The Law of Arms Control: International Supervision and Enforcement

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1 General introduction to the study

1. Introduction to the study and problems addressed

1.1 Introduction

In the community of States, as in any community, order is a primary value. Public international law constitutes a fundamental means for structuring and regulating the relations between States in the international order. Some decades ago already, it was observed that the structure of international law was changing, from the law of co-existence towards the law of cooperation. One of the first areas where the necessity of co-operative behaviour between States has been recognised is in the maintenance of international peace and security. As a guiding principle, it can be upheld that most of the time most of the States benefit most from a situation of international peace and security. At the same time, it should be acknowledged that in exceptional circumstances the international community as a whole will benefit more from (limited) warfare than from a peaceful situation in which a State is allowed to pose a serious threat to international peace and security; the collective security system of the United Nations (UN) is based on this concept.

History shows that the build-up by States of massive arsenals of weapons culminating in a quantitative as well as a qualitative arms race is one of the reasons that war and other forms of armed conflicts have occurred. The idea that arms should be controlled in order to avert war dates back a long time. Since the nineteenth century, an extensive number of arms control agreements has been concluded and recent events have attracted renewed attention to international arms control. Examples include the imposition of an arms control regime on Iraq by the UNSC (since 1991), the inclusion of arms control paragraphs in the Dayton Peace Agreement for the Former Yugoslavia (1995) and the discussions on the compatibility of the 1972 ABM Treaty with the revived US concept of national missile defence (since about 1999). The nuclear test explosions conducted by India and Pakistan in May 1998 and the launch of a three-stage missile on 31 August 1998 by the

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1 The notions ‘international law’ and ‘public international law’ are used as synonyms throughout this study.

2 See generally Friedmann (1964).
DPRK (North Korea) have caused the issues of nuclear arms control and ballistic missile threats to appear at the top of the agendas of States and various international organisations.

Today the subordination to international law of States’ behaviour with regard to national armaments remains problematic in many respects, notwithstanding the clear developments that have taken place regarding the manner in which States choose to organise themselves when dealing with problems of arms control. In the post Cold War situation, the political order appears to be changing further, towards interdependence. This development has not fundamentally changed the basic attitudes of ‘Western’, ‘Eastern’ and ‘Non-Aligned’ groups of States towards arms control law, and negotiations on arms control issues still take many years without their success being guaranteed, even after the conclusion of a treaty - as the difficulties surrounding the entry into force of the CTBT illustrate.4

Regulating the behaviour of States with regard to their national armaments has in many respects proven to be difficult and complex. For this, one paramount explanation comes to the fore: the national security interests (and subsidiary interests, such as economic ones) of different States in the field of arms control are too divergent to allow for the emergence of large-scale (let alone global) consensus on many fundamental issues. This begs the question how international law has dealt with the inherent tension between the well-perceived necessity of co-operation between States in order to establish a situation of international peace and security on the one hand, and the equally well-perceived necessity of each and every State to pursue its national security interests on the other hand. Whereas the first necessity implies the need for international regulation and a progressive reduction of armaments, the second necessity emphasises national self-defence, justifying the maintenance of at least an adequate level of armaments.

1.2 Main questions and purposes of the study

Against this background, the present study endeavours to contribute to the understanding of the role of international law in the international arms control process. In the first part of this study, the ‘law of arms control’ is identified as a special field of international law according to its legal characteristics. Furthermore, in this part the relationship between arms control, international law and the quest for the maintenance of international peace and security is discussed. The second part of this study is devoted to one of the most important features of the law of arms control, viz. the

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4 The CTBT was opened for signature on 24 September 1996, but the number of 44 specified States (Art. XIV) required to effectuate entry into force of the treaty has as yet (2000) not been reached. After the refusal by the American Senate to ratify the treaty (on 13 October 1999), it may very well take years before entry into force of the CTBT comes within reach. See infra, chapter [6].
appearance of (more or less elaborate) supervisory mechanisms. The conviction has grown, both in theory and in practice, that only if States’ behaviour in respect of arms control law can be carefully supervised, States are willing and able to submit their behaviour to international law and to respect any reasonable outcome of the supervisory procedures. The search for insights and trends with regard to the supervision of compliance with arms control law is undertaken by analysing the most important legal documents along the lines of a general theory of supervision. This theory is applied to a broad selection of multilateral arms control treaties currently in force. Special emphasis is on those treaties that create the most elaborate cooperative structures, viz. the safeguards system of the IAEA in connection with the NPT, the CWC and the CTBT. These treaty regimes have established specialised international organisations as supervising bodies. In the analysis of the supervisory mechanisms, the division of powers between the States Parties to the treaty and the supervisory body has to be taken into account. The third and final part of the study addresses the question of enforcement of arms control law by focusing on the powers regarding the enforcement of compliance that, in respect of the supervising bodies, derive from the treaty regime, and that, in respect of the States Parties, derive from general international law.

As already appears from the above, this study addresses three main questions. In Part I (chapters [2] and [3]), the question that will be addressed is: what is the place of the law of arms control in the system of international law and politics and by what special legal characteristics can this field of law be identified? Then, in Parts II and IIA, on international supervision of the law of arms control, theory and selected treaties - see chapters [4] to [6] - a theory on supervision, as applied to the law of arms control, will be enunciated and supervisory mechanisms in selected arms control treaties will be described and analysed in order to answer the question which general features of supervision in arms control law may be discerned. In Part III, entitled ‘enforcement of the law of arms control’ (chapter [7]), the enforcement of arms control law is discussed, by addressing the question how the legal interrelationship between the powers of law enforcement that are exercised by supervising bodies and those of the individual States Parties can be characterised.

To summarise, the purpose of this study is to provide a deeper understanding of the role of international law in the arms control process, primarily by presenting an analysis of the process of international supervision and enforcement of arms control treaty law. This study more specifically aims to provide insights into the legal characteristics of the body of law that constitutes the law of arms control, to offer an analysis of supervisory mechanisms in arms control treaties as well as an inventory of their common general features, and to discuss the basic problem of
enforcement of arms control law in cases of alleged or established non-compliance.

2. Overview of contents

An introductory chapter offers an ideal opportunity for giving a historical sketch, and so the final paragraph of this chapter addresses the historical developments in arms control prior to the establishment of the UN. In chapter 2, the law of arms control will be defined as a field of law and systematically placed within the larger framework of the politics and the law of international peace and security. It will be argued that its place in this framework accounts for most of the special legal characteristics of arms control law. In chapter 3, special legal characteristics of the law of arms control will be identified, as they are found in the sources of arms control law, in the scope of its substantive law as compared to the scope of the institutional law, and in the absence of practice in the application of some of the special supervisory procedures.

In order to be able to answer the question what general features are common to supervisory mechanisms in arms control treaties, it is necessary to make a comparative analysis of the supervisory mechanisms of those treaties. To that end, in chapter 4, a theory is presented for the analysis of supervisory mechanisms in arms control treaties. In chapter 5, this theory is applied to multilateral arms control treaties in order to provide an in-depth analysis of the common characteristics of their supervisory mechanisms. In chapter 6 the theory is likewise applied to the three global arms control treaties NPT, CWC and CTBT. Emphasis will be on the general features of the supervisory mechanisms of these treaties, thereby taking account of additional points of interest (such as historical notes, dual-use issues and confidentiality regimes).

Finally, chapter 7 deals with the division of powers of law enforcement between individual States Parties on the one hand, and supervisory bodies on the other hand, by raising the question as to what extent States Parties to arms control treaties have retained the right to make use of enforcement measures that are commonly available to them pursuant to general international law, when there is at the same time a treaty-based supervisory mechanism available on the basis of which the supervisory bodies can exercise certain powers of enforcement.

This study offers an in-depth overview of the law of arms control as it stands in the post Cold War situation and provides a comprehensive theory and model for the analysis of supervisory mechanisms in arms control treaties. It is endeavoured to take account of the long-term development of the law of arms control, against the background of the many political processes that influence this field of law. Since this study is not only meant
to be of interest to international lawyers but also to political scientists and policy-makers, certain concepts of international law, full understanding of which cannot be taken for granted where non-lawyers are concerned (such as the concept of how customary international law is created), will be explained before being applied.

3. Methodology of the research

In accordance with the positivist legal tradition, it is upheld in this study that a scientific inquiry into any field of law should have as its object what ‘is’ and not what ‘ought’ to be. Therefore the inquiry in this study, which involves questions such as ‘what are the legal characteristics of arms control law?’, ‘what are the general features of supervision in arms control law?’, and ‘what mechanisms are available with regard to enforcement of compliance with arms control law?’ has as its object lex lata.

It is probably the primary task of an international lawyer to answer the question ‘what is the law?’, rather than ‘what should the law be?’. The first question is a legal question, the other, interesting and important as it may be, is not. A positivist approach to law is an ideal tool for stocktaking: where does “existing” law stand on the matter? One consequence of making this choice of approaching the law of arms control as it is and how it has developed so far rather than concentrating on how the law should be and in what direction it (eventually) should develop, is that a clear so-called ‘Western’, ‘Eastern’, or ‘Non-Aligned’ stance in matters of arms control can be avoided as much as possible. Still, the law that ‘is’ is not completely severed from the law that is about to ‘be’: lex lata may help shape future law. The fact that international law with regard to arms control is the result of international political processes is constantly apparent and has to be taken into account when that law is being discussed. The importance of the political relations between States for the negotiation of arms control arrangements and their interpretation and application is even further enhanced by the fact that arms control law is dominated by considerations of security, which as a concept is - to say the least - more of a political than of a legal nature.

Keeping the above in mind, the present study relies heavily on the analysis of ‘primary’ sources, i.e. treaties and other official documents, such as decisions and resolutions of international organisations, (final) acts of intergovernmental and other conferences and, occasionally, travaux préparatoires. The theory used to analyse supervisory mechanisms in arms control law has been developed starting from earlier treaty analysis (namely,

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that is subsequently applied to and put to the test with regard to other multilateral arms control treaties in force. Of course this method of research does not exclude the possibility of making critical comments on the ‘state of the law’ in the field of arms control with a view to bringing it closer to what it ‘ought’ to be, but in this field especially it is important not to pretend that wishful thinking lege ferenda is part of lex lata.

Obviously there is a strong interaction between the theory presented in chapters 2, 3, 4 and 7 and the treaties to which it is applied in chapters 5 and 6, albeit that this connection is not a normative one - that is to say that the theoretical framework for analysis presented in this study is an aid to provide a deeper understanding of the structure of supervisory mechanisms in arms control treaties; it is not to be considered as a set of criteria that supervision in arms control law should meet. Regarding both the theoretical parts and the treaty analysis, naturally also ‘secondary’ sources, such as monographs, articles, conference papers, etc. have been made use of.

Finally, it should be stressed that the practice of arms control law in the sense of the day to day functioning of arms control treaty regimes is not the subject of this study. Whereas the discussion of the implementation and practical functioning of particular arms control treaties would detract from the coherent handling of the main questions and purposes of this study, most (known) practice of arms control law does not warrant separate discussion in the first place – apart from a few notorious cases of established non-compliance, which are discussed in chapters [3] and [6].

4. Historical developments in arms control prior to the establishment of the UN

4.1 Introduction

For a proper understanding of today’s arms control law, knowledge of the ideas of yesterday’s drafters of the law is indispensable. Since law has evolved in and is a reflection of social and political reality, the thinking about arms control is largely determined by historical conceptual developments. Mankind has such a long and continuous tradition of bloodshed that any history of warfare will serve to provide a good outline of human history as a whole. Closely connected to the emergence and

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7 This analysis appears in Den Dekker (1997).
8 The inventory of arms control agreements that appears in this section is based, first and foremost, on Dupuy & Hammerman (1973). The definition used by Dupuy and Hammerman to identify ‘arms control and disarmament agreements’ is the following: ‘disarmament’ means that actual reduction in armaments is referred to and ‘arms control’ is used for all other kinds of restrictions or limitations on weapons employment (p. V).
9 It is illustrative that the first documented treaty ever, dating back to 3100 BC, was a peace treaty. It was concluded to end a war between two Mesopotamian city-States, the common
development of arms control is the issue of the legality of war and the peaceful settlement of disputes, as well as the relationship between security and arms control for the maintenance of international peace and the prevention of war. Although many arms control treaties have been concluded especially after WW II, earlier periods have also witnessed quite ambitious endeavours towards controlling armaments through the law. Hence, there is no compelling reason why the starting-point for an inquiry into arms control law should be situated after the year 1945. Although many of the pre-WW II arms control treaties, especially those of the inter-war period, never made it beyond the drafting stage, they clearly indicate that the origins of the legal thinking about the interrelationship between peace, war, security and arms control started long before the creation of the UN.

4.2 Arms control agreements before WW I

Already in ancient times efforts were made to negotiate arms control. In the Middle Ages, it was the Church that attempted to control arms by way of the so-called ‘peace of God’ or ‘truce of God’. The peace and truces of God merely restricted fighting by forbidding attacks on churches and on clergy and others who are not bearing arms and by forbidding fighting on certain days of the week and at specified times of the church year. The punishment for violation of the peaces and truces was anathema or excommunication, and reparations were to be made through satisfaction (e.g. undertaking a pilgrimage to Jerusalem). Both kinds of documents (peaces and truces) were decreed for the whole church at the Second Lateran Council (1139), which even addressed the prohibition of the use of particular weapons against Christians. In those days, also temporal rulers used to decree so-called ‘peaces of the Land’ in order to prevent private

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Gods of which were the guarantors of the treaty: they would punish its violation. See Nussbaum (1961), p. 1.

10 E.g., in 546 BC a peace conference took place in Honan Province, China. This peace conference ended the seventy-two years of almost incessant war and pledged to bring about disarmament in the Yangtse Valley. The text of the document speaks of a ‘cessation of armaments’ without further specification. See Dupuy & Hammerman (1973), p. 3.

11 A peace of God proclaimed in the Synod of Charroux in the year 989 specifies ‘arms’ as shield, sword, coat of mail, or helmet. Also ‘defensive’ armoury is thus taken into account.

12 E.g., truce of God, made for the Archbishopric of Arles, 1035-1041, which prescribes to keep true and lasting peace from vespers on Wednesday to sunrise on Monday, so that during those four days and five nights, all persons may have peace, and, trusting in this peace, may go about their business without fear of their enemies. See also truce for the Bishopric of Terouanne, 1063, which forbids, inter alia, assault on persons and attack on castles.

13 Although in secondary works the use of the crossbow is usually mentioned as the best known example, the qualitative arms control effort in Lateran Council Decree 29 applies more generally to all kinds of bow-and-arrow weapons. There is general agreement that the ban was not applicable to the use against non-Christians, and there is no doubt that any ban that existed was widely ignored. See Dupuy & Hammerman (1973), p. 11.
wars within the domain of the ruler. As punishment for violating peaces of the Land the perpetrator could stand to loose his eyes or his hand or even be subjected to capital punishment.

In the 15th and 16th centuries, the centralised nation-State was in the course of replacing feudalism. The development of modern weaponry (especially firearms), which became increasingly deadly in the 17th and 18th centuries, made wars more devastating than ever before. From the 17th century onwards, efforts were made to neutralise territory (occasionally in combination with demilitarisation for purposes of neutralisation) and to raze fortifications. Some treaties that settled wars contained other measures in

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14 E.g., peace of the Land established by Henry IV, 1103 and peace of the Land for Elsass, 1085-1103.
15 E.g., Treaty of Münster of October 24, 1688 between France and the Holy Roman Empire, part of the Peace of Westphalia that ended the Thirty Years' War, which specifies exactly what fortifications (on the Rhine) have to be destroyed completely (Art. LXXXIII). See also the Treaty of Utrecht of April 12, 1713, which provided inter alia for the razing of the fortifications of the City of Dunkirk (Art. IX) and the so called 'Third Barrier Treaty' of November 15, 1715, between the Emperor and Spain and Great Britain, and the Netherlands, a minor part of which provided for the complete destruction of the Liège fortifications and the castle of Huy (Art. XXVIII). On neutralisation see e.g., 'Act signed by the Plenipotentiaries of Austria, France, Great Britain, Prussia, and Russia Conveying Recognition and Guarantee of the Perpetual Neutrality of Switzerland and of the Inviolability of its Territory', November 20, 1815. Also Belgium (Treaty between Great Britain, Austria, France and Russia, on the One Part, and the Netherlands, on the Other, April 19, 1839) and Luxembourg (Treaty of London between Great Britain, Austria, Belgium, France, Italy, The Netherlands, Prussia, and Russia, Relative to the Grand Duchy of Luxembourg, May 11, 1867) were made neutral. In the case of Luxembourg, demilitarisation for the purpose of neutralisation was part of the Treaty; pursuant to Art. V of the Treaty, the King of the Netherlands, Grand Duke of Luxembourg, engaged to demolish the Fortress of the City of Luxembourg directly after the King of Prussia had withdrawn his troops from said Fortress (pursuant to Art. IV of the Treaty). Under the Treaty of Paris, March 30, 1856, which marked the end of the Crimean War, the Black Sea was neutralised. In an Annex to this Treaty, which was to be considered an integral part of it (see Art. XIV of the Treaty of Paris), Russia and Turkey limited their naval forces in the Black Sea to six 'heavy' steamships and four light steamships or sailing vessels each, without however (unlike the Rush-Bagot Agreement of 1817) addressing the armaments of these warships. It is noteworthy that the Treaty of Paris established two Commissions (see Arts. XVI and XVII of the Treaty) mainly for the purpose of securing free navigation on the Danube (these Commissions had no role or tasks whatsoever in arms control). As late as 1920, the neutralisation and demilitarisation of Spitzbergen took place. See Art. IX of the Treaty between Great Britain, Denmark, France, Italy, Japan, the Netherlands, Norway, Sweden, and the United States of America, relative to the Archipelago of Spitzbergen, February 9, 1920. A comparable Convention, relating to the non-fortification and neutralisation of the Aaland Islands (which had been demilitarised already - at the time when the islands belonged to Russia - by the 1856 Treaty of Paris between France, Britain and Russia), entered into force on April 6, 1922. It prescribes the absence of military, naval or military aircraft establishments or bases of operations in the zone (Art. 2). Finland is allowed in exceptional circumstances to keep internal order in peacetime by armed force (Art. 4) and in times of war special rules apply which, inter alia, allow Finland to lay mines (Arts. 6 and 7). See Dupuy & Hammerman (1973), p. 16, 36-47 and 104-107 and see Goldblat (1994), p. 272-275.
the sphere of arms control, such as the prohibition of fortification and the numerical limitation of a standing army or of a category of weapons.\textsuperscript{16}

As new and even deadlier weapons appeared in the 19\textsuperscript{th} century and the beginning of the 20\textsuperscript{th} century, there were also efforts to outlaw specific means of war that seemed especially inhumane.\textsuperscript{17} These efforts, of which the most important results came from the well-known Hague Peace Conferences of 1899 and 1907, focused on those weapons that seemed to cause unnecessary suffering or seemed to be indiscriminate in their effects, such as expanding bullets, chemical agents, and air bombardment.\textsuperscript{18} At the Second

\textsuperscript{16} See the Treaty of Kutchuk-Kaïnardji, a Peace Treaty between Russia and the Ottoman Empire, July 21, 1774, that prohibited the Ottoman Empire (Turkey) from fortifying, garrisoning, or sending any military personnel into the Crimea (Art. III). See further ‘Treaty concluded at Paris between France and Prussia for the Regulation of War Contributions, the Occupation of Three Fortified Places, and the Recognition of the Kings of Spain and of Naples’, September 8, 1808. Pursuant to secret, so-called ‘Separate Articles’ to this Treaty, the King of Prussia assumed the obligation of not maintaining for ten years more than 42,000 troops as specified in Separate Article 1. See also the Rush-Bagot Agreement, April 28-29, 1817, which reduced, limited and equalised the naval forces present on the Great Lakes of Great Britain on the one hand and the United States on the other in order to stop the naval arms race that was going on there. Pursuant to the Notes, exchanged between Charles Bagot of Great Britain and Richard Rush of the United States, the naval force to be maintained upon the American lakes was to be confined to one vessel not exceeding one hundred tons burden and armed with one eighteen pound cannon on lake Ontario, to two vessels not exceeding like burden each and armed with like force on the Upper lakes and on the waters of lake Champlain to one vessel not exceeding like burden and armed with like force. All other armed vessels on these lakes were to be dismantled, and no other vessels of war were there to be built or armed. See Dupuy & Hammerman (1973), p. 26-28, 36-37 and 39-41.

\textsuperscript{17} As Martin (1952) observes (p. 29 and 54), this was the era in which governments were concerned with the humanisation of war rather than its prevention. One example is the St. Petersburg Declaration on Exploding Bullets, December 11, 1868, which can be considered an early effort on qualitative arms control or simply part of the long effort to reduce unnecessary brutality and suffering in warfare. An exception to this general emphasis on humanitarian considerations was the Argentine-Chilean Convention on Limitation of Naval Armaments of May 28, 1902, which was to establish a just balance between the fleets of said States. The two Governments bind themselves not to increase their naval armaments during a period of five years, without previous notice; the one intending to increase them shall give the other eighteen months’ notice (Art. II). This Convention was clearly meant to secure a ‘balance of power’ and stop (for at least five years) a naval arms race (the Governments desist from acquiring the vessels of war then being built for them in Italy and England, and from henceforth making new acquisitions (Art. I)). See Dupuy & Hammerman (1973), p. 47-48 and 58-59.

\textsuperscript{18} The First Hague Conference, which convened on May 18, 1899 was called (by Russian Czar Nicholas II) to consider, first, arms limitation, and, second, peaceful settlement of international disputes. It reached no agreement in either field. The only results were Declarations on expanding bullets and asphyxiating gases. See Declaration (IV,3) Concerning Expanding Bullets Signed at The Hague, July 29, 1899. The Contracting Powers, Signatories to this Declaration agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions. The Declaration, like the St. Peters burg Declaration it supplements, is only binding for the Contracting Powers in the case of a war between two or more of them. The Contracting Powers, Signatories to Declaration (IV,2) concerning
Hague Conference the only accomplishments in the field of arms control were a Declaration prohibiting discharge of projectiles from balloons and a Convention relative to the laying of automatic submarine contact mines. Perhaps the most important accomplishment of the Hague Conferences was the recognition of the general rule that the right of belligerents to adopt means of injuring the enemy is not unlimited (Art. 22 of the Hague Conferences on the Laws of Land Warfare). In the period between the Peace Conferences and the conclusion of the Covenant of the League of Nations, the idea of arms control ‘rested quietly in the depository of lost causes’.  

Asphyxiating Gases signed at The Hague, July 29, 1899, agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases. Also this declaration is only binding on the Contracting Powers in case of a war between two or more of them. The voeux, or recommendations, in the Final Act of the First Hague Conference that are important to the purpose of arms control and disarmament, are the following: (3) The Conference expresses the wish that the questions with regard to rifles and naval guns, as considered by it, may be studied by the Governments with the object of coming to an agreement respecting the employment of new types and calibres; (4) The Conference expresses the wish that the proposal, which contemplates the declaration of the inviolability of private property in naval warfare, may be referred to a subsequent Conference for consideration, (6) The Conference expresses the wish that the proposal to settle the question of the bombardment of ports, towns, and villages by a naval force may be referred to a subsequent Conference for consideration. Furthermore, the Convention (II) on Laws of Land Warfare of the First Hague Conference, July 29, 1899, prohibited, inter alia, the employment of poison or poisoned arms (Art. 23(a)) and the employment of arms, projectiles, or material of a nature to cause superfluous injury (Art. 23(e)). It furthermore prohibited the attack or bombardment of towns, villages, habitations or buildings which are not defended (Art. 25).

19 Another Convention on Laws of Land Warfare also resulted from the Second Hague Conference. However, the provisions of this Conference (IV) of October 18, 1907, are almost similar to the ones of the First Hague Conference. The Contracting Powers to the Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons, October 18, 1907 agreed to prohibit the discharge of projectiles and explosives from balloons or by any other new methods of a similar nature. The Convention Relative to the Laying of Automatic Submarine Contact Mines, October 18, 1907 is quite interesting. In its preamble, the Contracting Powers express the view that although the existing position of affairs makes it impossible to forbid the employment of automatic submarine contact mines, it is nevertheless desirable to restrict and regulate their employment in order to mitigate the severity of war and to ensure, as far as possible, to peaceful navigation the security to which it is entitled, despite the existence of war[]. The provisions of the Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention (Art. 7). Both the Declaration and the Convention (Art. 11) were meant to be binding for seven years, until the close of the Third Hague Conference, which was to be called in seven years but which was never held due to the outbreak of the WW I. See Dupuy & Hammerman (1973), p. 59-70.

20 See Martin (1952), p. 31. One noticeable exception in this period was the Lodge-Hitchcock Joint Resolution of the US Congress, which called for the appointment of a commission to consider the expediency of utilising existing international agencies for the purpose of limiting the armaments of the nations of the world by international agreement, and of constituting the combined navies of the world as an international force for the preservation of universal peace. See ‘Joint Resolution to Authorise the Appointment of a Commission in relation to Universal Peace’, June 25, 1910. See also Dupuy & Hammerman (1973), p. 71.
4.3 The impact of WW I on arms control

The impact of WW I with its extraordinary number of casualties (over 8,500,000 men of all nations involved had been killed by the end of the war) and the horror and massive destruction resulting from the employment of all kinds of new weapons, among which the aeroplane and the tank, the rapid-firing machine gun, high-explosive artillery shells and poison gas, gave a new and strong impetus to arms control efforts.

During the whole inter-war period, there was a prevailing pre-occupation with the problem of how to maintain peace and prevent war by coherent means comprising both adequate security guarantees as well as arms limitation- and disarmament measures. In the famous ‘Fourteen Points’ of US President Wilson, who had called for disarmament as part of the post-war settlement even before the USA entered WW I, the relationship between security and arms control was touched upon as part of the programme for world’s peace in the following manner: ‘IV. Adequate guarantees given and taken that national armaments will be reduced to the lowest point consistent with domestic safety’.\(^{21}\) The last of the Fourteen Points called for a general association of nations, formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity. The Covenant of the League of Nations was the embodiment of this general association and its disarmament article bore the traces of the influence of the Fourteen Points’ programme.\(^{22}\)

But before any serious discussion of arms control would become feasible, the path first had to be cleared by outlawing war as a means of pursuing national policy and as a way of settling disputes.

4.4 The legality of war and the emergence of substantive arms control law

With the Peace of Westphalia (1648), the European States intended to create a system which would be stable and permanent. It was on this basis that positivist thought on the law of nations developed. The fundamental distinction between the ‘necessary law of nature’ and ‘the voluntary law of nations’ was adopted. It was only with respect to the former that the

\(^{21}\) Address of President Woodrow Wilson to a Joint Session of the Congress, January 18, 1918. The Fourteen Points deal mainly with measures towards openness and peace (Points I-V) and settlements with regard to different States (Russia, Belgium, France, Italy, Austria-Hungary, Rumania, Serbia, Montenegro, Turkey, Poland; Points VI-XIII). See Dupuy & Hammerman (1973), p. 79-80.

\(^{22}\) See Art. 8(1) of the Covenant of the League: ‘The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations’. Only after much debate had the original phrase ‘domestic safety’ (such as in Wilson’s Point IV) been replaced by the wordings of the Article. It was reasonable that enough national armed strength be maintained to permit joint action against aggressors. See Dupuy & Hammerman (1973), p. 81.
question of the justice of a war could be raised. The voluntary law of nations did not inquire into the intrinsic justice of wars since no nation could assume the functions of a judge. Since the distinction between just and unjust wars was rejected, war became the supreme right of sovereign States and the very hallmark of their sovereignty. The 18th and the 19th century were dominated by an unrestricted right of war and the recognition of conquests, qualified by the political system of Europe at the time. The majority of writers during the 19th and the beginning of the 20th century considered war as an act entirely within the uncontrolled sovereignty of the individual State. The discretion of States in this matter was portrayed as unfettered: States could ‘resort to war for a good reason, a bad reason or no reason at all’. In the latter part of the 19th century, war was regarded as a means of obtaining redress for wrongs in the absence of a system of international justice and sanctions. Yet there were also new trends in favour of peaceful settlement of disputes. War gradually came to be considered as a means of last resort after recourse to available means of peaceful settlement had failed. This view of war as a last resort was strengthened by the increasing favour shown to peaceful means of settling disputes in the period preceding WW I, culminating in the two Hague Peace Conferences. Although the Hague Conferences did not result in the setting up of an adequate and comprehensive international system for the peaceful settlement of international disputes, they did mark the beginning of the attempts to limit the right of war and they were the first steps taken designed to somewhat restrict the freedom of war in general international law through multilateral treaties. Still, States regarded the liberty to go to war as the general rule, albeit that they were free to assume an obligation not to resort to war in their particular relations with other States.

The first significant step taken to curtail the freedom of war in general international law was the creation of the League of Nations. The Covenant of the League contained no clear and general prohibition of war, and war

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23 As Dinstein observes, the postulate that the two belligerents in war may simultaneously rely on the justice of their clashing causes, and that they will be equally right, brought the just war doctrine in international law to a cul de sac. See Dinstein (1994), p. 65.

24 Cf. Henkin (1995), p. 110: “Under traditional law, forcible intervention was illegal in time of peace (...). States could also abandon peace and the regime and law of peace and go to war. War was not illegal and indeed had a law of its own”. Most international lawyers conceded openly that “[w]ith the inherent rightfulness of war international law has nothing to do”. See Dinstein (1994), p. 66 and 72: “Subsequent to the virtual demise of the just war doctrine, the predominant conviction in the 19th (and early 20th) century was that every State had a right - namely, an interest protected by international law - to embark upon war whenever it pleased”.


was thus tacitly permitted as a means of settling disputes. But even though there was no total prohibition of war in the Covenant, its qualification of the right to go to war was much more comprehensive than anything else in place in the international law of that period. The main thrust of the Covenant was not so much to prohibit the resort to war as to highlight the obligation to first resort to a procedure for peaceful settlement. The Covenant justified war in certain cases: as a means of settling a dispute, as a remedy in international law, and as a means of enforcing the law. The Covenant thus made a distinction between legal and illegal wars, implying that the use of force was illegal when directed at conquest and unjustified acquisition. War, as well as the use of force short of war, were considered violations of the Covenant if the means for pacific settlement had not been exhausted. Wars of aggression could never serve as a means of settling international disputes, as was expressed in several resolutions of the League of Nations Assembly. At the heart of this view lay that the concern of the Covenant was not war but aggression.

The idea of legal limitation of the complete freedom of armament of States paved the way for the development of substantive rules of arms control law. The idea of illegality of war, which was first expressed by the ‘Treaty Providing for the Renunciation of War as an Instrument of National Policy’ (Pact of Paris or Kellogg-Briand Pact), signed in Paris on August 27, 1928, gave a strong impetus to and was a justification for the coming into being of rules of arms control. The right to arm was a corollary to the right to wage

27 This basic idea can already be identified in the initial ‘League to Enforce Peace’ plan of 1915 upon which the Fourteen Points of President Wilson were indirectly based. One of the objects of the League to Enforce Peace, as interpreted by the ‘Executive Committee’ of the League to Enforce Peace, was that ‘the Signatory Powers shall jointly employ diplomatic and economic pressure against any one of their number that threatens war against a fellow signatory without having first submitted its dispute for international inquiry, conciliation, arbitration or judicial hearing, and awaited a conclusion, or without having in good faith offered so to submit it. They shall follow this forthwith by the joint use of their military forces against that nation if it actually goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be dealt with as provided in the foregoing’. See Marburg & Flack (eds.) (1920), p. 1-2.

28 Pursuant to Art. 10 of the Covenant, the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. Accordingly, there were attempts to explicitly declare the illegality of ‘wars of aggression’, e.g. by Art. 1 of the ‘Draft Treaty of Mutual Assistance’ of 1923.

29 XCIV LNTS 57 (1929). Before the outbreak of WW II, the Pact had 63 contracting parties, a record number for that period. An earlier attempt to close the gaps left by the Covenant vis-à-vis the right to resort to war was made by the ‘Geneva Protocol on the Pacific Settlement of International Disputes’ (1924). In Art. 2 of this Protocol, the contracting parties agreed ‘in no case to resort to war’, except in resistance to aggression or with the consent of the League’s Council or Assembly. Art. 2 was intended to abolish the general right to go to war, but the Geneva Protocol never entered into force and therefore war did not become illegal in principle until the Pact of 1928. See Dinstein (1994), p. 80-81.
war as an instrument of national policy. Now that war was made illegal, there was room - albeit not undebated - for arms control as a means to securing international peace and security. At least, in theory. As was clearly demonstrated by the total failure of the World Disarmament Conference held in Geneva from 1932 to 1936, the conceptions of the role of war in society have constantly impeded the achievement of a significant evolution in the field of arms control.\textsuperscript{30}

The Pact of Paris prohibited war as a national policy instrument.\textsuperscript{31} Self-defence was clearly not meant to be prohibited. The Pact did not just renounce war, but allowed States to use force solely in self-defence by setting up mechanisms and procedures for States to comply with before resorting to war. Of course, such mechanisms and procedures could only work in an organised society of States and hence emphasised the significance of the Pact within the system of a world organisation: the League of Nations and later the UN. Through the 1934 ‘Budapest articles of interpretation’ of the Pact of Paris, it became clear that the Pact was also intended to prohibit the threat to resort to armed force; measures short of war were prohibited and the notion of ‘threat’ was explicitly introduced, while the right of collective self-defence was explicitly recognised.\textsuperscript{32} Efforts were made to bring the Covenant of the League in harmony with the Pact of Paris; under the Covenant resort to war was still permitted as a means of settlement of disputes, and it was recognised that the machinery of the League was essential for the enforcement of the obligations under the Pact of Paris. The proposals for the amendment of the Covenant aimed to prohibit the resort to war. However, many members made their ratification of the proposed extension of their obligations conditional on the entry into force of the ‘Convention for the Reduction of Armaments’, that was being negotiated in the World Disarmament Conference, and, as that Conference failed, the question of bringing the Covenant into harmony with the Pact of Paris remained unsettled. The Pact, although it has never been terminated, has now been superseded by Art. 2(4) of the UN Charter.

The importance of the establishment of a general prohibition to resort to war as a legally binding norm (as it occurred for the first time in the Pact of Paris) can hardly be overestimated. For only after this norm had been firmly

\textsuperscript{30} For example, in the opinion of the British leaders who were preparing for the Geneva Disarmament Conference, war was not an evil in itself: “War is unavoidable. Since war is the supreme test of a nation, and victory its supreme interest, nothing counts more than strong armaments and a developed military spirit.” See P. Noel-Baker, as cited in Nastase (1988), p. 121.

\textsuperscript{31} Under the Covenant of the League, war could also be employed as a means of redress for the maintenance of international law. In that case, war would be employed as an instrument of international policy and would therefore not be prohibited by the Pact of Paris. See Dinstein (1994), p. 83.

\textsuperscript{32} Alexandrov (1996), p. 64. A State that violated the prohibition to resort to war could of course not invoke the same prohibition if it endured a counter-attack in response.
set, it was clear when an attack (resort to armed force) was to be considered illegal. And, only after the norm on the illegal use of force had been set, a ‘trigger-point’ for the right to assistance could be established. Therefore, from that moment on, it became clear under what circumstances a State would be entitled to (military) assistance, viz. as soon as that State was under illegal attack. In the inter-war period, the conviction grew that arms control would only be feasible if a strict and reliable system of collective assistance in cases of unlawful resort to force - a system of collective security - would be made to operate effectively.

Thus, the legal relationship between peace (taken here as the absence of war), security and arms control can be described as such: after (1) the standards for maintaining peace in accordance with international law had been set, there was (2) room for an international security system, which in turn paved the way for (3) arms control measures. Since 1945, (1) is formulated in the UN Charter, especially by its Articles 2(4), 42 and 51; (2) is embodied in the collective security system of the UN Charter, especially in its chapters VI and VII, as well as in regional arrangements; and (3) is formed by the legal instruments that, as a whole, constitute the law of arms control.

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33 After WW II, the Nuremberg Tribunal held that the Pact of Paris provided a sufficient basis for the application of the principles in the Nuremberg Charter. The Tribunal held that the Pact of Paris was violated by Germany in all cases of aggressive war charged in the indictment. For the judgements of the Nuremberg Tribunal, see 41 AJIL 172-333 (1947).