The Law of Arms Control: International Supervision and Enforcement

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Summary and conclusions

1. The law of arms control
Arms control as a concept refers to all sorts of unilateral measures and bilateral or multilateral agreements between States to limit or reduce certain categories of weapons or military operations in order to achieve stable military balances and thus diminish tensions and the possibility of large-scale armed conflict. Arms control is not considered to be an end in itself, but has consistently been used as part of a process aiming at national and international peace and security. The arms control process is perceived as a means to achieve the objective of improved security and to reduce the chance of war. Taking account of its political context, the focus of this study is on the role of international law in the arms control process.

From ancient times onwards, international agreements, initially mostly peace treaties, have included paragraphs on arms control. When war was no longer permissible as a general means of enforcement (Covenant of the League of Nations, 1928 Pact of Paris), there was a legal motive for developing peace-time arms control law. Since the end of WW II, considerable numbers of peace-time arms control agreements have been concluded which together have gradually developed into a special branch of international law, viz. the law of arms control. The law of arms control can be defined as that part of public international law which deals both with the restrictions internationally placed upon the freedom of behaviour of States in regard to their national armaments, and with the applicable supervisory mechanisms. The common ultimate objective of the arms control process is the achievement of ‘general and complete disarmament under strict and effective international control’. Whereas general and complete disarmament remains the long-term objective, in practice more limited short-term goals have obtained priority over the general programme. This strategy is necessary to enable balanced arms reductions so that security can be ensured equally to all participating States throughout the entire process. For as much as uncontrolled arms races threaten international security, uncoordinated arms reductions would upset the balance of power and could turn out to be detrimental to international security. Hence, a co-operative approach between States to achieve security is imperative, not only because of the interrelationship between national and international security but also

* See also the ‘Concluding Remarks’ at the end of each Part of this study.
because of the need to escape the traditional security dilemma (an increase of one State’s security entails a corresponding decrease of another State’s security). In the Charter of the UN, arms control occupies only a modest place. It is seen as a supportive element in the maintenance of international peace and security, but certainly not as the most important element (as it used to be in the Covenant of the League of Nations). In practice it is not the UN concept of collective security, but combinations of the concepts of balance of power and of deterrence that are reflected in the concepts of security adhered to by States. This has not changed much until this day, despite the end of the Cold War.

2. Special characteristics of the law of arms control

Important characteristic features of the law of arms control appear in the sources of the law, the difference between the scope of substantive and institutional arms control law and the absence of practice with regard to certain parts of the arms control regimes. The law of arms control is first and foremost influenced by the close connection between the control of armaments and the (military) security of States. Since both national and international security are of fundamental interest to States, there is a perceived need for clarity and predictability regarding the legal rights and obligations of States in the field of arms control. In connection with this, it can be observed that treaties are the primary source of the law of arms control. Customary international law has not sufficiently developed in the law of arms control and hence does not play a substantial role, mainly because of its inherently vague and flexible character. Not only is it impossible to distinguish a standing ‘body of customary law of arms control’, conventional rules in the field of arms control have not developed into customary rules either. Apart from all kinds of ‘politically binding’ documents, certain general principles of arms control law and politics can be identified. Of these the principles that ‘what has not been prohibited is inferentially permitted’ and that ‘no State can be required to disarm below the level necessary to maintain internal law and order (and to participate in international peace-operations)’ are the most fundamental.

Since arms control law has such a direct bearing on the security of States, it is well conceivable that States may attempt to evade compliance with the provisions of arms control treaties when they consider this necessary to safeguard their security. In addition to the rule of *pacta servanda sunt*, incentives are deemed indispensable to induce compliance with the law, to provide transparency and to build confidence between the States Parties to the arms control agreements. These additional incentives derive for an important part from supervisory mechanisms. The term ‘supervisory mechanisms’ refers to legal arrangements on the basis of which control of compliance with arms control obligations can take place by the States or by other persons on their behalf. Supervisory mechanisms not only provide
methods of supervision, but also encompass a whole complex of provisions that regulate under what circumstances, for what purposes, by what body and according to what specific procedures of decision-making, those methods may be used (this is the ‘institutional design’ of the supervisory mechanisms). A clear trend is visible in the evolution of supervisory mechanisms in arms control treaties, in that the scope of the institutional law of arms control (which encompasses the supervisory mechanisms) has progressively developed and comprehensively expanded. The extensive scope of the institutional law of arms control as compared to the few substantive law provisions that are generally to be found in arms control treaties, is another special characteristic of the law of arms control. The nature, context, and technical characteristics of arms control law to a large extent account for the vast scope of the institutional law. A final special characteristic is the absence of known practice in the operation of most of the treaty-based supervisory procedures that for their operation depend on complaints or other ‘trigger’ mechanisms; a feature that may be explained at least in part from the practice of confidentiality in the field of arms control law and from the fact that allegations of non-compliance are generally looked upon as unfriendly acts.

3. International supervision of the law of arms control
Supervisory mechanisms enable States Parties to a treaty to mutually control compliance with the treaty provisions. Supervision is only possible with regard to norms that are characterised by ‘determinacy’, i.e. that are formulated so specifically and clearly that they prescribe particular behaviour and lay down, explicitly or implicitly, who is obliged to engage in that behaviour and who is the beneficiary of it. Real international supervision means that a neutral ‘third’ party is involved in the process, with the consent of the States Parties. Within the process of international supervision, compliance is supervised in four separate, but highly interrelated phases. First of all, the phase of monitoring offers methods for the gathering of relevant data and information as regards the behaviour of the States Parties to the arms control treaty. Monitoring is incident-independent (it needs no ‘trigger’ to be performed, but takes place irrespective of significant events precisely because it is concerned with tracing such significant events) and is performed on a continuous basis (repetitive or even permanent). Second, the phase of verification contains the core activities of supervision. Verification is itself a process consisting of different stages. It starts with the collection of specific facts on the behaviour of a (suspected) State Party. Then, review of the facts as tested against the rules of the treaty takes place, and finally an assessment regarding (non-) compliance is made. The process of verification is generally not performed on an ongoing or routine basis, but instead needs the ‘trigger’ of the occurrence of some (significant) event to be set in
motion. Third, the phase of dispute settlement aims at settling disputes regarding the application or the interpretation of the arms control treaty by peaceful means. Dispute settlement in arms control law is almost exclusively non-judicial, in that there are no international courts or tribunals involved. The fourth phase, the phase of correction/enforcement, is about enforcement in case it has been established that non-compliance has occurred. Finally, a special ‘element’ can be discerned in the process of international supervision which involves the specification and clarification of norms and which runs through all phases, viz. the interpretative element. Many elaborate arms control treaties establish their own supervisory regimes and therefore contain a twin set of obligations: the States Parties are required to implement the first set of (institutional) obligations putting the treaty’s supervisory mechanism in place, so as to allow for the control of compliance with the second set of obligations, viz. the substantive obligations of the treaty. Especially treaties that deal with materials having ‘dual-use’ applications, primarily nuclear material and chemical and biological agents, require very elaborate supervisory mechanisms so as to ensure as far as possible that only legitimate, peaceful use is being made of the materials, precursors and facilities that are at the same time fit (with slight modifications) for weapons production and other military applications. In addition, these treaties need to be equipped with confidentiality regimes, in order to prevent disclosure of confidential (business and other) information about the specific applications of the materials and agents. International supervision is important to further the objectives of arms control treaties because it indicates to States how they should behave and does not attempt to force States to behave in a specific way (at least not until methods of correction/enforcement have been triggered). Furthermore, supervision in general makes it possible for errors (either in the assessment of a situation or in taking action) which might jeopardise the stability and security of the international system to be rectified and as such helps to ensure international order.

4. International organisations as supervisors in arms control law

Who are the supervisors in arms control law? Until after WW I, States exercised supervision almost exclusively among themselves, either unilaterally or through their diplomatic organs. With the process of growing interdependence, the necessity arose for States to co-operate more actively in trying to reach solutions to ‘international’ problems, consisting first of all of the threat of war as well as of the - related - threat of weapons of mass destruction.

The spread of international organisations, especially after WW II, is the most visible result of a general trend towards States organising themselves in a framework of intensified co-operation. Peace-time arms control agreements have been concluded and international bodies have been
established with the specific purpose of exercising supervisory tasks in the law of arms control. Established during the Cold War, these bodies lack both legal personality and real powers, and offer little more than a forum for - often informal - discussions. In the nuclear field, where the interests of the nuclear superpowers had largely converged already during the Cold War, and, after the end of the Cold War, also in respect of other weaponry, specialised international organisations have been established with the task of supervising compliance with arms control law, usually the law contained in their constituent treaties. Known examples are the IAEA and the CTBTO in nuclear arms control, and the OPCW in chemical arms control. These organisations not only provide a forum for debates and discussions between the States Parties, but have also been invested with far-reaching supervisory powers, such as the power to decide on the conduct of on-site inspections. However, unlike States, international organisations do not possess inherent powers of supervision; any power must be attributed to it by the States Parties pursuant to the treaty which established the organisation.

In terms of legally and politically relevant supervisory powers, the process of international supervision first requires that the factual behaviour of a State Party be established. Second, the factual behaviour thus established must be measured against the norms that are laid down in the treaty. This requires at least some degree of interpretation of the law. Third, an assessment is to be made as to what extent the factual behaviour thus established conforms with or deviates from the norms of the treaty. Consequently, the core powers of international supervision comprise the power to collect information, the power to interpret the law authoritatively, and the power to make an official assessment regarding States Parties’ (non-) compliance with the treaty. From the text of recent arms control treaties it becomes clear that States Parties are prepared to grant extensive powers to the supervising organisations to collect information. It has become quite common for States Parties to agree to submit declarations and reports to the supervising organisation, sometimes to be drawn up in accordance with international guidelines issued by it. Moreover, States Parties have increasingly agreed to grant access to inspectors of international inspectorates of the supervising organisations to their territories. Furthermore, most supervising organisations include an executive organ of limited composition that has the (implied) power to interpret treaty obligations authoritatively. Things are less clear with regard to the last remaining power, the assessment. In but relatively few treaties has the supervising organisation been granted the power to make an official determination as to whether or not a State Party has violated the treaty in a particular instance; most of the time, it is only implied that such assessment could be made.
5. Some common characteristics of supervisory mechanisms in arms control treaties

The law of arms control is a rather heterogeneous field of law, comprising treaties as diverse as bilateral nuclear arms control treaties (such as the START Treaties), treaties regulating the stationing of armaments on uninhabited territories (such as the Sea-Bed Treaty), regional NWFZ treaties and global treaties (such as the CWC and the NPT). Still, despite this diversity, common characteristics can be found. In general there is a correlation between the impact on international security of a treaty regime on the one hand and the elaboration of the treaty on the other. The impact of the treaty regime on national and international security is, broadly speaking, determined by the type of weapons the treaty seeks to regulate and the scope of the substantive obligations of the treaty.

The methods of supervision that are used in arms control treaties range from the strictly unilateral (NTMs) to the co-ordinated (exchange of information, notification) and the co-operative (inspection, clarification). Depending on the institutional design of both methods and phases of the supervisory mechanism of the treaty, a supervising body may be involved where appropriate. Whereas few arms control treaties rely entirely on NTMs (e.g. LTBT), most treaties contain at least some special procedures for the purpose of supervising compliance and deterring non-compliance with the States Parties’ obligations. The methods of supervision that can be found in most arms control treaties include general exchanges of information, sometimes ‘internationalised’ and standardised (IDC of the CTBT), and routine reporting or alternatively, the submission of declarations and annual plans (CWC) or notifications (CFE-Treaty) in order to obtain the data and information required to allow for the monitoring of compliance. Specific fact-finding within the phase of verification commonly relies on elaborate routine on-site inspections. ‘Challenge’ inspections with very elaborate institutional design are available in the IAEA-NPT safeguards system, the CWC, and the CTBT. A trend is emerging in the development of supervisory mechanisms in arms control law, whereby permanent international organisations are established for supervisory purposes and the fact-finding parts of the process of international supervision become increasingly independent and elaborate.

In most arms control treaties, the phases of monitoring and verification are treaty-specific, i.e. regulated by and directly based on the terms of the treaty. The phases of dispute settlement and correction/enforcement are largely treaty non-specific. Dispute settlement is principally left to the individual States Parties; only in treaties with an extensive institutional structure, may the organs of the supervisory organisation play a role in dispute settlement in case the Parties cannot reach an agreement themselves. In arms control treaties, matters concerning non-compliance may eventually be referred to the UN; hence, the correcting body hails from outside the treaty regime. In
many cases, referral of any ‘matter’ to the UN will not just involve the possible invocation of the dispute settlement procedures of Chapter VI of the UN Charter, but enforcement under Chapter VII as well. Methods of correction/enforcement are in extreme cases applied by the UN, the UNSC in particular (due to the monopoly of the UNSC on the use of force in international relations). Some elaborate treaties (CWC, CTBT) also provide for certain treaty-specific procedures in the phase of correction/enforcement (e.g. ‘organisational’ sanctions). Since disputes in the field of arms control law have a ready impact on the maintenance of international peace and security, the UN may readily become involved. Furthermore, almost all arms control treaties stipulate that the UN may be called upon to assist in verification activities.

6. Enforcement of the law of arms control
This study finally touches upon the issue of enforcement of arms control law. Normally, the risk of detection through supervisory activities will deter a State from trying to violate arms control law. In those instances, the consent of the State to be bound both de jure and de facto means that the State is prepared to live up to its commitments, even if compliance with the law interferes with some of its (short-term) political interests. Only in exceptional circumstances has the risk of detection proven to be insufficient to deter a State from violating arms control law. The supervising bodies of arms control treaties do have some powers of enforcement, although these work mainly within the treaty regime. Outside the regime, referral of matters to the UNSC does not necessarily provide a solution, since all enforcement measures by the UNSC have to be decided without negative votes of the permanent members (the five declared NWS).

What about the unilateral enforcement powers of individual States? Under general international law, measures of self-help remain available in the form of countermeasures (under the law of State responsibility) and in the suspension or termination of, or withdrawal from, arms control treaties (under the law of treaties). It can be concluded that the existence of a treaty-specific mechanism for supervision (comprising some elements of enforcement) does not by itself exclude reliance on remedies available under general international law. Arms control treaties do not constitute so-called ‘self-contained’ regimes. Still, it can be upheld that the treaty regime, including its provisions on enforcement, enjoys priority over unilateral remedies. It must be presumed that only in the event of failure of the treaty-based remedies, States can fall back on the remedies of general international law to secure their national (security-related) interests. Even then, the principles governing the lawful use of countermeasures (such as proportionality, no harm to ‘third’ States) must of course be upheld. Finally, it must be noted that States have commonly been granted the right in arms
control treaties to withdraw from the treaty if extraordinary events related to the subject matter of the treaty jeopardise their supreme (security) interests.