

Disarmament and Arms Limitation Obligations Problems of Compliance and Enforcement

UNIDIR

United Nations Institute for Disarmament Research

UNIDIR is an autonomous institution within the framework of the United Nations. It was established in 1980 by the General Assembly for the purpose of undertaking independent research on disarmament and related problems, particularly international security issues.

The work of the Institute aims at:

1. Providing the international community with more diversified and complete data on problems relating to international security, the armaments race, and disarmament in all fields, particularly in the nuclear field, so as to facilitate progress, through negotiations, towards greater security for all states and toward the economic and social development of all peoples;
2. Promoting informed participation by all states in disarmament efforts;
3. Assisting ongoing negotiations in disarmament and continuing efforts to ensure greater international security at a progressively lower level of armaments, particularly nuclear armaments, by means of objective and factual studies and analyses;
4. Carrying out more in-depth, forward-looking, and long-term research on disarmament, so as to provide a general insight into the problems involved, and stimulating new initiatives for new negotiations.

The contents of UNIDIR publications are the responsibility of the authors and not of UNIDIR. Although UNIDIR takes no position on the views and conclusions expressed by the authors of its research reports, it does assume responsibility for determining whether they merit publication.

UNIDIR

Palais des Nations
CH-1211 Geneva 10
Tel. (41.22) 917.31.86/42.92
Fax (41.22) 917.01.76

Disarmament and Arms Limitation Obligations: Problems of Compliance and Enforcement

Serge Sur
Editor

UNIDIR
United Nations Institute for Disarmament Research

Dartmouth
Aldershot @Brookfield USA @Singapore @Sydney

© United Nations Institute for Disarmament Research 1994

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior permission of Dartmouth Publishing Company Limited.

Published by
Dartmouth Publishing Company Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Dartmouth Publishing Company
Old Post Road
Brookfield
Vermont 05036
USA

A CIP catalogue record for this book is available from the British Library and the US Library of Congress.

ISBN 1 85521 589 6

Printed in Great Britain at the University Press, Cambridge

Table of Contents

	Page
Preface	ix
List of Acronyms	xi
Introduction - Serge Sur	1
Part I Compliance and Enforcement Practices in a Changing International System	13
Chapter 1 Arms Control Compliance and Enforcement - Why Do They Matter? - Joachim Krause	15
Chapter 2 Current Experiences (I): Bilateral Agreements	25
2.1 An American View Amy Smithson	25
2.2 A Russian View Mikhail V. Berdennikov	41
2.3 Responses	57
2.3.1 Amy Smithson	57
2.3.2 Mikhail V. Berdennikov	58
2.3.3 Alan Crawford	58
2.3.4 Amy Smithson	60
2.3.5 Harald Müller	60
2.3.6 Amy Smithson	62
Chapter 3 Current Experiences (II): Implementation of UN Security Council Resolution 687 (1991)	63
3.1 Analysis of Practice and Problems Pierce Corden	63
3.2 Responses	75
3.2.1 Pierce Corden	75
3.2.2 Jan Priest	76
3.2.3 Pierce Corden	77
3.2.4 Jan Priest	78
3.2.5 Pierce Corden	78
3.2.6 Ralf Trapp	79
3.2.7 Pierce Corden	79

))

Chapter 11 Responses	213
11.1 <i>Hubert Thierry</i>	213
11.2 <i>Pierce Corden</i>	214
11.3 <i>Harald Müller</i>	215
11.4 <i>Mounir Zahran</i>	216
11.5 <i>Hartmut Pohlman</i>	216
11.6 <i>Gilles Cottereau</i>	217
11.7 <i>Hassan Mashhadi</i>	217
11.8 <i>Ralf Trapp</i>	218
11.9 <i>Alan Crawford</i>	219
11.10 <i>Serge Sur</i>	219
11.11 <i>Elinor Hammarskjöld</i>	220
11.12 <i>Alan Crawford</i>	222
11.13 <i>Ronald F. Lehman II</i>	224
Part IV Prospects for Development of International Mechanisms	229
Chapter 12 Prospects for Development of International Mechanisms: A Comprehensive Approach <i>Chantal de Jonge Oudraat</i>	231
Chapter 13 Specific Approaches: Nuclear, Chemical and Biological Proliferation - <i>Harald Müller</i>	251
Chapter 14 Responses	273
14.1 <i>Amy Smithson</i>	273
14.2 <i>Henny J. van der Graaf</i>	273
14.3 <i>Ariel Levite</i>	274
14.4 <i>Mounir Zahran</i>	275
14.5 <i>Jan Priest</i>	275
14.6 <i>Sola Ogunbanwo</i>	277
14.7 <i>Harald Müller</i>	278
Chapter 15 Responses to Violations of Arms Control Agreements <i>Jozef Goldblat and Péricles Gasparini Alves</i>	281
List of Authors	287

Preface

Although it is widely assumed that states enter international treaties in good faith, most disarmament and arms limitation agreements provide for verification of obligations undertaken by the parties. Verification serves to demonstrate that the prohibited activities are not taking place, and thus fulfils a confidence-building function. Its main purpose, however, is to deter cheating.

The means of verification differ depending on the extent to which a possible violation of a treaty may jeopardize the security of the parties. They were described and analyzed in two books published by UNIDIR: *Verification of Current Disarmament and Arms Limitation Agreements - Ways, Means and Practices*¹ and *Verification of Disarmament or Limitation of Armaments: Instruments, Negotiations, Proposals*.² This volume carries UNIDIR research further. It examines those cases where deterrence of violations has failed, and where parties have engaged in outlawed activities in disregard of their legal commitments. Since the responses to these occurrences are generally judged to have lacked in adequacy, new approaches to enforcement of the obligations are proposed.

This book consists of papers written by various authors and submitted at a conference held in Geneva in August 1993. The project was generously supported by Volkswagen Stiftung.

Professor Serge Sur, Deputy Director of UNIDIR, co-ordinated the project and edited this publication. My thanks go to all the contributors. I should also like to express my appreciation to Kent Highnam who carried out the language editing of the texts, and to Anita Blétry who prepared the manuscript for publication.

The views expressed by the authors are their own and not necessarily those of UNIDIR. Nevertheless, UNIDIR commends this report to the attention of its readers.

Sverre Lodgaard
Director
UNIDIR

¹ Edited by Serge Sur, 1991, 396p., published for UNIDIR by Dartmouth (Aldershot).

² Edited by Serge Sur, 1992, 267p., United Nations publications.

List of Acronyms

ABM	Anti-Ballistic Missile
ACDA	Arms Control and Disarmament Agency
ALCM	Air-Launched Cruise Missile
ASEAN	Association of South-East Asian Nations
ATTU	Atlantic to the Ural
BTWC	Biological and Toxin Weapons Convention
BWC	Biological Weapons Convention
CBMs	Confidence-Building Measures
CD	Conference on Disarmament
CFE	Conventional Forces in Europe
CIS	Commonwealth of Independent States
COCOM	Committee for Multilateral Export Controls
CPA	Act on Chemical Products
CSCE	Conference on Security and Co-operation in Europe
CTB(T)	Comprehensive Test Ban (Treaty)
CWC	Chemical Weapons Convention
DEA	Drug Enforcement Administration
DPRK	Democratic People's Republic of Korea
EEC	European Economic Community
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (or Environmental Modification)
FOA	National Defence Research Establishment
IAEA	International Atomic Energy Agency
ICBM	Intercontinental Ballistic Missile
ICJ	International Court of Justice
ILO	International Labour Office
INF	Intermediate-Range Nuclear Forces (Treaty)
ITU	International Telecommunication Union
JCIC	Joint Compliance and Inspection Commission
LTBT	Limited Test Ban Treaty
MDA	Mass Destruction Purposes
MEA	Act and Ordinance concerning Military Equipment
MTCR	Missile Technology Control Regime
NATO	North Atlantic Treaty Organization
NPT	Non-Proliferation Treaty
NSG	Nuclear Suppliers Group
NST	Nuclear and Space Talks
NTM	National Technical Means
NNWS	Non-nuclear Weapon State

))))))))))

- NWFZ Nuclear Weapon-Free Zone
- OAS Organization of American States
- ODA Official Development Assistance
- OECD Organization for Economic Co-operation and Development
- OPANAL Organismo para la Proscripcion de las Armas Nucleares en la Americana Latina (Agency for the Prohibition of Nuclear Weapons in Latin America)
- OPCW Organization for the Prohibition of Chemical Weapons
- PPCM Perimeter and Portal Continuous Monitoring
- SALT Strategic Arms Limitation Treaty or Talks
- SCC Standing Consultative Commission
- SCR Security Council Resolution
- SDI Strategic Defence Initiative
- SFDI Société Française pour le Droit International
- SIPRI Stockholm International Peace Research Institute
- SLBM Submarine-Launched Ballistic Missile
- SLV Space Launch Vehicle
- SSAC State's System of Accounting and Control
- START Reduction and Limitation of Strategic Arms
- TTBT Threshold Test Ban Treaty
- UN United Nations
- UNEP United Nations Environment Programme
- UNICEF United Nations Children's Fund
- UNSC United Nations Security Council
- UNSCOM United Nations Special Commission
- WEU Western Europe Union

Introduction

Serge Sur

This publication is part of a series of research activities undertaken by UNIDIR concerning the problems of verification. Initially, the focus was on analysing the existing provisions of the various current treaties and their operation. Research was concerned with assessing the effectiveness of established procedures and the extent to which parties were satisfied with them. Subsequently, the project turned its attention to the various negotiations under way and to the main proposals concerning the development of verification procedures and machinery.

These two successive stages were reflected in two publications: *Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices*¹ and *Verification of Disarmament or Limitation of Armaments: Instruments, Negotiations, Proposals*.² The purpose of the current research, which represents a third phase, is substantially different. It is far more concerned with the functions of verification, with its ultimate purpose, with the consequences that ensue from verification, or even from its very existence, than with its actual substance. In other words, the aim is not to analyse the constituent parts of verification, to describe its procedures and means, to assess its implementation and effectiveness but rather to examine the following issues: first of all, if verification gives rise to doubt about a state's compliance with its obligations, how is it possible to show that they have been breached, or, conversely, how is it possible to ensure they are complied with? Subsequently, if the violation is established, what are the possible consequences? Is it possible to conceive of coercive measures being taken against the recalcitrant state? How is it possible to protect the interests of other states that suffer as a result of the violation?

Clearly, these are not academic or theoretical issues, even though they are rarely raised in practice. They call into question the very significance and usefulness of verification. What would be the use of verification, what would be the point of developing increasingly intrusive machinery, if the possible conclusions led nowhere? There is thus a close functional, if not conceptual, link between verification and enforcement measures.

This link is at the same time more diversified than is apparent. On the one hand, ensuring compliance with obligations, or establishing that they have been infringed, is certainly a matter for verification in the proper sense of the word. On the other hand, compliance with obligations involves their implementation and proper application. Thus the question of observance of treaties and enforcement measures regarding treaties involves a blend of primary and secondary obligations, among which verification is a point of transit, or a kind of intermediary. The primary obligation is to comply with the treaty and to implement it. The secondary obligation is to accept any verification procedures, and to

¹ Edited by Serge Sur, 1991, 396p., published for UNIDIR by Dartmouth (Aldershot).

² Edited by Serge Sur, 1992, 267p., United Nations publications.

)))))))))

accept the possible consequences of failure to comply with the undertakings that have been made or accepted. For example, a state accepts the destruction of certain types of weapons. Their destruction constitutes the fulfilment of what appears to be a primary obligation. The destruction represents the carrying out or performance of the undertaking. However, acceptance of verification procedures represents a secondary obligation, reinforcing the primary obligation. Verification will establish whether or not the primary obligation has been complied with, whether the destruction agreed upon has actually been carried out. Assuming it is not actually carried out, the injured states could adopt measures to bring secondary obligations to bear on the perpetrator of the violation.

For this reason it is desirable first of all to clarify a number of concepts, and in particular the links that develop between them in the course of the disarmament or arms limitation process: verification and observance of instruments; verification, application and enforcement; treaty observance procedures; different types of violation; and different types of reaction.

1. Verification and Observance of Instruments

First of all, how should verification be defined? The issue is not merely abstract or academic, as it makes it possible to identify the substance of what follows. In particular, it is important to distinguish between verification in the strict sense of monitoring, on the one hand, and measures to enforce compliance with obligations on the other. Previous research by UNIDIR contains the following analysis of the verification process: in very general terms, it may be stated that verification is *a process covering the entire set of measures aimed at enabling the Parties to an agreement to establish that the conduct of the other Parties is not incompatible with the obligations they have assumed under that agreement.*³

It is widely agreed that the verification process includes the following components:

- (a) The existence of an obligation, the fulfilment and observance of which must be verified;
- (b) The gathering of information relating to the fulfilment of the obligation;
- (c) The analysis, interpretation and evaluation of the information from a technical, juridical and political viewpoint;
- (d) The assessment concerning observance or non-observance of the obligation, which concludes the actual verification exercise. While the problem of appropriate reactions to the possible violation of an obligation appears to be a logical consequence of this exercise, it is not in itself an integral part of verification.⁴

³ Serge Sur (ed.), *Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices*, Aldershot, published for UNIDIR by Dartmouth, 1991, p.13.

⁴ Serge Sur (ed.), *Verification of Disarmament or Limitation of Armaments: Instruments, Negotiations, Proposals*, Geneva, United Nations, 1992, p.1.

))

enforcement of obligations. In the face of established violations, a state may react, if necessary, by countermeasures restricting exports or designed to impose constraints on a state failing to comply with its undertakings. Such measures will involve the introduction of administrative measures, occasionally on the basis of legislative provisions which the courts of the country concerned will be able to monitor.

Thus, domestic law needs to be viewed from three angles: either it is self-sufficient and constitutes a satisfactory alternative to international obligations; or it operates as a national measure of application in respect of the obligations; or it makes it possible to adopt corrective measures if the obligations are disregarded. It is thus exceedingly important for these domestic provisions as a whole to be systematically known, internationally publicized, classified and disseminated. This would ensure better knowledge of practice; on this basis it would be possible to develop constructive cooperation; recalcitrant countries would be aware of the harmful consequences to which violations would expose them.

Whatever the case, recourse by international instruments to measures to promote the observance of treaties, or more particularly to enforcement measures designed to ensure observance of a disregarded treaty, is no longer part of the verification process proper. It is nevertheless closely linked to it. First of all, both pursue a common goal, namely, to contribute to the proper performance of an international obligation. Moreover, they mutually condition one another. How is it possible to establish a violation without verification, and why should there be verification if no conclusions are drawn from it?

Nevertheless, the interest taken in appropriate reactions or responses to violations is seriously inadequate. In addition, the corresponding provisions of the relevant treaties or instruments are generally, when they exist, of limited scope.

Certainly the nature of a treaty is different from the nature of obligations unilaterally imposed on a state, as was recently shown in the case of Iraq and Security Council Resolution 687. In the latter case, it is clear that, even if a state has to accept certain obligations, it only does so against its will and participates in the enforcement of such obligations with much resistance. In the case of treaties, the agreement between parties supposes that the balance between their interests is guaranteed and that each one estimates that it is advantageous to accept the obligations which might contribute to the reinforcement of their security or, at a minimum, to their stability.

This is why it is necessary to envisage mandatory enforcement mechanisms for unilaterally-imposed obligations, like the Security Council does with Resolution 687. On the other hand, it is *a priori* not necessary to do so in treaties or agreements, particularly if they correspond both to the common interest and to the individual interests of the parties. It might be expected that they will respect and spontaneously implement the treaty obligations, which are based on their own voluntary engagement. In this sense, it might seem to some extent superfluous to envisage mandatory enforcement mechanisms which could be said to be contradictory to the mutual confidence that must exist between parties to the same agreement. It may, in this respect, be observed that the majority of the principal treaties have been complied with on a global scale, even though none of them contained enforcement mechanisms.

))

as envisaged in the European framework (CFE Treaty, 1990), might jeopardize the entire disarmament process already under way.

As soon as one is engaged in the process of prohibiting production and in destroying arms - as soon as one is no longer engaged in the process of merely prohibiting tests or the deployment of certain weapons - a heightened vigilance seems to be indispensable: a refinement of the obligations must be accompanied by improved compliance and enforcement mechanisms.

3. Treaty Observance Procedures

The report aims to examine the different means and procedures which might facilitate compliance and enforcement with disarmament and arms limitation treaties and agreements. It assesses different possibilities and methods.

Certain general requirements are not always met by the treaties or agreements in question - for instance, the necessity to produce clear and precise texts which raise the fewest possible difficulties in interpretation. This requirement is all the more important for treaties concluded in different languages. The 1972 ABM Treaty constitutes, in this regard, a perfect counter-example. It concerns legal preoccupations, and it is regrettable from this point of view that the role of the legal specialist is so often limited in the negotiations, especially when compared to that of the technicians and other experts. A treaty leads to a juridically-binding text, and its vocabulary, like its articulation, must be carefully crafted. It is true that this concern permits only the elimination of involuntary discrepancies. It is well-known that a great number of ambiguities are actually voluntary and result from the impossibility of coming to a perfect agreement. But a constructive ambiguity can sometimes become a destructive misunderstanding.

Furthermore, it is also necessary for each state to anticipate the conditions of the treaty's implementation with respect to its own internal legislation - i.e. to take the legislative, administrative, and judiciary measures which allow for its respect within the framework of each state. This requirement is all the more important in the context of treaties containing more intrusive verification procedures - for example, in the nuclear, biological, or chemical fields, or in the area of technology transfers, which warrant very strict state controls on private activities that are conducted either on a state's territory or abroad, by its nationals. It should be observed that many treaties are silent on this issue or only include obligations of principle which are far from being complied with at all times; an example is the Convention on Biological Weapons.

This demand is even more imperative when considering that, in principle, a treaty cannot be dispensed with when internal legislation is insufficient. If the activities to be prohibited are foreclosed by national law, and if this legislation contains adequate guarantees for its respect, control and implementation, then an international treaty is not necessary. Reciprocally, the best guarantee of compliance with an international treaty resides in the conditions of its implementation, conditions which the state imposes on itself, as on its nationals and on the activities that take place on its soil.

))

jeopardize the relations between states, without truly safeguarding the object and the purpose of the treaty.

Certain measures foreseen by the treaties currently in force present the same inconvenience. This is especially true in some provisions allowing for the withdrawal from the treaty, following brief notification; while the reasons are most often not clearly specified, they evidently incorporate the hypothesis of another party's violation. In such a case, it is the entire régime established by the treaty that risks being destroyed without allowing for alternative security guarantees.

These criticisms do not apply to international machinery, which offers, beyond its collective nature, the advantage of greater objectivity. It is moreover directed more towards restoring observance of the treaty and preserving its authority than towards the narrow and short-term preservation of the interests of one or more specific parties, possibly to the detriment of the treaty. However, this distinction should not be overemphasized. In some cases, negotiations, even bilateral ones, may be better suited to the objectives of a treaty than a set of collectively developed coercive measures. Thus, in the case of North Korea, it would appear that observance of the NPT can be better secured by negotiations between the United States and North Korea than by the intervention of the Security Council. At the very least, these two techniques are not mutually contradictory but combine and complement one another. Political and diplomatic practice is always richer and more flexible, in adjusting to specific cases, than rigid and *a priori* theoretical classifications. Such classifications are nevertheless of interest, as they define a range of options which may permit analysis of specific cases and the choice of appropriate responses.

The analysis and assessment of the possibility and efficiency of the different types of reactions, as well as of the modalities of their corporation in the concerned treaties and agreements, constitute the core of this project. We may tentatively adopt the following classification:

- (a) An initial functional distinction would distinguish between the interest or interests that the reactions seek to defend. *The individual interests of one or more parties* may be at stake - in which case suspension of a treaty, withdrawal, or even counter-measures could follow. But it may also be a question of *the interest of the treaty*, in which case it is best to ensure that the treaty remains in force, via measures designed to reinforce its application. The two types of measures are not necessarily incompatible, but it must be stressed that they correspond to very different preoccupations.
- (b) Another distinction could focus on *the procedures* of implementation and enforcement: reactions are either spontaneous, or are regulated and subject to certain prerequisites, such as notifications, requests for explanations, postponements, etc.
- (c) An important distinction could be made between unilateral and collective reactions. The former are taken by each party for its own benefit, while the latter are subject to a process of examination, discussion, and adoption by all the interested parties. They may likewise be carried out or elaborated upon by an

))

a kind of penalty previously established by the law and appropriate to the infraction of the law; (4) a specific repressive purpose, the sanction being designed to reaffirm the sanctity of law and punish these who do not respect it.

Measures are taken in a very different spirit, which is an executive one. They intend to ensure the application of law, and also to protect the interests of the states affected by the supposed violations. They are not linked to a specific process, they can be taken by every state according to its evaluation and interests, or by an international political body. For instance, in the correct meaning of that word, the Security Council is not taking sanctions but measures, perhaps coercive ones, in order to maintain or establish international peace and security. It is not a judicial process, there is not an established list of cases relevant to its competence, neither the obligations of hearing all the concerned parties, nor a limitation and adopted list of the kind of measures it is able to take. By no means is it a judicial body.

In our context, measures and sanctions are not only opposed. They are complementary, in so far as sanctions, were they to be decided, would be a component of a larger set of measures designed to ensure a correct implementation of states' commitments.

* * *

This volume contains four parts. The first, *Compliance and Enforcement Practices in a Changing International System*, comprises three chapters. They successively develop a balanced appreciation of enforcement measures in the current international context (Joachim Krause); an analysis of the bilateral agreements and negotiations between the United States and the Soviet Union, then Russia (Amy Smithson and Mikhail V. Berdennikov); a study of the practice of resolution 687, adopted by the Security Council on 3 April 1991, in the case of the Gulf (Pierce Corden). The second part, *Multilateral and Regional Treaty Provisions*, devotes four chapters to an overall examination of the multilateral and regional treaties (Gilles Cottereau); to multilateral agreements (Hassan Mashhadi); to regional agreements (José Eduardo Felicio and Sola Ogunbanwo); and to overall observations and comments. The third part, *Domestic Law: Current Situation and Potential Improvements*, considers the vital issue of domestic measures, so decisive is the role played by national legislation both in applying instruments and in reacting against breaches of them. General considerations are dealt with by Ronald Lehmann and an assessment of the current situation and possible improvements is made by Alan Crawford, while Elinor Hammar skjöld provides a number of illustrations of the current situation. This is followed, in a third chapter, by relevant observations and comments. The fourth part is on *Prospects for Development of International Mechanisms*. Chantal de Jonge Oudraat considers their general aspects and Harald Müller their specific aspects in the spheres of nuclear, biological and chemical proliferation. This is followed by observations and comments. Finally, concluding remarks on the topic as a whole are presented by Jozef Goldblat and Péricles Gasparini Alves.

Some chapters or sections have been written by a single author who has explored his analyses. Others comprise a number of reactions to the exploration, or the discussions to which it has given rise. This approach ensures a diversity of views about a particular topic,

))

which is especially necessary in so open a field, which is in some respects controversial and in many others innovative.