Compliance with Disarmament Obligations

*Winfried Lang**

1. Introduction[1]

Since the early part of the 20th century a broad set of concepts has emerged which aim at clarifying how the parties to a treaty translate its provisions into practice. Today these concepts are found in various fields of international law, such as human rights, labour rights, protection of the environment and, last but not least, disarmament. As the content of these notions is sometimes identical but also frequently overlapping, it seems worthwile to look into them at the outset[2]:

– Compliance-control is a relatively new concept; it is rooted in the English term "compliance" and links it to the term "contrôle", which is the focal point of many French-language writings on this subject.

– Implementation sounds less juridical and compulsory, but it clearly indicates that real life practice is the key to a treaty's effectiveness. Whereas compliance-control apparently looks further ahead towards the consequences of deviating behaviour, implementation seems to represent a shorter sight perspective.

– Application is perhaps the more traditional notion; its origins may be found in domestic legal systems. It covers action by those to whom a rule is addressed; therefore this notion appears to be closely related to the preceding concept of implementation.

---

* Univ.-Professor, Dr. iur., Botschafter und Ständiger Vertreter Österreichs bei den Vereinten Nationen, Genf.

[1] An earlier version of this paper was presented at the XIIIth International Congress 1994 of the International Society for Military Law and the Law of War.

[2] Among the earlier writings the following are of particular interest: N. Kaasik, Le contrôle en droit international, 1933; P. Berthoud, Le contrôle international de l'exécution des conventions collectives, 1946; L. Kopelmanas, Le contrôle international, Recueil des Cours 1950/II, Académie de Droit International.

– Verification is a term especially familiar to negotiators in the disarmament field. It comes close to the concept of compliance-control, as it reflects an activity that scrutinizes the behaviour of those to whom a rule is addressed. Verification represents an external approach aimed at checking facts but it does not yet envisage the consequences of failure to comply.

– Supervision or surveillance are terms which suggest that states have agreed to submit their behaviour in respect of a treaty or another international rule to external examination, which may be done by their peers or an international organization.

– Monitoring is a term of more modern flavour and of a more technical nature; it indicates that the performance of states is scrutinized by means of collecting data, screening reports submitted by them, etc.

– Inspections are closely related to verification; persons or technical devices are used to look into activities that occur in the territory of a state, either by conducting enquiries on the spot or by using some long distance means such as remote-sensing, etc.

The above-mentioned concepts convey the clear understanding that in international relations the rule of law can only be assured if state behaviour is checked by peers or by some international institution[3]. Reviewing the performance of states from the outside and thus intruding more or less into domestic situations may be considered at first sight as conflicting with traditional notions such as "national sovereignty" or the "inviolability of internal affairs". Therefore control- and review-measures usually take place with the express consent of the state concerned; this consent, although expressed in a legal instrument, may be withdrawn by the respective state, if it feels that its supreme interests are threatened. Once a state has agreed, in general terms, to such control over its behaviour, its sovereignty may have become somewhat less absolute and more relative. However, this "new" sovereignty matches much better with the needs of interdependence and the requirements of an international society, in which cooperation as a rule should prevail over confrontation.

---

[3] Among more recent writings the following may be quoted: R. Bilder, Managing the Risks of International Agreement, 1981; W. Butler (ed.), Control over Compliance with International Law, 1991; A. Chayes/A.H. Chayes, On Compliance, International Organization, 1993, 175–906; P.-M. Dupuy, International Control and State Responsibility, in: Festschrift für Karl Zemanek, 1994, 307–318; W. Lang, Verhinderung von Erfüllungsdefiziten im Völkerrecht, Beispiele aus Abrüstung und Umweltschutz, in: Festschrift für Herbert Schambeck, 1994, 817–835.

A well established procedure located between cooperation and confrontation is the settlement of disputes for which international law has developed a considerable number of instruments and institutions such as mediation, arbitration, the International Court of Justice, etc.

These procedures and mechanisms of disputes settlement should be clearly distinguished from the above-mentioned complex of compliance-control/verification, although many linkages and affinities exist. The efficient application of compliance-control and verification procedures may prevent disputes from arising. It could, however, occur that both procedures are used in parallel: Country A is suspicious of B's behaviour under a treaty and launches a formal bilateral procedure of dispute settlement whereas country C triggers – by means of a challenge inspection – a multilateral verification procedure against that same party B. As these procedures may interfere with each other or may even lead to a mutual blocking, it is in the interest of clear and clean solutions to keep them apart. In the context of the Montreal Protocol on Substances that Deplete the Ozone Layer such potential deadlocks have already been discovered[4].

The potential parallelism of or even conflict between the two aforementioned procedures may lead to the question, which of the two is more relevant for making state responsibility operational. An especially difficult situation may arise when procedures of compliance-control/verification lead to assessments reflecting various degrees of compliance ("more or less") and do not give a clear "black and white" indication of non-compliance[5]. The notion of the "military significance" of a violation shows that compliance with disarmament regulations is not something absolute. Thus, the following question has to be replied to: At which point on a scale of violations does the "breach of an international obligation" occur that engenders the international responsibility of the state concerned, with all the consequences (self-help, withdrawal, compensation, etc.) linked to it? Especially, when national security is at stake, it seems unlikely that the states affected by a violation will wait until a formal statement has been made, that a breach has occurred. Unilateral measures, which are preceded by a political appreciation of the relative importance of a specific violation, are the more likely reaction. But such unilateralism is likely to increase tensions and confrontation. Multilateral

[4] M. Koskenniemi, Breach of Treaty or Non-Compliance?, Reflections on the Enforcement of the Montreal Protocol, Yearbook of International Environmental Law, Vol. 3, 1992, 123–162.

[5] See W. Butler, Ensuring Compliance with Arms Control Agreements: Legal Responses, in: id. (note 3), 37.

bodies of compliance-control and verification, which work on a permanent basis, may create a special "culture" of compliance-control, which in building up a minimum climate of mutual trust, could help to dedramatize occasional and less significant violations. Thus, these procedures of compliance-control/verification should also be examined in the light of their potential confidence-building function. From the above a preliminary conclusion may be drawn: as regards compliance-control or verification, one cannot expect clear-cut legally well defined solutions; sometimes the outcome will much more reflect considerations of political convenience and feasibility[6].

2. *Compliance-Control*

Compliance-control is at least as old as this century (e.g., the International Sugar Agreement 1902). But one could also find some earlier instances of international control such as that undertaken by the Rhine Commission established in 1804.

However, even before institutionalized control had become common practice, many states were interested in reviewing the performance of their fellow states as regards compliance with international obligations, i.e. obligations the fulfillment of which states owe to each other. In the absence of formal control bodies diplomatic agents were entrusted with the task of scrutinizing the compliance-practice of their host state. Such bilateral diplomatic supervision was, however, of limited value because of the traditional restrictions imposed upon the activities of diplomats and the need for a cooperative attitude of the respective host state. Thus, the effectiveness of diplomatic control has to be rated relatively low[7].

Institutionalized compliance-control, which was replacing diplomatic control as the density of international relations grew, may be analyzed according to a variety of criteria[8]:

- composition and size of the control-body
- powers of the control-body

---

[6] An overview concerning control-procedures in various international organizations was also given by N. Valticos, Contrôle, in: R.-J. Dupuy (ed.), A Handbook on International Organizations, 1988, 332–353.

[7] Kaasik (note 2), 339–351.

[8] An overview of various forms of compliance-control is also given by I. Khlestov, The Origin and Prospects for the Development of Control over Compliance with International Obligations of States, in: Butler (note 3), 23–30.

– initiatives for the control-activity
– duties of the state to be controlled
– causes of non-compliance
– consequences of non-compliance.

Control-bodies can be composed of state representatives or of independent experts[9]. A broadly shared assumption believes that independent experts are more likely to give impartial and objective assessments, which are solely based upon facts and their "objective" evaluation in the light of existing legal rules[10]. Whether this view is correct, depends very much on the mode of selecting and remunerating the respective experts[11]. Their role will be all the more impartial the less they depend on a specific government and in particular their home government for their nomination, renewal of their mandate and their remuneration. The task of these individuals, be they organized as a commission or as a court, will grow more and more complicated, if their activity goes beyond mere fact-finding into the area of giving advice, deciding on recommendations, etc.[12]. Another aspect not to be neglected is the size of the control-body, especially if it is composed of state representatives. If it is an "open-ended" institution, i.e. all parties to a treaty are entitled to sit on the control-body, the efficiency of scrutiny is likely to be low, clear-cut statements are likely to be diluted by empty language, and its activity will resemble much more a diplomatic negotiation than a judicial examination.

The powers of a control-body can be listed according to the degree of intrusiveness into the national domain. Along such a scale the following steps are possible[13]:

---

[9] Kaasik (note 2), 361–365; Berthoud (note 2), 304–314.

[10] On this point see also E.A. Landy, The Effectiveness of International Supervision, Thirty Years of ILO Experience, 1966, 200.

[11] But also on the functions of the control-body; if it fulfills not only review and correction functions but also creative functions (further development of norms) government representatives may be more important than independent individuals, see P. van Dijk, Normative Force and Effectiveness of International Norms, German Yearbook of International Law, Vol. 30, 1987, 9–35, at 31.

[12] F.M. van Asbeck, Quelques aspects du contrôle international non-judiciaire de l'application par les gouvernements de conventions internationales, Netherlands International Law Review, Vol. 6, 1959, 27–41, at 34, went so far to qualify any movement away from scrutiny by individuals to scrutiny by government representatives as "retrograde".

[13] Kaasik (note 2), 366–389; Berthoud (note 2), 332–351; Kopelmanas (note 2), 89–131, and M. Merle, Le contrôle exercé par les organisations internationales sur les activités des états membres, Annuaire Français de Droit International, Vol. 5, 1959, 424–429.

– Reports on national legislation translating international obligations are submitted by governments and reviewed by the body.

– Reports of governments on their concrete compliance-performance are scrutinized by the body.

– Reports of the above kind are not only reviewed or scrutinized; the body is entitled to ask questions, to request further explanations from the respective government.

– Examinations are undertaken by the body itself; it starts its own investigations; it conducts on-site inspections itself or instructs somebody else to conduct them.

– Findings and recommendations are submitted by the body to the respective government in confidence.

– Findings and recommendations are submitted by the body to the public.

– Sanctions may be decided by the body or at least proposed to a higher political organ, such as the Security Council.

The powers listed above should not be seen as totally separate; the competence to ask questions or to undertake independent investigations may well be linked to the power of issuing recommendations[14].

As regards the origin of control-activities various points of departure for initiatives do exist:

– If permanent or periodic control procedures are established, specific initiatives may not be necessary, unless the control-body itself considers that an *ad hoc* enquiry is appropriate, e.g. because of allegations of violation coming from certain governments or doubts the body itself may have.

– Frequently the formal request for a control-action may come from a state that has reason to believe that another state has violated its commitments (in the field of human rights) or is cheating in respect of its obligations (under a disarmament agreement).

– Individuals may trigger control-action if they are entitled to do so under the respective instrument (see human rights bodies or various possibilities in the context of the European Union – individuals claiming that their governments have not complied with certain directives).

---

[14] On the minimum powers of a control-body in disarmament matters see Butler (note 5), 36.

– The non-complying state may also launch some control-activity against itself, if it wishes to demonstrate its inability to comply with the respective obligations (Montreal Protocol)[15].

The very purpose of compliance-control is to seek clarity in respect of a state's performance under a certain treaty[16]. Beyond obligations of substance or primary obligations (reduction of polluting activities, destruction or conversion of certain weapons, protection of individuals against human rights violations) to be checked by this control-activity, certain procedural or secondary duties may also be incumbent upon a state under scrutiny:

– In cases of permanent or periodic control, states usually have to submit at regular intervals reports on their national legislation (translating international obligations into domestic law) and/or on the actual performance of their authorities (courts, administration) in relation to the treaty under consideration[17].

– In cases of on-site inspections the state under scrutiny has to grant inspection teams access to the respective sites (unless it objects to it on certain grounds approved by the respective treaty – national security, etc.) and to facilitate the task of the respective team[18].

– In cases of individuals claiming violations of certain – mostly human rights – obligations the respective government is bound to reply and in case of condemnation by the international body has to comply with the latter's terms (payment of compensation, amendment of existing rules, etc.)[19].

Non-compliance is not always a wilful act of obstruction. It may well be that the causes of non-compliance are simply beyond the control of the respective government. Especially in the field of the environment it may occur that a country does not have at its disposal the means to fulfill its international obligations; these means comprise not only fi-

---

[15] P. Szell, The Development of Multilateral Mechanisms for Monitoring Compliance, in: W. Lang (ed.), Sustainable Development and International Law, 1995.

[16] On the conditions for a successful international supervision see also Landy (note 10), 210.

[17] See obligations under the Montreal Protocol on Substances that deplete the Ozone Layer, the Framework Convention on Climate Change, the various protocols under the Convention on Long Range Transboundary Air Pollution.

[18] See the respective obligations in the two disarmament treaties in Section 4.

[19] For the respective instruments see F. Ermacora/M. Nowak/H. Tretter (eds.), International Human Rights, Documents and Introductory Notes, 1993.

nancial capacities but also scientific and technological know-how[20]. Therefore, governments would be well advised not to enter into international commitments, unless they are fully convinced that compliance will be feasible in the light of the means available to them. From this insight stems much of the "soft language" contained in some environmental treaties in respect of duties to be fulfilled ("... to the extent possible", "as far as appropriate", etc.).

In abstracto, the consequence of non-compliance would be state responsibility and whatever follows from that situation (*restitutio in integrum*, compensation, withdrawal of affected states, etc.). However, as mentioned above, statements of non-compliance may be graduated and qualified; therefore, no clear-cut answer can be given to the question on the respective consequences. Sanctions are certainly the most extreme solution although the least likely one in the light of the anarchic state of the international society. But sanctions need not necessarily be military measures; they could be trade embargoes or simply the withholding of certain advantages (transfer of technology, financial support) hitherto enjoyed by the non-compliant state[21]. In cases where not the ill-will of the respective government is at the origin of non-compliance but its lack of capacities, assistance and support appear to be a more appropriate response to non-compliance. Therefore, the consequences of non-compliance should not be seen in the abstract terms of legal theory, especially because compliance-control is not an end in itself but only a means to further the object and purpose of a treaty. Efforts aimed at advancing cooperation among states should not lead to new confrontations between them. From this flow two considerations: First, during negotiations leading to the conclusion of a treaty all stake-holders should be included and their interests should be taken into account to the maximum extent possible. Second, governments should abide by their obligations "in good faith"[22]; they should use their best endeavours to comply with their international duties as they are used to in the domestic arena[23]. They have

---

[20] See in particular A.H. Chayes/A. Chayes/R. Mitchell, Active Compliance Management in Environmental Treaties, in: Lang (note 15), who identify lack of capacity as a major cause for non-compliance.

[21] See the respective consequences contained in the Chemical Weapons Convention (Section 4).

[22] This simply reflects their general obligation under the Vienna Convention on the Law of Treaties (Art. 26).

[23] On the linkage between international and domestic compliance see O. Young, Compliance and Public Authority, 1979, 29–47.

to expect negative reactions from their fellow states, if their non-compliance can be traced back to a lack of good will. Again, as compliance-control is fully embedded in the real life situation of power politics, it has to be acknowledged that non-compliance is likely to draw less serious consequences, if such violations are committed by powerful states[24].

3. Verification

For the purpose of this paper verification may be defined as a special and somewhat limited category of compliance-control, especially in the field of disarmament[25]. Whereas verification was practically absent from disarmament treaties before World War II (see the Geneva Protocol of 1925 on Poisonous and Asphyxiating Gases) and during the Cold War period (see the 1972 Convention on Biological and Bacteriological Weapons) new insights into the functioning and needs of verification systems as well as an improved political climate between East and West facilitated the conclusion of treaties which include verification provisions (e.g. 1990 Treaty on Conventional Armed Forces in Europe, 1993 Convention on Chemical Weapons).

For many years, verification has been neglected by the legal sciences[26]. Its military, technical and political aspects were at the forefront of consideration. Approaching the issue from a lawyer's perspective, the question that arises is whether verification has some specific characteristics as compared to other types of surveillance. The following preliminary replies may be given[27]:

– As national security is at stake, political considerations usually prevail over legal niceties. Possibilities of withdrawal or denunciation in cases of breaches by other parties – a possibility fully compatible with the Vienna Convention on the Law of Treaties (Art. 60) – are available as a

[24] Therefore, the view that the most effective driving force behind compliance with arms control treaties are considerations of reciprocity has to be qualified in the light of asymmetrical power relations, see H. Neuhold, Legal Aspects of Arms Control Agreements, in: Festschrift für Ignaz Seidl-Hohenveldern, 1988, 427–448, at 441.

[25] W. Graf Vitzthum, Rechtsfragen der Rüstungskontrolle im Vertragsvölkerrecht der Gegenwart, in: Berichte der Deutschen Gesellschaft für Völkerrecht, 1990, No. 30, 118–127; for a broad definition of verification, not necessarily linked to disarmament matters, see Bilder (note 3), 120–139.

[26] Among the rare exceptions see A. Martin, Legal Aspects of Disarmament, International and Comparative Law Quarterly, Supplementary Publication No. 7, 1963, 39–52, and A. Gotlieb, Disarmament and International Law, 1965/1967.

[27] See Lang (note 3), 828–829.

last resort; such withdrawal is likely to cause the break-down of the respective regime as a whole, because if one key party leaves most others are likely to follow. The same negative result would be achieved, if a party confronted with the deviating behaviour of other parties does not invoke its "supreme interests" but only a "fundamental change of circumstances" (Art. 62 of the Vienna Convention), in order to terminate its participation in a treaty[28].

– Abstract issues such as state responsibility have to be balanced against concrete political interests and the significance of the concrete breach (full breach versus minor violations).

– Verification depends, to a considerable degree, on the availability of highly sophisticated technical means such as remote sensing by means of satellites which only a few countries can afford; therefore on-site inspections, which a greater number of countries can afford, should be considered as a relatively "democratic" device.

– Against the background of political climate change one may discover a certain movement leading from unilateral verification by national means – a typical feature of verification under the conditions of distrust prevailing in the Cold War period – towards multilateral and cooperative verification, which is based upon a minimum of confidence that has developed throughout the post-Cold War period[29].

– Verification is a compromise between security perceptions and assertions of sovereignty; the point at which such compromise may be achieved depends on the respective issue-area, type of weapons, etc. Thus, verification will continue to be a highly diversified activity; a general system of verification is unlikely to emerge[30].

– Although verification may be considered as a consequence of mutual distrust, its main purpose is confidence-building as it aims at preventing

---

[28] Neuhold (note 24), 438–444.

[29] If the Cold War climate is further receding, verification exercises in the East-West context may lose their "*raison d'être*" and may be replaced by North-South non-proliferation efforts, see H. J. van der Graaf, Verification – Past, Present and Future. Broadening the Process, in: J. Altmann/Th. Stock/J.-P. Stroot (eds.), Verification after the Cold War, 1994, 3–10.

[30] A general multilateral control system under the aegis of the United Nations is all the more unrealistic, see the proposal of I. Lukashuk, Control in Contemporary International Law, in: Butler (note 3), 10; a similar proposal contained in the same volume (Khlestov [note 8], 25) suggested an additional Protocol to the Vienna Convention of 1969 on individual and collective control.

breaches and dissuading from violations. Openness or transparency constitute the essential elements of confidence[31].

Considering now the legal approach to verification one is confronted with a view that distinguishes between three variations: minimalist, intermediate and extensive verification[32].

The minimalist concept reduces verification to the establishment of facts; its purpose is to prove that a certain line of conduct has not been followed by a certain state. Verification is perceived as a process in which problems of a technical nature – feasibility or adequacy of certain techniques – are most crucial: Indirect knowledge (flow of current information from many sources) competes with direct knowledge; the latter is obtained by national means or international procedures. As regards national means (mainly remote sensing based on the use of satellites or seismographs) legal problems cannot be ignored: Has a right to inspection to be recognized? Is there a duty not to interfere with the use of national means? Does transparency constitute a general obligation of states? Have states a right to monitor installations outside of their own territory? As customary international law is silent on most of these issues, replies to these questions depend on the rules stipulated in the respective treaty. But such rights and duties seem to be warranted in order to make a verification system operational and thus meaningful. As regards international procedures, special devices have to be developed to facilitate cooperation between the inspecting and the inspected state especially in the case of a bilateral exercise (CFE). In case of a multilateral process (CWC) special consideration has to be given to the institutional set-up, the powers and mandates of the competent organs and the relationship between various bodies co-existing within the respective treaty-system.

Special attention has to be paid to the legal problems arising from on-site inspections[33]. They range from the consent of the state to be inspected to the type of inspection (regular or routine versus *ad hoc* and random); especially sensitive problems may emerge in respect of territorial issues (identification of the site and installations to be inspected) as

---

[31] On the confidence-increasing role of supervisory arrangements see also Landy (note 10), 210.

[32] For these categories see S. Sur, A Legal Approach to Verification in Disarmament and Arms Limitation, United Nations Institute for Disarmament Research (UNIDIR), Research Paper No. 1, September 1988, 9–26.

[33] See also E. Ifft, The Use of On-Site Inspection in the Avoidance and Settlement of Arms Disputes, in: J. Dahlitz (ed.), Avoidance and Settlement of Arms Control Disputes, United Nations 1994, 9–27.

well as in respect of time (prior notice, minimum delay between notice and action, in order to avoid attempts at concealment). Unless such problems are settled well in advance of the concrete inspection, the entire system is likely to collapse.

The intermediate concept of verification goes beyond simple fact-finding; it includes legal assessment, which means that the specific conduct of a state is evaluated by comparing it with an abstract norm. Here again one should distinguish between a unilateral assessment or a cooperative assessment: the latter amounts to an interpretation of the facts and the norm, shared by all or most parties to the treaty concerned. Yet, as it is difficult to expect a party or its friends to admit that it has failed to live up to its obligations, cooperative verification may amount to diplomatic negotiations which resolve difficulties instead of identifying and condemning a guilty party. It has already been mentioned above, the process of legal assessment cannot be considered as an abstract exercise taking place in isolation; in most instances it will be accompanied by a political evaluation, which is based on a choice between several possibilities of a solution all or most parties can accept. Already the notion of "military significance" related to different degrees of compliance, a notion, which is quite common in verification discussions, contains a political choice. Much will depend on the objective parties wish to attain through the process of verification: Are they genuinely interested in disarmament or do they simply wish to maintain a de-facto status quo in the security situation prevailing among certain countries?

The extensive concept of verification includes reactions and consequences in the event of a violation that has been corroborated by undeniable facts and a legal evaluation beyond any doubt. Some consider this third stage or phase as the "cutting edge of the process and even its acid test". Again parties to the respective treaty are faced with a broad set of questions: Should the treaty be strengthened and its application be restored? Should the interests of the parties most affected and threatened by the violation prevail? Is public pressure the most appropriate reaction? Should the parties resort to coercive measures against the law-breaker? Are measures aimed at coercive action such as the referral of the matter to the Security Council an empty gesture? Is retaliation by the affected parties (withdrawal from the treaty as a minimum) likely to destroy the regime as such? In view of these and similar questions each treaty-regime has to develop its specific response. Regional disarmament treaties may provide answers different from those given by treaties of a global scope.

Approaching the issue of verification from its literal meaning, verification should be restricted to the first and second of the afore-mentioned variations. Problems arising in the third field considerably differ from the issues of fact-finding and legal assessment. Adopting the "extensive concept" would lead back to the broader idea of compliance-control already discussed in the previous chapter. The value of the various approaches – compliance-control and verification – shall now be assessed against the background of two specific cases.

4. Regional and Global Treaties

The above-mentioned insights stemming from lessons of the past are likely to facilitate the following analysis devoted to two disarmament treaties, which differ from each other in more than one respect[34].

At the time of signature (1990) the Treaty on Conventional Armed Forces in Europe (CFE) was considered as the most sweeping arms control agreement in history and as the beginning of a new era in arms control verification[35]. The following basic considerations – contained in the body of the treaty and its numerous annexes and protocols – guided the establishment of this new verification regime[36]:

– clearly spelled out and detailed data are to be exchanged (see notification requirements, in particular Art. V, VII, VIII, IX, X);

– verification means and measures must not be interfered with by other states parties (Art. XV para. 2);

– concealment measures are prohibited (Art. XV para. 3);

– every state party has an equal right to participate in verification (Art. XIV);

– maximum possible access to relevant military sites must be provided during inspections (Art. XIV);

– minimum interference with routine military activities should be observed during inspections (Protocol on Inspections).

[34] A full picture of verification issues in various disarmament treaties may be obtained through the following volumes: S. Sur, La vérification des accords sur le désarmement: moyens, méthodes et pratiques, UNIDIR 1991, and id., Vérification du désarmement ou de la limitation des armements: instruments, négociations, propositions, UNIDIR 1994.

[35] Reprinted in United Nations Department of Political Affairs, Status of Multilateral Arms Regulation and Disarmament Agreements, Vol. 1, 4th ed. 1992, 287–436.

[36] The most comprehensive analysis published is a SIPRI-Research Report, S. Koulik/R. Kokoski, Verification of the CFE-Treaty, Stockholm, October 1991; see also C. Hoppe/F. Rademacher, Das Verifikationsregime des KSE-Vertrages – Wiener Verifikationswunder oder unlösbare Aufgabe, Europa-Archiv, 7/1991, 225–232, and L. Dunn, Arms Control Verification, International Security, 1990 (4/14), 165–175.

The Treaty defines different cases of inspection (see in particular Art. XIV):

- inspections of declared sites;
- challenge inspections of undeclared sites, that is within "specified areas";
- inspections to witness reductions;
- inspections to witness certification (of certain recategorized weapons).

The Treaty does, however, not include permanent inspections, such as permanently manned observation posts and fixed remote sensors.

In addition, the treaty clearly distinguishes between on-site inspections and other inspections. At the same time it is a basic principle of this treaty that verification is undertaken within the national responsibility of one party, mainly using its national means or possibly multilateral means. This means that national inspectors or inspection teams act according to their national regulations, but also interests; data to be exchanged and verified will be evaluated by individual countries. There does not exist any kind of truly international inspection carried out by a special institution. A "Joint Consultative Group" composed of representatives of the parties is a deliberative body, which may address questions relating to compliance, seek to resolve ambiguities and differences of interpretation, consider and, if possible, agree on measures to enhance the viability and effectiveness of the treaty, and resolve technical questions in order to seek common practices as regards treaty implementation (Art. XVI para. 2). As a purely intergovernmental body it is bound by the consensus rule, which means that only in the absence of any objection by any party decisions can be taken and recommendations can be adopted.

As regards the inspection regime itself, the following rules are applicable: The number of inspections a party has to receive is qualified by a so-called "quota"; such quotas differ according to the phase in which an inspection is to be undertaken (baseline validation, reduction phase, residual validation phase, residual levels): The "passive declared site inspection quota" represents a certain percentage of objects of verification (between 20 and 10 % according to the respective phase). The "passive challenge inspection quota" is even much lower; during the first three phases it is only 15 % of the "declared sites quota"; in the last phase it amounts to 23 % of that quota. Because inspections can also take place between states belonging to the same group of countries (alliances) an additional ceiling had to be introduced in order to avoid that the quota is exhausted by "friendly" inspections. Therefore, not more than 5 inspections per

year by a state of the same group are to be allowed. These and other precautions were necessary in order to balance inspections from fellow countries belonging to the same group against inspections from the other side, it being understood that this "logic" represents a left-over from the old Cold War thinking.

Although openness and transparency were praised as the leading principles of this verification regime, inspected parties retained numerous rights protecting their sovereignty and security:

- they may shroud sensitive items of equipment;
- they may under certain conditions deny access to sensitive points, etc;
- they may refuse challenge inspections within specified areas; but they must provide all reasonable assurance that the specified area does not contain treaty-limited equipment, or give comparable assurances.

Furthermore, not more than one inspection team may be present at the same time at any inspection site; as a rule there should also not be more than two inspection teams simultaneously on a party's territory (or in the respective military district).

Having briefly reviewed some features of this verification system one is struck by the fact that despite its many cooperative elements, it still retains a number of characteristics of a unilateral exercise. This priority given to unilateral action is also reflected in the procedures related to the follow-up to violations of the treaty. The treaty itself does not provide for any common action against the law-breaker; each individual state retains its right of withdrawal, if it considers that extraordinary events related to the subject of the treaty have jeopardized its interests (Art. XIX). If that state exercises his right of withdrawal, the depositary has to convene a conference within 21 days (Art. XXI para. 3). Therefore, it may be argued that regional security is perceived by the CFE-treaty as a cooperative endeavour but not as a matter of collective security within the meaning of the UN-Charter; if the latter were to be the case at least some reference to the Security Council would be appropriate. Although considered as a major breakthrough this treaty still reflects distrust that prevailed during the so-called Cold War period. Furthermore, as regards modalities and techniques of inspection the treaty is very demanding: Equipment of a high-technology nature is necessary as well as fairly advanced military know-how. This implies that effective and reliable verification requires not only adequate preparation by each party interested in the proper functioning of the regime, but also the availability of technological and financial means necessary for carrying out these inspec-

tions. Therefore, this treaty is not a model to be used at a global scale, at which many countries lack the adequate capacities.

After twenty years of negotiations in the context of the Conference on Disarmament, the Convention on the Prohibition of, the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction was signed in early 1993 by 130 governments[37]. Its verification provisions cover 112 out of the 172 pages of the text (as distributed by the Provisional Technical Secretariat). Thus, verification and compliance-control may be considered as the centre-piece of this legal instrument, which in view of the high number of ratifications required (65) will need a considerable number of years for its entry into force. In view of its highly sophisticated procedures of inspection it should be more closely examined in this study[38].

Approaching this regime it seems advisable to distinguish at the outset between verification and inspection procedures on the one hand and procedures for compliance-control on the other. Compliance-control includes the consequences of well-identified violations. These consequences may be restrictions on or suspension of rights and privileges of the state found guilty of non-compliance. Furthermore compliance-control covers recommendations of the competent organ for collective measures against that state and, in cases of particular gravity, the seizure of the competent bodies of the United Nations (General Assembly and Security Council)[39]. Such decisions aimed at redressing a situation or ensuring compliance may be taken by the main political organ under the Convention, the Conference of the Parties (Art. XII); preliminary measures may also be taken by the Executive Council of the Organization for the Prohibition of Chemical Weapons, OPCW (Art. IX, para. 22 and 23).

---

[37] Reprinted in: International Legal Materials, Vol. 33/3, 1993, 804–873.

[38] Among the emerging literature the following should be mentioned: Th. Bernauer, The Chemistry of Regime Formation, UNIDIR-Dartmouth Publishing Company 1993; and id., The End of Chemical Warfare, Security Dialogue, Vol. 24/1, 97–110; P. Robinson/Th. Stock/R. Sutherland, The Chemical Weapons Convention: the Success of Chemical Disarmament Negotiations, SIPRI-Yearbook 1993, 705–734; W. Lang/W. Gehr, La Convention sur les Armes Chimiques et le Droit International, Annuaire Français de Droit International, 1992, 161–176, as well as the respective issues of Disarmament, Vol. 16/1, 1993, and UNIDIR-Newsletter, No. 20, 12–92; special attention should also be given to W. Krutzsch/R. Trapp, A Commentary on the Chemical Weapons Convention, 1994, see in particular 270–506 (Verification Annex).

[39] On the potential role of the Security Council see J. Dahlitz, Security Council Powers and Possibilities, in: id. (note 33), 57–83.

Turning back to the system of verification in its narrow sense, one may again distinguish between cases of inspection and types of inspection. Among the former one should differentiate between:

- inspections related to weapons destruction;
- inspections related to weapons production facilities (namely destruction and/or conversion);
- inspections related to the use of chemical weapons.

As regards types of inspection one should consider two different sets:

- routine inspections
- challenge inspections.

At the same time it should be noted that on-site inspections have been considered in this specific context as the rule.

Although states are still entitled to clarify and resolve doubts and suspicions about compliance by referring to traditional means such as exchange of information and consultations among themselves (Art. IX, para. 2) – this may even include inspections by mutual consent – the main instrument and the "*raison d'être*" of the Convention is an appeal of countries entertaining suspicions to the new Organization (OPCW).

As a first step, parties may request certain clarifications from the party they consider as violating its obligations under the Convention (Art. IX, para. 3–7). As a second step the Organization may be requested to conduct challenge inspections which however have to respect numerous procedural restrictions (Art. IX, para. 8–21).

Such challenge inspections are carried out by the Organization and its inspection teams; the country requesting an inspection is only entitled to participate as an observer in the inspection team, provided the inspected party does not raise any objections. Inspections which have been requested by a party have to take place unless the Executive Council of the OPCW decides by a three quarter majority against carrying it out. Because this negative threshold is very high, it is unlikely that any request for a challenge inspection would ever be rejected. This indicates that inspections are about to become a quasi-automatic element of this process. After having accomplished its mission the inspection team will report on its factual findings and on the degree and nature of access and cooperation granted by the inspected state. The Executive Council of the OPCW, to whom this report will be addressed, has to decide whether non-compliance or some degree of it has occurred; it will draw from this assessment the appropriate conclusions; if some deviations from full compliance have been discovered, the Council may decide on measures to redress the situation and to ensure compliance (Art. IX, para. 22–25).

During the challenge inspection process the inspected state has numerous possibilities to protect its national security and sovereignty (Part X of the "Verification Annex"): First, it has the final word on the exact location of the inspection perimeter; second, it has the right to take such measures as it deems necessary to protect its national security; third, it may take measures to protect sensitive installations. These restrictions in favour of the inspected party (para. 38–52) are somewhat balanced by its very broad obligation to make every reasonable effort to demonstrate its compliance and to provide access for the purpose of establishing facts related to possible non-compliance. Furthermore, the treaty stipulates that such measures in favour of national security shall not be used by the inspected state to conceal non-compliance. Although an evaluation of the various rights and obligations may lead to the conclusion that the entire process is biased in favour of the inspected state, which anyway is in full control of its territory, one should not neglect the political impact of a challenge inspection carried out by a sizeable international organization upon instruction from a broad community of parties. Challenge inspections are all the more likely to be "swallowed" by the inspected country, as through the continued practice of routine inspections a positive climate of trust has developed and created some kind of "verification culture". Challenge inspections will also be all the more easier as inspectors have, through previous routine investigations, become familiar with the potential sites, at which violations of the treaty may occur.

As in other treaties of this kind, any state which feels seriously affected by an alleged or proven breach of the Convention is entitled to withdraw from it (Art. XVI). It is curious that this right is expressly justified by a reference to the "national sovereignty" of that state and its "supreme interests" which may be jeopardized, especially because there does not exist any institution which would be entitled to "verify" such assertions.

Comparing briefly the above-mentioned treaties, some preliminary conclusions may be drawn:

- they differ in scope (regional versus global);
- both represent cases of cooperative verification, but only in respect of chemical weapons, parties rely on a fully "organized" procedure;
- the CFE-treaty still contains many elements of unilateralism; inspections are to be carried out mainly by national means;
- thus, the CFE-verification regime requires appropriate preparations undertaken at the national level and adequate capacities available at that level;

– in the chemical weapons regime governments can rely to a large extent on the machinery provided for by the OPCW, which indicates a more "democratic" approach, not fully dependent on national capacities;

– in the context of chemical weapons, compliance-control reaching beyond verification is based on the United Nations system and its sanctions machinery, whereas the CFE-treaty does not contain similar provisions[40].

5. Outlook

This last section is devoted to some lessons for further research and practice, which may be drawn from the above considerations. Among these lessons the following seem to be of special relevance:

– The basic content of notions such as "implementation", "verification", "inspection", etc. should be further clarified.

– A clear distinction should be drawn between regional and global regimes; their differences as well as their interdependence or mutual impact should be further investigated.

– Another distinction of importance is that between legally binding obligations and politically binding commitments (OSCE). In respect of the former, problems such as "state responsibility" and its relationship to compliance-control/verification should be considered; in respect of the latter, questions such as "military significance" or "confidence building" may receive adequate treatment.

– A further distinction, which has practical consequences, relates to the difference between verification/inspection under national responsibility (national or multilateral means) and verification/inspection relying on "neutral" inspection or inspection teams provided by international organizations. Only practical experience will tell which of the two modes is more reliable and successful; a periodic review of such experience would be helpful.

– Confusion should be avoided between the concept of verification (a process of technical fact-finding, followed by legal assessment) and the broader concept of compliance-control, which includes the follow-up to the outcome of verification, namely sanctions or other measures. Much of

[40] At least as regards the Chemical Weapons Treaty the traditional view that disarmament treaties do not contain sanctions regimes cannot any more be upheld, see Vitzthum (note 25), 132.

the success of this broader process will depend on the changing conditions of the overall political climate (feasibility of coercive measures).

– Verification regimes vary in accordance with the regulations contained in the respective treaty; but for adequately implementing these regulations, governments should consider enacting a domestic legal framework which determines inter alia:

– operational conditions for active and passive verification (including equipment, etc.),

– entry and exit of inspection teams,

– legal status of inspectors and inspection teams (own and foreign),

– competences of and communication between various parts of the national administration (contact points, etc.).

None of these procedures, mechanisms and institutions, if taken one by one, will secure conditions sufficient for peace. But the appropriate mix, based upon a broad political will, economic progress and social justice is likely to lead towards a more peaceful situation of mankind.