

Summary

Legal Questions of Arms Control under Current International Treaty Law

1. The fundamental question of the functions of legal or other obligations in the field of arms control is of a legal/sociological nature. It has, however, a number of normative consequences. This can best be explained by an historic overview.

A. The history of arms control and disarmament

2. A form of arms control which we encounter frequently in history is a limitation of armament imposed on a defeated state and designed to enhance the security of the victor. Agreements of the limitation of armaments for the purpose of mutual security were relatively rare until the First World War. The question of the costs of armament, however, has played an important role in arms control from very early times.
3. The peace treaties concluded after the First World War also provided for limitations of armament in the interest of the security of the victors. The League of Nations Covenant, however, set disarmament out as a goal in the interests of mutual security and reduction of armament costs. In addition, the idea of qualitative arms control developed in the interest of the protection of the civilian population, which meant securing the prohibition of certain methods and means of combat contained under the rules of the laws of war. The arms control efforts of the League of Nations finally failed. Only in the area of sea armaments were the partial achievements in the field of arms control for mutual security.
4. During the period of the Cold War, disarmament proposals were a propaganda weapon rather than a serious endeavour towards mutual accommodation of interests. After a nuclear stalemate was reached and under the impact of the Cuban missile crisis, the two superpowers started a common effort to find a mutual accommodation of interests and to stabilize the situation of mutual deterrence on the basis of the principle of equal security.
5. As a result of this, a number of multilateral agreements were concluded relating to collateral measures of arms control (test ban, non-proliferation of nuclear weapons, prohibition on placing weapons of mass destruction in outer space and on the seabed, the biotoxin weapons treaty, nuclear-free zones). Agreements or negotiations in the bilateral relations between the superpowers (communications agreements, threshold test ban treaty, SALT I and II, IMF, START) and between the military alliances (MBFR, CCA, also CSCE and CSBM) also resulted.

6. Some of the essential demands of arms control remained, however, unheeded (general test ban for nuclear weapons, elimination of C- and A-weapons, general and complete disarmament, arms control beyond the scope of the big military alliances).
7. In the field of arms control the United Nations has been unable to make the same impact on the law and the practice of states which it has made in other areas of international relations.

B. The functions of arms control obligations

8. Arms control obligations essentially serve five functions:
 - a) security and prevention of war;
 - b) damage limitation in case of conflict;
 - c) limitation of armament costs;
 - d) amelioration of cooperation and confidence-building;
 - e) publicity effects.
9. The function of maintaining security and preventing armed conflicts can be subdivided in three subfunctions:
 - a) elimination of threat capabilities;
 - b) prevention of an unintentional outbreak of armed conflict by securing continuous communication;
 - c) strengthening the stability of balance within a system of mutual redundant deterrence.
10. The last mentioned function nowadays plays a prominent role in the relationship between the superpowers. In this relationship, the principle of equal security prevails.
11. In view of the asymmetrical character of deterrence capabilities, the practicable application of the principle is difficult, particularly in relation to the definition of an equilibrium.
12. Stability can also be affected by third parties. Therefore, an important element in the stabilization of an equilibrium is the need to appropriately take into account, or to eliminate the possibility of, destabilization caused by third parties (e.g. by means of a non-proliferation régime).
13. Arms control agreements may also have the function of rendering a prohibition of the use of certain weapons more reliable by supplementing that prohibition with a prohibition on possessing such weapons.
14. To the extent that arms control agreements require or promote communication between potential adversaries, they contribute to a reduction of political tensions. This constitutes the important function of so-called confidence-building.
15. Some arms control agreements mainly constitute window-dressing, as a success reached in the field of arms control may enhance the sociopolitical acceptance of the actors claiming an agreement as their achievement.

C. Contents of arms control obligations

16. From a formal point of view, arms control obligations may be categorized as follows: obligations relating to certain weapons, to troop strength and to other activities (demilitarization, prohibition of dangerous activities), and obligations relating to certain forms of cooperation and, in particular, communications. There is a link between the function and the content of such obligations.
17. Obligations relating to weapons prohibit or limit manufacture, development, testing, possession, acquisition or transfer, or specific locations of certain weapons.
18. The problem of determining which particular weapons are limited by a specific agreement varies with the functions of the agreement.
19. If the publicity function of the agreement is its major function, legal precision in defining the scope of application is unnecessary.
20. In SALT, INF or any future START or conventional disarmament agreement, the definition of certain weapons categories serves or will serve the purpose of defining elements of the equilibrium to be achieved. With regard to the question of equilibrium, the function of a particular weapons category in a spectrum of military capabilities is the important point. This renders the fixing of appropriate numerical limits a difficult task.
21. Other agreements (CB weapons, NPT, nuclear-free zones) have the function of eliminating weapons with a particular effect. This function requires that materials used for the manufacture of such weapons, but which also have legitimate military or civilian uses, be made subject to the régime established by these agreements. The determination of the materials covered by these agreements is effectuated by a subjective criterion, i.e. the purpose for which the materials are to be used. This approach makes sense only in combination with appropriate verification rules.
22. Where treaties cover materials which may be used for the manufacture of weapons, but which are not (yet) so used, it is also necessary that these treaties include materials which are in the possession of private persons. This entails problems in relation to the attribution of private conduct to the state, or in the determination of control obligations of a state vis-à-vis private enterprises.
23. Where an arms control agreement is to function adequately, a participating party must be sure that any other party may not by surpise acquire possession of prohibited materials, giving it an advantage which cannot be remedied by adequate countermeasures. This is the reason for extending prohibitions to weapons development. However, such an extension creates difficulties as to the delimitation between research and development, whereby it is practically impossible to prohibit research.

24. As arms control has been understood, at least since the beginning of the 1960's, as a progressive process of partial measures, legal or political duties relating to further negotiations are quite often formulated in order to secure the progress of this process, with limited success, however.
25. States are only prepared to accept and observe obligations relating to arms control where they are of the view that these agreements do not unduly affect their security interests. Whether or not such interests are indeed affected is determined by a number of circumstances which may change over time. Thus, there is a need for flexibility. This need is met by limiting the duration of a treaty and by including procedures for adapting a treaty and a withdrawal clause. Including the latter in arms control agreements has become established practice. Such a clause can be distinguished in essential details from the *clausula rebus sic stantibus*.

D. The form of obligations

26. In the practice of international relations, one must distinguish between legal and non-legal (political) obligations. In the field of arms control, there are both legally and politically binding agreements as well as unilateral declarations.
27. The usual form of creating obligations in the field of arms control is the international treaty. The drafting of such a treaty takes into account different functions.
28. Political agreements are used for:
 - a) the shaping of a political *modus vivendi*;
 - b) the orientation of negotiations and the fixation of intermediate results of negotiations;
 - c) the creation of obligations in a context which is still politically unstable.
29. Unilateral declarations are used to create legal or political obligations where there is no adequate partner for reciprocal obligations or where treaties are unacceptable for political reasons.
30. It is difficult to distinguish between legally and politically binding unilateral declarations. Where a solemn form is chosen or where it is obvious that states intend other states to permanently base their behaviour on the declaration, the instrument may be regarded as legally binding. On the other hand, declarations made in the framework of a policy of mutual example and in anticipation of future treaty obligations as a sort of trial run are not legally binding. These declarations, however, may create a confidence which, where the other side relies on that confidence, may lead to a legal obligation on the basis of *estoppel*.

31. Although the so-called threshold test ban treaty has so far not been ratified, there exists an obligation not to frustrate the object and purpose of the treaty (see Article 18, Vienna Convention on the Law of Treaties). In addition, the full text of the treaty is politically binding.
32. The limits for offensive strategic weapons drawn by the SALT I Interim Agreement remained in force on the basis of a political agreement after the expiration of the treaty in 1977 until the signature of SALT II. It is possible to infer the continuing political binding force of the Interim Agreement from certain unilateral declarations.
33. The limited binding force of SALT II, as seen according to Article 18 of the Vienna Convention on the Law of Treaties, existed until President Reagan declared that the United States would not ratify the treaty. On the basis of mutual unilateral declarations, however, SALT II remained politically binding until the United States in 1986 exceeded one of the limits set by the treaty. There remains, however, also on the basis of unilateral declarations taking into account current START negotiations, a political obligation of restraint relating to future armament measures.
34. General principles of arms control can only be derived to a limited extent from treaty practice. Treaty practice only concerns a relatively small segment of the overall disarmament problem, namely the legal limitation of the system of mutual deterrence existing between the superpowers. In this context, the principle of equal security has developed into a political guiding principle. The stability of strategic equilibrium as well as the prevention and the reduction of asymmetries are accepted as political goals to be derived from that principle.
35. The law of arms control provides evidence of the great variety and range of forms which may be used to achieve secure behavioural expectations in international relations, and for the contribution the resulting security can make to the solution of international problems.