

"Senator STENNIS. There is no limitation or anything like that on these small tactical weapons or their use that go with our infantry?"

"Secretary RUSK. That is correct, sir."

(Hearings on Executive M., 88th Cong., 1st sess., Senate Committee on Foreign Relations, p. 43, 1963.)

#### THE NUCLEAR TEST BAN TREATY

AUGUST 14, 1963.

#### OPINION OF THE LEGAL ADVISER

Subject: Meaning of the words "or any other nuclear explosion" appearing in article I, paragraphs 1 and 2 of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater.

Article I, paragraph 1, of the treaty provides:

"1. Each of the parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, *or any other nuclear explosion*, at any place under its jurisdiction or control: \* \* \*

Article I, paragraph 2, provides:

"2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, *or any other nuclear explosion*, anywhere which would take place in any of the environments described or have the effect referred to in paragraph 1 of this article."

The question has been raised whether the words "or any other nuclear explosion" impose any limitation on the use of nuclear weapons by the parties in war.

The answer is "No."

#### I. THE TEXT OF THE TREATY

The text of the treaty and its internal construction provide ample grounds for answering the question in the negative.

The title of the treaty is "Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater." This title delimits the operative scope of the treaty. It shows that the treaty was intended to deal with weapon tests and not with the use of nuclear weapons in combat or in connection with armed hostilities. The limited scope of the treaty in this respect is reinforced by its preamble. The second paragraph looks forward to more general disarmament, eliminating the incentive to the production and testing of nuclear weapons. If this treaty banned the use of such weapons in wartime, the incentive for further production and testing would already be gone. Similarly, the third paragraph of the preamble, looking to the future negotiation of a comprehensive test ban, shows that this treaty is limited in its application to nuclear weapons tests.

The Agreed Communiqué issued when the Treaty was initialled refers to a series of meetings to discuss "questions relating to the discontinuance of nuclear tests." It notes that agreement was reached on the "text of a treaty banning nuclear weapons tests in the atmosphere, in outer space, and underwater." It refers to the agreement in several places as "the test ban treaty," and it refers specifically to discussions relating to a nonaggression pact. Had the negotiators agreed to ban the use of nuclear weapons in war it would surely have been mentioned in the Agreed Communiqué.

Moreover, the general scheme of the Treaty is inconsistent with an interpretation of the words, "other nuclear explosion" to cover wartime use of nuclear weapons. The Treaty has no effect on laboratory development of nuclear weapons. It permits weapons tests and other explosions underground, so long as the radioactive debris is confined within the territorial limits of the State in which the explosion is conducted. The Treaty does not restrict weapons production, as appears from the second paragraph of the Preamble. The Soviet Union has rejected any proposal even to restrict the production of fissionable material for weapons purposes. Finally the Treaty does not require the destruction of any stockpiled weapons. It is hardly conceivable that a treaty which permits the development, testing, stockpiling, and production of nuclear weapons should be construed as banning their use in wartime.

#### II. NEGOTIATING HISTORY

The conclusions derived from the text of the Treaty are supported by a review of the negotiating history. That history reveals that the words "or any other nuclear explosion" were inserted to prevent evasion of the Treaty by the explo-