

## Compliance mechanisms for disarmament treaties

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**ABSTRACT:** The main goal of treaty verification is to determine and, hence, to promote treaty compliance. Other important means and mechanisms—some provided for in treaties themselves—can also be used to stop nations from violating their commitments, and to permit action to be taken in the event of non-compliance. These include an array of possible incentives (carrots) and disincentives (sticks). This chapter examines possible compliance mechanisms to support multilateral arms control and disarmament treaties, especially those of global application. By studying the current treaty provisions, along with state motivations and behaviours, it is hoped that new and better compliance mechanisms can be developed over time.

What makes nations comply with treaties they have signed? There is no world police force to monitor, let alone enforce, compliance with international standards. Nonetheless, it remains true that most states comply with most of the agreements they have signed most of the time.

A sense of national honour provides the basis for treaty compliance, although sometimes it is a rather shaky foundation. To a greater or lesser extent, states, like individuals, feel obliged to live up to their commitments.<sup>1</sup> In international law, this sense of duty is epitomised by the Latin edict *pacta sunt servanda* (treaties must be respected). In the 1925 Geneva Protocol—the first modern multilateral disarmament treaty—the only compliance mechanism invoked in the text is the sense of national honour. The Protocol states that it is ‘a part of International Law, binding alike the conscience and the practice of nations’.

There have been very few occasions since the end of the Second World War when nations have openly violated disarmament treaties to which they are a

party. Even when North Korea was refusing access to inspectors from the International Atomic Energy Agency (IAEA), and thus contravening its obligations under the 1968 Nuclear Non-Proliferation Treaty (NPT), it was careful to put forward a series of excuses and claimed to be in full compliance. The explanations were generally invalid, but not once did this isolationist state declare that it was ignoring or ceasing to abide by the NPT. In recent times, the most frequent examples of flagrant treaty violations involve Iraq, although Baghdad offers excuses and claims to be acting lawfully.<sup>2</sup>

### Verification of compliance

The practice of self-justification by suspected violators highlights the need for an impartial forum to make judgements about whether states are truly in compliance. Catching and pursuing a nation that is cheating on a treaty requires that an authoritative and respected body first make an objective determination of non-compliance. The alternative is always weaker: unilateral determinations, usually by unfriendly countries. A fundamental compliance mechanism is, therefore, international verification. Even when there are no immediate suspicions of treaty violations impartial verification can help to increase confidence. This wise approach is embodied in the Russian proverb 'trust but verify'.

States must have faith in the technical and managerial capabilities of the international verification organisation (IVO) or any other body that carries out the monitoring. In addition, verification procedures should be non-discriminatory. A problem often arises in IVOS about how to focus energy, resources and attention on suspected states without being labelled discriminatory. The solution requires that an IVO conduct 'baseline' inspections<sup>3</sup> of relevant sites, facilities, weaponry and/or materials in all states parties impartially and equally. When it has gained credible evidence of a violation, however, it should carry out special, in-depth investigations and inspections of the suspected country.

Usually IVOS rely on the regular submission of declarations and reports by parties on their own activities. For several disarmament treaties, such as the NPT and the 1992 Chemical Weapons Convention (CWC), these are followed by inspections to verify the information. But such basic inspections are not always sufficient to detect non-compliance, particularly when they do not identify facilities or activities improperly omitted from the declaration. Obviously Israel had confidence in neither the limited reports submitted by Iraq to the IAEA nor the Agency's subsequent

inspections when the Israeli air force bombed the Osiraq reactor in 1981. In that case Israeli doubts were well founded, although its unilateral actions remain questionable under international law. After the 1990–91 Gulf War, inspections by the UN Special Commission (UNSCOM)—created by the Security Council in 1991 to monitor and assist with the destruction, removal or rendering harmless of Iraq’s weapons of mass destruction (WMD)—revealed that the country had a nuclear weapons programme, which it had managed to hide from the IAEA. The Agency’s safeguards regime did not include searches of undeclared sites. Thus, it was possible for Iraq to acquire and store some 400 tonnes of undeclared uranium.<sup>4</sup>

In response to the failure in Iraq, IAEA Director-General Hans Blix argued that the Agency must receive all relevant information in the possession of member states, even if it involves sharing sensitive satellite intelligence. Although he was not able to create a new unit in the IAEA for this purpose, the US provided increased intelligence information both to the Agency in the case of North Korea, and, later, to UNSCOM.<sup>5</sup> Subsequently, special inspections and more intrusive procedures were developed by the organization.

There remains a great deal of resistance among some countries, notably the US, to giving international bodies the right to make a determination of compliance or non-compliance. During the CWC negotiations, the US insisted that decisions ‘as to whether a Party is complying’ should not be put to a vote in the treaty administering body, the Organization for the Prohibition of Chemical Weapons (OPCW).<sup>6</sup> The final text, though, provides that the Conference of the States Parties (CSP) of the OPCW shall ‘review compliance with this convention’ (Article VIII, paragraph 20).<sup>7</sup> Still the US maintained that, while compliance matters may be discussed, the final decision rests with each individual state. Despite such a view, it is highly likely that the responsible organs under the CWC—the Executive Council and/or the CSP—will make decisions on non-compliance and that these will be taken as legally authoritative.

The Comprehensive Nuclear Test Ban Treaty Organization (CTBTO) and the proposed Organization for the Prohibition of Biological Weapons (OPBW) will follow the same OPCW precedent. The OPCW itself is built on the IAEA precedent.<sup>8</sup> An existing example of an international body passing judgement on a disarmament treaty is provided by the IAEA governing body’s resolutions of 1991 and 1993, declaring that Iraq and North Korea respectively were in violation of their safeguards agreements, and, hence, the NPT (which incorporates the safeguards agreements by

reference).<sup>9</sup> The IAEA Statute explicitly provides such authority to decide on non-compliance: 'The Board shall call upon the recipient State or States to remedy forthwith any non-compliance which *it finds to have occurred*' (emphasis added).<sup>10</sup>

The organisation must also have a means of publicising its decisions regarding compliance. The international media, for instance, closely followed the work of UNSCOM, which led to increased international attention and understanding, even though the reporting was often biased, inaccurate, incomplete and sensationalist. Unfortunately more attention was not paid to the UN Secretary-General's investigations of Iraq's non-compliance in the mid-1980s, when it used chemical weapons against Iran and its own people, in disregard of its obligations under the 1925 Geneva Protocol.

In addition, civil society is increasingly finding an appreciated role for itself in disarmament verification. For instance, Landmine Monitor—a consortium of non-governmental organisations (NGOs)—has begun to issue annual reports on the status of the 1997 Landmine Convention. The organisation helps to fill a vacuum in the treaty regime, which does not have an administering body, although it does authorise the UN Secretary-General to carry out a number of transparency and confidence-building tasks and to assist states parties in the event of another party's suspected non-compliance.<sup>11</sup> Landmine Monitor is a civil society effort 'to hold governments accountable to their obligations'. Being an NGO consortium, it is less constrained by diplomatic restrictions. Its reports provide a frank, overall assessment of the global status of the Convention, as well as specific commendations and criticisms of certain governments. *Landmine Monitor Report 1999* specifically named three countries as treaty violators.<sup>12</sup> Despite shortcomings in the scope, depth and consistency of the information, the report offers refreshing input into disarmament discussions and evaluations. In the area of international humanitarian law (which includes some treaties within the disarmament field, such as the 1980 Certain Conventional Weapons Convention), there is a long and constructive history of NGO assessment of compliance.<sup>13</sup>

Objective verification—a *sine qua non* of an effective compliance system—may not be sufficient to deter breaches.<sup>14</sup> In the mid-1980s, for instance, the UN Secretary-General verified Iraqi violations of the 1925 Geneva Protocol. While it can be argued that nothing short of military force could have stopped the Iraqi regime, international pressure at a much earlier stage would have been wise and entirely warranted at a time when Iraq was being armed by the major powers.<sup>15</sup>

Pressure on states parties can be of various sorts, most easily categorised as ‘carrots’ and ‘sticks’. These are the incentives for compliance and disincentives for non-compliance that can be applied by the international community. Treaties that include provisions for such measures become more robust. It is, therefore, worthwhile to examine in detail the range of benefits and penalties that can be incorporated into treaties during negotiations or applied more randomly afterwards to increase the motivation for compliance.

### **Benefits**

Nations may derive long-term general benefits from disarmament treaties. By joining a treaty regime they contribute to the establishment and development of international standards of behaviour, creating a safer environment for themselves and others. The presence of order and standards in international affairs is essential for the national security, economy and internal functioning of states. Treaties help to build sustainable security. For instance the CWC, which establishes a global norm against the production and stockpiling of chemical weapons, is a concrete step toward removing the risk of chemical attack. Countries will feel less threatened and more secure because of the Convention. Similarly, the 1963 Partial Test Ban Treaty (PTBT) removed the threat of radioactive fallout in the atmosphere from nuclear weapon tests—to the relief of states and citizens everywhere. In this general category of benefits, all states, including non-parties, gain as members of the international community.

Furthermore, direct and specific advantages usually accrue from being a party to a treaty. The CWC provides that a party being attacked by chemical weapons may receive assistance from the international community in order to defend itself against the assault (including gas masks and detection equipment). It also allows for the easing of restrictions on trade in sensitive chemicals among parties and a right to participate in the ‘fullest possible exchange of chemicals, equipment and scientific and technological information’ relating to chemistry.<sup>16</sup> The 1997 Inter-American Treaty on the Illicit Manufacturing and Trafficking in Firearms (Inter-American Treaty) promotes, among parties, scientific and technical information exchanges useful to law enforcement, co-operation in tracing firearms, as well as training programmes, technical help and mutual legal assistance. The Landmine Convention also encourages assistance to parties for mine clearance, stockpile destruction and victim care and rehabilitation. Although the actual degree of help

is determined by states at a later stage, a state party might miss out on considerable opportunities if it decided to violate or withdraw from the treaty.

Other specific benefits may not be in the text of the agreement but may be developed after the treaty is negotiated. To encourage support and compliance with the NPT among states without nuclear weapons, for instance, some nuclear powers have provided them with negative and/or positive security assurances. These amount to promises not to threaten them with nuclear weapons and to come to their assistance in the case of such a threat or attack. Still non-nuclear weapon states are seeking broader and clearer affirmation of such pledges, as well as accelerated nuclear disarmament.

### Penalties

The removal of treaty benefits can be considered a form of penalty. Several disarmament agreements stipulate that non-complying states will lose their 'rights and privileges'. For example, states parties to the NPT gain increased access to nuclear technology; by violating the accord they risk those advantages. In June 1994 the IAEA actually suspended its non-medical assistance to North Korea, when Pyongyang insisted on continuing its nuclear refuelling campaign (including the movement of an unspecified amount of weapons-grade plutonium) without the required inspections. The CWC contains provision for the suspension of a party's 'rights and privileges', which could possibly include the following:

- the right to the fullest possible exchange and trade in chemicals;
- the right to vote and to have nationals appointed to the OPCW;
- the right to receive information from the Organization;
- the right to prohibit undesirable persons from serving on inspection teams; and
- the right to call for a challenge inspection or to limit the number of inspections on its territory.

The right to be a member of the Organization, though, cannot be taken away: it is guaranteed by the Convention, as long as a state remains a party.

The response to North Korean violations of the NPT highlights an extensive list of other potential penalties, although they were not actually applied in this case.<sup>17</sup> In 1994 the US threatened Pyongyang with the following sanctions: a mandatory arms embargo; a halt to UN aid; a ban on financial transactions (including important remittances from North Korean nationals living in Japan—a substantial

source of income); a reduction in the size of North Korean foreign missions; and a cut in the number of North Korean staff working for international organisations.

Washington accelerated military exercises with South Korea and even deployed a battle group to the Sea of Japan. The first result was an agreement by North Korea to freeze its nuclear activities in return for direct negotiations with the US. In the end the carrot was used instead of the stick—a very large carrot, indeed. On behalf of a consortium of nations the US offered massive incentives to North Korea—including two new nuclear power plants, thousands of tonnes of oil and other materials—all in return for an immediate freeze on its nuclear activities and a promise to dismantle its plutonium extraction facilities.

The post-Cold War ‘unfreezing’ of the Security Council has allowed the application of sanctions to become an important and frequently used form of penalty to redress non-compliance. Sanctions may be military (arms embargoes), economic (boycotts), financial (freezing of foreign accounts), transport-related (a ban on flights to the nation’s territory or the creation of no-fly zones), sports/cultural (refusal to permit interaction) and other non-co-operative measures (suspension of research and development). A multi-billion dollar ‘stick’ was used against Iraq in the form of the ban on oil exports, pending the complete and final destruction of its WMD. The combined carrot and stick approach was used later when, although the sanctions remained in effect, Iraq was permitted under the UN ‘Oil for Food’ programme to sell certain quantities of oil in exchange for humanitarian supplies.<sup>18</sup>

In many cases the application of sanctions has been shown to be deficient in a number of ways. The UN Secretary-General highlighted some problems: the ‘imprecision and mutability’ of sanctions as currently practised by the Security Council, given that millions of people may be made to suffer for the actions of a few; the lack of ‘objective criteria for determining that their purpose has been achieved’; and the need to protect innocent victims and to compensate neighbouring states or the economic partners of targeted countries.

The Secretary-General also proposed the development of a mechanism in the UN Secretariat to assess the effects of sanctions before and during their application in order to ‘fine tune’ them.<sup>19</sup> Other observers have suggested that, if human ingenuity can produce ‘smart’ bombs to locate small targets, then it should be able to devise ‘smart’ sanctions for maximum effectiveness and minimum collateral damage. Since 1998 the UN’s Charter Committee has been working on guidelines to apply to future sanctions regimes imposed by the Security Council.<sup>20</sup>

## Multilateral arms control and disarmament treaties: major prohibitions and compliance provisions

### 1920s

#### Geneva Protocol, 1925

- use in war of chemical and bacteriological weapons.
- ✦ no compliance provisions.

### 1950s

#### Antarctic Treaty, 1959

- any measure of a military nature and any testing of weapons in Antarctica.
- ✦ parties to exert pressure to ensure compliance; consultation among parties; referral of disputes to ICJ by mutual consent.

### 1960s

#### Partial Test Ban Treaty, 1963

- nuclear weapons testing in the atmosphere, outer space and/or underwater.
- ✦ no compliance provisions.

#### Outer Space Treaty, 1967

- nuclear weapons or any other WMD in outer space; military use of celestial bodies.
- ✦ consultation among parties; incentives for compliance: information sharing.

#### Nuclear Non-Proliferation Treaty, 1968

- non-nuclear weapon states must not manufacture or acquire nuclear weapons; nuclear weapon states cannot help others to acquire nuclear weapons.
- ✦ incentives include peaceful nuclear cooperation; IAEA used for verification and promotion of compliance; IAEA Statute provides that its Board may: request a party to remedy non-compliance; refer violations to UN Security Council and General Assembly; impose specific penalties, such as curtailment or suspension of assistance, return of materials and suspension of privileges and rights.

### 1970s

#### Sea Bed Treaty, 1971

- placement of WMD on seabed.
- ✦ consultation and co-operation to ensure compliance; lodging complaint with UN Security Council.

#### Biological Weapons Convention, 1972

- development, production, stockpiling, transfer and use of biological weapons and means of delivery.
- ✦ domestic implementation measures, if considered necessary; consultation and co-operation among parties; lodging of complaint with UN Security Council; incentives: assistance to victims.

#### Environmental Modification (ENMOD) Treaty, 1977

- military or hostile use of the environment.
- ✦ domestic implementation measures to prevent violations, if considered necessary; consultation among parties to solve problems; convening of Consultative Committee of Experts for fact-finding; lodging complaint with Security Council; incentives: exchange of information on ENMOD for peaceful purposes; assistance to victims harmed by violations.

**Moon Treaty, 1979**

- placement of WMD in orbit or around the Moon; bans establishment of military bases and testing of weapons on the Moon.
- ♦ consultations among parties; peaceful settlement of disputes by method of parties' choosing, including assistance of UN Secretary-General.

**1980s****Certain Conventional Weapons Treaty, 1980**

- four protocols banning: use of weapons dispersing non-detectable fragments; certain types of landmines and booby traps; use of incendiary weapons; and use of blinding lasers.
- ♦ publicity about treaty; consultation and co-operation between parties.

**1990s****Chemical Weapons Convention, 1992**

- development, production, stockpiling, transfer and use of chemical weapons.
- ♦ national penal legislation against violators must be enacted; National Authority to be established for liaison; OPCW created to 'ensure the implementation' of the treaty and to promote compliance; consultation and co-operation among parties, including clarification of ambiguous situations, and use of group of experts for fact-finding; peaceful settlement of disputes, including referral to ICJ; OPCW may request that a party take measures to redress a situation in a specific period; OPCW may restrict or suspend a party's rights and privileges; OPCW may recommend collective measures to states parties, including sanctions; OPCW may ask for advisory opinion from ICJ; referral of serious violations to UN General Assembly and Security Council; incentives: assistance and protection against attack, including dispatch of emergency aid; economic and technological benefits, including fullest possible exchange in chemistry, removal of trade and other restrictions.

**Comprehensive Nuclear Test Ban Treaty, 1996**

- nuclear tests and other nuclear explosions in all environments.
- ♦ national implementation measures, including 'any necessary measures' to prohibit violations; National Authorities created for liaison; Comprehensive Nuclear Test Ban Treaty Organization (CTBTO) created to ensure implementation of Treaty, including verification; consultation and co-operation among parties to clarify and resolve issues of concern; CTBTO to assist in clarifying matters; CTBTO may request that a state party take measures to redress situation within a specified time; CTBTO may suspend parties' rights and privileges; CTBTO may recommend to states parties collective measures, including sanctions; CTBTO may ask for advisory opinion from ICJ; referral of non-compliance to the UN; peaceful settlement of disputes, including consultation, and referral to ICJ by mutual consent.

**Landmines Convention (Ottawa Treaty), 1997**

- use, stockpiling, production and transfer of anti-personnel landmines.
- ♦ parties to take all appropriate legal, administrative and other national measures, including the imposition of penal sanctions, to prevent and suppress violations; consultation and co-operation; a concerned party may submit request for clarification; special meeting of states parties may request a party to take measures to address compliance issue within a specified period; UN Secretary-General may exercise good offices; fact-finding provisions; incentives: fullest possible exchange of equipment, material and information; assistance for mine victims and mine awareness programmes; help with mine clearance and destruction.

**notes**

- major prohibitions ♦ compliance provisions for treaty (review amendment and withdrawal excluded)

Very few treaties in the disarmament field—or in any other area of international law for that matter—provide for specific penalties for non-compliance.<sup>21</sup> Nations, especially the major powers, have been reluctant to codify international responses and would prefer the flexibility to respond on a case-by-case basis. Most of the treaties provide for recourse to the UN Security Council, an action that may not strike fear in the hearts of leaders of non-complying states. In particular, the UN Security Council is virtually useless in the face of non-compliance by one of its veto-carrying permanent members or by any state that is under their protection. The Security Council has already been criticised for its failure to act on the Soviet Union's violations of the 1972 Biological Weapons Convention (BWC), although it is obvious that it could not have imposed penalties or censured the country given its veto status.<sup>22</sup>

### **Principles of response**

If the world is to move closer to the global rule of law, the range of responses to non-compliance needs to be guided by universally recognised principles of justice, especially impartiality, proportionality and automaticity. Impartiality requires that all parties be considered equal before the law and be accorded the same type of treatment. But in the politically charged environment of the international community, impartial action is all too often disregarded. Those nations with superior economic, military or political power are treated differently in political fora. What is needed is a legal approach with, for instance, provisions for mandatory recourse to judicial bodies like the International Court of Justice (ICJ).

There is resistance to this idea, though, as was demonstrated by the nuclear powers' opposition to an ICJ review of the legality of nuclear weapons.<sup>23</sup> Few disarmament treaties oblige parties to bring unresolved disputes to the ICJ, but several, such as the 1959 Antarctic Treaty, the 1967 Treaty of Tlatelolco and the CWC, recommend referral if all parties consent to it.<sup>24</sup> The CWC also provides that the OPCW may seek an advisory opinion from the ICJ.

The other two fundamental principles are proportionality (punishment is proportional to the crime) and automaticity (application of penalties as soon as non-compliance has been determined). But, again, these principles are often disregarded in practice. When Iraq violated the Geneva Protocol by using chemical weapons against Iran, there was no automatic response (except criticism) and no penalties were imposed.<sup>25</sup> By contrast, some observers contend that there was a lack of

proportionality in the case of the devastating sanctions and isolation measures imposed on Iraq in 1991.

A fourth principle of increasing importance is ‘individuality’ or individual accountability. It can be argued that international penalties can never be fair or satisfactory until individuals or small groups, as opposed to nations, are made the object of punishment. Shifting from national to individual responsibility would mean that leaders are held personally accountable for the behaviour of their countries and those under their command. There is a long way to go on this matter, but some powerful precedents are being developed in the human rights field, including:

- the war crimes tribunals created for the former Yugoslavia and Rwanda;
- the detention in the UK in 1999–2000 of former Chilean President Augusto Pinochet on charges of human rights abuses; and
- the adoption of the 1998 Statute for an International Criminal Court.

### **National legislation**

There is an easier way to introduce the notion of individual accountability directly into the treaty implementation process: by including a provision that requires states parties to pass domestic legislation prohibiting their citizens from violating the terms of the accord and penalising them if they do so. The BWC includes vague wording along these lines, requesting each state party ‘in accordance with its constitutional processes, [to] take any necessary measures to prohibit and prevent the development’ of biological weapons within its territory or under its jurisdiction or control. Despite the absence of a specific provision in the Convention some states (such as Australia, the Netherlands and the US) have passed penal legislation, while others (like Canada) have deemed it unnecessary. The CWC goes much further, and, for the first time in the history of arms control, specifically requires that ‘each State Party shall . . . enact penal legislation’.<sup>26</sup> Such legislation must ‘prohibit natural and legal persons anywhere on its territory or in other places under its jurisdiction . . . from undertaking any activity that a State Party to the Convention is prohibited from undertaking by this Convention’ (Article VII, Paragraph 1).

The type of punishment handed out to violators is left to states to legislate and put into practice. But they must inform the OPCW about their legislation. In BWC review conferences, states have been requested to deposit copies of their legislation with the UN. Future treaties could provide for an assessment of national legislation—a mechanism that already exists in some international trade,

investment and labour agreements. And a well-developed regime, such as that overseen by the International Labour Organization (ILO), could even require modifications to legislation and, possibly, review and overturn national judicial decisions.

One obvious limitation of domestic penal legislation is that an independent judiciary is needed for it to be of true value. In some states, which may also be the most likely to engage in treaty non-compliance, the legal system would be unlikely to pronounce judgement against the wishes of the state, much less enforce international law or even its own decisions. But, even in these states, the requirement for penal legislation may have some effect, if only to embarrass the judiciary or to raise concerns in the minds of current leaders about decisions that may come to haunt them.<sup>27</sup> One possible disincentive to making domestic legislation mandatory under a treaty is that the added burden of passing new laws might cause some states to delay ratification, since the adoption of such legislation may be required before ratification can take place. Despite the difficulties, though, this more complex process is something that should be welcomed.

### **Other mechanisms**

Objective verification, incentives and penalties, as well as domestic implementation provisions (especially penal legislation), should be regarded as fundamental mechanisms to promote compliance. Other perhaps less important instruments and procedures will be briefly discussed. However, the following is by no means exhaustive.

#### *Dispute settlement mechanisms*

Minor disagreements over the interpretation or implementation of a treaty are to be expected among parties. If they are not dealt with, tensions can escalate, encouraging non-compliant behaviour and even threatening the integrity of the treaty regime itself. Many agreements thus encourage or oblige states to follow certain mechanisms for the peaceful settlement of disputes. The first step often cited in treaties is consultation. The Antarctic Treaty commits states involved in disagreements over treaty interpretation 'to consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice' (Article XI, Paragraph 1). A resolution method that is specifically named in many disarmament treaties is referral by mutual consent to the ICJ. While no multilateral disarmament treaty has yet provided for mandatory recourse to the ICJ,<sup>28</sup> several treaty-administer-

ing organisations are entitled to apply to the body for an advisory opinion, even if one or more of the parties objects.<sup>29</sup> They may also apply pressure to conflicting parties to bring disputes to the Court. Under the IAEA Standard Safeguards Agreement,<sup>30</sup> however, a party to a dispute may submit the matter to an arbitration tribunal without the consent of the other disputant. Its decision is binding.

The CWC provides the most developed and detailed mechanisms for consultation, provisions that were subsequently copied in the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT).<sup>31</sup> Both treaties stipulate that parties should 'make every effort to clarify and resolve [disputes], through exchange of information and consultations among themselves'. If a suspicious state requests clarification about a compliance issue, the suspected state is obliged to respond within ten and two days for the CWC and CTBT, respectively. In order to increase the pressure on the suspected state party, the requesting state can ask the treaty organisation (the executive councils) to demand clarification within 24 or 48 hours for the CWC and CTBT, respectively. If the response is not sufficient, the treaty organisation can form an expert group to study the compliance problem.

### *Graduated measures*

Once non-compliance is suspected, there is usually a process of graduated exposure: consultation with the suspected party; formal recommendations from an expert group or governing body; possible demands for inspections; demands for remedial action with a stipulated deadline; increased public exposure; referral to the UN Security Council; condemnation in national and international fora; and collective measures or other arrangements to address non-compliance (for example, the North Korea–US bilateral agreement of 1994).

In most of the treaties signed since 1967, these measures are provided for in outline only. Similar provisions appear likely to be adopted in the verification protocol to the BWC. Among the collective actions that can be suggested by the respective treaty-administering organisations are sanctions. Although, unlike decisions of the Security Council, these measures can only be in the form of recommendations to states parties and must not involve the use of military force, they could still be quite powerful if undertaken voluntarily and collectively. More in-depth academic analysis of these instruments and their application could be useful, especially an examination of the provisions and precedents in other areas of international law. In labour conventions and the ILO, for example, certain high-

level government officials may be called to appear at ILO headquarters in Geneva, Switzerland, to explain their country's behaviour to an international audience, including state representatives and members of the business community.<sup>32</sup>

### *Domestic implementing agency*

Several treaties provide that each party must establish or designate a government agency to be responsible for overseeing compliance and liaising with the IVO. Consequently, a constituency within the government is created that, formally at least, is committed to upholding the agreement and promoting its smooth operation. Such a National Authority, as it is called in the CWC and CTBT, can also be expected to help facilitate inspections and become involved in the licensing process (of dual-use chemicals, for example). There is a danger that a National Authority may be used to support non-compliance and to help a state evade detection, but international treaty-administering organisations should be able to gain enough experience over time to know if trust is warranted. If necessary an obstructive National Authority could be exposed and the nation reprimanded.

### *Amendment and review provisions*

To deal with possible dissatisfaction among states parties, which might lead to non-compliance or withdrawal, there should be a mechanism for amendment and for treaty review conferences where complaints can be voiced and constructive measures adopted. BWC review conferences are held every five years and have helped to advance transparency and confidence-building initiatives. The PTBT Amendment Conference of 1991 and the NPT review/extension conference of 1995 both allowed the majority of states dissatisfied with the status quo to press the nuclear weapon states for more progressive nuclear disarmament.

### *Withdrawal clauses*

Provisions for withdrawal are often included in treaties and may provide some benefits. First, they may serve as an incentive for nations to sign a treaty since they would not feel trapped indefinitely, especially if they can pull out when their 'supreme national interests' are jeopardised. Second, there may be restraints on withdrawal that enhance compliance at critical moments. For instance, the NPT has a three-month time lag between the declaration of withdrawal and the date it takes effect. This provision provided valuable time for the international community to exert pressure on North Korea to prevent its withdrawal.<sup>33</sup>

### **Learning from other areas of international law**

Other branches of international law have also developed useful new mechanisms for compliance. International humanitarian law, human rights law, and trade/labour/investment law offer novel instruments and procedures for consideration in the negotiations of future disarmament treaties. Peace agreements, both between states and between warring factions within states, also offer innovative approaches. There are many possible types of treaty provisions to consider, including: individual accountability; measures to accommodate and obligate non-state actors; binding dispute settlement mechanisms (especially in trade agreements); methods of arbitration and adjudication; means to protect 'whistle-blowers'; retaliation rights (such as retaliation in kind);<sup>34</sup> methods of imposing financial penalties; liability for compensation; confiscation of materials (as in the laws of contraband); court challenges initiated by NGOs and other civil society actors (to apply pressure and provide exposure);<sup>35</sup> and strengthened links to domestic enforcement mechanisms.

As mentioned above, one of the most powerful means of promoting treaty compliance is to harness the target state's own law enforcement mechanisms. This approach was developed to a high level of sophistication in the 1993 Side Agreements under the 1992 North American Free Trade Agreement (NAFTA) between Canada, Mexico and the US. These agreements, which involve the same parties as NAFTA, deal with environment and labour matters.<sup>36</sup> A special mechanism involving judicial enforcement was inserted at Ottawa's request and applies only in cases where the non-compliant party is Canada. In other instances the agreement allows the injured party to apply penalty tariffs.

After proving to a panel of experts that it has been affected by Canada's illegal behaviour, the injured party is entitled to register the panel's decision with the Federal Court of Canada (FCC). At that point the decision takes effect automatically as a judgment of the Court and is treated like any other court order. In effect, the injured party has a mandatory injunction against the Canadian government, requiring it to take the remedial steps contained in the panel decision. In the unlikely event of the Canadian government failing to comply, the injured party is entitled to apply to the FCC for remedies in aid of execution, such as seizure of assets, or, conceivably, in a serious case, imprisonment of the responsible official.

This important example and the previous list show that there are many new and potentially fruitful avenues for study in comparative international treaty law. The field of 'compliance methodology' in disarmament, as well as in inter-

national law in general, is quite a new discipline.<sup>37</sup> In the past, much more attention has been paid to verification than to the means of ensuring compliance and of responding to violations. With additional research, more creative provisions might be inserted into future disarmament treaties and measures might be taken to uphold current agreements.

**Conclusion**

Compliance mechanisms in disarmament accords have gradually become more sophisticated in the twentieth century. From the primitive provision of the 1925 Geneva Protocol to the complex mechanisms of the CWC, great strides have been made to increase verification capabilities, to list the rewards for compliance and penalties for non-compliance, and to incorporate other compliance initiatives.

In the twenty-first century the international community will have many opportunities to make treaties more robust with the inclusion of novel and evolving compliance mechanisms. In this way, one can hope that international law will gradually acquire the force of national law and be more strictly monitored, enforced and obeyed. Treaty compliance mechanisms are building blocks for a safer future. If nations are to carry out deep reductions in their weaponry and move towards their stated goal of 'general and complete disarmament under strict and effective control', then even more progressive instruments will need to be devised.

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## Endnotes

<sup>1</sup> Fortunately this commitment to treaty adherence extends to agreements signed by previous governments on behalf of the state, even if the leaders of the current administration were opposed to the signing of the treaty.

<sup>2</sup> Iraq has violated the 1925 Geneva Protocol, its IAEA safeguards agreement, the NPT and its 1991 agreement to abide by UN Security Council resolution 687, which calls for the elimination of all Iraqi weapons of mass destruction. The disarmament requirements of that resolution were formally accepted by the Iraqi parliament, and, consequently, they constitute a disarmament agreement. See 'Letter dated 10 April 1991 from the Permanent Representative of Iraq to the President of the Security Council Transmitting the National Assembly Decision of 6 April 1991 Concerning Acceptance of Security Council Resolution 687 (1991)', UN document S/22480, 11 April 1991.

<sup>3</sup> Treaties typically require parties to submit initial declarations about treaty-related facilities or activities, which may then be subject to baseline verification.

<sup>4</sup> Leslie Thomas, *IAEA Bulletin*, 34(1992), p. 21.

<sup>5</sup> See statement by IAEA Director-General Hans Blix in *Hearings before the Committee on Foreign Relations*, 102nd Congress, First Session (S. Hrg. 102-422), 17 and 23 October 1991, US Government Printing Office, Washington, DC. The idea of establishing a new information/intelligence unit within the IAEA Secretariat met substantial opposition from member states, and, as a result, was shelved. The current approach is to handle sensitive information within the Director-General's own office.

<sup>6</sup> 'The report of a fact-finding inquiry should not be put to a vote, nor should any decision be taken as to whether a Party is complying with the provisions of the Convention', footnote in the US draft convention submitted to the Conference on Disarmament in 1995, UN document CD/500, Annex I.A.5. This wording appeared in every version of the Rolling Text after the US submission (including CD/III6 of 20 January 1992, Article VIII, paragraph 20(d), footnote 2) up until the eve of the Convention's final draft being adopted.

<sup>7</sup> Under the CWC the Executive Council 'shall consider . . . concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference' (Article VIII, paragraph 35).

<sup>8</sup> A comparison of these two institutions can be found in Walter Dorn and Ann Rolya, 'The OPCW and the IAEA: A Comparative Overview', *IAEA Bulletin*, 3/193, p. 44.

<sup>9</sup> The IAEA Board of Governors declared Iraq to be in non-compliance with its safeguards agreement on 18 July 1991. This was based on a report (GOV/2530) by Director-General Hans Blix, which presented the same conclusion. In a similar manner the Board determined North Korea to be in non-compliance on 1 April 1993 (GOV/2645).

<sup>10</sup> See Article XII.C. The same Article of the Statute also gives inspectors such a right: 'The [IAEA] inspectors shall report any non-compliance [with a safeguards agreement] to the Director General who shall thereupon transmit the report to the Board of Governors'.

<sup>11</sup> For a summary of the compliance provisions in the Landmine Convention, see *Compliance Matters: the Newsletter of the Markland Group*, no. 5, located at [www.hwcn.org](http://www.hwcn.org).

<sup>12</sup> The three reported violators were Angola, Guinea Bissau and Senegal, all of which were involved in civil wars. Landmine Monitor Core Group (ed.), *Landmine Monitor Report 1999: Towards a Mine-Free World*, Human Rights Watch, Washington, DC, 1999. The report can be found at [www.icbl.org](http://www.icbl.org).

<sup>13</sup> In the case of the 1949 Geneva Conventions and the 1977 Additional Protocols, verification and implementation tasks for the International Committee of the Red Cross (ICRC) are included in the treaties themselves. Human rights NGOs, like Amnesty International, and, more recently, Human Rights Watch, have long played an important role in exposing government non-compliance with their human rights obligations.

<sup>14</sup> The 16 Principles of Verification adopted by the UN General Assembly first demonstrated the new international consensus on the requirement for verification of disarmament treaties. See *Official Records of the General Assembly, Fifteenth Special Session, Supplement No. 3 (A/S-15/3)*, paragraph 60 (paragraph 6, section 1 of the quoted text). Reproduced in *Trust & Verify*, no. 90, VERTIC, London, March 2000, p. 10.

<sup>15</sup> In 1984 and 1985, when Iraq was found by the UN Secretary-General and the Security Council to have used chemical weapons and, therefore, to have violated the 1925 Geneva Protocol, there were no serious efforts to

punish the country. At the time Baghdad was considered to be an 'ally of the West' in the front against Islamic Iran.

<sup>16</sup> Article XI, paragraph 2(b) of the CWC.

<sup>17</sup> A detailed case study of the international community's efforts to secure North Korean compliance with the NPT is presented in Walter Dorn and Andrew Fulton, 'Securing Compliance with Disarmament Treaties: Carrots, Sticks and the Case of North Korea', *Global Governance*, no. 3, 1997, p. 17.

<sup>18</sup> The UN's 'Oil for Food' programme allowed Iraq to sell oil in such a way that the revenue could be used to buy humanitarian supplies. This scheme, while it might look like a specific incentive, was not in fact used for that purpose. The benefits were not made conditional on Iraqi co-operation and were not used as a reward. Iraqi co-operation was neither tied to the initiation of the scheme, nor was there any link in either of the two instances when its scope was dramatically expanded. (Resolution 1153 of 20 February 1998 increased the maximum value of oil permitted for export under the scheme from \$2 billion to \$5.25bn. Resolution 1284 of 17 December 1999 removed the ceiling altogether.)

<sup>19</sup> UN Secretary-General, 'Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations', UN document S/1995/1, 3 January 1995.

<sup>20</sup> For an account of the Charter Committee's efforts, see 'Improving UN Sanctions', *Compliance Matters: the Newsletter of the Markland Group*, no. 9, April 1999. Available at [www.hwcn.org](http://www.hwcn.org).

<sup>21</sup> The IAEA Statute and the CWC are treaties where some penalties are specifically listed, including loss of rights and privileges. The IAEA Statute provides for 'direct curtailment or suspension of assistance being provided by the Agency or by a member, and call[s] for the return of materials and equipment made available to the recipient member or group of members'.

<sup>22</sup> Milton Leitenberg, 'Biological Weapons, International Sanctions and Proliferation', *Asian Perspective*, vol. 21, no.3, winter 1997, p. 7.

<sup>23</sup> The resulting opinion stated that, *inter alia*, nuclear weapons use was generally contrary to international law and the nuclear weapon states had an obligation to pursue negotiations to achieve nuclear disarmament.

<sup>24</sup> This right to ICJ adjudication is available to disputing parties under Article 36(1) of the ICJ Statute, even if clauses are not present in the treaty.

<sup>25</sup> To his (very rare) credit US Senator Jesse Helms proposed, in 1985, that the US automatically impose sanctions on any state caught using chemical weapons. In 1988, the then French President, Francois Mitterrand, recommended that the UN similarly impose an international embargo on 'products, technologies, and . . . weapons' against any such state. See *Washington Post*, 30 September 1988, p. A21.

<sup>26</sup> Notable precedents for mandatory penal legislation are to be found in the 1948 Genocide Convention, the 1949 Geneva Conventions and the 1985 Torture Convention. The 1919 ILO Constitution also requires its members to pass certain legislation.

<sup>27</sup> In some states (for example, common-law countries like Canada) legislation is not binding on government officials unless it contains a clause that specifies that the legislation is 'binding on the Crown'.

<sup>28</sup> The Treaty of Tlatelolco comes closest to mandatory referrals to the ICJ. Article 24 states that: 'Unless the parties concerned agree on another mode of peaceful settlement, any question or dispute concerning the interpretation or application of this Treaty which is not settled *shall be referred* to the International Court of Justice *with the prior consent* of the parties to the controversy' (emphasis added).

<sup>29</sup> The CWC (Article XIV) and CTBT (Article VI).

<sup>30</sup> The Structure and Content of Agreements between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA, INF/CIRC.153, paragraph 22.

<sup>31</sup> The CTBT has yet to enter into force; the CWC entered into force on 29 April 1997.

<sup>32</sup> The ILO procedure that has developed over the years can be summarised as follows: each state must file reports with the ILO detailing the legislation it has passed and other implementation measures that have been adopted; copies of these reports are distributed to the country's employers' and workers' organisations to give them an opportunity to file comments; the reports, together with the comments of NGOs, are analysed and evaluated by the Committee of Experts on the Application of Conventions and Recommendations (sometimes called the 'Committee of Experts' or the 'Application Committee'); the Committee prepares a report that is sent to the government for comment; the Committee sometimes engages in a dialogue by correspondence. On certain

points the country may be asked to defend itself at a meeting of the ILO General Conference; the report then goes to the Tripartite Conference Committee, which may invite the country to send representatives to Geneva for discussions; in some cases, the ILO Director-General, with the consent of the country, sends a representative to visit the state to discuss reasons why it is failing to comply; finally the Tripartite Committee's report is prepared and presented to the General Conference's plenary session. The recalcitrant country may be asked to appear at the general debate to explain its failure to comply; if compliance efforts fail, the Governing Board may refer the matter to the ICJ 'for decision'. From 1964 the Committee of Experts examined thousands of cases in which measures were taken to bring national legislation and practice into conformity with a ratified convention. See *International Labour Standards*, pamphlet issued by the ILO, Geneva, 1981, p. 26.

<sup>33</sup> North Korea suspended its notice of withdrawal one day before it was due to take effect.

<sup>34</sup> The 1985 Treaty of Rarotonga is the only disarmament accord that comes close to giving parties a kind of 'retaliatory' right (in this case to withdraw). Article 13 states that: '... in the event of a violation by any Party of a provision of this Treaty essential to the achievement of the objectives of the Treaty or of the spirit of the Treaty, every other Party shall have the right to withdraw from the Treaty'. Providing rights to retaliate or for 'reciprocal non-compliance' runs a great risk of unravelling a treaty regime.

<sup>35</sup> Many means have been applied successfully by NGOs to promote compliance with national and international obligations, including watchdogs, citizen inspections, lobbying, action in the legal sphere (suing governments), voluntary economic boycotts, civil disobedience and 'direct action' against industrial or government facilities.

<sup>36</sup> For example, see North American Agreement on Environmental Cooperation, Annex 36A, 'Canadian Domestic Enforcement and Collection'.

<sup>37</sup> Three important pioneering references are: Serge Sur (ed.), *Disarmament and Arms Limitation Obligations: Problems of Compliance and Enforcement*, United Nations Institute for Disarmament Research (UNIDIR), Geneva and Dartmouth, Aldershot, 1994; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement*, Harvard University Press, Cambridge, 1995; Canadian Council on International Law and the Markland Group, *Treaty Compliance: Some Concerns and Remedies*, Kluwer Law International, London, 1998.