# 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 1855215896

Printed in Great Britain at the University Press, Cambridge

## Table of Contents

	Page	
	nyms xi	
Introductio	<b>n</b> - Serge Sur	
Part I	Compliance and Enforcement Practices in a Changing International System	
Chapter 1	Arms Control Compliance and Enforcement - Why Do They Matter? - Joachim Krause	
Chapter 2	Current Experiences (I): Bilateral Agreements	
2.1	An American View Amy Smithson	
2.2	A Russian View  Mikhail V. Berdennikov	
2.3	Responses	
	2.3.1 Amy Smithson	
	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)	
3.1	Analysis of Practice and Problems  Pierce Corden	
3.2	Responses	
3 <b>.2</b>	3.2.1 Pierce Corden	
	3.2.2 Jan Priest	
	3.2.3 Pierce Corden	
	3.2.4 Jan Priest	
	3.2.5 Pierce Corden	
	3.2.6 Ralf Trapp 79	
	3.2.7 Pierce Corden	

vi )))))))))))))))	Disarmament: Compliance and Enforcement		
Part II	Multilateral and Regional Treaty Provisions 81		
Chapter 4	Application and Compliance of Disarmament Agreements: An Overview - Gilles Cottereau		
Chapter 5	Multilateral Agreements Hassan Mashhadi		
Chapter 6	Regional Treaties		
6.1	Problems of Compliance and Enforcement of Regional Arms Limitation Treaties and Agreement		
6.2	José Eduardo M. Felicio119Nuclear Weapon-Free Zone in Africa50la Ogunbanwo136		
Chapter 7	Responses		
7.1 7.2 7.3 7.4 7.5 7.6 7.7 7.8	Harald Müller143Serge Sur144Jan Priest145Ariel Levite146Ralf Trapp148Hassan Mashhadi149José Eduardo M. Felicio150Gilles Cottereau150		
Part III	Domestic Law: Current Situation and Potential Improvements		
Chapter 8	The Importance of Domestic Law to International Arms Control - Ronald F. Lehman II		
Chapter 9	Domestic Law: Potential Improvements Alan Crawford		
Chapter 10	Current Situation: An Analysis of Some Examples Elinor Hammarskjöld		

Table of Contents ))))))))))))))))))))))))))))))))))))			
Chapter 11	<b>Responses</b>		
11.12	Hubert Thierry       213         Pierce Corden       214         Harald Müller       215         Mounir Zahran       216         Hartmut Pohlman       216         Gilles Cottereau       217         Hassan Mashhadi       217         Ralf Trapp       218         Alan Crawford       219         Serge Sur       219         Elinor Hammarskjöld       220         Alan Crawford       222         Ronald F. Lehman II       224		
Part IV	Prospects for Development of International Mechanisms		
Chapter 12	Prospects for Development of International Mechanisms: A Comprehensive Approach Chantal de Jonge Oudraat		
Chapter 13	Specific Approaches: Nuclear, Chemical and Biological Proliferation - Harald Müller		
Chapter 14	Responses		
14.1 14.2 14.3 14.4 14.5 14.6 14.7	Amy Smithson       273         Henny J. van der Graaf       273         Ariel Levite       274         Mounir Zahran       275         Jan Priest       275         Sola Ogunbanwo       277         Harald Müller       278		
Chapter 15	Responses to Violations of Arms Control Agreements  Jozef Goldblat and Péricles Gasparini Alves		
List of Autho	ors 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<sup>1</sup> and Verification of Disarmament or Limitation of Armaments: Instruments, Negotiations, Proposals.<sup>2</sup> 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

<sup>&</sup>lt;sup>1</sup> Edited by Serge Sur, 1991, 396p., published for UNIDIR by Dartmouth (Aldershot).

<sup>&</sup>lt;sup>2</sup> 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 Practices¹ 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

<sup>&</sup>lt;sup>1</sup> Edited by Serge Sur, 1991, 396p., published for UNIDIR by Dartmouth (Aldershot).

<sup>&</sup>lt;sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup>

<sup>&</sup>lt;sup>3</sup> Serge Sur (ed.), Verification of Current Disarmament and Arms Limitation Agreements: Ways, Means and Practices, Aldershot, published for UNIDIR by Dartmouth, 1991, p.13.

<sup>&</sup>lt;sup>4</sup> Serge Sur (ed.), Verification of Disarmament or Limitation of Armaments: Instruments, Negotiations, Proposals, Geneva, United Nations, 1992, p.1.

For our purposes, the conclusions drawn regarding the observance of a treaty should be considered as an integral part of the verification process. However, it is necessary to distinguish between two hypotheses: either the conclusions are drawn by a party to a treaty in isolation, and lead it to form an individual judgement; or a procedure common to all the parties will be applied, leading to a judgement concerning the observance or non-observance of the treaty, which will be binding on all. This is not merely a legal question. It is closely linked to the conclusions that may be drawn from a possible violation. In the first case, there would be a tendency for the state which considers that it has been the victim of a violation to react in isolation, unilaterally to defend its own interests. In the second case, collective action in the common interest is capable of safeguarding and ensuring the performance of the treaty.

3

### 2. Verification, Application and Enforcement

This calls for a distinction between treaty enforcement measures and treaty application measures. Treaty application measures, or measures for the initial performance of the treaty, are, as has already been observed, of a primary nature, as they involve the normal implementation of the treaty. Enforcement measures are of a secondary nature as they are a reaction to an established or alleged violation. The two types of measures are of course not unconnected and may sometimes overlap. Application is a factor of observance. Non-application by a party may on the other hand be a response to an allegation of a violation directed at the other party. Accordingly, when considering problems connected with observance of obligations and measures to promote it, it is essential to examine the means of implementing treaties and everything capable of facilitating them, which is what this publication sets out to do.

In this respect, it is impossible to exaggerate the importance of domestic legislation. First of all, the very existence of an international obligation is a response to the inadequacy of domestic legislation, which it seeks to correct. International regulations are only introduced in respect of matters that have not been suitably regulated by domestic legislation alone. Either there are gaps in its substantive rules, which at the very least need to be consolidated, or its machinery is unsuited to the international nature of the regulations. This led France to conclude that a domestic law prohibiting biological weapons was a satisfactory alternative to a treaty, before ratifying the corresponding international convention several years later. Furthermore, if an international obligation is formulated, domestic enabling legislation is in most cases essential. It is all the more necessary because the subject of the regulations concerns not only the international behaviour of the state, its diplomatic conduct, but also the activities of its enterprises and citizens. The domestic legal apparatus, legislative, executive, judicial, is usually called on to intervene to ensure the implementation of such obligations. The situation in which international cooperation channels the domestic measures adopted by each country concerned, as in the case of the London Club or the MTCR, represents something of an intermediate stage. Lastly, these domestic measures also have a bearing, beyond the sphere of application, on the 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.

However, it is necessary to expand upon this initial statement. Indeed, some problems have appeared concerning compliance with certain important treaties: for example, the ABM Treaty, which gave rise to a controversy bearing simultaneously on the exact meaning of its provisions and on its respect by the USSR. The fact that the USSR recognized that the Krasnoyarsk radar was contrary to the ABM Treaty is far from settling all the problems, especially since the United States has not abandoned its support for an interpretation more favourable to its own freedom of action than that which still applies today.

The safeguards system of the Treaty on the Non-Proliferation of Nuclear Weapons revealed serious deficiencies during the Iraqi affair, was also at stake in the North Korean case, and is ill-equipped to stop potential proliferation. Likewise, the Biological Weapons Convention contains significant gaps in terms of compliance and enforcement, in spite of the suggestions made at the different review conferences. The two Gulf Wars have demonstrated the weakness of the 1925 Geneva Protocol for the prohibition of the use in war of Chemical or Biological Weapons, even though they have at the same time established the importance of developing procedures in reaction to violations. These are only a few examples.

It is furthermore striking that, during recent negotiations and conferences, the need to reinforce these compliance and enforcement mechanisms has been stressed, be it at the Third Review Conference of the Biological Weapons Convention (Geneva, September 1991) or in the negotiations on the Convention for a total ban on Chemical Weapons. It may also be expected that the problem will be widely discussed at the 1995 Conference, which will determine the future of the NPT.

Different factors may explain this evolution and this increased perceived need to incorporate compliance and enforcement mechanisms into the treaties.

A *first* factor is the evolution of the general political context. The new course of international relations is marked by greater instability and by increased multilateralism, with a greater number of actors, which are themselves more unstable and unpredictable. The breaking up of the Soviet Union and the creation of new Republics liberates states whose attitudes with respect to disarmament treaties has indeed created additional difficulties.

A *second* factor is the increased possibilities for states to produce or acquire arms, possibilities which are demonstrated by the greater availability of technologies and researchers, the development of dual (civil and military) activities, and the intensification of international exchanges. These capabilities can hardly be reduced at the source. The general opening of markets, and at the same time the right of each state to possess and choose its own means of defence, greatly limit preventive efforts that could be deployed. The risks of increased proliferation, at the minimum of dual-use technologies, are probably unavoidable.

In addition, the more detailed nature of the prohibitions and treaty provisions makes more effective control mechanisms necessary: for instance, in the field of chemical weapons, a state that would not respect the obligation to destroy and not produce chemical arms might threaten the entire treaty. Similarly, non-compliance with the destruction obligation,

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.

However, in view of the unequal development of national legal and judiciary systems, and in view of the fact that the parties may wish to see some guarantees on the international level, it is not enough to count on internal mechanisms of compliance and enforcement. It is necessary to determine what mechanisms can be developed on the international level. In this regard, a first distinction can be made between problems related to compliance with accepted obligations and problems related to possible reactions in case of a qualified breach of these obligations.

As was already stressed, compliance with the accepted obligations is an issue that is logically part of verification, since the object of the latter not exactly demonstrate the respect of a treaty, but, more accurately, to establish that its violation cannot be proven. Indeed, any state is *a priori* expected to respect its treaty obligations, and, in case of doubt, the state that calls this respect into question is charged with proving the violation.

The nature of most current treaties is such that each state proceeds in its own right with its own analysis and assessments, which are not mandatory for anyone. This solution is far from perfect, since difficulties can only be overcome by way of agreement between the interested parties. Points of contention may hence persist and ultimately threaten the treaty itself.

It is therefore appropriate to examine the means of ameliorating these procedures. They seem, at first sight, to fall into two possible categories.

First, some procedures may facilitate an agreement, through the existence of mandatory consultation mechanisms, or by recourse to third parties which can give an objective and independent point of view - e.g. arbitration committees or other mediation formulas, possibly through international organs. These formulas do not automatically ensure a solution, but they can put the dispute into perspective and assist in finding a peaceful solution, without having the relations between the opposing states deteriorate into a crisis.

Authoritarian procedures which allow an international organ to impose a solution upon the parties are also conceivable. It can be a matter for political organs, with a Conference of the parties deciding by majority, or a matter for judiciary organs, like the International Court of Justice (if its competence is accepted). It should be emphasized, however, that the slowness and complexity of the procedure of an organ like the ICJ is not *a priori* adapted to the types of problems characterized by a breach of obligations of arms limitation agreements, which may directly and immediately threaten the security of the states.

#### 4. Different Types of Violations

The approach to be adopted with respect to violations needs to be improved, to the extent that violations intervene at different levels. They are not all of the same importance and thus do not call for the same type of reactions. The analysis of possible reactions should therefore rely upon a preliminary examination of the different types of violations to which they are to respond.

It is important to distinguish, in a preliminary fashion, between the object of violations, their character, their nature and their importance.

- (a) In terms of the object, a distinction may be made between *procedural* violations e.g. those by default or tardiness of required declarations, those that affect the planned verification procedures e.g. those that do not allow the normal exercise of inspection mechanisms, and those that affect the *substance* of the obligations.
- (b) As regards character, a distinction can be drawn between *active* and *passive* violations. The former assume deliberate action, action that runs directly counter to an obligation for example, producing prohibited weapons or carrying out prohibited tests; the second imply mere abstention, but abstention which entails failure to carry out the treaty for instance, failure to provide the information requested, failure to conclude an agreement that is provided for, refusal of due authorization. This distinction is unconnected with the purpose, the scale or the nature of the violation: abstention, as much as action, may or may not be intentional, secondary or important, procedural or substantive. In order to assess it, the nature of the obligations must also be taken into account: some of them require abstention and others deliberate action, and breach of them is normally established by omission.
- (c) In terms of the nature, a distinction may be drawn between *intentional* and *non-intentional* violations, even though it might be a delicate task to distinguish between them. An intentional violation is, *a priori*, more serious than an accidental one, but this is not always the case. In principle, however, non-intentional violations may be more easily corrected and put right.
- (d) In terms of importance, the distinction may be between violations of a *secondary order* and those that are *significant for the security* of the parties, notably where the military is concerned. It is clear that the latter are the more dangerous ones, both for the parties and for the treaty, since they may require fast reactions resultant from other engagements to protect the security of other parties. At the same time, the significance of a violation is subjective and depends on many considerations on the part of each party, as well as those outside of the treaty, and on the general state of relations between the concerned parties.

These different criteria do not contradict one another and must be combined. Their combination may serve as a basis for a classification of possible reactions.

#### 5. Different Types of Reactions

In the hypothetical case a violation was established, it is appropriate to examine effective reactions that could be developed and which would be able to maintain international security by protecting the interests of the parties.

Given the current status of international law - and in the absence of any special provisions in the treaties under consideration - counter-measures may be taken individually by states in order to defend their interests. The nature of these measures, like the régime, is badly defined and reflects the anarchy of the international community. Such measures

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 countermeasures 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

international organization which, according to its own procedures, issues directives to its Member States.

- (d) Following the nature of the reactions, one may again distinguish *between direct* reactions and indirect reactions.
  - Indirect reactions involve initiating a procedure by which respect for the treaty is to be re-established through a referral to the Security Council or other institutions. The Party that has invoked this procedure is not necessarily determining its outcome in terms of substance.
  - Direct reactions consist, for the interested parties, of taking measures themselves and of pursuing their application by their own means. These reactions can be very diverse, and it is necessary to analyse the principal categories: measures linked to the application of the treaty itself, measures taken in other areas (for example, diplomatic or economic countermeasures), measures that only concern the interests of the adverse state, or likewise concern its nationals, etc. ...
- (e) Finally, the distinction between *bilateral treaties* and *multilateral treaties* (whether regional or universal in application) needs to be examined in this framework. A *priori*, one might consider that, since bilateral treaties correspond more immediately and directly to the interests of the two parties, violation of them would more rightly justify reactions that are individual, spontaneous, unilateral, and direct. On the other hand, for violations of multilateral treaties which strive to establish a régime whose interests extend beyond those of each party considered individually, it might seem more justified to imagine a collective procedure designed to protect the régime established by the treaty, as well as each party's own interests. All things considered, it is within the framework of multilateral treaties, and especially those with universal vocation, that the problem of the development of organized indeed, institutionalized reactions, in case of violations, most often arises.

It is nevertheless necessary to refine this observation. Bilateral treaties - for example, the ABM Treaty or the INF Treaty, or even the recent START Treaties - extend beyond the sole interests of American-Soviet/Russian relations and, as a matter of fact, concern the international community in its entirety. It is thus that the calling into question of the ABM Treaty could significantly endanger the legal Outer Space régime as it applies in practice to all its users. This point must remain in consideration when defining the type of reactions that would seem most appropriate in case of a violation. It is clear that an over-systematic spirit should be avoided, and that diverse solutions may be adopted for different types of treaties or for different situations.

At the basis of all these distinctions lies a major one, which is of a conceptual nature. It is the distinction between "measures" and "sanctions". It is sometimes blurred in practice and more frequently in the current vocabulary. But this distinction entails very useful precisions concerning the global process of reactions and its significance.

Sanctions are normally the conclusion of a judicial, even criminal process. They imply (1) at the basis a clear violation of law, previously defined by the law itself; (2) a contradictory process, allowing the different concerned states to expose their positions; (3)

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 posssible improvements is made by Alan Crawford, while Elinor Hammarskjöld 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,

12	Disarmament: Compliance and Enforcement
	))))))

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