# The lawyer's role in treaty-making: a review

## Philip C. Jessup and Howard J. Taubenfeld, *Controls for outer space and the Antarctic analogy*
## Louis Henkin, *Arms control and inspection in American law*

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The image of the lawyer that is most commonly in the mind of the rest of the community is that of the "mouthpiece," the clever advocate who can make things seem what they are probably not and sway justice in favor of his client (for a price). In the international sphere, where courts have no compulsory authority, his value is thought to be slight.

What the popular view overlooks is the fact that, quite as much as he is an advocate, the lawyer is a specialist trained in the task of adjusting conflicts of interest by seeking out points of agreement and devising workable formulas for the relations of individuals or groups based on existing balances of power and interest.

In international relations solutions of this kind take the form of treaties. The conclusion of a treaty of course gives no practical assurance that the parties will be willing to maintain the treaty scheme indefinitely. In a world of sovereign nations the power to break treaties inevitably exists, whatever the rights of the situation, and a treaty can be relied upon only so long as it remains in the interest of the parties to observe it. Nevertheless, despite its terminability in fact, a well-drafted treaty gives better grounds for confidence in the *modus vivendi* which it reflects. Its initial acceptability to the respective parties is indicated by their willingness to enter into it. It defines in agreed terms the conduct expected of them in carrying out their joint purposes. Departure from its terms, besides incurring international opprobrium, may cause other parties to reassert their own freedom from the treaty limits. It will therefore not be undertaken lightly. The treaty also brings into operation what Professor Henkin calls a "process of education for legislation, and education by legislation," which generates further co-operation (3, p. 97).

Treaties are quasi-legislative documents, the international counterpart of the domestic parliamentary enactment. Within the United States they have the effect of laws. This means that thought must be given not only to the international legal consequences of projected treaty provisions but also to their impact on our own legal system. In a number of respects, therefore, the lawyer has a large role in the treaty-making process.

The different facets of this legal role are well illustrated by the two books here reviewed. As is characteristic of American legal scholarship, they eschew abstract theory. Each is a concentrated analysis of a specific, practical problem. Both are de-

signed to prepare the way for the drafting of treaties on subjects high on the agenda of urgent international business.

## I

In *Controls for Outer Space and the Antarctic Analogy,* Professors Jessup and Taubenfeld examine "the potentials and limitations of the various alternative types of international agreements which could be negotiated" for the internationalization of outer space and the Antarctic (4, p. 5).

The first part of the book is a review of the various types of international controls devised in the past for other areas and for technical and administrative problems comparable in some degree to those confronted in the Antarctic and in space activities. In particular, the analysis of the regimes drafted at one time or another for Spitsbergen, Tangier, Danzig, the Saar, Leticia, the Italian colonies, Trieste, and Jerusalem, among others, is an interesting compilation of international ingenuity in administrative matters. The authors analyze the reasons which have inspired co-operative solutions, their relative advantages, and the reasons for their failure. Particular attention is paid to weighted voting systems. One conclusion drawn is that "a crucial factor in the success of a multinational administration is the effective internationalization of the administrative personnel" (4, p. 123). The authors note the phenomenon that governments have been willing to treat as separable from national political interests many aspects of international life. They suggest that many governments are coming to the realization that "sovereignty itself can be divided, as witness the supranational institutions of the European Community and, indeed, many provisions of the Charter of the United Nations" (4, p. 122). They adduce no evidence, however, of Russian acceptance of this idea. This part of the book is a useful supplement to such studies of international administration as those of Sayre (7) and Reinsch (6).

The second part of the book is devoted to the situation in the Antarctic, which the authors view as the most important testing ground for controls for outer space. Jessup and Taubenfeld here describe the physical and political background for the treaty among the twelve most interested nations which was signed in Washington on December 1, 1959, since the publication of their book. It was the authors' conclusion that, while "so long as the Antarctic remains relatively uninhabited and relatively unimportant strategically" limited functional arrangements in such fields as scientific study, meteorology, whaling, and air facilities might suffice, it would be "a wasted opportunity not to experiment with a more unified international governmental approach which might, while favorable conditions last, be installed successfully" (4, p. 190). To an important degree their hope has been fulfilled in the treaty, which places a thirty-year moratorium on territorial claims, bans nuclear explosions or dumping, provides for international inspection, and sets up a committee for continued scientific research (1). There is still the possibility of a slip, for the treaty depends on ratification by all the signatories, and in Argentina and Chile it will have to buck strong sentiment for inclusion of the Palmer Peninsula ("Tierra O'Higgins," "Tierra San Martín") in the national domain. Nevertheless, the experience of these negotiations points the way to similar co-operation regarding outer space.

Coming to the specific legal and political problems posed by the use of outer space, Jessup and Taubenfeld waste little time over the argument as to how high national sovereignty extends. They note the general consensus that each state has exclusive control of a belt of "airspace" comparable to

its "territorial waters" but that, just as with the latter, there is no precise agreement where national airspace ends. They feel that attempts to define this limit should be deferred. They also conclude that no momentous decisions are needed to insure that functional co-operation to meet technical problems will be extended by treaty to space activities. The serious question of political control remains. The authors indorse the proposal of Secretary-General Hammarskjöld that the basis of any international settlement should be agreement that "outer space, and the celestial bodies therein, are not considered as capable of appropriation by any state" (4, p. 275). They do not discern at the present time any insurmountable political obstacle which stands in the way of more specific agreement on some form of direct international administration. Agreement of this kind might become more difficult at a later stage. The authors recognize, however, that the crucial military aspect of the problem—the control of nonpeaceful uses—"is essentially part of the problem of world peace and disarmament rather than a peculiarity of the use of space" (4, p. 222). They thus reach no startling or unexpected conclusions. Their careful and painstaking study should be of real value, however, to the national and international officials who are weighing the alternative solutions for space problems.

This is a rapidly developing field and, as in the case of Antarctica, also in regard to the regime of outer space there has been progress since the publication of the Jessup-Taubenfeld book. Most important was the unanimous adoption by the General Assembly on December 12, 1959, of a resolution which expressed agreement on the desirability of avoiding the extension of national rivalries into this new field, established a Committee on the Peaceful Uses of Outer Space, and provided for the holding of an international scientific conference on outer space in 1960 or 1961.

## II

In *Arms Control and Inspection in American Law,* Professor Louis Henkin examines the legal and administrative consequences within the United States of a system of international arms control and inspection. He assumes for the purpose of his study a treaty establishing a corps of international personnel within the United States armed with wide powers. These include the power to inspect government installations, private industrial or business establishments of any character, vehicles of every kind, hospitals and hospital records; the power to require reports and the keeping of records in prescribed forms by all corporations or persons engaged in activities related to armaments; and the power to interrogate such persons, as well as doctors, scientists, and any other persons suspected of activities unlawful under the control plan.[1]

The study focuses attention on the reciprocal nature of any arms-control plan. It thus fills an important gap in our thinking on the problem of arms control. As Henkin points out, any such plan involves "a compromise between how much or how many rights and powers we wish to get for international or foreign inspectors in Russia and how few we would like to grant such inspectors in the United States" (3, p. 23). It would be in basic contradiction with our Bill of Rights, to take one example, for us to accept a general power of search within the United States by foreign inspectors without search warrants. This might indi-

[1] Problems of the technical feasibility of inspection are surveyed in a companion study, *Inspection for Disarmament,* edited by Professor Seymour Melman (5).

cate, Henkin believes, the need "to seek alternative forms of inspection and detection which may be equally effective without reaching unnecessarily into the lives of a country and its people" (3, p. 23). The requirement of a search warrant issued by a United States court might fill the bill, but would the United States have sufficient confidence in Soviet courts to give them, reciprocally, this control over inspection? Perhaps the answer here is a provision for warrants to be issued by international tribunals. The question illustrates, however, the type of problem requiring study of the kind Henkin gives us. He analyzes the possible constitutional obstacles, the types of implementing legislation that would be required, the need for protection against abuses of the powers of the inspecting agency, and the problems of securing state and local co-operation.

On certain of the issues of American constitutional law raised by the assumed international inspection provisions there are fairly clear answers in decided cases. In respect to others there are no pertinent decisions, and it is possible only to point to the considerations pro and con. The skill with which Henkin, who once served as law clerk for both Mr. Justice Felix Frankfurter and Judge Learned Hand, discusses these issues inspires confidence in his judgment.

He finds no problem in the limited abandonment of United States sovereign discretion which an arms-control treaty would involve. Every treaty diminishes national freedom of action in some degree. By and large, the key to the problem of surmounting possible constitutional obstacles is the fact that, subject to the recognized power of the United States government to break the treaty, all the powers vested by the Constitution in the federal government will support the authority delegated to the international inspectorate by the treaty itself and the necessary implementing legislation. Vis-à-vis state and local authorities the international inspectorate "would stand in a position similar to that of a federal agency" (3, p. 99).

Though precise authority is lacking, one is inclined to agree with the suggestion that "Congress may impose inspection—a limited regulation—on all industry as 'necessary and proper' to make effective the regulation of armaments under the treaty power" (3, p. 75). Henkin adds, however, that the "reasonableness" of inspection, a condition of its validity, would be enhanced, in the view of the courts, if it were limited as to time and frequency.

Though treaties are subject to the limitations of the Bill of Rights, these limits can be in large part avoided if criminal prosecution of individual violators is not a primary objective of the treaty. The privilege against self-incrimination can thus be avoided by the enactment of an immunity statute protecting those questioned by the inspectors. The most serious constitutional questions would be raised by any authorization to search individual homes without warrants, but this also is regarded as probably unnecessary to an effective inspection system. To authorize the inspectors to penetrate state governmental activities, the consent of the states or a constitutional amendment might be necessary, Henkin believes, though, once more, there is no authoritative answer in the cases. Possible difficult questions of the extent of permissible delegation of the executive power would be avoided so long as direct regulation (rule-making, the issuance of orders, the granting of licenses) was reserved to the United States government, as distinguished from inspection of compliance, which would be performed by the international agency. With these qualifications, it is Henkin's important over-all conclusion that the probable elements of an

arms control plan "do not violate constitutional limitations, nor do they seriously disturb traditional concepts. . . . The important obstacles to control of armaments are not in law . . ." (3, pp 153, 156).

It is indeed surprising that no analysis of constitutional problems such as this book makes was ever undertaken in connection with the Baruch Plan of 1946, which envisaged international public ownership of atomic industry and direct international administration within the United States. As Henkin notes, the lack of such analysis is possibly an indication that there was thought to be no serious prospect that the plan would be adopted (3, p. 104). It is also interesting to scrutinize in this light the latest disarmament proposals put forward by the United States (2). General disarmament is to follow the creation of world law enforced by a world court and an international armed force. In contrast to the proposals for safeguards against surprise attack and the prohibition of the testing of nuclear weapons, which would entail no greater controls than Henkin presupposes, one would suppose that there is thought to be no serious prospect that agreement for general disarmament will become a reality. When disarmament proposals are accompanied by official studies of resulting constitutional problems, and by efforts to persuade Congress and the public to accept them, it will be evident that our government sees a serious possibility of agreement.

## REFERENCES

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