The Law of Arms Control: International Supervision and Enforcement

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Citation for published version (APA):

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3 Special characteristics of the law of arms control

1. Introduction

It has been indicated in the previous chapter that the law of arms control occupies the place of a special branch of international law within the system of international law and politics. Although this branch of law is still in statu crescendi, some distinctive legal characteristics can be discerned, which will be discussed in this chapter. The issue as to the extent of which the law of arms control distinguishes itself from other branches of public international law is not raised here. Rather, this survey of special characteristics serves to address particular features of this field of international law as compared with the law in general. Special characteristics appear in the sources of arms control law, in the difference in scope of the substantive law as compared to the institutional law of arms control, and in the absence of practice with regard to some of the supervisory procedures provided for in the arms control treaties.

2. Characteristics of the sources of arms control law

2.1 The sources of international law
In a formal sense, 'sources of law' indicate the methods or procedures by which international law is created. Following the positivist legal tradition, the sources of the law of arms control, as any branch of international law, can be found in the formal sources of Art. 38 of the Statute of the ICJ, which remain the core of international legal discourse. According to the provisions of Art. 38(1), the Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall

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145 See e.g. Briggs (1952), p. 44.
146 The text of this provision already appeared in a slightly different wording in Art. 38 of the Statute of the PCIJ in 1920. Before that, in Art. 7 of the (unratified) Twelfth Hague Convention Relative to the Creating of an International Prize Court of 1907, a general determination of the sources of international law was given. See Degan (1997), p. 3.
apply international conventions, whether general or particular, establishing rules expressly recognised by the contesting States; international custom, as evidence of a general practice accepted as law; and the general principles of law recognised by civilised nations. As subsidiary means for the determination of rules of law, judicial decisions and the ‘teachings of the most qualified publicists of the various nations’ are mentioned. It is by now no longer seriously disputed that this determination of the sources of international law works beyond the limits of ICJ proceedings.\(^{147}\)

In general, a body of law can be described along the lines of conventional international law (the treaties), customary international law and the general principles of law underlying them. There is no reason why this starting point should be different in regard to the law of arms control. An inquiry into the instruments and procedures through which arms control law is created therefore leads to the examination of arms control treaty law, customary arms control law and general principles of arms control law.

2.2 The importance of treaties in arms control law

Arms control law is in essence treaty law, i.e. the law created or evidenced by or consolidated in an international agreement. The treaty is the supreme legal means in the formation of this branch of law and other sources play only a subsidiary role.\(^{148}\) The importance of treaties and their modification by written amendment-like procedures is universally accepted in arms control practice. States have a sovereign right to conclude arms control treaties and have an obligation, once they have become Parties, to implement those treaties. This obligation is ultimately based on the basic rule that States have to live up to their commitments.\(^{149}\) The consent about the arms to be controlled, the supervisory mechanisms, and the process of assurance of compliance is the common core of agreement among the States participating in an arms control agreement.

Within the framework of the UN and regional organisations concerned with the maintenance of international peace and security, newly concluded arms control treaties have been adopted. Several arms control treaties originated from regional initiatives and many others have been adopted by the UNGA before being opened for signature. The dominant position of the recognised nuclear powers (China, France, Russia, UK, USA) in the world system has enabled them to balance to a large extent the division of (economic, political, military) power in the world, a circumstance that has proven

\(^{147}\) See Mosler (1995), p. 515: “Although this provision [Art.38(1) (a) to (c)] is only binding on the ICJ, it has generally become the point of departure for doctrinal discussions and for the practical application of international law”.

\(^{148}\) Cf. Lysén (1990), p. 221; Committee on Arms Control and Disarmament Law (2000), p. 3.

\(^{149}\) Pacta servanda sunt. See Art. 26 of the 1969 Vienna Convention on the Law of Treaties. This obligation only exists after the treaty has entered into force. Until that moment, the legal ‘state of affairs’ is governed by Art. 18 of the Vienna Convention.
decisive for the failure or success of arms control negotiations. It should be recognised that the position of the nuclear powers has not only given them the power to block progress in many fields of international law, but has - in case of consensus between those powers, and especially between the USA and Russia - also yielded results that would have been impossible in a world where the equality of sovereign States before the law would have been supported by equal (military) power. It can be maintained that in general the negotiating processes in the fora from which arms control treaties have resulted, have been orchestrated by those nuclear powers. To lay down arms control measures in legally binding documents is tantamount to achieving order in the power relations in the international system. Order in power relations brings stability and at least some degree of predictability in international security issues, which is also beneficial to the consolidation of the dominant position of the nuclear powers.

Thus, the close connection between arms control and (inter)national security has dictated treaty-made law, also because of the relative clarity and certainty of treaty language as compared to instruments or rules emanating from other sources of law. The importance of treaties in arms control law can therefore be explained from the nature of this field of law, as well as from the simple fact that developments in other sources of law have been problematical in the field of arms control.

2.3 Classification of arms control treaty law
Arms control treaties can be classified into very divergent categories, depending on the criteria used for classification. The types of weapons the treaties seek to control (conventional, or weapons of mass destruction), the contents of the norms contained in the treaties (e.g., prohibition, limitation, or obligation to destroy), the (number of) States that are Parties to the treaties (bilateral, regional, universal), or the fora in which the treaties have been negotiated (e.g., organs of the UN, or bilateral negotiating fora), to name just a few relevant criteria, may all be used to group arms control treaties.

From a legal point of view, one of the most functional criteria for classification, however, is the division between arms control treaties that sovereign States have voluntarily entered in to, and arms control measures that are part of peace treaties or ceasefire arrangements, and that consequently have been imposed on ‘vanquished’ States by ‘victor’ States or, nowadays, by international organisations. The first class of treaties mentioned can be referred to as ‘consensual’ arms control law, whereas the latter constitutes the class of ‘dictated’ arms control law. It should be kept in mind that all sorts of considerations, especially security considerations, can induce States to conclude an arms control treaty. The term ‘dictated’ arms control refers to situations wherein States are forced to conclude treaties which contain arms control measures, as a result of their defeat after an
armed conflict.\textsuperscript{150} The division between consensual and dictated arms control will be used here as a criterion to make a first classification of arms control treaty law.

A second criterion useful for grouping arms control treaties is the division between arms control treaties proper and those treaties, declarations or arrangements that are accessory to arms control treaties, but that fall outside the definition of the law of arms control because they do not restrain the behavioural freedom of States in arms control affairs.

2.4 Arms control law as part of peace treaties or ceasefire arrangements: dictated arms control law

In past times, when war was considered a legitimate means of acquiring territory and of pursuing national political aims in general, provisions on arms control came into being as part of ceasefire agreements or peace treaties. The defeated party was forced to consent to the imposition of arms control measures, including possible supervisory mechanisms.\textsuperscript{151} Arms control in these instances was ‘dictated’. The coming into being of legal principles outlawing the use of force in international relations has not fundamentally altered this picture.\textsuperscript{152} On the contrary, arms control has been applied within the UN system in the form of dictated measures on numerous occasions. The UN has consistently used arms control measures, mainly relating to the control of arms transfers to and from conflict areas, as part of comprehensive settlements to be monitored and observed by UN Peace-Keeping missions.\textsuperscript{153} The UNSC has also on many occasions mandated arms embargoes as a sanction under Chapter VII (Art. 41) of the UN Charter.\textsuperscript{154} The same pattern can be discerned in recent times, where arms control measures have been imposed as part of the settlement after Iraq invaded Kuwait, but also as part of the design for peace after the violent conflicts in

\textsuperscript{150} Note that this situation is completely different from the enforcement of compliance, which is dealt with when discussing the institutional law of arms control (\textit{infra}, chapters [4] and [7]). Enforcement of compliance can take place in accordance with international law, precisely because a State has voluntarily consented to be bound by the terms of a treaty. In contrast, ‘dictated’ arms control leaves no room for true ‘voluntary’ consent to be bound.

\textsuperscript{151} Examples can be found in many pre-WW II Peace Treaties, in particular in the 1919 Versailles Treaty. See \textit{supra}, chapter [1].

\textsuperscript{152} For post-Charter arms control law as part of Peace Treaties, see the 1947 Peace Treaties with Bulgaria, Finland, Hungary, Italy and Romania, all of which contain arms reduction- and demilitarisation clauses, the 1955 Austrian State Treaty, the 1955 Protocol no. III on the control of armaments to the Modified Brussels Treaty (WEU), and the 1990 Treaty on the Final Settlement with respect to Germany.

\textsuperscript{153} For example, in S/Res/733 (1992) restrictions on arms transfers were introduced regarding Somalia; later Resolutions provided for the deployment in Somalia of a UN-force (UNOSOM). Eventually, the situation in Somalia led to the adoption of S/Res/794 (1992) which went further in its use of force mandate than any comparable Resolution of its time.

the former Yugoslavia. The case of Iraq provides an example of dictated arms control law, imposed on Iraq as part of a mandatory settlement in UNSC Resolutions, whereas the case of the former Yugoslavia provides an example of dictated, or perhaps better ‘semi-dictated’, arms control law as part of the Dayton Peace Accords. The treaties and ceasefire agreements that were concluded on these and similar occasions are not expressions of the will of sovereign States Parties, but instead reflect the will of ‘the’ international community that imposes a settlement (including arms control measures) on a State because of its aggressive, peace-threatening behaviour. Supervision in the context of this kind of imposed agreements has a completely different role than it has in arms control treaties that have been voluntarily entered into. Supervision in dictated arms control agreements is control in the sense of domination. Features such as international confidence-building and reciprocity that play a vital role in the supervision of consensual arms control law, are normally absent in cases of dictated arms control law. In addition, the respect for State sovereignty that accounts for many difficulties in the drawing up of supervisory mechanisms in arms control treaties, is a far less relevant factor in the drawing up of dictated arms control law.

2.5 Arms control treaties voluntarily entered into by the States Parties: consensual arms control law

The class of consensual arms control treaties forms the core of the conventional law of arms control since WW II. The treaties will be classified here as follows: a division is made between bilateral and multilateral treaties; the multilateral treaties are divided into global and regional arms control treaties; global arms control treaties are divided into treaties relating to uninhabited territories and areas not under the sovereignty of any State on the one hand and other global arms control treaties on the other hand; in turn, the class of regional arms control treaties is divided into the NWFZ treaties and the CFE Treaty. This classification is also used in chapters [5] and [6].

This section is not meant to provide an exhaustive overview, but it will list the most important bilateral, regional and global arms control treaties that are in force today. Also, other classes of documents concerned with consensual arms control will be considered. These documents differ from bilateral and multilateral arms control treaties either in their subject matter (documents accessory to arms control agreements), in their format

(unilateral arms control measures) or by their nature ('politically' binding documents concerned with arms control).

2.5.1 Unilateral arms control measures
It is duly recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. States may legally bind themselves towards others by way of such unilateral acts. The ICJ has underlined this starting-point even in the sphere of arms control, viz. with regard to unilaterally declared moratoria on (atmospheric) nuclear test explosions.\(^{156}\) Still, in arms control law the use of unilateral measures as a means of self-restraint on the behavioural freedom of States with regard to their armaments is quite rare. Apart from said testing moratoria (that have in practice simply been lifted at any time when considered necessary), the reduction of short-range nuclear weapons between the USA and Russia in 1991 provides an (exceptional) example of unilateral arms control measures. With two speeches in the fall of 1991, Presidents Bush and Gorbachov came close to withdrawing and eliminating all deployed tactical nuclear artillery, missiles, and naval nuclear weapon systems with a range of less than 500 kilometres, thereby outpacing any negotiations on Short-Range Nuclear Forces.\(^{157}\)

Paradoxically, at the same time this example illustrates the importance of reciprocity in arms control, since the two 'sets' of unilateral measures were actually part of a bilaterally co-ordinated action between the USA and Russia. Both sides retained, for example, the air-delivered Short-Range Nuclear Forces as the single category not affected by the ban. In addition, both sides felt that supervision of compliance with any kind of formal 'short-range nuclear forces agreement' would prove to be impossible in practice, given the numerous, small, very mobile and multi-capable forces such agreement would have to deal with. Therefore, to avoid endless and costly negotiations that would lead nowhere, unilateral action was preferred over a formal treaty as the framework for the control of Short-Range Nuclear Forces.

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\(^{156}\) See *Nuclear Test Cases (1974)*, esp. par. 43-51. In August 1995 re-opening of the Nuclear Tests Case was requested by New-Zealand as a reaction to the resumption of (underground) nuclear test explosions by France on the island of Mururoa. The ICJ decided that the Case of 1974 could not be re-opened since the 1974 judgement had been based on a unilateral statement that did not see to *underground* nuclear test explosions (but only to atmospheric ones). See ICJ Press Release ICJ/541, 22 September 1995.

\(^{157}\) See Smithson (1992); see also Quester (1992), p. 78-79, who speculates that potential command-and-control problems (because so many warheads have been added to the superpower arsenals in the previous decades) were at the basis of this reduction. Baglione (1997) on the other hand, attaches a principal role to the national leaders that were simultaneously balancing domestic political considerations against international challenges and opportunities in their approach to arms control.
Furthermore, both France and the UK have taken significant unilateral reduction measures with regard to their land and air-based nuclear weapons, including the closing-down and dismantling of nuclear weapons related facilities.

2.5.2 Bilateral arms control treaties

Almost all bilateral arms control treaties that exist today have been concluded between the USA and the SU/Russia. The bilateral arms control treaties provide examples *par excellence* of the use of arms control law as a means to secure the strategic balance of power in the world. Apart from stabilising this balance by way of mutual reductions in the numbers of nuclear missiles, which took place pursuant to the INF-treaty\(^{158}\) and the START-I Treaty,\(^{159}\) the balance of power has been secured pursuant to the ABM-treaty\(^{160}\) by ensuring vulnerability to a nuclear retaliatory strike, which is the essence of the strategic theory of Mutually Assured Destruction (MAD).

Further stability was sought through ensuring equality in technological developments, which, in regard to nuclear weapons, took place by way of the TTBT and the PNET,\(^{161}\) both of which limit the maximal yield of

\(^{158}\) The Treaty on the Elimination of the Intermediate-Range and Shorter-Range Missiles (INF-Treaty, 1987) was concluded between the USA and the SU. A Memorandum of Understanding on Data (MOU), a Protocol on Elimination and a Protocol on Inspection have been annexed to the treaty and form an integral part of it (Art. I). The Treaty was signed on December 8, 1987 and was ratified by the Parties on June 1, 1988. The Russian Federation has assumed the SU’s rights and obligations by the 1992 Resolution of Bishkek; see Ipsen (1999), p. 997.

\(^{159}\) START-I, the Treaty between the USA and the SU on the reduction and limitation of Strategic Offensive Arms, was concluded on 31 July 1991. With the Protocol of Lisbon of 1992, START-I was adjusted to the changing political situation. As signatories, the governments of Belarus, Kazakhstan, the Russian Federation and Ukraine assumed the SU’s rights and obligations under START-I, thus providing START-I with the character of a multilateral treaty. The Treaty entered into force on 5 December 1994.

\(^{160}\) The Anti-Ballistic Missile Treaty (ABM-Treaty, 1972) was signed in Moscow on May 26, 1972, by the USA and the SU and entered into force on October 3, 1972. Agreed Interpretations and Common Understandings were added to the Treaty as well as a Protocol, which was signed on July 3, 1974 and which entered into force on May 25, 1976. In addition, both Parties issued unilateral statements. On 26 September, 1997, four Declarations on the ABM Treaty were agreed on and adopted by the US and Russia, *inter alia* declaring that Theatre Ballistic Missile Defence Systems such as Patriot rockets are not covered by the prohibitions of the ABM-Treaty. See Ipsen (1999), p. 1006.

\(^{161}\) The Threshold Test Ban Treaty (TTBT) was signed in Moscow on July 3, 1974, (ILM 1974, 906) by the USA and the SU, and entered into force on 11 December 1990. A Protocol has been annexed to the Treaty and forms an integral part of it. The TTBT is complementary to the Peaceful Nuclear Explosions Treaty (PNET; ILM 1976, 891), which was signed in Moscow and Washington on May 28, 1976 and entered into force on 11 December 1990. A Protocol and an Agreed Statement form an integral part of the PNET. It is interesting to note that both treaties will become practically obsolete when the CTBT (1996) enters into force. See Ipsen (1999), p. 1004.
nuclear weapon tests to 150 kilotons, and, with regard to both nuclear and chemical weapons, by way of bilateral agreements on verification experiments involving trial challenge inspections, so as to gain experience and thereby facilitate the elaboration and implementation of the multilateral (or also bilateral) treaty that was to follow the verification experiment.\textsuperscript{162} Other bilateral agreements between the USA and Russia on further reductions of their nuclear weapons stockpiles have been negotiated and concluded (START-II), but little progress has been made on their implementation.\textsuperscript{163} Only on rare occasions have States other than the USA and Russia concluded bilateral arms control agreements; one example is the Argentine-Brazil Agreement on the Exclusively Peaceful Use of Nuclear Energy.\textsuperscript{164}

2.5.3 Multilateral arms control treaties
Multilateral arms control treaties can be divided into regional treaties and universal (global) treaties. As a rule, these treaties are structured to comprise a short basic treaty, and various complex and very extensive annexes and other documents that are attached to the basic treaty. Many regulations in the basic treaty find their extension, supplement or elaboration in the various annexes and other related documents.

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\textsuperscript{162} See the USA-SU 1989 ‘Agreement regarding a bilateral verification experiment and data exchange related to prohibition of chemical weapons’, especially Art. I(3) (Text in 28 ILM 1438 (1989)). See also the ‘Agreement between the USA and the SU on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons (US-Soviet Chemical Weapons Agreement)’, of June 1, 1990 (entry into force 1 November 1993), especially Art. VI. As the title indicates, the superpowers concluded this agreement with a view to achieving a world wide ban on chemical weapons in a multilateral Convention. The provisions of this Convention, the CWC, which came into force on 29 April 1997, shall prevail over conflicting provisions in the bilateral agreement; otherwise the agreement will supplement the Convention as between the Parties (Art.VIII(1) of the Agreement). See furthermore the special USA-SU ‘Agreement on the Conduct of a Joint Verification Experiment’ of 9 December 1987, concluded for the purpose of elaborating effective verification measures for the treaty concerning the limitation of underground nuclear weapon tests.

\textsuperscript{163} START-II was signed at Moscow on 3 January 1993. Protocols and a Memorandum of Understanding are annexed to the START-II Treaty, which was ratified by the Russian Federation on 19 April 2000, shortly after President Putin officially assumed power. The USA ratified START-II on 26 January 1996.

\textsuperscript{164} This Agreement of 18 July 1991 established the Argentinean-Brazilian Agency for Accounting and Control of Nuclear Materials (ABACC), which has been in operation since July 1992. A quadripartite Safeguards-Agreement to cover all nuclear materials within the territories or under the jurisdiction or control of the two States was signed by the end of 1991. On 4 March, 1994, this Agreement, concluded between Argentine, Brazil, IAEA and ABACC, entered into force.
a) Regional arms control treaties

The regional arms control treaties include the CFE Treaty\(^{165}\) and the NWFZ treaties.\(^{166}\) NWFZ treaties constitute the only category of arms control treaties that have been negotiated primarily on the initiative of States from the different regions instead of that of the nuclear superpowers. However, since supervision of compliance with the NWFZ treaties has been conferred on the globally operating IAEA, the provisions of all nuclear non-proliferation treaties taken together (the NPT included) bear the character of a global legal regime. Almost all negotiations on universal arms control treaties as well as on arms control treaties relative to regions that are connected to a nuclear superpower by way of a military alliance, have been jointly initiated by those superpowers.

b) Universal arms control treaties

Some of the treaties in this category relate to uninhabited territories and areas not under the sovereignty of any State;\(^{167}\) they were the first to be concluded, since no sovereign State was forced to ‘give up’ any freedom of behaviour within its territory. Various other global arms control treaties, relating either to conventional, nuclear, biological or chemical weapons, have been concluded since.\(^{168}\) Some of those treaties do have far-reaching

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\(^{165}\) The (original) Treaty on Conventional Forces in Europe was concluded 19 November 1990, and entered into force on 9 November 1992. In 1999 at the OSCE Istanbul Summit, an ‘Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe’ was adopted by the States Parties to the CFE Treaty (CFE.DOC/1/99, 19 November 1999). This Agreement has not yet entered into force.

\(^{166}\) The Nuclear-Weapon-Free Zone Treaties encompass The Treaty of Tlatelolco (1967) signed in Mexico on February 14, 1967, and entered into force on April 22, 1968 (Two Additional Protocols are annexed to the Treaty); the Treaty of Rarotonga (1985), which was opened for signature on August 6, 1985, and entered into force on December 11, 1986 (The Treaty encompasses Four Annexes and three Protocols); The African Nuclear Weapon Free Zone Treaty (Treaty of Pelindaba) was signed in Cairo on 11 April 1996; the Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Treaty of Bangkok), was concluded 15 December, 1995 and entered into force 28 March 1997.

\(^{167}\) Starting with the Antarctic Treaty (1959), which was signed in Washington on December 1, 1959, and became effective on June 23, 1961; the Outer Space Treaty (1967), which was signed in London, Moscow, and Washington on January 27, 1967, and entered into force on October 10, 1967; the Agreement governing the activities of States on the Moon and Other Celestial Bodies (1979) was opened for signature in New York on December 18, 1979, and entered into force July 11, 1984; the Sea-Bed Treaty (1971), which was signed in London, Moscow, and Washington on February 11, 1971, and entered into force on May 18, 1972.

\(^{168}\) The first breakthrough in global arms control law came with the LTBT, the Limited nuclear Test Ban Treaty (also known as Partial Test ban Treaty (PTBT), or ‘Moscow Agreement’), which was signed in Moscow on August 5, 1963, and entered into force on October 10, 1963. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was signed in London, Moscow, and Washington on July 1, 1968, and entered into force on March 5, 1970. The Biological Weapons Convention (BWC) was signed in London, Moscow, and Washington on April 10, 1972, and entered into force on March 26, 1975; the Convention on the Prohibition of Military or any other Hostile Use of Environmental
consequences for the State’s freedom of activities within its territory; formal ratification of these treaties puts in place various co-operative arrangements incorporated in their texts.

2.5.4 Treaties, Acts and Documents accessory to arms control treaties

Along with the basic arms control treaties, many accessory treaties, acts and documents have come into being. They are legally binding and non-legally binding documents of whatever name that are concerned with arms control as an instrument for the maintenance or the enhancement of international peace and security. The legally binding documents in this sphere, that are accessory to the basic arms control agreements, include, at the bilateral level, so-called ‘Hot Line Agreements’, which aim at excluding the outbreak of nuclear war,\(^{169}\) and Agreements on notifications of missile launches and large-scale military exercises.\(^{170}\) Both types of Agreements were concluded mainly between the USA and the SU. The unilateral declarations that have been made by NWS to assure NNWS against the threat or use of nuclear weapons also fall into this category, since they can be considered accessory to the NPT and the NWFZ treaties.\(^{171}\) The accessory agreements purport to avoid the unfolding of situations in which actions and reactions could

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Modification Techniques (ENMOD Convention), signed at Geneva on 18 May 1977, entered into force 5 October 1978; the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Inhumane Weapons Convention), signed at New York on 10 April 1981 and entered into force 2 December 1983; the Chemical Weapons Convention (CWC), was signed in Paris on 13 January 1993 and entered into force on 29 April, 1997. The United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which was adopted at Oslo on September 18, 1997, entered into force on 1 March, 1999. The Comprehensive nuclear Test Ban Treaty (CTBT), adopted by the UNGA on 26 August 1996, is also part of this group of global arms control treaties but has as yet not entered into force.

\(^{169}\) For example, the USA-SU Agreement on Prevention of Nuclear War, June 21, 1973; the USA-SU Agreement on Measures to reduce the Risk of the Outbreak of Nuclear War, September 30, 1971; the UK-SU Agreement on the Prevention of Accidental Nuclear War, September 30, 1971; the Exchange of Letters between France and the SU concerning the prevention of accidental or non-authorized launch of nuclear weapons, of 16 July 1976. Furthermore, a Nuclear Threat Reduction Act (Nunn-Lugar Act) and numerous bilateral agreements between the USA and the Russian Federation, Ukraine, Belarus and Kazakhstan were concluded as elaborations of several ‘umbrella agreements’ in the field of nuclear energy.

\(^{170}\) For example, the USA-SU Agreement on notifications of launches of intercontinental ballistic missiles and submarine-launched ballistic missiles, signed on 31 May, 1988; the USA-SU Agreement on reciprocal advance notifications of major strategic exercises, signed on 23 September, 1989; the USA-SU Agreement on the prevention of dangerous military activities (DMA Agreement), entry into force 1 January 1990; also the USA-SU Agreement on the establishment of Nuclear Risk Reduction Centres, of September 15, 1987 can be placed in this category.

\(^{171}\) Declarations of NWS containing Security Assurances to NNWS were endorsed by the UNSC in S/Res/255 (1968), as well as in S/Res/984 (1995).
through misconceptions or misjudgements lead to a greater risk of conflict, in particular nuclear conflict.

On several occasions institutional arrangements have been separated from the formal texts of the basic treaties and have been transferred to ‘annexes’ and other ‘documents’ accessory to the treaties. These annexes and documents can be adapted and amended in a simplified way (as compared to the constitutional requirements in place in most States with regard to formal treaty amendment) so as to secure the flexibility of procedures. A problematic category in this respect is constituted by all kinds of annexes and other documents that are accessory to arms control treaties, but are not integral parts of those arms control treaties. A good example is the (unratified) Strategic Arms Limitation Treaty (SALT-I) which was negotiated between the USA and the SU, starting in 1972. There are no less than eight accessory documents to the SALT-I Treaty, none of which constitute an integral part of the basic Treaty, even though they cannot operate without it. These accessory documents differ in duration and some of them do not even require formal ratification. The legal status of many of those documents is unclear; with regard to some of them even the basic question whether or not they are legally binding remains unanswered. The difficulties that might arise out of the unclear status of documents attached to a basic treaty have been countered in later arms control treaties, by declaring that the various Memoranda, Annexes and Protocols form an ‘integral part of the treaty’. Hence, it is clear that the regulation of certain issues in one type of document or another has no further meaning than that of a separation of rules in a technical sense. As such, the legal status of these

172 See Kolasa (1995), p. 7-12. These accessory documents are: an ‘Interim Agreement on certain measures with respect to the limitation of strategic offensive arms’ (signed 26 May, 1972); a ‘Protocol’ to this Interim Agreement (26 May, 1972); ‘Interpretations’ to the Treaty and other agreements (May 26, 1972; these ‘Interpretations’ are divided in: ‘Agreed Interpretations’ and ‘Unilateral Statements’, whereby ‘Agreed Interpretations’ are further divided into ‘Initialled Statements’ and ‘Common Understandings’); a ‘Memorandum of Understanding regarding the establishment of a Standing Consultative Commission’ (21 December 1972); a ‘Protocol with Regulations of the US-Soviet Standing Consultative Commission’ (30 May, 1973); a ‘Protocol to the Treaty on the limitation of anti-ballistic missile systems’ (3 July, 1974); a ‘Declaration of the USA on the further application of the Interim agreement’ (23 September, 1977); and a ‘Statement by the SU: intent regarding the SALT Interim agreement’ (24 September, 1977).

173 See, e.g., Art. XVII(1) of the INF-Treaty: “This Treaty, including the Memorandum of Understanding and Protocols, which form an integral part thereof, shall be subject to ratification in accordance with the constitutional procedures of each party (...)”, and see Art. XVII of the CWC (which has three Annexes attached to it): “The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes”. See also Art. X of the CTBT: “The Annexes to this Treaty, the Protocol, and the Annexes to the Protocol form an integral part of the Treaty. Any reference to this Treaty includes the Annexes to this Treaty, the Protocol and the Annexes to the Protocol”.

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attached documents is not in doubt and they are to be implemented and executed on an equal footing with the basic treaty.

2.5.5 'Politically binding' documents concerned with arms control

Arms control has always been a popular subject for all kinds of political deliberations not producing legally binding documents. In recent years attempts have been made to give some weight to these non-binding documents, e.g. by calling them norms of 'soft' law, or 'politically' binding measures. They are acts the drafters did not intend to create legal relations, even though they may give rise to formal procedures and institutions to co-ordinate future actions. Such non-binding documents can be considered indicators of the possible direction of the evolution of the law. States may choose between committing themselves to be bound by legal norms or accepting other norms to serve as guidance in their behaviour. Especially in the field of arms control, taking account of the distinction between legally binding and non-legally binding norms is of utmost importance.

It should be acknowledged that some of the (many) political documents have played an important role in the development of arms control law, by laying down principles for the negotiation of future arms control agreements. Agreements on negotiations for arms control are themselves not part of the law of arms control, since they do not set norms with regard to national armaments; they rather serve to guide negotiations meant to lead eventually to the conclusion of arms control agreements. The importance of those documents should however not be underestimated; they have provided a direction for the development of the law, without being legally binding.

General principles for the negotiation of future arms control agreements, as well as general principles relative to the contents of arms control law, can be found in documents that have been drawn up in the context of international conferences, such as the World Disarmament Conference (1932-1936) and the UNGA Special Sessions On Disarmament (SSOD’s) of 1978, 1982 and 1988 respectively, as well as, occasionally, in other contexts, such as the bilateral meetings of the USA and the SU that resulted in a Joint Statement of Agreed Principles for Disarmament Negotiations. Besides, in several Resolutions, the UNGA has voiced opinions which can be considered indications of the contents of general principles of law relevant to the law of

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175 See SSOD-I (1978); SSOD-II (1982); the third UNGA Special Session on Disarmament (SSOD-III) was held in 1988, but no final document was adopted.
arms control. In addition, bilateral agreements have been concluded on the outline of principles for subsequent arms control treaty negotiations. Furthermore, ‘politically binding’ documents relating to arms control and so-called ‘Confidence and Security Building Measures’ (CSBM) have been developed in the framework of the OSCE. Especially within the OSCE context, arms control can be seen to be an evolutionary process, beginning with modest ‘politically binding’ confidence-building measures, followed at a later stage by more ambitious measures, including verification, which in turn were followed by legally binding arms limitation and disarmament measures with full verification provisions. With regard to ‘politically binding’ documents regarding the trade in conventional armaments, the UN Register of Conventional Arms and the ‘Wassenaar Arrangement’ can be mentioned as examples. Both are intended to increase transparency in armaments. Finally, in the nuclear field the so-called Nuclear Suppliers Group (NSG) has issued guidelines on a voluntary export reporting system with regard to nuclear materials as a means to co-ordinate the national policies of States exporting nuclear-relevant goods and services. The NSG


178 E.g., on 21 June 1973, presidents Carter (USA) and Breznev (SU) signed a ‘Special Agreement on basic principles of negotiations for further limitation of strategic offensive arms’. Upon signing the SALT II Treaty, the Presidents again agreed on a ‘Joint Statement of principles and basic guide-lines for subsequent negotiations on limitation of strategic arms’ (June 18, 1979).

179 In the 1975 Stockholm Document, Confidence-Building Measures were introduced. The CSBMs were subjected to verification in the 1986 Stockholm Document. See the ‘Document on Confidence-Building Measures and Certain Aspects of Security and Disarmament’, included in the ‘Final Act of the Conference on Security and Co-operation in Europe’ (Helsinki CSBM Document), signed at Helsinki on 1 August 1975 and the ‘Document of the Stockholm Conference on Confidence- and Security Building Measures and disarmament in Europe’ (Stockholm CSBM Document), adopted at Stockholm on 19 September 1986, which entered into force on 1 January 1987. Arms control measures contained in a legally binding treaty with stringent verification-measures were only later introduced, in the CFE Treaty, which entered into force in 1992.

180 The UN Register of Conventional Arms was established with effect from 1 January 1992; the provision of data is voluntary and is not subject to verification. The ‘Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies’, concluded on 19 December 1995, between 28 States (primarily NATO-Members, as well as Russia and some former Warsaw-Pact States), provides for a regime of voluntary exchanges of information with regard to conventional arms exports and dual-use goods. See Ipsen (1999), p. 1008-1009.

guidelines bear the character of a voluntary system of co-ordinated unilateral policy declarations.

2.6 Customary international law in the field of arms control

2.6.1 Arms control and the nature of customary international law

The binding force as well as the evidence of the existence of rules of customary international law does not originate from prior consent of States (as with treaties), but is derived from the consistent conduct of States and a corresponding recognition of that conduct as legally permissible or obligatory (opinio iuris sive necessitatis).\(^{182}\) State practice is usually highly diffuse and therefore the evidence of customary international law is scattered and elusive. Furthermore, the contents of the customary rules of international law are often vague and abstract – customary law is by its nature the result of an informal process of law creation. In the field of arms control there is a need for clear wording and explicit consent; predictability and deliberateness can be considered special features of the law of arms control.\(^{183}\) Concern about possible attribution of (tacit) consent to rules of customary international law has had harmful effects on arms reduction and prohibition. On the one hand, it has created an obsession to anticipate every trivial application of detail in ever longer treaty texts, while on the other, it has inhibited treaty commitment altogether.\(^{184}\)

2.6.2 The absence of an established body of ‘customary arms control law’

In order to be established as rules of customary international law, international custom must be evidenced in general State practice, both factually (in that it takes place) and legally (in that there is opinio iuris). State practice, in order to constitute rules of customary international law, must be constant and uniform.\(^{185}\) With regard to the generality of practice, it has been rightly asserted that the practice must have been applied by the overwhelming majority of States which hitherto had an opportunity of applying it.\(^{186}\) Special weight may be given to the practice of those States whose interests are specifically affected by the subject matter of the rule.\(^{187}\) It can be upheld that ‘State practice’ is not only evidenced by the external

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\(^{182}\) Cf. Brownlie (1998), p. 7; Committee on Formation of Customary General International Law (2000), p. 6-8. As the ICJ has stated, the substance of customary international law must be ‘looked for primarily in the actual practice and opinio iuris of States’. See Continental Shelf Case (Libyan Arab Jamahiriya/Malta), Judgement, ICJ Rep. 1985, p. 29, par. 27.


\(^{185}\) As determined by the ICJ in the Asylum Case, ICJ Rep. 1950, at p. 227.


\(^{187}\) As determined by the ICJ in the North Sea Continental Shelf Cases, ICJ Rep. 1969, 3.
conduct of States towards each other, but also by such internal matters as their domestic jurisdiction, judicial decisions, diplomatic dispatches, internal government memoranda, and ministerial statements in parliaments and elsewhere. However, diplomatic correspondence and so on may carry *opinio iuris*, but may also constitute mere expressions of political convenience or expediency. What is more important is the actual practice that has been followed in the State’s international relations and has been accepted by other States. In that respect, State practice regarding established custom may be determined by all kinds of documents that clearly fall outside the scope of treaties and other agreements, whatever their designation, that are meant to be legally binding. In addition, *opinio iuris* may be deduced from the conclusion of treaties or voting records in international fora, up to the point where practice and *opinio iuris* cannot be clearly distinguished from each other. Customary international law is therefore essentially based on the (constant and uniform) practice of States in their international relations.

In the field of arms control it is difficult to establish rules of customary international law. Unilateral actions in arms control matters have been isolated and fragmented, and the status regarding the established customary law content of many documents remains unclear. For example, can UNGA Resolutions create custom if adopted unanimously, nearly unanimously, when representing a majority or merely the often repeated views of States from a certain region? Similarly, what is the status, regarding established custom, of international declarations, or final documents adopted by international conferences such as the UNGA SSOD’s? Likewise, are drafts adopted by the ILC, recommendations of the Conference on Disarmament or of the Disarmament Commission, evidence of customary law? And, what about recommendatory acts of organs of specialised international organisations in arms control matters, such as the IAEA and the OPCW? In sum, with regard to ‘emerging’ (not or not yet established) customary law, the vital question remains: when does State practice become binding law?

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189 In the Vienna Convention on the Law of Treaties, ‘Treaty’ is defined as an ‘international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’ (Art. 2(1(a)). The ILC in a provisional draft, as recorded in the Yearbook (1962) ii, p. 161, listed several particular designations, viz. ‘treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation’.

190 See Nicaragua Case (1986), p. 98 (par. 186).


192 As a general rule, resolutions of international organisations and of international conferences do not *ipso facto* create new rules of customary law. See Committee on Formation of General Customary International Law (2000), p. 54-66.

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course the point at which States are ready to indicate that they wish to be bound. As mentioned, in the law of arms control a practice has emerged of giving priority to treaties by expressing full consent to be bound through the appropriately authorised State representatives and through the required forms.

The reluctance of States to accept anything other than treaties as constituting binding arms control law has been clearly illustrated by the 1996 Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons. In this Advisory Opinion, the ICJ first reiterated its earlier statement that 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.\(^{193}\) Thus, the starting-point is that States are free to threaten or use nuclear (or other) weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Then, the Court examined the ‘relevant applicable law’ that might imply any such limitation. With regard to customary international law on the subject of the illegality of nuclear weapons, the Court noted that the UNGA had adopted an extensive series of Resolutions on that subject since 1961. But even the clear and constant pattern of expressions in those Resolutions of general illegality of the use of nuclear weapons by a large majority of States over a period of 35 years did not establish a rule of customary international law to that effect.\(^{194}\) It is illustrative that the Court noted that customary international law does not contain any specific proscription on the threat or use of nuclear weapons *per se*.\(^{195}\) Even though one should be cautious in deriving too many general conclusions from these observations,\(^{196}\) the Court’s general opinion on the existence of customary rules relating to nuclear weapons seems valid for the law of arms control as a whole, in that custom has insufficiently developed to allow for the identification of a body of customary principles and rules relating to the law of arms control.\(^{197}\)

\(^{193}\) This conclusion was reached in the *Nicaragua Case* (1986), p. 135, par. 269. See Advisory Opinion (1996), par. 21.

\(^{194}\) See Advisory Opinion (1996), par. 64-73. Certain States had advanced that this important series of UNGA Resolutions, beginning with Resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of customary international law which prohibits recourse to those weapons.

\(^{195}\) Advisory Opinion (1996), par. 74. This conclusion was reached even though the Court noted (in par. 70) that UNGA Resolutions, even if they are not binding, may sometimes have a normative value, providing in certain circumstances evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*.

\(^{196}\) For example, the importance of nuclear deterrence-policies, which have been duly taken into account by the Court (see par. 67 and 73 of Advisory Opinion (1996)) is far less self-evident with regard to other weapons of mass destruction.

\(^{197}\) See also Combacau & Sur (1995), p. 699: “(...) la coutume est insuffisamment développée pour permettre de dégager un ensemble de principes et de règles dominant un droit de
A State’s fancy for arms control treaty law cannot rule out the possibility of the emergence of customary rules on the same subject matter, precisely because treaties may generate ‘new’ customary rules through the impetus they give to State practice. For example, it has been argued that the prohibition on the use of chemical weapons in warfare as laid down in the 1925 Geneva Protocol has developed through customary international law into a prohibition also covering a second strike with this class of weapons.\(^{198}\) However, the concept of treaty law becoming binding, in the form of customary international law with the same contents, on ‘third’ States not Parties to the treaty will hardly ever occur in the practice of arms control law.\(^{199}\) For the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule it is an indispensable requirement that State practice should have been both extensive and virtually uniform and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.\(^{200}\) The only examples of arms control treaty law becoming binding as customary law on States not Parties originate from certain treaty provisions having an undisputed *erga omnes* effect, such as those on peaceful use in the Antarctic Treaty and in the Outer Space Treaty. But then again, constant and uniform State practice in this regard is rather easily established, for the case of a State not Party to the Antarctic Treaty wanting, for example, to establish military bases on Antarctica (thereby violating Art. I of the Treaty) seems rather far fetched. Besides these cases, perhaps the prohibition to conduct nuclear test explosions in the atmosphere and under water is on the way of becoming customary law binding on all States.\(^{201}\)

\(^{198}\) See Rosas (1995), p. 582, who even asserts that the prohibition of use of chemical weapons may be an emerging peremptory norm. According to Greenwood (1998), p. 211, and Price (1995), p. 76, so many States had entered reservations to the 1925 Protocol to the effect that they retained the right to use chemical weapons if those weapons were first used against themselves or their allies that the Protocol was, in reality, only a ban on the first use of such weapons.

\(^{199}\) See for this concept Art. 38 of the Vienna Convention on the Law of Treaties, which provides that nothing in the articles containing the basic rules on treaties and third States precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such.

\(^{200}\) See *North Sea Continental Shelf Cases, ICJ Rep.* 1969, 3, p. 43.

\(^{201}\) As argued by Goldblat (1996), p. 51. Obviously, here considerations of preserving the natural environment as well as the fact that nowadays underground nuclear explosions are less dangerous than atmospheric ones and equally useful, account for this development. Grief (1987), p. 227-235, in this respect only ‘finds’ a customary prohibition of ‘radioactive venting’, i.e. radioactive debris outside the territorial limits of the State under whose jurisdiction or control the explosion is conducted.
In general, in the law of arms control, which after all demands as much clarity and predictability as possible, the concept of treaty law becoming binding as customary international law on States without their express consent is problematic. This can be convincingly illustrated by the recent case of nuclear proliferating by India and Pakistan. India conducted five underground nuclear weapon test explosions on 11 and 13 May 1998, followed by Pakistan, which conducted six such tests on 28 and 31 May 1998, even though legal prohibitions of the possession of nuclear weapons and the conduct of nuclear test explosions have been laid down in several treaties, viz. the NPT, LTBT and CTBT, that have been ratified by an exceptionally large number of States. India and Pakistan are among the very few States that have never become Parties to any of those treaties, and hence there is general consensus that India and Pakistan did not violate any legal prohibition when they conducted their series of nuclear test explosions and afterwards declared they were in possession of nuclear weapons for their security.202 Apparently, even though the nuclear non-proliferation regime has functioned over thirty years and nowadays involves as many as 187 States Parties, no rule of customary international law prohibiting others than the five declared NWS to test and possess nuclear weapons has emerged from the constituent treaties.

It can thus be concluded that there is little or no evidence to support the view that there exists a body of established customary law on arms control. It is precisely the absence of a clear-cut general consensus in arms control issues that prevents customary rules of international law from coming into being. There is of course a major difference between customary rules forming part of the law of arms control and customary rules being applicable to the law of arms control. The absence of an established body of customary international law obviously does not mean that relevant general rules of customary international law would not be applicable to arms control treaties.

2.7 General principles of law relating to arms control

2.7.1 Arms control and the nature of general principles of law

General principles of law are broadly formulated and intended to be applied by reference, not compulsorily in the way precise rules of law apply. A central feature of ‘general principles’ as a source of law is that they comprise principles that are common to the law systems from which they

202 That is notwithstanding the disappointment and moral objections voiced in Statements by the President of the UNSC relative to those series of nuclear tests. See S/PRST/1998/12, 14 May 1998 and S/PRST/1998/17, 29 May 1998. See also S/Res/1172, 6 June 1998. In the case of India the nuclear option has been presented as an insurance against possible adverse developments in Indian-Chinese relations. For Pakistan, the acquisition of nuclear weapons has been motivated entirely by India’s behaviour. See Latter (1998), p. 3.
originate. That is to say, they are principles that can be retrieved in most national law systems, or applied generally in all cases of the same kind which arise in international law, or are indispensable for the proper functioning of legal relations in the legal order of organised societies, be it national law, international law, the internal order of international organisations, or any other autonomous legal system. General principles of law may thus refer to principles originating in national law or in international law, or to principles not restricted to any specific legal order and, finally, to the consequences of legal logic. In national legal systems, there are no laws equivalent to the law of arms control in subject matter. Therefore, general principles of law of particular importance to arms control law cannot be found among the principles that are common to national legal systems. On the contrary, the law of arms control is an outstanding example of a branch of international law that functions in the sphere of international relations between sovereign States. Therefore, the general principles of law that can be considered important to the law of arms control are first and foremost general principles of international legal relations. International relations are the direct origin of such principles; they establish themselves from the top down, not by deduction from domestic law but by proclamation in international fora. It must be kept in mind that the general principles are considered law, not as maxims for ethical and moral orientation. This means that a distinction must be made between principles that are common to national policies in the field of arms control, i.e. political principles, on the one hand, and legal principles on the other hand, even though both legal and political principles can be found in any one document.

2.7.2 General principles of arms control law and politics
It might be argued that the law of arms control finds its origin in one of the principles of the laws of war, viz. that parties to the conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. The principle, in combination with the de Martens clause, serves as a basis for specific prohibitions to employ (current and future) weapons or methods of warfare of a nature so as to cause unnecessary losses or excessive sufferings. This principle, although it may be considered the


204 See Mosler (1995), p. 517. The insertion in Art. 38 of the Statute of the ICJ of the phrase referring to the function of the ICJ ‘to decide in accordance with international law such disputes as are submitted to it’ clearly indicates this is a fact.

205 See Art. 22 of the 1899 and the 1907 Hague Conventions on the Laws of Land Warfare. The origins of this principle can be traced back even further, to the Brussels Conference of 1874. See Greenwood (1998), p. 187.

206 Vagt (2000), p. 36, refers to this principle (and the de Martens clause) as (only) a moral basis for restricting the usage of new weapons.
expression of what has been an important underlying motive for concluding certain arms control treaties (e.g. the 1981 Certain Conventional Weapons Convention), is however not a principle of the law of arms control as such. Whereas the laws of war are laws imposed upon belligerents and upon their belligerent activities and formed by the practice of belligerent States and meant to change the ‘nature of warfare’, the law of arms control relies upon consent and is created by international agreements, requiring compliance in almost all instances including during peace-time and not necessarily changing the face of war.  

It has furthermore been alleged that the fact that the right of the State to possess national armed power is not unlimited could be identified as the basic principle of the law of arms control. However, this principle has not been laid down in any treaty or other legally binding document, and therefore - given the absence of a standing body of customary arms control law - the question whether a general principle of law applies in present-day international law holding the above-mentioned contents has to be answered in the negative. As in any field of international law, in the law of arms control there exist no general principles forcing States into concluding arms control treaties, nor does contemporary international law contain a general duty for States to disarm otherwise.

A separate, but related question is whether it may be inferred from international law that States have a duty to negotiate in good faith about disarmament and to conclude respective treaties and agreements. It is true that pursuant to Art. VI of the NPT, each of the Parties to the NPT “undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”, but the exact content of this obligation is heavily disputed. The observation by the ICJ in 1996 that these negotiations should be ‘brought to a conclusion’ has so far yielded (almost) no effect. The negotiating principle of Art. VI NPT and similar ones, that all set forth a duty of States to negotiate arms control agreements, would have to be elaborated into clear rules before direct legal obligations to

210 The Non-Aligned Movement, and especially India and Pakistan, have always perceived the NPT as having introduced structural inequality in arms control obligations. The States in the Non-Aligned Movement have consistently emphasised the obligation resting on the NWS to pursue nuclear disarmament within a strict time-frame as a trade-off for the Non-Aligned’s renunciation of nuclear weapons.
211 See Advisory Opinion (1996), par. 105 (F). The only ‘effect’ that may be pointed at concerns the adoption of ‘practical steps for systematic and progressive efforts to implement Art. VI’, as agreed on by the 2000 Review Conference of the NPT. See Final Document NPT (2000), comments on Art. VI, par. 15.
disarm could emerge from them (see infra chapter [4]). Consequently, it
cannot be argued that States have to accept limitations on their freedom of
behaviour with regard to their national armaments on the basis of these
principles.

Even though, under certain circumstances, a State may bind itself by issuing
unilateral statements, in arms control law reciprocity is the dominant factor.
It would go too far in this respect to argue that reciprocity in multilateral
arms control law entails a right of States Parties not to apply an obligation
that is not being applied by whatever other State Party (see infra chapter
[7]). However, reciprocity in the form of a balance of mutual responsibilities
and obligations is implied by the structure of the arms control process.
Restrictions on the freedom of behaviour in the context of arms control can
support international security when accepted reciprocally: limitations or
prohibitions should be mutual and agreed upon. Since there is no central
effective power capable of guaranteeing world wide equal security to all
States alike, the law of arms control must take account of reciprocity
especially with regard to the level of armaments present in States. Taking
into account the need of all States to protect their security, enhancing
stability at a lower military level can only be carried out by way of equitable
and balanced reductions of armed forces and of armaments. It is imperative
that States retain freedom of behaviour with regard to their national
armaments, until the opposite has been made explicitly - both legally and
politically - clear. Hence, the security context of arms control law, in
connection with the element of reciprocity, demands the acceptance of the
adage that ‘what is not specifically prohibited, is inferentially permitted’ as
a general principle of substantive arms control law.

Furthermore, the USA and the then SU in the 1960s, and as was later, in
1978, affirmed by the UNGA, accepted as a principle that States would
‘have at their disposal only such non-nuclear armaments, forces, facilities
and establishments as are agreed to be necessary to maintain internal order
and protect the personal security of citizens; and that States shall support
and provide agreed manpower for a UN peace force’.212 Thus, the process of
arms control should not go beyond a certain level of arms limitation and
disarmament. It can be considered a general principle of arms control law
that ‘the ability of a State to maintain internal law and order and to
participate proportionally in international peace-operations constitutes the
lowest level of disarmament’.213 This ancient principle, securing some level
of armed capability to all States, can ultimately be based on the right of
every State to self-preservation and the inherent right of self-defence against

212 See McCloy-Zorin (1961), principle (2). See for the affirmation of this principle by the
UNGA, SSOD-I (1978), par. 111.
213 This principle, albeit phrased slightly differently, was already acknowledged in the
Fourteen Points of US President Wilson and by Art. 8(1) of the Covenant of the League of
Nations; see supra, Chapter [1].
armed attack. The principle that a State has the right to retain the armaments necessary to maintain its internal order might be particularly relevant in the context of dictated arms control law, albeit that the question who is to determine what level of armaments is ‘necessary’ for the maintenance of the internal order of the State cannot be answered in general.  
In the practice of arms control negotiations, a further principle has developed, which is nowadays considered crucial in arms control law. All consensual arms control measures, especially when they involve disarmament proper, should be implemented from beginning to end under strict and effective international supervision so as to provide firm assurance that all parties are honouring their obligations.  
In other words, supervision of compliance with the implementation of arms control treaties, including the substantive legal norms contained therein, is considered essential, and the more reductions are prescribed by the substantive law of the treaties, the more important supervision becomes as complying States would become increasingly (militarily) weak or vulnerable vis-à-vis non-complying States. According to the UNGA, every effort should be made in this context to develop appropriate methods and procedures of supervision, which are non-discriminatory and which do not unduly interfere with the internal affairs of other States or jeopardise their economic and social development. Of course, States remain free to conclude arms control treaties without such international supervisory mechanisms, just like they did in the past (see e.g. the 1925 Geneva Protocol and the 1963 LTBT). Establishing a supervisory mechanism in arms control law is not a legal duty; the principle that arms control should take place under international supervision is a principle of a political, rather than a legal, nature. In case a supervisory mechanism is established, institutional principles would be that States should as far as possible have equal opportunities to participate in the supervision of compliance, and that the supervisory organisations should operate with cost-effectiveness (e.g. keeping the size of the staff of Secretariats and inspection

214 In situations after an aggressive war, like in ‘post-Gulf War’ Iraq (1991), it would be conceivable that the UNSC (or an organ of another international organisation), on behalf of the international community, determines what level of armaments is in accordance with the preservation of internal order in the defeated aggressor State. In situations of ‘semi-consensual’ arms control law, like in ‘post-war’ Yugoslavia (1995), the core principle of State sovereignty might still interfere with such determination by the UNSC (or any other international organisation).


216 Cf. SSOD-I (1978), par. 92.
teams to a minimum necessary for the proper fulfilment of their tasks and functions).

Other relevant legal principles could also be discerned (e.g. States should act in good faith in fulfilling arms control obligations; States should not abuse their rights under the treaties), but they are not specific to the law of arms control. One important 'principle', viz. the principle that all States have the right to participate on an equal footing in arms control negotiations which have a direct bearing on their national security, has not exactly been lived up to in practice. Nuclear arms control, for example, continues to be discussed among the NWS inter se, and the membership of the Conference on Disarmament (CD), the world's single largest multilateral disarmament negotiating forum, consists of the declared NWS and only 56 other States.

2.8 Subsidiary sources for the determination of arms control law

Judicial decisions

Art. 38(1(d)) of the Statute of the ICJ refers to 'judicial decisions' as a subsidiary means for the determination of the law. Contrary to, for example, the field of international humanitarian law, in which important international courts and historical tribunals (Nuremberg, Tokyo) have been established, the role of the judiciary has been fairly limited in arms control law. At the international level, very few legally binding judgements on arms control issues have been delivered. The reasons behind the absence of involvement of the judiciary in arms control matters are obviously connected to issues of national and international security. States are reluctant to allow the legality of their behaviour in concrete cases involving arms control law to be assessed by way of a legally binding judgement of a Court. Instead, in practice dispute settlement in arms control law takes place through informal consultations or other informal, non-judicial procedures.

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217 See for this principle, SSOD-I (1978), par. 28. See also Pawlak (1991), p. 142-144.
219 See the 'International Criminal Tribunal for the Former Yugoslavia' (ICTY), which was established by S/Res/827 (1993), the 'International Criminal Tribunal for Rwanda', which was established by S/Res/955 (1994) and the 'International Criminal Court' (ICC), the Statute of which was adopted in 1998.
220 The few exceptions relate to the contentious cases before the ICJ in the Corfu Channel Case (1949) and in the Nicaragua Case (1986). However, those cases related first and foremost to legal questions of State responsibility. In addition, the Nuclear Tests Cases (1974) primarily related to the issue of the binding nature of unilateral declarations. Note that the possible role of the national judiciary in matters of arms control is not discussed here. Arms control law is essentially a matter of the central governments of States. At the national level, the judiciary will in principle not be competent to judge on the legality of the behaviour of other States; therefore at the national level only rulings relating to the behaviour of the State itself with regard to its national armaments can be expected, if any.
These procedures may result in non-legally binding recommendations for settlement. There is little point in considering whether the strengthening of a system of peaceful dispute settlement should be envisaged as a prerequisite for effective arms control measures, as supplementary to progress in the arms control process, or rather as a result of successful arms control measures. The fact remains, that judicial enforcement, whether considered a prerequisite for, complementary to, or a result of, successful arms control, has proven to play only a very modest role in the practice of arms control law. It has even been remarked that the occasional references to the ICJ as a judicial dispute settlement body in arms control treaties might be considered no more than a reminder to States of the Court's existence. The absence of Court decisions in matters of arms control also means that any development of customary international law in the field of arms control cannot benefit from the role of the judiciary, as Courts usually accelerate the creation of customary law by confirming trends in State practice and by 'constructing' the necessary *opinio iuris* or by indicating how the law is developing or how it should develop. This circumstance may be somewhat mitigated, at least in theory, by the fact that some specialised international organisations in the field of arms control law, notably (organs of) the IAEA, OPCW and CTBTO, have the right, subject to authorisation by the UNGA, to request the ICJ to give a (non-binding) advisory opinion on any legal question arising within the scope of the activities of the specialised organisation. So far however, no such opinion has been requested.

3. Characteristics of the scope of substantive and institutional arms control law

3.1 The scope of substantive arms control law

The substantive law of arms control is that part of the law of arms control that deals with the substantive restrictions on the freedom of behaviour of States with regard to their national armaments. The process of acquiring a weapon or military capability can be viewed as a sequence of events similar

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221 See e.g. United States Memorandum on Principles that should govern negotiations for general and complete disarmament in a peaceful world, 14 September 1961, UNGA Doc. A/4880, Annex II, par. 10. On the role of procedures of dispute settlement in arms control treaty supervision, see *infra*, Chapter [4].

222 See SSOD-I (1978), par. 110: "Progress in disarmament should be accompanied by measures to strengthen institutions for maintaining peace and the settlement of international disputes by peaceful means".


224 See Weeramantry (1997).

225 See e.g. Art. XIV(5) of the CWC and Art. VI(5) of the CTBT.
to many industrial processes. Therefore, it is possible to distinguish several generic stages in the ‘life’ of any particular armament. The ‘life cycle’ of a particular armament can be divided into the stages of research and development (R&D), testing, production, deployment, storage, transfer and finally withdrawal or destruction.\(^{226}\) The substantive law of arms control may relate to any (combination) of the stages in the life of a particular armament. The categories of armaments that can generally be distinguished are nuclear weapons, chemical weapons, biological weapons, and conventional weapons. Only the approach towards arms control which differentiates between those categories of armaments has proven to be workable in practice.\(^{227}\)

The main obligations that are encountered in the substantive law of arms control encompass the following limitations, prohibitions and other obligations: limitations or prohibitions of use, deployment, testing, possession, production, and transfer. The word ‘limitation’ refers to situations wherein the law does not impose a complete prohibition of some particular behaviour, but instead allows this behaviour to be displayed only under certain conditions, such as a prohibition of the possession of weapons above maximum numbers, or a prohibition of testing weapons above certain explosion yields. Limitations in the numbers of armaments are in many instances coupled with the ‘positive’ obligation of dismantling and destruction. ‘Destruction’ relates to physical destruction or otherwise rendering harmless the weapons themselves, their precursors, production facilities, etc., or to combinations thereof. ‘Dismantling’ in itself refers to the separation of launchers and warheads and their separate storage.

### 3.1.1 Substantive nuclear arms control law

‘Nuclear weapon’ has been defined in the Southeast Asia NWFZ-Treaty as: ‘any explosive device capable of releasing nuclear energy in an uncontrolled manner’, but does not include the means, transport or delivery of such device ‘if separable from and not an indivisible part thereof’.\(^{228}\) It should of course be kept in mind that such definition is valid ‘for the purpose of [that] treaty’. However, this definition does not seem to be in need of adjustment in other contexts. Nuclear weapons bear some unique characteristics that distinguish them from any other kind of weapons. For nuclear weapons release not only immense quantities of heat and energy, but also powerful and prolonged radiation. While the causes of damage (heat and energy) are


\(^{227}\) This lesson can inter alia be learnt from the failure of the comprehensive disarmament talks in the World Disarmament Conference of the 1930s, and, more recently, from the fact that progress in biological and chemical disarmament only occurred after the decision had been made to separate chemical and biological weapons in the disarmament talks that were held in the predecessors of the Conference on Disarmament (CD).

\(^{228}\) See Art. I(c) of the Treaty on the Southeast Asia Nuclear Weapon-Free Zone.
vastly more powerful in nuclear weapons than in other weapons, there is also the phenomenon of radiation which is peculiar to nuclear weapons. These characteristics render nuclear weapons potentially catastrophic.\textsuperscript{229} That is also why nuclear weapons are generally kept for deterrence purposes only and can under no circumstances be considered as war-fighting weapons.\textsuperscript{230} Not only the characteristics of nuclear weapons are unique, their position in international law is too. In the 1968 NPT, a strict division has been made between the recognised NWS and NNWS.\textsuperscript{231} Where the NWS are allowed to develop, produce, possess, stockpile and further refine their nuclear weapons in accordance with international law (namely on the basis of the NPT), and (only) bear the responsibility of not transferring nuclear weapons or other nuclear explosive devices to any recipient whatsoever (Art. I NPT),\textsuperscript{232} the NNWS are obliged not to receive, not to manufacture or otherwise acquire, and not to seek or receive any assistance in the manufacture of nuclear weapons (Art. II NPT). Furthermore, the NNWS are obliged to accept IAEA safeguards in order to verify the prevention of the diversion of nuclear energy from peaceful purposes to nuclear weapons or other nuclear explosive devices (Art. III NPT). The latter provision makes clear that the use of nuclear energy for peaceful purposes is allowed by both NWS and NNWS; the NPT encourages international co-operation in the development of the applications of nuclear energy for peaceful purposes (Art. IV(2)). From a NWS perspective, the bargain made in the NPT between the NWS and the NNWS rests upon a perceived shared interest in preventing nuclear proliferation and on mutually compatible but not identical national security (and economic) interests; where the NWS have an interest in maintaining a system in which there are few nuclear-capable actors, the NNWS are considered to benefit since they can act in an international system in which most potential adversaries do not have nuclear weapons.\textsuperscript{233} The NPT is clearly not meant to ensure the total absence of nuclear weapons in the world, but it explicitly draws attention to the right of any group of States to conclude regional treaties that declare a certain region a NWFZ (see Art. VII). In a NWFZ, the total absence of nuclear weapons is

\textsuperscript{229} See Advisory Opinion (1996), par. 35. Cf. in this respect also the definition of ‘nuclear weapon’ in Protocol III to the Modified Brussels Treaty (1954). According to that definition, a nuclear weapon is, by explosion or other uncontrolled nuclear transformation of nuclear fuel or by radioactivity of nuclear fuel or radioactive isotopes, capable of mass destruction, mass injury or mass poisoning.


\textsuperscript{231} NWS under the NPT are those States that manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967 (Art. IX(3) NPT).

\textsuperscript{232} This obligation includes the prohibition of in any way assisting, encouraging, or inducing any NNWS to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or to acquire control over such weapons or explosive devices.

guaranteed.\textsuperscript{234} States Parties to NWFZ treaties therefore undertake to renounce nuclear weapons (by undertaking not to conduct research on, develop, manufacture, stockpile or otherwise acquire, possess, have control over or use nuclear weapons), to prevent the stationing of nuclear weapons in their territories by any third party, and not to conduct nuclear test explosions. Nuclear test explosions are also the subject of the CTBT (not yet in force). Each State Party to the CTBT is obliged to abstain from carrying out any nuclear test explosion (both for weapons and for peaceful purposes), and to prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control (Art. I(1)).

Apart from the CTBT, the NPT and NWFZ treaties, all nuclear arms control law has been agreed between the declared NWS. The conduct of atmospheric nuclear test explosions has been prohibited by the LTBT of 1963; the conduct of nuclear explosions with a yield exceeding 150 Kilotons has been prohibited between the USA and Russia pursuant to the PNET and the TTBT. Dealing with the subject in two separate treaties results from the outdated belief that a nuclear test explosion might be undertaken either for weapons purposes only or for peaceful purposes only. The USA and Russia are furthermore the only NWS that have reciprocally restricted the maximum number of nuclear weapons they are allowed to possess, namely in the INF Treaty (with regard to intermediate range nuclear weapons) and in the START Treaties (with regard to strategic nuclear weapons). Before these nuclear reduction treaties were concluded, the deployment of particular defence systems ("ABM systems") against incoming ICBMs was prohibited by the Treaty between the USA and the SU on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty). There is a clear direct relationship between the nuclear reduction treaties and the ABM Treaty: only after overall strategic defence was prohibited and the vulnerability to large-scale nuclear attack had thus been guaranteed, a reduction in deployed strategic offensive nuclear arms became feasible.\textsuperscript{235}

Large parts of the world, including Latin America, the South Pacific, most of Africa and Southeast Asia, have been declared free from nuclear weapons. In addition, the NPT and the NWFZ treaties provide an almost universally adhered to regime that prohibits States Parties from acquiring the status of NWS. India and Pakistan, which have both consistently refused to sign the NPT, have acquired the \textit{de facto} status of NWS through their series of nuclear test explosions in May 1998. The nuclear status of Israel and of the DPRK remains as yet unclear.\textsuperscript{236}

\textsuperscript{234} This is the central element of the concept of NWFZ as defined by the UNGA. See UN Doc. A/Res/3472 B (XXX), 1975. See also SSOD-I (1978), par. 60-64.

\textsuperscript{235} Russia has even linked its START-II ratification in April 2000 to the continued viability of the ABM Treaty, see Kelle (2000), p. 83.

\textsuperscript{236} Israel is assumed to have acquired nuclear weapons to secure its national security objectives. In the case of the DPRK it is not entirely clear whether the development of
3.1.2 Substantive chemical arms control law

‘Chemical weapons’ have been defined in the CWC as being the following, either together or separately: (a) Toxic chemicals and their precursors (except where intended for ‘purposes not prohibited’); 237 (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified under (a), which would be released as a result of the employment of such munitions and devices; (c) Any equipment specifically designed for the use directly in connection with the employment of munitions and devices specified in (b).

The prohibition of the use in warfare of ‘projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases’, established by the 1899 Hague Peace Conference (in Declaration IV, 2), has been confirmed in the 1925 Geneva Protocol. The Protocol, like the Declaration, does not mention the word ‘chemical weapon’, but instead relates to ‘asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices’. The CWC of 1997 contains an all-encompassing and complete set of prohibitions, directed at the elimination of chemical weapons in all stages of their life cycle. Thus, it is prohibited to develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer directly or indirectly, chemical weapons to anyone; to use chemical weapons; to engage in any military preparations to use chemical weapons; to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State party under the CWC (Art. 1(1)). Furthermore, each State Party to the CWC undertakes to destroy its chemical weapons and its chemical weapons production facilities (Art. 1(2-4)) 238 and not to use riot control agents as a method of warfare (Art. 1(5)).

From this, it can be concluded that chemical weapons are intended to be outlawed as a method of warfare. It should of course be remembered that neither the CWC nor the Geneva Protocol have been ratified by each and every State in the world; there is still a considerable number of States that has decided not to become a Party to either treaty. Furthermore, the peaceful application of chemicals has not been outlawed; on the contrary, the CWC makes explicit that it shall not hamper the international co-operation of chemical activities for purposes not prohibited under the Convention (Art.

missiles reflect a general aspiration to deploy weapons of mass destruction and delivery systems, or whether they reflect efforts to secure economic aid and assistance in return for their abandonment. See Latter (1998), p. 6-7.

237 “...except where intended for purposes not prohibited under the CWC, as long as the types and quantities are consistent with such purposes” (Art. II(1(a)) CWC, which is related to Art. VI (‘Activities not prohibited under this Convention’) of the CWC.

238 The Convention speaks of chemical weapons and chemical weapons production facilities a State party ‘owns or possesses, or that are located at any place under its jurisdiction or control’, or that it has ‘abandoned on the territory of another State Party’; all those must be destroyed ‘in accordance with the provisions of the Convention’.

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VI(11)). However, as compared to the law on the other categories of weapons mentioned, substantive chemical arms control law is firm and leaves the States Parties no discretionary freedom of behaviour with regard to chemical armaments.

3.1.3 Substantive biological arms control law
The BWC refers to biological weapons as ‘microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes’ (Art. I(1)). With regard to the substantive biological arms control law, the starting-point again is the 1925 Geneva Protocol. The Governments Parties to the Geneva Protocol agreed to extend the prohibition of the use in war to bacteriological methods of warfare. The BWC should be interpreted as prohibiting the use of biological weapons as well.\(^{239}\) In addition, the BWC contains a set of prohibitions that establishes a complete set of norms outlawing biological weapons as a method of warfare (almost comparable to the substantive law in the CWC). Thus, the States Parties to the BWC undertake not to develop, produce, stockpile or otherwise acquire or retain ‘biological agents or toxins’ (as defined supra) and weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict (Art. I); they also undertake not to transfer, directly or indirectly, and not in any way to assist, encourage or induce any State, group of States or international organisations to manufacture or otherwise acquire any of the agents or toxins mentioned (Art. III). Furthermore, States Parties undertake to destroy, or to divert to peaceful purposes, all agents, toxins, weapons, equipment and means of delivery specified in Art. I of the BWC, which are in their possession or under their jurisdiction or control (Art. II). From this it is clear that the BWC is directed at completely eliminating the freedom of behaviour of the States Parties with regard to biological weapons. Again, a considerable number of States is not a Party to either the BWC or the Geneva Protocol, so that the comprehensive set of prohibitions is not universal. And, as with chemical weapons, there is the problem of dual-use: the use of biological agents and toxins for peaceful purposes is not prohibited and co-operation in this field is encouraged by the BWC (Art. X).

3.1.4 Substantive conventional arms control law
Perhaps the most complicated category of weapons to control consists of the conventional armaments. No behaviour with regard to that category of weapons has been completely prohibited under international law. There are

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however certain conventional weapons the use of which is deemed to be necessarily in violation of basic principles of international humanitarian law. The use of those weapons has been outlawed by the 1981 'Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects'. The conventional weapons the use of which is outlawed include weapons the primary effect of which is to injure by fragments which escape detection in the human body (Protocol I, on Non-Detectable Fragments).\textsuperscript{240} landmines, booby-traps and other devices herein, including mines laid to interdict beaches, waterway crossings or river crossings (Protocol II, on Prohibitions or Restrictions on the use of Mines, Booby Traps and Other Devices), incendiary weapons (Protocol III, on Prohibitions or Restrictions on the Use of Incendiary Weapons), and blinding laser weapons (Protocol IV, on Blinding Laser Weapons).\textsuperscript{241} Amended Protocol II was adopted in 1996 and tightened the restrictions on use of APM and improved the protection of the civilian population.\textsuperscript{242} A more elaborate 'Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction' (APM Convention) was adopted at Oslo in 1997 and entered into force on 1 March 1999. This Convention obliges States Parties never under any circumstances: to use anti-personnel mines; to develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention (Art. 1(1)). Furthermore, each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of the Convention (Art. 1(2)).\textsuperscript{243}

\textsuperscript{240} There is no officially registered data available that such types of weapons have significant battlefield application. These devices have been used primarily for police purposes. See Anastassov (1991), p. 282.

\textsuperscript{241} Protocol II defines mines, booby-traps and other devices in Art. 2; the concern is primarily with indiscriminate use and excessive injury as appears from Art. 3 of the Protocol; Protocol III includes definitions of 'incendiary weapons' (Art. 1(1(a) and lists what are explicitly not to be regarded as such (Art. 1(1(b)); Protocol IV was adopted in 1996 and prohibits the employment of laser weapons specifically designed to cause permanent blindness to unenhanced vision.


\textsuperscript{243} The obligation to destroy is elaborated in Art. 4 and 5 of the Convention. The destruction of stockpiled mines that a State Party owns or possesses has to be completed within four years after entry into force of the Convention for that State Party (Art. 4), whereas the destruction of APM under the jurisdiction or control of a State Party has to be undertaken not later than ten years, subject to requests for extension of that deadline (for a period of at most another ten years) that have to be submitted to the Meeting of the States Parties or to a Review Conference (Art. 5(3)). An exception is made for a small percentage of APM used in development and training in mine detection, mine clearance or mine destruction techniques
All existing prohibitions on conventional armaments stem from the conviction that the use of the kinds of conventional weapons described bears the unacceptable risk of violating the most fundamental principles of humanitarian law, viz. the prohibitions of indiscriminate effects and of excessive injury. Still, substantive conventional arms control law has to be considered within a military-strategic context as well. This is made particularly clear by the 1990 CFE Treaty, which contains restrictions on the freedom of build-up of conventional armaments and troop concentrations around the borders of the former military 'blocks' (NATO vs. Warsaw Pact) in Europe. Because of the changed circumstances after the end of the Cold War, the CFE Treaty is to be supplemented and to a considerable extent to be replaced by an 'Agreement on Adaptation', which introduces a system of national ceilings for TLE. The CFE Treaty imposes the obligation to disarm to a certain level 'heavy' conventional armaments in five categories, viz. battle tanks, armoured combat vehicles, large-calibre pieces of artillery, combat aircraft and attack helicopters. The numerical limitations set on those 'heavy' conventional armaments do not relate to the characteristics of the weapons; States retain freedom of behaviour with regard to those weapons, as long as their behaviour is in line with the numerical restraints for strategic purposes. It is clear that substantive conventional arms control law is motivated by both humanitarian and strategic security principles (within a specific context).

3.1.5 Substantive arms control law relating to future weapons

Some arms control treaties prohibit the (further) development of certain kinds of weapons that are not (yet) operational by the time they are prohibited. The best example is the ENMOD Convention, which prohibits the employment of environmental modification techniques for purposes of warfare. The ABM Treaty may be mentioned here as well, since no operative and actually functioning ABM system has ever been developed and deployed either before or after the prohibition was agreed to as a means of securing military stability between the US and the SU/Russia.

(Art. 3(1)), and transfer of APM for purposes of destruction is not prohibited (Art. 3(2)). See further Van den IJssel (1999); Greenwood (1998), p. 210; Blix (2000), p. 95-96. 244 See Agreement on Adaptation CFE (1999), which adds two new Protocols to the 1990 CFE Treaty, viz. a 'Protocol on National Ceilings' and one on 'Territorial Ceilings' for conventional armaments and equipment limited by the CFE Treaty. The Agreement on Adaptation, like the 1990 CFE Treaty, is to be placed in perspective of considerations of security; see e.g. Art. 1: “Committed to the objectives of establishing and maintaining a secure, and stable and balanced overall level of conventional armed forces in Europe lower than heretofore, of eliminating disparities to stability and security and of eliminating the capability for launching surprise attack and for initiating large-scale offensive action in Europe (…)”.

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3.1.6 Substantive arms control law not related to a particular category of weapons

Finally, a number of arms control treaties prohibit in general the stationing of weapons in certain defined zones. This kind of treaty establishes demilitarised zones. Antarctica, the Deep Sea-Bed, Outer Space, the Moon and other Celestial Bodies are all zones that have been demilitarised. Furthermore, some smaller pieces of land, such as the Aaland Islands and the Island of Spitsbergen, have been demilitarised for indefinite periods of time (see supra, chapter [1]).

3.2 The scope of institutional arms control law

The institutional law of arms control relates in the first place to the arms control treaty-based supervisory mechanisms, including possible supervising bodies, which, on behalf of the States Parties, supervise compliance with the obligations set forth in the arms control treaties. Often, the very complex and detailed procedures for the implementation and supervision of the substantive obligations imposed by the arms control treaties are laid down in various protocols that are attached to the basic treaty. These protocols are much longer and usually require much more elaboration than the substantive law contained in the basic treaty texts.

A clear trend can be discerned in the evolution of supervisory mechanisms in arms control treaties. The scope of institutional arms control law has progressively developed, starting from being (almost) absent at the beginning of the twentieth century to making up (almost) the entire text of some of today’s major arms control treaties. Whereas many early arms control treaties consisted almost exclusively of substantive provisions, in later ‘generations’ of arms control treaties technical and institutional rules overshadow the substantive provisions. Some arms control treaties have established comprehensive supervisory mechanisms, consisting of methods of supervision and rather extensive organisational structures, within which the supervisory functions are even entrusted to permanent international organisations established by treaty with the special purpose of supervising compliance with that particular treaty.

On the one hand, the perceived need for extensive supervision could be regarded as an expression of newly sprung up mistrust between the States Parties, taking them back a step to the political tensions of the Cold War period. On the other hand, the need for comprehensive, formalised and institutionalised supervisory mechanisms has always been recognised as a

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245 Lysén (1990), at p. 62-63 classifies treaties such as these as ‘preventive limitations of armaments’, which are meant to prohibit the existence of weapons or certain military activities, often in a partial way, but may also directly forbid the development of future weapons, e.g. weapons that might be placed on the Moon or on the Deep Sea-Bed.

246 See e.g. the extensive Protocols attached to the CFE-Treaty (1990), the CWC (1993), and the CTBT (1996).
vital means to provide transparency and build confidence among the States-Parties to arms control treaties. The presence of an institutional supervisory framework in the treaty also fulfils the important function of providing a forum for deliberation and communication between the States Parties. The constant contacts, deliberations and discussions among the States Parties in itself already create a climate that is beneficial to confidence-building and hence to compliance. Furthermore, the co-operative supervisory procedures, leading to continuing contacts and consultations in the implementation of the treaties, enable the States Parties to gauge whether their expectations of mutual advantages, which form one of the guarantees for the implementation of international law in general, are justified.

The comprehensive supervisory mechanisms not only purport to control compliance (and deter non-compliance) with the substantive law, but also see to the establishment and implementation of the supervisory mechanism itself. That is to say, part of the legal obligations deriving from the arms control treaty relate to the setting up of the supervisory mechanism proper. It is this institutional part of the treaty, arranging for the implementation of the supervisory mechanism, which requires a truly high degree of organisation. The extent to which the organising and ‘managing’ of the implementation of the supervisory mechanism is necessary depends at least partly on the contents of the substantive law of the arms control treaty. In general, supervision of compliance with arms control agreements that demand specific results, involving e.g. obligations to reduce or completely destroy certain categories of armaments, are more consequential and difficult to manage than arms control agreements that merely serve to confirm the existing status quo ante in military power relations. The CWC probably provides the best example of an arms control treaty that establishes an elaborate framework for the purpose of supervising the obligation to destroy all chemical weapons in the hands of or under the control of the States Parties. Likewise, the BWC, which inter alia demands the destruction of biological weapons, is now considered to be in need of an additional Protocol which is to establish an extensive institutional framework for the supervision of compliance with that obligation. But also in case no positive obligation to disarm is present in the treaty, comprehensive supervisory mechanisms can still be found. The IAEA safeguards system, that is applied to supervise inter alia the NPT and all NWFZ treaties, consists of a comprehensive supervisory mechanism, even though neither the NPT nor the NWFZ treaties prescribe the destruction of nuclear weapons, but instead purport to maintain the status quo ante in regard to the number of States possessing nuclear weapons for their security. The same goes for the CTBT, which envisions the establishment of a worldwide network for the control of compliance with the (negative) obligation not to

247 See e.g., Kelle (1997); Dando (2000); Mathews (2000).
conduct nuclear test explosions anywhere.

As mentioned, the supervision of compliance with elaborate arms control treaties such as the ones mentioned supra serves several purposes: first, the States Parties are guided into the implementation of the supervisory mechanism of the treaty, which is a prerequisite for the actual control of compliance with the substantive obligations of the treaty. This pattern can be discerned both in regard to arms control treaties that require actual reductions in armaments and those that lay down the obligation for States Parties to refrain from certain behaviour. For example, the INF Treaty, which entered into force in 1988, required the USA and the SU to eliminate all their intermediate-range ground-launched ballistic and cruise missiles and their launchers within three years of the treaty’s entry into force. While those obligations have been met, supervision of compliance continues, with a focus on ensuring that the provisions are being observed.248 This continuing exercise of supervision becomes self-evident if one considers that any ‘positive’ obligation to achieve a reduction-to-zero in the number of specific armaments (full disarmament) entails a further ‘negative’ obligation to never again acquire any of these specific armaments. To provide another example, the same pattern can be found with regard to the NPT: only after the initial declarations by the States Parties to the NPT regarding the presence of nuclear materials in their territories had been made, and initial inspections by the IAEA to verify those declarations had been conducted, the inspection regime of the IAEA became operative. Only from that moment on, and no sooner, the IAEA was able to fulfil its task of verifying compliance of the States Parties with the obligation not to engage in activities involving the use of nuclear materials for military purposes. The process of supervision which takes place on the basis of the arms control treaty, is thus both directed at ensuring the States Parties’ compliance with the measures necessary for the implementation and application of the envisaged supervisory mechanism proper, and at inducing compliance with the substantive obligations that are laid down in the treaty.

The question can finally be asked why so many arms control treaties nowadays are characterised by extensive, comprehensive supervisory mechanisms. On the one hand, the constant inventions leading to qualitative refinements of weapons of all kinds require progress in techniques and procedures used in arms control supervision. This calls for flexibility in the application of the technical rules and the rules for implementation. One way of attaining this flexibility is by separating institutional regulations from the basic arms control treaty and drawing up separate regulations for their adjustment or amendment, thereby increasing the scope of the specific institutional rules.249 On the other hand, the legitimate security concerns of

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249 See Kolasa (1995), p. 16-17. On the - often complicated - amendment clauses in
States, as well as the basic concept of State sovereignty, must be taken into account when designing and operating the supervisory mechanism. For this reason, the conduct of, for example, on-site inspections is normally restricted to areas designated by the State Party proper for the purpose of inspections, and usually cannot take place at undeclared sites unless specific conditions are met. Furthermore, the inspected State Party normally has the right to protect sensitive installations and sites in its territory pursuant to special regulations, such as 'managed access regimes'. Harmonising these converse requirements again calls for refined and elaborate procedures.

In addition, in the regulations regarding precisely the most dangerous type of weapon, viz. weapons of mass destruction, account has to be taken of the fact that the materials on which the development of these weapons is based are characterised by dual-use applications: the same technologies that are used in sophisticated weaponry also have important commercial applications. Legitimate concerns of States relate to the peaceful use of nuclear technology and of nuclear energy, and the use of chemical and biological agents for peaceful purposes, including the protection of related confidential (business) information. The threat to confidential (business-) information stems from the need to gather reliable and objective intelligence under the treaties in order to monitor weapons production and acquisition, either through data reporting requirements or through on-site monitoring and inspections. 250 Disputes between States may arise easily, given the high interests that are generally at stake when valuable information is revealed in an uncertain legal environment. The supervisory mechanisms of arms control treaties, especially those that are meant to operate worldwide, must be equipped with clear and detailed regulations so as to prevent (as much as possible) disputes from arising between the States Parties regarding the application, operation and interpretation of the procedures of the treaty. This in turn requires definitions, as well as clear and elaborate provisions on exactly what activities the States Parties may still perform under the treaty regime.

Another characteristic which explains for the vastness of supervisory mechanisms in arms control treaties is that the methods contained therein must be equally accessible and practicable to all States Parties, either developed or developing, weak or powerful. It has to be acknowledged that arms control treaties in general require large numbers of States Parties in order to be meaningful. As the number of negotiating States involved

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(250) The term 'confidential business information' refers to business-related information that gives its holder a commercial advantage because it is not widely known to competitors or the general public. See Kellman et al. (1995), p. 73-74. The importance of the protection of confidential information has been recognised explicitly in recent arms control law; see e.g. the 'Confidentiality Annex' of the CWC and the 1997 'Model Additional Protocol' to the IAEA safeguards system (esp. Art. 15).
increases, it is clear that the successful negotiation and conclusion, as well as the proper implementation of arms control agreements depend on the elaboration of suitable methods and procedures for the effective and objective supervision of compliance with the treaty. Therefore, the supervisory mechanisms of many arms control treaties incorporate a range of co-operative and mutually reinforcing measures, such as extensive on-site inspection regimes connected to State declarations and governmental reports, whereas on some occasions the use of (unilateral) NTMs, such as satellites, might have sufficed to obtain all information necessary regarding compliance.

In short, the nature, context and technical characteristics of the subject matter of arms control law to a large extent account for the vast scope of the institutional law in arms control treaties. The growing complexity of the procedural issues that must be covered is evidenced by the parallel growth in comprehensiveness and length of the texts of arms control agreements. The extensiveness of institutional law, as compared to the relatively few substantive law provisions laid down in arms control treaties, is one of the main special characteristics of the law of arms control.

4. Characteristics of the practice of arms control law

The last special characteristic of arms control law that is addressed here, relates to the absence of practice with regard to the application of most of the treaty-based supervisory methods that for their operation depend on complaints or other ‘trigger’ mechanisms. It is true that pursuant to some arms control treaties, such as the NPT, the CFE Treaty and the CWC, hundreds or even thousands of routine on-site inspections have been carried out and will continue to be carried out in the future, thus demonstrating the operational viability of the regimes established by those treaties. On the other hand, many provisions relating to the supervision of (non-) compliance with arms control treaties have never been invoked. This is most apparent with regard to procedures for the conduct of ‘special’ or ‘challenge’ inspections, i.e. inspections which may be carried out at the request of States Parties when they suspect a violation, and which have been laid down in many arms control treaties, ranging from the 1959 Antarctic Treaty to the 1996 CTBT. None of these have ever actually been used. A similar absence of practice is seen with regard to the common references to the UNSC in arms control treaties. All this might be interpreted to indicate that the field of arms control is characterised by a complete absence of

251 No violations have been reported and consequently the special procedures have not been made use of. See on the attempted use of special inspections initiated by the IAEA against the DPRK, infra, chapter [6].
suspicions of violations, but it is far more realistic to assume that suspicions of violations of arms control treaties are dealt with exclusively and confidentially within the respective treaty regimes. It may be repeated that given the delicate subject of the law of arms control, States consider themselves perfectly legitimised to maintain the confidentiality of their activities in arms control matters, both regarding the provision of information as well as the outcome of verification procedures. The activities of supervisory bodies in arms control law, such as bilateral and multilateral consultative committees and organs of supervisory organisations such as the OPCW and the CTBTO, are mostly confidential and not open to public investigation. Due to the rule of confidentiality, not very much is known about the organisation of the work and operation of the supervisory bodies established by the arms control treaties. It appears that a preference exists for informal political procedures when it comes to finding solutions to problems that arise during the implementation and the application of arms control treaty law. Then again, confidentiality in this respect may have the advantage that not too much information is provided about means of implementation so that States Parties inclined to ignore their obligations will not learn about a treaty’s shortcomings and thus be tempted deliberately to circumvent the treaty. Seen from that angle, the publication of the facts of a case of non-compliance could do nothing more but demonstrate that the States Parties were powerless to ensure respect for their treaty and could risk weakening it seriously. In the field of arms control law, only few allegations relating to non-compliance are common public knowledge. Familiar ‘Cold War’ cases relate to the ‘venting’ of radioactivity beyond the borders of the US and SU caused by underground nuclear tests possibly in violation of the LTBT, as well as concerns about compliance under the ABM Treaty, which arose as a result of the Reagan Administration adopting a restrictive (‘domestic’) interpretation of the term ‘ABM systems’ as defined in Art. II of the treaty, and the unlawful Russian construction of a radar system at Krasnoyarsk. Also gross violations of arms control law that are known about now have gone undetected for many years. Only recently Russian scientists, after having defected to the USA, revealed the existence of a large biochemical project in Russia between 1973 and 1992 which violated the BWC in all possible respects. And who knows if Iraq’s violations of the NPT had

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257 Admittedly, even before this, the sudden outbreak in 1979 of pulmonary anthrax at and
been discovered if it had not been for the Gulf War? This general lack of publicly known cases of (allegations of) non-compliance cannot be entirely explained from the emphasis on the rule of confidentiality in arms control law. Another plausible explanation is that States will easily regard allegations of possible non-compliance as unfriendly acts, having a negative impact on their international political relations. When weighing one against the other, the States' interest in maintaining good political relations with each other and the perceived importance of keeping the de facto status quo in the security situation may prevail over the importance that is attached to verifying compliance with the obligations of arms control law. Furthermore, arms control treaties to date have not dealt with matters that go to the heart of national survival, like general and complete disarmament, and they have not even constrained fundamental military programmes. Not many potential disputes are likely to concern issues that warrant formal allegations of non-compliance. It can be upheld that the States Parties to arms control treaties confine allegations of non-compliance to situations of (militarily) significant violations that are sufficiently obvious and important. Yet the meaning of 'significant' implies a political decision rather than a precise legal assessment. For example, evidence found by the US in the 1970s as to probable Soviet non-compliance with the BWC has been ignored on the grounds that biological weapons had no strategic value and therefore could not justify significant violations, and when the Soviets invited American experts to tour the Krasnoyarsk radar site in the late 1980s, this visit revealed the radar's poor quality, convincing many in the US that Krasnoyarsk did not constitute a 'significant' violation of the ABM Treaty.

5. Concluding remarks on Part I

In the first part of this study (chapters [2] and [3]), the law of arms control as a special field of international law has been identified and portrayed according to its most important special (legal) characteristics. It appears that these special characteristics can be traced back to the first and foremost property of the concept of arms control: the direct connection between quantitative and qualitative levels of armaments and national, as well as international, security. This property explains the overwhelming political interest in the field of arms control law, an element that can be found

around a heavily secured Soviet military facility (the so-called 'Sverdlovsk Incident') had given cause to suspect that all might not be well with regard to the BWC, see Murray (1993), p. 142.


throughout the whole process of negotiation, implementation and operation of arms control treaties.

The omnipresent concern of States with the field of arms control is based on their desire to secure national (security) interests, while at the same time the security context of the arms control process demands co-operation between States in order to support international peace and security. This ‘balancing act’ explains the many long-term evolutionary approaches to arms control, _inter alia_ depending on, and commensurate with, the development of the security situation. Co-operation between States in the field of arms control is often directed at providing transparency and at building confidence before actual restrictions on the freedom of behaviour with regard to national armaments can be accepted. And even when restrictions are accepted, they are commonly coupled with an extensive body of institutional law for purposes of supervising compliance with these restrictions. The extent of the scope of institutional law as compared to the scope of the substantive rules constitutes a special characteristic of arms control law. It may even be so that the overwhelming concern with security in the field of arms control accounts for the generally perceived need for clarity and predictability of legal obligations in all respects. These features may form the basis of yet another special characteristic of arms control law, _viz._ the importance of treaty law which springs into view as an essential element in the sources of arms control law. Presumably for the same reasons, no standing ‘body’ of customary international law has developed in the field of arms control.

There is no general legal principle that obliges States to enter into arms control treaties. This means that, apart from general conventional and customary law restrictions on the use of armed force stemming from the laws of war, States retain legal freedom to behave as they please with regard to their national armaments so long as they have not entered into arms control treaties. This characteristic is mirrored in the acknowledgement that the general principle ‘what is not specifically prohibited, is inferentially permitted’ is the valid adage in the field of arms control law. In connection with this, the law of arms control has been ‘negatively’ defined as that part of public international law that 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. The first part of this definition, which relates to the substantive law of arms control, has been the focal point of the first Part of this study. In the next Parts, the extensive body of institutional arms control law (the ‘applicable supervisory mechanisms’ in the definition) will be further examined.