The Law of Arms Control: International Supervision and Enforcement

den Dekker, G.R.

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The place of the law of arms control in the international system

1. Introduction

This chapter will first portray arms control as a concept within the larger framework of the international system for the maintenance of international peace and security. Then, the subject matter of this study, the law of arms control, will be introduced and defined as a special field of international law. Next, rules of international law outside the law of arms control pertaining to the armaments of States will be briefly dealt with. As such, this chapter means to provide insights into the place of the law of arms control in the system of general international law and international politics.

2. Origins of and incentives for arms control in the international system

2.1 The international system and military power

The current international system is horizontal consisting of some 190 independent States that are, in legal theory, all equal in that they all possess the characteristics of sovereignty, and do not have to recognise anyone in authority over them (par in parem non habet imperium).\(^{34}\) Within the international system, autonomy of the constituent States is a primary value. Autonomy in general means that every State (through its government) is permitted to decide for itself its internal political, economic, social, cultural system and its domestic policies, as well as its foreign policy and its relations with other States.\(^{35}\) Achieving and maintaining the maximum autonomy possible for every State has been a primary purpose of

\(^{34}\) See, for example, the concise wording of Art. 4 of the 'Montevideo Convention on Rights and Duties of States', adopted by the Seventh International Conference of American States (Signed at Montevideo, December 26\(^{th}\), 1933, 165 LNTS 19 (1936), at p. 25): "States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law".

\(^{35}\) See e.g., Nicaragua Case (1986), p. 108 (par. 205).
international law.\textsuperscript{36} Though the independence of States remains the ideal, the international system is characterised by a tangle of complex interdependencies. In the hectic interplay of world affairs the need is felt for a regulatory framework, and international law fulfils that requirement.

As a starting-point, it can be maintained that sovereign States can only be bound to observe international law when and to the extent that they freely consent to be bound. This point reflects an important characteristic of international law: there is no executive or governing entity to see that those who break the rules they consented to are corrected.\textsuperscript{37} The use of force can be considered as the ultimate means to correct wrongful behaviour and to enforce compliance with international rules, but force may also be used in pursuit of the national political aspirations of one State going against the interests of other States. The legal fiction of the equality of States cannot and does not take account of the unequal division of (military) power between the States in the international system. To guarantee that the interdependence of States does not lead to a loss of their independence, the use of force has been generally outlawed and has been centralised by conferring it on the international community as a whole. For this purpose, the system of collective security as formulated under the Charter of the UN has been established. The UN Charter declares peace to be the supreme value, to secure not merely State autonomy, but fundamental order for all. The system involves the paradox of war for peace - peace being achieved through the collective capacity and will to resist.\textsuperscript{38} Every infringement of the subjective right of a State not to be illegally attacked by other States constitutes a problem, not just for the State directly affected but for all members of the international community alike. The system of collective security thus implicitly acknowledges that security is indivisible, in that an attack on one is of concern to all.\textsuperscript{39} The system is meant to protect national interests and sovereignty in a collective manner and to thereby lead to the strengthening of international security.

The collective security system aims at a broader objective than just the absence of war by taking into account the wider requirements of international peace and security. An ‘armed peace’ is not sufficient to ensure security and therefore armed peace is insufficient to attain the purposes and

\begin{itemize}
  \item \textsuperscript{36} See Henkin (1995), p. 109. \textit{Cf.} also Art. 2(1) UN Charter.
  \item \textsuperscript{37} The ultimate authority of the UNSC as the paramount body in world enforcement action needs to be recognised. This organ, however, cannot be said to function as a world-wide correction and enforcement force, due to mainly political obstacles.
  \item \textsuperscript{38} See Twitchett (1971), p. 32.
  \item \textsuperscript{39} Within NATO, indivisible security is perceived more as an active obligation of mutual assistance; it means an armed attack on one (or more) of NATO’s Parties shall be considered an attack on them all. See Art. 5 of the North Atlantic Treaty (34 UNTS 243); see also The Alliance’s Strategic Concept (1999), par. 41. The obligation of mutual assistance is compatible with the UN system, see Art. 51 of the UN Charter.
\end{itemize}
principles of the UN Organisation. The concept of the system of collective security is based on the renunciation of force, except in self-defence, on commitment to the peaceful settlement of international disputes and on the obligation to support collective measures, both military and non-military, to defeat any threat to the peace, breach of the peace, or act of aggression. The core substantive principles of the UN, the prohibition of the threat or use of force (Art. 2(4) UN Charter) and the complementary general provision to settle international disputes peacefully (Art. 2(3) UN Charter), are the basic legal pillars of the collective security system. The Charter provides that disputes shall be settled peacefully in such a manner that international peace and security, and justice, are not endangered and prohibits the threat or use of force by States in their international relations against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the UN. The ‘inherent’ right to use force in individual or collective self-defence against an armed attack is not impaired by the Charter system (Art. 51 UN Charter), so that it is perfectly legitimate for a State to be a member of a military alliance that is based on the right to collective self-defence (usually referred to as ‘assistance’) against any potential aggressor in case one of the member States of the alliance becomes the victim of aggression. International organisations based on the principle of regional assistance against aggression can be found in all major regions of the world (America, Africa, Europe, Southeast Asia, the Middle East). Note, however, that such defensive organisations cannot confer more rights on their member States than those States individually have under the Charter system: in the event of a conflict between the obligations of the Members of the UN under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail (Art. 103 UN Charter).

One of the instruments for strengthening the regime prohibiting the use of force in international relations is arms control. Arms control has been

40 See Goodrich & Hambro (1949), p. 93.
explicitly linked to the goals of the elimination of the danger of war, in
particular nuclear war, as well as to ensuring that war is no longer a method
of settling international disputes and that the threat and the use of force are
eliminated from international life as provided for in the Charter of the UN.43
Still, under the Charter the control or reduction of armaments is only a
secondary means, which should follow, and not precede, the setting up of a
workable system of security. The Charter does not set forth any ultimate
goals with regard to arms control. Instead, the few references to arms control
in the UN Charter only recognise the importance of the establishment of a
system for the regulation of armaments in order to promote the establish-
ment and maintenance of international peace and security with the least
diversion of the world’s human and economic resources for armaments (see
Art. 26 Charter). Arms control is not regarded as a direct means to attain
collective security, but as part of another important task of the UN
Organisation, viz. the prevention of waste of economic resources.44 The
Charter disapproves of the investment of precious labour, material, and
money in such ‘wasting assets’ as armaments. Furthermore, the UNGA may
make recommendations to the Members or to the UNSC or to both with
regard to the ‘principles governing armaments and the regulation of
armaments’ (Art. 11 Charter). The notion of ‘regulation’ discloses no bias to
either a high or a low level of armaments. There only is a tendency to
disapprove of the lack of regulation and the arms race, albeit more out of
economic than out of political concerns.
In the theory of the collective security system, the UNSC has both the legal
authority and the moral suasion to sanction the elimination of doomsday
weapons in the hands of irresponsible members of the international
community.45 Chapter VII of the Charter grants the UNSC a broad authority
and wide discretionary powers, enabling it (again, in theory) to take
effective collective measures for the prevention and removal of threats to the
peace, and for the suppression of acts of aggression or other breaches of the
peace.46 It is common knowledge that the collective security system in the
UN Charter has in practice never functioned as envisaged. Cold War
opposition and a general lack of political will to co-operate have blocked
consensus in the UNSC for almost forty-five years, and no stand-by armed
‘UN forces’ have ever been made available to the UNSC.47 These

44 Schneider (1954), p. 9. See also the Moscow Four-Nation Declaration on General Security
(30 October 1943), preamble: “Recognising the necessity of ensuring a rapid and orderly
transition from war to peace and of establishing and maintaining international peace and
security with the least diversion of the world’s human and economic resources for armaments;
(…)”.
46 See articles 1(1), 24(1), and 39-42 of the UN Charter.
47 It was originally envisaged in art. 43 of the Charter that Member States made available to
the UNSC, on its call and in accordance with a special agreement or agreements, armed
circumstances have to a large extent precluded the UNSC from fulfilling the role of central decision-maker which it was accorded by the Charter in preventing and countering aggression and in maintaining or restoring international peace and security.

The role of the UN in arms control has struck a similar fate. After WW II, the confrontation between East and West brought about a bi-polarization of the world. This promoted distrust and insecurity which in turn triggered an arms-race and the ‘action-reaction’ cycle, which proved to be a major factor in continuing this race. The bipolar order was determined by the security policies of the US and the SU. In the US, security policy was until the end of the 1960s premised upon the containment of communism (Truman and Eisenhower doctrines), while later it was dominated by the doctrine of détente (Kissinger-Nixon doctrine) and in more recent times by the ‘encroachment’ doctrine of the Reagan era. The SU on the other hand, claimed the right to exercise influence over security zones contiguous to its territory, effectively extending its land border to prevent an invasion from the West. It also claimed, under the Breznjev doctrine, the right to defend the gains of international socialism. Despite ideological divisions, both sides found the power necessary to sustain these claims and policies in the nuclear capabilities of the Eastern and Western ‘bloc’.48 Apart from the fact that Cold War opposition proved to be an impregnable stumbling-block on many occasions to arms control as well, the Non-Aligned Countries on the one hand and the States within (nuclear) alliances on the other hand also strongly opposed each other, which has severely hampered international negotiations on arms control.49

After the dissolution of the SU and the end of the Cold War in 1991, progress has been made in the field of arms control, both bilaterally as well as multilaterally. It has been much contended that a New World Order would be on the verge of emerging. The post Cold War situation accelerated a tendency to move UN organs to take action. Rather optimistically, the last decade of the twentieth Century was proclaimed the ‘Decade of International Law’ by the UNGA.50 The successful collective effort to

forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. Such agreements, which are a prescribed part of the full implementation of the system for international peace and security under the UN Charter, have never been concluded.


49 That is despite the fact that both the Non-Aligned and the ‘Aligned’ States subscribed to the Final declaration of the UNGA Special Session on Disarmament, which declares that ‘in accordance with the Charter, the UN has a central role and primary responsibility in the sphere of disarmament’ (SSOD-I (1978), par. 27). On the opposition between the several ‘ blocs’ in nuclear arms control negotiations, see Bourantonis (1993).

50 See for the programme of action for the period 1997-1999, UNGA Res. 51/157, 16
counter aggression in the (second) Gulf War (1990-1991) appeared to provide evidence that the positive changes in international relations would indeed lead to unprecedented progress in the maintenance of international peace and security. However, precisely during this last decade, the outer limits of the system of collective security have been severely put to the test. Presumably as a result of the absence of Cold War opposition, the threat of force and even the actual use of force were employed on a number of occasions, primarily by the US (and some of its allies), as the ultimate means to secure political interests without UNSC approval. In the European region, NATO has adopted ‘new’ security tasks and has assumed far-reaching enforcement powers, which were not always supported by an express mandate from the UNSC. It is clear that the contemporary international community still finds itself far from any centralised system of legislation and law enforcement by specific organs modelled after that of States. The threat of force even appears to be re-gaining the acceptance of States and international organisations as a legitimate means of exerting pressure for political purposes in international relations. Throughout this study, it will repeatedly come to the fore that arms control is closely related to the maintenance of national, as well as international, peace and security. At this point, it suffices to note that disrespect for the basic rules of the collective security system in the long term can only have negative effects on the international arms control process.

2.2 The (political) concept of arms control

Arms control can be described as an evolutionary process. Beginning with the development of a politically favourable environment, followed by a political commitment to negotiate, sometimes complemented by ‘politically


51 The application of the use of force without a supporting UNSC Resolution can be witnessed in the case of Iraq (enforcement of ‘no-fly zones’ over parts of northern and southern Iraq from 1992 onwards, and Operation Desert Fox of mid-December 1998) as well as in the bombings of Sudan and of Afghanistan by the US on 20 August 1998. In the case of Iraq, non-compliance with obligations of arms limitation were at the basis of the use of military power in Operation Desert Fox.

52 With regard to the civil war in Kosovo, NATO has repeatedly threatened to use military force in case Serbia would not take part in peace negotiations with the Kosovo Liberation Army (KLA). On 24 March 1999, NATO commenced its mission ‘Allied Force’ consisting of air bombardments on the Federal Republic of Yugoslavia (FRY), without any supporting UNSC Resolution whatsoever, a situation that lasted until 10 June 1999. Also ‘on paper’ NATO has assumed far-reaching powers. The Alliance’s Strategic Concept (1999) which refers to the security tasks of NATO (for the 21st century), mentions crisis management, including ‘non-art. 5 crisis response’ operations, to be carried out by NATO even beyond the Allies’ territory (par. 10 and 52).

binding’ instruments, States with adversary interests, participating in the
process, finally agree that their individual security is better served if the
arms competition between them is managed under agreed covenants.\textsuperscript{54} The
‘managing’ of an arms competition may take the form of a negotiated
reduction of military arms to zero or to a greatly reduced level, or may be
designed to seek the more modest goals of slowing the acquisition of arms
or directing those acquisitions in areas believed unlikely to lead to war. In
other words, arms control refers to all kinds of agreements between two or
more States to limit or reduce certain categories of weapons or military
operations to diminish tensions and the possibility of conflict.\textsuperscript{55}
There is no generally accepted definition of ‘arms control’. Descriptions or
definitions of the contents of the notion of ‘arms control’ (and also
‘disarmament’) have been based on the goals that States want or wanted to
pursue with it. Thus, ‘arms control’ has been described as a policy of
reducing or eliminating instabilities in the military field with the primary
aim of lessening the probability and possibility of outbreak of war
(accidentally or deliberately caused, with emphasis on the avoidance of
nuclear war).\textsuperscript{56} ‘Arms control’ has also been defined as changes in the
numbers, types, and qualities of weapons; changes in their configurations;
and other modifications that affect their use or effectiveness in order to
reduce the chance of war, especially nuclear war.\textsuperscript{57} Other definitions \textit{inter alia}
refer to ‘all measures, directly related to military forces, adopted by
governments to contain the costs and harmful consequences of the continued
existence of arms (their own and others), within the overall objective of
sustaining and enhancing their security’,\textsuperscript{58} and to ‘all the forms of military
coopération between potential enemies in the interest of reducing the
likelihood of war, its scope and violence if it occurs, and the political and
economic costs of being prepared for it’.\textsuperscript{59} Many other definitions have been
provided, by various authors. These and other definitions vary from
concepts including disarmament, arms limitation but also an increase of
weapons if it appears to be in the interest of national or world security to do
so, to more narrow concepts making a strict distinction between the notion
of arms control and the notion of disarmament.\textsuperscript{60} Again others favour the
word ‘disarmament’ since it is understood to cover all degrees of reduction
of armaments, and it includes the pre-emption of options for further arms

\begin{itemize}
  \item \textsuperscript{54} Cf. Duffy (1988), p. 1.
  \item \textsuperscript{55} See McCausland (1996), p. 4.
  \item \textsuperscript{56} See Schütz (1995), p. 263.
  \item \textsuperscript{57} Intrigilato & Brito (1989), p. 213.
  \item \textsuperscript{58} Morgan (1989), p. 301.
  \item \textsuperscript{59} Definition by Schelling and Halparin (1985), cited by Morgan (1989), p. 300.
  \item \textsuperscript{60} An overview can be found in Lysén (1990), p. 52-63. He himself describes ‘disarmament’
as any reduction of weapons or forces, including reduction to zero-levels; and ‘limitation of
armaments’ as controlled growth (qualitatively and/or quantitatively) which may constitute a
necessary prerequisite to disarmament. For another overview, see Ipsen (1999), p. 986.
\end{itemize}
development (non-armament) as well as measures for regulating the production or use of arms quantity or quality.\(^61\) Or, ‘disarmament’ is taken as encompassing a broad spectrum of measures relating to the regulation, limitation, reduction and elimination of armaments, armed forces and military expenditures, as well as limitations or prohibitions on the development, testing, production, emplacement, deployment, proliferation and transfer or use of arms.\(^62\)

In summary, it becomes clear that arms control (and disarmament) has consistently been described as part of a larger process aimed at international stability and security, and at the reversal of the arms race and the avoidance of war or large-scale international armed conflict. Arms control is therefore not considered an end in itself, but instead has been perceived as a means to achieve the objective of improved security and, through that, to reduce the chance of war. A ‘common sense’ appreciation of what constitutes ‘war’ or (large-scale) ‘international armed conflict’ is favoured here, in that both terms comprise international hostilities irrespective of formal declaration or its absence.\(^63\)

2.3 The changing scope of ‘arms control’

As already appears from the above, over time the scope of the term ‘arms control’ has changed in rather profound ways. Initially, the conception of arms control was largely influenced by the outbreak of the major wars of the twentieth century. After WW I, it was thought that the abundant availability of arms and the willingness to use them had brought about the war. Thus, the belief that a high level of armaments could in itself present a danger to peace explains why the Covenant of the League of Nations placed principal emphasis on disarmament. After WW II, there was the belief that had the Allies been more extensively armed and ready to use their forces, the war might have been averted. It is therefore not surprising that the idea that the maintenance of a high level of national armaments is a positive danger to peace is not proclaimed in the Charter of the UN. Still, generally speaking, until the 1960s the concept of arms control was virtually synonymous with disarmament. In this interpretation, arms control refers to the reduction of the number of weapons; ‘control’ over ‘arms’ was exercised by reducing their numbers, that is, limiting and reducing inventories of weapons.\(^64\)

Whereas in the immediate post-WW II period the emphasis of arms control

\(^{61}\) Definition by Myrdal (1976), cited by Lysén (1990), p. 60.


\(^{63}\) Cf. McCoubrey & White (1992), p. 194. International armed conflict or war can thus be considered to involve (unilateral or collective) resort by States to active and hostile military measures in the conduct of their international relations with intent to the attainment of policy objectives or defence against the same, whether or not a state of ‘war’ is declared or recognised to exist.

was on the reduction of strategic weapons of mass destruction, particularly nuclear weapons, by the 1960s the meaning of arms control had changed to the reduction of the chance of war, primarily as a result of the development of the deterrence paradigm. According to the deterrence paradigm, stability in the sense of reducing the chance of war is achieved when each of the contending States has enough capability to inflict unacceptable damage on the other side in a retaliatory second strike, after the other side has inflicted the first strike (deterrence by threat of retaliation), or when each of those States has the ability to overcome the effects of the first strike and continues to prosecute effective operations and prevail in the conflict (deterrence by denial).\textsuperscript{65} Arms control serving the policy of deterrence involved any initiative that would reduce the chance of war, particularly nuclear war; reduce damage in case war did occur; and reduce the cost of defence.

The change in the interpretation of the term ‘arms control’ from reducing the number of weapons to reducing the chance of war involved a substantial broadening of interpretation. It could even amount to the opposite of the arms control process in its ‘original’ meaning. For the deterrence paradigm could - in circumstances of inequality in arms and imbalance of powers - call for more weapons, precisely in order to reduce the chance of war.\textsuperscript{66} By the late 1970s, the meaning of arms control had once again changed, partly as a result of the wide attention given to the SALT/START process, to an interpretation which emphasised the strictly US-Soviet negotiations on limiting or reducing strategic weapons.\textsuperscript{67} This confining of arms control to bilateral negotiated weapons reductions narrowed even the earlier, ‘arms reduction’ interpretation, which allowed also for reductions stemming from multilateral negotiated agreements. During the 1980s, arms control increasingly focused on the problem of (horizontal\textsuperscript{68}) proliferation of weapons of mass destruction. Critical to controlling proliferation is controlling the means of weapons production rather than limiting their deployment. In this view, the possession of weapons of mass destruction, and not the inclination of a State to use them, is the ‘offensive’ activity that should be controlled.\textsuperscript{69} In line with this development, the UNSC in 1992 declared that the proliferation of all weapons of mass destruction\textit{eo ipso} constitutes a threat to international peace and security.\textsuperscript{70} NATO in its 1999

\textsuperscript{68} The term ‘horizontal’ proliferation refers to the spreading of weapons by (de jure or de facto) possessors of those weapons, i.e. from the ‘haves’ to the (de jure or de facto) ‘have-nots’. In contrast, ‘vertical’ proliferation refers to the modernisation and further development of weapons systems already de jure or de facto in the possession of the (vertical) proliferator.
\textsuperscript{70} ‘The responsibility of the Security Council in the maintenance of international peace and security’, held at the level of Heads of State and Government, 31 January 1992, \textit{UN Doc.}
Strategic Concept likewise emphasises the threat of proliferation of weapons of mass destruction and declares that the Alliance and its members have their own non-proliferation goal, viz. to prevent proliferation from occurring or, should it occur, to reverse it through diplomatic means.\textsuperscript{71} Also coupled with non-proliferation goals is the assurance of the NWS not to threaten or use nuclear weapons against States who do not possess nuclear weapons: only States that participate in the Non-Proliferation Regime are entitled to those security assurances.\textsuperscript{72}

Between the superpowers, in the first place the US and the then SU, arms control was instrumental in sustaining a stable ‘balance of power’ between 1945 and 1991. During the Cold War period, arms control was given the highest priority in the pursuit of international security and stability. The comprehensive arms control agreements concluded towards the end of the Cold War (INF Treaty, START-I Treaty, CFE Treaty) are testimony of the fact that the predominant paradigm during the Cold War had been narrowed down to a consideration of arms control almost exclusively concerned with the maintenance of strategic (nuclear) stability between the superpowers.\textsuperscript{73}

The dissolution of the Warsaw Pact and of the SU have had their impact on the global balance of power, and on the equality of arms in Europe. China has emerged as another key player in the international strategic field, and the danger of nuclear proliferation and the spread of ballistic missile technology to smaller states such as Iran, Iraq and the DPRK is being perceived as a serious threat.\textsuperscript{74} Still, ‘arms control’ does not seem to have a fundamentally different connotation in this changed security environment. The arms control efforts of the USA and the Russian Federation are still devoted to keeping the legacy of the Cold War in check - which, for all its shortcomings, at least provided for stable military balances. The Cold War legacy consists of the well-known practice of the management of the size and character of particular weapon systems, that serves to codify existing or

\textsuperscript{71} See The Alliance’s Strategic Concept (1999), par. 40; also par. 21, 22, 41, 53(h), 56.

\textsuperscript{72} Whether this type of assurance of security to NNWS was an obligation of the NWS or something which they could or should offer in return for the signature of the NPT was the subject of extensive debate in the 1998 sessions of the ‘Ad Hoc Committee on Effective International Arrangements to Assure Non-Nuclear-Weapon States Against the Use or Threat of Use of Nuclear Weapons of the Conference on Disarmament’. See the Report of the Ad Hoc Committee (CD/1554), as contained in the Annual Report (1998). On security assurances and the NPT see also Elaraby (1991), p. 48-51.


\textsuperscript{74} See only the ‘Statement for the Record to the Senate Foreign Relations Committee, 16 September 1999, on Foreign Missile Developments and the Ballistic Missile Threat to the United States Through 2015, by Robert D. Walpole, National Intelligence Officer for Strategic and Nuclear Programs’ and the Intelligence Community Report ‘Foreign Developments and the Ballistic Missile Threat to the United States Through 2015’, both reproduced in 19 Comparative Strategy 1, (2000), pp. 79-99. See also Daaldor et al. (2000).
planned military balances. Since the end of the Cold War, a further refinement of the arms control contained in this legacy has been taking place. The ongoing efforts towards reducing the number of strategic nuclear weapons between the USA and Russia (START-II and presumably START-III), as well as the revision of the 1990 CFE Treaty in order to adapt it to the changed security environment in Europe, reveal an ongoing pursuit of global and regional military balances, albeit based on lower levels of armaments. Furthermore, it is considered that nuclear weapons in Europe will remain valuable in the post Cold War security environment, both inside and outside NATO’s collective deterrent. Likewise, the majority of Russian politicians and experts in areas of arms control and disarmament stick to the models and tools developed during the Cold War and in the bipolar world. Even (recent) arms control efforts that to a large extent have been inspired by humanitarian considerations, such as efforts leading to the outlawing of chemical weapons and of anti-personnel landmines, have been specifically considered in the context of strategic military stability and security. For example, many large States have declared to depend on landmines for the defence of their (or other States’) national borders, and chemical arms

75 See Netherlands Helsinki Committee Working Group (1997), p. 9. See in this respect also The Alliance’s Strategic Concept (1999), which re-emphasises that the presence of US conventional and nuclear forces in Europe remains vital to security in Europe, which is inseparably linked to that of North America (par. 42).

76 See ‘Treaty between the USA and the Russian federation on further reduction and Limitation of Strategic Offensive Arms’ (START-II) which was ratified by the US in 1996 and by Russia in 2000, and which will eliminate the most devastating strategic nuclear weapons (all multiple-warhead ICBMs) and reduce the total number of strategic nuclear weapons deployed by both States. At a US-Russian summit meeting in Helsinki, a Joint Statement of 21 March 1997 envisaged the negotiation of a START III which would reduce the number of strategic nuclear weapons on each side to the levels of 2000-2500; see Blix (2000), p. 71. See furthermore the Final Act of the Conference of the States Parties to the Treaty on Conventional Armed Forces in Europe, CF.Doc/2/99, 19 November 1999, as adopted on the Istanbul Summit of the OSCE (18-19 November 1999). Earlier, on May 31, 1996, the States Parties to the CFE Treaty in Vienna adopted the ‘Flank Document Agreement to the Conventional Armed Forces in Europe Treaty’ (text in 36 ILM 866 (1997)), which is a legally binding agreement that co-operatively resolves concerns expressed by Russia and Ukraine with regard to the Treaty’s flank limit in a way that is acceptable to all States Parties; see Homan (2000), p. 54.

77 See the Alliance’s Strategic Concept (1999), par. 64. This notwithstanding the observation that “the circumstances in which any use of nuclear weapons might have to be contemplated are extremely remote”. See also Tertrais (1999), who signals a trend through which Europe may develop a nuclear identity of its own, less dependent on the American nuclear umbrella and with a relatively increased share of European nuclear weapons, although the total number of nuclear arms in Europe has impressively decreased as compared to the days the Cold War was at its height.


79 Russia, China, India and Pakistan (all of them produce landmines) took this position during the Review Conference of the 1981 Certain Conventional Weapons Convention, held in May 1996. They refused to become Parties to the amended Protocol on Landmines of the 1981
have been termed the ‘poor man’s nuclear bomb’, thereby illustrating their (potential) role in the context of balancing military power relations. As a final illustration, it has been upheld with regard to biological weapons that their relatively early outlawing was feasible (long before chemical disarmament could be discussed) because of their low strategic value in warfare.

3. The security context of arms control

3.1 The interrelationship between national and international security

The collective security system of the UN Charter is first of all devoted to the maintenance of international peace and security (Art.1(1) Charter). As has been mentioned, international peace can be perceived to be maintained in the absence of international war (negative peace), but it is clear that such an ‘armed peace’ with the fear of war as the recurrent theme is not sufficient for the achievement of the purposes of the UN and cannot be considered satisfactory for the avoidance of large-scale armed conflict in the long run. Peace must be accompanied by a feeling of security, security from war in particular. The notion of ‘international security’ should therefore not be identified with that of ‘international peace’. It has a meaning of its own, which warrants separate analysis.

‘Security’ has both an objective and a subjective meaning. Security in its objective meaning refers to the condition of being protected from or not exposed to danger, while subjective refers to freedom from care, anxiety or apprehension, a feeling of safety. On the international level, the objective ‘condition’ of security cannot be established without (the governments of) States ‘feeling’ subjectively secure. Therefore, in principle, international security can be described as a condition in which States consider that there is no danger of military attack, political pressure or economic coercion, so that they are able to freely pursue their own development and progress. The attainment of the objective of security has been one of the most profound aspirations of all time of States all over the world. Traditionally, States are faced with a security dilemma, in that efforts to increase one

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80 See Price (1995), p. 98, who regarding the non-use of chemical weapons both discusses the ‘stigma’ attached to chemical weapons out of humanitarian concerns and points at their potential role in deterrence.


State’s security are generally achieved at the cost of increasing another’s insecurity. No single State can gain absolute security. Individual States may temporarily achieve an increase in their security through the development of their military capabilities but they will ultimately be negatively affected by off-setting measures undertaken by other States and the resulting deterioration in international security. Even the great empires of ancient times (such as Rome and China) eventually could not maintain their security without the help of others. Likewise, in today’s organised community of States, no absolute security can be attained by any one single State and security policies must take into account the broad and complex issues of the interrelationship between national and international security, as well as between military and non-military aspects of security. Security is a relative term and national as well as international security need to be viewed as matters of degree. Degrees of international security necessarily are both the result and the sum of the (relative) security of each and every State member of the international community. Because of this interrelationship and in order to escape the traditional security dilemma, a co-operative approach by States towards security is imperative.

The relative balance of military power between the States in a given region has always been an important factor taken into consideration by States when addressing their security concerns. By way of (secret) pacts, all kinds of alliances, treaties of guarantee, treaties of friendship and treaties of neutrality, States have tried to find a balance of power reconciling national security interests with international security. As such, the concept of balance of power has often been the basis for the formation of military alliances ever since it was introduced in the sixteenth century. Even though the preamble to the Covenant of the League of Nations introduced the maintenance of international peace and security as a central goal to be attained by the League, true ‘pactomania’ still reigned within the framework of the Covenant. The Members of the League continued to adhere to existing bilateral and regional pacts and alliances and concluded new ones, often in secret. After WW II, this practice was not ruled out in the framework of the UN Charter. In its Chapter VIII, the Charter expressly recognises the importance of regional arrangements to supplement the collective security system. New (defensive) alliances, as well as regional

85 ‘Absolute’ or ‘ideal’ security can be defined as ‘the absence of threats to acquired values’, see O’Connell (1997), p. 2.
87 For a pre-WW II overview, see Wild (1932). For a post-Cold War account, see Waltz (2000), p. 27-39.
88 According to Verosta (1971), p. 537, the principle of the balance of power (Princip des Gleichgewichts) was introduced from physics into historical science by Guiccardini in the 16th Century.
organisations with broader purposes were established on the basis of treaties concluded openly. Since the Charter in addition explicitly recognises the inherent right to use force in individual and collective self-defence (Art. 51), all States evidently have the right to maintain military capabilities for purposes of national defence and collective action and they have the right to be militarily prepared in matters concerning their own security, as well as in matters concerning the security of the members of their alliance. These provisions can be seen as a recognition of the fact that absolute international security cannot be provided by the collective security system of the Charter. The survival of States has indeed, in certain cases, effectively depended on whether they could count on their own means of defence. Yet it cannot be disregarded that the uncontrolled accumulation of weapons, particularly nuclear weapons, may constitute much more of a threat to, than a protection of, the security of States. History has shown that in the end an uncontrolled arms race, that is, the unabated competitive qualitative and quantitative strengthening of military capabilities, impairs international confidence, stability and hence security. Although States have the right to defend their own security, they all bear responsibility to ensure that their national security policies do not jeopardise international security. If States pursue security policies that rely on their own military strength and broadly defined national interests, serious problems may arise for international security. Interpretations of ‘national security’ and ‘vital national interests’ in ways that condone the use or threat of force against the territorial integrity of other States, interference in their internal affairs and the projection of national security interests to the territory of other States constitute examples of this. Still, it is important that in the course of pursuing the international arms control process, the need of States to protect their security during that process is being taken into account. For as much as an uncontrolled arms race threatens international security, uncoordinated disarmament would upset the balance of power and could therefore turn out to be detrimental to international security.

3.2 The interrelationship between arms control and security
In international relations, both policies of disarmament and arms limitation, and policies to maintain and develop military capabilities are pursued as a means to promote security. Whether a State will seek security in arms limitation or in arms accumulation, is - as long as it remains within the boundaries of international law - a subject of national policy.

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90 Cf. The “High Command Case” (USA v. Von Leeb et al., Nuremberg, 1948, 11 N.M.T. 462, at 488): “Almost all nations, including even a traditionally neutral country like Switzerland, arm and prepare for the eventuality of war. As long as there is no aggressive intent there is no evil inherent in a nation making itself militarily strong.” Quoted in Dinstein (1994), p. 139.
national arms control policies are pursued depends on the concepts of security that States adhere to.\textsuperscript{91} The concepts of security that are primarily reflected in arms control policies are combinations of the concept of balance of power and the concept of deterrence. In general, arms control as an element of balance of power-politics aims at promoting the creation or preservation of an equivalence in power between two or more States or groups of States. In addition, deterrence policies are pursued by the NWS, of which the relatively small, yet invulnerable, nuclear forces provide a basis for strategic parity and equality in security.\textsuperscript{92} Both concepts of security can be adhered to at a lower or a higher level of armaments, although the concept of deterrence may contain incentives for increasing weapons stocks. In order to work, the concept of deterrence requires a level of military force that is capable of deterring any potential aggression against it, and of stopping an aggressor’s advance as far forward as possible should an attack nevertheless occur (i.e. to deter and counter aggression). Still, as (groups of) States gain confidence through experience in the security concept of deterrence, they become more willing to rely on that concept for maintaining stability against resort to weapons, i.e. to rely upon their adversaries to adopt the same perspectives they have adopted against aggression. Potential adversaries, in a concerted effort, may then agree to pursue policies of deterrence at a lower level of armaments.

In theory, deterrence as a military security concept may be pursued with conventional weapons and with all kinds of weapons of mass destruction.\textsuperscript{93} However, the potential role of chemical and biological weapons in deterrence policies has greatly diminished as a result of the entry into force of the BWC and the CWC.\textsuperscript{94} What has remained is nuclear deterrence, which relies on the possession of offensive nuclear capabilities that would be used against an adversary in the event that that adversary were to initiate conflict, and which, against other NWS, relies on a concept known as Mutually Assured Destruction (MAD).\textsuperscript{95} This strategic concept refers to a situation in which large-scale nuclear attack is deterred by the threat of nuclear retaliatory strike on the territory of the adversary, so that the first use of nuclear weapons becomes suicidal. Nuclear deterrence policies

\textsuperscript{91} Concepts of security are the different bases on which States and the international community as a whole rely for their security. See United Nations (1986), p. (v).

\textsuperscript{92} Currently, there are seven States that overtly signal the possession of nuclear weapons as part of their security policy, viz. China, France, Russia, the UK, the US, India and Pakistan.


\textsuperscript{94} In case a State should want to rely on the security concept of deterrence with biological and chemical weapons, it would have to maintain those weapons in its arsenals not only to deter the use of this type of weapons against it, but also to provide a retaliatory capability if deterrence failed. Strict adherence to the CWC and the BWC definitely makes this impossible. Cf. in this respect The Alliance’s Strategic Concept (1999), par. 57: “Alliance Strategy does not include a chemical or biological warfare capability”.

actually constitute their own variant of the concept of balance of power, seeking stability by deterring aggression. Between the NWS there is a balance of nuclear arsenals, which can be described as a 'balance of terror'. The central balance between the superpowers is reinforced by the existence of medium-sized nuclear powers (France, the UK and China), which helps to dissuade the superpowers from attacking one another because the other powers could intervene and exploit whatever attrition occurred as a result of the initial conflict. It has been asserted that nuclear weapons make a unique contribution in rendering the risks of aggression against those who possess them incalculable and unacceptable and that nuclear weapons thus remain essential to preserve peace. In a recent Advisory Opinion, the ICJ in this regard confined itself to noting that in order to be effective, the policy of nuclear deterrence necessitates that the intention to use nuclear weapons be credible. Whether this constitutes a 'threat' contrary to Art. 2(4) of the UN Charter depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State or against the purposes of the UN or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality.

Whether nuclear weapons might exclusively be used against other nuclear weapons ('no first use' of nuclear weapons) is still open to legal and political debate. As long as this issue is not perfectly clear, and as yet it is not, nuclear weapons can serve both politically and legally to deter the use of any kind of weapon (conventional, chemical, biological, nuclear). Reconciling deterrence, which emphasises the importance of possessing nuclear weapons, with non-proliferation goals, which necessitate the opposite, could become one of the most fundamental dilemmas of post-Cold War strategy for Western States.

Security and arms control are closely interrelated, both on the national and the international level. Each State will carefully scrutinise its security when considering concrete proposals for arms control. States are not likely to adopt far-reaching measures of arms control unless effective means to provide international security are available. The interrelationship between the achievement of measures of arms control, especially those involving disarmament, and the establishment of an effective system of international security is complex. The dilemma whether to seek international security

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96 Cf. Wohlstetter (1958); see also Nagan (1999), at p. 489-490. Note that the possession of nuclear weapons for the purpose of pursuing credible policies of mutual deterrence implies the right not only to develop and stockpile those weapons, but also to refine and adjust them as the security situation or technological developments demand.

97 See Quester (1992), p. 75.

98 See The Alliance’s Strategic Concept (1999), par. 46, and see Tertrais (1999), p. 35-49.


100 See Tertrais (1999), p. 76.
through arms control or to seek arms control by way of international security paralysed inter alia the disarmament efforts conducted under the auspices of the League of Nations, and has wisely been avoided under the system of the UN Charter. As mentioned, the UN Charter incorporates the concept that the realisation of its system for the maintenance of international peace and security would facilitate arms control and even disarmament proper, and at the same time it considers the elaboration and implementation of measures for the regulation of armaments to be valuable in promoting the maintenance of international peace and security. As such, security and arms control have been de-coupled under the Charter in the sense that the possible contention that failure to bring about an early and substantial reduction of armaments would be tantamount to the failure of the whole system of collective security of the UN has been refuted in advance, whereas at the same time the maintenance of peace and security and the proper functioning of the collective security system have not been made dependent on the progress in arms control. A similar approach to avoid the dilemma can be found in the 1999 Strategic Concept of NATO, which on the one hand declares to seek to achieve its security objectives by way of a policy of support for arms control and disarmament (par. 40), thus seeking security through arms control, whereas on the other hand it states that “by deterring the use of NBC weapons, [the Alliance’s forces] contribute to Alliance efforts aimed at preventing the proliferation of these weapons and their delivery means” (par. 41). This latter assumption considers deterrence (the core objective of the security concept) as a means to prevent the proliferation of weapons of mass destruction (an objective of arms control), and therefore arms control is sought through security.

Progress in arms control (in particular measures involving disarmament) and in the strengthening of international security must be looked upon as parallel means in the effort to preserve peace and to prevent war. Thus, making specific steps in one of these processes a prerequisite for specific steps in the other leads to deadlock. Parallelism and co-ordination of measures in both the arms control and the security field are the only logical and practical solutions to the problem. Starting from the idea that a military equilibrium, including a strategic balance, is a peace-preserving factor, arms control should contribute to such equilibrium by stabilising military balances at a substantially lower level of armaments, and, between the NWS, by making mutual deterrence less likely to result in war. When this course of action is continuously aspired to, arms control effectively supports the maintenance of international peace and security.

101 For example, both the draft ‘Treaty for Mutual Assistance’ of 1923 and the draft ‘Geneva Protocol for the Pacific Settlement of International Disputes’ of 1924 proposed to make the entry into force of (security) ‘guarantees’ conditional upon disarmament. Neither of these treaties entered into force. See Martin (1952), p. 61. See also Kelsen (1934).
3.3 The interrelationship between law and politics in the field of arms control

It has been argued that arms control is *inter alia* meant to strike a balance between the individual objective of maintaining national security and the collective objective of maintaining international security. The direct connection between arms control and the security of a State, in the national as well as in the international sense, is one of the most important characteristics of the arms control process, prominently present in arms control politics but also in arms control law. Both lawyers and politicians have their own views regarding what ‘ought to be’ in arms control. Their views may conflict and maybe a decision-maker has good reasons to disobey a rule - for whatever reason, be it moral or immoral, egoistic or altruistic, humanitarian or State-interested. But the lawyer’s role is not to facilitate the decision-maker’s dilemma between law and politics (and, occasionally, between law and morals), but to clarify the legal side of things. Still, even if what ought to be has been laid down in legally binding norms, it does not mean that arms control is a purely legal issue. The lawyer is only acting as a lawyer when formulating or interpreting legal norms, not in the determination of what ‘should be’. It can be maintained that arms control policies have as their common objective the improvement of political relations among States by creating, through an intensive dialogue and habitual co-operation, a set of principles, norms and rules that govern the military dimension of inter-State relations; the creation of arms control law can be understood as a fundamental objective of (co-operative) arms control policies.

International law as a ‘legal order’ is constantly influenced and, to a certain extent, even conditioned by external factors in its formation, adaptation, and implementation. It has already been mentioned that the horizontal organisation of the international system as a whole, in that States recognise no higher authority above them, makes its influence felt strongly in the field of arms control. The level of armaments present in a State has since long been perceived as an asset of the State’s sovereignty and decisions relating to national armament have therefore always been entrusted to the government of the State. States have always been cautious about allowing their behaviour with regard to their national armaments to be governed by international law, precisely because it is so closely connected to their national security. Probably more than in any other field of international relations, the treaties relating to arms control mirror the division of power in the international system. The substantive norms contained in arms control policies

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treaties represent the common denominator of the maximal amount of self-restraint that is attainable for the most powerful States and allow States' expectations to converge on an equilibrium behaviour that, once achieved, no one has incentives to violate.\textsuperscript{106} To what extent an arms control treaty contributes to supporting such equilibrium behaviour naturally depends on the number of participating States. It is true, that because the process of arms control may affect the security interests of all States alike, as many States as possible should be actively concerned with and contribute to measures of arms control; no arms control is feasible without international co-operation. A maximal number of participating States (the aim of universality) helps to create confidence among States and is correlated to the strength and relevance of arms control treaties: the more States are Parties to the treaty, the more the treaty may contribute to balancing security interests. The conclusion of arms control treaties by some States evidently has divergent consequences for their security, depending on whether other States decide to remain outside the arms control treaty, and, if so, what States. This reality may give rise to difficulties, for it is a general principle of law governing the legal relationship between participating States and ‘third’ (non-participating) States that \textit{pacta tertiis nec nocent nec prosunt}, i.e. treaties neither harm nor favour third States.\textsuperscript{107} Over time, different solutions to the problem of defining the relationship between States Parties to arms control treaties and non-participating States have been sought, e.g. by allowing States Parties to make reservations in which the protection offered by the treaty is declared valid only towards other States Parties, or by arranging possible ‘third party effects’ by way of specific provisions.\textsuperscript{108} Nowadays, the (political) need of balancing security interests in arms control law has been recognised in standard withdrawal clauses which can be found in almost all arms control treaties currently in force and which work between the Parties to the treaty. On the basis of such clauses, States have the right (in exercising their national sovereignty) to withdraw from the arms control treaty if they decide that extraordinary events related to the subject matter of the treaty have jeopardised their supreme interests.\textsuperscript{109} The

\textsuperscript{108} E.g. many States Parties to the 1925 Geneva Protocol (see \textit{infra}, Chapter [6]), which prohibits the use of chemical and bacteriological weapons in times of war, made reservations upon signature. In the Washington Naval Treaty of 1922, the Treaty on Limitation and Reduction of Naval Armament (London Naval Treaty) of 1930 and the Treaty on Limitation and Reduction of Naval Armament of 1936, specific provisions were made regarding possible third party effects. In Art. X of the 1993 CWC (see \textit{infra}, Chapter [6]), a special arrangement has been made to protect States Parties against the use of chemical weapons by any State, be it a Party to the CWC or not.  
\textsuperscript{109} Art. X(1) of the 1968 NPT provided the ‘model’ standard withdrawal clause, which has remained in general use in arms control treaties up to the present. See e.g., Art. IX(2) of the CTBT of 1996.
‘supreme interests’ of States in the field of arms control (the ‘subject matter’ of the treaties involved) relate to their security interests. The standard escape clause grants a right of withdrawal irrespective of the source of the events jeopardising the security of the States Parties. Therefore, in case a ‘third’ State (non-Party) were to directly endanger the security of a State Party to the arms control treaty, the latter could exercise its right of withdrawal if it considered this necessary in order to protect its national security. States will only withdraw from arms control treaties, which are after all very important to the maintenance of international security and stability, if their national security is in direct danger. States need a possibility to escape their obligations by denouncing the treaty as a final resort in order to safeguard their sovereignty. If it is attempted to impose obligations on a State that it is no longer willing to accept, there is a profound risk of losing entirely the already weak means of pressure in international law through which one may hope to exercise a beneficial influence on States.

Whereas arms control policies appear to be developed to answer the question why and to what extent arms must be controlled (by the law), the legal aspects of arms control focus on the question how this control should take place in legal terms and by whom, once political agreement that it should take place has in principle been reached. With this in mind, it is time to turn to the law of arms control.

4. The law of arms control: definition

4.1 The law of arms control as a special branch of international law

One cannot attempt to make an analysis of important developments in some branch of law without formulating, as a starting-point, a definition of this branch of law. A branch - or field - of (international) law can be described as a body of coherent legal rules governing a certain area of international relations, defined by the scope of legal regulation and containing certain special characteristics. Before addressing its special characteristics, it is important that a definition be provided of the branch of law that is central to this study. It could be argued that the law of arms control consists of the ‘common denominators’ of national arms control policies, as laid down in legally binding documents. There is however more to it than this. For when entering a field of international law, States become legally bound to observe their obligations pursuant to the agreements they have concluded in this field, notwithstanding the possible changes in their national policies. Non-compliance with provisions in arms control agreements not only has political consequences but legal ones as well, such as international

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responsibility of the violating State. Furthermore, depending on the kind of supervisory mechanisms present in the treaty, other legal consequences may result from non-compliance, such as the obligation to enter into consultations with other States Parties or the obligation to follow prescribed procedures for the pacific settlement of disputes in case such settlement is sought.

The law of arms control is studied here as a special branch of international law. That is to say, it is considered that the law of arms control is composed of a number of systems of legal norms that are related because of their common subject matter, viz. the regulation of national armaments, and their common ultimate objective, viz. the achievement of general and complete disarmament under strict and effective international control. Attempts to identify arms control law as a special branch of international law have only been made quite recently. As in other fields of international relations, the realisation of arms control implies the establishment of the necessary legal framework, substantiating the State’s agreement on principles and rules, obligations and rights, as a means to achieve the common objectives pursued. A quite impressive collection of treaties nowadays constitutes the basis for this framework of international law aimed at the regulation of armaments. Both multilateral and bilateral treaties refer to earlier arms control treaties as the source of their own conclusion and of the obligation to further negotiate and conclude more advanced agreements. As a direct result of the close interrelationship and interdependence of all arms control treaties (and related documents), a special branch of contemporary international law is created, which comes under the broader field of the rules of international

11 See Mrázek (1987), p. 89: "Until recently, arms control and disarmament measures were treated as parts of 'International Security Law', being the set of norms of international law directly concerned with ensuring peace and preventing war, i.e. primarily with the implementation of the principle of the non-use of force". See also Lysén, (1990), p. 11 and p. 222, in which the author identifies the ‘Law of Disarmament’ as a special branch of public international law; Feldman (1991), p. 35: “The failure, until recently, to investigate the international law of arms control as such or in connection with works on arms control and disarmament, has resulted in a hiatus in the science of international law”. He identifies arms control and disarmament as part of the ‘Law of International Security’; Bolintineanu (1987), p. 22, who tries to review “certain trends in the forming of what might be called in the future the international law of disarmament, as a new branch of public international law of today”; Blix (2000), p. 41: "(...) one may marvel that the legal rules on arms control and disarmament (...) have expanded to such an extent that they now constitute a separate body of law next to other new bodies of international law (...)". Finally, see Myjer (1980), p. 301: "(...) the material presented in this study can be regarded as theoretical groundwork for a new Chapter in international law on the control and limitation of arms: ‘the law of weapons’. “, and Myjer (1995), p. 547: “The law of arms control is a sub-area of the international law of military security.” Greenwood (1998), identifies ‘the law of weaponry, which seeks to regulate both the means and methods of warfare’, and, remarkably, considers that to be ‘one of the oldest and best established areas of the laws of war’ (whereas almost all arms control law is designed to work in times of peace as well).
law relating to international peace and security.\textsuperscript{112} The following definition of that branch, the law of arms control, is used:\textsuperscript{113}

the law of arms control is that part of public international law which deals both with the restrictions internationally placed upon the freedom of behaviour of States with regard to their national armaments, and with the applicable supervisory mechanisms.

It follows from this definition that the law of arms control, like other fields of law, has two components: a substantive part, that will be referred to as substantive arms control law, and an institutional part, that will be referred to as institutional arms control law. The first part of the above definition refers to the substantive law of arms control and will be clarified and explained first.

4.2 The substantive law of arms control
In the first part of the definition, which reads '[the law that deals with] the restrictions internationally placed upon the freedom of behaviour of States with regard to their national armaments’, the term ‘behaviour’ (of a State) not only encompasses dynamic behaviour - i.e. behaviour comprising some kind of (productive) activity, such as testing, production, transfer, trade, stockpiling, deployment and use of armaments, but also more static behaviour, such as research and development and possession of armaments. The term ‘freedom’ (of behaviour) is used, because it is alleged that, as a principle, States are free to behave as they like with regard to their national armaments, as long as restrictions have not been accepted by them. As the ICJ observed: “State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorisation but, on the contrary, is formulated in terms of prohibition,” and: “in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited.”\textsuperscript{114} The latter observation is of course

\textsuperscript{113} Cf. the definition provided by Myjer (1994), p. 151, as follows: “The Law of Arms Control is that part of Public International Law that deals both with the restraints internationally exercised upon the use of military force (in general) and on the use and/or the possession of armaments (in particular), whether in respect of the level of armaments, their character or deployment, and with the applicable supervisory mechanisms”.
\textsuperscript{114} See Advisory Opinion (1996), p. 247 (par. 52) and see Nicaragua Case (1986), p. 135 (par. 269), respectively. This does not mean that arms control treaty law consists exclusively of limitations on the freedom of behaviour of certain States with regard to their national armaments; as a corollary to these limitations, the law may also make explicit a right of States to engage in certain behaviour with some of those armaments. For example, the NPT has made clear that those States that have achieved the official status of NWS possess their nuclear weapons in accordance with international law.
without prejudice to rules of customary international law, that become
binding on States without their express consent to be bound. However,
except for some of the specific obligations not to use weapons with certain
characteristics, it is extremely doubtful that any such norms exist in the field
of arms control law (see infra, chapter [3]).
The words ‘internationally placed’ are used to emphasise that the law of
arms control is part of public international law, which operates between
sovereign States. Contracts between governments and public or private
enterprises or individuals fall outside the scope of the law of arms control.
Also national laws, that e.g. restrict the possession of small arms to the
police forces or similar internal security forces, clearly fall outside the scope
of the law of arms control (the permanent use of the adjective ‘international’
before the words ‘law of arms control’ seems exaggerated and superfluous,
since in fact no comparable national laws exist on the subject). The same is
true for all kind of ‘political’ declarations that do not set norms but merely
indicate the existence of certain intentions; since they are not part of binding
international law, they too fall outside the scope of the law of arms control.
The term ‘restrictions’ refers to qualitative and quantitative limitations, such
as circumscription of the character of certain behaviour (e.g. testing of
nuclear weapons only for peaceful purposes), or numerical limitations
placed on (static) behaviour (e.g. prescribed levels of certain categories of
‘heavy’ conventional armaments in Europe), or a combination of both
quantitative and qualitative limitations (e.g. prescribed limits on the number
of strategic nuclear weapons and on the maximum number of delivery
vehicles allowed per nuclear missile). ‘Restriction’ can also be endeavoured
by way of (near) total prohibitions, which would amount to disarmament. In
this study, disarmament is considered to be the most far-reaching form of
arms control rather than a distinct notion. Disarmament means that the
restrictions placed on the behaviour of States consist of prohibitions to
possess armaments above a set limit, which lies beneath the level of
armaments that this State already possesses.
The term ‘national armaments’ refers to all military capabilities that a State
possesses for defensive and offensive purposes (including military
operations within the framework of the UN). They include conventional
armaments of all sorts, as well as weapons of mass destruction and all
related delivery systems. ‘National armaments’ can also relate to armed
forces (troops) and their training, but legally binding restrictions on the
armed forces of a State are normally only found in peace treaties, where the
victor State(s) impose this kind of restrictions on the vanquished State(s).
This study concentrates on arms control law that has been negotiated freely
in peace time between sovereign States. Therefore, any discussion of forced

restrictions on armed forces pursuant to peace treaties will be limited to those cases the historical value of which merits discussion.

The focus on (the behaviour of) 'States' is to denote that arms control law is State-oriented, State-made and largely State-dominated. Naturally also public and private national industries, such as chemical industries, must comply with the restrictions that have been imposed on the freedom of behaviour of the States of which they bear the nationality. It is a principle of international law that States take the action necessary to enable the implementation of their international obligations in their national legal order. However, as the definition already shows this study will not go into national implementation measures, such as the national laws that must be enacted by States that apply the dualist system in order for international law to become applicable in that State, nor will it deal with related legal problems, such as problems that may arise as a result of weapons-producing public and private companies situated outside the territory but still under the jurisdiction or control of a State Party to applicable arms control treaties.

4.3 The institutional law of arms control

The second part of the definition, 'the applicable supervisory mechanisms', refers to the institutional law of arms control. Since focus will be principally on this part of the law of arms control, the clarifications provided here are provisional and will be elaborated in the following chapters.

As has already been mentioned, there exists no general legal principle that forces States to conclude arms control agreements. The law of arms control therefore starts at a point where States are already prepared, in principle, to limit their freedom of behaviour with regard to their national armaments, because they expect it will serve their interests best. But even then, arms control law can only attain its objectives if States somehow gain the confidence that they will mutually act in compliance with the arms control agreement they entered into. In practice, the conditions under which States are prepared to trust each other in the sensitive field of arms control have been embodied in supervisory mechanisms. The term 'supervisory mechanisms' refers to legal arrangements on the basis of which control of compliance by the States (or by other persons on their behalf) with arms control obligations can take place. Supervisory mechanisms (in arms control treaties often referred to as 'control systems') encompass not only methods of supervision, but also a whole complex of provisions that regulate under what circumstances, with what purposes and by what body according to


\[^{117}\text{Cf. Landly (1966), p. 1: "(…) the adoption of international legislation and its formal acceptance by a growing number of countries cannot, by themselves, add to the stability of inter-State relations, unless there also exists some degree of assurance that the Contracting Parties really comply with their obligations". See also Myjer (1997), p. 355.}\]
what specific procedures of decision-making, those methods may be used, i.e. the institutional design. As we will see (infra, Chapter [4]), the institutional design of the arms control treaty is crucial to the implementation of the treaty and the effective functioning of the entire process of (international) supervision of compliance. The adjective ‘applicable’ is used to indicate that different supervisory mechanisms relate to different arms control agreements; supervision of arms control law is largely treaty-specific. The supervisory mechanisms that are ‘applicable’, are found in the arms control treaties proper, as well as in certain areas of general international law (such as the law of treaties and the laws of war).

4.4 The common ultimate objective of the arms control process

Whatever the specific subject matter of the legal instruments that together constitute the law of arms control, they are always considered by the Contracting Parties as a step in the arms control process on the way towards achieving the common ultimate objective of ‘general and complete disarmament under strict and effective international control’, or more limited ‘higher’ goals in that respect. The quest for general and complete disarmament stems from the conviction that the complete elimination of some category of weapons (such as chemical or nuclear weapons) offers the only effective guarantee against the threat or use of such weapons. General and complete disarmament comes down to the dismantling and destruction or the reduction and abolition of armaments, at most to a level necessary for the State to maintain internal law and order (and to contribute to the enforcement of international obligations by common action). For disarmament, even in its general and complete form as the outcome of the arms control process, does not denote the complete absence of weapons at the national level. States have the right to maintain internal order and to retain military capabilities to that end. Some additional capability, necessary to deliver a proportional contribution to the defence of international law and order outside the State territory in the context of operations of the UN or of regional organisations must remain available, too.

The first proposals to come to general and complete disarmament as the outcome of the arms control process stem from the period of the League of Nations, during which a high level of armaments was considered to constitute a danger to the peace per se. After WW II, the UN established a proposition of its own: a high level of national armaments is only a danger to peace if it is not general, for the relative unpreparedness of one part of the world will always encourage aggression.118 This may account for the continued emphasis on general and complete disarmament after WW II, albeit that it is safe to assume that between both World Wars the focus in

118 Martin (1952), p. 58.
arms control shifted from the notion that ‘general and complete disarmament should take place’ to the consideration that ‘should disarmament take place, it should be general and complete’.

The principle that plans for the reduction of armaments need to be of a general and complete character has remained the point of departure, as is shown by references to general and complete disarmament in many international documents, covering either a single category of weapons (e.g. nuclear weapons) or referring to unqualified disarmament.\footnote{An important re-statement of the idea of GCD can be found in McCloy/Zorin (1961), point 1(a): “[that] disarmament is general and complete (…)”; see furthermore the Helsinki Final Act (1975) and see the ‘Decision on Principles and Objectives for Nuclear Non-proliferation and Disarmament’, annexed to Final Document NPT (1995) as well as Final Document NPT (2000), comments to Art. VI, par. 11, in both of which the Conference reiterates the ultimate goals of the complete elimination of nuclear weapons and a Treaty on General and Complete Disarmament under strict and effective international control. See also Final Document BWC (1996), p. 14.}

The related obligation to pursue negotiations in good faith leading to a ‘treaty on general and complete disarmament under strict and effective international control’ has likewise been repeated many times.\footnote{See e.g. the preambles to the LTBT, NPT, CTBT and CWC. Some treaties even include similar obligations outside the preamble, in their provisions; see e.g. Art. XVIII of the 1990 CFE-Treaty.}

With regard to nuclear weapons, the ICJ has in addition explicitly stated that these negotiations must be brought to a conclusion.\footnote{See e.g., art. VI of the NPT (1968); the Declaration of the UNGA on the ‘Principles of International Law concerning Friendly relations among States (Res. 2625 (XXV) of 24 October 1970) and the ‘Charter of Economic Rights and Duties of States (UNGA Res. 3281 (XXIX) of 12 December 1974). See also SSOD-I (1978) and the ‘Declaration on International Co-operation for Disarmament’ (UNGA Res. 3488 of 11 December 1979).}

Viewed in a broad evolutionary context, the process of arms control still works towards the ultimate aim of achieving general and complete disarmament under strict and effective international control.\footnote{See Advisory Opinion (1996), par. 105(F), Decision of the Court: “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”. The Court also refers (in par. 102-103) to S/Res/984 (1995) of 11 April, 1995, and to Final Document NPT (1995).}

So far, little progress has in fact been made towards creating the preconditions for a programme for general and complete disarmament. In order to reach at least limited goals of arms control, partial arms control measures have rightly obtained priority over the programme for general and

\footnote{See SSOD-I (1978), par. 19 and 109. It is interesting to note that the Agenda of the 1998 session of the Conference on Disarmament (CD/1484) opened by stating: “Taking into account, inter alia, the relevant provisions of the Final Document of [SSOD-I] (…)”. In the CD discussions of that year the ultimate aim of GCD with regard to nuclear weapons was repeated many times. See the Annual Report (1998) of the CD.}
complete disarmament, a choice that was already proclaimed in the 1960s by the US and the SU. The halting and reversing of the arms race, in particular preventing the proliferation of nuclear weapons, and the gradual reduction of military budgets on a multilaterally agreed basis, have been proclaimed as more limited ‘higher’ goals of arms control. Still, the objectives of specific arms control measures should always be placed in the perspective of their common, ‘higher’ goals and the conduct of negotiations on partial measures of arms control should always be considered in the context of the ultimate goal of general and complete disarmament.

In the process towards achieving general and complete disarmament, all measures of consensual arms control law, especially those involving disarmament proper, must be balanced so that at no stage of the implementation of arms control treaties any State or group of States gains a military advantage over others, and so that security is ensured equally for all participating States. As such, general and complete disarmament should be implemented in an agreed sequence, by stages, until the process is completed, taking into account the need of States to protect their security at each stage, with the objective of undiminished security at the lowest possible level of armaments and military forces. Approximate equality and parity, as well as undiminished security, are the basis for the achievement of a stable situation at a lower level of military potential. During the whole process it remains essential to watch that the achievement of any specific arms control measure does not result in increasing armaments in other ways or in triggering an arms race or turning the process into other directions.

5. International law applicable to the behaviour of States with regard to their national armaments outside the law of arms control

5.1 The applicability of rules of international law to the law of arms control

Arms control law does not operate independently of related relevant fields of international law, in particular the law of treaties, the law of international organisations, the laws of war and the law on State responsibility. There is of course a major difference between rules forming part of the law of arms control and rules being applicable to the law of arms control. For example, the fact that the twelve-miles zone is used as a criterion in the 1971 Sea-Bed Treaty and is thus declared applicable to a treaty that bears all

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125 See SSOD-I (1978), par. 8, par. 55-58, par. 65, par. 89-90 and par. 94-95.
126 “All measures should be taken in such a way that they would facilitate and form part of this [i.e. the GCD] programme”. See McCloy/Zorin (1961), par. 8.
127 See SSOD-I (1978), par. 22 and 29. See also United Nations (1982), p. 10 (par. 47-49) and p. 33 (par. 159-160) and see Ipsen (1999), p. 991.
128 In full: Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other
characteristics of an arms control treaty, does not alter the place of this rule in the system of general international law. It remains part of the law of the sea and does not by itself become a rule of arms control law.

The law of arms control, as any branch of law, does not operate in a legal vacuum. In principle, little difficulty arises regarding the applicability of general international law to the law of arms control, since arms control law functions in the system of general international law as a special field of law. It is important to distinguish between rules of general international law that cover all international legal relationships, irrespective of their subject matter, and rules of international law that are of direct importance to the law of arms control, although they fall outside its scope. The first category of rules here refers to the general law of treaties, as laid down in the Vienna Convention on the Law of Treaties, and the law of State responsibility, as laid down in the Draft Articles on State Responsibility of the ILC. The second category of rules referred to above relates to the international law that regulates the use of force, as laid down in the laws of war.

It has been alleged that many of the concepts of the law of treaties and the law of State responsibility, such as 'military necessity', 'force majeure' or the operation of 'rebus sic stantibus' in a case of changed circumstances, which have their basis in customary international law, are not suitable for arms control issues due to their inherent vagueness and ambiguity. There is however no valid legal reason why customary international law should not apply to the law of arms control. On the contrary, the 'juridification' which takes place in the sphere of arms control and which justifies the treatment of arms control and disarmament law as a special branch of international law entails precisely this embedding of that law into the system of general international law. Naturally, in situations where and to the extent that the law of arms control sets its own rules that conflict with rules of general international law, the applicability of the general rules of international law will generally be subsidiary, subject to the principle of lex specialis derogat lege generali. But even in such situations, specific circumstances could be imagined in which application of the general rules of international law might be contemplated. The consequences of the applicability of the general law of treaties and the law of State responsibility will be discussed in chapter [7], since concurrence of arms control law and general international law is an issue arising in respect to the consequences of non-compliance with arms control treaties.

The specific branches of law that are distinct from, but of direct importance to, the law of arms control because of their subject matter, are the constituent parts of the laws of war, viz. the ius ad bellum and the ius in

Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof, Art. I and II. For an analysis of this treaty see infra, Chapter [5].


In the next paragraph, the effects of those fields of law on the law of arms control will be briefly discussed.

5.2 The law of arms control and the laws of war

In its 1996 Advisory Opinion on the question of the legality of the threat or use of nuclear weapons, the ICJ provided an overview of the law most directly applicable to issues of arms control. From this Opinion, it is possible to determine what restraints are posed on the freedom of behaviour of States with regard to the use or threat of use of their national armaments outside the rules of arms control law. The *ius ad bellum* is that part of the laws of war that determines under what circumstances the use or threat of use of weapons is allowed in international law. Contemporary *ius ad bellum* is codified in the Charter of the UN, which in general terms prohibits the aggressive threat or use of weapons in international relations (Art. 2(4)). However, provision has been made for the contingency that a State infringes this rule and, without authorisation of the UNSC, without indeed making any attempt to obtain such authorisation, proceeds to take steps against another State amounting to the use of force. A State that is the victim of such aggression has the right to take emergency action by way of self-defence, albeit that any use and threat of use of armed force must be in conformity with the Charter of the UN and forceful self-defence in particular must be in conformity with Art. 51 of the Charter and the principles of proportionality and necessity. Customary international law not only prohibits the use of force in international relations, but recognises a right to self-defence as well. Depending on the interpretation of the customary right of self-defence, self-defence may be considered lawful in other situations but those covered by the codified variant. Generally, an armed attack must be in progress (or must at least be imminent) in order to give rise to the lawful resort to self-defence. The use of military force outside the context of self-defence, such as recourse to armed reprisals in times of peace, is unlawful.

It should be kept in mind that specific treaty or customary law-based prohibitions on the use of particular weapons are actually prohibitions of use of those weapons in self-defence or in collective security operations authorised by the UNSC under Chapter VII of the UN Charter. In the absence of explicit legal prohibitions, States must be presumed to have the right to embark upon weapons programmes such as testing and development.

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131 On the importance of distinguishing both parts, see Gill (1999).
132 See Advisory Opinion (1996), par. 23-34.
134 See Franck (1970). At the same time, the concept of ‘anticipatory self-defence’ which recognises a right of self-defence outside situations of armed attack should be mentioned. See e.g. Shaw (1997), p. 789-790.
135 See Advisory Opinion (1996), par. 46.
measures associated with readiness and targeting, and determinations of reliability precisely because they are legally entitled to defend themselves (especially in wars of surprise or deception). Finally, it should be noted that collective self-defence in regional organisations and alliances is also allowed under the *ius ad bellum*. The use of force applied by a State whose rights have not been directly infringed, in fulfilment of its obligations to an alliance for the defence of its ally in response to aggression affecting that ally, is legal assistance.

Furthermore and in addition, the threat or use of weapons must be in conformity with the *ius in bello*, better known as international humanitarian law or the humanitarian laws of war. There is obviously a relationship between the law of arms control and the humanitarian laws of war. Whereas the first is meant to contribute to international security and to the avoidance of large-scale armed conflict, the second is meant to reduce the horrors of armed conflict once it has nevertheless broken out. An obvious distinction between both fields of law is of course that the humanitarian laws of war directly address the behaviour of individuals (especially combatants), whereas arms control law is directed at regulating the behaviour of States. The branch of law known as international humanitarian law consists of the so-called ‘Hague Law’ (the Hague Conventions of 1899 and 1907) and the ‘Geneva Law’ (Conventions of 1864, 1906, 1929, 1949), which are highly interrelated. Apart from specific regulations in the ‘Hague’ and ‘Geneva’ law, the freedom of behaviour of States with regard to the use of their national armaments is limited by some general principles of the humanitarian laws of war which find their origin in customary international law. The Court in its 1996 Advisory Opinion dealt with international humanitarian law in two main principles, viz. the principle of distinction and the principle of prohibition of unnecessary suffering. The freedom to choose methods and means of injuring the enemy in an international armed

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137 See Advisory Opinion (1996), par. 75.

138 On both principles see Greenwood (1998), p. 194-200. Under the principle of distinction, a belligerent is required to distinguish between the enemy’s combatants and military objectives on the one hand and the civilian population and civilian property on the other, and to direct his attacks only against the former. The other principle has been concisely illustrated in the preamble to the ‘Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight’ (Signed at St. Petersburg, 29 November/11 December 1868): “Considering (...) [T]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this objective would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; that the employment of such arms would, therefore, be contrary to the laws of humanity (...)”. Reprinted in Schindler & Toman (1988), p. 101-103.
conflict are limited by those principles. Since neither the rules deriving from the UN Charter nor the principles deriving from humanitarian law distinguish between the type of weapons that are made use of, these general rules and principles are applicable to all kinds of weapons. Therefore, the threat or use of any weapon must be applied in self-defence, which must be necessary and proportional to the attack against which the defence takes place and which must distinguish between civil and military objects, and, finally, which must limit the damage inflicted to the pursuit of military objectives and not cause unnecessary suffering.

Regarding nuclear weapons, the Court in its 1996 Advisory Opinion was unable to find a general or specific prohibition of their threat or use.\textsuperscript{139} Therefore, with regard to nuclear weapons the same goes as with regard to conventional weapons: even though their aggressive use is generally prohibited, their use in self-defence is limited only by the demands of proportionality and necessity and the basic principles of humanitarian law. It should be added that the Court restricted the legality of the use of nuclear weapons in self-defence somewhat further to ‘extreme circumstances of self-defence, in which the very survival of a State would be at stake’.\textsuperscript{140} However, since it will be up to the State proper to decide on what occasions its ‘very survival’ is at stake, the legal importance of that qualification should not be overestimated. Some arms control treaties that deal with specific categories of weapons prohibit the threat or use of the specific weapons they deal with. In the treaties relating to arms control that are in force today, all behaviour (including use) with regard to chemical weapons has been generally and completely outlawed in the CWC, whereas the use of biological weapons is prohibited by the BWC and the 1925 Geneva Protocol. Furthermore, the use of certain conventional weapons, which may very well be excessively injurious, cause unnecessary suffering or have indiscriminate effects, has been prohibited primarily for humanitarian reasons in the Protocols to the 1981 Certain Conventional Weapons Convention.

Generally speaking, the concurrence of rules affecting the freedom of States to threat or use weapons, originating from the law of arms control on the one hand and the laws of war on the other, does not give rise to difficulties. Nevertheless, some ambiguity may arise relative to the scope of the prohibition of the use of particular weapons. For early prohibitions on the use of weapons were sought to establish laws of war prohibitions that were intended to develop from being prohibitions affecting only the ratifying States to ultimately becoming part of customary international law.\textsuperscript{141} Whereas the laws of war rely heavily on custom as their source and attempt

\textsuperscript{139} See Advisory Opinion (1996), par. 74.

\textsuperscript{140} See the Decision of the ICJ in Advisory Opinion (1996), par. 105 (2(E)).

to uphold the reach of customary international law over the conduct of hostilities and warfare (e.g. via the de Martens Clause\(^\text{142}\)), in the law of arms control the opposite occurs by strict reliance on treaty law. Consequently, it is still disputed whether the prohibitions of use as contained in arms control treaties such as the CWC and the 1925 Geneva Protocol have an \(\text{erga omnes}\) character, i.e. whether also States that are not Parties to those treaties are nevertheless bound by the prohibition of use contained therein. It can be upheld that in the absence of universal adherence to arms control treaties, States that have not become Parties to the treaties and that are not otherwise restricted from displaying certain behaviour with regard to their national armaments under international law,\(^\text{143}\) have the right to defend themselves with all weapons available so long as they do not violate the principles of international humanitarian law. Obviously, e.g. chemical and biological weapons can only be used in self-defence in very specific circumstances without necessarily violating international humanitarian law; therefore, the absence of a formal prohibition of the use of these ‘inhumane’ weapons for States not Parties to the relevant treaties is anyhow compensated by the restraints originating from the laws of war.

Other behaviour with regard to national armaments, not consisting of their threat or use, is not governed by the rules and principles of the \(\text{ius ad bellum}\) and the \(\text{ius in bello}\). Restrictions on that behaviour, relating to the development, production, acquisition, possession or retention, storage, testing and transfer of certain types of weapons are rooted in arms control treaties, just like quantitative and qualitative restrictions on specific weapons. Consequently, in peace time, the possession, production, testing, stockpiling and refining of weapons is only restricted by treaty-based restraints. The effects of war or armed conflict on the validity and the operation of arms control treaties will be dealt with in chapter [7]. At this point, it suffices to note that some arms control treaties which prohibit the use of a particular weapon declare this prohibition to be valid ‘under any circumstance’.\(^\text{144}\) This implies that States Parties to those treaties are never allowed self-defence with those particular weapons, not even in situations of large-scale armed conflict or war. With regard to other arms control treaties not containing such an extensive prohibition, the principle of reciprocity in arms control law might interfere with the requirement that a State employs

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\(^\text{142}\) The de Martens Clause, which was introduced in the 1899 Hague Convention and repeated in Protocol I of 1977 (Art. 1(2)) declares that in cases not covered by that Protocol or other international agreements, civilians and combatants remain under the protection and authority of principles of international law derived from established custom, from the principles of humanity and from the dictates of Public Conscience. The Clause should not be regarded as laying down a separate legal principle for judging the legality of weapons under existing law, see Greenwood (1998), p. 206.

\(^\text{143}\) E.g., in the case of Iraq, severe restrictions on the freedom of behaviour with regard to its national armaments originate from legally binding UNSC Resolutions.

\(^\text{144}\) See, e.g., Art. I(1) of the CWC and Art. I(1) of the APM Convention.
only lawful weapons to counter another State’s aggression, even if this aggression was performed using prohibited weapons.