

# INTERNATIONAL LAW ASSOCIATION

## BERLIN CONFERENCE (2004)

### ARMS CONTROL AND DISARMAMENT LAW

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## FINAL REPORT OF THE COMMITTEE

### INTERNATIONAL AND NATIONAL LEGAL REGULATION FOR ARMS CONTROL AND DISARMAMENT

#### I. INTRODUCTION

1. The Committee on Arms Control and Disarmament Law was established by the Executive Council in 1990. Its mandate<sup>1</sup> required a comprehensive assessment of the principles and rules of international law relevant to arms control and disarmament without, however, evaluating the effectiveness of arms control negotiations or implementation processes. Substantive guidelines<sup>2</sup> developed under this mandate have stressed the relevance of varying national

<sup>1</sup> **Mandate:** 'To investigate the manner in which the principles and rules of international law may contribute to the control or reduction of armaments and military forces and to the reduction of the risk of armed conflict, with special regard to any shortcomings that may be found, offering recommendations for improvement where appropriate.'

The Committee is not called upon to evaluate any arms control agency or institution, nor charged with the task of examining the adequacy of substantive arms control provisions as such, nor with the oversight of the efficacy of provisions regarding the verification and observance of arms control treaties. The objective shall be to concentrate upon the operation of the relevant principles and rules of international law although, in order to do so in a concrete manner, it will be necessary to take cognisance of specific arms control provisions and the operation of arms control related institutions.'

<sup>2</sup> **Guidelines:**

(a) To examine varying national perceptions, definitions, concepts and theories of international law as they relate to arms control and disarmament and affect the creation and understanding of international law in the field.

(b) To contribute to the development of arms control and disarmament law by investigating and elucidating the legal background of existing and evolving principles of the law and other relevant norms in this area. In that connection, the Committee should not only take account of treaty law and customary law but also give consideration to unilateral undertakings, politically binding commitments and generally accepted resolutions of international organisations.

(c) To explore the role of dispute prevention and dispute settlement mechanisms for the purpose of enhancing

approaches to arms control and disarmament law. As for most other ILA Committees, the mandate of this Committee, originally to be terminated in November 2001, was renewed by the Executive Council on 13<sup>th</sup> November 1999 for two years and prolonged on 2<sup>nd</sup> April 2002 for a further two years, after the Berlin Conference.

2. Extensive work has been accomplished within the mandate of the Committee. Five substantial Reports<sup>3</sup> have covered major parts of arms control and disarmament law, an area very much developed by politicians, diplomats and government experts, but which deserves and requires increasing attention in academic research<sup>4</sup>. The legal aspects of arms control and disarmament constitute a new discipline of international law which could not be fully assessed and adequately put into practice, if other disciplines of law were not duly taken into account. The main activities of the Committee have been devoted to investigating the manner in which the legal method may best be utilised to achieve arms control and disarmament law goals identified by States. The Committee has been moving towards consensus positions and all five Reports have met with wide support at the respective ILA Conferences. The diligent, although necessarily limited, contributions of the Committee to global and regional developments have been widely recognised.
3. Essential elements of the studies and discussions promoted by the members of the Committee at various forums are available in four books published by the United Nations<sup>5</sup>. A fifth publication based on an expert workshop on small arms and light weapons held by the Committee in Geneva in May 2001<sup>6</sup> was published in 2002<sup>7</sup>. A second workshop on "The Future of Arms Control Law" was organized together with the Justus-Liebig University of Giessen on 15<sup>th</sup> – 16<sup>th</sup> May 2003 in Berlin. The findings will be published<sup>8</sup>. The present report reflects the results of the two meetings and the written contributions by its Members.

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compliance with arms control and disarmament treaties, including third-party participation, as well as other procedures and institutional modes.

(d) To examine the problems of treaty interpretation and to assess the value of bilateral and multilateral, as opposed to unilateral interpretation. To compare the theory and practice of international law relating to the interpretation of arms control treaties with the interpretation of agreements in other fields, including international economic law. Arising from those comparisons, if warranted, to recommend improvements in the theory and practice of interpreting arms control and disarmament treaties.

(e) To examine the positive and negative aspects of reservations and unilateral statements made with respect to entering into treaty obligations, as well as other asymmetries in rights and duties relating to arms control and disarmament treaties and, if warranted, to recommend improvements in the theory and practice of international law in that regard. (f) To draft model treaty elements of arms control and disarmament treaties, with a view to enabling States to expedite negotiations and to make the machinery provisions of treaties more consistent.

(g) To assess whether the means by which arms control and disarmament treaties evolve over time in order to meet changing needs and circumstances are adequate and, if not so, to recommend improvements. The assessment is to refer to all forms of treaty evolution, including subsequent practice, declaration and tacit agreement, as well as amendment, review, renegotiations and replacement.<sup>7</sup>

<sup>3</sup> First Report: *General Observations on the Law of Arms Control*, in: International Law Association (ed.), Report of the 65th Conference (Cairo 1992), pp. 389-396.

Second Report: *Legal Restraints on Arms Proliferation*, Report of the 66th Conference (Buenos Aires 1994), pp. 401-431.

Third Report: *Legal Remedies for Arms Control Impasse*, Report of the 67th Conference (Helsinki 1996), pp. 307-322.

Fourth Report: *Further Constraints on Nuclear Weapons*, Report of the 68th Conference (Taipei 1998), pp. 164-178.

Fifth Report: *National and International Verification Measures*, Report of the 69th Conference (London 2000), pp. 222-247.

<sup>4</sup> Guido den Dekker, *The Law of Arms Control. International Supervision and Enforcement*, The Hague/Boston/London (Martinus Nijhoff), 2001.

<sup>5</sup> Julie Dahlitz (ed.):

- *The International Law of Arms Control and Disarmament* (1991),

- *Avoidance and Settlement of Arms Control Disputes* (1994),

- *Future Legal Restraints on Arms Proliferation* (1996),

- *Peaceful Resolution of Major International Disputes* (1999).

<sup>6</sup> Small Arms and Light Weapons: Legal Aspects of National and International Regulations, Geneva Expert Workshop Report, ILA Newsletter No. 15 (2001), pp. 7-8.

<sup>7</sup> Dahinden/Dahlitz/Fischer, *Small Arms and Light Weapons, Legal Aspects of National and International Regulations*, Volume IV, Arms Control and Disarmament Law, United Nations, 2002.

<sup>8</sup> *Journal of Conflict and Security Law*, (Vol.9 No.3), Oxford 2004.

Additionally, Committee Members have made significant contributions in the academic field and within the framework of their Governments and other institutions, deriving inspiration from the on-going efforts of the Committee.

4. Dr. Julie Dahlitz, first Chairman of the Committee, died in London on 4 December 2001. Due to her unflinching initiative and highly professional diligence, the Committee was influential in both assessing and supporting legal developments in arms control and disarmament law since its establishment in 1990. Her commitment, discipline and courage as an international lawyer has impressed and greatly influenced those who had the pleasure and privilege of closely working with her. Julie Dahlitz very distinctly contributed to understanding and advancing the process of arms control and disarmament as an important part of public international law. The following contribution is dedicated to her memory.

## II. INTERNATIONAL AND NATIONAL LEGAL REGULATION FOR ARMS CONTROL AND DISARMAMENT

5. **Non-proliferation of nuclear, chemical and biological weapons.** After the end of the Cold War, the most problematic threats are not strategic delivery vehicles, the number of nuclear warheads or accidental nuclear war. They are instead lax controls over military nuclear weapons and materials, nuclear terrorism and the breach of proliferation obligations by non-nuclear weapon States. The background and legal perspectives have been dealt with in the Committee's Second Report (Buenos Aires, 1994). More recently, Co-operative Threat Reduction (CTR) Initiatives, which aim at safeguarding and eliminating dangerous materials and weapons at the source, if possible, and helping to contain and combat proliferation, have become core parts of the new security environment. CTR Initiatives may also reassure States whose assistance is essential and critical for combating international terrorism. Moreover, initiatives such as the G-8 Global Partnership against weapons of mass destruction, the TACIS Program of the European Union, the European Joint Action, and specific bilateral programs have been put in place in order to help the Russian Federation overcome the legacy of weapons of mass destruction deployed by the Soviet Union and improve the control of production and processing facilities. Similar initiatives have been successfully implemented in the Ukraine, Belarus and Kazakhstan.

During the 1990ies, there was growing awareness that non-fissionable radioactive sources might also be used for hostile purposes. The terrorist attacks on the United States on 11 September 2001 greatly aggravated these fears and measures were taken at national, regional and international level with respect to the protection and security of these materials. For instance, the International Atomic Energy Agency IAEA established a Nuclear Security Fund, designed to reduce the threat of terrorist use of nuclear and other radioactive material. It also maintains an Illicit Trafficking Database. Member States recently revised the Code of Conduct on the Safety and Security of Radioactive Sources. At the national level, a number of countries have established regulations as well as accounting and monitoring systems for preventing the misuse of high-risk radioactive sources. The progress, however, is rather slow and many countries still lack adequate measures.

The close co-operation and assistance with respect to the elimination of weapons of mass destruction from the Cold War and to combating terrorism create an environment where concepts such as mutual assured destruction, strategic containment and, to a certain extent, even nuclear arms control become less relevant. Another development with far-reaching implications in terms of arms control is the adaptation of strategic nuclear doctrines and force postures to the new strategic environment marked by concerns over proliferation of weapons of mass destruction, terrorism and asymmetric warfare. Part of these new doctrines and force structures will be the military capability to destroy dangerous installations by pre-emptive military actions, including the use of weapons of mass destruction. A significant development in this respect and clear break with the past was the US withdrawal from the ABM Treaty and its subsequent obsolescence (see below paragraph 7). It remains to be seen, whether this process of transition endangers both existing and future arms control and non-proliferation agreements on weapons of mass destruction. In any case, the demise of arms control and disarmament efforts would be contrary to the ICJ Advisory Opinion<sup>9</sup>, which has clearly identified an obligation for nuclear weapon States to pursue in good faith and bring to a

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<sup>9</sup> International Court of Justice, *Nuclear Weapons case*, Advisory Opinion, July 8, 1996, ICJ Reports 1996, p. 226.

conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective control. Present and future challenges with respect to nuclear (radiological) arms regulation, nuclear non-proliferation and the protection and security of nuclear materials and equipment including the question of pre-emptive military actions against illegal activities with weapons of mass destruction require progressive assessments and the development of new security strategies<sup>10</sup>. The maintenance and enforcement of the existing nuclear non-proliferation regime is also closely related to three non-parties of the Nuclear Non-Proliferation Treaty – NPT – of July 1, 1968: India, Pakistan and Israel. For the foreseeable future, these three countries are unlikely to ratify the NPT or to submit their nuclear facilities to IAEA safeguards. Since these countries have the technical know-how and capabilities which might be helpful to other countries for acquiring nuclear weapons, they represent a constant danger to the existing non-proliferation regime. This danger became obvious when clandestine nuclear programs of Iran and Libya were uncovered. It remains to be seen whether these countries will be willing to constrain themselves and to abstain from providing nuclear weapon technologies and equipment to non-nuclear weapons States.

6. **North Korean Nuclear Issue.** For the international community the North Korean nuclear issue<sup>11</sup> has posed a great proliferation risk for more than ten years. It escalated on January 10, 2003, when Pyongyang announced the reactivation of its suspended withdrawal from the NPT. On March 12, 1993 the Democratic People’s Republic of Korea (DPRK) had already declared its withdrawal, but at that time the declared withdrawal was suspended on June 11, 1993, one day before effectuation. According to Article 10, paragraph 1 of the NPT, withdrawal from the Treaty shall take effect three months after its notification, which includes a statement of the extraordinary events having jeopardised the withdrawing party’s supreme interests and shall be given to all other parties and to the UN Security Council. Given the complicated nature of the situation, there are different ways of interpreting the North Korean status under the NPT:

- (A) North Korea withdrew from the NPT as of June 12, 1993 (three months after its first announcement);
- (B) It withdrew from the NPT as of January 11, 2003 (one day after its second announcement);
- (C) It withdrew from the NPT as of April 10, 2003 (three months after its second announcement); and
- (D) North Korea still remains Party to the NPT.

There appears to be no State supporting interpretation (A), including North Korea itself, as evidenced by the fact that it participated in the NPT Extension Conference in 1995 as a party to the Treaty and no other party raised any question about it. Interpretation (B) is the North Korean position. Pyongyang has maintained that now that its 1993 suspension of withdrawal was lifted, the withdrawal fully took effect on the following day of the lifting. But the IAEA has challenged it by stating that the NPT contains no provision for the “suspension” of withdrawal from the Treaty. It argued that the North Korean suspension of withdrawal should be treated as a revocation of withdrawal. If so, the DPRK would have withdrawn from the NPT on April 10, 2003 – Interpretation (C) –, or it would still remain party to the NPT – Interpretation (D) –, depending on whether one considers that the second announcement meets all the requirements for the withdrawal from the NPT as stipulated in Article 10, paragraph 1. Those who support Interpretation (D) have argued that the January 2003 notification of withdrawal did not contain a statement of the extraordinary events jeopardising North Korean supreme interests and/or that not all NPT parties have received the North Korean notification, thus the requirements under Article 10, paragraph 1 have not been fulfilled. During the Second and Third Sessions of the Preparatory Committee for the 2005 NPT Review Conference held in April 2003 in Geneva and in April 2004 in New York, the status of the DPRK was deliberately not questioned and the Chairman of this meeting acted as guardian of the nameplate of the DPRK. The Chairman of the respective sessions of the Preparatory Committee made the following statement: “the Chair has the intention, under his own

<sup>10</sup> See, Sheema Gahlaut/Victor Zaborsky, *Do Export Control Regimes Have Members They Really Need?*, in *Comparative Strategy* 23, 2004, pp. 73-91.

<sup>11</sup> Masahiko Asada, *Arms Control Law in Crisis? A Study of the North Korean Nuclear Issues*, in *Journal of Conflict and Security Law*, Vol 9, No 3 (Winter 2004), pp. 331-355.

responsibility, not to open a debate on this issue and to retain the nameplate of the said country temporarily in his custody.”

In overcoming the first nuclear crisis on the Korean Peninsula in 1993-94, North Korea and the United States reached an Agreed Framework in October 1994. The Agreed Framework provided for a deal under which North Korea would freeze its nuclear program by first freezing and eventually dismantling its three graphite-moderated reactors and two related facilities, including a reprocessing facility, and the United States would, in return, make arrangements for the provision to the DPRK a light water reactor (LWR) project with a total generating capacity of 2,000 megawatts. The United States also committed itself to provide 50,000 tons of heavy oil annually to cover the energy shortage caused by the freeze. In order to implement these arrangements, a Korean Peninsula Energy Development Organisation (KEDO) was established in March 1995. Faced with the alleged Pyongyang acknowledgement of its nuclear program based on enriched uranium in October 2002, however, the KEDO Executive Board decided in November to suspend heavy oil deliveries to the DPRK beginning with the December shipment. Without any positive development in practical terms, the KEDO Executive Board further decided in November 2003 to suspend the LWR project for a period of one year, beginning December 1, 2003. The future of the project is to be decided by the Board before expiration of the suspension period.

In the meantime, there has been an endeavour going on to resolve the issue diplomatically through multilateral talks among the States most concerned. In April 2003, first such talks were held in Beijing with participation of North Korea, the United States and China. In August 2003, South Korea, Japan and Russia joined the process making it six-party talks. During the six-party talks in August, North Korea agreed to the eventual elimination of its nuclear programs if the United States were first willing to sign a bilateral “non-aggression treaty” and meet various other conditions, including the provision of substantial amounts of aid and normalisation of relations. The United States refused to accept the North Korean proposal, maintaining that it would not provide benefits or incentives for North Korea to abide by its previous international obligations. Preferring a multilateral resolution on the issue, President Bush said in October 2003 that he would be willing to consider a multilateral written security guarantee in the context of North Korea’s complete, verifiable and irreversible elimination of its nuclear weapons program. Despite these developments and despite the convening of the second round of six-party talks hosted again by China in February 2004, there is no clear prospect for a final resolution to the issue.

7. The US-Russian Treaty on the **Limitation of Anti-Ballistic Missile Systems** (ABM-Treaty) of 26 May 1972 withstood pressures of the reinterpretation controversy in the mid-1980ies<sup>12</sup>. However, technological advances unforeseen in 1972 and emerging missile threats led to the withdrawal of the United States from the ABM Treaty and the conclusion of the Treaty on Strategic Offensive Reductions (SORT)<sup>13</sup>. Considering the future development of a missile defence system in the absence of the restrictions of the ABM Treaty,<sup>14</sup> in particular with respect to the possibility that weapon components of such systems might be deployed in outer space<sup>15</sup>, new efforts are required to establish a comprehensive ABM/non-proliferation regime that would combine the conceptual designs of NPT and Missile Technology Control Regime.

<sup>12</sup> John B. Rhineland, *The ABM Treaty – Past, Present and Future: Part I*, JCSL Vol. 6 No. 1 (June 2000), 91-114, Part II, JCSL, Vol. 6 No. 2 (December 2001), 225-244; Bakhtiyar R. Tuzmukhamedov, *Maintaining the ABM Treaty regime by Multiple Actors: Options for the Post-USSR Space*, in: Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, Christian Raap (eds), *Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, 2004, 593-610; The U.S. Decision To Withdraw From the ABM Treaty, *Arms Control Today*, Vol. 32, N° 1 (January/February 2002), 4-21.

<sup>13</sup> Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions signed in Moscow 24 May 2002, in: *Arms Control Today* June 2002, pp. 9-11 [<http://www.armscontrol.org/documents/sort.asp>]; Letter of Transmittal and Article-by-article Analysis of the Treaty On Strategic Offensive Reductions, in: *Arms Control Today* July/August 2002, pp. 28-30.

<sup>14</sup> Nikolai Sokov, *The Russian Nuclear Arms Control Agenda After SORT*, in: *Arms Control Today*, April 2003, pp. 7-11.

<sup>15</sup> Detlev Wolter, *Völkerrechtliche Grundlagen „Gemeinsamer Sicherheit“ im Weltraum* (Common Security in Outer Space and International Law, with English summary, in *ZaöRV/HJIL* 62 Nr. 4 (2002), 941-992; see also Wolter, *Grundlagen „Gemeinsamer Sicherheit“ im Weltraum nach universellem Völkerrecht*, Berlin 2003.

8. The **Comprehensive Test Ban Treaty** (CTBT) of 24 September 1996 is yet to be fully accepted and implemented. The three Article XIV Conferences on Facilitating the Entry into Force of the CTBT (6 – 8 October 1999 in Vienna, 11-13 November 2002 in New York and 3-5 September 2003 in Vienna )<sup>16</sup> did not achieve an entry into force of the CTBT at the earliest date possible. However, they strengthened this instrument by stressing the importance of its provisional application and of the maintenance of the existing test moratoria. The provisional application, as a confidence-building mechanism, reinforces the legal standing of the CTBT, encourages further ratifications, and deters any State from conducting nuclear tests in the future. However, the provisional application is not a substitute for the entry into force requirements. The current situation of the CTBT has become so vulnerable that without a clear prospect for an entry into force the further development of the highly sophisticated international monitoring system (IMS) might be frozen if not reversed<sup>17</sup>. Indeed, it would be highly questionable to maintain an expensive and fully functional international monitoring system for provisional application of a treaty. It could neither effectively deter nor prevent a single nuclear test explosion.
9. The significance of **international verification regimes** which was assessed in the Committee's Fifth Report (London, 2000) has progressively been developed in the context of the OPCW, the NPT and the CTBT. Similarities and divergences in these different areas have not been fully assessed yet. Possibilities of unifying various regimes under one umbrella organisation have been proposed several times without achieving credible feasibility. Diverging membership, little synergy in the inspection capacity and the fear of State parties that confidential military and economic information could be merged and possibly abused are the main obstacles. The OPCW inspection activities are based on initial and routine inspection measures. Despite alleged development and possession of CWs as expressed in the case of several States parties, there are no requests for challenge controls so far. There is the risk that the non-use of the means of challenge inspection will increase political sensitivity towards such a step. Continued allegations without making use of the treaty verification means may undermine the long-term credibility of the OPCW and the costly routine inspection system.
10. The failure<sup>18</sup> of the Fifth Review Conference (November 2002), to agree on a verification system for the **Biological Weapons Convention** (BWC) basically reflected the contradiction of two main negotiation objectives: on the one hand, to have effective verification procedures and rights (reaction time and intrusiveness) in order to discover treaty violations and to deter such actions. On the other, such effective measures would endanger production secrecy and economic interests. These diverting interests arose not only between various numbers of States but were also not reconcilable at the national level<sup>19</sup>.

As it was not possible to continue efforts to improve the inadequate verification provision of the BWC through multilateral negotiations, the Review Conference has maintained the level of co-operation of States parties until the next Review Conference in 2006, by establishing a follow-up process relating to the security and protection of biological agents and materials, to capabilities for responding and investigating suspicious outbreak of diseases and guidelines and to recommendations related to the abuse of biotechnology for biological weapons purposes in the pharmaceutical and biotechnological industry. There is an expectation that the annual meetings of experts and of representatives on these issues will improve the national implementation of the BWC.

Another pragmatic approach is co-operation with respect to national vaccination efforts and possible military and terrorist use of smallpox. International co-ordination of the stockpiling of vaccines may improve the ability to react. In that respect the World Health

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<sup>16</sup> Masahiko Asada, *CTBT: Legal Questions Arising from its Non-entry into Force*, in: JCSL (2002), Vol. 7 No. 1, 85-122.

<sup>17</sup> The discussion on the need of further or new testing continues. See Kathleen Bailey/Robert Barker, *Why the United States Should Unsign the Comprehensive Test Ban Treaty and Resume Nuclear Testing*, in: *Comparative Strategy*, Volume 22, 2003, pp. 131-138.

<sup>18</sup> Jean Pascal Zanders, *International Norms Against Chemical and Biological Warfare: an Ambiguous Legacy*, in: *Conflict & Security Law*, Volume 8, October 2003, pp. 391 ff.

<sup>19</sup> Compare US reasons for Rejecting the Protocol, Mark Wheelis/Malcom Dando, *On the Brink: Biodefence, Biotechnology and the Future of Weapons Control*, in: *The CBW Conventions Bulletin*, Issue 58, December 2002, pp. 3 ff.

Organisation<sup>20</sup> might play an important role.

11. Efforts to limit **conventional weapons** have been forcefully supported by non-governmental organisations and public opinion. Under the 1997 Ottawa Convention on the Prohibition of Anti-personnel Landmines each State party undertakes to destroy or ensure the destruction of all anti-personnel mines irrespective of their use in international or non-international conflicts. Shortly before, the 1980 Convention on Certain Conventional Weapons was supplemented by the 1995 Blinding Weapons Protocol and the 1996 Revised Mines Protocol. Legal forms of combating the illicit trade in small arms and light weapons were subject to various further activities. These issues were discussed by the Committee<sup>21</sup> on the eve of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in all its Aspects, which adopted a Program of Action, on 21th July 2001, recommending practical efforts at national, regional and international levels<sup>22</sup>. The issue of illicit small arms and light weapons was also discussed by the Security Council on 2nd August 2001<sup>23</sup>. At the regional level, the OSCE-participating States, the member States of the European Union, OAS Member States as well as African States enhanced regional and sub-regional efforts to control and combat illicit small arms and light weapons.

Recently, the scope of certain rules of conventional international law, originally designed for international armed conflicts, was formally expanded to ensure their application also in non-international armed conflicts. These include: the Ottawa Convention on the Prohibition of Landmines, in which each State party undertakes to destroy or ensure the destruction of all anti-personnel mines; the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property adopted on 26 May 1999, which extended all provisions of the Hague Convention to non-international armed conflicts; and the 1980 Convention on Certain Conventional Weapons (CCW), which was amended to cover non-international armed conflicts, due to a successful US initiative<sup>24</sup> at the Second Review Conference in 2001, following similar earlier developments under the 1995 Blinding Weapons Protocol and the 1996 Mines Protocol. In November 2003, the Fifth Protocol on Explosive Remnants of War (ERW)<sup>25</sup> was adopted by State parties to the CCW. In recognising the serious humanitarian problems caused, after the end of a conflict by explosive remnants of war, which have ceased to serve any military purpose, the Protocol requires each party to an armed conflict to clear, remove or destroy ERW and to co-operate and provide assistance for the marking and clearance, removal or destruction of ERW as well as for risk education and to take other measures to reduce the threat to civilians. While the Protocol may facilitate further activities to improve humanitarian protection in non-international armed conflicts, considerable efforts still remain necessary to prohibit the uncontrolled use of anti-vehicle mines and to ensure with inter alia preventive technical measures that weapons such as cluster bombs do not become ERW. Furthermore, great efforts within the CCW are taken to tackle the unsolved problem of unintended effects of undetectable mines other than anti-personnel mines.

12. A new attempt to oblige non-state actors to respect the provisions of humanitarian law in general and the 1997 Ottawa Convention on the Prohibition of Anti-personnel Landmines in

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<sup>20</sup> See World Health Assembly resolution WHA 54.14 of May 2001: "requests the Director-General: 1) to devise relevant international tools, and provide technical support to member States for developing or strengthening preparedness and response activities against risks posed by biological agents, as an integral part of their emergency management programmes 2) to provide support for building up national capacity for epidemic alert and response, especially development of laboratory diagnostic competence and training in intervention epidemiology in the most exposed countries 3) to explore appropriate mechanisms for strengthening global alert and response, so as to avoid duplication of efforts when gathering information on infectious diseases, whatever their origin..."

<sup>21</sup> See above, note 6.

<sup>22</sup> UN-Doc A/CONF.192/15.

<sup>23</sup> UN-Doc S/PV.4355 and Resumption 1.

<sup>24</sup> Second Review Conference of the State parties to 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, CCW/CONF.II/MC.I/CRP. 1/Rev. 1, 20 December 2001.

<sup>25</sup> See Erwin Dahinden, *Neue Regelungen für Nichtexplodierte Munitionsrückstände (NEMR)*, in: Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, Christian Raap (eds), *Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, 2004, pp. 59-79.

particular, reflects the “**Geneva Call**”<sup>26</sup>. This non governmental organisation, part of the Swiss Landmine Campaign, tries to convince selected non-state actors (NSA) to stop using, producing, stockpiling and transferring anti-personnel landmines, to destroy their stockpiles, to accept an international verification of their commitment and finally to allow mine action on their territories. Until the 25<sup>th</sup> January 2004, 26 groups of NSA<sup>27</sup> signed a Deed of Commitment. The depository of these documents is the Government of the Republic and the Canton of Geneva. This new mechanism reflects the will to get universal acceptance and implementation of the MBT and to promote humanitarian law without being involved in the problem of formal recognition of non-state actors.

13. Limitations of use, possession, production and proliferation and their interrelationship. In this respect, the illicit transfer of **small arms and light weapons** (SALW) has become an increasingly important issue on the international agenda. The ILA-Workshop 2001 in Geneva underlined that need of the international community to find effective practical and legal solutions at national, regional, and international levels. The following conclusions<sup>28</sup> of the workshop can be seen as a working agenda for the national and international level:  
In the process of SALW regulation, legal elements are important, especially for the implementation of national laws.

- Legal considerations are not necessarily to be the first step at global level, but there are some key elements that need to be agreed upon: definition of SALW, prohibitions/regulations marking and tracing of illicit SALW, brokering destruction of surplus stocks (not reselling)
- Effectiveness of the regulations may be achieved more easily through activity-oriented than goods-oriented regulations.
- Several existing regulations in other fields provide useful precedents and models for SALW regulation.
- The regulation process should include both bottom-up (demand factors) and top-down (supply factors) approaches.
- Implementation of the agreed measures (politically or legally binding) has to be ensured on a wide basis, with an emphasis on regional implementation. Otherwise, the exploitation of loopholes and illicit transfers could undercut basic endeavours.
- At the national implementation level, key elements have to be regulated by the appropriate legal instruments, even if self-regulation is an important approach.

A Program of Action to counter the various challenges of SALW was adopted by the UN Conference on the “Illicit Trade in Small Arms and Light Weapons in all its Aspects” on 21 July 2001<sup>29</sup>. The document reflects measures to be taken at the national and international level and proposes a follow-up process. The next meetings of the UN open-ended working group on the negotiation of an international instrument to enable States to identify and trace illegal small arms and light weapons in a timely and reliable manner will present an opportunity to bridge the gap between existing legally binding law enforcement instruments to combat illicit trafficking in firearms and the 2001 Program of Action<sup>30</sup>.

14. Important instruments in countering uncontrolled accumulation and spread along with illicit trafficking of SALW and ammunition are (1) effective management and security stockpiles

<sup>26</sup> [www.genevacall.org](http://www.genevacall.org)

<sup>27</sup> NSAs in Myanmar, Philippines, Iraq/Kurdistan, Sudan, Somalia and Burundi. List published under <http://www.genevacall.org/resources/testi-referencematerials/deeds.htm>.

<sup>28</sup> See Dahinden/Dahlitz/Fischer (note 7), p. 153f.

<sup>29</sup> Another key document is the Protocol against the Illicit Manufacturing or Trafficking in Firearms, Their Parts and Components and Ammunition (so called Firearms Protocol), which was negotiated in the framework of the UN Convention against Transnational Organized Crime (A/55/383/Add2).

<sup>30</sup> UN General Assembly mandate according to Doc A/RES/58/241.

including their secure movement, i.e. transport, as well as (2) the destruction of identified surplus, preferably by rendering the weapon both permanently disabled and physically damaged. This is particularly important in post-conflict rehabilitation programs and disarmament, demobilisation & reintegration (DD&R) processes which also include successful collection, control and disposal of SALW. At a regional level, the OSCE SALW document and its relating best practice guides provide relevant guidelines<sup>31</sup> for stockpile management and security as well as assistance mechanisms<sup>32</sup>. Similar mechanism have been introduced with the newly adopted OSCE Ammunition Document.<sup>33</sup> Important assistance and destruction programs are conducted in Moldova by the OSCE's permanent mission in Chisinau, NATO's Maintenance and Supply Agency (NAMSA) and the South Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC) in connection with a considerable amount of surplus stockpiles of SALW, anti-personnel landmines and ammunition inherited by the Russian 14th Army, which is committed to total military withdrawal according to the 1999 Istanbul Agreement.

15. Arms transfers have major **implications for international humanitarian law** and humanitarian assistance operations. The relationships between the availability of weapons, the worsening situation of civilians during and after conflicts and the challenges of providing humanitarian assistance have been underlined at international fora<sup>34</sup>. It must be admitted that weapons availability increases the cost of humanitarian operations. The unregulated transfer of weapons and ammunitions can facilitate violations of humanitarian law, increase tensions, heighten civilian casualties and prolong conflicts. A Plan of Action adopted by the 28<sup>th</sup> International Conference of the Red Cross and the Red Crescent stipulates that “*States should make respect for international humanitarian law one of the fundamental criteria on which arms transfer decisions are assessed. They are encouraged to incorporate such criteria into national laws or policies and into regional and global norms on arms transfer*”<sup>35</sup>. For EU Member States respect for international humanitarian law by recipients is a central element in decisions on arms transfers<sup>36</sup>. The key questions to be considered should include the following: Has the potential recipient adhered to the relevant treaties of international humanitarian law? Are the potential recipient's forces trained in humanitarian law? Do mechanisms exist for punishing violators? Are authority structures able to ensure compliance with humanitarian law? Is the potential recipient the actual end-user? Will the potential recipient maintain control over transferred arms and ammunitions?
16. **Regional developments** have shown successful examples for effective co-operative solutions, but also illustrated open issues. As far as the OSCE area is concerned, positive results are certainly reflected in the overall successful implementation of the Vienna Document on Confidence and Security-Building Measures, the two agreements under Article II and IV of the Dayton Annex 1-B of the General Framework Agreement for Peace in Bosnia and

<sup>31</sup> See in particular Section IV of the *OSCE Document on Small Arms and Light Weapons (SALW)* which was adopted by the OSCE participating States on 24 November 2000. The *OSCE Handbook of Best Practice Guides on SALW* was released on 1 December 2003 during the *Eleventh Meeting of the OSCE Ministerial Council* in Maastricht (see the Best Practice Guide on National Procedures for Stockpile Management and Security and the Best Practice Guide on National Procedures for the Destruction of Small Arms and Light Weapons).

<sup>32</sup> Section V of the OSCE SALW Document provides mechanism for responses to requests for assistance on the security and management of stockpiles as well as assistance with and possible monitoring of the reduction and disposal of SALW. Belarus was the first participating State which has submitted such a request for assistance.

<sup>33</sup> The *OSCE Document on Stockpiles of Conventional Ammunition* of 19 November 2003 includes provisions for stockpile management and security (Section IV) and scope of assistance and procedure (Section IV). Annex I provides a model questionnaire for a requesting State. Hitherto Ukraine, Belarus and the Russian Federation have submitted requests for such assistance.

<sup>34</sup> International Committee of the Red Cross, *Arms Availability and the Situations of Civilians in Armed Conflict*, Geneva, June 1999.

<sup>35</sup> Final goal 2.3.1 of the Plan of Humanitarian Action adopted by the 28<sup>th</sup> International Conference of the Red Cross and Red Crescent in 2003.

<sup>36</sup> EU Joint Action on Small Arms and EU Code of Conduct on Arms Transfers of 1998; OAU Declaration on an African Common Position on the Illicit Proliferation, Circulation and Trafficking of Small Arms and Light Weapons (Bamako, November 2000); OSCE Document on Small Arms and Light Weapons (November 2000); NATO Parliamentary Assembly, Committee Resolution on Small Arms Control, Germany's Policy Principles for the Export of War Weapons and Other Military Equipment of January 2000.

Herzegovina, and the Treaty on Open Skies. However, one cannot overlook the stalemate regarding pending ratification of the adapted Treaty on Conventional Armed Forces in Europe (CFE). Necessary preconditions for its ratification would be a consensus not existing so far on whether the Russian Federation has fully met its Istanbul 1999 commitments and a still pending agreement between the Russian Federation and Georgia regarding the duration and modalities of the functioning of the Russian military bases at Batumi and Akhalkalaki. This situation is of serious concern because the existing CFE-Treaty no longer matches the new security architecture in Europe and it jeopardises the legal arms control foundation for European stability and security. This cannot be compensated by any other arms control agreement, even taking into account other positive developments such as the adoption of the politically binding OSCE Document on Stockpiles of Conventional Ammunition (November 2003).

17. Much less successful were the restrictions imposed by the Security Council under Chapter VII of the UN Charter. The restrictions imposed on **Iraq** after the Iraq-Kuwait war were hardly indicative of new developments in the law of arms control and disarmament. No important obligations were created by the Security Council that could serve as peace-making examples for the creation of further treaty obligations in this field. However, the Iraqi use of chemical weapons in its war with Iran led participating States to conclude the 1993 Chemical Weapons Convention, whereas the deception of the IAEA in Iraq resulted in the elaboration of an Additional Protocol to the IAEA Safeguards Agreements. Moreover, revelations about the advanced nature of Iraq's nuclear programs may have contributed to the May 1995 decision of NPT State Parties to extend the Treaty indefinitely. The strict determination of the Security Council to introduce a system of on-going monitoring and verification under Resolutions 687 (1991) and 1284 (1999), and its continuing efforts to make this system fully operational in Iraq, have triggered enormous efforts to ensure verification and monitoring. UNSCOM and UNMOVIC, together with the IAEA, have been involved in the most comprehensive international monitoring system ever established in the sphere of arms control<sup>37</sup>. Another result of the 1991 Gulf War is the awareness of the dangers of exporting dual-purpose technologies, which led to the review of the guidelines and practices for inspections under IAEA Safeguards Agreements with the NPT signatories. The practical experience gained with regard to nuclear, chemical and biological weapons and ballistic missiles by both UNSCOM and UNMOVIC remains useful for future efforts to strengthen international activities with respect to fact-finding and inspection. The Iraqi case illustrated the problem of how difficult it is to enforce verification in a non-co-operative environment. Without a military build-up by the United States in the summer of 2002 in Kuwait, Iraq would probably not have accepted a resumption of UN inspections. However, neither the military build-up nor the return of inspectors guaranteed that Iraq would fully co-operate with the inspectors. Although it is conceivable that continued build-up would have improved Iraqi compliance and co-operation, military action seemed to be inevitable. The question was whether the military action would be authorised by the UN Security Council. The Iraq war forcefully underlined that there is no viable alternative to determined action by the Security Council to threaten military action in case of non-compliance, and diplomatic pressure on the concerned country with a view to improve co-operation with the international inspectors. It likewise supports the conclusion that a failure of the Security Council to act decisively or to present a viable solution may oblige major powers to act unilaterally<sup>38</sup>.

An indirect effect of the decision to seek a military solution with respect to the Iraqi presence of weapons of mass destruction<sup>39</sup> was a significant increase of opportunity costs for illegal and clandestine nuclear activities, in violation of the NPT and IAEA Safeguards. As a consequence, countries like Iran and Libya decided to give up or substantially reduce their clandestine nuclear programs. The subsequent inspections by the IAEA of these clandestine programs revealed the existence of an important black market for nuclear weapon technologies with countries like Pakistan and North Korea acting as major suppliers for

<sup>37</sup> Dieter Fleck, *Developments of the Law of Arms Control as a Result of the Iraq-Kuwait Conflict*, in: EJIL (2002), Vol. 13 No. 1, pp. 105-119.

<sup>38</sup> The legality of the US-interpretation of the right of self defence with regard to article 51 UN Charter was widely contested (See Kofi Annan expert group).

<sup>39</sup> Although US underlined the need of the intervention by the possession of WMD, the failure to find evidence until 2004 de-emphasises the counter-proliferation dimension of the Iraq case. See, IISS, *Strategic Survey 2003*, Oxford, pp. 9ff.

technology and equipment. Over the coming years, the international community will have to elaborate a new comprehensive international control regime in order to prevent the reoccurrence of similar black markets in the future. To what extent this new control regime will impede on the right of the NPT State parties to use all available nuclear technologies for peaceful purposes remains to be seen.

18. The achievements of international arms control and disarmament efforts are heavily challenged by the on-going **Revolution in Military Affairs (RMA)**. This revolution may be more fundamental than former developments<sup>40</sup> which occurred with the advent of nuclear weapons. It is progressively developing in four areas: information operations, weapons systems, militarization of civilians and space<sup>41</sup>. New information systems may include sensors the size of dust mites that could be seeded by unmanned aerial vehicles. Weapon systems, intelligence and weapons effects will be considerably developed, e.g. by microwave and high energy laser weapons, solar powered satellites or nuclear-tipped interceptors. In modern military operations there is a growing dependency on civilians which jeopardises the rule of distinction, unless clear definitions for direct participation in hostilities can be established<sup>42</sup>. The effective role of space operations was illustrated dramatically in Operation Desert Storm<sup>43</sup> and Iraqi Freedom.

These new technologies are hardly covered by the existing arms control and disarmament law at all. Information technology has achieved the status of a “force multiplier” indicating its pivotal role in achieving military effectiveness of main battle systems. Against this background, the strategic and operational relevance of the existing arms control agreements is partly decreasing. The dual use character of this technology, the conduct of non-detectable preparatory actions prior to the outbreak of hostilities as well as the offensive and defensive capability of the systems would make it rather difficult to regulate developments in this field. Even if there were a possibility to identify confidence-building measures, there seems to be a lack of interest and willingness on the side of the haves to engage in negotiations with the have-nots.

19. The **role of the Security Council** to impose a disarmament regime on States, to control arms transfer and to issue sanctions for violations has so far not been fully used. There was a great illusion that after the Cold War that the Security Council would overcome the years of “paralysis” and that the removal of ideological divisions might increase the effectiveness of this body<sup>44</sup>. In the case of Iraq the intervention by the US and the UK has shortcut any option that was in the hands of the Security Council<sup>45</sup>. As pre-emptive actions may not be feasible in the case of alleged nuclear proliferation of North-Korea and Iran, the Security Council may play a more important role in finding a diplomatic solution in these two cases<sup>46</sup>. On 3 November 2003, UN Secretary General Kofi A. Annan established a "High Level Panel on Threats, Challenges and Change" that examines the major threats and challenges the world is facing in the broad field of peace and security. Specifically, the Panel is asked to recommend clear and practical measures for ensuring effective collective action<sup>47</sup>.

<sup>40</sup> Transforming U.S. Forces: Lessons From a Wider Revolution.‘ Rand Issue Paper 193, 2000.

<sup>41</sup> Michael Schmitt, *Bellum Americanum: The U.S. View of Twenty-First-Century War and Its Possible Implications for the Law of Armed Conflict*, in: Michael N. Schmitt Leslie C. Green (eds.), *The Law of Armed Conflicts: Into the Next Millennium*, Naval War College Newport, R. I. 1998, International Law Studies Vol. 71, pp. 389-428.

<sup>42</sup> Michael N. Schmitt, “*Direct Participation in Hostilities*“ and *21st Century Armed Conflict*, in: Horst Fischer, Ulrike Froissart, Wolff Heintschel von Heinegg, Christian Raap (eds), *Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, 2004, pp. 505-529.

<sup>43</sup> Department of Defence, *Conduct of the Persian Gulf War (Title V Report to Congress) 95-101* (1992), pp. 801-806.

<sup>44</sup> Mats Berdal, *The UN Security Council: Ineffective but Indispensable*, in: *Survival*, Vol. 45, Summer 2003, pp. 7-30.

<sup>45</sup> See Hans Blix, *Disarming Iraq*, New York 2004.

<sup>46</sup> See Robert S. Litwak, *Non-proliferation and the Dilemmas of Regime Change*, in: *Survival*, Volume 45, No 4, Winter 2003-04, pp. 7-32.

<sup>47</sup> The question of the right of self-defence and its relationship to collective security measures is of fundamental importance. A workshop composed of international law and security policy experts, held in Geneva on 29 and 30 March 2004, is due to report to the UN SG. Preliminary findings underline, that the collective security

20. **The Future of Arms Control Law:** The workshop on “The Future of Arms Control Law” (Berlin, 15-16 May 2003)<sup>48</sup> addressed the “crisis” of arms control and disarmament, which many commentators currently perceive. In light of the general tendency to “legalise” international political processes, the workshop looked at the specific potential of public international law to overcome such crises. While there was agreement that progress in arms regulation can only be made if it is politically achievable, the present architecture of arms control law was criticised as being fragmented. As a way towards a more coherent approach, the adoption of a framework treaty on arms regulation was proposed, with specific treaties, protocols, codes of conduct and other implementation instruments providing the necessary details. Since multi-layered law-making is not uncommon in other functional areas of international law, it would move arms control further in the direction of what international relations theorists label as “regimes”. Such a framework treaty could also strengthen the role of the UN in arms regulation, further embedding arms control into the UN’s purposes, principles and activities than has hitherto been the case. Apart from improving law-making in arms regulation, there was agreement on the need to strengthen the effectiveness of arms control arrangements. Focusing on arms regulation in the long-term was felt to be a more efficient anti-terrorist strategy than trying to eradicate terrorists by the use of military force. Existing compliance control procedures should be streamlined and made more cost-efficient. To this end, the role of NGOs as unofficial verification mechanisms should be strengthened, and States should be encouraged to internalise arms control regulations (e.g. on the basis of model national legislation). With regard to RMA, the development of a preventive framework was considered useful. Finally, participants stressed that without gauging the effectiveness of specific legal regimes, no one could be confident about the value of future law-making with regard to arms regulation.
21. **New regulatory approaches and techniques** may help solve security problems or promote peaceful settlement of differences and adjustments in international relations<sup>49</sup>. Arms control is a co-operative approach<sup>50</sup> to international security by which States for different motives accept a binding regulation. The main focus is of a preventive nature, and in this context ‘crisis resistance’ may be an important criteria. The following new or reviewed approaches indicate where arms control<sup>51</sup> “regulation” approaches and techniques are required and may contribute to security and freedom<sup>52</sup>.

**a) Implementation has priority, not negotiation**

Too often, diplomats and academics focus on new negotiations and relate progress directly to progress in on-going negotiations. Even more relevant than negotiations, but often less spectacular, however, is the implementation of existing treaties. There is still an important gap between legally agreed regulations and their implementation. Full implementation is not only a prerequisite for further regulations but also the essential part in achieving security benefits.

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system by the UN Charter provides an adequate framework for dealing with the new threats and challenges and that an amendment to Article 51 UN Charter is neither desirable nor feasible. They agreed that there is no need for a reinterpretation of the right of self-defence set out under Article 51 of the UN Charter.

<sup>48</sup> See above, paragraph 3.

<sup>49</sup> Normative measures fostering a community of values and behaviour are as important as concrete provisions regarding the reduction and/or control of potentials and capacities. The OSCE’s Code of Conduct on Politico-Military Aspects of Security is a good example for the democratic control of armed forces or the use of armed forces which has to be in compliance with the Law of Armed Conflict.

<sup>50</sup> Even those talking about the ‘end of arms control and the traditional concept of security co-operation’ propose measures as alternatives that only work with the co-operation of States. The nature of the problem calls for the co-ordinated action of as many States as possible. The divergences arise in the definition of the role of the individual State. The idea to reduce ‘co-operation’ to the content of ‘assistance in implementation’ without participation in setting objectives and content or having a balance of interests goes contrary to existing world order and international practice. After 9/11 the world has experienced a new quality of international co-operation in the fight against terrorism, where the co-operative measures included not only legal assistance but also extensive sharing of intelligence and the exchange of investigation specialists. Compare John J. Mearsheimr *‘The Tragedy of Great Powers Politics’*, New York, 2001; Robert Kagan, *‘Of Paradise and Power’*, New York, 2003; Ernst-Otto Czempiel, *‘Kluge Macht’*, München 1999;

<sup>51</sup> There are also structural and institutional approaches like security sector reform, Democratic Control of Armed Forces and Code of Conduct (OSCE).

<sup>52</sup> Arms control has played an extraordinarily prominent role because of its prominence in superpower relations and the recognition it enjoyed from the idealistic and pacifistic milieu.

Disarmament assistance as well as the creation of incentives for compliance as for further reductions<sup>53</sup> become decisive. As implementation is part of state practice it is also relevant for the creation of customary law<sup>54</sup>

#### **b) Preserve the “acquis”**

The call to give implementation adequate recognition reflects another issue of strategic importance. The stalemate in on-going negotiations should not divert attention from the fact that there is also an ‘acquis’ which must be preserved. The reduced prominence of arms control in the political agenda tends to make politicians unaware of attempts to weaken the acquis. Arms control has the potential of moderation in a world of increased chaos and anarchy<sup>55</sup>. This may be illustrated by the following examples:

- The implementation of the amended CFE Treaty reflects the results of the end of the Cold War and guarantees a foundation of strategic stability in Europe’s conventional arsenal.
- Failure to multilateralise the INF Treaty had made it necessary to develop and deploy missile defence systems.
- The discussion of non-lethal chemicals<sup>56</sup> as a method of warfare is critical for considering CWC prohibitions.
- The absence of challenge inspections according to the CWC, although violations of the convention have been alleged, could undercut the credibility of the entire Convention.

#### **c) Bottom up approach through practical steps/implementation without regulation**

In the field of SALW there are various options for a new bottom up approach. Even without an international agreement, several practical measures within States may be realised in the context of bilateral and multilateral co-operation: buy-back programs, stockpile security measures, and stockpile destruction could be developed as an ‘implementation without regulation’ approach. NATO’s Partnership for Peace Program already plays an active role in this field.

#### **d) Politically/legally binding approaches**

There are already good results in ‘politically binding’ approaches in the area of the OSCE. The advantage of such approaches lies not only in its more flexible implementation procedure, but also in lowering the threshold for becoming engaged in such a process. Taking again the field of human security and SALW, there is no absolute need for an international, legally binding instrument, as long as main measures are taken at the national level and the effects do not compromise security and trade interests. In this respect, national registrations or the marking of small arms might constitute an important step towards substantial progress. At the international level, this approach could include the elaboration of ‘standard national legislation’ which may be very crucial for timely implementation.

#### **e) Coalitions of the “willing”**

Some areas of arms control are mainly humanitarian and the balance of capabilities does not play a crucial role. Here the established consensus principle in the context of arms control negotiations which helps to promote strategic balance and universality is in reality blocking the feasibility of progress for a significant number of States. Hence new ways must be found to mobilise the emerging common will of an important number of States without letting them become victims of linkage policies and “consensus-veto”. One important area is cluster ammunition, where decisive improvements are feasible but blocked by a small number of States. A new method may consist of pursuing an interim step towards a multilateral treaty and bringing the ‘willing’ together in a ‘best practice’ approach. A method that already exists but has not yet been sufficiently exploited is ‘framework regulation’ (e.g. CCW): all State Parties agree to basic principles in a kind of framework regulation and are free to agree to

<sup>53</sup> See Cooperative Threat Reduction Programme (so called CTR, Nunn-Lugar Programme).

<sup>54</sup> Compare Lisa Tabassi, *Impact of the CWC: Progressive Development of Customary International Law and Evolution of the Customary Norm against Chemical Weapons*, in: The CBW Conventions Bulletin, Issue 63, March 2004, pp. 1-7.

<sup>55</sup> There is a need to maintain the normative framework even if the time of strategic arms control has passed, compare, Avis Bohlen, *The Rise and Fall of Arms Control*, in: Survival, Volume 45, No 3, autumn 2003, p.32.

<sup>56</sup> For the discussion of “Non-Lethal Weapons in the CWC and BWC and “Law Enforcement and the CWC” see The CBW Convention Bulletin, Issue 58, December 2002 p 1f. and Issue 61, September 2003, pp. 1f.

annexes or protocols with more detailed obligations. This approach with a limited number of States will certainly have to face the fact that without US participation or at least toleration, new breakthroughs are unlikely to happen.

#### f) NSA-Mechanisms

Non-state actors play an increasingly important role in areas where weapons are easily obtainable and internal conflicts exist. There are many challenges to the international community that have to be approached in new ways:

- Parties to international regulations are States. In countries where the Government does not enjoy full control over its territory, it may be important also to bring in the *de facto* powers (e.g. 1997 Ottawa Convention on the Prohibition of Anti-personnel Landmines).
- Concerning the threat that non-state actors might access to weapons of mass destruction, the UN Security Council adopted in April 2004 the Resolution 1540<sup>57</sup> urging Member States to improve the security and protection of material, technologies and facilities related to weapons of mass destruction or to components thereof.
- As universalisation is crucial for the success of international instruments, it may be necessary to mobilise all important actors to support new regulations.

The involvement of NSA in international law very quickly leads to *de facto* recognition that provokes not only an adverse response of the concerned or possible State Party but puts into question the entire legal approach.

### III. OPEN ISSUES

22. The past years have witnessed a slowing down and, in some respects, even a **reversal of arms control endeavours**. The increasing preference of the United States for unilateral action with respect to weapons of mass destruction, the increase of unsupported allegations of possession and development of weapons of mass destruction, the unilateral withdrawal of the United States from the ABM treaty and the BWC protocol negotiations, the emergence of new avowed nuclear powers, the stalemate in the Conference on Disarmament as well as in the UN Disarmament Commission (UNDC), the emergence of new forms of security threats such as global terrorism after September 11 and the possible access of non-state actors to weapons of mass destruction, are just some of the most disturbing recent developments. With respect to the existing international control regimes, too, there are some disquieting trends. The available resources for existing verification organisations in the nuclear and chemical area have become stagnant. They are barely sufficient for maintaining the current level of activities and do not allow further technical developments. After the breakdown of the negotiations for a BWC protocol, the prospects for establishing an international verification organisation for the use of biological weapons has become very slim. Probable alternative measures should be envisaged, if future unknown outbreaks of infectious disease have to be properly investigated. Currently, efforts are being made to preserve the existing verification experience of both UNSCOM and UNMOVIC at international level and to establish a permanent international verification body under the authority of the UN Secretary General. These trends may underline the importance of the Committee's work and the need for even greater efforts in the area of arms control and disarmament law.
23. **Terrorism and counter-terrorism measures** bring up a gamut of legal questions which are likewise relevant to the field of arms control<sup>58</sup>. A dirty bomb or chemical and biological agents in the hands of terrorists are especially effective in causing terror and achieving political effects. Thus it comes as no surprise that the so called "war on terrorism" points especially to terrorist links with known and alleged possessors of WMD. Terrorism strikes directly at the heart of democracy and the rule of law. Democratic States must have the right to fight effectively against terrorism<sup>59</sup>. However, if counter-terrorist actions violate the rule of

<sup>57</sup> Adopted by the Security Council at its 4956<sup>th</sup> meeting, on 28 April 2004.

<sup>58</sup> Erwin Dahinden, *Terrorism: Military and Legal Challenges*, in *International Peacekeeping: The Yearbook of International Peace Operations*, Volume 8, 2002, pp. 315-331.

<sup>59</sup> Bucharest Ministerial Declaration, Bucharest, 4 December 2001 and Ministerial Council Decision No.1 Combating Terrorism with the Annex „the Bucharest Plan of Action on Combating Terrorism“.

law and fundamental human rights, the strategy behind counter-terrorism is undermined and the terrorists' basic objectives may eventually be realised. Governments must take appropriate action to protect their population. Counter-terrorism in this context is more than a fight for maintaining power. It is the defence of the basic rights of human beings as individuals and members of the society. Human rights have not only to be declared but also to be defended. That is why human rights oblige States to protect against terrorism and provide the necessary flexibility for adequate measures. Criteria of proportionality must be applied with utmost diligence in areas where derogation and limitation of human rights may be required and justifiable: right to a fair trial, right to liberty and security, freedom of opinion, freedom of assembly and association, right to privacy, abolition of the death penalty, protection of the rights of the child, rights of juvenile suspects. National legislation must be harmonised in order to facilitate international investigations and the prosecution of terrorists and terrorist supporters, including the extradition of suspects.

In the wake of the September 11 terrorist attacks against the United States, the Ministerial Council of the OSCE adopted the Bucharest Plan of Action on Combating Terrorism.<sup>60</sup> The OSCE Forum for Security Co-operation (FSC) subsequently developed a "Road Map" to strengthen the efforts of participating States to combat terrorism, in particular through full and timely implementation of all relevant measures agreed.<sup>61</sup> The Road Map also stipulated enhanced implementation and application with regard to the politico-military commitments and agreements of the OSCE, in particular of the "OSCE Code of Conduct on Politico-Military Aspects of Security" and the "OSCE Document on Small Arms and Light Weapons" and their respective questionnaires along with the "Questionnaire on the Process of Ratification of the Chemical Weapons Convention". The most recent decision taken with a view to contributing and reinforcing the OSCE's efforts to prevent and combat terrorism are the OSCE Principles on MANPADS.<sup>62</sup>

In direct response to the terrorists bombings in Madrid on 11 March 2004, the European Union and its Member States adopted the "Declaration on Combating Terrorism"<sup>63</sup> pledging to do everything within their power to combat all forms of terrorism in accordance with the fundamental principles of the Union, the provisions of the Charter of the United Nations and the obligations set out under United Nations Security Council Resolution 1373 (2001). Among others, the declaration compels member States to ensure co-operation of law enforcement agencies, strengthening of border controls, sharing of intelligence and prevention of financing of terrorism.

24. Far more still remains to be done in the following areas of investigation and innovation relevant to the legal regulation of armament and disarmament:
- a) **general principles** of international law as applicable to arms control and disarmament,
  - b) legal responses to the continuing challenge of **non-proliferation**,
  - c) legal considerations to support the **implementation** of the CTBT, the BWC,
  - d) international and national legal contributions to limit and restrict **conventional weapons**, and
  - e) the role of **bilateral agreements** and the protection of the legitimate concerns of third-party States:
- they all must be pursued with similar priority.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

25. While the general principles and rules of international law apply in the field of arms control and disarmament as they do throughout the whole body of international law due to the special nature of the subject, the **need to adopt emerging concepts and methods** is often felt. This may be true for substantive rules and for procedural rules (supervision, monitoring, sanctions)

<sup>60</sup> „Road Map of the FSC for Implementation of the Bucharest Plan of Action for Combating Terrorism" of 20 March 2002, which also includes the obligation to report the status and steps taken towards the ratification of the 12 United Nations Anti-terrorist Conventions and Protocols set out under United Nations Security Council Resolution 1373 (2001).

<sup>61</sup> FSC Decision No. 3/04 „OSCE Principles for Export Controls of Man-Portable Air Defence Systems (MANPADS) of 26 May 2004.

<sup>62</sup> The "Declaration on Combating Terrorism" was adopted in Brussels on 25 March 2004.

as well as for evolving principles and new techniques of arms regulation (co-operation, transparency, confidence-building, unilateral implementation). While security can be enhanced with the utilisation of up-to-date technologies and the traditional objectives of arms control and disarmament remain valid<sup>64</sup>, greater flexibility will depend on innovative legal thinking and accelerated methods of consensus building, with regard both to the creation of arms control treaty regimes and to their successful evolution over time and following changed circumstances. Thus, the overall goal to be achieved is: *Security with flexibility in arms control legislation.*

26. The work of the Committee has contributed to a systematic evaluation of the **legal measures necessary to ensure the effective functioning of arms control and disarmament agreements**, such as the significance of general principles of international law (including international humanitarian law) and their application, legal restraints in arms proliferation, national and international verification measures, and legal remedies of arms control impasse. The interdependence between different fields of international law and the importance of concerted action at national, regional and international level have vigorously been underlined in the process of the Committee's work.
27. At the same time, the need for an in-depth study of certain aspects and the requirement of an assessment of new issues relevant for a progressive arms control process has been revealed. A growing awareness of the importance of legal considerations may be seen as a result of the arms control impasse in complex security environments, but it could also be viewed as a challenge for lawyers to elaborate viable solutions for effective **implementation of international, regional and national measures.**
28. This underlines the requirement for continued legal efforts, that could best be promoted by a **new committee of Governments and academic experts** representing all the relevant legal disciplines and regions where arms control efforts are progressively developing. Good working conditions may be a problem also in the future. In this respect, wider participation at ILA Conferences would be essential. This should be encouraged by appropriate programs and organisational means. Cross-fertilisation with the work of other ILA Committees might thus be enhanced in the future.
29. A necessary next step would be establishing a new *Committee on Arms Regulation* with the following **mandate**: to assess new security strategies, including the question of pre-emptive military actions against illegal activities with weapons of mass destruction:
  - to compare the NPT, OPCW and CTBT regimes with a particular view on the development and continued effectiveness of routine inspections in the absence of short-notice challenge inspections;
  - to evaluate export control measures as a means to counter proliferation;
  - to examine legal aspects of post-conflict peace building (i.e. applicable law, procedural aspects of implementation, remedies against violation).
30. More specifically, the new Committee would
  - examine the legal aspects to defend against measures directed at jeopardising survivability;
  - assess the legal aspects of defence against non-state actors;
  - discuss defence against measures undermining social security (drug dealers);
  - examine the legal rules for proportionate response against regional attacks;

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<sup>64</sup> This is necessary to reduce the arms race and primarily the risks and costs at the lowest possible level of armament; to maintain stability and stabilise on-going arms races; to improve predictability and foster transparency; to reduce the risk of accidental war; to prevent surprise attacks.

- examine proliferation of high-tech conventional weapons and small arms and light weapons to third-party States and non-state actors;
- assess activities related to the new Proliferation Security initiative (PSI) and/or other new instruments, such as the HCOC (The Hague Code of Conduct Against Ballistic Missiles Proliferation);
- determine the applicability of relevant international treaty law and other sources of law to new issues and security challenges, such as global terrorism, non-state actors and the security and protection of nuclear, biological and chemical materials and equipment;
- determine the contribution that politically binding agreements as opposed to traditional legally binding ones can make in the current complex environment;
- explore the need and possible modalities for the improvement of existing and additional obligations, including the development of model agreements, codes of conduct, guidelines for better national implementations and development of new approaches as well as legal, technical and other tools;
- investigate the role, contribution and responsibility of international organisations in the field of arms regulation;
- assess new challenges – technical and other – for the effective implementation of relevant rules and provisions;
- explore the interrelationship of international, regional and national measures to ensure compliance and application;
- explore alternative models and approaches to arms control and disarmament verification, including the possibility of establishing a permanent international inspection body in the area of weapons of mass destruction and
- establish rules for a *ius post bellum* (limits of the law of occupation, human rights, national law, role of international organisations).

31. Under such a mandate, broad and specific challenges would have to be faced. An interdisciplinary approach and extensive co-operation with other related Committees would be essential. The complex relationship between arms regulation and the development of the economic order, the environmental challenges involved, implementation techniques under the existing communication order, and the effects for the cultural dialogue mark the requirements and difficulties for an agenda yet to be accomplished.