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World Peace Through World Law: The Disarmament Problem

The rule of law among nations becomes meaningful, according to the author, only in proportion to the assurance nations have that others will not resort to force to settle disputes. The primary purpose and function of disarmament, in the context of world law, is to lessen the incentive to resort to force. Its secondary purpose is to serve as a significant token of a nation's desire for a peaceful world. The disarmament problem begins with the search for what is negotiable, he states.

by William W. Schwarzer • of the California Bar (San Francisco)

FOR SOME time now the American Bar Association has espoused the cause of world peace through world law. A basic assumption underlying this proposition is that international disputes should be settled without resort to arms. World peace through world law therefore envisions some form of "disarmament". It is meaningless to the extent that nations are left the option to appeal an unsatisfactory decision to arms. Some time may pass before an international sheriff rides to enforce the law but meanwhile, if world peace through world law is to be more than an empty phrase, there must be some evidence of progress toward rejection of the alternative of force as a means for attaining national objectives.

Grave danger, however, lies in confusing the domestic rule of law with an international rule of law. The citizen living in an organized society surrenders his right to use force as a means of attaining his ends in exchange for the collective security which society affords him by the equivalent surrender of all of his fellow citizens. But a nation as the guardian of the national interests of all of its citizens, cannot be expected to surrender its right to protect these national interests by force unless it is assured that no other nation will threaten them with force. Thus the rule of law among

nations becomes meaningful only in proportion to the assurance nations have that others will not resort to force to settle disputes.

Much remains to be done before world peace through world law grows into something more than a slogan. One great task is to define world law so that nations may be able to predict more accurately their rights, duties and liabilities as nations. Equally important will be the establishment of machinery for enforcement of the law, for without it law is nothing but exhortation. But before this point can be reached, the crucial foundation must be laid by diminishing the incentives to resort to force. The primary purpose and function of disarmament, in the context of world law, is to lessen the incentive to resort to force. Its secondary purpose is to serve as a significant token of a nation's desire for a peaceful world. For these reasons disarmament in some form appears to be a corollary of the concept of world peace through world law.

It is not the intention here to present a comprehensive or definitive analysis of disarmament or even to suggest that there are not many other and perhaps more important things to be said about it. The only purpose of this paper is to call attention to the other side of the coin of world peace through world law—the accustomed use of

force among nations. We cannot, it seems, promote the former without regulating the latter.

"Disarmament" Has Many Meanings

Disarmament, like any catch phrase, suffers from a lack of definition. It may but does not necessarily mean that all nations shall lay down their arms forever. It may mean reduction in the number or variety of weapons produced or in existence, or in the size of armies. It may also mean control over the use of arms or merely inspection of military installations and formations. It may refer to any scheme of arms control, reduction, inspection or stabilization, unilateral or agreed, whether yet known or not, which lessens the likelihood of a resort to arms, and in this broad sense it is used here.

Past history does not augur well for the prospects of disarmament. There

Note: This paper is based in part on discussions of the disarmament study group of the World Affairs Council of Northern California in San Francisco, held during the winter and spring, 1960-1961. The views expressed, however, are the writer's. In addition, for the benefit of the interested reader, reference should be made to the special issue on *Arms Control of Daedalus*, JOURNAL OF THE AMERICAN ACADEMY OF ARTS AND SCIENCE (Fall, 1960), which of the many recent publications is perhaps the most comprehensive and well-rounded review of the arms control problem to date.

is no known successful precedent.¹ Nevertheless, the demonstrated and abiding desire of people throughout the world for the abolition of war as a means of settling disputes makes it imperative that efforts to achieve some form of disarmament be continued, and on a greater scale than ever before. It particularly behooves lawyers, advocating world peace through world law, to think how the objective may be achieved. Clear thinking on the disarmament scene is plainly called for.

In essence the problem of disarmament is a problem of weighing risks. No form of disarmament is likely to afford complete security to a nation. Evasion, error and surprise are always possible. Yet we know that the rapid advance in arms technology and the proliferation of weapons of mass destruction confront us with a continually increasing risk of war. The growing role played by highly complex electronic weapons systems increases the hazard of accidental war. The mounting tension which accompanies the arms race increases the chances of war through diplomatic blunder or miscalculation. Thus, any fruitful analysis of the disarmament problem must start from the realization that perfect security is unattainable and that the question will always be one of degree.

The source of the insecurity lies not so much in the existence of weapons as in the fundamental conflicts of the core interests of nations. Each nation, motivated by a desire for maximum physical security, tends by advancing that purpose to threaten the security of others. The United States, for example, has built a chain of military bases around the Soviet Union for the obvious purpose of enhancing our ability to protect our territory, yet with the inevitable result of impairing the Soviet Union's feeling of security. The Soviet Union, believing that its own security requires a closed society, has greatly increased our insecurity by concealing many of its actions behind an iron curtain. There are many other national core interests; they naturally change from time to time and they are not necessarily all ascertainable. The Soviet Union's core interests may extend to the maintenance of a closed society and to the exclusion of

hostile governments from certain areas adjacent to its borders. The United States, on the other hand, would insist on maintaining a relatively free society and on resisting aggression in particularly vital areas of the world. So also it is with other nations.

The significance of core interests is that they represent non-negotiable matters. No matter what the threat or the promised reward, neither the United States nor other nations would be willing to bargain over certain positions deemed to be crucial to the nation's security. The disarmament problem therefore begins with the search for what is negotiable. As one observer recently put it, "We will not find out whether the Russians will go through a door until we stop pushing them through a locked door." Out of the context of history, geography, technology and psychology, every nation has developed a complex of security interests, many of which may be core interests and therefore non-negotiable. But the shifting balances of security in a world of rapidly changing technology and political complexion may from time to time open up new areas for negotiation. For example, American bases abroad may have been non-negotiable ten years ago; the development of long-range missiles and in-flight refueling may now make these bases a subject for bargaining.

The Initial Approach to Disarmament

The initial approach to disarmament must be twofold: one, to find the areas in which bargaining is possible, and, two, to proceed in awareness of a continuing conflict of core interests in other areas. The realization that the demands of national security, as seen by the various nations, will continue for some time to produce clashing core interests is vital to a realistic approach here. As Americans we are prone to look for an apocalyptic solution to the cold war. We tend to believe that if only the right formula is discovered and the right paper signed, our present conflicts and dangers will end. Yet history tells us that the antagonism of major powers is likely to be with us indefinitely, regardless of the prevailing ideologies. The cold war is pri-

marily a current manifestation of this antagonism and we would do well to pursue the effort toward disarmament with the realization that in a world of nations, inter-nation conflict is inevitable.

Much as we abhor such conflict, no progress is likely to be made as long as we cast the conflict in moral terms. The prejudices on which national security judgments are often made are too deep-seated to respond to moral exhortation or condemnation. If we base our policies of attaining disarmament and world peace on the hope of converting our enemies, we are saddling ourselves with a built-in guarantee of failure. Similarly, it would be tragic if elimination of the use of *force* were to be tied to the elimination of the use of national *power* in international affairs. So long as there are nations, they will compete for power and influence and we can only hope to channel action away from major armed conflicts. Common sense dictates therefore that only by patiently searching out the areas in which negotiation and agreement are possible and by working for limited objectives first, or what C. L. Sulzberger has called "a brushfire peace", can progress be made.

Lessening Incentives To Resort to Force

There is little hope that any of the major powers will soon succeed in persuading any other to change its basic national security policies. There is great hope, however, that through negotiation and international co-operation, the incentives to resort to force can be lessened. We have, in one way, sought to lessen the incentive to make war by adopting, after World War II, a policy of deterrence through the threat of nuclear retaliation. By threatening massive destruction of any nation which should choose to attack us, we have attempted to lessen the incentive

1. Although on occasions throughout history, nations have entered into treaties which have satisfactorily settled disputes among them and have brought about long intervals of peace (the Congress of Vienna, the arrangements between Canada and the United States), there is no record of a successful inspected disarmament arrangement. The closest approximation is the Hague Convention, which has helped to impose some rules on the conduct of war. Events in the Korean War and recent developments in the destructive force of weapons render these rules relatively meaningless.

for an attack. But such a policy—necessary as it is in the present state of things—is fraught with danger and, by tending to keep the world teetering near the brink of international disaster, may carry the seed of its own failure. While nothing suggests that we can safely abandon nuclear deterrence, the potential horror implicit in such a policy calls for the development of alternative means for removing the incentive to war.

All of the evidence points to mutual fear of attack on the part of the United States and the Soviet Union as the greatest potential hazard. As Herman Kahn puts it, "The big thing that the Soviet Union and the United States have to fear from each other is fear itself."² The fact that each of the major antagonists has adopted a policy of deterrence leads to the conclusion that fear of attack is the dominant policy motive, that it may be the greatest incentive to be the first to launch an attack, and that it may therefore be the greatest cause of instability. Highest priority therefore needs to be given to complementing deterrence with reassurance.

This is one of the most difficult tasks facing the nuclear nations. Ever since the Open Sky proposals of 1955, sporadic attempts have been made to find ways of lessening the risk and the fear of surprise attack. Changing technology has changed the conditions of 1955 and it is doubtful that overflights would today—or tomorrow—give adequate assurance. Other methods may, however, be available or discoverable which through limited inspection, surveillance or checks may give reasonable assurances against surprise attack. In any case, the dilemma likely to be inherent in any method is that as nations proceed to give assurances to each other, they also tend to make themselves more vulnerable. A lessening of the capacity to launch a surprise attack may tend to lessen retaliatory capability. An increase in the efficacy of inspection improves the targeting capacity of the inspecting nation. Ways must therefore be found for lessening the incentive to attack which grows out of fear, without increasing the incentive by improving the prospects for success.

Beyond the military implications, any system of inspection or surveillance, even if limited, confronts a nation with hard political choices, choices of particular concern to lawyers. How far are we prepared to go in opening our borders to inspection by agents of an international or supranational agency? What discovery powers would we grant to international inspectors? How far shall we permit the constitutional guarantees against unreasonable search and seizure to be modified by a disarmament treaty, and what is to be the status of inspectors under state and local law? If we have concerns and reservations, how much greater would be those of a closed society such as the Soviet Union, which may believe international inspection to be synonymous with internal upheaval. We do not need to respect these fears to recognize them. Much as the Russians may value disarmament, we should be expecting the impossible if we were to look for them to open their society within the immediate future. Again, we see that for disarmament efforts to be meaningful they must be carried on in areas which are realistically negotiable and for limited objectives, bearing in mind that without small beginnings no great results are likely to be achieved.

We are not likely, then, to achieve disarmament and a peaceful world by bullying our opponents or by converting them to our view of the world. Disarmament is a bargaining problem, calling for the greatest bargaining skills—skills with which lawyers are particularly familiar. We must find the areas in which progress can be made, and we must negotiate for ends which will be attractive to both parties to the negotiation. Above all, we must demonstrate our willingness to bargain patiently and understandingly, and we must show the world that we are neither unreasonable nor gullible.

Other Factors Affecting Disarmament Prospects

There are additional factors which affect the prospects for disarmament. One of these is the relative weight given to defensive as against offensive capability in our military planning. It is at least arguable that an increased effort on our part to harden our missile



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bases, to develop a second strike capability that would survive a surprise attack, to perfect anti-missile missiles and to provide shelters for our civilian population may assure other nations not only that an attack on us would probably not be profitable, but that our intentions are defensive rather than aggressive. Another factor is our capacity to resist aggression with non-nuclear weapons and to fight less than total wars. Maintenance of this kind of capability may also help to keep our antagonists from blundering into a major war by making it clear to them that we could and would resist limited aggression. In short, we must try to demonstrate to those with whom we would negotiate that we do not intend to act in a manner inconsistent with what we are asking them to do.

The approach to disarmament does not lie solely through bargaining and formal agreement. The existence of a signed treaty unfortunately—as history demonstrates—does not provide assurance of its being honored. In the present state of world law, a treaty at best

² 3 STANFORD RESEARCH INSTITUTE JOURNAL 140 (1959).

can only reflect accommodations that are self-enforcing by reason of built-in incentives. But accommodations of this kind are possible and probable without being reduced to writing. In fact, numerous accommodations appear to have been made over the years between the United States and the Soviet Union. Examples are the moratorium on nuclear testing and the limitations observed in fighting in Korea and in the Formosa Straits. In addition, each nation appears to have respected certain strategic interests of the other. Neither has employed nuclear weapons since the second world war, and each to a limited extent has by aerial and other forms of intelligence permitted the other to inspect and test its responses to limited provocation. In large part, these and other forms of accommodation have probably never been subjects of negotiation or agreement, but they are evidence of a real though tacit working arrangement.

Opportunities for further meaningful accommodations may arise at any time and may open the way for substantial progress toward the ultimate disarmament goal, whether a formal treaty is ever made or not. This country must be alert to such opportunities, and its policy and leadership must be sufficiently intelligent, subtle and flexible to take advantage of them when they may be beneficial to us. Conversely, while we must be firm on the essentials, we must avoid provocation and blunder which will forestall accommodation without giving compensating security benefits. In many sensitive

areas, such as the future of West and East Germany, and the distribution of nuclear weapons to other nations, the choice among courses of action will determine whether there will be accommodation or aggravation.

Disarmament Demands Our Best Efforts

Progress toward disarmament demands our best efforts. No better cause for the application of talent and resources can be imagined than the avoidance of a nuclear war. Compared to what we have spent on our war-making capability, what we have spent on war-preventing capability is less than puny. Compared to our knowledge in other national and international areas, our ignorance of things relating to disarmament is appalling. The causes of our lack of progress and knowledge lie not solely in our indifference. As the complexity and sophistication of weapons systems have grown, disarmament has tended to become the province of scientists and specialists. Intelligent discussion of the control and surveillance of missiles, for example, is virtually impossible without an understanding of their technical and operating characteristics, an understanding shared by few laymen. The very growth of the role of the scientist and technician in the disarmament field, however, underscores the importance of active participation by political leaders and by informed and articulate lay citizens.

The job of working for disarmament will require that we periodically re-

examine our basic assumptions concerning security and national policy. Yesterday's truth may become tomorrow's folly. We shall be confronted with situations that are neither black nor white, and with choices between unsatisfactory alternatives. All of this suggests the need for informed and sympathetic citizens who can help direct and support national policy in this difficult area. Nowhere else are we likely to have to make more difficult decisions with respect to our national values and goals—nowhere else will it be as hard to translate our national aspirations into a viable policy. The future of our institutions will rest on the wisdom of the choices we make between various forms of security.

The lawyer, of course, carries a particular responsibility in the preservation of our values and our institutions and in their adaptation to a changing world. He has assumed even broader responsibilities in urging the rule of law as the touchstone for peace. To advocate that law replace force in international affairs without a candid appreciation of the tough choices that must be made on the way would be a cruel hoax. At the same time, to condemn world peace through world law because it conflicts with outmoded concepts of national sovereignty is irresponsible. World peace, world law and disarmament are necessary and possible, but they lie at the far end of a long and tortuous road. Nowhere else are the hopes held higher, and nowhere else are the consequences of failure more fearsome.

Canon 35 Sustained

The Supreme Court of South Carolina on November 14, 1961 in *State v. Sharpe*, upheld Canon 35 of the Canons of Judicial Ethics of the American Bar Association. The Canon states that the taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings should not be permitted.

After referring to a similar provision of Rule 53 of the Federal Rules

of Criminal Procedure, the court in its opinion by Judge Moss said:

We agree that Canon 35 . . . should be enforced in the trial of cases in the courts of this State. The Canon sets forth a standard which should govern the conduct of judicial proceedings. To allow a deviation therefrom would permit distractions or disturbances that are inimical to judicious conduct.

We are fully conscious that there

has been criticism of Canon 35 of the Canons of Judicial Ethics. Members of the press and representatives of the radio and television industries, and some judges and lawyers, argue that the restriction of Canon 35 is a violation of the freedom of the press. Attention is directed to an article by William O. Douglas, Associate Justice of the Supreme Court of the United States, who answers the critics of Canon 35. This article is reported in Vol. 46, at page 840, of the American Bar Association Journal.