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Supervisory mechanisms in arms control treaties and enforcement under general international law

1. Introduction: co-operation and enforcement

Co-operation between the States Parties to arms control treaties is a prerequisite for the effective functioning of the supervisory mechanisms contained in those treaties and indeed for the entire process of arms control. Whereas the methods and institutional design of most phases of the process of international supervision provide guidance for co-operative behaviour, enforcement measures such as those of the phase of correction/enforcement may appear to be counterproductive in that respect. Given the rationale of international supervision, which includes not only the detection of violations but also the response to violations detected, there will always be a component of enforcement present in the process of international supervision. ‘Enforcement’ directed against a State in a broad sense refers to all means of redress that can be taken by individual States and by international bodies to bring about compliance with the obligation of that State to follow a particular course of conduct.

The topics of supervision of arms control law and enforcement in general international law are closely interrelated, not only because enforcement action in accordance with the UN Charter is referred to in practically all supervisory mechanisms present in arms control treaties, but also because a principal objective of the arms control process is to contribute to the prevention of large-scale use of force in international relations (the use of force being a method of enforcement pur sang). It can be observed that the supervisory mechanisms in most arms control treaties, even when they contain elaborate rules for verification, generally offer little specific remedies after a case of non-compliance has been established. This means that in general, reactions to situations of non-compliance in arms control law will be conditioned by the principle of reciprocity, rendering unilateral actions more likely than collective responses. Here, reference is made to the concept of self-help, which exists under general international law as a means of redress in the international system. ‘Self-help’ in a broad sense covers a
range of actions (other than armed force) taken by an aggrieved State against a State that it considers has breached a legal obligation owed to it. The measures of self-help can be seen as peaceful unilateral measures considered necessary by a State in order to safeguard its national interests. Measures of ‘collective’ self-help may also ‘spontaneously’ occur in practice, outside the framework of international institutions or judicial proceedings. The occurrence of self-help can be considered a reflection of the general principle that every rule in international law is a priori equipped with a legal sanction: if violated by a State, the victim States are in principle entitled to suspend the performance of any other rule of international law in their relations with the violator. All measures of self-help are within the discretion of the State that considers them necessary, unless restricted by treaty provision. In that respect, it should be acknowledged that many arms control treaties feature a potential concurrency of powers of (supervision and) enforcement of, on the one hand, the individual States Parties and, on the other hand, the supervising body. This raises a fundamental question, viz. to what extent are States Parties allowed to apply unilateral measures of self-help as reactions to (alleged) non-compliance, when the arms control treaty has established an international body for supervising compliance and, with regard to enforcement, stipulates collective reactions to established treaty violations?

In this chapter, first the criteria to determine what reactions are possible in the event of a violation of substantive or institutional arms control law will be examined. Next, it will be endeavoured to clarify the relationship between the reactions to violations which can be undertaken pursuant to the arms control treaty-based supervisory mechanisms and those which can be undertaken pursuant to general international law.

2. Violations of arms control law: nature and significance

2.1 Criteria for categorising violations

Given that non-compliance can take on differing degrees of importance, the question may be asked what means can be employed in reaction to a particular violation of an arms control treaty, either pursuant to the treaty-based supervisory mechanism or on the basis of general international law. Generally speaking, the answer to this question depends on the (military) significance of the violation that the reaction is directed at. It can be upheld that only those alleged violations that are considered significant will be reacted to. In multilateral agreements, it is up to each State Party to develop its own definition of significance based on the purposes of the treaties and

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their impact on its own security needs. However, each State Party should respect the principle of proportionality in reacting to violations. Proportionality may detract from the deterrent effect of reactions to non-compliance, but it is a fundamental legal principle that is to be taken into account. It is therefore important to consider whether the violations detected are significant breaches or merely minor infringements of the treaty, and whether there is a single violation or ongoing or repetitive violations. Furthermore, non-compliance may be the result of causes that are beyond the control of the government of the State concerned, instead of being a wilful act of obstruction. The reactions allowed in response to violations that can be traced back to a lack of goodwill will differ from those that can be traced back to lack of capacity. Therefore, in general, the significance of a violation can be measured by two criteria: first, the intent of the violating State (is it a deliberate violation or not) and second, the amount of damage that the violation has caused or will probably cause to the (object and purpose of the) arms control treaty or to other States. The range of non-compliance thus flows from unintentional violations causing minor damage (or no damage at all) to deliberate violations causing maximal damage to other States and to the treaty. Furthermore, the significance of violations may differ considerably depending on the nature of the provision (allegedly) violated, viz. whether it concerned a provision of substantive or institutional law.

2.2 The significance of violations of substantive arms control law
Prohibited activities committed by States in disregard of substantive arms control law readily qualify as deliberate violations, the chances of accidental use or possession of prohibited arms being highly remote. Further qualifications of such violations depend on the damage done to the treaty or to the States Parties. Significant violations of substantive law amount to defiance of the object and purpose of the arms control treaty and qualify as material breaches under the law of treaties. From international jurisprudence and legal doctrine it appears that the object and purpose of a treaty are normally to be found in the intentions of the States Parties and the general aim of the treaty in its entirety, as expressed in the preamble to the treaty, its title, and, clarity still failing, the aggregate of its provisions. Arms control treaties commonly have the particular object and purpose of

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795 To commit violations as a result of e.g. misreading or misinterpretation is clearly very unlikely with regard to the (threat of) use or the possession of a prohibited weapon. Still, to prevent misinterpretation arms control treaties may cover all possible kinds of use of a particular weapon. E.g., the CWC allows the possession of riot control agents but prohibits their use as a method of warfare (Art. I(5)).
796 Cf. Art. 60 of the Vienna Convention on the Law of Treaties, see infra.
797 See the extensive overview presented by Buffard & Zemanek (1998).
restricting one of the most sensitive areas of State sovereignty, viz. the disposition of the State’s (actual or potential) armed force. Among the possible cases of non-compliance, violations of prohibitions of use, threat of use, possession, and destruction deserve special attention.

**Use.** Since most arms control treaties have as their primary object and purpose the prevention of the use of the armaments subjected to control, the actual use of prohibited weapons represents the most significant violation of substantive arms control law. The most far-reaching deviant behaviour in this respect would be a deliberate, overt challenge to the treaty system as a whole, whereby the violating State in effect calls for the capitulation of the other States. When the use of a weapon actually takes place, the right of individual and collective self-defence comes into play as a specific, lawful reaction to the armed attack. Naturally, this right exists irrespective of whether or not the use of particular weapons is prohibited by law, but it should be noted that some treaties contain a prohibition of the use of particular weapons which even covers their use in self-defence in reaction to prior illegal use of the same weapons.\(^{798}\)

**Threat of use.** The threat of use of prohibited weapons is closely connected to their actual use. As the ICJ observed in the context of self-defence using nuclear weapons:

"In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a "threat" within article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under article 2, paragraph 4. [...] The notions of threat and use of force under article 2, paragraph 4, of the Charter stand together in the sense that if the use of force is in a given case illegal - for whatever reason - the threat to use such force will likewise be illegal".\(^{799}\)

From this, it becomes clear that the threat of use of certain weapons follows from a State’s signalling its possession of those weapons and its stating its readiness to use them. But even then it is ‘depending on the circumstances’ whether or not this constitutes a ‘threat’ as prohibited by Art. 2(4) of the Charter. Still, in general the threat of use will be reserved to respond to significant situations short of war, or even during armed conflict. For example, during the Gulf War of 1991 Iraq is said to have threatened to use chemical weapons, whereas the US is reported to have threatened Iraq that it would retaliate with nuclear weapons.\(^{800}\) In peace-time, a threat of use of a

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\(^{799}\) ICJ Advisory Opinion (1996), par. 47.

prohibited weapon to support certain demands may indicate that the violating State is trying to determine which provisions of the arms control treaty will actually be enforced; the violating State may speculate on a de facto acceptance of its deviant behaviour. Furthermore, it cannot be ruled out that the State threatening the use is actually prepared to use the prohibited weapon if its demands are not met. For those reasons, a threat of use of a prohibited weapon can always be considered as a significant violation of substantive arms control law and may be responded to as such.

**Possession.** In recent arms control treaties the prohibition of the use of certain categories of weapons has been linked to the prohibition of their possession. When a State is threatening the use of a prohibited weapon, it will almost necessarily have violated the prohibition of possession of that weapon as well. ‘Almost’ necessarily, since there is always the possibility that the State concerned is merely ‘bragging’ in order to test the strength of the arms control treaty. The violating State may not have the fixed intention to overthrow the treaty but may wish to determine the extent to which the technical limitations of the supervisory mechanism (especially the verification mechanism with its inspection system) or the irresolution of the other States Parties would permit it to whittle away its obligations.\(^{801}\) Even though they cannot be considered entirely on a par, the illegal possession of prohibited weapons like the illegal threat of their use constitutes a significant violation of substantive arms control law.

**Destruction.** Significant violations may also occur with regard to the non-fulfilment of obligations of result, especially the obligation to (dismantle and) destroy a given number of weapons. In this respect, it is essential that the number of weapons to be destroyed is clearly indicated and the time-frames within which this has to take place are unambiguously stated in the treaty. Whereas it is possible to establish that a deliberate violation of the substantive obligation to (dismantle and) destroy has taken place, the adequacy of the reaction still very much depends on the significance of the violation, which is in turn determined by the damage done given the particular circumstances of the situation. For example, a State that has had to destroy all its chemical weapons stockpiles but has illegally retained one hundred chemical weapons may pose a much greater risk to stability and security than a NWS that has had to (dismantle and) destroy, e.g., 1,000 nuclear weapons from its much larger nuclear stockpile and has managed to destroy only 750 within a given time-frame. Since it is of vital importance that a process of phased reductions is not interrupted once started, the arms control treaty may provide for the possibility of variable speed in relation to the phased destruction periods.\(^{802}\) This will allow States Parties to indicate

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\(^{801}\) See Barnett (1965), p. 169.

\(^{802}\) See e.g. Part IV(A), par. 21-28 of the Verification Annex of the CWC, which deals with the phased destruction of chemical weapons.
in time that they will not be able to meet the deadline without immediately being in non-compliance with the treaty.

Other potential violations of substantive arms control law relate to non-compliance with specific prohibitions, such as the prohibition of testing certain weapons (in certain environments) and of transferring prohibited types of weapons. If it can be determined that a State conducted a prohibited test explosion or made illegal weapons transfers, a violation of substantive arms control law has taken place. Even though such violations may occasionally be the result of misreading or misinterpretation of the treaty text (depending on the terms of the provision), they can normally be regarded as significant violations of substantive law.

2.3 The significance of violations of institutional arms control law

With regard to those arms control treaties that establish comprehensive regimes involving supervision by a specialised international organisation, such as the CWC, CTBT and the IAEA-NPT system, violations may occur not only at the level of substantive obligations but also at the level of procedural obligations. Should a State e.g. fail to submit a declaration or a report within the time-frame specified in the treaty, it would violate the treaty at the institutional level. The same holds true in case a State Party refuses access to an inspection team to which it should provide access on the basis of the treaty. Similar problems of compliance may arise with regard to rules that are created by the legal acts of the supervising bodies established by the treaties. Most potential cases of non-compliance that arise early in the operation of arms control treaties relate to possible violations of procedural obligations. Most of the time, the issues will be relatively minor and can be dealt with within the framework of the treaty. Unlike violations of substantive law, violations of institutional law may well be the result of non-volitional factors, such as State incapacity and treaty ambiguity (since institutional arms control law often does not bear a high degree of determinacy). It can be upheld that such violations should be dealt with using ‘managerial’ techniques rather than coercion. However, those very same innocent-looking violations may be at the root of concealed violations of substantive arms control law. In regard to treaties that oblige the States Parties to decrease their stockpiles of nuclear, or chemical or biological, weapons to circumscribed numbers, the classic problem of non-compliance has always been the spectre of the hidden nuclear, chemical or biological weapons stockpile. A clandestine stockpile could result either from production antedating the arms control agreement through a combination of under-declaration and imperfect inspection or from clandestine production.

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carried on while the agreement was in force.\textsuperscript{804} The cause of the hidden non-compliance mentioned first lies in the partial violation of procedural obligations, viz. the failure to submit truthful declarations and the frustration of intrusive inspections by trying to conceal quantities of weapons (or their delivery vehicles). Thus, violations of substantive obligations may go unnoticed through the evasion of obligations resulting from the supervisory mechanisms. A real danger of non-compliance with arms control treaties may emerge following the scenario wherein (minor) institutional violations are being used to cover up (far more serious) violations of substantive arms control law. Clearly, violations of institutional law may deprive the States Parties of the possibility of establishing whether non-compliance with the substantive law of the arms control treaty has occurred. For that reason, this type of violation may lead to the frustration of the fulfilment of the object and purpose of arms control treaties, even if account is taken of the fact that supervision is not considered to be an end in itself.

It might perhaps be expected that treaty-based remedies are generally available in fully-equipped treaties, such as the CWC, not only in the event of violations of substantive law but also in the event of non-compliance with institutional law. However, with regard to reactions to institutional violations, even well-equipped arms control treaties offer little or no specific remedies, except for some ‘remedial’ provisions that leave the States Parties concerned the choice of entering into consultations using the institutional structure of the treaty. Such remedies are usually confined to stating that the State Party concerned should notify, and consult with, the organs of the supervising organisation in order to reach agreement on the outstanding issues.\textsuperscript{805} The tendency seems to be to treat unintentional and relatively minor failures to comply separately and to identify the few possible cases of deliberate and relatively damaging violations of procedural obligations. Only (militarily) significant institutional violations, such as those that are likely to have been committed in order to conceal violations of substantive law, will in the end be dealt with as if they were violations of substantive law. In such cases, the treaty may provide that the matter should be referred to (an organ of) the supervising body, that may make use of the powers conferred on it.\textsuperscript{806}

\textsuperscript{804} See Barnet (1965), p. 157.

\textsuperscript{805} See e.g. CWC Annex Part II(A), par. 13, 18, 51, Annex Part IV(A), par. 20, 36, and Part V(A), par. 47, and also Annex(9) of the Southeast Asia NWFZ Treaty.

\textsuperscript{806} Cf. e.g. Annex Part II(A), par. 56, Annex IV(A), par. 53, 58, Part V(A), par. 36, Part V(D), par. 79, 82 of the CWC.
3. Reactions to violations: the relationship between remedies in supervisory mechanisms and remedies available under general international law

3.1 Introduction: possible concurrence of reactions to violations

As mentioned, apart from the remedies available pursuant to the treaty-based supervisory mechanism (in particular the phase of correction/enforcement), many other important remedies in reaction to violations which have not been expressly embodied in the arms control treaty may still be available under general international law. These include (unilateral or ‘by chance’ collective) self-help actions such as the ad hoc organisation of economic sanctions by one or more States, the withholding of a promised positive incentive (e.g., a scheduled loan or technology transfer) or the implementation of a linkage strategy such as barring a State from other co-operative endeavours.\(^{807}\) It is important to determine under what circumstances, if any, non-compliance with the substantive or the most important institutional treaty law can be dealt with by falling back on general international law. This question is of particular importance to the category of arms control treaties that come fully equipped with a comprehensive supervisory mechanism administered by a specialised international organisation, since these treaties run the greatest risk of being violated at the institutional level, with all possible consequences for the substantive level.

In general international law, the law of State responsibility as well as the law of treaties determine the consequences of violations of arms control treaties. Questions as to the relationship between the law of treaties and the law of State responsibility need not be answered, as those two branches of international law obviously have a scope that is distinct.\(^{808}\) A determination of whether a treaty is or is not in force and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. An evaluation of the extent to which certain State behaviour, seen as incompatible with the law of treaties, involves the responsibility of the State displaying it, is to be made under the law of State responsibility. It should be noted that there is a distinction between ‘automatic’ consequences of non-compliance on the one hand and possible reactions to manifestations of non-compliant behaviour on the other hand. As a principle, the ‘automatic’ consequence that international law attaches to instances of non-compliance by a State constituting an internationally wrongful act, is


\(^{808}\) See ICJ Gabcikovo-Nagymaros Case (1997), par. 47. See furthermore Art. 73 of the Vienna Convention on the Law of Treaties, which determines that the provisions of the Vienna Convention shall not prejudice any question that may arise from the international responsibility of a State.
international responsibility of the perpetrator State. A further legal consequence of international responsibility is that the State that committed the illegal act must cease its wrongful conduct (if it is of a continuing character) and make reparation, which must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Conversely, it is a well-established rule of international law that an injured State is entitled to obtain reparation in case damage has been suffered, in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination, from the State which has committed the internationally wrongful act to make good for the damage caused by it. In case two States have committed internationally wrongful acts mutually affecting each other, both of them are under an obligation to pay compensation and both of them are entitled to obtain compensation.

In arms control law, the consequences of an internationally wrongful act are in principle no different from those in other branches of international law. However, a complication may arise in that in some arms control treaties the power to make the assessment that certain conduct of a State Party constitutes a breach of its obligations under the treaty is the prerogative of a supervisory body following a circumscribed procedure. Obviously, the establishment of a violation pursuant to the treaty-based mechanism must be deemed to itself provide the legal basis for remedies normally available under general international law. But could this also mean that the individual State is precluded from taking unilateral measures as long as no violation has been established pursuant to the treaty-based supervisory mechanism - except perhaps when this cannot be established because of non-compliance with vital institutional obligations? In the following this question will be examined in the framework of the law of State responsibility, the law of treaties and the law of the collective security system of the UN Charter.

3.2 Supervisory mechanisms in arms control treaties and reactions to violations pursuant to the law of State responsibility

3.2.1 Non-military countermeasures as reactions to violations
It is well established that when a State has committed an internationally wrongful act, this will likely entail international responsibility whatever the

810 See the Judgement of 13 September 1928 in the case concerning the Factory at Chorzow, PCIJ, Series A, No. 17, p. 47, and see Art. 41 and 42 of the Draft Articles on State Responsibility (1998).
nature of the obligation it has failed to respect.\textsuperscript{813} A State will have committed an internationally wrongful act when two conditions have been fulfilled: the behaviour consisting of an action or omission is attributable to the State under international law, and that behaviour constitutes a breach of an international obligation of the State.\textsuperscript{814} Non-compliance with provisions of an arms control treaty, be they of a substantive nature or not, in principle amounts to an internationally wrongful act which entails international responsibility. The reactions that are available in accordance with the law of State responsibility in the event of a breach come under the heading of ‘countermeasures’. Countermeasures should be distinguished from ‘retorsions’, the latter comprising unfriendly acts that commonly fall outside the law.\textsuperscript{815} Countermeasures involve the non-performance by a State of an obligation under international law, presented as a justified response to illegal acts of another State that were committed before the countermeasures were employed.\textsuperscript{816} The wrongfulness of the countermeasure is precluded on the ground that the measure so adopted was in response to a prior failure by the State against which the countermeasure has been directed to comply with its obligations under international law. When the injured State decides, as a countermeasure, not to comply with one or more of its obligations towards the perpetrator State, this countermeasure does not necessarily have to relate to provisions of the treaty previously violated by the State against which the countermeasure is directed.\textsuperscript{817} In this, countermeasures depart from the exception \textit{inadimpleti non est adimplendum}, i.e. the suspension of equal obligations based on reciprocity as a reaction to prior violation.

The use of countermeasures is often negatively associated with ‘primitive’ societies, in which subjects of law cannot but rely on self-help in the absence of obligatory dispute settlement and a centralised executive body to enforce judgements. Still, countermeasures are among the few effective measures of enforcement that can secure observance of the law.\textsuperscript{818} The possible resort to countermeasures gives ‘teeth’ to international law, also in the context of the law of arms control where the use of countermeasures may sometimes be considered necessary by States in order to protect their legitimate (security) interests. Such use might indicate the failure of those


\textsuperscript{814} See Art. 3 and 16 of the Draft Articles on State Responsibility (1998). Of course, in order to breach an obligation one additional criterion is that the act of breach by a State must have taken place at the time when the obligation was in force for that State (Draft Art. 18).

\textsuperscript{815} Cf. Zoller (1984), p. 5, 43, 514. In the field of arms control, e.g. a State’s increase of its defence budget as a response to perceived new threats could be regarded as a retorsion.

\textsuperscript{816} This description is deducible from the ICJ Gabčíkovo-Nagymaros Case (1997) and the Case Concerning the Air Services Agreement (1978), par. 84.

\textsuperscript{817} Cf. Gabčíkovo-Nagymaros Case, par. 106.

parts of the arms control treaty-based supervisory mechanism that are directed at the enforcement of compliance with the treaty, although countermeasures may be employed in situations where other solutions are still available; as such, their use may be premature and perhaps, depending on the circumstances, even illegal. For in order to be justifiable a countermeasure must meet certain conditions.\textsuperscript{819} In the first place, a countermeasure must be taken in response to a previous wrongful act of another State and must be directed against that State.\textsuperscript{820} A second condition for a countermeasure to be justifiable, is that the injured state must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. Thirdly, the purpose of the countermeasure must be to induce the wrongdoing State to comply with its obligations under international law, and the measure must therefore be reversible. The countermeasure must, in other words, bear the character of a remedial measure, not of a punitive measure.\textsuperscript{821} As such, the notion of ‘countermeasures’ is similar to ‘reprisals’ provided the latter have as their objective coercion to induce compliance with the law.\textsuperscript{822} A final, important, condition for their legality is that the effects of countermeasures must be commensurate with the injury suffered, taking account of the rights in question. In other words, countermeasures must, in order to be lawful, be proportionate to the wrongful act against which they were directed.\textsuperscript{823} Obviously, the significance of a given violation will play a pivotal role in the determination of the proportionality of the countermeasure. Recourse to countermeasures involves the great risk of in turn giving rise to further reaction, thereby causing escalation leading to further deterioration of the conflict. Taking into account the potential consequences of any escalation involving weapons of mass destruction, notably nuclear weapons, it goes without saying that especially in this field countermeasures ‘should be a wager on the wisdom’.\textsuperscript{824} Indeed, the measures to be taken in consequence


\textsuperscript{820} This ‘previous wrongful act’ is not limited to a violation of treaty obligations, but may also concern rules of customary international law. In the context of the law of arms control however, few instances can be imagined where countermeasures would constitute a response to previous acts that were illegal but did not defy any arms control treaty obligation.

\textsuperscript{821} Or, as was observed in the Case Concerning the Air Services Agreement (1978), par. 90, the aim of countermeasures is ‘to restore equality between the States involved and to encourage them to continue negotiations with mutual desire to reach an acceptable solution’.

\textsuperscript{822} But countermeasures are different from those reprisals that have reparation or punishment as their objective. See Zoller (1984), p. 49-80.

\textsuperscript{823} See Zoller (1984), p. 125-137 (discussing principles of equivalence and proportionality in relation to countermeasures). With regard to reprisals this condition of legality was already identified in the Nautilus Arbitration (1928, 2 RIAA 1012), see Alexandrov (1996), p. 16-17. See also Koskenniemi (1992), p. 153.

\textsuperscript{824} Cf. Case Concerning the Air Services Agreement (1978), par. 91.
of State responsibility will have to be balanced against concrete political interests and the (military) significance of the concrete breach. It should however be noted that responsibility itself is indivisible, rendering it impossible to make legal distinctions between the ‘amount’ or ‘weight’ of responsibility one entails when breaching international legal obligations, be they fundamental (substantive or procedural) obligations or only minor ones.

3.2.2 Restrictions on the employment of countermeasures due to the existence of a treaty regime

Apart from the conditions that must be fulfilled before countermeasures can be lawfully applied, certain restrictions on their employment may result from treaty provisions. In the leading case in this respect, the ‘Case Concerning the Air Services Agreement’, the arbitral tribunal considered that:

under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State’s view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through ‘countermeasures’.825

From this it becomes clear that as a general rule, with the exception of the use of armed force,826 a State has the right to take countermeasures as a reaction to previous actions by another State, which in the view of this first State were contrary to international law. This freedom to judge may however be limited by ‘special obligations arising under particular treaties, notably mechanisms created within the framework of international organisations’. This general limitation is of direct importance to arms control law. For the supervisory mechanisms of most arms control treaties that establish international supervisory organisations (generally invested with wide discretionary powers) entail special obligations for the States Parties, which taken together may place severe restrictions on the freedom of the States Parties to establish their legal situation vis-à-vis other States Parties. It is a valid question whether the presence of such an elaborate supervisory mechanism including a specialised supervising organisation in

825 Case Concerning the Air Services Agreement (1978), par. 81.
826 The prohibition of the use of force in international relations can be considered a norm of ius cogens which can therefore only be set aside by a new norm of ius cogens and not by the mere unilateral assessment of a situation by a State. See Art. 53 and 64 of the Vienna Convention on the Law of Treaties and Art. 2(4) UN Charter. The ius cogens character of the prohibition of the use of force has been affirmed by the ICJ in the Nicaragua Case (1984), par. 190.
an arms control treaty restricts the possible employment of countermeasures by the States Parties to that treaty. In conceptual terms, this question is concerned with restrictions of the right to take countermeasures due to the existence of a treaty regime.

In this context, a ‘regime’ must be understood as an ordered set of conduct rules, institutional rules and status provisions, within which the substantive rules are linked to rules prescribing the specific legal consequences of their breach. A treaty may create a regime of international law on its own, on the basis of express or implied institutional rules tailored to its substantive rules. With regard to arms control treaties not containing supervisory mechanisms and thus offering little more than certain substantive rules of conduct, it is difficult to establish any regime capacity and this would, in fact, not be meaningful since no specific rules may be discerned that concur with the general rules of State responsibility. But, with regard to the more elaborate treaties, and especially the CWC, the CTBT and the NPT-IAEA system, it may easily be established that they include an extensive set of institutional rules that are meant to operate with a view to the prevention and detection of, and in reaction to, instances of breach of the substantive rules. Such arms control treaties create a regime, which contains the general prohibitions as substantive rules and the supervisory mechanisms as institutional rules, encompassing specific rules on reactions in the event of a violation of the treaty.

As stated earlier, the treaty-specific rules on reactions in the event of (established or alleged) violations are to be found in the phases of dispute settlement and correction/enforcement. Those parts of the treaty regimes could impose restrictions on the employment of countermeasures by States Parties that claim to be the victim of some kind of breach. However, the provisions on dispute settlement in arms control treaties in general do not prescribe specific, mandatory procedures that have to be followed by the disputing States Parties. On the contrary, the States Parties are merely appealed to, to solve their disputes by peaceful means (among themselves),

827 Cf. Simma (1985), p. 115. See also Ipsen (1991), p. 77. The terms ‘regime’ and ‘subsystem’ are used here with the same connotation, cf. Marschik (1998), p. 212: “Regimes of international law which combine certain primary norms (which regulate the behaviour of subjects of international law) with a distinct set of secondary norms designed to ensure the operation of those primary norms have been termed ‘subsystems’ of international law”. See for a much more general ‘political’ definition (which is not used here), Chayes & Chayes (1993), p. 195: “Regimes are sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations”.

828 Some (elaborate) treaties even emphasise this by making clear that the dispute settlement procedures are ‘without prejudice’ to inter alia the treaty-specific procedures on correction and enforcement. This means that in the event of a ‘collision’ of the different provisions, the provisions on dispute settlement cannot be invoked so as to prevent the full application of the provisions on correction/enforcement of the treaty-based supervisory mechanism. See Art. XIV(6) CWC; Art. VI(6) CTBT; par. 18 INFCIRC/153.
and the decisions on the choice of means and modalities are left to their own discretion. In case a specialised international organisation has been established, such as the OPCW, the CTBTO and the IAEA, organs of the organisation may play a role in dispute settlement, but it is clear that this in itself does not exclude falling back on countermeasures. International practice has not recognised that the mere presence of a dispute settlement clause in a treaty bars the application of countermeasures.829

This may however be different depending on whether the case is under negotiation or is already pending before a dispute-settling body, as appears from the ‘Case Concerning the Air Services Agreement’.830 The arbitral tribunal in this case did not believe it was possible to lay down a rule prohibiting the use of countermeasures during negotiations between the disputing States, especially where such countermeasures were accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.831 The tribunal furthermore considered that as long as a dispute had not been brought before it, the period of negotiations was not over. During this period, States have not yet renounced their right to take countermeasures. But as soon as the tribunal is in a position to act, the right of the Parties to initiate countermeasures disappears to the extent that the tribunal has the necessary means to achieve the objectives justifying the countermeasures.832 In sum, both powers are complementary: if the power of the tribunal as appears from its statute is more limited, the power of the States Parties to the dispute to initiate or maintain countermeasures may not disappear completely.833 Although the tribunal thus acknowledged that the

829 See Koskenniemi (1992), p. 156. See also Trimble (1989), p. 899, who notes that the mere existence of a formal dispute settlement mechanism can help forestall disputes by retarding (not: excluding) the impulse to act unilaterally.

830 See Case Concerning the Air Services Agreement (1978), par. 84. This general consideration raised questions in connection with the dispute settlement clause that was part of the text of the Air Services Agreement between the US and France. It was asked whether resort to countermeasures was restricted if it was found that the Parties previously accepted a duty to negotiate or an obligation to have their dispute settled through a procedure of arbitration or of judicial settlement. The dispute settlement mechanism of the Air Services Agreement has much resemblance to the dispute settlement procedure in par. 22 of INFCIRC/153 (See Art. X of the Air Services Agreement, as cited in fn. 14 of the Case).


832 If e.g., the tribunal has the power to decide on interim measures of protection, regardless of whether this power is expressly mentioned or only implied in its statute, the use of this power leads to the disappearance of the power to initiate countermeasures and may lead to an elimination of existing countermeasures to the extent that the tribunal so provides as an interim measure of protection.

833 Case Concerning the Air Services Agreement (1978), par. 95, 96. In this case, the tribunal decided that the countermeasures taken by the US were lawful, since implementing the arbitration procedure provided for in the Agreement might take time, and during that period countermeasures were not excluded; a State resorting to such measures must do everything in its power to expedite the arbitration and this was exactly what the US had done in the case concerned. See Case Concerning the Air Services Agreement (1978), par. 98, 99 and
The sole existence of judicial dispute settlement procedures as such did not prohibit recourse to countermeasures, it also observed that the existence of an institutional framework ensuring some degree of enforcement of treaty obligations is sufficient for the prohibition of any recourse to countermeasures, as soon as the judicial dispute settlement proceedings that are part of that framework are initiated.\(^\text{834}\) The existence of such framework should however not be easily presumed; it has been asserted that at the international level only the ICJ forms part of such institutional framework ensuring some degree of enforcement.\(^\text{835}\)

It can be upheld that States Parties to a treaty can only be presumed to have given up the right to resort to unilateral or collective measures of their own choice in an express manner or by way of necessary implication.\(^\text{836}\) There are no examples of arms control treaties in which - in case of an alleged violation - the organs of the supervising organisation have the exclusive right of responding to the violation, in the sense that unilateral responses have been explicitly excluded in the treaty text. This holds true not only in the phases of dispute settlement and correction/enforcement, but also in the review and assessment parts of the process of verification. In the verification process of many treaties, States Parties suspecting non-compliance of some kind is taking place for example have the right to obtain clarification from other States Parties through bilateral procedures of their own choice. The supervising body may offer an alternative, institutionalised procedure, but it is made explicit that such procedure is not compulsory.\(^\text{837}\) Furthermore, even if the final assessment made by a supervising body must be considered legally binding on all States Parties (in that they can no longer individually maintain that no violation has taken place), the arms control treaties concerned do not stipulate what decisions should be taken by the individual States Parties regarding the measures to be employed in reaction to this assessment.

As the above considerations imply, the presence of a specialised supervisory organisation and the existence of rules on dispute settlement and correction/enforcement as part of an arms control treaty regime do not necessarily exclude the application of rules of general international law relating to the legal consequences of wrongful acts.\(^\text{838}\) This conclusion might

Dispositif.

\(^{834}\) "If the [judicial] proceedings form part of an institutional framework ensuring some degree of enforcement of obligations, the justification of countermeasures will undoubtedly disappear, owing to the existence of that framework". Case Concerning the Air Services Agreement (1978), par. 94.

\(^{835}\) See Zoller (1984), p. 123 (referring to the role of the UNSC in enforcement of ICJ rulings pursuant to Art. 94(2) of the Charter).


\(^{838}\) Cf. Koskenniemi (1992), p. 136: "The existence of a special regime does not exclude the
however be challenged when considering that provisions on dispute settlement and correction/enforcement have been included in the treaties precisely for the purpose of providing co-operative alternatives to the reliance on countermeasures or other unilateral remedies. It might even be argued that given this purpose, a treaty regime would entail a prohibition *per se* to set aside the specific rules of the treaty in case of its breach in all circumstances, irrespective of their functioning in practice. To surpass mere presumption, focus should be on the reversed test in this respect, viz. on the question under what circumstances, if any, falling back on the general legal consequences of internationally wrongful acts is *prohibited* due to the existence of a treaty regime. This issue, which concerns the illegality of a fall-back on the general legal consequences of a treaty violation, is directly connected to the concept of treaty regimes that are so-called ‘self-contained’ regimes. Only truly self-contained regimes preclude falling back on general international law in all circumstances. However, the existence of a self-contained regime and the related ‘softening’ of legal consequences of wrongful acts through the exclusion of ‘normal’ rules relative to the consequences of wrongful acts should not be readily presumed. Self-contained regimes imply an exception to the principle of the residual applicability of general legal consequences of internationally wrongful acts, and proof of the ‘self-contained’ character of a (treaty) regime must be found in the treaty text. It has already been argued that with regard to the text of arms control treaties no such proof can be furnished. Moreover, it can be upheld that treaty regimes providing that in case of failure of a special remedy built into the treaty, a more general remedy based on another treaty (regime) or customary international law becomes (once more) application of the general law on countermeasures, but, rather, gives it a secondary role. The Parties must first use the treaty-specific machinery. If the machinery proves ineffective, then the measures available under general international law may be used.” Cf. also Sur (1991), p. 28: “The fact that supervision in arms control law has its basis in particular treaties is not to say that certain general machinery could not be used if necessary to make good the shortcomings of the treaties”.


The concept of ‘self-contained regimes’ finds its origin in the well-known ‘Case concerning US Diplomatic and Consular Staff in Tehran’ which was decided by the ICJ on 24 May 1980 (*United States of America v. Iran*), *ICJ Rep. 1980*, p. 3, par. 86.

It has been argued that only those regimes that embrace a full, exhaustive and definite set of institutional ‘consequential’ rules in the event of a wrongful act and that prohibit falling back on general international law in that event would qualify as a self-contained regime. Furthermore, the concept of self-contained regimes relates to closed regimes consisting of rules of international law. Thus, ‘rules’ of soft law and other ‘rules’ that are not intended to create international legal obligations at all and whose breach is not supposed to lead to State responsibility in the international legal sense, fall outside this scope. See de Hoogh (1995), p. 221; Simma (1985); Zoller (1984), p. 90-93, 113-115; Marschik (1998), p. 222-234.

Or, if this would lead to an ambiguous or obscure result, the records of the negotiators; cf. Art. 31 and 32 of the Vienna Convention on the Law of Treaties.
applicable, are not self-contained. In this regard, the common references to the role of the UN in the supervisory mechanisms of arms control treaties can be considered to provide general remedies in case the treaty-based, specific verification mechanism has failed to generate compliance in practice. Such references thus fulfil the general purpose of filling gaps in the treaty regimes. Also in this respect, mention can again be made of the withdrawal clauses that may be found in virtually all arms control treaties. Withdrawal clauses allow for the withdrawal from the treaty and thus from the special regime that has been established by it. On the one hand withdrawal clauses could be considered saving clauses, because the existence of such clauses could indicate that the arms control treaty is intended to offer a ‘well-rounded’ regime which should be preserved in all circumstances and which therefore gives States that are no longer willing to comply the choice of leaving the regime. However, on the other hand withdrawal clauses can be considered evidence of the recognition that situations may occur to which the treaty regime cannot provide answers. Moreover, it is clear that withdrawal clauses may have the opposite effect of saving the treaty regime: the withdrawal by one State Party may induce other States Parties to do the same and may thus cause the treaty regime to collapse.

It can be concluded that arms control treaty regimes are not self-contained and do not preclude falling back on general international law in all circumstances. However, it is obvious that in case of a breach the legal consequence of the existence of a treaty regime will be that the applicable specific rules of the regime enjoy priority over the general rules of State responsibility. As a principle, the States Parties should try to make use of the procedures available pursuant to the treaty regime before resorting to unilateral measures. The general rules of State responsibility can be called into play, but only after all remedies provided in the treaty regime have been exhausted without leading to any positive results and when the injured States Parties can no longer be expected to further tolerate the imbalance of costs and benefits caused by the non-compliant behaviour. Furthermore, if it is clear from the outset that the appropriate organs of the supervising organisation will not react or will otherwise completely fail to undertake any action whatsoever, the States Parties concerned must be presumed to have

844 Most treaties provide for a special session of the supervising body which may decide to refer the matter to the UN or, in case of a clear threat to international peace and security, is required to do so. See e.g. the Antarctic Treaty, BWC, ENMOD Convention, the NWFZ treaties, CTBT and CWC. Internally, potential ‘gaps’ in the treaty regimes have often been obviated by an internal sanctions regime, for example treaty clauses on suspension of membership rights as a reaction to breaches. This type of clause does not exclude the operation of other legal consequences of a breach, such as countermeasures.
the right to fall back on the remedies available to them under general international law and act unilaterally, out of self-help based on considerations of individual security. In sum, the right of States Parties to resort to individual or collective countermeasures outside the treaty-specific framework is limited to the extent that they must first exhaust the remedies of that framework or establish its ineffectiveness. It can be maintained that there is not so much exclusivity, but rather priority of the arms control treaty-based remedies over measures available to States under general international law.

3.2.3 Restrictions on the employment of countermeasures 'in kind' due to the existence of a treaty regime

As has been rightly noted, there are two angles to the question whether States would be prevented from having resort to countermeasures due to the existence of a treaty regime. So far, focus has been on the possibility that the existence of the regime would exclude any resort to countermeasures outside the regime. The second angle to the question relates to the possibility that the existence of a treaty regime would exclude the possibility of resort to countermeasures (temporarily) suspending the obligations established under the regime. This concerns the situation wherein States Parties cannot react 'in kind' when a State Party violates its obligations under the treaty. It can be translated into the question whether a State Party could react to treaty violations by (temporarily) suspending its own obligations towards the violating State without violating at the same time the obligations it owes all other States Parties to the treaty (the 'third' States Parties). For one of the most fundamental restrictions on the employment of unilateral measures is the respect for the legitimate rights of third States.

With regard to the effect of countermeasures on the rights and duties of third States Parties, a distinction should be made between those obligations that bear the character of reciprocal obligations, and those obligations that a State Party has taken on towards all other States Parties to the treaty. Only the first category, that of strictly reciprocal obligations, could be suspended towards the State that earlier breached the same obligations towards the responding State. However, only in exceptional cases would it be feasible to 'split up' the legal relationships under the arms control treaty to identify rights and obligations operating bilaterally between the States Parties, whose

846 See Koskenniemi (1992), p. 150, 160. Cf. also Rosas (1995), p. 588: "At least if the verification and compliance system of the particular regime, be it an extremely far-reaching and sophisticated one, breaks down, reprisals may still be open to States under general international law".
848 Of course, this suspension of obligations should be distinguished from the (collective) suspension of the operation of a treaty, which is regulated by the law of treaties; see infra.
fulfilment could be suspended as a countermeasure without infringing upon the rights of other States Parties not guilty of breach. Most obligations of the arms control treaties are ‘integral’ in the sense that every State Party has an interest in and a right to performance by every other State Party and hence no suspension is allowed. The only exception would be the case of a significant violation which completely defies the object and purpose of that treaty as a whole; in that case the infringement upon the rights of the third States Parties could no longer be considered decisive for assessing the legality of the reaction of a directly affected State Party. This type of reaction could ultimately be justified as being based on the right to self-preservation of every State.\textsuperscript{850}

This implies the existence of an ‘all-or-nothing’ situation: since probably all of the obligations under the arms control treaty have far-reaching effects on ‘third’ States Parties, this means that general remedies having the effect of suspending the obligations under the arms control treaty are never available, except in those cases in which a significant violation of object and purpose of the treaty has taken place (unless of course the treaty itself would provide for such reaction ‘in kind’). But even in cases of (militarily) significant violations a reaction ‘in kind’ would not always be justified. Taking the CTBT as an example, the most significant violation of object and purpose would be the conduct of a nuclear test explosion. Even though such a clear violation of substantive law would justify seeking all kinds of remedies, it would not justify the conduct of a nuclear test explosion as a retaliation ‘in kind’. Instead, such violation would most probably mean the end of the treaty regime, since most States Parties would arguably withdraw from the treaty in reaction to the violation. After their withdrawal, those States Parties would eventually be free to start or resume underground nuclear testing. One significant violation which defies the object and purpose of the treaty may therefore usher in the collapse of the entire treaty regime.

The idea of a State Party committing a clear breach of the substantive obligations of an arms control treaty might be considered far-fetched, but cases of ‘technical’ non-compliance with certain procedural obligations of the treaty, such as the submission of declarations or reports within a given period of time, are manifold and familiar.\textsuperscript{851} It will be clear that a violation of institutional arms control law should first be dealt with in accordance with the special procedures for determining and reacting to such violations as available in the arms control treaty (the treaty-based regime enjoys priority). As has already been mentioned, not many specific procedures relating to reactions to violations of institutional law can be found in arms

\textsuperscript{850} On the status of self-preservation, either perceived as an international legal principle or not, see Cheng (1987), p. 29-105; Kahn (1999); Kohen (1999).

control treaties. In the absence or failure of specific procedures, States Parties may react to institutional violations through remedies available under general international law, as long as no suspension of their own institutional obligations under the arms control treaty takes place. Thus, the failure of the supervising organisation to react (adequately) to the violation cannot act as an excuse for the other States Parties not to carry out treaty obligations on their part. Unilateral measures taken as a reaction to the violation of institutional law of the arms control treaty regime should be directed against, and have their effects on, legal obligations owed to the non-compliant State Party outside this regime.

What about institutional violations that defy the object and purpose of the treaty? First of all, it should be questioned whether any violation of institutional law could by itself ever amount to a (militarily) significant violation of the object and purpose of an arms control treaty. This qualification probably cannot be upheld, even though there are some sets of provisions, such as those on international inspection regimes, that can be considered essential to the fulfilment of the object and purpose of a treaty. Even then, a retaliation in kind would be unlawful, assuming that such procedural violation would not amount to the complete defiance of the object and purpose of the treaty as a whole. For example, if a State Party refuses access to its territory to teams of international inspectors, other States Parties cannot be considered to have the right to in turn refuse inspections on their territory as a reaction to the previous violation. Other measures, such as the refusal of only those inspectors that have the nationality of the violating State Party without obstructing inspection *per se*, must be considered a legitimate countermeasure (since they do not infringe upon the rights of third States Parties). In those arms control treaties where the inspection regime is not ‘internationalised’ but takes place on the basis of strict reciprocity, a State Party is of course allowed to refuse access (as a countermeasure) to a team of inspectors from another State Party that earlier refused access to its inspectors. That State Party would of course still be obliged to allow access to teams consisting of inspectors of other nationalities, so as not to violate the legitimate rights of the other States Parties to the treaty. In sum, even in cases of significant violations of procedural obligations essential to the fulfilment of the object and purpose of the arms control treaty, it appears that unilateral reactions should have their effects outside the treaty regime.
3.3 Supervisory mechanisms in arms control treaties and general law of treaties reactions to breaches of treaty

3.3.1 Introduction
Earlier it has been established that treaties are the principal source of the law of arms control. Furthermore, it has been demonstrated that almost all present-day arms control treaties contain more or less comprehensive supervisory mechanisms, encompassing provisions applicable in the event of (alleged) non-compliance, or, in other words, provisions on breach of treaty. The general law of treaties, as codified in the 1969 Vienna Convention,\(^ {852} \) contains provisions with regard to the consequences of breach of treaty as well. These consequences encompass withdrawal, termination and suspension of the operation of the treaty breached.

In the following paragraphs, two main questions will be simultaneously addressed. First, in what circumstances are provisions in the Vienna Convention likely to concur with similar provisions in arms control treaties? Second, although the provisions of the Vienna Convention are usually without prejudice to the treaty-specific provisions that deal with similar issues, a legitimate question is whether treaty-specific provisions apply to the exclusion of similar provisions of the Vienna Convention. It is not inconceivable that in some situations provisions of the supervisory mechanisms cannot be applied, e.g. because a treaty organ is unable to take a majority decision due to political obstacles. Would a State Party in such a case, in which the mechanism envisaged in the treaty fails, be barred from invoking provisions of the general law of treaties? If not, what would be the consequences for the treaty mechanism? And, would a mere threat of failure of the treaty mechanism already justify appeals to remedies of the general law of treaties?

3.3.2 Withdrawal, termination or suspension of the operation of a treaty
Part V of the Vienna Convention sets out the circumstances in which a treaty will cease to be applicable, in whole or in part, for a State Party to it by reason of an acknowledged ground for invalidity, termination or suspension. The opening article of Part V, Art. 42, lays down that the validity of a treaty or the consent of a State to be bound by a treaty may be impeached only through the application of the Vienna Convention; and that the termination of a treaty, its denunciation or the withdrawal of a Party, or the suspension of the operation of the treaty, may take place only as a result of the application of the provisions of the treaty in question or of the Vienna Convention. It was thought desirable as a safeguard for the stability of treaties, to underline in a general provision at the beginning of Part V that

the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the articles of this Part V of the Vienna Convention (apart from any special cases provided for in the treaty itself).\textsuperscript{853} Especially regarding treaties in the field of arms control it is extremely important to realise that there is only a limited number of circumstances in which a treaty may, in whole or in part, for all the Parties or for one Party alone, cease to have legal effects by reason of faults in or relating to the treaty instrument itself, by reason of certain facts external to the treaty or by reason of unlawful acts committed in the execution of the treaty.

3.3.2.1 Withdrawal from a treaty

According to Art. 54 of the Vienna Convention, the withdrawal of a Party from a treaty may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the Parties after consultation with the other contracting States.\textsuperscript{854}

As mentioned, arms control treaties commonly provide for a general, standardised withdrawal clause. According to the standard clause, each State Party to the arms control treaty shall have the right to withdraw (occasionally referred to as a ‘denunciation’\textsuperscript{855}), from the treaty if it decides that extraordinary events, related to the subject matter of the treaty, have jeopardised the supreme interests of its country.\textsuperscript{856} This right is based on the exercise by the State of its national sovereignty.\textsuperscript{857} The question as to what exactly constitutes the ‘supreme interests’ of a country perhaps cannot be answered in general and \textit{in abstracto}, but it can be assumed that in arms control matters reference is to the State’s security interests. Furthermore, and in this there is a connection between the treaty-based withdrawal clauses and the concept of material breach in the law of treaties, the ‘extraordinary events related to the subject matter of the treaty’ which the clauses commonly point at, will normally only relate to cases of non-compliance with fundamental obligations of the arms control treaty. In some cases, the withdrawal clause is more clearly connected to material breach of the treaty; e.g. Art. 13(1) of the Rarotonga Treaty provides that ‘in the event of a violation of a provision of the treaty, which is essential to the achievement of the objectives of the treaty or of the spirit of the treaty, every

\textsuperscript{854} The termination of a treaty is covered by this provision as well, but will be dealt with separately \textit{infra}.
\textsuperscript{855} As in Art. 9 of the 1981 Certain Conventional Weapons Convention.
\textsuperscript{856} See Art. X(1) NPT, which has become the ‘model’ withdrawal clause for later arms control treaties.
\textsuperscript{857} This becomes apparent from what these clauses commonly state: ‘Each State shall in exercising its national sovereignty have the right to withdraw (…)’. But see Lysén (1994), p. 138, who asserts that the right of withdrawal is based on the specific conditions established by the clause as part of the pactum.
other Party shall have the right to withdraw from the treaty’. Thus, such violation by one State gives the other States the right to withdraw from the treaty, whereby it is not even provided that the violation must have jeopardised the supreme interests of the other States Parties. Another example may be found in the 1990 CFE Treaty, which has both a standard withdrawal clause and one directly linked to a breach of treaty, involving an increase of TLE outside the scope of the limitations of the treaty in such proportions as to pose an obvious threat to the balance of forces within the area of application (Art. XIX).

It should be noted that standard withdrawal-clauses do not set substantial criteria for invoking their provisions. After all, it is the State itself that can claim that its supreme interests are at stake because of some extraordinary event relating to the subject matter of the treaty, and no other State is either allowed or able to check this. Some arms control treaties require that the State in its notice of withdrawal includes a statement of the extraordinary events which it regards as jeopardising its supreme interests. It can however be questioned whether very general statements on extraordinary events or even failure to make a statement at all, would render the decision to withdraw invalid. For the only criterion appears to be that the State concerned decides (in good faith) that its supreme interests are being jeopardised.\(^{858}\) Furthermore, the only additional criterion generally provided for in arms control treaties is connected to time-limits: the notice of withdrawal will take effect after a specified period of time, e.g. six months.\(^{859}\) The exercise of the right of withdrawal by a State Party on the basis of a provision of an arms control treaty clearly only relates to this specific treaty and has in itself no consequences for the position of the other States Parties. In that context, some arms control treaties make explicit that the withdrawal of a State Party from the treaty shall not in any way affect the duty of other States to continue fulfilling the obligations assumed under any relevant rules of international law.\(^{860}\) In other words: the exercise of the right of withdrawal from a treaty by a State Party does not grant the right to other States (-Parties) to no longer observe the provisions of that treaty or other treaties (or other relevant rules of international law, e.g. rules of customary international law).\(^{861}\) It can however not be disregarded that an

\(^{858}\) See Ronzitti (1991), p. 120; Lysén (1994), p. 137.
\(^{859}\) As for example in Art. IX(2) CTBT. To provide another example, the Rarotonga Treaty mentions a period of twelve months’ advance notice (Art. 13(2)). The APM Convention in Art. 20(2) contains a withdrawal clause similar to that in other arms control treaties, but with one addition: withdrawal normally takes effect six months after the receipt of the instrument of withdrawal by the Depositary (i.e. the UNS-G, see Art. 21), except if the withdrawing State Party is, on the expiry of that six-month period, engaged in an armed conflict; then the withdrawal shall not take effect before the end of the armed conflict.

\(^{860}\) See Art. XVI(3) of the CWC, which draws attention to the 1925 Geneva Protocol in particular. See also Art. 20(4) APM Convention.

\(^{861}\) Note that this is a general rule of the law of treaties. Under the part of the law of State
extraordinary event that jeopardises the supreme interests of one State Party may easily touch upon the supreme interests of the other States Parties as well. Still, in any case every State Party must decide for itself whether its national security is at stake as a result of the extraordinary events.

The mere fact that one State Party decides to exercise its right to withdraw from an arms control treaty in itself cannot be considered a threat to the supreme interests of the other States Parties. If this were otherwise, one single withdrawal would suffice to destroy a complete treaty regime. The same holds true in case a State that is not a Party to a given arms control treaty displays certain behaviour, related to the subject matter of this treaty, that might be considered by the States Parties to this treaty as constituting a threat to their supreme interests. Practice in this matter has shown that even the most rigorous events possible, viz. the nuclear test explosions that were conducted by India and Pakistan in May 1998, have not led to the exercise of the right to withdrawal by (neighbouring) States Parties from relevant treaties (such as the NPT). This is remarkable, taking into account that especially near-by countries must feel their supreme interests potentially jeopardised by these extraordinary events - the nuclear testing - notwithstanding the fact that this testing was not contrary to international law.

Finally, note that invoking a ‘fundamental change of circumstances’ would have the same effect in order to terminate participation in a treaty, albeit that here the State invoking this exception has to prove that the situation that existed previously constituted an essential basis for its consent to be bound and that the effect of the change is such that it is to radically transform the extent of obligations still to be performed under the treaty (see Art. 62 of the Vienna Convention).

### 3.3.2.2 Termination or suspension of a treaty as a consequence of its material breach

One of the measures available under general treaty law as a reaction to breach of treaty is the suspension of the operation, in whole or in part, or the termination of the treaty (see Art. 60 of the Vienna Convention). Many arms control treaties contain a duration clause providing that the treaty shall be of unlimited duration, and several other treaties are silent as to their period

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responsibility which relates to countermeasures this possibility has not been ruled out.

862 See e.g. Art. IV LTBT; Art. XIII(1) BWC; Art. VII ENMOD Convention; Art. 20(1) APM Convention; Art. 31 (old 30) Tlatelolco Treaty; Art. 13(1) Rarotonga Treaty; Art. 17 Pelindaba Treaty; Art. 22(1) Southeast Asia NWFZ Treaty; Art. XVI(1) CWC; Art. IX(1) CTBT. In the NPT, an initial period for the duration of twenty-five years has been fixed, with provision for continuance in force after the expiry of that period subject to a right of denunciation or termination (Art. X(2)). In 1995, the treaty was extended for an indefinite period of time, see Final Document (1995), Annex, Decision 3.
of duration. However, apart from the right to withdrawal, arms control treaties do not contain termination clauses. This means that except for the right to withdrawal, the termination and suspension of operation of arms control treaties is regulated by the provisions of the Vienna Convention.

As has been emphasised earlier, it is extremely important that the treaty regimes in the field of arms control are upheld, both where the substantive law provisions as well as the treaty-based supervisory mechanisms are concerned. Precisely with regard to arms control treaties, suspension and especially termination would be extremely counter-productive and must be deemed instruments of last resort. In case of withdrawal by one State Party, the other States Parties are still bound by the treaty regime. The termination of an arms control treaty as a result of material breach however would release all States from their obligations and could have worldwide destabilising effects, such as a renewed massive arms race. The possibility of termination mentioned in Art. 54 is remote, since the consent of all the Parties is required for it to happen. However, the ‘preservation’ of a treaty may also be endangered in case of material breach, as defined in Art. 60 of the Vienna Convention.

The Vienna Convention stipulates that a material breach of a treaty may consist of (a) a repudiation of the treaty not sanctioned by the Vienna Convention; or (b) the violation of a provision essential to the accomplishment of the object and purpose of the treaty (Art. 60(3)). For the moment, discussion of material breach will be confined to subparagraph (b). It can easily be upheld that the breach of at least the substantive obligations (which are, after all, provisions essential to the accomplishment of the object and purpose of the treaty) of an arms control treaty would be tantamount to a material breach. Since violations of substantive arms control law will also be at the basis of the ‘extraordinary events’ that jeopardise the supreme interests - the national security - of the other States Parties, situations of material breach will virtually always concur with situations in which the withdrawal clause of the treaty is likely to be invoked. But, contrary to circumstances leading to invocation of the withdrawal clauses, circumstances leading to reliance on material breach are objectively verifiable, at least to some extent. It is important to note, that a ‘material breach’ not only covers the violation of a provision directly touching upon the central purposes of the treaty, but may also entail other provisions considered by a State Party to be essential to the effective execution of the treaty, which may have been material in inducing it to enter into the treaty in the first place, even though these provisions may be of an ancillary character.

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863 E.g. Outer Space Treaty; Sea-Bed Treaty; Moon Agreement; Certain Conventional Weapons Convention.
breach took place without necessarily amounting to a situation in which the supreme interests of the State are at stake. In this context, reference can be made to a State violating fundamental procedural obligations, such as the obligation to allow inspectors onto its territory or sending in accountability reports on the basis of which the entire supervisory mechanism is meant to function. In case such obligations are violated, the supervising body will be unable to verify whether the potentially defaulting State has complied with its substantive obligations. It may be contended that this situation amounts to a material breach of the treaty, since the State has made it impossible to establish whether or not it has complied with the basic obligations of the treaty. But even then, it can be easily upheld that before relying on this provision of general international law, a solution must first be sought through the treaty-specific provisions, if any are available. For the provisions on suspension and termination in the Vienna Convention are without prejudice to any provision in the treaty applicable in the event of a breach (Art. 60(4)). Even when it is recalled that most arms control treaties contain few provisions on reactions in the event of an established breach, it seems that the object and purpose of an arms control treaty would resist relying on unilateral measures under the general law of treaties before starting discussions in the plenary organ of the supervising body, which for that matter has a general function of dealing with all kinds of compliance-problems. Only where no body is established nor treaty-specific procedures are provided, immediate reliance on unilateral suspension of operation of the treaty may be unavoidable.

The consequences of material breach of a multilateral treaty by a State Party are set out in Art. 60(2) of the Vienna Convention. Such material breach entitles the other Parties by unanimous agreement inter alia to suspend the operation of the treaty in whole or in part or to terminate it either (i) in relation between themselves and the defaulting State, or (ii) as between all the Parties. Note in this respect, that the violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured state, but it does not constitute a ground for termination under the law of treaties.865 It is only the material breach of the treaty itself, committed by a State Party to that treaty, that entitles another State Party to rely on it as a ground for terminating the treaty. But even then, termination of the treaty will only be achieved by unanimous agreement of the States Parties (Art. 60(2(a)).

With regard to the suspension of the operation of an arms control treaty, par. 2(c) of Art. 60 deserves special attention. This paragraph is specifically designed to deal with breaches of special types of treaties, such as arms control treaties, where a breach by one Party tends to undermine the whole

865 See ICJ Gabcikovo-Nagymaros Case (1997), par. 106.
treaty regime in a very specific manner.\textsuperscript{866} According to Art. 60(2(c)), a material breach of a multilateral treaty by one of the Parties entitles any Party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one Party radically changes the position of every Party with respect to the performance of its obligations under the treaty. This rule aims at the protection of innocent Parties against the threat resulting from the behaviour of the defaulting State, by permitting innocent Parties to claim temporary release from obligations owed not only to the defaulting State but also to the other Parties.

Taking into account the nature of arms control law, it may be relevant to point at par. 5 of Art. 60. According to this paragraph, paragraphs 1 to 3 of the article (on material breach and its consequences) do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties. It constitutes a part-recognition of the principle that a rule of unilateral denunciation in the event of breach is inapplicable in the case of treaties which embody absolute or unconditional obligations and not reciprocal obligations.\textsuperscript{867} All rules of this character are intended to apply not so much for the benefit of States, as directly for the benefit of the individuals concerned, as human beings and on humanitarian grounds. The (substantive) provisions of those arms control treaties which also bear the character of humanitarian law, such as the 1981 Certain Conventional Weapons Convention, consequently are among the provisions referred to. Art. 60(5) can be regarded as declaratory of customary international law and thus applies to all treaties in force today.\textsuperscript{868} It could even be argued that adherence to arms control treaties is even more important than the observance of human rights, since the survival of humanity itself may be at stake.\textsuperscript{869} Still, the provision appears to have been made specifically for the protection of individuals; Art. 60(5) sees to it, that the provisions of certain treaties that mean to provide protection to these individuals cannot be terminated because of the material breach of the same provisions by other States Parties. The duty to perform those absolute obligations is not dependent on reciprocal or corresponding performance by other Parties. Clearly, the exception of par. 5 cannot be considered to see to all provisions of arms control treaties in general.

Finally, with regard to the period after which termination of a treaty takes effect, Art. 65(2) of the Vienna Convention stipulates that such effect shall

\textsuperscript{869} See Myjer (1990), p. 106.
occur three months after notification of termination has been given (in writing; see Art. 67). Art. 65 and 67, if not codifying customary law, at least generally reflect customary law and contain special procedures which are based on an obligation to act in good faith. 870

3.3.3 Breach of prohibitions of use: the effect of inter-State armed conflict on the validity and operation of arms control treaties

It can be upheld that the use of a particular weapon in contravention of an arms control treaty-based obligation constitutes the most significant material breach possible of that treaty. A State that in self-defence against another State's attack employs a weapon, the use of which is prohibited to it by an arms control treaty to which it is a Party, necessarily violates that arms control treaty, even if the (second) use of this weapon is in accordance with the laws of war. For example, if a State Party to the CWC used chemical weapons in self-defence against a (lawful or unlawful) chemical attack, that use would clearly be contrary to Art. I(1) of the CWC. The question raised here is whether in that case the contention that an inter-State armed conflict affects the validity or operation of the substantive obligations laid down in arms control treaties may justify the use of prohibited weapons. 871

The arms control treaties themselves are silent on this subject. Furthermore, there is no rule of general law of treaties on this issue; the Vienna Convention explicitly has not prejudged on the effects the outbreak of hostilities between States has on treaties (see Art. 73). In practice, the type and nature of the treaty concerned will be decisive for the effects of armed conflict on its validity and operation: some treaties will be considered abrogated, others remain in force and operative, and yet others are suspended and susceptible to resumed operation as soon as the armed conflict has ended. 872 Two tests apply in this instance, viz. a subjective test of intention - did the signatories of the treaty intend that it should remain binding on the outbreak of war? and an objective test - is the execution of the treaty incompatible with the conduct of war? 873

870 As the ICJ stated in an Advisory Opinion dealing with a case in which the Vienna Convention did not apply: "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith". See 'Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt' (ICJ Rep. 1980, p. 96, par. 49), as cited in the ICJ Gabcikovo-Nagymaros Case (1997), par. 109.

871 The substantial use of weapons in self-defence by a State against another State usually indicates that there is an (aggressive) attacker on the one hand and a defender on the other and thus a situation of inter-State armed conflict. The issue whether the humanitarian laws of war are applicable to such armed conflicts will not be dealt with here.


873 Cf. Resolution on the effects of armed conflict on treaties ('Les effets des conflits armés sur les traités') of the Fifth Commission of the Institute of International Law, adopted at
The ‘subjective’ test, based on the text of the treaties and confirmed by their object and purpose, makes clear that the Parties to consensual arms control treaties intended to create viable permanent regimes unaffected by armed conflict. It would be contradictory to consider arms control treaties, that after all purport to strengthen the prohibition of the use of force in international relations, to be inapplicable in the event of armed conflict. This becomes particularly clear where it is stipulated that the Parties ‘shall never under any circumstances’ perform certain behaviour (e.g. Art. I(1) CWC; Art. I AP M Convention; see also Art. I BWC). Another indication lies in the statement that the articles of the treaty ‘shall not be subject to reservations’ (e.g. Art. XXII CWC), excluding war as a tacit reservation for non-application of the treaty.

As regards the ‘objective’ test, it can be upheld that the execution of arms control treaties that do not as such prohibit the use of weapons will generally be compatible with the outbreak of armed conflict. It is clear that, unless all the States Parties would consent to terminate it, the arms control treaty itself will remain in force both during and after the armed conflict. Therefore the view that the US would not have to apply arms control agreements during wartime vis-à-vis an adversary State Party, which was expressed in connection with nuclear arms control treaties (that do not prohibit the use of weapons), cannot find any basis in the law. Serious difficulties that arise from the outbreak of armed conflict can be met by States through use of the standard withdrawal clause. The case of war is an extraordinary event that may undoubtedly jeopardise the supreme (security) interests of a State. The States Parties directly involved in the armed conflict, but also ‘third’ States Parties affected by the armed conflict, may invoke the withdrawal clause, provided that the effects of the armed conflict are related to the subject-matter of the arms control treaty. The States Parties, being the ultimate judges of how best to safeguard their own security, therefore may quite readily have reason to withdraw from the treaty in the event of hostilities breaking out. The time-limits in the withdrawal clauses, providing that the notice of withdrawal shall take effect only after a specified period of time, may present a problem in this respect. States may feel they do not have the time to wait for the notice of withdrawal to become

875 This view was for example voiced by the legal advisor of the Department of State when the nuclear test ban treaties came before the Senate Foreign Relations Committee to initiate the advice and consent process. With regard to the NPT, the US made clear during the ratification procedure that it considered that this treaty would cease to be valid in time of war. This so-called ‘war reservation’ agreed within NATO is controversial and it is not known whether and to what extent it is shared by other States Parties. See Goldblat (1995), p. 31-32 and see Almond (1997), p. 29-30.
effective, because they may feel compelled to immediately display behaviour which is contrary to the terms of the arms control treaty in order for them to be prepared to wage war or, when they are already actively involved in battles, in order to properly defend themselves. For example, suppose a war between NATO and Russia was imminent, compliance with the terms of the CFE Treaty might be sacrificed to a rapid build-up and deployment of forces all over Europe. States in that position could decide that, given the circumstances, the damage which might result from the violation of the arms control treaty by no means outweighs the damage that could result from not violating the treaty, and therefore may choose to deliberately violate the treaty out of conditions of necessity, such as self-defence. Such violation of the treaty could be termed an ‘efficient breach’. It should be noted, however, that an ‘efficient breach’ does not take away the unlawfulness of the violation. The ‘efficiently breaching’ State bears unabridged international responsibility, and may suffer losses in the form of countermeasures by other States Parties or sanctions by a supervising (or other) body.

It can be upheld that only those arms control treaties that contain a prohibition of use are directly affected by the outbreak of hostilities (as required by the ‘objective test’ mentioned). However, especially with regard to arms control treaties prohibiting use, the prominent principle of reciprocity should be taken into account. It might seem difficult to accept that a State which suffers an attack with prohibited weapons (e.g., chemical weapons) would remain bound not to use similar weapons in self-defence. Still, upholding the prohibition of use is exactly what is required by the (partly) ‘humanitarian’ character of modern arms control treaties, such as the CWC and the APM Convention. States must be deemed to have considered the consequences of giving up the possibility of making use of specific weapons for their own defence. This is a valid observation, regardless of whether or not the attacking State itself is a Party to the arms control treaty and therefore violated the prohibition of non-use first. Again, a ‘first’ breach by one of the States Parties does not provide a ground for terminating the arms control treaty or suspending its operation in whole or in part with regard to provisions relating to the protection of the human person, which include at least the prohibition of use. An ‘efficient breach’

876 See on this concept Morrison (1994-5).
877 Of course, a major technological breakthrough cannot be foreseen. If, for example, a new kind of nuclear weapon were invented (e.g. based on thorium), then States might decide to undertake explosive testing experiments even if they would thereby ‘efficiently’ breach the CTBT (assuming that it is in force), or would act contrary to Art. 18 of the Vienna Convention.
878 See in this respect also Art. X CWC, on the system of assistance and protection against (possible) use of chemical weapons against a State Party. The CWC also contains a prohibition to engage in any military preparations to use chemical weapons (Art. 1(c)). In the above reasoning, a State suffering from an attack with chemical weapons could nevertheless
of the prohibition of use is almost completely impossible, from humanitarian and security considerations. That is because any small-scale use of prohibited weapons, for example in order to deter further attacks with whatever weapons, might easily provoke an action-reaction cycle, thus causing much more damage than in case the prohibition of use had been respected (at least) by the defending State Party. The one single exception may be that a State invokes the right to self-preservation, since it cannot be expected to sacrifice its very existence to uphold its treaty obligations, thus consenting to its own annihilation.\(^{879}\) Consequently, a plea by a State Party for immediate termination or suspension of the operation of the prohibition of use in an arms control treaty, based either on ‘material breach’ (see Art. 60(5) Vienna Convention) or on ‘fundamental change of circumstances’ (see Art. 62(3) Vienna Convention), cannot be accepted. With regard to the effects of armed conflict on bilateral arms control treaties, the line of reasoning is similar. It may even be upheld that out of humanitarian considerations and notwithstanding the fact that the principle of reciprocity is even more important in a bilateral than in a multilateral context, in case of armed conflict between the two States Parties to a bilateral arms control treaty, a prohibition of use could not be terminated or suspended as a reaction to prior breach by the other State Party.\(^{880}\)

Finally, the question may be asked what the effects of armed conflict on the procedural obligations of the States Parties to arms control treaties will be. The same tests as applied to the substantive obligations of the treaties can be employed here - a subjective test of intention and an objective test of compatibility of the execution of the treaty with the conduct of war. First of all, it is clear that the States Parties to arms control treaties comprising comprehensive supervisory mechanisms intended to establish a standing, continuously operating mechanism to supervise compliance with the substantive obligations. Since the outbreak of hostilities by itself does not affect the validity or operation of the arms control treaty, it can be established that the outbreak of hostilities in principle (and apart from practical problems) does not exempt the States Parties from executing their procedural obligations under the treaty. However, it is equally clear that a State Party which is at war with another State Party cannot be expected to provide to its adversary State Party during that war declarations containing highly sensitive military information, such as information on troop

deck to engage in such preparations in order to deter any further use of chemical weapons against it. This could be considered an ‘efficient breach’.

\(^{879}\) Perhaps this is the scope of the ‘extreme circumstance of self-defence in which the very survival of a State would be at stake’ as formulated by the ICJ in par. 105(F) of its Advisory Opinion (1996) regarding the legality of the threat or use of nuclear weapons.

\(^{880}\) Art. 60(1) is not applicable to provisions meant to fulfil purposes as described in par. 5 of that article. Currently, there is no bilateral arms control treaty in force which contains a prohibition of use.
movements or the production numbers and storage location of all kinds of weapons. It can be established that the exchange of such information would be incompatible with the conduct of war. The same goes for on-site inspections on the territory of a State Party requested by the adversary State Party during the war between them. Therefore, between the belligerent States Parties the procedural obligations must be deemed to have been suspended for the duration of the armed conflict. Belligerent States are however still required to fulfil their procedural obligations towards the other States Parties and the supervising body, again provided that such compliance is compatible with the conduct of war.

In practice however, it is highly unlikely that a State Party which is at war, whether its adversary is another State Party or not, will be prepared to disclose highly sensitive military information to the supervising body, which would mean that this State Party would for its security have to rely entirely on the effectiveness of the confidentiality rule to which the supervising body is bound. Indeed, since almost all procedural obligations of arms control treaties are directed at providing openness, predictability and transparency in military matters, generally speaking a State Party that is at war will determine for itself to what extent the disclosure of military information is still compatible with the conduct of war. That State Party will still have to bear all possible consequences of illegal suspension of the fulfilment of its procedural obligations. In any case, as soon as the war has officially come to an end, the procedural obligations will revive (where relevant ex tunc).

It can be concluded that the outbreak of armed conflict does not by itself affect the validity or the operation of the substantive obligations of arms control treaties, whether these treaties prohibit the use of certain weapons or not. The execution of procedural obligations related to the operation of the supervisory mechanism of the arms control treaty may be suspended between belligerent States Parties as far as the fulfilment of those obligations is incompatible with the conduct of war. In practice, during wartime it may be difficult to keep a State from determining for itself the scope of the procedural obligations under the arms control treaties to which it is a Party. Hence, instances of ‘efficient breach’ cannot be ruled out beforehand.

3.4 Supervisory mechanisms in arms control treaties and the role of the Security Council in enforcing compliance

Most arms control treaties contain provisions relating to the powers of the UNSC as a last resort in case of difficulties surrounding compliance with the obligations resulting from the treaty. The fact that in ultimate cases the UNSC should deal with the situation is a common feature of the

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contemporary system of international law and therefore as such not unique to the law of arms control. Still, the fact that this possibility has been expressly mentioned in the treaty regimes is a characteristic feature of arms control law. The explicit reference to the UN or its organs at least has the consequence that nobody can legally object to the interference of the UN when it is called upon regarding questions of breach of arms control treaties. A point of interest is that collective responses by the UNSC are triggered by acts of aggression, threats to the peace or breaches of the peace (Art. 39 Charter), and not necessarily by established breaches of arms control treaties. Obviously, this does not bar the UNSC from determining that - taking into account the specific circumstances - certain armaments of a particular State may pose a threat to international peace and security. It can be maintained that in case of a dispute between States Parties relative to an arms control treaty, the UNSC could readily decide that the continuance of the dispute would endanger international peace and security and that for that reason, the UNSC recommend or authorise the taking of enforcement action against the State that in its view has violated and continues to violate the provisions of the arms control treaty.

Still, a valid question in this respect is whether the UNSC is allowed to order enforcement measures in accordance with the UN Charter but in total disregard of the treaty that is of direct importance to the dispute. This question was central to a case pending before the ICJ between Libya and the USA and the UK concerning the aerial incident at Lockerbie. In this case, the Montreal ‘Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation’ of 1971 was the treaty involved containing a legal regime of its own, that requires each State Party either to assume jurisdiction over persons in its territory who are alleged to have committed acts of terrorism against a civil aircraft, or to extradite them to a State which has, and is willing to exercise, such jurisdiction. Libya, in assuming jurisdiction, asserted that it had already taken the necessary steps for complying in full with the Montreal Convention. It therefore refused to comply with Res. 748 (1992) of the UNSC, which called for extradition of the Libyans allegedly involved in the 1988 bombing of Pan Am flight 103 and the 1989 bombing of UTA flight 772. Libya challenged the legality of

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882 As was for example done in the case of Iraq where the UNSC (by S/Res/687 (1991)) pointed at the relationship between Iraq’s armed attack on Kuwait and the level of armaments present in Iraq. See Marauhn (1992), p. 783. See also (on the CWC) Krutzsch & Trapp (1994), p. 220.


885 See S/Res/748 (1992), par. 3-6. In this Resolution, the UNSC specifically purports to act
Res. 748 before the ICJ and stated that the powers under Chapter VII that were invoked by the UNSC infringed *inter alia* upon the rights conferred on Libya by the Montreal Convention. The ICJ, in its decision on the request by Libya for provisional measures of protection, found that Libya, like all other Members of the UN, is obliged to accept and carry out the decisions of the UNSC in accordance with Art. 25 of the Charter, including the obligations imposed by Res. 748. The ICJ concluded that the obligations of UN Members in that respect prevail over their obligations under any other international agreement, including, as in this case, the Montreal Convention. This conclusion was reached by an interpretation of the effect of Art. 103 of the UN Charter which provides that obligations of the Charter shall prevail in case of conflict with any other obligations of the Members of the UN.\textsuperscript{886} As such, the UNSC was accorded virtually unlimited powers – albeit only *prima facie*, given that a definitive pronouncement on this matter has been deferred until the ICJ reaches the merits of the case.\textsuperscript{887}

A similar line of reasoning can be found with regard to the actions of the UNSC after the end of the Gulf War between Kuwait and Iraq. In Res. 687 (1991), the UNSC *inter alia* observed that Iraq had not yet ratified the BWC. The Resolution implies that a State’s failure to ratify major arms control treaties, taken together with behaviour at variance with their peace-supporting norms, contributes to the ‘threat that all weapons of mass destruction pose to peace and security’ (Res. 687, preamble). Of course the UNSC did not say that failure of a State to ratify an arms control treaty of itself justifies the application of Chapter VII remedies.\textsuperscript{888} It does imply, nonetheless, that such non-ratification in combination with past behaviour justifies the UNSC inducing Iraq, even as a non-Party, to comply with the BWC norms, probably because the intent to comply in the future can best be attested by ratification.\textsuperscript{889} Since Iraq posed a threat to international peace and security by way of its programmes of weapons of mass destruction, the UNSC ordered Iraq to destroy all these weapons in order to neutralise this threat. The specific obligation of Iraq to destroy its biological weapons stems from the legal regime based on Res. 687 (1991), not from the BWC. The UNSC in this case assumed the power to order that Iraq renounce biological weapons and open itself up to inspection. Although this action


\textsuperscript{888} Such would defy the free consent of States to be bound by treaties. Instead, Iraq is merely ‘invited’ to ratify the BWC (S/Res/687, par. 7).

provides significant questions of control and accountability, there was no problem of colliding powers of the UNSC under the Charter on the one hand and the supervisory mechanism under the BWC on the other, since Iraq was not a Party to the BWC. This is different with regard to Iraq's alleged violation of the NPT. In Resolution 707 (1991), the UNSC invoked Chapter VII to condemn the failure of Iraq to disclose weapons capabilities and to co-operate with the inspectors, as well as its non-compliance with the obligations under its safeguards agreement with the IAEA, which constitutes a violation of its commitments as a Party to the NPT.\(^{890}\) Since the IAEA has been entrusted with the task of verifying compliance with the NPT, this treaty-based organisation must be considered the best authority available for determining whether a State by its conduct has violated a legal obligation arising from the NPT.\(^{891}\) Nevertheless, the UNSC in fact performed all stages of verification: it 'found' the relevant facts, reviewed the behaviour of Iraq while performing an interpretative act with regard to the contents of the obligations deriving from the safeguard agreement between Iraq and the IAEA, and made an assessment as to whether and to what extent Iraq had violated its obligations under the NPT. The UNSC finally threatened to make use of its powers of enforcement in order to coerce Iraq into compliance. In contrast with the initiative of the UNSC in the case of Iraq's alleged violation of the NPT, the IAEA itself took action in 1994 when it accused the DPRK of non-compliance with the NPT and notified the UNSC. This too, opened the way for the UNSC to designate that violation as a threat to the peace and to order enforcement measures (although eventually it did not do so; see supra, chapter [6]).

Two questions can be raised with regard to the cases of Libya (Lockerbie), Iraq and the DPRK. The first question is whether the UNSC is allowed to act as it did in those cases. The answer must be in the affirmative. Under Chapter VI of the Charter, the UNSC has been granted a wide power of investigation and in itself, the UNSC must be deemed to have the power to determine that a certain treaty has been violated by the behaviour of a particular State.\(^{892}\) The second question is whether the UNSC is allowed to enforce treaty-based rules of conduct when a treaty-based supervisory mechanism is available that grants powers of investigation and assessment

\(^{890}\) S/Res/707 (1991), par. 2. The resolution demands full compliance under an implied threat of further collective measures.

\(^{891}\) See Final Document NPT (2000), par. 7 of the comments on Art. III: "(...) the IAEA is the competent authority responsible for verifying and assuring (...) compliance with its safeguards agreements with States Parties [and] nothing should be done to undermine the authority of IAEA in this regard (...)".

\(^{892}\) Cf. Marauhn (1992), p. 797 (discussing the case of Iraq and S/Res/707 (1991)); Rosas (1995), p. 574 (discussing the CWC). Rosas (1998), p. 445 even upholds - with regard to the CWC and the 1925 Geneva Protocol - that the UNGA is 'certainly empowered' to state that a violation of those arms control treaties has occurred and in such a case also has the power to condemn the breach.
regarding compliance to a particular supervising body. This is a pressing question, since there would be no point in spending money on personal and material resources to set up vast and comprehensive supervisory mechanisms if it is clear from the outset that part of the mechanisms will not be made use of.

When taking into account the observations made above, it can be upheld that on the basis of the UN Charter the priority of the powers of treaty-based supervisory bodies may be set aside where they concur with the powers of the UNSC. Even though one should always be cautious in generalising the effects of a few isolated cases, it can be observed that no legal obstacles exist that might prevent the UNSC from assuming the power to assess whether the behaviour of a State constitutes a violation of its obligations under an arms control treaty, even if this treaty contains a treaty-specific supervisory mechanism including provisions for verification of compliance. It should not be forgotten that the UNSC is a political organ, like the UN is a political organisation, whose function is not to react to breaches of treaty, but to react to breaches of the peace, threats to the peace or acts of aggression, the determination of which is at the discretion of the UNSC itself. Finding a threat to the peace, a breach of the peace, or an act of aggression is a political act, any judicial review of which is problematic. Furthermore, political organs like the UNSC are not under a legal obligation to follow precedents, nor to give reasoned explanations of their acts or for not acting in a specific situation. This does not mean that the UNSC would be able to excuse the Member States of the UN from observing the substantive obligations of arms control treaties, but it does mean that the UNSC cannot be held to await the assessment of any supervising body before taking action. It should however be noted that the special majority required by Art. 27(3) of the Charter places an additional burden on decision-making by the UNSC. As a result, even if the UNSC is clearly authorised to act, and a majority would have it act, no action will take place if the special majority required for any particular action cannot be found. Reference or referral to the UNSC may therefore sometimes be regarded as an empty gesture - namely in those instances that a majority decision is clearly not within reach - and may be used to mask the absence of any specific regulation of suitable measures likely to restore the authority of the arms control treaty concerned.

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893 As the ICJ observed in its advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations (ICJ Rep. 1949, p. 174)*: "(...) It must be added that the [UN] Organisation is a political body, charged with political tasks (...); and in dealing with its Members it employs political means". See also Nicaragua Case (1984), par. 95: "The [Security] Council has functions of a political nature attached to it (...)."

894 See Szasz (1995), p. 18-19, who concludes: "No matter how tempting, one should be most cautious in trying to establish a formal ‘jurisprudence’ for political organs" (p. 19).

A final question raised here concerns situations in which it is not the UNSC but the States Parties that take the initiative. It is not altogether clear whether States Parties to an arms control treaty containing a comprehensive supervisory mechanism are obliged in case of a dispute to first 'exhaust' (make use of) the treaty-based supervisory mechanism before bringing the dispute to the attention of the UNSC. Even though the UN Charter places no restraints on any State's right to refer matters directly to the UNSC, it seems this course of action would contravene the spirit of the arms control treaty that contains specific procedural obligations. Moreover, in case the provisions of the arms control treaty demand that serious concerns about a State Party's compliance be discussed among all States Parties in the plenary organ of the supervising body, a direct referral to the UNSC by a State Party as a result of such serious concerns could be considered a violation of the institutional law of that arms control treaty.

4. Concluding remarks

In this chapter, the issue of enforcement of the law of arms control has been examined by addressing the question how non-compliance with arms control treaties may be lawfully reacted to. The division of powers between the individual States Parties and the supervising organisation is of central importance to this question, since enforcement by individual States can take place unilaterally, out of 'self-help', both pursuant to the law of State responsibility (countermeasures) and the law of treaties (termination, suspension, withdrawal). It can be concluded that the treaty-specific supervisory mechanisms enjoy priority over measures available to States under general international law. This entails that States should first try to resolve matters within the treaty-based mechanism and should refrain from taking unilateral enforcement actions when the supervising body is in the course of examining a case of (possible) non-compliance. However, if the treaty-specific remedies prove to be insufficient falling back on remedies available under general international law must be deemed possible. This subsequent applicability of general international law may seem detrimental to the co-operation between the States Parties, but instead may precisely have the effect of preserving the treaty regime because States Parties prefer to seek solutions to problems within the regime rather than facing the possibility of a State falling back on countermeasures or other unilateral remedies. It can however not be upheld that the general priority of the treaty regime also exists relative to the employment of enforcement powers by the UNSC under the system of the UN Charter.
5. Concluding remarks on the role of international law in arms control

The broader purpose of this study has been to contribute towards the identification of the role of international law in the arms control process. It may be recalled that the law of arms control constitutes a special field of law in its own right, primarily consisting of interrelated treaties with a common subject matter and shared final objectives. The law of arms control offers a striking example of a field of law where respect for State sovereignty has remained the starting-point, given the fact that this field of law directly touches upon the most delicate and fundamental interests of any State. Respect for State sovereignty is inherent in arms control law because also in the current international system, to a large extent States themselves have to preserve and ensure their own (military) security. In the absence of a well-functioning system of global collective security (which in practice may perhaps not be tenable at all), the voluntary acceptance by States of restrictions on their national armed force appears to be the only way for arms control to support the maintenance of international peace and security. The law of arms control purports to contribute to the furtherance of international security through stabilising military power relations, and thus aims to contribute to the prevention of large-scale international armed conflict. Stability of international relations also results from the incorporation of supervisory mechanisms in arms control treaties. Arms control treaties can create legal regimes of their own and the exercise of supervisory tasks helps to implement the norms and to maintain the regimes. It can be upheld that arms control treaties once more breathe respect for the sovereign equality of States where international organisations (and not single States) have been equipped with international supervisory tasks for the control of compliance. As always, political needs and possibilities have been decisive for success. Supervision is not only a legal matter; political conditions often play a dominant role. For instance, it is not a coincidence that the IAEA-NPT system ran far ahead of its time. The most powerful NWS (US and SU), entangled in a vicious arms race, were very anxious to keep the nuclear weapon exclusive and hence stimulated the establishment of a rather stringent supervisory mechanism in the nuclear field, out of shared security concerns. Likewise, the agreed limitations on chemical and biological weapons, although initiated out of humanitarian considerations, clearly also bear in them dimensions and considerations of international security.

The law of arms control as a field of law has functioned well, in that since WW II, no arms control treaty has been terminated and no States Parties have withdrawn from any arms control treaty. There are so many States Parties to vital arms control treaties, such as the NPT, BWC and CWC, that those treaties actually fulfil a stabilising function on a global scale. Furthermore, there is general confidence that the elaborate supervisory
mechanisms are able to detect (militarily) significant violations of the treaties in due time. Significant violations of substantive arms control law are very rare, indeed. This can for an important part be explained by the fact that arms control treaties will in general only be concluded at the point at which very many States, including the most powerful States in the international system (or within a certain region), agree to their contents. This feature accounts for the strength of (consensual) arms control law: compliance with arms control treaties is a concern of each and every State Party, as the maintenance of international peace and security is a concern to all.

It is remarkable, that even though the field of arms control shows a strong and ongoing tendency towards 'juridification' through its growing numbers of extensive and detailed law-making treaties, the role of the international judiciary has been fairly limited in this. Specific provisions for judicial dispute settlement are highly exceptional in arms control treaties, and, if present, remain unused in practice. Problems regarding compliance with arms control law are excluded from judicial supervision and are solved in diplomatic ways, even in cases where a clear legal question, such as one involving the interpretation of a treaty provision, is at the basis of the problem. Apparently, international law in the field of arms control serves to put the seal upon political agreements, but within the regimes thus created politics demand maximal room for manoeuvre. The observation that arms control is a means and not an end in itself should be considered against this background. It is a means to create confidence and predictability, and therefore stability, in the relations between States.

But that is not all there is to it. It is clear that the question of enforcement of compliance with arms control treaties is perceived as a central problem in this field of law. Not only is this true because of the limited capabilities for enforcement in international law in general, but also because of the fact that enforcement of arms control law may interfere with the preferred mechanism of diplomacy and political discussions. At this point, international law may offer opportunities that go against the preferred diplomatic, negotiated solutions to controversies, viz. the possibility to fall back on enforcement measures offered by general international law. The priority of the treaty-specific supervisory and enforcement mechanisms cannot prevent this from ultimately happening when a State's security is directly under threat; the withdrawal clauses in arms control treaties testify to this.

There is little point in trying to define the relationship between (levels of) armaments and (inter-) national security in strict legal terms. No State is willing to have adjudged 'objectively', either by a legal or a political body, what quantity and quality of armed forces are necessary for it to maintain its security. Such defiance of State sovereignty is only feasible in highly exceptional circumstances, viz. after a war whereby the victor States (or an
international organisation) impose restrictions on the national armaments of the vanquished States, i.e. in cases of dictated arms control.
The possibility that States may eventually rely on remedies under general international law should however not only be considered dangerous. States themselves have for many centuries been the sole guarantors of their security, and it appears that to a large extent this situation has lasted until today, the establishment of the UN notwithstanding. The threat that States might rely on unilateral remedies may even support the treaty regime, because States will make every effort to prevent the disturbance, let alone the nullification, of the regime they have built so carefully. It should be added that the most powerful States in the world - in the first place the NWS - are the ones that by their support or opposition either 'make or break' arms control regimes. As such, after the end of the Cold War arms control treaties have remained important instruments in the hands of the superpowers, which - for the time being - are handled in a very careful and sophisticated manner.
The absence of Cold War opposition in security matters has proven beneficial to the development of comprehensive arms control regimes. Major political achievements have been realised, such as the mutual reductions of nuclear weapons between the US and Russia, the outlawing of chemical weapons and the general acceptance of international supervision with intrusive methods. Currently, the strategic balance is relatively stable. Threats of inter-State force and the occurrence of international armed conflict as a result of aggression are scarce as compared to the many internal armed conflicts that have emerged over the past decades. In the future, it is important that the arms control process be continued and that legally binding arms control agreements are concluded. The tendency to create 'politically binding' documents fortunately so far has not led to non-legally binding arms control 'agreements'. Arms control law should continue to be used not only to build non-proliferation regimes, but also to initiate further, phased and balanced reductions in national armaments, including nuclear weapons. This is a precondition for decreasing the level of armaments on a global scale without at the same time inviting potential aggression.