Wolfgang Graf Vitzthum, in: Rechtsfragen der Rüstungskontrolle im Vertragsvölkerrecht der Gegenwart, Berichte DGVR Heft 30, Heidelberg 1990

Summary

Legal Questions of Arms Control in Contemporary International Treaty Law
by Prof. Dr. Wolfgang Graf Vitzthum, Tübingen

1.1 While *Germany* demanded "equal security" during the inter-war period on the basis of the Covenant of the League of Nations and the Treaty of Versailles (1919), she based her claim that others should discharge their obligation to disarm on the grounds of treaty law and the principle of the equality of states. By contrast, the starting-point of the special present-day interest in arms control in the two German states is empirical and its aim is ethical.

1.2 The SPD/SED (Social Democratic Party of the Federal Republic of Germany/Socialist Unity Party of the German Democratic Republic) concept of a chemical weapon-free zone was a wrong step in the right direction. A merely German-German area of reductions would be too *small* an area to eliminate the dangers of backsliding, i. e. forces and weapons may rapidly return; given the slight detection probability, adequate verification would only be possible by unconstitutional and, therefore, unacceptable means.

1.3 The particular commitment of *Austria* and *Switzerland* in the field of arms control, for instance in the areas of CSCE/CDE, of Non-Proliferation of Nuclear Weapons and of banning chemical weapons, goes beyond their role as host country of these various negotiations. Bindschedler's CSCE proposal of a European system of dispute settlement by peaceful means should be recalled here. In the field of verification, in particular, the good offices of neutral states are likely to be increasingly in demand.

2.1 *Arms control* in the most general sense of the term includes the subjects: disarmament; arms control in the narrower sense (arms freeze, arms limitation, arms reduction as well as arms regulation); and confidence-building measures. Given the enormous dimensions involved in these three areas of arms control, thinking in abstractions will always stand in the way of realistic thinking.

2.2 The closer look at the concept and actual character of arms control, an important task in the study of international law, must be primarily directed by three concrete *examples:*

- the Strategic Arms Limitation Talks (SALT) of the 1970s as the paradigm of arms limitation and regulation (as substantive obliga-

tion), of the "national technical means" of verification (as formal obligation) and of the institutionalization of certain forms of communication (procedural-institutional obligation);
- the non-legally binding CSCE/CDE documents of the 1970s and 1980s as examples of, first, linkages between confidence-building measures, on the one hand, and human rights, on the other; of, second, progress in verification (observation and inspection); and of, third, the deliberate renunciation of steps towards institutionalization;
- the INF Treaty on Intermediate-Range Missiles of 1987 as an example of an arms control measure in the nuclear sphere verified by on-site inspection and of an obligation not to arm in the conventional sphere; because of its zero-option character, amongst other things, the Treaty contains no procedural-institutional elements worth mentioning.

2.3 Arms control agreements are typically comprised of three combinable, interrelated *elements:*

- (always) a substantive element (for instance, to scrap tanks),
- (often) a formal element (the control of treaty compliance by verification), as well as
- (increasingly, at least in the multilateral sphere) a procedural-institutional element (for instance, obligatory consultation and review).

2.4 *Economic* considerations are part und parcel of the arms control concept. Arms control is an offspring of budgetary constraints. Furthermore, attention must be paid to the interrelationships between arms control and *social and political change.* Domestic reform pressures can increase willingness to co-operate in the field of international arms control.

2.5 In contrast to the *continuity* in the principles (equality, reciprocity, etc.), in the problems (amongst others, of the status of third countries, of the impermeability of the state and of drafting precise, workable definitions), and in the tasks (incorporation of technological change, weapons based on futuristic technology, etc.) in the substantive area of arms control, complete *stagnation* characterises the procedural-institutional side. For instance, not one single treaty contains an obligation to seek third party settlement. The decisive *innovation* achieved in the field of verification concerns short-notice inspections with no right of refusal (Document of the 1986 CDE; INF Treaty of 1987).

2.6 The increasing emphasis on verification reverses the three stages in the *process of achieving peace* which were theoretically presupposed by the peace movement of the first decades of this century: arbitration

(dispute settlement) – security – disarmament. Today, increasing the sense of justice (Politis) and security is expected to result from arms control agreements, not the other way round.

2.7 Arms control by international agreements advances spirally: once a level of verification has been reached, it will not be undercut in subsequent – similar – agreements; it becomes part, as it were, of the arms control *acquis communautaire*. Hence the significance of the CDE/INF advances into new verification territory. A world-wide Chemical Weapons Convention or a pan-European Treaty on the Reduction of Conventional Forces with no substantial element of co-operative verification would now seem a step backwards, even farcical.

3.1 The international arms control agreement is *a special type* of treaty under international law. It has affinities to peace treaties, to treaties of guarantee, to state treaties and to "status" treaties; but only here, in the field of arms control agreements, do the "existentialism" of the subject-matter (survival) and the intensity of the effect of (foreign) controls intersect and reinforce one another. The *par in parem* rule suffices to make the treaty approach indispensable in fields like that of verification.

3.2 Arms control agreements contribute to the *progressive development* of international law in the sense of Article 13 of the UN Charter. For the foreseeable future, a *codification* of an International Law of Arms Control would not be possible.

3.3 As common ground in the area of *antagonism* between "Freund und Feind", friend and foe, arms control agreements avoid matters of fundamental and crucial difference. Such agreements include "agreements to disagree" – to exclude areas not accessible to agreement. This antagonism – revealed, for instance, in the pre- and post-effects of unratified agreements (SALT II) or in questions of sanctions – emerges more strongly in *bilateral* arms control than in *multilateral*.

3.4 A politically *existential* content-matter distinguishes the law of arms control from other areas of international law. Treaties on arms control affect the very roots of statehood. In this respect, arms control law is *political* international law (Neuhold). This special feature sets limits to an ever more extensive juridification of arms control. The political virulence of the subject-matter and the desire to minimise risks are reflected in the sequential and segmentary nature of arms control treaty policy.

3.5 The Lotus Case ruling that limitations to sovereignty are not to be assumed is especially valid in view of arms control agreements which partially *break down* state sovereignty (cf. the Non-Proliferation Treaty) but also in view of those which *strengthen* it (cf. the Multilateral Basing

Country Agreement [MBCA] regarding inspections relating to the INF Treaty).

3.6 There is no more a *general right* (not even one composed of various special elements) to *arms control* or a corresponding obligation than there is an unlimited right to participate in arms control negotiations; there is also no general obligation to reduce asymmetries. In so far as any *treaty* specifications to that effect exist, they are too particular and too heterogeneous, even in the superpowers' relationship, to allow general rules to be derived. Nor do any general rules follow either from precepts such as the equality of security interests or from the plethora of relevant UN Resolutions ("right to security", "right to live in peace", "right of nations to disarmament").

3.7 The question, whether a *general* obligation to use *areas beyond the limits of national jurisdiction* exclusively for peaceful purposes may be derived from the agreements on these matters and from subsequent practices – say, as the key element of a "Principle of the Common Heritage of Mankind" – must also be answered negatively. There ist no such norm in general international law. In terms of the law of arms control, too, each area beyond the limits of national jurisdiction has its own individuality.

4.1 *Verification* consists of observation, inspection and other forms of information gathering, as well as the processing, analysing and evaluating of the data thus acquired. In detail, it is necessary to distinguish between detection, early warning and deterrent functions on the one hand and the functions of objectification and the preparation of response and reaction on the other. On the whole, verification serves confidence building, whilst not being tailored to serve crisis management. The more confidence building advances, the more controls built on mistrust may be withdrawn.

4.2 The further an area remains *free of national jurisdiction*, the more intrusive the verification regime can be. This rule reflects today's continuing addiction to ideas of sovereignty.

4.3 The extension of verification instruments, in particular the institution of short-notice inspections with no right of refusal, co-exists uneasily with both the rules of international courtesy and the *pacta sunt servanda* principle. Because of the dangers of abuse, the first steps towards "watching the watchdogs", inspecting the inspectors, have been taken.

4.4 Every verification regime is subject to the *principle of reasonableness.* Insignificant security matters do not justify costly controls. Disproportionate verification regimes may induce espionage.

4.5 The concept that only verifiable arms control agreements should be concluded presupposes the availability of the requisite means of verification at the time of the treaty's conclusion. Hence, today, progress in arms control depends to a large extent upon *progress in verification capabilities.*

4.6 *Verifiability determines reducibility:* no reduction without verification. Hence, it may be deduced from the verification regime what content-matter the parties wanted to agree upon. The scope of the formal verification obligation, then, is an instrument for interpreting the nature and scope of the substantive obligation. In the US-Soviet controversy over the interpretation of the ABM Treaty, for example, the non-verifiability (by "national technical means") of a ban on SDI *research* activities was used as evidence against a reading of the Treaty asserting that such a ban on research had in fact been agreed.

4.7 For technical and political reasons, there are limits to raising ever higher the level of verification. It is always a matter of "how much is enough?" There is no verification regime which excludes *all* possibilities for break-out.

4.8 Making use of "national technical means of verification", together with the prohibition of the verified state from interfering with or impeding verification – integral parts of the SALT Agreements – constitute an established rule which has subsequently been embodied in many other arms control agreements. This *SALT standard* is on the way to acquiring the status of international customary law.

4.9 Since SALT, satellite reconnaissance – which is, incidentally, prestige-neutral – is considered a legal means of verification (unlike aerial observation): an innovation in general international law derived from the particular law of arms control agreements.

4.10 In conjunction with improved observation and inspection regulations along CDE lines, *a satellite from a neutral country* could, if the Vienna negotiations reach a successful conclusion, undertake important verification tasks in the area of conventional security in Europa.

5.1 The rights (part of the *institutionalized process of communication and complaint*) to appeal to the UN Security Council or to convene a review conference have, up until now, proved to be of no great use in achieving their aim. In the bilateral sphere, one may continue to do without obligatory review conferences at five-yearly intervals (with the exception of the ABM Treaty); they, in any event, apparently add little or nothing to the quality of communication.

5.2 Verification and communication can rectify a lack of knowledge, but they cannot compensate for a *lack of will:* this lack of will, they can

only disavow. Hence the importance of the question: "After detection, what?"

5.3 Clearing procedures and institutions for treaty-related disagreements, such as the *SALT Standing Consultative Commission*, can only work successfully if their area of responsibility is of sufficient substance and breadth and if the political will exists to make use of such institutions and procedures.

5.4 It is not at present foreseeable whether the model of the future will be found primarily in institutional *permanence* (like that of the IAEO, which is now being partially applied in the field of chemical weapons) or in institutional *flexibility* (like that of the INF sphere, and now apparently being envisaged for START). The CSCE/CDE approach, up until now anti-institutional, may undergo change simply for reasons of practicability (concerted verification).

5.5 To date, arms control policy has been unable to tackle the questions of *sanctions* and *dispute settlement*. At most, the UN Security Council and the UN Secretary General are making minimal gains in terms of competencies. Even the Antarctic Treaty, so impressive in its inspection regime, does not provide e.g. for automatic jurisdiction by the ICJ.

6.1 The *substantive range* of an arms control agreement is to a large extent the pre-condition of its effectiveness. Problems of scope arise, for instance, in attempts to create "proleptic laws" encompassing future technological change. One example is the negotiations on a radiological weapons ban.

6.2 A further special feature of the law of arms control agreements consists in a factual limitation of the principle of equality of states. At the normative level, too, the impact of varying *political weights and substances* can be discerned.

6.3 In the final instance, however, in the sphere of arms control the great powers have hardly more freedom of choice than the small ones. Inescapable facts of life experienced equally by *every* member of the international community make progress in arms control inevitable. Hence, the recognition and understanding of this reality are essential; the will to engage in arms control is not enough. Arms control *agreements* are only one element of this situation, a situation which draws states closer together.