech delivered by Soviet Foreign Minister Andrei Gromyko to the General Assembly of the United Nations, *reprinted in N.Y. Times*, Sept. 23, 1981, at A14, col. 1.

does make our insistence on a first-use strategy more difficult. It would seem, however, to inhibit the Soviet Union's freedom to blackmail us with an implied threat of a preemptive attack on our land-based missiles, the fear of which has been the driving force behind much of our strategic programs as well as our arms control proposals in START. The Soviet declaration hardly seems consistent with a policy of nuclear adventurism about which our officials are properly concerned.

The "Gang of Four" proposal has generated a good deal of interest in private circles—a number of studies are in progress. The yeast is working.

X

It is no simple matter to reach a realistic arms control policy in 1982. The Soviets are still in a dynamic phase of their strategic build-up. They present an ugly countenance to the world with their aggression against Afghanistan and their coercion against Poland. The new Soviet leadership does not hold much promise for positive change. Charges of violation of biological and chemical weapons constraints have not yet been met by Soviet offers of clarification. With evidence of Soviet aggression and uncertainties about their willingness to abide by certain non-strategic agreements, it is understandable that any United States administration would be cautious about approaches to new controls.

Under these conditions what should we do to advance a nuclear arms rule of law? During the "years" which the President has said START will take to negotiate, it seems most unlikely that he will ask formal Senate consent to the ratification of the SALT II Treaty—even if the campaign carping at the treaty for being "fatally flawed" seems to have been overtaken by current dependence on this unratified treaty to keep the Soviets from surging ahead in arms competition. Since the prospect of our negotiating anything better than SALT II in the foreseeable future seems slim, ratification of this treaty should be a persistent long-range goal of American policy. In the meantime we should continue to honor its provisions.

The impasses reached in recent years by following the treaty route raise the question of whether further strategic arms limitations should follow the precedent of the SALT I interim freeze agreement²¹ which was approved by both houses of Congress. The ABM Treaty²² which

21. Interim Agreement on Limitation of Strategic Offensive Arms, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3462, T.I.A.S. No. 7504.

22. Treaty on the Limitations of Anti-Ballistic Missile Systems, May 26, 1972, United States-U.S.S.R., 23 U.S.T. 3435, T.I.A.S. No. 7650.

headed off a costly, dangerous competition in defensive ballistic missiles should be preserved. Efforts to amend or annul it should be carefully watched. Only the most clear-cut advantage to American security would warrant tinkering with or abandoning this most successful example of nuclear weapons control through international law.

The twenty-year search for a comprehensive test ban should be resumed as soon as conditions permit. Ending Soviet and American testing would not only tend to freeze the strategic balance, but would constitute a manifestation of superpower intentions to fulfill article VI of the Non-Proliferation Treaty²³ and would present a high, new hurdle to nations tempted to start nuclear weapons programs. I am aware of the reasons advanced against a comprehensive test ban. I find the opposite case more persuasive.

In our strategic planning we should recognize that our acquiescing in NATO's continuing deficiencies in conventional military force involves running an unnecessary risk of war. While modernizing our strategic forces we should, with our allies, make major new efforts to restore the balance in conventional forces in Europe that was fecklessly abandoned after World War II. It is not too much to say that the road to nuclear arms control will probably have to be guarded indefinitely by stronger non-nuclear forces. The prevention of an escalating race in conventional forces through negotiations such as the Mutual Balanced Force Reduction talks²⁴ should, however, be pursued.

CONCLUSION

Let us hope that the process of genuinely striving for a broadening of a rule of international law over arms will soon be pressed by our present security managers. There is no safe stopping point in this quest.

I believe our descendents will look upon these post-war decades, and perhaps centuries, as a period of world slavery to nuclear weapons—and upon the coming era as a time of working for their abolition. Until the abolition of nuclear arms is accomplished, we will continue to face prospective human sacrifice, not only of individuals, but of the majority, if not all, of humanity. I cannot expect to see the day when the end of this nuclear slavery will be in sight, but it is a goal well worth working toward.

23. Non-Proliferation Treaty, *supra* note 12, art. VI.

24. See 6 U.N. DISARMAMENT Y.B. 292, U.N. Sales No. E.82.IX.7 (1981).