Visits under Public International Law

Theory and Practice

Proceedings of an APT Workshop,
Geneva, 23-24 September 1999

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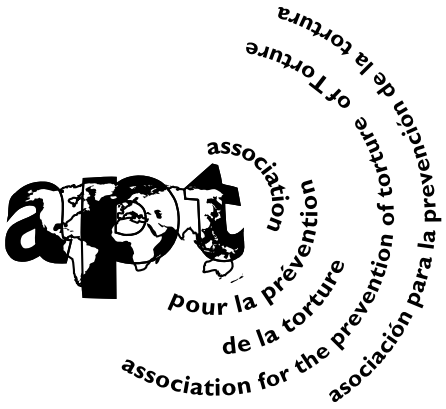

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LIST OF ABBREVIATIONS

ABM	Anti-Ballistic Missile
ACHPR	African Charter of Human and Peoples' Rights
APT	Association for the Prevention of Torture
BWC	Biological Weapons Convention
CAT	Committee against Torture
CBM	Confidence-Building Measures
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CEC	Commission for Environmental Co-operation
CFC	Chloro Floro Carbons
CFE	Conventional Forces in Europe
CPT	European Committe for the Prevention of Torture
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties
CTBT	Comprehensive (Nuclear) Test-Ban Treaty
CTBTO	Technical Secretariat of the CTBT Organisation
CWC	Chemical Weapons Convention
DOP	Draft Optional Protocol to the United Nation Convention against Torture
DPRK	Democratic People's Republic of Korea
ECHR	European Convention on Human Rights
ECPT	European Convention for the Prevention of Torture
EMAS	Eco-Management and Auditing Scheme
EMSO	Environmental Management Systems
FIELD	Foundation for International Environmental Law and Development

GCSP	Geneva Centre for Security Policy
GEF	Global Environment Facility
GHG	Green House Gases
GIPRI	Geneva International Peace Research Institute
IACHR	Inter-American Commission on Human Rights
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ICRW	International Convention for the Regulation of Whaling
IDA	International Development Association
IDR	In-Depth Review
IHFFC	International Humanitarian Fact-finding Commission
IHL	International Humanitarian Law
ILM	International Legal Material
ILO	International Labour Organisation
IMO	International Maritime Organisation
IMO Convention	International Maritime Organisation Convention
IMPEL	European Union Network for Implementation and Enforcement of Environmental Law
IMS	International Monitoring System
IOS	International Observer Scheme
IUCN	International Union for the Conservation of Nature
IWC	International Whaling Commission
JCIC	Joint Compliance and Inspection Commission

KEDO	Korean Energy Development Organisation
MARPOL	Convention for the Prevention of Pollution from Ships
MBA	Managing By Walking Around
MEA	Multilateral Environmental Agreements
MF	Multilateral Fund
MIT	Massachusetts Institute of Technology
MOP	Meeting of the Parties
NAAEC	North American Agreement on Environmental Co-operation
NAFTA	North American Free Trade Agreement
NCP	Non-Compliance Procedure
NGO	Non-Governmental Organisation (hyphen)
NAAEC	North American Agreement on Environmental Co-operation
NPT	Non-Proliferation of Nuclear Weapons Treaty
NTM	National Technical Means
OAS	Organisation of American States
ODS	Ozone Depleting Substances
OECD	Organisation of Economic Co-operation and Development
OPCW	Organisation for the Prohibition of Chemical Weapons
OSI	On-Site Inspection
POW	Prisoner of War
RMS	Revised Management Scheme
SR	Special Rapporteur
START	Strategy Arms Reduction Treaty
TRAFFIC	Trade Records Analysis of Flora and Fauna in Commerce
UAE	United Arab Emirates

UK	United Kingdom
UNCAT	United Nations Convention against Torture
UNCED	United Nations Conference for Economic Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNIDIR	United Nations Institute of Disarmament Research
UNIDO	United Nations Industrial Development Organisation
UNSCOM	United Nations Special Commission
UNTS	United Nations Treaty System
US	United States (of America)
USSR	Union of Soviet Socialist Republics
VERTIC	Verification Research, Training and Information Centre
YYIL	Yale Yearbook of International Law

FOREWORD

By Ms Claudine Haenni, Secretary General, Association for the Prevention of Torture (APT), Geneva, Switzerland

The Association for the Prevention of Torture (APT) is one of the few, if not the only, human rights organisation that focuses exclusively on the prevention of human rights violations, as opposed as to the their denunciation or the rehabilitation of the victims. It is mainly thanks to the APT that there is a European Convention for the Prevention of Torture which created a Committee of Experts in 1987. These experts visit places of detention all over Europe. They make recommendations to governments with a view of proposing means to reduce possible risks of torture that have been identified in the course of these missions. What originally was perceived as superfluous in a context of Western democracies, is now considered one of the success stories of the Council of Europe.

Not surprisingly, the APT has been lobbying for a similar instrument within the United Nations. In 1991 a draft Optional Protocol to the UN Convention against Torture was introduced by Costa Rica. The Human Rights Commission created an Open-Ended Working Group with the mandate to examine the draft and to negotiate a text that then could be adopted by it. Since 1992, this Open-Ended Working Group has met every year for two weeks. Representatives from over 40 countries participate as well as non-governmental organisations and experts from the UN Committee against Torture. Sadly in the recent years, it has become increasingly obvious that, due to obstacles of a more political than legal nature, the draft Optional Protocol is not close to being adopted. The issues at stake are mainly:

- Visits without prior notice or invitation
- The modalities of the visits
- The composition of the visiting teams
- National legislation
- Reservations to the treaty

The defenders of the original draft argue that in order to be credible, the Committee of Experts should be able to decide when and where its members will undertake a mission to a country. The defenders of national sovereignty and of predictability of the system hold that each mission should be negotiated as is already the case with all the other existing human rights protection mechanisms. As to the modalities of the Committee's work, the defenders of the original project draw a comparison to article 142 of the Fourth Geneva Convention and existing standard operating procedures already in place for the thematic human rights procedures of the Human Rights Commission. Other countries would rather see a limited scope of work for the experts and leave the actual inspections to national experts. And so on.

In order to prevent the current negotiations from becoming stuck in a quagmire, the APT proposed that a meeting of experts be held in order to consider the issues raised by such visits, such as matters concerning national sovereignty, the necessary degree of notice and the extent to which this needs reflection in a treaty instrument, could be examined in a non-partisan setting. The idea originated in article published by Professor W. Kälin, on the occasion of the APT's 20th anniversary[1].

Prevention implies a co-operative approach and a search for dialogue and this finds a reflection in the working practicies of the APT itself which constantly looks for new partners and innovative approaches to its work. It was therefore natural that the APT should look beyond the boundaries of human rights and seek to learn lessons, if possible, from other realms of international law, such as human rights law, international humanitarian law, disarmament, arms control and environmental law. As it turned out, networking to profit from others' expertise was indeed a logical step to take.

The APT looked for co-sponsors and was fortunate to receive the support of various organisations working in standard setting in various field of public international law: the Quakers International, the International Commission Jurists, the Verification, Research, Training and Information Centre (VERTIC) and the Foundation for International Environmental Law and Development (FIELD). These organisations were happy to pool their knowledge and contacts and just as interested in adopting a comparative approach as was the APT.

The result of this co-operative effort is before you. The Workshop took place on 23-24 September 1999 and was held at the World Council of Churches. More than 40 persons from various walks of public international law participated fully during these two days. Despite the unforeseen Special Session of the UN Human Rights Commission on East Timor, which took place on the same time, many of the diplomats residing in Geneva tried to split their time between the Palais des Nations and our Workshop.

Given the wealth of practical experience and the complexity of the subject, it was decided to split the conference into smaller working groups or workshops with panellists from each of the various field. This format allowed for discussion and comparisons which were then reported back into plenary by the Rapporteurs. The Conference *per se* did not adopt a final declaration. The organisers did not want the focus to be on drafting but on discussion and debate. The reports of the Workshops were collated and commented upon by the General Rapporteur, Prof. Malcolm Evans.

Introductory remarks were made by Ambassadors W. Gyger from Switzerland and J. Molander from Sweden and Dr. M. Mona, President of the Association for the Prevention of Torture. The final key-note speaker was Ms T. Delpèche of the Atomic Agency who presented a majestic tour d'horizon on the future challenges.

During these two days, many ideas and experiences were exchanged. It became clear that the term "visit" can encompass many things, not all of which are comparable. Issues such as State sovereignty and security, confidentiality and unrestricted access were debated. Here it became apparent that the closer the foreign inspectors or experts came to matters which were deemed to be of 'national interest', the more difficult it became for them to pursue the object of their visit. Over and over again the difference in language between the different fields was stressed. Aggressive or assertive terms which are common in the field of disarmament, such as "challenge inspections", have hitherto been unthinkable in the human rights field, as have others such as "confidence building measures". On the other hand the relative simplicity and straight forwardness of human rights or humanitarian law drafting was held up as an interesting example, for those coming from disarmament or arms control regimes.

Although comparisons were not always easy to draw, the conclusions and overwhelming feeling of all the participants was that this had not been a futile exercise. On the contrary, sharing experiences and "cross fertilization" was valuable and gave plenty of food for thought for everyone. The NGOs present also felt that they could gain more by networking and exchanging experiences across the board more often.

The papers before you reflect the richness of the debates. The editors decided not to edit them more than was strictly required in order to leave the texts as an anthology of ideas on the issue of visits under international law. This whole field would certainly require and merit further research, but this will be the domain of academia or institutes, and not that of a non-governmental organisation.

Last but not least, a final word of thanks. This Workshop could not have taken place without the enthusiastic support from Ambassadors Molander and Gyger in Geneva. Not only did they manage to persuade their respective Foreign Ministries to partially fund this enterprise, but they stood at our side with advice about appropriate specialists and experts to invite, as well as suitable venues and other practical matters. Thanks therefore also go to the Swedish Foreign Ministry, the Swiss Foreign Ministry, the Swiss Defence Ministry as well as the Norwegian Foreign Ministry. We would also like to thank the participants, especially the panellists, moderators, rapporteurs, volunteers and others who all helped make this a memorable event. Without them, we would not have been able to profit from a truely enriching experience.

1 W.Kälin: "*Missions and Visits without Prior Consent : Territorial Sovereignty and the Prevention of Torture*", i.: 20 ans consacrés à la réalisation d'une idée – Recueil d'articles en l'honneur de Jean-Jacques Gautier, APT, Geneva, 1997

Part I
Background papers

1 Arms control and disarmament inspection regimes

By Dr Trevor Findlay, Executive Director, Verification Research, Training and Information Centre (VERTIC), London, United Kingdom

1.1 Introduction

In the field of arms control and disarmament, the equivalent of human rights "visiting mechanisms" are known as inspection regimes. Inspection regimes have come to be seen as a vital element in verifying compliance with a wide variety of arms control and disarmament agreements. These range from global multilateral agreements, such as those banning chemical and biological weapons, through regional arrangements to regulate conventional weapons, such as the Dayton Accords on Bosnia, to punitive regimes visited on individual States, as in the case of the UN Special Commission (UNSCOM) for Iraq. Like verification measures generally, inspection mechanisms can have detection, deterrent and/or confidence-building functions.

Various types of inspections may be conducted in verifying arms control and disarmament agreements. They vary in intensity, complexity and intrusiveness depending on the provisions of the particular treaty and on the circumstances in which they are applied. Normally the pattern is as follows:

- At the entry into force of a treaty each State Party declares its treaty–relevant holdings and capabilities; at this stage so–called baseline inspections may be conducted to establish the veracity of such declarations;
- Once baselines have been established, a system of routine inspections may be instituted to confirm periodically that the situation has not changed or that the required reductions or decommissioning processes have been carried out (in some cases automatic sensing devices may be installed for continuous monitoring between inspections);
- In order to ensure that a predictable pattern of routine inspections does not permit Parties to violate treaty requirements between inspections, a system of *ad hoc* or random inspections may also be instituted; these may be subject to a quota system (active or passive);
- Finally, if there is a suspicion of non-compliance, a short-notice challenge on-site inspection (OSI) may be undertaken at the request of any State Party to confirm the veracity or otherwise or such suspicions; normally such OSIs are subject to approval or at least non-rejection by a governing body of treaty Parties and safeguards are established to prevent malicious or frivolous OSI requests; in addition, procedures may be established to prevent OSI teams from obtaining irrelevant but sensitive national security or commercial proprietary information.

These inspection measures must not be seen in isolation from the other methods of verifying and demonstrating compliance. Many arms control and disarmament agreements provide for monitoring by remote means as a substitute for intrusive inspections. Other agreements rely primarily or secondarily on so-called National Technical Means (NTM), which are monitoring capabilities under the control of national governments. NTM normally refers to remote sensing by satellites, but it may encompass all of the information-gathering techniques employed by governments, including, most controversially, intelligence operations.

Arms control and disarmament agreements also employ so-called confidence-building measures (CBMs) to provide opportunities for Parties to demonstrate their compliance unilaterally rather than through formal verification mechanisms. Such CBMs may include invited inspections. An example is the 1984 Stockholm Agreement on Confidence-Building Measures, which encourages States Parties to invite foreign observers to view major military exercises.

The role of inspection mechanisms in arms control and disarmament agreements must also be seen in the context of the institutional arrangements for verification of compliance. Increasingly these envisage the establishment of an international organisation, which comprises a conference of States Parties, an executive council of selected States Parties and a secretariat to administer the treaty and its verification system. Day–to–day inspections conducted by such organisations are meant to be seen as routine, co-operative and non-accusatory. Challenge inspections, on the other hand, are likely to occur in a highly charged atmosphere of claim and counter-claim in which the accused State will be highly protective of its sovereign prerogatives. Since such challenge inspections have been rare, their viability has not been adequately tested. However, the case of UNSCOM, which attempted to verify Iraq's compliance with its disarmament obligations in the face of systematic Iraqi obfuscation, obstruction and hostility, indicates the difficulties that challenge inspections are likely to confront.

Following is further detail on some specific arms control and disarmament inspection regimes.

1.2 International Atomic Energy Agency (IAEA) Safeguards

The IAEA's nuclear safeguards system has traditionally relied on routine inspections to verify that nuclear materials are not diverted to non-peaceful purposes. Recently, however, through an Additional Protocol to the existing bilateral safeguards agreements with non-nuclear weapon States and through its Strengthened Safeguards System, the Agency has begun instituting improvements which permit much more intrusive inspection measures.

Although the Agency is forbidden to conduct its new procedures "mechanistically or systematically", its right to so-called Complementary Access permits it to inspect:

- any place on the site of a nuclear facility
- any decommissioned nuclear facility
- nuclear-related manufacturing and other locations identified by a State, including mines, enrichment plants, re-processing plants or location of nuclear material subject to safeguards;
- other suspect locations (in order to carry out location-specific environmental sampling).

While the Agency must give at least 24 hours' notice of an inspection outside declared sites, within such sites it may give, in exceptional circumstances, less than two hours' notice. Written notice giving the reasons for inspections is required.

The Agency's long-standing but rarely used right to undertake "Special Inspections" of any site on the territory of a State Party, as a last resort in exceptional circumstances, is reaffirmed in the Additional Protocols. In theory this amounts to an "anytime anywhere" inspection right. Such an inspection must be approved by the Agency's Board of Governors.

1.3 The Chemical Weapons Convention (CWC)

This has the most elaborate and intrusive verification provisions yet devised for a disarmament agreement. The number of sites subject to routine and systematic inspections under the CWC exceeds the number covered by all other multilateral arms control and disarmament agreements combined. The crowning glory of the CWC and its most intrusive verification technique is the mandatory, short-notice challenge on-site inspection. This permits a State Party to seek an on-site inspection of another State Party by a team of trained inspectors from the Organisation for the Prohibition of Chemical Weapons (OPCW) in The Hague. They may visit any undeclared site on the territory of an-

other State Party if there is evidence that clandestine activities are being conducted there. While the OPCW's Executive Council must approve an OSI request and the accepting State may impose various restrictions on the timing and conduct of the inspection, the challenged State must ultimately accept such an inspection. It must do so within 120 hours from the time it is notified of the inspection. This too is virtually "anytime anywhere".

To prevent frivolous or malicious challenge inspection requests, the Executive Council may disallow such requests by a three-quarters majority vote. This is a so-called "red light" provision, requiring a negative decision by the Council to abort an inspection, rather than a "green light" provision which would require a positive decision for the inspection to proceed.

Unfortunately, there has been some watering down of the impact of on-site inspections under the CWC as a result of implementation decisions taken by States Parties, both unilaterally and multilaterally, after entry into force of the treaty. A similar "backlash" against intrusive on-site inspections is occurring in the negotiations on a verification protocol for the Biological Weapons Convention.

1.4 The Comprehensive Nuclear-Test-Ban Treaty (CTBT)

Remote monitoring by an International Monitoring System (IMS) is the key element of the CTBT verification system. However, the treaty does permit on-site inspections. Each State Party has the right to request such an inspection on the territory of another State Party to establish whether a suspect event detected by remote means was a nuclear explosion. The accusing State may base its request on evidence from National Technical Means and/or the IMS.

As soon as a request for an OSI is received, the Technical Secretariat of the CTBT Organisation (CTBTO) must immediately begin preparations and the Executive Council must decide within 96 hours whether or not to proceed. Unlike the CWC, the CTB requires a "green light" vote by the Executive Council for the OSI to proceed, involving 30 votes out of 51 (which is less than the three-quarters majority vote required by the CWC).

Also unlike the OPCW, which will use its own inspectors for OSIs, an inspection under the CTBT would be conducted by a team of experts selected by the Director-General of the CTBTO from a list of experts nominated by the States Parties. The team may spend up to 130 days on-site and is expected to produce a report on its findings for the Technical Secretariat, for review by the Executive Council.

Again unlike the CWC, the CTBT does not permit anytime, anywhere on-site inspections. The area that can be inspected must not exceed 1,000 square kilometres in any direction and must be continuous. The inspected State must ensure the arrival of the inspection team at the site no later than 36 hours after their arrival at the point of entry to the country. The Executive Council is obliged to make a decision on authorising an OSI no later than 96 hours after receiving the request from a State Party.

1.5 The Landmine Ban Treaty (Ottawa Convention)

Situated somewhere between arms control and disarmament treaties and international humanitarian law, the Ottawa Convention has fact-finding provisions which may culminate in the conduct of a fact-finding mission. Such a mission must be approved by a Meeting of States Parties (Special or ordinary). The team, comprising up to nine experts drawn from a list maintained by the UN Secretary-General (the treaty depository) must give at least 72 hours' notice of entry, but may stay up

to 14 days (although no more than 7 at any one site). The mission report is to be submitted to States Parties for their collective consideration. Such are obviously to be used only *in extremis* and are likely to be highly charged politically. The treaty lacks the baseline and routine inspection mechanisms of other arms control agreements.

1.6 Comparison with Visiting Mechanisms for the Convention on Torture

Presumably, like arms control and disarmament inspection regimes, visiting mechanisms to detect violations of the Convention against Torture are controversial, both in principle and in their implementation. They are perceived by States as potentially too intrusive and an infringement of sovereignty. Arms control and disarmament inspections may also be opposed on the grounds of their potential damage to State security: such an argument in the case of torture would seem far-fetched, although it is undoubtedly used.

The difficulty of actually detecting and proving violations, depending on the particular location and type of activity being examined, would appear to be equally difficult in the arms control/disarmament and torture cases. In both cases violations can occur away from the normally expected sites (in the case of disarmament at hidden underground facilities, for example; in the case of torture at secret detention centres). In both cases inspections or visits may be unable to find sufficient evidence to mount a convincing case (in the case of disarmament, production equipment for weapons may have been moved or destroyed, while in the torture situation victims, witnesses and perpetrators may have disappeared). Finally, in both areas, even if the verification system detects a violation, the consequent action taken will be the result of an essentially political decision by the States Parties acting collectively or individually or by some higher authority such as the Security Council.

In both fields, however, even without a violation being proven, inspections/visits can play a useful deterrent and confidence-building role, increasing the possibility that illicit activity might be detected, raising the costs of attempting to hide illicit activity and permitting compliant States to demonstrate their *bone fides* where they are under question.

2 Visiting mechanisms and the protection of human rights

By Dr Malcolm Evans, Professor of Public International Law, University of Bristol, Department of Law, Bristol, United Kingdom

Human rights standards are now found in a diverse range of source material. At one extreme lie the specific obligations set out in international treaties and which are binding on all those States which have signed and ratified them. At the other lie a large number of instruments such as declarations and codes of conduct which, although not legally binding in themselves, provide a touchstone by which to measure the practice of States. These instruments can feed into the interpretation of the legally binding obligations, which are usually couched in more general terms, and so can acquire a force greater than that envisaged when they were originally formulated. The obligations found in the treaties can themselves become accepted as reflecting customary international law and so come to bind all States irrespective of whether they are party to them. There is, then, considerable potential for the flexible development of normative standards in a fashion that transcends the formal status of the document in question. The problem is that the same is not true of the mechanisms which accompany them. These remain largely static and tied to their governing texts. This can have a negative effect upon the progressive development of the normative standards.

In general terms, there are two principal sources of human rights protection at the international level. First, there are mechanisms derived from the UN Charter itself, the operation of which is largely in the hands of the UN Commission on Human Rights, and the bodies which operate under it. Secondly, there are the large number of specific treaty-based mechanisms. The Charter-based mechanisms are indeed capable of flexible development – indeed, they are a prime example of it – but suffer from numerous defects which hamper their usefulness. Above and beyond such particular problems, however, lies a broader conceptual difficulty. As with so much of international law, it is assumed that States do not act in a manner which conflicts with their obligations freely assumed, and so the accompanying mechanisms are primarily designed to receive the evidence of compliance and to respond to any allegations of breach. They are not well crafted to bring about compliance and prevent breaches from occurring. In the field of human rights prevention this is as important – if not more important – than *ex post facto* findings of violations, and it is in this sphere that the mechanisms are inadequate.

Prevention requires active engagement with the State. Since most violations of human rights come about as a consequence of State action, prevention requires an intrusion into the laws and legal system of the State itself. Moreover, since many violations are the result of direct acts by State agents – e.g., police, armed forces, etc…-, it requires penetration into the very heart of the State's system of power and control. In essence, the prevention of human rights abuses requires persuading a State to change fundamental aspects of its relationship with its citizens. This is a very threatening undertaking and is more likely to be successful if there is a relationship of trust between those concerned. Unfortunately, much of the international protection of human rights is based on allegations of breach and results in condemnation. It is confrontational in nature and thus renders the task of prevention even more difficult.

The central argument in favour of developing visit-based mechanisms in the human rights field is that it might be a way of breaking down this model.

Of course, a number of visiting mechanisms already exist, but, as the following overview indicates, they are inadequate for a preventive mandate, and the brief examination that follows will illustrate a range of problems which need to be overcome.

2.1 UN Charter-based mechanisms

The Commission on Human Rights can initiate studies into the human rights situation in any UN Member State and this will often include arranging a visit to the country concerned. However, no visit can take place without the consent of the State in question, and even if consent is granted, its practical utility may not be very great since it will usually be conducted within the rather hostile climate brought about by the decision to conduct the study in the first place.

The Commission has also established a number of Special Rapporteurs with thematic mandates. They can request information about specific allegations which fall within the scope of their mandate and request assurances that the rights of certain named individuals will be respected. Thus they can both respond to information concerning alleged violations and act in a preventive capacity. Special Rapporteurs can also arrange visits to States to discuss the situation, but once again such visits can only take place with the consent of the State concerned. States may "request" a visit, but in practice such requests are usually solicited in instances where there is evidence of serious problems.

Ad hoc consent, then, is central to visiting under the Charter-based mechanisms. If visits take place at all, there may well be an unco-operative atmosphere and exchanges may be fairly formalistic. The range of persons and places which might be visited is likely to be limited and subject to a degree of official control. Such visits are infrequent, and the work of Special Rapporteurs (which are not full time appointments) is limited by a shortage of resources.

2.2 Treaty-based mechanisms

Most of the principal human rights treaties set up a body to oversee compliance, and this is achieved through a combination of reporting procedures and individual and inter-State complaints mechanisms. The distinguishing feature of almost all of these mechanisms is that they are responsive to information submitted to them – either to the report of the State Party or to communications. Although a number of treaty monitoring bodies are now prepared to consider the situation in a State whose report is overdue on the basis of a previously submitted report (and further information received), it remains true that the principal function of the treaty body is to ensure that the legal framework of the State in question accurately reflects the obligations undertaken and to consider whether violations have occurred in specific instances. Where facilities for visits exist, they tend to be focussed on fact finding in the context of complaints procedures – for example, fact finding by the old European Commission on Human Rights – rather than on taking forward the reporting function.

An exception to this is the UN Committee against Torture, which has the capacity to conduct an investigation into allegations of the systematic practice of torture, and this might involve a visit to the State concerned. Once again, however, this is dependent on the State concerned giving its consent. Moreover, since it is conducted by the very body which may be engaged in determining compliance in a quasi-judicial manner in response to allegations of breach, it will be difficult to present such visits as being other than investigatory in nature.

In one form or another, then, all of the human rights mechanisms sketched out share two common problems: first, the need for *ad hoc* consent to be given before a visit can take place and, secondly, that visits are normally a response to a situation that has already given rise to allegations of violations of human rights. Although they may have a preventive aspect, this does not lie at their heart.

There appears to be much more scope for the creative development of a preventive function within the UN Charter-based mechanisms than in the treaty-based mechanisms, but these have the

potential handicap of being ultimately derived from a political consensus rather than from a treaty regime. Moreover, they share with the treaty-based mechanisms outlined above the problem of selectivity. If only some States are to be visited, then this implies a belief that there is a problem that needs to be addressed, that is to say, that the State is in fact not complying with its international obligations.

What is needed, therefore, is a system in which States are visited on a routine basis, in a non-confrontational environment, and with the purpose of ensuring that mechanisms are in place to minimise the possibility of human rights violations occurring and to check that they are functioning properly. Ideally, such a mechanism would not be involved in any quasi-judicial determination of compliance.

The European Convention for the Prevention of Torture clearly provides a model. It is a treaty system which provides a generalised, *ante hoc* consent for visits to take place and for a preventive dialogue. Arguably, the system suffers from the same confusion of purposes as indicated above in that it is engaged both in fact finding and prevention and these do not always lie easily with each other. However, this is mitigated to a large extent by the Committee for the Prevention of Torture not having any formal judicial or quasi-judicial role, and whereas the other systems outlined above lean towards responsive measures, the ECPT is clearly rooted in the preventive function. This finds reflection in its not being associated with the implementation of any particular set of normative standards. Rather, it can draw inspiration from across the broad range of sources outlined at the start of this paper and mould them into the construction of a preventive web. This has the advantage of further breaking down the barriers presented by the formal status (or lack of status) of some of the instruments concerned and assists in the preventive function.

2.3 Conclusion

A number of visiting mechanisms exist in the human rights field but most are dependent on *ad hoc* consent and, to a greater or lesser extent, are confrontational in nature. Given the nature of human rights and the need to secure the active co-operation of the State in ensuring their enjoyment, this is inadequate. One cannot make a State respect human rights, but one can assist a State which wishes to do so. These are separate functions and must be treated as such. Assistance is best rendered over a prolonged period of time and in the context of an evolving relationship based on trust and mutual understanding. This is best achieved by regular contact, and this provides the justification for visiting mechanisms based on a preventive mandate and which are not tied to a particular set of normative standards. Its realisation should reflect these desiderata.

3 Visiting mechanisms and the protection of the environment

By Dr Paolo Galizzi, Lecturer in Law, University of Nottingham, School of Law, Nottingham, United Kingdom

3.1 Introduction

Several environmental treaties provide visit mechanisms to control compliance with their obligations,[2] but these mechanisms have not played a major role so far.[3]

This situation may partly be due to the nature of international environmental law, principally concerned with preventing environmental damages. Financial constraints may also be a cause for the limited use of on-site visits. The weakness of the existing inspection mechanisms, which require the previous consent of the State concerned before a visit can be carried out, may be another reason for their scarce utilisation. States often consider inspections to control their compliance as confrontational, an intrusion into domestic affairs and often react to them in a negative way. This in turn can cause non-compliance: if a State decides not to co-operate and not to implement its obligations, there is little, generally speaking, that can be done to achieve the goals set out in a given treaty.[4] To avoid these potential conflicts, compliance control mechanisms under environmental treaties tend to prefer a co-operative approach with States Parties. The effective implementation of the international obligations agreed to deal with environmental issues (reduction in the emission of polluting substances, protection of endangered species, etc.) is in fact paramount to tackle and solve such problems.

Inspections are, generally speaking, only an instrument of secondary importance in environmental treaties and must be seen in the broader context of the various mechanisms provided in a specific treaty regime to achieve effective implementation. Compliance is in most treaties monitored by the treaty's institutions (Conference of the Parties, Secretariat and in some cases *ad hoc* Implementation Committees).[5] Reports of data provided by States are still the principal instrument used by such institutions to monitor compliance. Final decisions on how to deal with non-compliance are always left to the political organ of a given treaty, where all States are represented (the Conference of the Parties). Compliance control instruments are increasingly matched with compliance assistance mechanisms. This is in recognition that non-compliance is often involuntary and due to ignorance and/or lack of resources rather than due to a deliberate act/omission of States. Assistance (financial or through the transfer of technologies) is therefore essential to overcome these obstacles.

The following are a few examples of some inspection mechanisms to be found in environmental treaties. It is important to stress that there are many more such examples in other treaty regimes.[6] This presentation has only the purpose of giving a general overview of the current trends and practice of "inspections" in international environmental law and is not meant to be an exhaustive list of all the inspection mechanisms present in international environmental agreements.[7]

3.2 Convention on Wetlands of International Importance (Ramsar Convention)[8]

The original emphasis of the Ramsar Convention was the conservation and wise use of wetlands primarily to provide habitat for waterbirds. Over the years, however, the Convention has broadened its scope to cover all aspects of wetland conservation and wise use, recognising wetlands as ecosystems that are extremely important for biodiversity conservation and for the well-being of human communities.

The Convention does not have specific enforcement mechanisms. Contracting Parties are expected to fulfil their obligations and situations of non-compliance are brought to the attention of the Conference of the Parties, which may only express its concerns. There is no further sanction for non-compliance.

The fourth Conference of the Parties (Montreux, Switzerland, 27 June – 4 July 1990) of the Convention adopted a recommendation on a "Mechanism for improved application of the Convention". The procedure, initially named "Monitoring Procedure", then "Management Guidance Procedure" and now called "Ramsar Advisory Mission", is aimed at giving assistance to Contracting Parties when "it comes to the attention of the Bureau that the ecological character of a listed wetland is changing or is likely to change as a result of technological development, pollution or other human interference". In such event, the Bureau of the Convention may offer to assist the Party concerned to find an acceptable solution. Actions taken by the Bureau, including on-site visits, must be agreed with the Contracting Party in question.

The "Advisory Mission" is a co-operative procedure, and the recommendation underlines that its principal aim is to "help the Party to find a solution". A total of 40 missions have been carried out since the adoption of this procedure.

The Conference of the Parties also established a "Wetland Conservation Fund" (now called "Ramsar Small Grant Funds") to offer financial assistance for developing countries to comply with the Convention's obligations.

The "visits" under the Ramsar regime are therefore not carried out to investigate and take actions in case of non-compliance, but rather to assist countries in their efforts to effectively implement the Convention.

3.3 Convention on International Trade in Endangered Species (CITES)[9]

The international wildlife trade, worth billions of dollars annually, has caused massive declines in the numbers of many species of animals and plants. The scale of over-exploitation for trade aroused such concern for the survival of species that an international treaty was drawn up in 1973 to protect wildlife against such over-exploitation and to prevent international trade from threatening species with extinction.

The Convention requires the Secretariat to monitor its implementation. When the Secretariat "in the light of information received is satisfied that any species included in Appendix I or II is being affected adversely by trade in specimens of that species or that the provisions of the present Convention are not being effectively implemented, it shall communicate such information to the authorised Management Authority of the Party or Parties concerned" (Art. XIII, paragraph 1).

In such a situation, Article XIII, paragraph 2, provides that an "inquiry may be carried out by one or more persons expressly authorised by the Party" where the Party considers an inquiry to be desirable.

The information resulting from any inquiry will be reviewed by the next Conference of the Parties which may make whatever recommendations it deems appropriate.

The details of this procedure are not specified by the Convention and have not been outlined by any decision of the treaty organs. According to the Convention's Secretariat, no such on-site visit to investigate situations of non-compliance with the Convention has ever been carried out. The

Secretariat, however, has carried out several visits to assist and help Member States in the implementation of the Convention. In these instances, there was the agreement and the co-operation of the Parties concerned.[10]

3.4 Montreal Protocol on Substances that Deplete the Ozone Layer[11]

The Montreal Protocol on Substances that Deplete the Ozone Layer was agreed to by governments in 1987. The Protocol's goal is the reduction and eventually elimination of the emissions of man-made ozone depleting substances.

The Montreal Protocol is one of the most innovative non-compliance procedures in environmental treaties. Article VIII of the Protocol gave a mandate to the Meeting of the Parties to develop a procedure to deal with issues of non-compliance. The non-compliance procedure was adopted by the fourth Meeting of the Parties (Copenhagen, 23-25 November 1992) and has been recently modified by the tenth Meeting of the Parties (Cairo, 23-24 November 1998).

The procedure can be initiated by the Convention's Secretariat, by any Party to the Protocol concerned about non-compliance by other Parties and by a Contracting Party concerned about its own inability to comply with its obligations.

The non-compliance procedure is administered by an Implementation Committee, which, *inter alia*, can "undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party" to fulfil its functions. There are no guidelines concerning those inspections, and as of today no inspection has ever been undertaken. This could be due to several factors and in particular to the fact that States have shown great co-operation with the Implementation Committee and have been willing to share information to achieve compliance, reducing the need for external inspection.

The non-compliance procedure's main goal is in fact to find an amicable solution with the Party found in non-compliance. For this purpose, the Protocol also provides a Multilateral Fund to assist developing countries to comply with their obligations. This procedure has been very effective in ensuring the achievement of the goals of the Protocol.[12]

3.5 International Convention for the Regulation of Whaling[13]

Another example that can be mentioned is the inspections regime of the International Convention for the Regulation of Whaling. The Schedule to the International Convention for the Regulation of Whaling requires each ship engaging in whaling to carry two inspectors, paid by the government having jurisdiction over the ship, to maintain twenty-four hour inspections. Adequate inspections shall also be maintained at each land station. Furthermore, the International Whaling Commission has the power to appoint observers placed on ships and land stations. These observers are nominated by Member States willing to participate in the programme on a mutual basis and are paid by such governments. In practice, this means that observers from whaling nations are appointed to inspect each others' operations and the utility of such inspections is, to say the least, questionable.

3.6 The World Bank Inspection Panel[14]

An interesting instrument, successfully used by NGOs to protect the environment, is the inspection procedure established by the World Bank to "provide an independent forum to private citizens who believe that they, or their interests, have been or could be directly harmed by a project financed by the World Bank".

The Inspection Panel was created by a resolution of the IBRD (International Bank for Reconstruction and Development) and the IDA (International Development Association).

One of the problems that had to be dealt with was the need to avoid the perception of borrowing countries that the Inspection Panel was aimed at evaluating their conduct. An investigation by the Inspection Panel can in fact lead to the cancellation of a project financed by the Bank (and supported by the borrowing country) and this outcome can be perceived as an "indirect" negative evaluation of the conduct of the borrowing country. To avoid this risk and consequent potential problems and tension with borrowing countries, in April 1999 the Bank's Board in its "Conclusions on the Second Review of the Inspection Panel" underlined that:

"The profile of Panel activities, in-country, during the course of an investigation, should be kept as low as possible in keeping with its role as a fact-finding body on behalf of the Board. The Panel's methods of investigation should not create the impression that it is investigating the borrower's performance. However, the Board, acknowledging the important role of the Panel in contacting the requesters and in fact-finding on behalf of the Board, welcomes the Panel's efforts to gather information through consultations with affected people. Given the need to conduct such work in an independent and low-profile manner, the Panel – and Management – should decline media contacts while an investigation is pending or underway. Under those circumstances in which, in the judgement of the Panel or Management, it is necessary to respond to the media, comments should be limited to the process. They will make it clear that the Panel's role is to investigate the Bank and not the borrower".

The language used by the Board is extremely interesting and, in my opinion, exemplifies very well the need to address and take into account the potential conflict between a truly independent investigation and the "sensibility" of States (which do not like investigations of their activities, even indirect ones).

As mentioned earlier, the Inspection Panel deals only with claims alleging violations by the Bank of its own operational policies. Affected parties in the territory of the borrower must show that the Bank's actions (or omissions) result in direct harm to them or their interests.

The procedure can be summarised as follows:

- When a request is received, the Panel initially decides whether the request is within its mandate;
- The request is sent to the Bank Management;
- The request and the Management's response are reviewed by the Panel, which recommends to the Board of the Bank whether the claim should be investigated (to decide whether a claim should be investigated, the Panel may gather information with on-site visits);
- The Board may approve or reject the recommendation of the Panel; if the recommendation to investigate is accepted, the Panel may then proceed with an investigation;
- The Panel may use a variety of investigatory methods, including visits to the project sites (physical inspections in the country where the project is located will be carried out with the prior written consent of the Executive Director representing the country concerned; however, in the "1999 Conclusions on the Second Review of the Inspection Panel" the Board affirmed that "it assumed the borrowers' consent for field visits envisaged in the Resolution");
- When the investigation is concluded, the Panel sends its findings to the Board and to the Bank Management;

- The Bank Management has six weeks to submit its recommendations to the Board on what actions should be taken in response to the Panel's findings;
- A final decision is taken by the Board, on the basis of the Panel's findings and of the Management's recommendations.

As of today the Panel has received 13 complaints and 4 are still pending. The Panel requested to carry out 5 investigations, but the Board has only authorised two investigations. In the first case the Panel's investigation led to the withdrawal of support to the project in question (the building of a megawatt power station in the Arun Valley, Nepal, which would have caused harm to the environment and to indigenous people). The second investigation, on a power generation project in India, was the first to be carried out only as a "desk study" at the Bank's headquarters as authorised by the Board. A final decision is still pending.

Almost all the complaints dealt with by the Inspection Panel concerned alleged violations of the Bank's policies causing environmental harm.

This procedure, although not prescribed by an environmental treaty, has been quite successful in holding the World Bank accountable for its lending activities and to question their "environmental compatibility". It could be, *mutatis mutandis*, an interesting example for the drafters of a Protocol on investigations for human rights abuses.

3.7 Conclusion

The experience in the environmental field of inspections carried out to control States' compliance with environmental treaties is limited. Inspections or, better, visits are often used to assist countries in their application of international conventions and are co-operative, non-confrontational and are carried out with the agreement of the States concerned.

A few suggestions/comments can be made after having analysed the experience gathered in the environmental field. These suggestions/comments may be useful to stimulate a debate and for the design of an inspection mechanism in the human rights field (and in particular of a Protocol to the Convention against Torture):

1. Inspections are only one of the tools to be used to ensure compliance with a treaty; it is important to design a comprehensive compliance regime, in which inspections should play an important role;
2. A compliance regime (including inspections) can be provided in a soft-law instrument or in a treaty. Both options have advantages and disadvantages. The use of a soft-law instrument may allow the regime to be easily modified when different circumstances arise; however, soft-law is not legally binding. On the other hand, treaties are binding for those States that ratify them, but they are not as flexible as soft law instruments;
3. An inspection mechanism should be devised in a way that allows future developments: one should only prescribe general rules and allow room for "creative interpretation";
4. Measures of compliance assistance should be included (for example, a human rights fund);
5. Trade related measures could be included (these measures have been effective – and highly controversial – in the environmental field);
6. Inspections should be allowed to control the activities of international organisations;
7. An inspection mechanism should be designed to maximise its potential effectiveness;
8. Particular attention should be paid to avoid waste of scarce resources (in particular avoiding duplication of structures, competence, etc.).

These are just a few thoughts that I am sharing with you. How realistic and achievable they are, it is not a matter for me to decide. Creative lawyers have the ability to design very effective visit mechanisms, at least on paper. The most difficult task is to persuade States to accept such mechanisms and to make sure that they are put in a position to function properly.

2 It is important to stress that the reference to inspections in this paper is to those inspections carried out to control compliance of Member States of a given treaty with their international obligations.

3 This is not equivalent to saying that these instruments are not useful. They do serve a purpose, as we will see, but they are not the main tools used in international environmental agreements to achieve compliance.

4 There are several instruments under international law to sanction the non-compliance of international obligations. However, these instruments very often cannot achieve the effective implementation, the goal, of a given treaty. This can only be done through actions (or omissions) of the States Parties to a treaty.

5 Control over compliance is often carried out through the co-operation of the various treaty organs. It is not possible to analyse in detail these procedures in this context (being this a short introductory note to contribute to the general debate on inspection mechanisms).

6 Examples include inspections regimes in international fisheries conventions, the Antarctic Treaty, IMO Conventions, etc.

7 For an interesting and more detailed analysis of inspection mechanisms in international law see S Oeter, *Inspection in International Law. Monitoring Compliance and the Problem of Implementation in International Law,* in *Netherlands Yearbook of International Law*, 1997, pp. 101-169.

8 The Ramsar Convention was adopted on 2 February 1972 and entered in force on 21 December 1975. The text of the Convention can be found, *inter alia*, in 11 *ILM* 963.

9 CITES was adopted on 3 March 1973 in Washington and entered in force on 1 July 1975. The text of the Convention can be found, *inter alia*, in 12 *ILM* 1085.

10 Examples of non-compliance with CITES and an analysis of the actions taken will be discussed in papers delivered by other participants in this workshop.

11 The Protocol was adopted in Montreal on 16 September 1987 and entered in force on 1 January 1989. The text of the Protocol can be found, *inter alia*, in 26 *ILM* 1550.

12 According to the *UNEP Global Environment Outlook 2000* the recovery of the ozone layer to pre-1980 levels will be achieved by around 2050, thanks to the measures adopted in the Montreal Protocol and its related amendments.

13 The Convention was adopted in Washington on 2 December 1946 and entered in force on 10 November 1948. The text of the Convention can be found, *inter alia*, in 161 *UNTS* 72.

14 More detailed information on the Inspection Panel can be found on the World Bank website "www.worldbank.org/hmtl/ins-panel/overview/html".

4 Visits under international humanitarian law

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4.1 Introduction

International humanitarian law (IHL) regulates the methods and means of warfare and protects victims of armed conflict who are not or no longer taking part in fighting. A wide range of protections are accorded to civilians, prisoners of war, detained persons, religious and medical personnel.[15] The intention is to limit the effects of armed conflict on persons not involved in warfare. Like international law generally, the mechanisms of enforcement under IHL are still rudimentary and therefore less than perfect. To a large measure they depend on the integrity and the good will of State actors and other affected parties. That notwithstanding, several mechanisms exist for the implementation of the obligations created by IHL for international armed conflicts. Because of the special nature of IHL as a body of law applicable in period of armed conflict, visits constitute the single most important method of verifying compliance with the applicable legal standards. Visits under IHL, however, have unique qualities, that are discussed below.

4.2 The system of protecting powers

The system of protecting powers has a long history in the law of warfare. It was intended to provide a mechanism through which in periods of hostilities the opposing Parties may continue to have a neutral party managing their respective affairs.

Today the role of protecting powers has not changed much. They still have the duty and the responsibility of protecting the interests of the Parties to the conflict for as long as the hostilities between the Parties subsist.[16] Ordinarily, the protecting powers may act through their regular diplomatic and consular staff or through other delegates chosen from their own nationals or those of neutral States. The Parties to the conflict are obliged to facilitate the work of the protecting powers.[17] The Conventions are to be applied "with the co-operation and under the scrutiny of the protecting powers". In practice, the protecting powers assume the role both of managing the interests and mediating between the Parties. If and when they became aware through whatever means that any of the protections of the Conventions have been violated, e.g. that prisoners of war have been mistreated, it is their responsibility to seek a rectification of this condition. In order to do so, it is expected that the protecting powers will visit and inspect all the relevant people and facilities subject only to the "imperative necessities of security of the state".

One major drawback of the protecting powers system is that the consent of the State in which they are to operate is required. In the circumstances of war, it is not easy for the Parties to agree on many things. Where no protecting powers are appointed, probably due to the inability of the Parties to agree on any, the Parties may nevertheless "agree to entrust to an organisation, which offers, on guarantees of impartiality and efficacy the duties incumbent on the protecting powers". If for whatever reason the protected persons cease to enjoy any protection from the protecting power, the detaining power is obliged to request a neutral or an impartial organisation to undertake the functions. The consent of the adverse Party is not necessary under these circumstances, but the mechanism of ensuring that this happens is inconclusive.

4.3 Enquiries as to any violation of the Conventions

The enquiry system mandated by all the Conventions is as close as IHL gets in establishing a comprehensive monitoring system. Under the Conventions, at the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be agreed upon by the Parties to investigate any alleged violations of the Conventions.[18] In practice an enquiry would normally entail visits to the people and places affected by the conflict. If the Parties do not reach agreement as to the manner of conducting the enquiry, they are required to agree on an umpire who shall decide on the procedure to be followed. This requirement for consensus among the Parties complicates the process. Little wonder that in practice these provisions have never been applied, as the opposing Parties have never given their consent.

4.4 The international fact finding commission.

The 1st Additional Protocol to the Geneva Conventions, relating to the protection of victims of international armed conflict, sets up an international fact finding commission intended to investigate any alleged grave breaches or other serious violations of the Conventions and the Protocol.[19] The investigations envisaged by the Protocol entail visits to the places and people affected by the conflict. A contracting power may accept the competence of the fact-finding commission in advance by declaration or on an *ad hoc* basis when the subject of an enquiry is specific. In many instances, States ratifying the Protocol do not *ipso facto* recognise the competence of the commission. As at 31 March 1991, the commission had received the requisite number of subscribers and had therefore formally come into being. The mandate of the commission is two-fold. One is to enquire into any facts alleged to be a grave breach as defined in the Conventions and the Protocol or other serious violations of the Convention or Protocol. Secondly, to facilitate through its good offices the restoration of an attitude of respect for the Conventions and the Protocol.

4.5 Visits by advocates to accused prisoners of war and protected persons in occupied territories

A prisoner of war who has to stand trial has the right to defence by a qualified advocate or counsel of his/her own choice. He or she is entitled to call witnesses and retain the services of a competent interpreter should he deem one necessary.[20] Occupying powers are obliged to ensure that accused persons in occupied territories realise their right to the assistance of a qualified advocate or counsel of their own choice. To this end an advocate or counsel representing an accused person is entitled to visit him/her and to have unhindered access to him/her and his/her witnesses including other prisoners of war. Unless the case is held in camera, the representatives of the protecting power are entitled to visit and to be present at the trial.[21] The same rights are to be enjoyed by internees who are in the national territory of the detaining power.[22]

4.6 Visits by delegates of the protecting power, of the International Committee of the Red Cross or other agencies giving relief to prisoners of war

Delegates from the protecting power, the ICRC, or other relief agencies may visit the following places unhindered,

(i) Labour detachments and detachment camps.
(ii) All places of internment, detention and work.

The camp commander is obliged to keep an up-to-date record of the detachment and communicate it to these delegates.[23] The commandant of labour detachments is also obliged to keep an up-to-date list of the labour detachments subordinate to him/her and communicate it to the delegates of the protecting power, the ICRC, and other humanitarian organisations who may visit the places.[24] The duration and frequency of such visits shall not be restricted and the delegates/representatives shall be at liberty to select places they wish to visit.[25] Similar rights of visitation are to be enjoyed by protected persons who are detainees[26] and internees who are in the national territory of the detaining powers.[27] The representatives or delegates of protecting powers have permission to go to all places where protected persons are, especially places of internment, detention and work and to all premises occupied by protected persons and to interview them without witnesses, personally or through an interpreter,[28] subject to prohibitions prompted by reasons of imperative military necessity but which must be exceptional and temporary in nature.

4.7 Visits to prisoners of war by compatriots

Compatriots of prisoners of war may be permitted to participate in visits by representatives/delegates of protecting powers and of the ICRC where the detaining or occupying power, the protecting power and when occasion arises, the power of origin of the persons to be visited, so agree.[29] Similar rights are to be extended to compatriots of internees.[30]

4.8 Visits of interned ministers of religion to internees in places of internment and hospitals

Detaining powers are to allow ministers of religion who are interned to freely minister to interned members of their community, ensure their equitable allocation amongst the various places of internment and provide them with the necessary facilities including means of transport for moving from one place to another where they are few in number. Detaining powers are also to authorise these visits to internees who are in hospital.[31]

4.9 Visits by chaplains

Chaplains falling into the hands of the enemy power and retained with a view to assisting prisoners of war shall be allowed to minister to them. They are to be allocated among the various camps and labour detachments containing prisoners of war. Detaining powers are to afford them necessary facilities including the means of transport for visiting the prisoners of war outside their camp.[32]

4.10 Visits of relief societies, representatives of religious organisations or any other organisation assisting prisoners of war, by themselves or their duly accredited agents

Delegates of relief societies, representatives of religious organisations or any other organisation assisting prisoners of war may visit prisoners themselves or through their duly accredited agents. These are to receive from the detaining powers, subject to measures which these may consider essential to ensure security or to meet any other reasonable needs, all necessary facilities for visiting the prisoners.[33]

4.11 Visits by medical personnel

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, the staff of National Red Cross Societies and other voluntary aid societies (duly recognised by their governments and who may be employed in the same duties as the personnel hereinbefore mentioned), who falling to the hands of the adverse Party shall be retained only in so far as the spiritual needs, number of prisoners of war and state of health require, and be accorded authorisation to periodically visit prisoners of war in labour units or hospitals outside the camp and afforded transportation means by the detaining power.[34]

Medical personnel and chaplains retained by the detaining power to assist prisoners of war are to have similar rights extended to them.[35] Prisoners of war are to have the attention, preferably of medical personnel of the power on which they depend and if possible, of their nationality.[36]

4.12 Medical authorities

Prisoners of war may not be prevented from presenting themselves to medical authorities for examination[37]. Medical inspections of prisoners of war are to be held at least once a month[38]. Internees awarded disciplinary punishment are to be allowed, if they so request, to be present at the daily medical inspections.[39] Similar rights are to be enjoyed by prisoners of war undergoing confinement as a disciplinary punishment[40] and to prisoners of war whilst in confinement awaiting trial.[41]

4.13 Mixed medical commission to prisoners of war[42]

Mixed medical commissions are to carry out examination of particular wounded or sick prisoners of war and to communicate their decisions in each specific case, during the month following their visit, to the detaining power, the protecting power and the ICRC, to inform the prisoners of war of the same and to issue certificates to those whose repatriation is proposed.[43]

Mixed medical commissions are to function permanently and visit each camp at intervals of not more than 6 months.[44]

4.14 Visits by near relatives

Internees are to be allowed visits, especially by near relatives, at near and frequent intervals and to visit their homes, especially in urgent cases (e.g. on the death or serious illness of a near relative).[45]

4.15 Visits by prisoners' representatives

Prisoners' representatives shall be granted a certain freedom of movement necessary for the accomplishment of their duties (e.g. inspection of labour detachments) and shall be permitted to visit the premises where prisoners of war are detained[46]. Every prisoner of war shall have the right to freely consult his or her representative.[47]

4.16 Visits and inspections by representatives of the protecting powers

Representatives of protecting powers on their visits to the camps are to be allowed to inspect the accounts, held by the detaining powers, on account of each prisoner of war.[48]

4.17 Conclusion

The mechanism of visits under IHL is an important way of verifying compliance with IHL and ensuring that the victims of armed conflict are appropriately protected. On the whole these mechanisms have served reasonably well in a very difficult area. There are, however, serious limitations that need to be addressed. The lack of a compulsory and centralised machinery is a major drawback. The requirement that the Parties to the conflict must consent to visits and inspections also renders the process ineffectual. The complete lack of a preventive mechanism is yet another serious drawback. There is therefore the need to intensify surveillance of humanitarian conditions in situations of armed conflict. There is the need to strengthen existing mechanisms and to formulate new ones, especially for non-international armed conflicts. This is the challenge of IHL in the new millennium.

15 Whereas much of IHL is to be found in customary international law and numerous other conventions, for simplicity consideration is here given to the Geneva Conventions of 1949 and the two additional protocols of 1977.

16 Article 8 common to the Conventions 1 to 3 and Article 9 of the 4th Convention.

17 Articles 10 of Conventions 1-3 and Article 11 of the 4th Convention. To date no agreement of this nature has been reached.

18 Articles 53 of 1st Convention, 52 of the second, 132 of the 3rd and 149 of the 4th.

19 Article 90.

20 Article 105 of 3rd Convention.

21 Article 105 of 3rd Convention.

22 Article 126 of 4th Convention.

23 4th Convention Art 56/3

24 4th Convention Art 96

25 4th Convention Art 143/3

26 4th Convention Art 76-6

27 4th Convention Art 126

28 4th Convention Art 30-3

29 4th Convention Art 143

30 3rd Convention Art 126/3

31 4th Convention Art 93-2

32 3rd Convention Art 35

33 3rd Convention Art 125/1

34 1st Convention Art 28/2 (a)

35 3rd Convention Art 33/2

36 3rd Convention Art 30/3

37 3rd Convention Art 30

38 3rd Convention Art 31

39 4th Convention Art 125-2

40 4th Convention Art 98-4

41 4th Convention Art 103-3

42 4th Convention Art 113

43 3rd Convention Art II, Art 11

44 3rd Convention An II, Art 14

45 4th Convention Art 116

46 3rd Convention Art 81/3

47 3rd Convention Art 81/2

48 3rd Convention Art 65/2

Part II
Workshops

WORKSHOP ON FRAMEWORK (INCL. SCOPE OF APPLICATION) AND PROCESS

1 Framework and processes in disarmament/arms control

By Dr Patricia M Lewis, Director, United Nations Institute of Disarmament Research (UNIDIR), Geneva, Switzerland

1.1 Introduction

In the fields of arms control and disarmament a framework has evolved for visits and inspections. However, this framework, and its associated procedures, are not set in stone. Each treaty negotiation, each bilateral discussion, each unilateral gesture is another opportunity to push boundaries, attempt to reverse precedents or hold the line. Nevertheless, an international set of norms has been developed and there is a common language across a broad range of countries.

Each term such as short notice, challenge inspection, confidence-building measure, routine inspection, randomly selected inspection, observation of activities, and voluntary visits has previous agreement and practical experience to provide context for negotiators and implementers alike.

This presentation attempts to highlight key aspects of the frameworks and processes that exist in arms limitation agreements and flag up where progress is in danger of being eroded.

1.2 Frameworks

The concept of verifying commitment to agreements on arms limitation through mutual inspections probably goes back to the very first agreements on cease-fire agreements and peace treaties in early civilisation. However, in the twentieth century, a whole industry for verification of treaty compliance was spawned (and in some countries a counter-industry for smart deception was likewise nurtured). This industry included public servants, political scientists, physical scientists, engineers, manufacturers and the military.

On the eve of the twenty-first century, we have in place a global and regional security treaty architecture that, if sustained, provides enhanced security and stability throughout the world. It could be argued that the backbone of this architecture is the associated verification regimes for the treaties. Although each treaty has a very different verification regime – and indeed some treaties have no verification provisions at all – there are some agreed principles for verification forming the bedrock of the regimes.

The first of these principles is that there can be no guarantee that a verification regime – however well designed and conscientiously implemented – can yield 100% certainty. The purpose of a verification regime is to demonstrate compliance and increase the likelihood of detecting non-compliance. This in itself is likely to deter would-be-cheaters – although, as we have seen from past experience, a determined treaty evader operating in a closed society and prepared to spend large amounts of State funding on illegal activities can camouflage its actions. A good verification regime, incorporating on-site inspections, however, would at least indicate the probability of non-compliant behaviour and raise the suspicions of other States. At the very minimum, verification provides high quality, additional information to assist States in assessing others' compliance with agreements. At best, verification can provide strong evidence for compliant and non-compliant behaviour.

Another principle that has emerged in the last three decades is that each agreement requires its own tailor-made verification regime. This is known as treaty-specificity. Bilateral treaties require bilat-

eral regimes, regional treaties require regional regimes and multilateral treaties require multilateral verification structures. Even though there are crossovers and similarities between treaties, the differences are usually marked enough to warrant separate frameworks and procedures for verification. One exception to this rule is when a treaty is modified or built on in such a way as to simply increase the numbers and types of weapons to be controlled. For example, the second US-Russia strategic arms reduction treaty builds on the first strategic arms reduction treaty and so does the verification regime.

A third principle, borne out by experience, is that on-site inspections carried out by human inspectors provide the highest quality information. Humans, when trained to observe and collect data, integrate information and pick up clues from the environment, from other people and therefore add value to the basic data they are tasked to record. No equipment or remote sensing monitoring can quite do the job of an inspector.

Finally, there is the principle of cost-effectiveness. Compared with most other security measures, verification of arms control agreements is inexpensive and highly cost-effective. However, because verification is seen as an add-on cost rather than a replacement cost, the financial and resources implications of implementing verification regimes are becoming increasingly closely scrutinised. It is true, depending on the agreement, that different aspects of a regime can be less cost-effective than others. For example, when counting numbers of nuclear missiles, it is cost-effective to count every one and the marginal extra cost of tags can also be considered cost-effective, precisely because of the terrible destructive power of just one warhead. However, in the case of counting tanks, it may be cost-effective to count the number of tanks at a military base but it is not worth fretting about obtaining an exact tally with the declared number. Out of a few hundred tanks, one or two unaccounted for is not usually of great military significance.

The frameworks in existence today include on-site inspections as the mainstay of the verification regimes, remote monitoring as an important feature in some agreements, and the option of national or multinational technical means in most treaties. The procedures about who, why, when and how to inspect and monitor and how to interpret the information gathered are inextricably linked with the verification regime and form part of the procedures for inspections.

1.3 Processes

Given that the topic of the conference is on visits under international law, I shall limit my discussion about processes to on-site inspections and visits in the security sector.

There are a number of different types of inspections, depending on the type of treaty, the weapons involved and the political conditions during negotiation. These include, amongst others:

- Routine inspections: inspections planned and expected – often to a time schedule.
- *Ad hoc* inspections: inspections planned and expected but time not known to recipient.
- Randomly selected inspections/visits: mathematical selection based on random selection of weighted sample groups. Similar to *ad hoc* inspections, inspections planned and expected but time not known to recipient.
- Challenge inspections: inspections not planned in long term, short notice, initiated due to concern over activities in recipient country. Politically sensitive.
- Special inspections: similar to challenge inspections but need not be so politically charged (depending on circumstances).
- Data verification inspections/visits, baseline inspections: initial inspections to check early data on activities/facilities/numbers from States. Planned and expected.

- Clarification visits/inspections: inspections to clarify confusion over data or activities. Agreed between recipient and other State(s) as necessary. Could be politically sensitive.
- Destruction/decommissioning inspections: inspections planned and expected to witness the destruction or decommissioning of weapon systems/facilities.
- Closeout/closedown inspections: inspections to witness the decommissioning of a military base or facility.
- Voluntary visits/inspections: inspections initiated by recipient to help reduce confusion or to build confidence – could be volunteered at the suggestion of another State.
- Observations: primarily confidence-building measures where inspectors are invited to observe, for example, military exercises.
- Field investigations/special investigations: inspections at the scene of a suspected or possible use of illegal weapons – can take place up to years after suspected event.
- Long-term monitoring: inspectors at facilities or regions for years and decades.
- Enforced inspections: inspections under an agreement, for example a cease-fire, when the inspected party is reluctant to participate and attempts to undermine the verification regime.

Decisions about whether and where to inspect are made in different ways depending on the treaty and on the type of inspection. Generally speaking, routine, *ad hoc* inspections, long-term monitoring, destruction inspections, baseline inspections and closeout inspections are decided on in a technical way by the implementing body or by agreement between the parties. Challenge inspections, field investigations, etc. are more politically sensitive and tend to be decided on by a political body such as the conference of States Parties to an agreement.

The decision-making process for such politically sensitive inspections differs from treaty to treaty. There is a continuing discussion within the security sector on how to proceed in the making of such a decision. Called the "green light, red light" debate, there are differences of opinion over whether a decision by the implementing body to carry out, say, a challenge inspection should go ahead unless specifically opposed by one or more State Party (red light) or whether the decision to go ahead requires the active consent of a certain number of Parties (green light). Some types of inspections may require a simple majority; some may require a two-thirds majority, and some a number in between.

All types of inspections require some amount of notice. A general rule of thumb is the more sensitive the inspection and the more easily concealed the weapon or the activity, the less the amount of notice that should be given. There have been proposals for no-notice inspections (and in theory these do exist). For example, in the late 1980s there were proposals for "roving inspectors" for the Conventional Forces in Europe Treaty. These roving inspectors could have gone anywhere within their jurisdiction at any time and turned up at military bases with no prior notice to check the numbers of, say, armoured vehicles against the number declared for those installations. The proposal was not taken up, but it was seriously discussed.

The scope of inspections again depends on the treaty and the agreed verification regime. There is a general approach that the information gathered by inspectors should only be for the purposes of verifying the treaty and not go beyond that task. Equipment allowed to be used by inspectors again varies from agreement to agreement. The equipment can usually be checked by the inspected Party so as to ensure that it can only gather appropriate data. Equipment can vary from such very basic items as binoculars and cameras, through audio and video recorders to more sophisticated detectors and sample-taking instruments.

Inspectors are usually allowed to remove information and samples from an inspection, but duplicates are given to the inspected Party as protection for both Parties. There have been instances of failure in this part of the inspection procedure, and there are difficulties generally with some key provisions in certain agreements. To whom the information and the samples belong, and therefore who has ultimate control over what happens to the information, can be a contentious issue.

Likewise the analysis of the material and information taken from an inspection site can cause severe political difficulties. Further laboratory analysis has to be carried out blind, at least in duplicate and to rigorously high standards. Although this process increases the costs and delays political consideration, it is clearly essential.

How the analysed data are then evaluated and how decisions are made following inspections can be fraught with problems. In the end, a decision on compliance is a political decision taken by States. Rarely is there a smoking gun from a single inspection. Frequently there are potentially worrying inconsistencies – most of which are resolved to the satisfaction of all, but some of which remain unresolved and some add to a pattern of knowledge that altogether suggest that a State may be in, or preparing to be in, serious non-compliance with an agreement.

Decisions on compliance and non-compliance are often made in private, but sometimes one or more States choose to declare their findings publicly. Such a declaration on non-compliance may lead to calls for national or international action. It is at that point where the decision-making process decidedly leaves the realm of verification regimes and falls directly into the centre of the international political arena. There is no consensus or consistency over action to be taken in cases of clear material breaches of an arms control treaty, and this in the end serves to undermine the treaty and security architecture built up over the last three decades.

2 Visiting mechanisms in national environmental legislation and international agreements

by Dr Iwona Rummel-Bulska, Chief, Compliance and Enforcement of Environmental Conventions Unit, United Nations Environment Programme (UNEP), Châtelaine, Switzerland

"The overall objectives of the review and development of international environmental law should be to evaluate and to promote the efficacy of that law and to promote the integration of environment and development policies through effective international agreements or instruments, taking into account both universal principles and particular and differentiated needs and concerns of all countries" (Agenda 21 adopted Rio de Janeiro 14 June 1992 by the UNCED, Chapter 39).

Ensuring compliance with environmental treaties and national environmental legislation is a widely recognised problem. Nobody questions the need for better reporting, monitoring and enforcement mechanisms. Until recently, international environmental agreements have contained few substantive mechanisms for monitoring and evaluation. Some authors consider that one of the reasons for this is the concept of State sovereignty, which has resulted in nations not willing to accept external scrutiny. That is why some countries question external monitoring of compliance with international treaties to which they are Parties. However, taking into account limited reporting rates and data quality, the effectiveness of a self-monitoring approach is questionable. Some effective enforcement has taken place in some countries, but in general, together with the large evolution of international environmental agreements have come more opportunities for criminal activities related to the subjects to be controlled by these agreements (i.e. illegal traffic in ozone depleting substances, hazardous wastes, toxic chemicals, endangered species, etc.). The criminal activities undermine the effectiveness of international legal agreements and national legislation.

As environmental protection legislation, both national and international, becomes more specific and widespread, incentives for evasion also increase. Control measures of international treaties are by now having quite an impact on economy and trade. Related to the above is the increase in the lack of compliance with international treaties and even an increase in environmental crime. There is still only limited capture of environmental criminals. One of the reasons for this is the almost complete lack of requirements, at least at the international level, related to visiting mechanisms, which do exist in other groups of international treaties (e.g. human rights). Visiting mechanisms and inspections are part of the process of verification of monitoring and compliance with environmental law at national and international levels. Verification can also be done through obtaining information from other sources or through independent analysis. Use of visiting mechanisms, including inspections, has not yet been included in environmental agreements *per se*.

2. The exact scope and extent of verification is not yet well defined. In agreements related to disarmament which contain verification clauses, two elements are clear: verification is considered to be a process rather then a static concept, and verification, which is based on collection of information on fulfilment of obligations required for their implementation by treaty, needs analysis of such information and judgement. Verification is supposed to ensure that all Parties to the agreement meet their obligations by preventing breaches of its provisions or by discovering that a violation of the treaty took place. Verification constitutes part of the monitoring system, which includes collection of information; verification processes serve as an element of checking on information received with a view of detecting any inconsistencies or/and inaccuracies. Monitoring should therefore contain verification processes as an integral part. It is not yet the case in environmental agreements where the Parties in most cases have opted for self-assessment as regards their action on provisions of the agreement (e.g.

in the Basel Convention, Parties decided to assess for themselves whether the bilateral agreement signed under Art.11 of the Convention is not less environmentally sound than the provisions of the Convention, which in practical terms may undercut the meaning of the main concept of this provision).

Enforcement is considered by most lawyers as the measures to be taken for implementation of international conventions or national legislation including in particular measures to be taken against a State not implementing the convention or/and acting in breach of agreement (e.g. non-compliance procedures and even dispute settlements).

Obligation to control systematically the implementation of conventions is included in most of them. However, this international control is, in most cases, a sort of "auto-control" in the terms of internal mechanisms of each convention, mainly through conferences of the States Parties, inter-governmental committees or secretariats which usually have a very limited role.

Self-reporting on measures taken to implement the treaty is often central to efforts to create a transparent information system and ensure compliance. The principal problems with respect to self-reporting seem to be less the deliberate flouting of reporting requirements than limitations of capacity and of the bureaucratic setting in which reports are generated. Occasionally a country will skip its report to avoid revealing a serious violation. An ILO working group concluded that reporting failures usually stem from administrative and technical difficulties or personnel changes rather than from deliberate refusal. The ILO has strong management procedures of blacklisting countries that fail to report, because it views reporting as essential to the compliance process. Data collected in an agreement among fourteen industrialised members of the International Maritime Organisation (IMO) permit effective performance of inspections, which is a high priority of the port agencies, and has close to 100 percent reporting rates. In contrast, compliance with the various reporting requirements of the International Convention for the Prevention of Pollution from Ships (MARPOL) is quite low, because the IMO secretariat does not facilitate reporting, makes little use of the information it does receive, and does not censure failures to report.[49]

Nations often report to international secretariats only data that they already collect for other reasons. This circumstance undoubtedly means that much information frequently remains unreported. On the other hand, incentives exist to make performance look good.

Although environmental treaties usually require only national self-reporting, ways of skirting the "self-incrimination" problems inherent in such systems are increasingly being recognised and put to use.

NGOs commonly help verify human rights treaties. Even in the security-shrouded world of arms control, advocacy NGOs as well as research organisations have developed impressive credentials as independent sources of authoritative information. Environmental NGOs have been collecting information on treaty related behaviour. The Commission on Sustainable Development explicitly created a channel for NGOs to provide reports in order to facilitate evaluation of compliance and non-compliance. Even industry may provide independent information on compliance. Shipping companies have regularly identified ports that have not provided reception facilities as required by MARPOL, and much CFC production information has been provided directly by industry.

The availability of other sources for the same data sometimes facilitates verification of national data. Data from one country can be compared with those from other countries. (e.g. in the Basel Convention). Finally, a secretariat can provide independent verification by direct enquiries.

The Ramsar Convention established on-site monitoring procedures that have been used to verify non-compliance and assist countries in identifying strategies to encourage compliance.

Collected data contribute to compliance management only if the regime provides environmental analysis, evaluation, interpretation, and dissemination of the information acquired. Some environmental conventions make extensive use of the data they collect. The Basel Convention and CITES make extensive use of the reports, to attempt to identify illegal trade.

Systematic control of the implementation of agreements through reporting has given limited results. Improvement can be achieved through establishment of independent experts and scientific groups, which can review the reports submitted. Recently concluded conventions established scientific and technical committees which can support activities related to control of their implementation (e.g. the 1991 Antarctic Protocol; Biodiversity Convention, 1992; Climate Convention, 1992).

The Climate Convention established a procedure on the review of national reports. The Conference of Parties (COP) is assigned the task to "assess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, the overall effects of measures taken pursuant to the Convention, in particular environmental, economic and social effects and the extent to which progress towards the objective of the Convention is being achieved " (Art.7). Moreover, the COP shall consider and adopt regular reports on implementation of the Convention and ensure their publication.

More ambitious review procedures were being discussed during the negotiations, but due to the opposition by some countries to inclusion of an adversarial mechanism, only the framework for such review was included and the more detailed provisions on such reviews (e.g. the question of whether a permanent review committee is needed) were left open for further development.

To resolve questions regarding a Party's compliance with the Convention, many felt that a multilateral, non-adversarial procedure was needed in addition to traditional dispute settlement. It was argued the adversarial procedures are particularly inappropriate because climate change is a global concern and non-compliance would therefore affect all the Parties collectively, not simply the Party challenging another for violating the Convention (art.13).[50] It was agreed that the mechanism should assist Parties to comply with the Convention instead of introducing sanctions (cf. the non-compliance procedure under the Montreal Protocol). The International Negotiating Committee did not, however, reach agreement on the procedure but left it to the COP at its session to consider the establishment of such a procedure (Art. 13).

Control of implementation should be accompanied by measures which could assist collecting additional information and checking on the accuracy of information received. In these sorts of situations, the classical procedure, which has been used for human rights, should also be used for environmental protection.

Verification of information can be done through requesting an up-dating.[51] Opinions by independent experts have been used in some conservation treaties.[52] A more efficient way of control is inspection, which allows *in situ* control. This control has been accepted in several IAEA related treaties. In purely environmental treaties this sort of control is very rare and depends on the prior consent of the Party involved.

Evolution of international treaties on fisheries shows since 1974 establishment of inspection on the base of reciprocity, followed by report to the Multilateral Commission.[53]

There should be definitely a stronger independent element in environmental co-operation. As maybe the most advanced regional environmental corporations in the world, the States at least in the European region have the opportunity to set the agenda and be a model also for other international environmental corporations. Until now, for example, the very basis for the North Sea co-operation is the strong national control over the whole process. Nations pick their own scientists, they do their own reporting on their own performance, and they decide who should take part in relevant parts of the process. This is the very basis for almost all international co-operation, but within such a long-standing and advanced co-operation as this, it may be time to loosen up a little bit on the national control dimension. Strengthening the Secretariat in terms of role and scope in the process may be one way to go. This may be related to building up capacity for more independent checking of reporting procedures; as in the IAEA, it might be in the form of inviting independent scientists to evaluate research or to do specific tasks, or bringing other types of participants and experts with experience from perhaps other types of environmental regimes into the process. It might also be in the form of organising environmental performance reviews to increase transparency and maybe to increase interest among the public.

Independent inspection is only established in Antarctic agreements. The Antarctic Treaty of 1959 plus its Protocol on Environmental Protection of 1991 is the only agreement related to environment which contains provisions related to visiting mechanisms – inspections. Article VII of the Antarctic Treaty stipulates that in order to promote the objectives and to ensure that the treaty is observed, the Contracting Parties are entitled to designate observers, who ought to be nationals of the Contracting Parties, to carry out inspections in Antarctica. The Party designating the observers must inform the other Contracting Parties about the names and termination of appointments of observers. The designated observers have complete freedom of access at any time to any area of Antarctica. It should be, however, kept in mind that Antarctica has a special legal status and that these agreements are not environmental agreements *per se*. The Antarctic Treaty further specifies that all areas of Antarctica, including all States, installations and equipment within those areas, and all ships and aircraft at point of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by designated observers. The Protocol on Environmental Protection to the Antarctic Treaty (1991) specifies the expected outcome of such inspections. Parties shall arrange individually or collectively for inspections to be made by observers, in order to promote the protection of the environment and dependent and associated ecosystems, and to ensure compliance with the Protocol (Art.14). The Parties shall co-operate fully with observers undertaking inspections, and shall ensure that during inspections, observers are given access to all parts of stations, installations, equipment, ships and aircraft as well as all records maintained thereof. The reports of inspections shall be sent to the Parties whose equipment, stations, etc. were covered by the reports. After these Parties have been given the opportunity to comment, the reports and comments are to be circulated to all Parties to the treaty and to the Committee, considered at the next Antarctic Treaty Consultative Meeting, and made publicly available. Making reports public puts pressure on Parties which do not comply with the treaty. There were several inspections carried out on the basis of this article, and this kind of inspection could be considered as a good example for future inspections of compliance with environmental treaties.

It should be noted that the Special Rapporteur of the UN High Commission for Human Rights has performed several verification missions related to environment protection, dealing with illegal traffic in hazardous wastes, and presented her reports to the Human Rights Commission at its annual meetings. Although these inspections were closely related to the environmental agreement related to this issue, the inspections were carried out within the scope of different agreements; this was emphasised by some countries.

The Basel Convention on the Control on Transboundary Movement of Hazardous Wastes and their Disposal (1989) does not contain any provisions related to inspections. In spite of this, the

Secretariat of the Basel Convention organised, at the request of its Contracting Parties, some inspections by visiting the sites of the illegal disposal of hazardous wastes (in Somalia and in Paraguay). These on-site visits of alleged illegal traffic were based mainly on Article 19 of the Basel Convention which states that any Party which has reason to believe that another Party is acting or has acted in breach of its obligations under the Convention may inform the Secretariat, and shall simultaneously and immediately inform, directly or through the Secretariat, the Party against which the allegations are made. All relevant information should be submitted by the Secretariat to the Parties. Basing its activities mainly on this article and on requests received from the Party concerned, the Basel Secretariat has organised some on-site missions, the results of which were presented to the Parties and which in fact played a positive role in solving the problems. It is worth mentioning that some environmental NGOs, namely Greenpeace International, have been sending, on several occasions of alleged illegal traffic in hazardous wastes, their own missions/inspections, and although without any legal provisions, these missions on many occasions helped solve the problem related to uncontrolled traffic in hazardous wastes.

Inspections and visiting mechanisms are much easier to be introduced in national environmental legislation. All the issue of providing permits for certain activities, which may have adverse effects for the environment, is to ensure that the appropriate environmental requirements are included in the permit. The conditions for giving permits have to be verified and checked by inspectors who can and do use visiting mechanisms. Organisation of inspection is an integral part of the government's responsibility to verify that the regulations they have established are working. The inspection system must be set up in such a way that it can achieve its goals. Verification, correction of violations and feedback to lawmakers are the main aspects of implementation. Inspectors/inspectorates should therefore be given full independence in carrying out their work and should report on their findings to high-level bodies. Reporting, as far as possible, should be public. Unfortunately, these arrangements exist only in a few developed countries.

An audit plays an important role in environmental verification; it comprises periodic and objective evaluation on how well environmental practices are performing. The audit compares results with the permit conditions and may be carried out by special task forces of the authorities or by certified consultants. It is generally recognised that governments must retain the primary role in establishing environmental standards and verifying and enforcing compliance with law and regulations. What is important also is to agree on how far governments should and would be ready to co-operate in establishing standards and how far they would allow each other not only to assist in their implementation but also to proceed with verification and inspection on the implementation of common programmes and even more of the implementation of international legal environmental agreements.

An interesting mechanism for ensuring and assessing environmental compliance, which includes elements of inspection, can be found in the 1993 North American Agreement on Environmental Co-operation (NAAEC) signed between Mexico, Canada and the US, which created the Commission for Environmental Co-operation (CEC). A Council of cabinet level Party representatives is responsible for overseeing the implementation of the NAAEC with the support of the Secretariat. The agreement obligates the Parties to effectively enforce their respective environmental laws with the aim of achieving high levels of environmental protection and compliance. The mandate of the Council includes encouraging the Parties' compliance with this obligation, compliance with regulations and technical inter-Party co-operation. The Council established the CEC Enforcement Co-operation Programme, which is delivered under the guidance of the North American Working Group on Environmental Compliance and Enforcement Co-operation – the so-called Enforcement Working Group. The Group examines the relationship between Environmental Management Systems (EMS), other voluntary compliance initiatives and environmental compliance. In 1997 the Enforcement Group started to explore: (1) – the relationship between the ISO 14000 series and other voluntary EMSs and government programmes to enforce, verify and promote compliance with environmental law; (2)- opportunities to exchange infor-

mation and develop co-operative positions of EMSs on compliance and environmental performance. The preliminary report on these issues was ready by 1998. The Enforcement Working Group also provided recommendations for future co-operation, recognising and respecting each Party's domestic requirements and sovereignty. The Group recommended continuation of exchange of information with the European Union regarding policies and programmes that involve EMSs. The European Union promotes participation in the Eco-Management and Auditing Scheme (EMAS) – a voluntary program based on EMSs developed by the EU Environment Commission. The Enforcement Working Group also exchanged information with the Central American Commission on Environment and Development and with Central American governments on approaches in North America regarding EMSs and compliance. The above – mentioned international programme, given its international aspect and co-operation, has the potential to be developed into a very interesting compliance co-operation programme with a possibility of establishing verification instruments at international levels.

In Europe, the European Union Network for Implementation and Enforcement of Environmental Law (IMPEL) is an informal network of environmental authorities of the Member States of the European Union. The European Commission is also a member of the IMPEL Network. IMPEL deals mainly with EU environmental legislation and promotes exchange of information and experience in its implementation, application and enforcement. It provides a framework for policy makers, environmental inspectors and enforcement officers to encourage the development of enforcement structures and best practices. Environmental inspections are a key activity in the implementation and enforcement of environmental law and essential to secure a high level of environmental protection. IMPEL attaches great importance to environmental inspections and in 1996-97 developed minimum criteria for inspections. The minimum criteria for inspections aim to promote common principles for the inspection of industrial installations, which arise from the obligations on industry to respect the implementation of environmental law. The Working Group which developed the minimum criteria recognised the importance of interconnections between minimum standards for inspection, the organisational framework for inspecting bodies and the qualifications for inspectors. It was recognised that site visits play an important role in compliance checking and that inspectors should have a right of access for inspection and monitoring of the environmental legislation. *Ad hoc* site visits in response to complaints, incidents and non-compliance should occur for the investigation of serious complaints, the investigation of significant accidents and incidents and non-compliances. It was recognised that it is the responsibility of each Member State to demonstrate that the minimum criteria have been implemented. This may be achieved through regular evaluation and reporting of the inspection activities.

Why are visiting mechanisms and inspections that rare, and in fact almost absent, in international agreements in the field of the environment? There are general reasons apart from being considered by some countries as interference with their sovereignty.

First of all, any inspection and/or visiting mechanism, which takes place on the territory of an inspected State, should have to receive prior agreement from that State. If measures are to be taken regarding a country which is alleged to have acted in breach of its obligation under international agreement, they should be seen as assistance rather than as a sanction. The most promising method is that Parties provide regular reports on their implementation of the environmental agreements and that the content of these reports be verified. It should, however, be possible to make an on-site verification/inspection in cases when there are doubts about the facts in the reports.

Establishment of a system of control of implementation takes time. At some point in the future, the Parties will have to come to an agreement controlled by the international community with regard to the implementation of international environmental treaties.

49 Engaging countries; MIT, 1998, p.46.
50 A Commentary to the UN Framework Convention on Climate Change, YYIL, Vol. 18: 451, 1993 p. 548
51 Cf. 1972 UNESCO Convention; 1971 Ramsar Convention.; 1972 UNESCO Convention.
52 Cf. North-West Atlantic Treaty 1978 and North-East, 1980; Canberra Convention of 1980 on Conservation of Antarctic Fauna and Flora
53 Convention on North-West Atlantic of 1949 and its 1978 Protocol.

3 Human rights and humanitarian law treaties pertaining to visits

By Ms Claudine Haenni, Secretary-General, Association for
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3.1 Introduction

This presentation is concerned with visits to places of detention. It will address existing mechanisms in international humanitarian law and human rights law and conclude with the negotiations of the Draft Optional Protocol to the United Nations Convention against Torture. More specifically, it will address the issue of consent to the visits, whether the visiting mechanism can initiate the visits, or if prior consent of the State is necessary before a visit can be carried out.

3.2 International humanitarian law (IHL)

Under IHL, there are not many visiting mechanisms that exist, in the sense of pursuing verification, monitoring and prevention functions. In the rules specifically regulating international armed conflicts, and relating to prisoners of war (POWs) and civilian detainees, there are various possibilities for visitation by fellow officers, POW representatives, and medical and religious personnel, as shown in the briefing paper by Professor Muigai.

3.2.1 International armed conflicts

More specifically, there are two systems provided for in the Geneva Conventions and Additional Protocol I pertaining to international armed conflicts only.

Visits by the ICRC for persons deprived of their liberty

In international humanitarian law, and in the context of international armed conflicts, there is a long tradition of a right of visit for POWs. Officers of a neutral State can visit fellow officers.

The International Committee of the Red Cross (ICRC) can conduct traditional visits to POWs and civilian detainees. This is an activity that the ICRC has pursued and developed since 1915.

The States Parties to the Geneva Conventions have formally undertaken to allow ICRC delegates to visit the aforesaid persons in the event of international armed conflict. Provisions specifically granting the ICRC prerogatives in visits to persons deprived of their liberty in international armed conflicts are Articles 126 and 143 of the 3rd and 4th Geneva Conventions of 1949 respectively. In the case of international armed conflict, the prior consent of the State is not necessary.

Granted, the ICRC is not a visiting mechanism instituted by an international treaty. It is an organisation that conducts visits to persons deprived of their liberty, and the competence of the ICRC has been recognised by drafters and States Parties to the 1949 Geneva Conventions. The proceedings of the ICRC are conducted in strict confidentiality.

The International Humanitarian Fact-Finding Commission

The other visiting mechanism that exists in international humanitarian law is the International Humanitarian Fact-Finding Commission (IHFFC) provided for in Article 90 of Additional Protocol I to the 1949 Geneva Conventions.

Article 90 §2 (c) provides that the Commission shall be competent to:

(i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;

(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.

States ratifying Protocol I are not automatically bound by Article 90 and the IHFFC; under this article, States have to make an additional declaration accepting the competence of the IHFFC. This system can be compared to Article 36(2) of the Statute of the International Court of Justice for the compulsory jurisdiction of the Court in relation to disputes under international law. This corresponds to an *ante hoc* consent because it pertains both to conflicts that are already taking place but most importantly to conflicts that may arise in the future.

The Commission has not yet been called upon by the 55 States that have recognised its competence. This is mainly due to the small number of international armed conflicts that took place since the Commission was created. The principles guiding the creation of the Commission are co-operation, good offices and confidentiality.

Protecting powers

The Geneva Conventions provide that States in conflict can nominate protecting powers. These also address the duties these protecting powers can perform. The protecting powers are neutral States and are appointed to safeguard the interests of the Parties to the conflict in enemy countries. These include the possibility of visiting POWs and civilian detainees, under Article 126 of the third Convention of Geneva and Article 143 of the fourth Convention of Geneva.

In principle, this system corresponds to a self-monitoring mechanism for the application of humanitarian law in international armed conflicts. The system of protecting powers has worked well during the two world wars, explaining the codification of this practice in the Conventions. However, since 1949, the system of protecting powers has not worked, and only on very few occasions has a protecting power been designated. The 1977 Additional Protocol I provided for a mechanism to facilitate the designation of a neutral power as protecting power, but has not helped to revive the institution. It cannot be relied on as a mechanism to monitor compliance in humanitarian law. In the Geneva Conventions and Additional Protocol, it is provided that the ICRC can be called upon to act as a substitute for the protecting powers. However, the ICRC has always refused to take up this role, given the impossible reconciliation of this role with its mandate as a neutral intermediary between the warring parties.

3.2.2 Non-international armed conflicts

The ICRC

There are no provisions in the Geneva Conventions of 1949 or its Additional Protocol II of 1977 which provides explicitly for the right of the ICRC to visits persons deprived of their liberty in non-international armed conflicts.

In non-international armed conflicts, and under Common Article 3 of the Geneva Conventions, the consent of the State is always required for visits by delegates of the ICRC to take place. The ICRC is allowed to make proposals to the State and offer its services. The State is under no obligation to accept the services of the ICRC (for visits to detainees or other humanitarian activities). The same is true for the action of the ICRC pertaining to detention in countries facing situations of political unrest.

The ICRC's action in each specific case is the subject of an agreement, which, for the ICRC, must allow for similar modalities of operation as in Article 126 of the Geneva Convention III and Article 143 of the Geneva Convention IV.

In principle, if not accepted, no agreement is concluded. Moreover, in the framework of this agreement, the ICRC requests that those States to which it has offered its services authorise visits without prior notification or with brief advance notification and inform the ICRC of any new arrest, transfer, hospitalisation, liberation and death of persons visited or to be visited.

The IHFFC

The IHFFC has declared its readiness to find facts also in a non-international armed conflict situation, even if it has been devised to address violations in international armed conflicts only.

Protecting powers

The system of protecting powers is provided for international armed conflicts only. It is quite difficult to see how this system could be adapted to non-international armed conflicts.

3.3 Human rights law

The system in human rights law is generally one of monitoring and can be described as follows. Treaties are negotiated in principle for standard-setting purposes, and the monitoring of a treaty is entrusted to a Committee. This Committee is in charge of examining reports by States Parties on a periodical basis and submitting their comments to the States concerned on the basis of the information contained in the reports. The goal is to enhance the proper implementation and of respect for the treaty. The monitoring body may receive (depending on the human rights treaty concerned) information on allegations of violations from either individuals or other States Parties. The procedure in this case is usually to request additional information from the State concerned.

3.3.1 UN system and treaty bodies

Visits under Article 20 of the UN Convention against Torture (UNCAT)

Under Article 20 of the UN Convention against Torture, the Committee against Torture (CAT) is competent to conduct *in situ* visits in cases of massive allegations of torture. Obviously this system remains a response to violations of the UNCAT and therefore comes into play after violations have already occurred. The proceedings of the Committee remain confidential, in accordance with Article 20 (5), and it is specified that what is sought in the process is the co-operation of the State concerned.

In the case of the UNCAT, a State Party can opt out of Article 20 visits in accordance with Article 28 § 1: "Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognise the competence of the Committee provided for in article 20."

Prior consent is necessary before a visit/mission, even though the State has not opted out upon ratification or accession.

3.3.2 Regional system and treaty bodies

The European Convention for the Prevention of Torture

The European Convention on the Prevention of Torture is in many respects a very interesting instrument. The Convention itself does not set standards; it does not define torture as such. The Convention establishes the European Committee for the Prevention of Torture (CPT) and the right of this Committee to conduct on-site inspections at any time and at any place of detention. When ratifying the Convention, a State Party accepts *ante hoc* the visits on its territory. The Convention has been ratified by 40 members of the Council of Europe, and the CPT can conduct visits to places such as police stations, prisons, centres for detention of foreigners, psychiatric hospitals and transit zones in international airports.

In this respect, the visits are triggered at the initiative of the CPT and, some procedural aspects set aside, the State concerned cannot refuse the visit of the CPT: periodic visits, visits organised by the CPT as appear to be required in the circumstances (Article 2). The CPT can also be spontaneously invited by a State Party to make a visit.

As these visits can take place at any place and at any time, the CPT does play a preventive role in relation to occurrences of torture and other forms of inhuman and ill-treatment. To achieve complementarity with other visiting mechanisms, Article 17 of the Convention provides that the CPT will not visit sites which are effectively and regularly visited by the ICRC in virtue of the Geneva Conventions and their Additional Protocols.

Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) was created before the adoption of the American Convention on Human Rights (1969), on the basis of the American Declaration of the Rights and Duties of Man (1948), by the Organisation of American States (OAS).

In accordance with Article 18(e) of the American Convention, the IACHR can "conduct on-site observations in a state, with the consent or at the invitation of the government in question." Articles 55-59 provide in greater detail the procedures to be followed during on-site visits or observations.

In this respect, visits are conducted only after the State concerned has provided its consent. The IACHR may conduct visits, as general country visits or pursuant to allegations received.

3.3.3 UN Commission on Human Rights and Special Rapporteurs

Visits to States Parties have been formalised within the United Nations system, through the establishment of Special Rapporteurs, either on a country or a thematic basis. The mandate of the Rapporteur does establish that, in principle, he/she is allowed to conduct on-site visits for the purposes of his/her report. While these mechanisms are accepted and developed by and within the United Nations Commission on Human Rights, they have no legal binding force. They are part of soft law. The country concerned must invite the Rapporteur to conduct visits.

For example, the United Nations Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has a general fact-finding role. The reports are published. The visit to places of detention is the result of an invitation by the government, or the Special Rapporteur may seek an invitation. Usually, negotiations lead to an agreement, with specific conditions attached. A visit is decided pursuant to allegations of violations received.

The Special Rapporteur system has also been developed on a regional basis: for example, the Special Rapporteur on Prisons and Conditions of Detention in Africa, by the African Commission of Human and Peoples' Rights.

The consent of the State for a visit to take place is always required.

3.4 Negotiations within the UN Working Group on the Draft Optional Protocol (DOP) to the UN Convention against Torture

The APT has been following the work of the UN Working Group on the Draft Optional Protocol since it first convened in 1992. In essence, the goal of the DOP is to adopt a visiting mechanism similar to the ECPT at the universal level.

One of the stumbling blocks in negotiations on the DOP has been the issue of consent to the visits. In the terms used in this workshop, the question is between *ante hoc* consent (when ratifying the treaty), or *ad hoc* consent (every time the visiting mechanism wishes to conduct an on-site visit). Within the language of the DOP, these are respectively referred to as visits without prior consent and visits with prior consent.

The position of the APT has been that visits to any place of detention without prior consent is required for the effectiveness of the instrument instituting a visiting mechanism, as well as by the principles of universality and equality among the Parties. The purpose of the DOP is to seek improvements in the quality of treatment of persons deprived of their liberty through the establishment of a Sub-Committee to the Committee against Torture (UNCAT). This Sub-Committee would be the visiting organ to be instituted by the DOP. Its main role would be to give advice and concrete recommendations to the State Party concerned, via a continuing dialogue on the implementation of such recommendations.

Ante hoc consent is therefore necessary for the Sub-Committee to adopt a coherent working programme and to allocate resources away from the negotiation of consent *per se*. It would set all the States Parties on an equal footing (States confronted with serious problems of torture and others alike).

These visits would be notified to the authorities concerned, as they would be involved in the process. All visits under existing mechanisms are notified to the authorities, whether these work with or without prior consent.

The effectiveness of the DOP would be compromised if a State Party could, at any time, threaten to withhold its consent from the Sub-Committee, and therefore endanger the whole process of dialogue.

WORKSHOP ON CONFIDENTIALITY/USE OF DATA OBTAINED DURING A VISIT

1 Getting access and using information: The case of verification organisations against nuclear and chemical weapons

By Mr Bruno Pellaud, former Deputy Director General of the International Atomic Energy Agency (IAEA), Icogne, Switzerland

The Treaty of Non-Proliferation (NPT) reflects the commitment of close to 180 countries around the world not to acquire nuclear weapons or nuclear explosive devices of any kind. The International Atomic Energy Authority (IAEA) has been entrusted with the responsibility to verify that all these commitments are being respected. The IAEA Department of Safeguards – with its staff of 600 – inspects more than 800 facilities world-wide and collects a large volume of information through its inspections and through the collection of media information about the relevant nuclear activities of the countries inspected.

The Member States of the IAEA have always stressed the importance of confidentiality in the dealings of the IAEA. This principle was enshrined in the 1957 Statute of the IAEA, was confirmed in the Safeguards Agreements that bind the IAEA and a particular State, and was emphasised in numerous resolutions of the IAEA's Board of Governors. The concerns have dealt primarily with commercial interests that could be jeopardised by irresponsible staff members serving interests other than the Agency's.

Since the discovery of the Iraqi clandestine nuclear programme in 1991, the IAEA safeguards system has been drastically strengthened by providing the Inspectorate with new inspection rights, such as the authorisation to collect (possibly) incriminating dust samples in facilities and in the environment, and more important, by the provision of access without much notice to a broad range of facilities. Such strengthening challenges the tenet of national sovereignty; Member States have therefore insisted on a reinforcement of the confidentiality measures within the Secretariat of the IAEA.

In former times, the information about nuclear activities was provided only by the State concerned or collected by the inspectors themselves. With the objective of verifying the State's declarations, any anomaly, any difference between the declared information and the observations on site would always be pursued until a satisfactory explanation has been given or a solution found to satisfy the IAEA. While the resolution of some anomaly could sometimes require months or even years, there are only few instances – one being the Democratic People's Republic of Korea – where the IAEA has been challenged in its very mission and denied the right to obtain a satisfactory response when confronted with questionable data obtained during visits and inspections.

Under the new arrangements agreed in 1997 which give the IAEA much more intrusive rights, the IAEA has begun to use a much broader range of data – such as the analysis of dust samples or the screening of media news. Any discrepancy has and will lead to more or less lengthy discussions – in particular when the incriminating information comes from media reports.

As to the central issue of this parallel workshop, it can be said that the IAEA has indeed been able to make use of the information collected during its inspections and visits to assert the effectiveness of its verification activities. In practical terms, the available information has been used to ask questions, to request clarifications, to require changes in facilities when deemed necessary by the Inspectorate. In other words, the information has been used directly and bilaterally with – or against – the State concerned. As long as a State plays by the rules, the IAEA does not advertise the results of its verification. Its annual Safeguards Implementation Report is distributed only to the Board mem-

bers; anomalies, technical or administrative difficulties encountered in the verification process are reported qualitatively and quantitatively in writing, but without revealing the corresponding names of facilities and countries. In spite of repeated requests by some States for full identification, the IAEA's Director General prefers to maintain confidentiality of the verification process in order to allow a more constructive relationship with the States, since anomalies and inconsistencies are most of the time of limited importance. When a State clearly prevents the Agency from carrying out its mission – such as North Korea in 1993 – then the Director General can go public and even appeal directly to the Security Council.

The IAEA experience warrants some additional comments on what could be called " looking sideways ", a matter of relevance for this workshop. This refers to the observations of a verification or monitoring organisation going beyond its formal mandate, in an attempt to contribute to the resolution of other worthy causes. The use of nuclear facilities and nuclear materials is dominated by three concerns that need to be addressed to protect the community at large:

- Safety, or the need to ensure that a facility will always function properly and not endanger the health of people and their environment. The facility is the focus. The facility operator and the national safety authorities are the responsible entities to ensure the required safety level.
- Security, or the need to protect nuclear materials against theft or external criminal attacks, with here again the facility operator and the national safety authorities being responsible. The location of nuclear materials is here the focus.
- Safeguards, or the need to ensure that the State where the facility is located does not divert the nuclear materials for non-peaceful purposes. The IAEA is here responsible. The misuse of nuclear materials in terms of non-proliferation is here the focus.

The IAEA has been given an international, politically-binding verification mandate only for safeguards. It is only for safeguards purposes that the IAEA can send inspectors to facilities in countries around the world without being impeded in carrying out its mission. In the fields of safety and security, the IAEA has no mandate, no right to inspect at will and to require changes, since the governments are here directly responsible. However, in the frame of its broader activities, the IAEA is otherwise active in these fields; it defines standards and offers advice to the States which request assistance. Several IAEA standards may well have become part of some national legislation, but the IAEA has no say in their enforcement.

Do safeguards inspectors look sideways – at the security or safety status of a facility – when they are on inspection travel? Strictly speaking, the answer is No. Even though the context is different, the IAEA takes the same general attitude as the International Committee of the Red Cross. The main mission of the organisation should not in any way be weakened by the pursuit of ancillary objectives, even if the latter have a high ethical value of their own.

The IAEA inspectors have no legal authority to look sideways; they have no right to make use of data obtained during visits for non-safeguards purposes. They have no right to ask question or to challenge facility operators in these other fields of safety and security. And in fact, the IAEA has always exercised a strict discipline in maintaining this separation, conscious of the importance of its main non-proliferation mission and of the priority of not jeopardising its effectiveness.

This being said, there are still informal mechanisms to draw the attention of national authorities to weaknesses in the areas of safety and security. Without being linked in any way to non-proliferation, these informal mechanisms would indeed remain very informal in the case of safety concerns, a conversation over lunch or on the telephone, to draw the attention of a government official to the

IAEA's free services in the safety assessment of nuclear facilities. The link between security and safeguards is stronger – after all, stolen nuclear materials may end up in clandestine, non-peaceful activities of another State. In that case, the existence of a particular security weakness in a facility would be informally communicated to the government. A general letter may even be sent to the government to draw attention to the availability of IAEA services (peer-reviews, training courses, assistance in installing protective and alarm equipment).

The Organisation for the Prohibition of Chemical Weapons (OPCW) in The Hague is the enforcing organisation of the Chemical Weapons Convention; it has a mandate similar to that of the IAEA on declared and undeclared facilities. Confidentiality is also a major component of the OPCW's work. For the same reason – namely the protection of commercially sensitive information of the chemical industry – the organisation must respect strict rules of confidentiality. There is even a permanent "Confidentiality Commission" that oversees all related matters. Confidentiality applies to all routine inspections, but is particularly important in the case of challenge inspections, a unique feature of the OPCW. A State can request a challenge inspection anywhere in another State to ascertain compliance with the Convention. The inspection can be conducted at any facility in the territory of the target State. Within 12 hours of the request, the Executive Council of OPCW may abort the inspection with a majority. The Director General is obliged to assemble and dispatch an inspection team as soon as possible. He must notify the Inspected State Party not later than 12 hours before arrival of the inspection team. As for routine inspections, the inspection team is explicitly prevented from collecting information not related to the Convention. Since the entry into force of the Convention in April 1997, the OPCW has been able to make use of the information collected and has been able – within strict confidentiality constraints – to report convincingly on its activities. No request for challenge information has yet been submitted to the Director General.

2 Information gathered during visits by human rights monitoring bodies in respect of persons deprived of their liberty

By Jan Malinowski, Secretariat of the European Committee for the Prevention of Torture (CPT), Strasbourg, France

"Much of the international protection of human rights is based on allegations of breach and results in condemnation. It is confrontational in nature and thus renders the task of prevention even more difficult.

The central argument in favour of developing visit-based mechanisms in the human rights field is that it might be a way of breaking down this model." Dr Malcolm Evans – Briefing paper

Certain international human rights monitoring bodies concerned with persons deprived of their liberty have the possibility to be present in the field, by visiting places of detention, carrying out fact-finding missions and/or providing assistance to detained persons. For a few of the existing mechanisms, such on-site presence is at the very heart of their mandate and visits constitute a fundamental aspect of their work.

However, the working methods of human rights monitoring bodies differ, according to their respective objectives or purposes, in particular as regards the manner in which they use the information gathered during visits. The nature and scope of the information gathered may also vary from case to case depending on its foreseeable use[54].

The question of the confidentiality of the information gathered during visits can be examined at different levels.

The gathering process itself is likely to be confidential. At least part of the information gathered will, at some later stage, be disclosed to the authorities of the State concerned. There may be subsequent exchanges with (or feedback provided to) the persons who furnished or were at the origin of the information. Different human rights mechanisms on occasion share information among themselves. Finally, information may eventually be disclosed to third parties or made accessible to the general public.

The extent to which information is disclosed and the nature of the information disclosed may also differ at various points in time, depending on the rules applied by each monitoring mechanism.

A feature common to most international human rights monitoring bodies which carry out fieldwork relates to the information gathering process, especially when persons deprived of their liberty are concerned. Interviews and, where relevant, the examination of detained persons tend to take place in private.

Most instruments establishing monitoring bodies, which carry out visits to places of detention, provide that such mechanisms[55] will conduct interviews in private. As regards visits which are not directly authorised by an international convention, in the course of negotiating such visits with the national authorities, international monitoring bodies accord considerable importance to that requirement.[56] The authorities' agreement to permit private interviews with persons who are deprived of their liberty is often regarded as a condition *sine qua non* for a visit to take place. As a result, at least at an early stage, the content of an interview with or examination of persons deprived of their liberty will be confidential.

Of course, even at this stage, quasi-judicial or judicial international bodies are likely to apply different rules when taking evidence on site.[57] This will be particularly the case in the context of gathering evidence when a contradictory procedure is called for. In such cases, witnesses could well be interviewed in the presence of State agents or representatives, and be cross-examined by the intervening parties.

The information gathered may give rise, in certain cases, to proceedings with a view to reaching a conclusion as to whether a human rights violation has taken place.[58]

Other monitoring bodies also pursue individual cases in order to enhance the protection of a specific person or group of persons or to ensure that their rights are respected.[59] On occasion, action is aimed at ensuring that victims obtain redress (i.e. Special Rapporteur on Torture). In some cases the authorities are approached in order to ameliorate the situation and treatment of the person(s) concerned or asked to provide information on the case.[60]

Often, the monitoring body may seek guarantees in respect of detained persons (commitment not to retaliate or to ensure the persons' safety) or, as regards urgent cases/on-going situations, make urgent appeals[61] or immediate observations.[62]

In all such cases, it will be necessary to disclose at least part of the information gathered to the relevant State authorities, including – on occasion – the identity of the detained person concerned. This disclosure will allow the authorities to make their views known, provide further particulars and/or take the required action. However, details of the allegations recorded are not always provided (ICRC).[63]

As regards preventive mechanisms in the strict sense[64], the information gathered, including any "hard evidence" collected, serves as an indicator of risk and will lead to the making of recommendations of a general nature with a view to strengthening the protection of all persons deprived of their liberty. Similarly, failings in the legal safeguards system, which do not themselves amount to ill-treatment, may also justify making recommendations to the relevant authorities in order to remove the risk or close any interstices which may provide State officials minded to ill-treat detained persons with the opportunity to do so with impunity.

Certain of the information gathered will be set out in a visit report. However, a preventive mechanism (such as the CPT) will not be required to provide information on the identity of a person interviewed, and in the vast majority of cases it does not give that information.

Nevertheless, the monitoring body may decide to request the authorities to provide information on specific cases; this will require disclosing certain particulars to them (the name of a person, the allegations made). Further, there will be many details which are readily available to the authorities if they choose to seek such information. By way of example, the authorities can easily identify at least certain of the persons interviewed during a visit.

In certain cases, the content of the exchanges between the State authorities and the monitoring body will be reported back to the person(s) who initially provided information or made allegations.[65] This type of feedback is much less likely to occur as regards strictly preventive mechanisms (the CPT).

It is to be expected that information is shared – whether or not on a confidential basis – between different human rights monitoring bodies. In certain cases, the bodies in question are required to furnish others with certain particulars.[66] In others, information sharing may take place in a some-

what spontaneous (and/or off-the-record) manner in order to enhance the effectiveness of a mission, to avoid repetitions and even to unify criteria or ensure that a single message is delivered to the State authorities.

An entirely different matter concerns confidentiality in respect of third parties of the findings of an international human rights monitoring body and the content of the on-going dialogue between such a body and the authorities of a particular State (correspondence, reports and responses).

Two bodies – namely the CPT and, in the context of international conflict situations, the ICRC – have been given the right (i.e. through ratification of the relevant conventions) to carry out visits or to scrutinise on the spot the manner in which persons deprived of liberty are treated. Further, as regards certain of its activities, the ICRC is frequently authorised (by agreement) to visit persons deprived of their liberty. Both mechanisms are bound by strict confidentiality rules.

Dr Evans suggests that "prevention requires intrusion into the laws and legal system of the State itself. Moreover, since many violations are the result of direct acts of State agents – e.g. police, armed forces, etc. – it requires penetration into the very heart of the State's system of power and control."

The CPT is a notable example of the States' inclination to accept intrusion by a body, subject to the rule of confidentiality. It should be recalled that, pursuant to Article 11 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: "1. The information gathered by the Committee in relation to a visit, its report and its consultations with the Party concerned shall be confidential. 2. The Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party. 3. However, no personal data shall be published without the express consent of the person concerned."

Following the opening of the European Convention for the Prevention of Torture to signature in November 1987, the seven States required for the Convention to enter into force ratified it rapidly. Indeed, within a mere 14 months of its opening to signature, the Convention entered into force in respect of 11 Council of Europe Member States. The ratification of the Convention continued to be "popular" amongst European States, and the number of Parties to it grew alongside the number of Council of Europe Member States. At a later stage, upon their accession to the Council of Europe, certain Central and Eastern European States were required to commit themselves to ratifying the Convention. At present, of 41 Council of Europe Member States, 40 are party to the European Convention for the Prevention of Torture.

States' favourable attitude vis-à-vis the CPT has not been limited to ratifying the Convention. State agents have, only exceptionally, displayed reticence as regards providing a CPT visiting delegation with the facilities required for the performance of its tasks[67] (cf. CPT visit reports). Moreover, the authorities at central level have rarely been at the origin of such shortcomings, except indirectly due to having failed to inform the relevant local authorities or officials about the Committee's mandate and powers.

The information disclosed by the ICRC concerning its activities as regards persons deprived of their liberty is very limited.

As for the CPT, States retain control of the publication of visit reports and government responses. Nonetheless, publication by decision of the State authorities has become the norm. As indicated in the CPT's 9th general report (published on 30 August 1999), "58 of the 83 visit reports drawn up by the CPT have been published. Many of the remaining 25 visit reports have only recently been forwarded to Governments and will in all likelihood be published in due course."

It should be borne in mind that, whilst – in general – it is for the State concerned to decide upon publication, the authorities do not have a choice as to the content of the information to be disclosed. The contrary could result in misrepresenting the content of a report in one way or another (e.g. through partial disclosure). In terms of Rule 42 of the CPT's rules of procedure: "1. The report transmitted to a Party following a visit is and, as a rule, shall remain confidential. However, the Committee shall publish its report, together with any comments of the Party concerned, whenever requested to do so by that Party. 2. If the Party itself makes the report public, but does not do so in its entirety, the Committee may decide to publish the whole report. 3. Similarly, the Committee may decide to publish the whole report if the Party concerned makes a public statement summarising the report or commenting upon its contents."

Conclusion

It might be concluded that States tend to accept on-the-spot scrutiny by international human rights monitoring mechanisms concerned with persons deprived of their liberty which are subject to the rule of confidentiality. Indeed, in such cases, States would appear to be prepared to give considerable powers to the monitoring mechanism in question.

Moreover, the existence of a rule of confidentiality does not seem to prejudice the likelihood of a State subsequently authorising publication of a visit report (and government responses), i.e. once the relevant authorities have become acquainted with the content of the report and have been given an opportunity to express their views on it. It could be argued that this will be particularly the case where a non-confrontational preventive mechanism is concerned.

However, two questions remain to be answered: Does the above mean that, in the absence of a confidentiality rule, it will be less likely that a State will permit "intrusion" by an international human rights monitoring body? If so, could this explain why the negotiation of *ad hoc* arrangements for visits by bodies which are not bound by strict confidentiality rules[68] tends to be, to say the least, somewhat protracted?

54 e.g. the ICRC will «register» all relevant persons interviewed during a visit and follow closely any developments in their situation, whereas the CPT is more interested in the situation of detained persons in general than in any one individual case.
55 e.g. ICRC, CPT, IACHR
56 e.g. ICRC, IACHR, UN Commission on Human Rights Special Rapporteurs
57 e.g. ECHR, ICC
58 e.g. CAT, IACHR
59 e.g. ICRC, Special Rapporteur on Torture
60 e.g. on investigations carried out into allegations
61 e.g, Special Rapporteur on Torture
62 e.g. the CPT
63 e.g. Special Rapporteur on Torture
64 i.e. the CPT
65 e.g. IACHR, SR on Torture and, in the context of repeated visits to a person, ICRC)
66 e.g. SR on Torture vis-à-vis CAT
67 e.g. relevant information, unlimited access to places of detention and the possibility to move inside such places without restriction, the possibility to interview detained persons in private.
68 (ACHR, CAT, SRs)

3 Access to information and international environmental law: The example of the 1998 Aarhus Convention

By Dr Paolo Galizzi, Lecturer in Law, University of Nottingham, School of Law, Nottingham, United Kingdom

The use of information gathered during an inspection is one of the most important and delicate questions that need to be addressed when designing an inspection mechanism. The use of data obtained during a visit may in fact have to be limited to protect the confidentiality of certain information.

In the limited time available, I would like to draw your attention to the solutions to the potential conflict between confidentiality/use of data to be found in the field of international environmental law. The trend in international environmental law is towards increasing public participation in the decision-making process, and therefore the emphasis seems to be more on allowing wide access and use of information rather than on protecting confidentiality. Confidentiality can be used to hide and keep secret information which public authorities, private companies or individuals do not want to be disclosed. There is obviously a legitimate room for confidentiality (and I do not have the time to enter into the debate on the meaning of this term), but potential abuses should be carefully scrutinised.

There are provisions in various environmental treaties that deal with the issue of the use of data obtained during a visit. However, I do not believe that it would be useful for the purpose of this workshop to go through a list of articles on confidentiality to be found in environmental treaties, with which most of you may not be familiar. Suffice it to say that, generally speaking, information gathered during inspections/visits is normally available to the public, subject to the agreement of the State Parties concerned or to a decision of the competent treaty organs.

I would like instead to draw your attention to the provisions of a recent environmental treaty, the "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters" created at Aarhus, Denmark, on 25 June 1998.[69] Thirty-nine countries and the European Union have signed it, and it is estimated that the Convention will enter into force by the year 2000.

The Aarhus Convention, as it is usually known, is an extremely interesting illustration of how the conflict between confidentiality/use of data can be addressed and solved.

The preamble of the Convention underlines the importance of the right of access to information so as to guarantee the right that every person has to live in an environment adequate to his or her health and well-being. To assert the right to live in an adequate environment, citizens must have access to information. In other words, the right of access to information is considered a fundamental right that enables people to assert their human rights (including the right to live in a clean environment).

Article 1 sets out the objective of the Convention in unequivocal terms:

"In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the **rights of access to information**, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention".

The obligation to provide, *inter alia*, the right of access to information in environmental matters is addressed to the public authorities of the States Parties. The definition of "public authority" given by the Convention is extremely broad. Article 2(2) of the Convention in fact provides as follows:

"Public authority means:

(a) Government at national, regional and other level;

(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

(d) The institutions of any regional economic integration organisation referred to in article 17 which is a Party to this convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity."

It is interesting to observe that the concept of "public authority" includes natural or legal persons performing public functions: their inclusion is fundamental due to the increasing use of such persons to carry out "public" functions.

The definition of the environmental information to be disclosed is also very broad. Article 2(3) specifies that:

"Environmental information means any information in written, visual, aural, electronic or any other material form on:

(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above".

Article 4 of the Convention, entitled "Access to environmental information", specifies the obligation imposed on States Parties to guarantee access to environmental information to the public[70] and lays down detailed provisions on the conditions for the exercise of the right of access to information:

"1. Each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested and subject to subparagraph (b) below, copies of the actual documentation containing or comprising such information:

(a) Without an interest having to be stated;

(b) In the form requested unless:

(i) It is reasonable for the public authority to make it available in another form, in which case reasons shall be given for making it available in that form; or

(ii) The information is already publicly available in another form.

The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it."

Article 4, paragraphs (3) and (4), lay down the grounds for refusal of requests for access to information. Particular attention should be paid to the grounds for refusal of requests of information when issues of confidentiality arise (Article 4(4)(a), (d), (f)). It is important to stress that the Convention specifies that the "aforementioned grounds for refusal should be interpreted in a restrictive way":

Article 4(3) provides namely that:

"A request for environmental information may be refused if:

(a) The public authority to which the request is addressed does not hold the environmental information requested;
(b) The request is manifestly unreasonable or formulated in too general a manner; or
(c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure."

Furthermore, Article 4(4) provides that:

"A request for environmental information may be refused if the disclosure would adversely affect:

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
(b) International relations, national defence or public security;
(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
(e) Intellectual property rights;
(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or
(h) The environment to which the information relates, such as the breeding sites of rare species.

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment."

Article 4 requires public authorities to justify their refusal of the right of access to information in writing (if the request was in writing or the applicant so requests). Public authorities must also state the reasons for the refusal and inform the applicant of the right to have the decision reviewed.[71]

The possibility of a judicial review of the refusal of access to the requested information is of fundamental importance. The decision on the confidentiality of a specific information, for example, is subject to the scrutiny of a third and impartial arbiter. Article 9 of the Convention requires States Parties to "ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law".[72]

This brief analysis of the Aarhus Convention allows me to make a few general remarks on the issue of confidentiality/use of data.

First of all, "real" confidentiality issues can and should be taken into consideration to limit the disclosure of specific information, but one should be careful about the potential abuse of "confidentiality" to restrict the right of access to information. Secondly, it is possible to achieve a balance between confidentiality and use of data, as clearly demonstrated by the Aarhus Convention. Thirdly, and most importantly, the key problem to be addressed, in my opinion, is the question of "who decides what is confidential". Final decisions on the release of information should not be left to the authorities or entities concerned. The final say on what is and what is not confidential should be given to an independent adjudicator, capable of guaranteeing the protection of legitimate confidential information but also of preventing abuses which unjustifiably restrict the right of access to information.

Finally, in my opinion access to information is fundamental to create an atmosphere of trust and develop co-operation between public authorities and citizens or between States. Denying access to information can raise suspicions and cause distrust and doubts about the conduct of a public authority/State. Refusals should be limited to exceptional circumstances and subject to careful scrutiny to improve transparency and public confidence.

69 The text of the Convention can be found on the website of the United Nations Economic Commission for Europe "www.unece.org/env/europe/ppconven.htm"

70 The public, according to Art. 2(4) of the Convention, "means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups". Paragraph 5 specifies that the "public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

71 Article 4 provides other detailed rules on the access to environmental information (paragraphs 5 to 8):
"5. Where a public authority does not hold the environmental information requested, this public authority shall, as promptly as possible, inform the applicant of the public authority to which it believes it is possible to apply for the information requested or transfer the request to that authority and inform the applicant accordingly.
6. Each Party shall ensure that, if information exempted from disclosure under paragraphs 3 (c) and 4 above can be separated out without prejudice to the confidentiality of the information exempted, public authorities make available the remainder of the environmental information that has been requested.
7. A refusal of a request shall be in writing if the request was in writing or the applicant so requests. A refusal shall state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9. The refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.
8. Each Party may allow its public authorities to make a charge for supplying information, but such charge shall not exceed a reasonable amount. Public authorities intending to make such a charge for supplying information shall make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge."

72 Article 9, entitled "Access to Justice", provides that:
"1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.
2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention. What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.
5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice."

4 Visits to places of detention: Analogies with the medical field*

By Mr Philippe de Sinner, Director, Swiss Training Centre for Prison Officers, Fribourg, Switzerland

When one addresses the issue of visiting mechanisms to places of detention, one inevitably refers to two institutions with experience in this field: the International Committee of the Red Cross (ICRC) and the European Committee for the Prevention of Torture (CPT).

The similarities in the methods used by these two institutions to conduct visits are striking, as well as the place played by confidentiality in their respective proceedings.

Must we therefore conclude that this model is the only possible formula? Are there no other modalities possible? Why maintain the confidential character of these proceedings when it is relativised with apparent success by the CPT, which publishes its reports with the agreement of the detaining authorities? Are there different degrees of confidentiality? What is the purpose of confidentiality? Whom and what interests does confidentiality aim to safeguard?

Clearly for these two institutions, the CPT and the ICRC, confidentiality remains, to this day, an essential aspect of their proceedings.

For the CPT, this confidentiality is the object of a legal provision. The ICRC presents confidentiality as a counterpart for the facilities that the detaining authority provides it with to conduct its visits. It gladly adds that confidentiality is a working method, rather than a sign of shyness on its part, or a will to dissimulate atrocities committed. Confidentiality facilitates the access to persons and places that States are most likely to hide: political detainees or interrogation centres. The ICRC also considers that this "intervention " on its part is perfectly acceptable to the detaining authority and that it can therefore work in secret and sensitive areas, in complete independence, and without the pressure from public opinion, media, and other political organisations.

In this regard and also more generally, one should never lose sight of the following: from family secrets to imperial State secrets, from doctor-patient confidentiality to that of the confessional, elements of personal knowledge and fields of competence coexist and interact in everyday life. These are sometimes compatible, sometimes not, depending on the actors, the situations, and the rule of law.

Concerning visits of places of detention, the appropriation of information is what justifies the confidentiality, especially if the publication of this information is likely to provoke a reaction from the detaining authority. The difficulty of the process will be, for the visiting agents of the CPT or ICRC, to identify the proper person with whom they can share this secret information, to whom these findings can be reported, and under what conditions.

From this difficult weighing up between absolute confidentiality and disclosure, the CPT or the ICRC will develop a visiting method susceptible of modifying the actions of the detaining authority: improving detention conditions, eliminating torture, putting an end to involuntary disappearances.

Depending on the confidential nature of this method, one can expect to obtain a more or less positive response. One must never lose sight of the only goal of this approach: to radically modify certain actions and the devastating consequences thereof, namely disappearances, torture, or other forms of cruel, inhuman or degrading treatment.

* Original text in French.

This mechanism, as opposed to a judicial or condemnatory procedure, is qualified as preventive. However preventive it may be, in too many cases it comes too late. The development of visiting mechanisms similar to that of the CPT or ICRC may only reduce or eliminate future violations. Ironically, both institutions require actual violations to document their "approach" and "visiting methods" to combat torture or ill-treatment. It is a rather paradoxical form of prevention, as it intervenes *a posteriori*.

Some observers would point out that this visiting approach is mainly therapeutic rather than preventive.

Associated with therapy, one can use such terms as "patient", "diagnosis", "prescription", "tests", "analysis", "relations with the patient", "monitoring", "frequency of consultations"... Many references from the medical field can be used, not omitting the Big Secret, the best known and codified of all: doctor-patient confidentiality.

It is therefore not out of context, for the purpose of our discussions, to compare this approach with that of the medical field.

Visiting mechanisms for detainees = therapeutical proceeding

For doctors, the tripartite relationship, involring the informant, the confidant, and third parties imposes on the medical profession either confidentiality, or in certain cases, the obligation to speak. Under this analogy with the medical field, it is without any doubt the detaining authority which is ill (as it tortures, provokes disappearances, and inflicts ill-treatment on persons under its authority).

Through visits, it is the torturer, not the tortured, that one attempts to heal, the actor whose actions, behaviour, and mentality must be defeated, treated, and healed.

In order to achieve this, the patient must be willing to submit to treatment. A detaining authority must be prepared, not only to submit itself to a complete check-up (with confidentiality in the gathering of information and diagnosis), but also to accept whatever medication is prescribed. As long as the active participation of the detaining authority is ensured during the treatment, positive results may ensue which justify the confidentiality of the dialogue, monitoring, visiting procedures, and reports.

In such serious cases, rarely will agents of the CPT or the ICRC have to conduct their investigations only in establishments depending directly on ministries of justice; visits will also be held in more obscure establishments.

Confidentiality is a token of recognition by the detaining power of the know-how of the beneficiaries of the confidences. The acquisition of this information will serve to treat the "patient", namely the deficiencies of the repressive State apparatus, or some deficient echelons of the organisation of the detaining authority.

This method must lead the "patient" to change. Making the results of the investigations public is to force the "patient" to justify or explain its actions, rather than adopt the measures required and prescribed by the investigators as a result of their findings.

Exceptions are rare, and the agreement of the detaining power to publication of a report involves both a political analysis and a manifestation of its good faith. The publication of the reports

per se does not necessarily enhance the effectiveness of the visiting mechanism: it will have proven effective when the detaining power has expressed the will to follow the recommendations made, and takes active measures to modify its behaviour.

The analogy with the medical field is almost perfect: this approach is not solely preventive, and never condemnatory.

The analogy could be pursued even further. When the illness is serious, the frequency of visits is increased, the dialogue with the patient is intensified, and the investigations and analyses are carried out in detail.

If the goal of the visits is only to establish whether the general conditions of detention are met in accordance with general principles, or whether the facilities, structures and organisation comply with expectations, then confidentiality will be less important. These are objective elements, and their evaluation does not depend on confidences or secrets. This information can easily be compared and systematically published, and we might even envisage an international rating.

If visiting places of detention entails confronting torture, confidentiality must be preserved. In these circumstances, confidentiality takes on an ethical dimension, as the confidant must protect the informant. One or more detainees run a supplementary risk when they make revelations: i.e. that of reprisals.

The confidentiality between the confidant and the informant must be maintained. A rupture of this relation would be intolerable, as the detainee, beyond the visits themselves, remains at the mercy of the detaining authority. Allegations made by a detainee or group of detainees, who remain easily identifiable by the detaining power, require extreme caution. Following the example of the doctor-patient relationship, the confidentiality of the visits can only be lifted if the formal authorisation of the detainee concerned is given, and with the quasi-assurance for the visiting agent that he/she can, at any time, revisit the detainee and inquire about his/her well-being. This confidentiality relating to the source of the information must be upheld; the information, even if it can be shared with the detaining authorities under certain conditions, must under no circumstances be made public. The interested individual, of course, is free to do so at some later day.

The parallel drawn with the medical field helps to make one aware of the different aspects of the role of confidentiality during visits to places of detention: the relations with and modes of action toward the detaining authority, the process of information gathering, and the more ethical concern to protect the informant - to mention but three levels.

Given these elements, a visit to places of detention can never be compared to a more classical "audit" destined for publication. Following the example of the medical field, confidentiality has its *raison(s) d'être*.

5 The International Committee of the Red Cross and the issue of confidentiality

By Mr Raphaël Gailland, Head of Latin America Desk, Central Tracing Agency and Protection Division, International Committee of the Red Cross (ICRC), Geneva, Switzerland

Within the ICRC's scope of action, the concept of protection encompasses all activities consistent with the letter and spirit of international humanitarian law (IHL). These activities aim at shielding human beings against the dangers, abuses and sufferings stemming from a situation of armed conflict and violence, by:

- preventing their occurrence;
- alleviating their effects, by bringing relief and assistance to their victims;
- voicing the prevailing humanitarian concerns.

5.1 A manifold protection strategy based on the persuasive approach

ICRC activities occupy a specific place dictated by the specificity of needs prevailing in a situation of armed conflict and violence: in a context of potential collapse of normal values and institutional safeguards, the use of force by the parties/authorities concerned adds significantly to the gravity and urgency of protection needs. In any such situation, persons and populations of concern are particularly exposed to arbitrary and abusive behaviour.

It is ICRC's mandate and approach to address their most basic and urgent protection needs through a collaboration-oriented, bilateral type of dialogue with the responsible parties/authorities.

By giving the authorities concerned the means and the information to translate this responsability into concrete measures of prevention and correction, the ICRC assumes that these authorities – conceived as the whole chain of institutions and officials having a direct and/or indirect responsibility towards the persons entitled to protection – are *a priori* willing to improve the protection of the persons under their authority. Should that not be the case, the ICRC may suspend its action and break its confidentiality commitment. However, that can occur only when all reasonable efforts to modify the pattern of behaviour of the authorities have failed, and taking into account the ultimate interests of the persons requiring protection.

More particularly, the needs for protection experienced by persons or populations in a context of conflict or violence may depend on an array of causes such as: deliberate will to harm them or neglect their rights, inadequate level of training of security personnel, disorganised chain of command, poor institutional cohesiveness, lack of material means, and so forth.

5.2 Protection of persons deprived of freedom: a set of objectives and methods

Deprivation of freedom is a situation of vulnerability as such, with regard to the detaining authority as well as to the environment of detention. This vulnerability becomes sharper in situations of conflict and violence, when abusive resort to force may become routine and structural deficiencies are aggravated.

The objective: the physical integrity as well as the dignity of the persons detained and their families are at the heart of the ICRC's action. For the ICRC, the objective consists (according to the context) in preventing and putting a stop to forced disappearances and extra-judiciary executions, torture and ill-treatment, in improving the conditions of detention and restoring family links.

The ICRC aims at establishing a constructive dialogue based on transparency and mutual confidence. To this end, the ICRC makes it very clear that its exclusive objective is to help ensure full respect for the detainees, by sensitising, informing, holding the authorities in charge accountable, and, whenever necessary, by issuing and following up recommendations and/or providing direct assistance. The authorities are requested and encouraged to use ICRC-provided information to ensure control and supervision of the institutions and personnel under their responsibility, in line with their humanitarian obligations. In other words, the ICRC proposes to function as an internal regulatory mechanism with no other purpose than enhancing respect for IHL dispositions and principles.

With regard to the method: the ICRC adopts a specific *modus operandi* that goes through four different stages:

5.2.1 Establishment of a framework for dialogue with the political authorities concerned

This stage is normally formalised through an Accord or Protocol, which specifically stresses the strictly and exclusively humanitarian purpose of ICRC action. What the ICRC guarantees, and asks for, is complete confidentiality with regard to the substance of the dialogue on humanitarian issues. This precondition sets the background for a dialogue immune from interferences caused by political undertones. Thus, it excludes any contribution, direct or indirect, to any political controversy.

5.2.2 Preparation of the protection programme for detainees

The ICRC proceeds with the preparation of the protection programme for detainees. Concretely, this consists in obtaining from the authorities concerned the following measures:

- provision of all relevant information on the penal, judiciary and administrative system and texts of reference;
- clarification of the political and judiciary status of the detainees;
- provision of comprehensive information on their numbers and locations;
- information on relevant issues affecting directly or indirectly all detainees (structural, conjunctural);
- acknowledgment of ICRC-specific modalities for the visits and corresponding instruction to the political/security personnel throughout the geographic/political context and the chain of command.

5.2.3 Implementation of the visit programmes

A visit follows a specific course of action:

- meeting with the authority in charge. The prison or camp director is briefed on ICRC goals and *modus operandi*. He/she is asked to provide the ICRC visiting team with all relevant information on the place of detention (status, capacity, capabilities, available facilities, functional and structural aspects, etc.), the individuals held therein (identities, status) as well as groups of persons detained (rules and regulations applied, regimes, etc.)
- carrying out a tour of the premises. The ICRC team is allowed full access to all areas within the facility. This allows for the evaluation of the entire environment of detention (kitchen, sanitary installation, workshops, disciplinary cells, etc.)
- interviewing the detainees without witnesses. Detainees may be individually registered (for further follow-up as required). Interviews are generally individual ones.

This is a confidential meeting: the person is invited to provide a full account of his/her situation from a strictly humanitarian perspective. All aspects related to his/her condition are investigated (conditions of arrest, interrogation, situation in previous places of detention, present-day conditions, from a material and/or treatment point of view, behaviour of guards, nutrition, activities, access to medical care, contacts with the outside, etc.) Any allegation of ill-treatment is recorded, but will be transmitted further only with the consent of the source.

- provision of supplies, transmission of Red Cross messages, implementation of structural projects (renovation of a water tank, for example) normally takes place at this stage.
- final meeting with the authority in charge. ICRC findings are shared, and possible recommendations forwarded. Again, the officials in charge are informed that all findings and recommendations are intended for internal use only, but the ICRC may forward them to higher authorities.

- Follow up of the visits. The visit: will trigger an integrated set of responsive actions: reporting to the authorities. The ICRC establishes reports of different types: written (working papers, *ad hoc* representations, synthesis reports, etc.) and oral (meetings with the relevant authorities) whereby it transmits its assessment, points of concern, and suggestions/recommendations/appeals for improvement as required. All humanitarian-related issues are included in the ICRC reports, as opposed to politically related ones. For instance, the ICRC will not pronounce itself on the legitimacy of the arrest/capture; however, the level of respect of fundamental judicial guarantees enshrined in IHL and customary law will be monitored and addressed correspondingly.

  These reports make it clear that they are confidential for both the authorities and the ICRC. They are not to be published or made public, integrally or partially, without the consent of the ICRC.

- proposing and implementing ICRC programs, as needed: i.e. carrying out an assistance programme to detainees, a material renovation project in the detention facility, the organisation of family visits, etc.

5.3 Concluding remarks

The accountability of the individuals in charge of detained persons is substantial, all the more so in a highly politicised context such as a conflict. The receptiveness by a given authority to an ICRC offer of services and subsequent field action will depend on two strong factors:

- The neutral identity of the ICRC, i.e. the ability to ensure that the humanitarian criterion is the one and only one for action and that no aspect of the co-operation can cause conflict whith political interests.

- The independent action of the ICRC, i.e. the ability to set up its course of action autonomously, and immunity from pressures, direct or indirect, objectives and/or perceived, exerted by external powers.

These two factors rate the ICRC as highly predictable and politically neutral, thus rendering ICRC deployment, monitoring, and action more acceptable, and enabling to save rights – and even lives – to take place.

In light of a deliberate violation of humanitarian law, the options enshrined in the mandate and doctrine of the ICRC consist in confronting the potential or actual perpetrator with humanitarian considerations, keeping in mind that he/she has the means to prevent their recurrence or alleviate their impact. This approach implies the establishment of a substantive dialogue that must be based on positive, non-confrontational interaction.

It is only on the basis that humanitarian considerations are clearly distinguished from political ones, and that co-operating constructively with the ICRC cannot entail damaging consequences at the personal or institutional level, that such a dialogue can effectively be set up.

Confidentiality is a key argument for the ICRC when negotiating both access to the victims or solutions to their most direct needs, for two main reasons: firstly, because it excludes political utilisation, which can only become detrimental to an objective treatment of urgent humanitarian issues; secondly, because in most conflicts, the persons responsible for humanitarian violations are precisely the ones with the capacity to prevent further violations and minimise their impact. Accordingly, the ICRC underlines that its operations focus on the prevention of humanitarian violations, rather than on the punishment of their perpetrators.

6 Additional paper: Verification of compliance and use of compliance information, including confidential information, under the Chemical Weapons Convention

By Ms Kathleen Lawand, Lawyer and former Legal Officer of the Organisation for the Prohibition of Chemical Weapons[73] (OPCW), The Hague, The Netherlands

6.1 Introduction

International verification of a State's compliance with its treaty obligations is a remarkable feature of modern-day treaties. It challenges the traditional assumption that a sovereign State which freely undertakes international obligations carries these out in good faith. In the area of arms control,[74] this assumption has long given way to the principle of "trust but verify", at least at the bilateral level. The Chemical Weapons Convention, which entered into force in April 1997, has for the first time taken this principle to the level of multilateral disarmament[75], where it subjects State compliance to comprehensive verification.

Since the purpose of an arms control regime is to enhance the security of the participating States, assurance that the requirements of the treaty are indeed being fulfilled is critical to the regime's success. This assurance is normally lacking at the outset because of the mutual suspicion and distrust that pervade State relations in this area. In addition, information on relevant military and commercial activities is not readily available in the public domain. It follows that the key ingredient of confidence-building in arms control regimes is the transparency of compliance, that is the availability to the participating States of reliable information on each other's compliance with their treaty obligations. This implies two faces of transparency: the regime's ability to effectively access compliance information, which relates to what I refer to as vertical transparency, and its ability to effectively disseminate such information to its constituency for the purposes of compliance determination, i.e. horizontal transparency. The greater the regime's transparency, i.e. its ability to effectively access and disseminate credible information on compliance, the greater the confidence of its participants.

While most contemporary multilateral treaties rely exclusively on reporting by States Parties (also known as "self-reporting") to achieve vertical transparency, arms control regimes tend to go further by conducting verification of compliance, i.e. by actively seeking out indicia of State compliance either through remote means (e.g. seismic monitoring or satellite surveillance) or through on-site inspections. The latter method, used by the CWC, requires a sovereign State to give an international inspection body access to sites within its territory to witness compliance at first hand. The intrusiveness of this verification tool and the technical complexity of chemical weapons disarmament account for the CWC's detailed verification procedures and sophisticated safeguards for the protection of sensitive State Party information accessed in the course of verification.

This paper will describe the means used by the CWC to achieve transparency of compliance, and in particular how the confidentiality of compliance information may affect transparency. The paper will conclude with an attempt to draw some lessons for human rights regimes.

6.2 Overview of the CWC's verification regime

The CWC prohibits the development, production, stockpiling, and use of chemical weapons and requires their destruction.[76] It also regulates the production, use and trade for legitimate purposes of the highly toxic chemicals contained in the three Schedules that make up its Annex on Chemicals, also known as "dual-use" chemicals – i.e. chemicals that are used for peaceful purposes although they are capable of being used in chemical weapons production. As previously mentioned,

the CWC aims for transparency of compliance with these substantive requirements by means of reporting by States Parties and of on-site verification.[77]

The Organisation for the Prohibition of Chemical Weapons (OPCW) is the inter-governmental organisation established pursuant to the CWC *inter alia* to implement verification of compliance.[78] It is made up of three organs, each of which has a role in this regard: the Conference of the States Parties, which is the plenary of the States Parties to the CWC; the Executive Council consisting of a rotating membership of 41 States Parties; and the Technical Secretariat which is responsible for carrying out the verification measures provided by the CWC (notably on-site inspections) and reporting on these to the policy-making organs (the Conference and the Executive Council).

Verification operates essentially as follows. States Parties are required to submit declarations of their past and present chemical weapons production capability, existing stockpiles of chemical weapons, and plans for the destruction thereof. In addition, they must declare the manufacture and use above certain thresholds of scheduled chemicals for purposes not prohibited by the CWC.[79] Military facilities and industrial plant sites so declared are subject to routine verification by the OPCW through on-site inspections to determine the accuracy of the declarations and compliance with the treaty. In addition, a short-notice surprise inspection, known as a "challenge inspection", may be initiated at the request of any State Party alleging non-compliance by another State Party at any location within its jurisdiction. The CWC also provides for measures to investigate alleged use of chemical weapons and for exchanges of information on States Parties' means of protection against chemical weapons. For the purposes of this paper, only routine verification will be referred to.

The starting point for routine verification of all types of installations covered by the CWC – chemical weapons production, storage and destruction facilities, Schedule 1 facilities, and Schedules 2 and 3 plant sites – is of course the State Party's declaration. The Technical Secretariat conducts an initial inspection of the installation for the purposes of verifying the accuracy of the declaration and in order to plan future inspections of the installation. Thereafter, routine verification is conducted by regular or random inspections of the installation (depending on its type). Notification of inspection varies between 24 and 120 hours, depending on the type of inspection.

As provided by the CWC, OPCW inspectors may use a number of inspection methods while on the site including access to documentation, records, and data, the taking of photographs, the interviewing of site personnel, and the collection of chemical agent samples and their analysis. In case of ambiguities, chemical samples may be taken off-site for analysis at OPCW designated laboratories. Inspectors will typically bring on-site OPCW "approved" inspection equipment to perform their inspection activities.[80]

6.3 Protection of sensitive compliance information

Because the military and industrial installations subject to CWC verification involve activities that are of a highly sensitive nature, i.e. relating to a State's national security or to its industry's commercial proprietary information (also known as confidential business information), States would only agree to on-site inspections if guaranteed that the inspecting body would be held accountable for the protection of sensitive information in accordance with strict procedures. In the course of the negotiation of the CWC's verification provisions, the protection of sensitive compliance information by an accountable verification body became the *quid pro quo* of on-site verification.

In the result, the CWC contains in its Confidentiality Annex a robust framework for management by the OPCW of compliance information in general and confidential information in particular.

Detailed measures and procedures in this regard were developed in the OPCW Policy on Confidentiality adopted by the First Session of the Conference of the States Parties.[81] Taken together, the Confidentiality Annex and the OPCW Policy on Confidentiality form the basis of the OPCW's confidentiality regime, which provides *inter alia* for the distribution of responsibilities within the OPCW for the protection of confidential information, a classification system, procedures for the dissemination and release of confidential information, and procedures for dealing with breaches of confidentiality (which will be discussed later in this paper). What follows is an overview of the main features of the confidentiality regime.

Access to confidential information is strictly limited to those within the OPCW who have a "need-to-know". This is a key principle of the confidentiality regime: no one has an absolute right to receive confidential information; instead they must demonstrate a need for the information in order to carry out their functions in accordance with the CWC.[82] In this, the "need-to-know" principle restricts not only the pool of recipients of information but also the scope of information received.

Each Technical Secretariat staff member is required to enter into a secrecy agreement applying to his/her period of employment and a period of five years after termination thereof. Staff members are also required to undergo a clearance procedure in order to have access to confidential information.[83] States Parties are also bound to afford special handling to information that they receive in confidence from the OPCW in connection with the implementation of the CWC. They must inform the OPCW upon request of the measures they have taken in this regard,[84] though so far only a handful have done so.

Information will be treated as confidential if so designated by the State Party from which it was obtained and to which the information refers.[85] Confidential information must be classified according to one of three categories specified in the OPCW's Policy on Confidentiality – restricted, protected, or highly protected – in increasing order of sensitivity. Each of these categories entails specific access and handling procedures to avoid improper disclosure.

A State Party may not use confidentiality to refuse access to compliance information, nor to prevent OPCW inspectors from taking copies of compliance information off-site if required for reporting purposes. The contrary view, which has been taken by some States Parties, would defeat the purpose of verification by impeding access to and proper assessment of information relevant to demonstration of compliance. The OPCW's confidentiality regime aims at balancing the requirement that the inspected State Party disclose information relevant to its compliance with the CWC and the need to safeguard confidential compliance information from improper disclosure. In this regard, the Confidentiality Annex expressly requires that the amount of confidential information removed from a site by the inspectors be kept to the minimum necessary for the "timely and effective" implementation of verification.[86] The Confidentiality Annex allows States Parties to "take such measures as they deem necessary to protect confidentiality, *provided that they fulfil their obligations to demonstrate compliance* in accordance with" the CWC.[87] The OPCW and its inspectors are required to conduct verification activities, including on-site inspections, "in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives" and the OPCW is enjoined to "request only the information and data necessary to fulfil its responsibilities under this Convention."[88] OPCW inspectors determine relevancy of information and data.[89]

It follows that confidentiality is meant to affect not the substance of transparency but only its form. Indeed, as just mentioned, it cannot impede access to information relevant to demonstration of compliance. Nor, as will now be examined, can it impede dissemination of information for compliance assessment purposes.

6.4 Dissemination and release of compliance information

"Dissemination" of compliance information refers to authorised disclosure *within* the OPCW as required for implementation of verification and compliance assessment, including the routine provision of compliance information by the OPCW to States Parties as well as regular and *ad hoc* provision to the OPCW's political organs (internal flow of information). Dissemination must be distinguished from "release" of information which refers to authorised disclosure outside of the OPCW and which comprises public release and limited non-public release (external flow of information).[90]

6.4.1 Routine dissemination to States Parties[91]

In order for States Parties to be assured of the continued compliance with the CWC of other States Parties, the Technical Secretariat is required to routinely provide to them certain information such as initial and annual reports and declarations submitted by other States Parties, even if this information is confidential. In this connection, States Parties are required to treat as confidential and afford special handling to all information received in confidence from the OPCW and they must inform the OPCW of the measures they have taken in this regard. So far, only a handful of States Parties have done so.

The Technical Secretariat is also required to provide to States Parties "general reports on the results and effectiveness of verification activities", which it supplies to the Executive Council on a quarterly basis in the form of Status of Implementation Reports. These reports are usually confidential depending on the level of detail (read finger-pointing) that they contain. The Conference of the States Parties receives similar reports in a far more sanitised form.

Confidential reports or other information are submitted to the Executive Council in closed session in accordance with special stringent procedures managed by the Secretariat's Confidentiality Branch.

6.4.2 Dissemination and release of information in cases of alleged non-compliance

When an inspection reveals a serious compliance problem that is not redressed by the inspected State Party, the Technical Secretariat must bring the matter to the attention of the OPCW's political organs for consideration. In order to understand how specific information relating to non-compliance is disseminated, it is first necessary to review how on-site verification by the Technical Secretariat feeds into compliance assessment by the OPCW's political organs.

After each inspection, the inspection team prepares a final inspection report which is to contain only facts relevant to compliance with the CWC as well as information on the manner in which the inspected State Party co-operated with the inspection team. This report is kept confidential and is transmitted to the inspected State Party no later than 10 days after the inspection. The State Party may make written comments thereon. Within 30 days after the inspection, the final inspection report along with the inspected State Party's comments is submitted to the Director-General of the Technical Secretariat. Unless there are uncertainties in the report or questions regarding the inspected State Party's co-operation, the inspection file is closed with no further ado. If the report contains ambiguities or alleges non-co-operation by the inspected State Party, the Director-General shall seek "clarification" from the State Party. Up to this point, the discussion remains at the bilateral level, between the Technical Secretariat and the inspected State Party. It is only if the uncertainties flagged in the final inspection report cannot be removed or if the facts established are of a nature to suggest that the obligations under the CWC have not been met that the Director-General must immediately inform the Executive Council.[92]

When considering a non-compliance issue, the Executive Council is required to consult with the State Party concerned, and it may request the State Party to take measures to redress the situation within a specified time. If it considers that further action is necessary, the Executive Council may either inform all States Parties of the issue, bring the issue to the attention of the Conference, and/or make recommendations to the Conference regarding measures to redress the situation and to ensure compliance. If the issue is particularly serious and requires urgent action, the Executive Council may *proprio motu* bring the matter, including any relevant information, to the attention of the United Nations General Assembly and the Security Council.[93] Article XII of the CWC empowers the Conference of the States Parties to take measures to redress a situation that violates the CWC and to ensure compliance, including sanctions, taking into account the recommendations made to it by the Executive Council. "In cases of particular gravity", the Conference may also bring the matter, including any relevant information, to the attention of the UN General Assembly and the Security Council. If a matter raises a legal question relating to the OPCW's activities, the Executive Council and the Conference of the States Parties are separately empowered pursuant to Article XIV of the CWC to request an advisory opinion of the International Court of Justice with prior authorisation of the UN General Assembly.

When the Executive Council and the Conference of the States Parties consider a non-compliance issue, they must of course consider relevant information including, as the case may be, confidential information. Confidential information is disseminated in closed session in accordance with the strict procedures of the confidentiality regime, in the manner outlined above. Where either of the political organs decides to refer a non-compliance matter to the UN General Assembly and Security Council, or where either decides to request an advisory opinion of the International Court of Justice, the CWC's confidentiality regime allows for the "limited or non-public release" of information, be it confidential or not. In the case of confidential information to be released, the CWC requires the Director-General of the Technical Secretariat to first determine that the recipient organisation is capable of maintaining adequate protection and control of the confidential information and to conclude an agreement in this regard with the recipient organisation. Unless a State Party to which confidential information specifically refers consents in writing to its release, any limited or non-public release of confidential information must be approved by the Conference or the Executive Council on the basis of the recipient organisation's "clear need to know" in accordance with the recipient's role in assessing and redressing a situation of non-compliance. Information proposed for release may be processed into less sensitive forms in order to avoid the disclosure of non-relevant confidential information.[94]

6.4.3 Public release of information

It should come as no surprise that confidential compliance information is strictly off-limits to the public. Moreover, this restriction also applies as a rule to *non*-confidential compliance information, with the exception of information referring to a State Party where that State Party consents to its release and of general information on the course of the CWC's implementation. Even so, the public does not have automatic access to such information, as this is left to the discretion of the Director-General of the Technical Secretariat. The rationale for restricted access is that the CWC, like most multilateral treaties, leaves implementation oversight exclusively to States Parties with no role for the public. An alternative recourse for a member of the public wishing to access compliance information (e.g. a State Party's declarations or inspection reports) may be through a State Party's national access to information procedures, although some States Parties have legislated to subtract all information submitted to the OPCW for the purpose of CWC implementation from freedom of information laws.

6.5 Dealing with breaches of confidentiality

A salient feature of the CWC's confidentiality regime is its detailed procedures for dealing with breaches of confidentiality. The Director-General is required to investigate alleged breaches of confidentiality by Technical Secretariat staff members, by other individuals or entities outside of the Technical Secretariat, or by States Parties. The Director-General may impose punitive and disciplinary measures on staff members who are found to have violated their obligation to protect confidential information and this includes, in case of "serious breaches", the waiver of the staff member's immunity thereby exposing him or her to possible prosecution in national courts.

The CWC expressly exempts the OPCW from liability for any breach of confidentiality by a staff member of the Technical Secretariat. Instead, an aggrieved State Party may take its case against the OPCW or another State Party to the Confidentiality Commission, a subsidiary organ of the Conference of the States Parties charged with settling disputes relating to breaches of confidentiality. Unless the parties to a dispute before the Confidentiality Commission agree to binding arbitration, the Confidentiality Commission can only make recommendations. It has thankfully had no disputes laid before it to date.

The strength of the measures and procedures for breaches of confidentiality lies in their effect as a deterrent to violations of confidentiality.

6.6 Independence and impartiality of OPCW

Another measure of the accountability of the OPCW in protecting confidential information is the degree to which the Technical Secretariat, as gatherer and manager of compliance information, acts independently and impartially. In this connection, the CWC prohibits inspectors and other staff of the Technical Secretariat from seeking or receiving instructions from any government or other source external to the OPCW, and it prohibits States Parties from seeking to influence inspectors and other staff in the discharge of their responsibilities.[95] The independence and impartiality of the Technical Secretariat in discharging its duties under the CWC is critical to State Party confidence in its ability to protect confidential compliance information.

A key ingredient of independence is of course the privileges and immunities of the OPCW, and especially those of its inspectors in the discharge of their functions. The CWC's Verification Annex specifically spells out the privileges and immunities of OPCW inspectors, and in this regard it incorporates by reference several provisions of the Vienna Convention on Diplomatic Relations. Key immunities include the inviolability of inspectors' papers and correspondence as well as that of OPCW inspection equipment.[96] However, the Executive Council and the Conference of the States Parties have jeopardised this inviolability in several policy decisions which could be interpreted as allowing unfettered access by an inspected State Party to inspectors' notebooks and their inspection equipment. Though such policy has been justified as necessary to protect "non-relevant" confidential information, it may critically impair the effectiveness and integrity of on-site verification.

6.7 Conclusions: lessons for human rights visiting mechanisms

In order to achieve transparency of compliance with its technically intricate requirements, the CWC sets up a complex verification mechanism, which it matches with a sophisticated regime for the protection of confidential information accessed and disseminated in the course of verification. CWC verification aims at uncovering technical military and industrial information on a State's compliance with its chemical disarmament and non-proliferation obligations for the purpose of enhancing the se-

curity of States Parties. The obligations imposed by the CWC are owed to all other States Parties. Therein lies an important difference from human rights regimes, which aim at uncovering evidence of a State's compliance with obligations primarily owed not to other States, but to its own citizens. How one State treats its citizens within its borders is usually of remote concern to other States (except where massive human rights abuses in one State provoke the flight of its nationals into the territory of other States). Conversely, arms build-up by one State is more immediately threatening to other States. When States voluntarily agree to international verification of installations within their territory to demonstrate that they are not contravening arms control commitments, they are doing so on the self-interested expectation of reciprocity, i.e. that other (rival) States are equally held to the same verification obligations. What both arms control and human rights regimes have in common is the interest of the participating States in coming clean and being perceived as members of good standing in the regime.[97]

If only because of the differing objects and underlying motivations of arms control and human rights regimes, it is safe to assume that human rights verification may never attain arms control verification's level of complexity. There are important procedural similarities, however, as both regimes require State consent to be able to conduct international verification of relevant sites and both require access to sensitive information, though the motivations for protecting the latter differ.

As seen in this paper, confidentiality considerations permeate the OPCW's verification regime and, although they influence the verification procedure, they are not meant to affect the transparency of compliance *per se*. In this regard, if transparency is compared to a window, the effect of confidentiality is simply to limit the number of persons who have access to the window and to impose certain conditions of access. For those privileged few who may look through the window, compliance is transparent. Effective transparency of compliance requires the viewers to act independently and impartially, to have freedom of observation of relevant information, and to be held accountable for what they do with what they see. These ingredients are essential to the integrity of any type of verification regime, including human rights regimes.

In order to function independently and effectively within the territory of the inspected State, the investigating body must be accorded privileges and immunities by that State. These include, at a minimum, immunity of the inspectors from arrest and detention and from civil and criminal jurisdiction, inviolability of the information and evidence gathered by the inspectors for compliance assessment purposes, inviolability of the media used by the inspectors to store information, and inviolability of the premises in which the inspectors work. Inviolability means that no one other than the inspectors themselves may access or otherwise interfere with the information gathered in the course of inspections.

Safeguards to ensure the accountability of the verification body for the protection of confidential information include strict control over the flow of information through systematic recording of all access to and transmission of information. All such information must be securely stored. Staff members of the verification body, including inspectors, must be required to enter into secrecy undertakings and undergo clearance procedures prior to having access to confidential information.

As for breaches of confidentiality, their consequences differ between arms control and human rights regimes. Breaches of confidentiality in arms control regimes refer to mishandling of State and commercial secrets with possible damage to national security and intellectual property. Breaches of confidentiality in human rights regimes, when relating to evidence on treatment of individuals, may jeopardise the physical security of individual witnesses. In both instances, they involve a breach of trust by the holder of the information. In this regard, all types of verification regimes require measures to deal with breaches of confidentiality, namely effective procedures for investigating and sanctioning breaches.

73 The views expressed are those of the author exclusively. For more information on confidentiality considerations under the Chemical Weapons Convention and other arms control regimes, see Report of Pugwash Meeting No. 234, *CWC Implementation: Balancing Confidentiality and Transparency* (Noordwijk, The Netherlands, 15-17 May 1998), in *Pugwash Newsletter*, Vol. 35, No. 2, November 1998.
74 The term "arms control" as used in this paper includes "disarmament" and "non-proliferation".
75 The 1972 Biological Weapons Convention (BWC) is the first multilateral treaty to ban an entire category of weapons of mass destruction, but it has no verification mechanism. The States Parties to the BWC are currently negotiating a draft Protocol which would strengthen compliance oversight, possibly through on-site "visits" similar to the CWC's inspections. The Comprehensive Test Ban Treaty (CTBT) will, when it enters into force, subject the ban of all new tests of nuclear weapons to remote verification.
76 See Article I of the CWC, General Obligations.
77 For the purposes of this paper, "compliance" with the CWC refers to fulfilment of the CWC's substantive obligations, as opposed to procedural requirements such as, for example, the timelines within which States Parties must perform certain tasks.
78 See Article VIII, paragraph 1 of the CWC.
79 The definition of "chemical weapons" includes "toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes": paragraph 1 of Article II of the CWC.
80 See paragraphs 27 to 29 and 45 to 58 of Part II of the Verification Annex to the CWC.
81 Conference decision C-I/DEC.13, dated 16 May 1997, as amended by paragraph 3 of Conference decision C-II/DEC.14. References throughout the Confidentiality Annex to "procedures", "regulations" or "recommendations" to be considered and approved by the Conference designate the OPCW Policy on Confidentiality.
82 Paragraph 2(h) of the Confidentiality Annex and 2.3 of Part VI of the OPCW Policy on Confidentiality.
83 See Part B of the Confidentiality Annex to the CWC.
84 See paragraph 6 of Article VII of the CWC and paragraph 2.11 of Part VI of the OPCW Policy on Confidentiality.
85 Paragraph 2(a) of the OPCW Policy on Confidentiality.
86 Paragraph 2(g) of the Confidentiality Annex. See also paragraph 12 of Part III of the OPCW Policy on Confidentiality.
87 Confidentiality Annex, paragraph 13 (emphasis added). See also paragraphs 2 and 3 of the OPCW Policy on Confidentiality.
88 CWC, Article VIII, paragraph 5 and Confidentiality Annex, paragraph 14.
89 See e.g. the last sentence of paragraph 45 and paragraph 47 of Part II of the Verification Annex to the CWC.
90 See paragraph 3.1 of Part VI of the OPCW Policy on Confidentiality.
91 See paragraph 2(b) of the Confidentiality Annex to the CWC.
92 See paragraphs 62 to 65 of Part II of the Verification Annex to the CWC.
93 See paragraph 36 of Article VIII of the CWC.
94 See paragraph 3 of Part VII of the OPCW Confidentiality Policy.
95 Paragraphs 46 and 47 of Article VIII of the CWC.
96 See Section B of Part II of the Verification Annex to the CWC.
97 On what motivates States to comply with international obligations, see A Chayes and A H Chayes, *The New Sovereignty – Compliance with International Regulatory Agreements*, Harvard University Press, 1995.

SUMMARY OF DISCUSSIONS FOLLOWING WORKSHOPS 1 AND 2 ON FRAMEWORK AND CONFIDENTIALITY

The discussions led to remarks and questions of a general nature on the framework of visiting mechanisms in each field, and specific clarifications on the role of confidentiality.

1. On the general issue of framework, it was noted that the interests of the States and the nature of the obligations are different in the four fields of international law. The question was raised whether these should necessarily lead to different regimes. For example, obligations in disarmament and environmental law treaties are very detailed. In human rights, the essential part of the regime is individual rights. It is not clear whether this very difference, individual rights, should lead to a different regime in view of the visiting mechanism itself. If the object of the visit is taken into account, it is possible to find similarities between the fields. For example, in the Geneva Conventions, the visits structure is based on the status of the individual under the Conventions; access to these persons serves to ensure that they can enjoy their rights under the Conventions.

In the disarmament sphere, there have been some setbacks in recent years, as States tend to withdraw from their obligations. This was already observed during the negotiations for the Chemical Weapons Convention, when the United States proposed an anytime, anywhere inspection regime, knowing the then Soviet Union would not agree to it. With the advent of Gorbachev, the USSR agreed to this type of mechanism, and the US found itself in a delicate position. A lot of what can be achieved during negotiations is also a function of the security environment. The Ottawa treaty on anti-personnel landmines was qualified as a hybrid convention. It is an arms control agreement but using terminology of the humanitarian field. It does provide for an anytime, anywhere inspection regime, but with a political filter, implying that only countries like Serbia or Iraq will eventually be subject to this regime. The question of whether this is a satisfactory agreement has been raised. Generally, an absolute anytime, anywhere inspection regime in the field of disarmament is impossible, because there are too many interests to be protected.

2. Confidentiality was addressed through various parameters. As had been exposed in the presentation of the report of the working group, confidentiality is in many respects a working method and a prerequisite such that an on-site visit can take place at all.

There are different types of confidentiality and vis-à-vis different entities. Confidentiality may be to protect the State, or to protect the individual, and various interests are being protected through confidentiality. Confidentiality is mostly process-oriented. It does raise the following questions: the quality of the information, the control of the information (in the case of verification through remote-sensing, who retains and controls the technology?), the feed-back between the institution doing the visit and the informant, and the reporting to the State concerned.

In the environment and disarmament fields, confidentiality is also mainly a question of the protection of technologies and products, with examples given of pharmaceutical and chemical industries. It is also the protection of security-related information. These considerations provide ample justification for the detailed provisions on confidentiality to be found in disarmament agreements. Likewise, not all persons working in an organisation involved in the conduct of on-site visits will have access to the same information. Therefore, safeguards exist and tend to be quite developed to protect the genuine interests of the State.

It is expected that on-site visits will gain importance in the environmental field, due to the rise of environmental crime. Properly addressing this problem will lead to more visiting mechanisms, to more intrusiveness, and to more confidentiality.

Pertaining to the visit of places of detention in the field of human rights and humanitarian law, repetition of visits is necessary to reach the goals (prevent torture, improve conditions of detention), but also for confidentiality to have a purpose and a *raison d'être*.

3. It was remarked that visiting mechanisms in the different fields do not necessarily have the same purposes and that therefore there is a danger of over-generalising. Also, the mechanisms may be very different within a field, and thus the visit process and what comes out of it will be different as well. The two most important questions for the visiting mechanism should be what is to be visited or inspected, and why. As to the first point, the object may be a facility, an asset, a piece of equipment, a finished product, an activity or an intention. The purpose of the visit may be any of the following (or a combination thereof): transparency, increased confidence in the system as a whole, deterrence, to persuade and encourage compliance, to dissuade and deter non-compliance, to find facts and clarify ambiguities, or to investigate specific allegations. Basically the further down the list one goes, from facility to intention, the more intrusive the mechanism will have to be, and the greater will be the role of confidentiality.

4. Pertaining to the human rights field in particular, it was noted that confidentiality is especially desired to protect the State. One of the main obstacles to visiting mechanisms in this area is sovereignty, this regardless of provisions for on-site visits such as Article 20 of the Convention against Torture.

It was also emphasised that the present human rights system is characterised by the explosion of mechanisms: reporting, treaty-based, *ad hoc*, some mechanisms with individual complaint procedures. Additionally, there is the problem of under-funding. In situations of non-compliance, the only real recourse is the United Nations Commission on Human Rights, and this is the main reason for the confrontational aspect in the human rights field. It was noted that there was ample scope for co-operation with existing treaty bodies, and with the work of the CPT for example, to avoid this confrontational aspect of the Commission. Generally speaking, existing mechanisms are under-used.

One of the explanations for the confrontational aspect of human rights is most probably its judicial background. Human rights is about the relationship between the individual and the State, which is established through national courts. This relationship, to a certain extent, has been reproduced at the international level. There are perceivable trends away from this confrontation, and this should be encouraged.

WORKSHOP ON THE ROLE OF DOMESTIC LEGISLATION

1 Domestic legislation and arms control agreements

By Dr Trevor Findlay, Executive Director, Verification Research, Training and Information Centre (VERTIC), London, United kingdom

Arms control and disarmament agreements do not always have provisions obliging States Parties to enact domestic legislation to bring the treaty into force for them or to ensure that they fulfil their obligations. Some States may enact legislation anyway, according to their own constitutional procedures, and those with a very sophisticated legal system tend to do it almost as a matter of course. Complex modern arms control agreements like the Chemical Weapons Convention (CWC) may, however, contain specific requirements for each State Party to adopt the necessary measures to implement its obligations, which implies legislation or at least administrative measures.

But my understanding of international law is that there is, in any event, an assumption that domestic law should not contradict a State's treaty obligations and that if there is any such contradiction domestic law should be brought into line with such obligations.

There are three areas in which States have tended to pass national implementing legislation in relation to arms control and disarmament agreements:

a. In relation to the conduct of on-site inspections
b. In relation to the establishment of national authorities for implementing treaties
c. In relation to criminal penalties for individual acts that would lead to a State violating the agreement in question.

a. The details of on-site inspections or other types of inspections under arms control agreements are usually fleshed out in great detail, at least in the more modern arms control agreements, because the issues are so sensitive to States Parties' national security. They want to be certain, for example, that they will not be opening themselves up to unexpectedly intrusive inspections. There is therefore a tendency to pin down clearly what the obligations will be under on-site inspections or other forms of intrusive inspections.

In many cases, even in very intensive negotiations, it is impossible for the negotiations to envisage every possibility and ensure that all the procedures for on-site inspections are laid down as they should be. In the case of the CWC, there were a number of the problem areas handed over to the Organisation for the Prohibition of Chemical Weapons for it to sort out: these included some of the detailed procedures for on-site inspections, some of the time-lines, the sorts of materials that would be inspected and samples to be taken. Because these have been subsequently adopted by consensus by the treaty parties' organisation, they become part of the treaty law and must be complied with by the States Parties.

However, some States, even if there is great detail in a treaty and in the procedures worked out by the verification organisation, will still want to pass domestic legislation, introducing, for example, all the corpus of law and the practices of the OPCW into their domestic statutes. This may become controversial. The worst example is US legislation implementing the CWC, which forbids samples of chemicals to be taken out of the country for testing by the international organisation for the purpose of verification. This is in effect rewriting the treaty. The US therefore sets a precedent that other States may follow. In effect the US, through domestic legislation, took the opportunity to obtain something it was not able to at the negotiations.

On the more positive side, there is the case of New Zealand, in terms of its national implementing legislation for the Landmines Convention. The legislation gives the benefit of the doubt to the on-site inspector, and makes it illegal for New Zealand nationals to obstruct the activities of an on-site inspection.

So it can go both ways. States can use their domestic legislation for beneficial purposes or can use it to put conditions on them. Where conditions are imposed that appear to contravene the provisions of the treaty, a case could go the International Court of Justice, if the States Parties themselves feel unable to rule on a violation.

Other details relating to the conduct of on-site inspections, such as privileges and immunities of on-site inspectors, are handled by simply adopting the normal diplomatic immunities and privileges. There is generally not much controversy about those. It is more in terms of what the inspectors are allowed to do once they get there that is the issue. There is a particular problem in certain States where there are constitutional provisions prohibiting unwarranted searches, for example in the US.

b. Another opportunity for States to pass domestic legislation is in the establishment of national authorities to deal with the multilateral verification. In the case of the CWC, States are obliged by the treaty to establish a national authority. This is a welcome development, even if it is only half a person in their foreign ministry or very small office. The requirement to establish a national authority will induce States to think carefully about many issues: what legal standing the national authority will have vis-à-vis the multilateral authority; how will the national authority handle on-site inspections; how confidential can the information be that the national authority handles. It creates another level of verification between the State and the international verification authority.

c. The third area where national legislation may be required is in regard to criminal penalties. States have to be aware that their own nationals could cause them to violate the convention if they conduct illicit activities. In some cases there may already be domestic legislation, which criminalises, for example, the possession of plutonium or the attempt to create a nuclear weapon. In other cases, there will be no such legislation. In the case of the Landmine Convention, it is very important that States pass legislation providing for criminal penalties for the manufacture of landmines, their sale and promotion, because landmines are easy to make, including by non-government actors. With weapons of mass destruction, it may not be so obvious that you need such legislation. Even States which have not in the past been engaged in landmine activity should pass this legislation to prevent criminal activity in the future and by their nationals overseas.

A very good example of how this can work occurred in the United Kingdom recently, where a Romanian company was discovered promoting the sale of landmines at a government-sponsored arms exhibition. This could be interpreted as the UK encouraging the trade in landmines on its own territory, which is banned by the Convention. The UK fortunately does have criminal legislation in place which makes this a criminal offence and under which the Romanian company or its British agents could be prosecuted. This is a very direct example of how arms control/disarmament agreements require domestic legislation to be effective.

2 Defining a role for national law in the negotiation of the Rome Statute of the International Criminal Court

By Mr Bruce Broomhall, Senior Program Coordinator,
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International monitoring has been part of the system of international human rights protection since its inception, and the use of visits has been an obvious candidate as a tool in this system from the very beginning. At the same time, sovereignty concerns in a variety of forms have hampered the development of such mechanisms. The end of the Cold War has to some extent accelerated movement towards the establishment of effective oversight of national compliance with international norms. One of the most remarkable developments in this direction is the establishment of an International Criminal Court,[98] which has gone from utopian dream to pending reality within ten years. Although the ICC will not be a visiting mechanism as such, and although as a court it will operate within a different framework from such mechanisms, it nonetheless shares an ability to examine the national situation (including through on-site investigations) and to expose shortcomings to international scrutiny. As a result, the negotiation of the Rome Statute presented many of the same issues that arise in drafting the constituent instrument of any visiting mechanism.

During the negotiation of the founding instrument of any international mechanism that will exercise review, oversight, or visiting functions with respect to national authorities or national law, sovereignty concerns frequently take the form of questions as to national law's application with respect to the international mechanism. Such concerns arise even among States that are well disposed towards the negotiation of the instrument, and do not necessarily represent obstructionism or bad faith. The following review of the Rome Statute, although brief and to a certain extent superficial, nevertheless shows that legitimate concerns relating to national law can be expressly addressed in a founding instrument in a manner that does not jeopardise the ultimate ability of the mechanism to fulfil its purpose. A balanced approach to national law can lead to great support for the instrument and can thereby increase its impact.

There is no need to outline here the workings of the proposed International Criminal Court. The reader in search of greater detail will not have difficulty finding it.[99] Suffice to say that the Rome Statute was adopted after the long, complex and often contentious negotiations of 160 nations on 17 July 1998. It will enter into force, and the Court will be established, once 60 nations have ratified it. The ICC will initially be able to try genocide, crimes against humanity and war crimes, when the crime alleged was committed on the territory or by a national of a State Party. Crucially, however, the principle of "complementarity" dictates that the Court will only exercise its potential jurisdiction when the relevant national authorities are either unwilling or unable to do so themselves. Once the Court does take jurisdiction, the co-operation of its States Parties will be essential to its ability to investigate and prosecute effectively.

During the negotiations before and during the Rome conference the question arose whether the Statute should provide a blanket obligation to co-operate or whether States Parties would decide themselves whether and when to co-operate. This debate had obvious consequences for the future effectiveness of the Court. The question as to the role of national law was one of the fronts along which this battle was fought.[100]

The Draft Statute that provided the Diplomatic Conference with the starting point for its negotiations[101] provided various grounds of exclusion to the proposed duty to co-operate within its bracketed (undecided) text. These included grounds of national law that would allow a State Party to "deny a request for assistance, in whole or in part … if … the authorities of the requested State would

be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State" (Art. 90(2) (Option 2(b))). This provision by itself had the potential to provide States with a means of legislating their way out of any duty to co-operate.

The broad exclusion proposed in the Draft Statute was deleted during the Diplomatic Conference when a cluster of articles pertaining to Part 9 (International Co-operation and Judicial Assistance) was agreed upon instead. These begin with a general duty to "co-operate fully with the Court" in accordance with the Statute (Art. 86). Parties to the Statute are also required to "ensure that there are procedures available under their national law for all of the forms of co-operation" specified in Part 9 (Art. 88). The latter part divides co-operation into (a) the duty to arrest and surrender, and (b) the duty to provide "other forms of co-operation" (relating primarily to documents, physical evidence, testimony, etc.). Article 89 (Surrender of persons to the Court) states that Parties "shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender". Article 93 provides much the same with regard to "Other forms of co-operation", obliging States Parties to comply with requests for the enumerated forms of assistance "in accordance with the provisions of this Part and under procedures of national law". In the case of Article 93, an exception is provided in that the Court is required to consult with a requested State and modify a request as necessary in order to accommodate "an existing fundamental legal principle of general application" that would prohibit the fulfilment of a request (Art. 93(3)). No such exception is provided in the case of arrest and surrender (which can therefore not be refused on grounds e.g. that the law prohibits the surrender of nationals). Article 93(3) is, along with Article 72 (Protection of National Security Information), the only remnant of the grounds for refusal contained in the Draft Statute at the beginning of the Diplomatic Conference. Each of these is subject to a duty to consult in good faith with the Court in order to find an acceptable means of meeting both national concerns and the needs of the Court. Article 97 puts States Parties under a further, general duty to consult with the Court wherever problems are identified that may impede or prevent the execution of a request (such as insufficient information or conflicting treaty obligations).

The experience of the Rome Diplomatic Conference can be summarised in a way that highlights its relevance for the negotiation of the proposed Optional Protocol to the Convention against Torture and for other such instruments. The Rome Statute sets a series of benchmarks as to the kind and degree of co-operation required of its Parties. At the same time, it vests in the Court the power to decide whether adequate co-operation has been forthcoming, and requires good faith and creative problem-solving on the part of Member States. The Statute assumes consistency between national law and its own requirements. It allows consultation and flexibility as to modalities and manner, but not generally on whether and what co-operation is given.

The result is that a conflict with national law will not in itself suffice to allow non-co-operation with the ICC. The exception lies in the two clearly delineated exceptions provided by Articles 72 and 93(3), but even these are subject to good faith requirements and the exhaustion of all reasonable forms of co-operation. The Statute assumes good faith and a basic will to co-operate in allowing the international mechanism to fulfil its purpose. With an independent power to determine non-co-operation, the Court can sanction non-compliance through a referral to the Assembly of States Parties.

The experience of the Rome Statute demonstrates that where blanket exclusions are avoided, where the power of the international body to make its own determinations of (non-) compliance is not restricted, and where the principle of good faith interaction is effectively embedded within a founding instrument, express national law accommodations need not be feared as such.

98 Rome Statute of the International Criminal Court (17 July 1998), UN Doc. A/Conf.183/9, as corrected ("Rome Statute" and "ICC"), available in M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational, 1998) at 39.

99 See Roy Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999); Otto Triffterer, ed., *The Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos, 1999).

100 For a helpful overview of the Rome Conference debates around co-operation issues, see Phakiso Mochochoko, "International Cooperation and Judicial Assistance" in Lee, n.3 above, at 305.

101 UN Doc. A/Conf.183/2/Add.2 (1998), available in Bassiouni, n.2 above, at 119.

3 The International Committee of the Red Cross (ICRC) and national implementation of international humanitarian law treaty obligations

By Ms Maria Teresa Dutli, Head of Advisory Service on IHL (International Humanitarian Law), International Committee of the Red Cross (ICRC), Geneva, Switzerland

I am going to speak about the way the International Committee of the Red Cross (ICRC) deals with the national implementation of international humanitarian law treaty obligations. It consists mainly in assisting the national authorities to draft national laws to implement treaty obligations at the international level.

This is a new activity for the ICRC. We started to work more in depth with this issue three years ago through the establishment of an advisory service for international humanitarian law. Our work consists in raising the awareness of national authorities on the need to implement treaty obligations at the national level, and in giving legal/technical assistance in drafting these national laws to be in accordance with international obligations.

We focus particularly on legislative/administrative measures adopted at the international level:

- Repression of war crimes – this is the most important issue to ensure the respect of international humanitarian law, for if there is no adequate national penal legislation aimed against violations, it would be difficult to get the law respected. It also includes the repression of torture committed in international and non-international armed conflicts.
- Protection of the Red Cross/Red Crescent emblem in order to protect the assistance given to victims;
- Definitions and guarantees of the status of protected persons to ensure the fundamental guarantees of humane treatment and due process;
- Dissemination of international humanitarian law at the national level.

In order to achieve these objectives, we use different methods, one of them being the development of expertise. We have expertise in international humanitarian law, but not in the national systems. We have convened meeting of experts at the national level to learn what legislation needs to be adopted in each national system.

We have convened two meetings for the repression of war crimes, one for the civil law countries in 1997 and one for the common law countries in 1998. Following these meetings we drafted guidelines on how to introduce these international obligations at the national level.

The question of the repression of war crimes is the most important, and with the creation of the International Criminal Court, the sensibilities of government authorities have increased on this particular issue.

Introducing this at the national level is a very sensitive question because we should not only introduce the definition of war crimes, but also the principle of universal jurisdiction. There are different opinions on the obligation to try war criminals, on the basis of a permissive or of an obligatory universal jurisdiction. These different views have been adopted on the international level as well as in the various national legislations.

The meeting of experts convened in Geneva at ICRC headquarters was followed by regional meetings in order to mobilise and sensibilise the legal advisers, prosecutors, judges and other authorities of ministries of justice in the different regions of the world. We organised such a meeting in

Madrid for Spanish-speaking countries this year, and there are two others planned, one in Colombia and one in Abidjan (Ivory Coast). The aim is to present what has been discussed here and discuss it with international experts at the regional level.

We also provide specific legal advice in drafting legislation. We focus mainly on the drafting of legislation, taking into account the legal tradition of the country concerned, but we do not get involved into trying individual cases. We limit our activities to technical advice.

All this is accompanied by ICRC training activities, legal education, training for lawyers, authorities, and members of international humanitarian law committees – there are about 50 committees of international humanitarian law in the world which are active in the implementation at the national level of IHL.

In tackling the question of the role of domestic legislation, we have never approached the problem of the visits by the ICRC to detention centres. As you know, the ICRC has a right to visit prisoners of war and civilian detainees in international armed conflicts on the basis of international humanitarian law treaties. We do not have a right to visit detention centres in non-international armed conflicts, so that these visits are done on the basis of agreements with the national authorities.

It has happened in certain cases that visits have been denied on the basis of domestic legislation. This was not because the government authorities denied the entry of the ICRC into the country, but because the judiciary raised objections based on its domestic legislation, maintaining, for example, that detainees have only the right to see their defence lawyer.

We have discussed internally the question of trying, through domestic legislation, to avoid this kind of problem. It was finally decided that since there is no international obligation on this right of ICRC visits in non-international armed conflicts, and that the entry of the ICRC depends on the authorisation of the government authorities, even if domestic legislation is changed, it would still be difficult in practice if there is no political will to allow visiting.

We think that having access in situations which are not formally binding for non-international armed conflicts will continued to depend on the political will of the authorities. Since there is nothing established in humanitarian law treaties on the right of the ICRC to make visits in these situations, we are not working on national legislation on this issue at this time.

4 Additional paper: The national legislation project under the Convention on International Trade in Endangered Species

By Dr Rosalind Reeve, Researcher for the Foundation for International Environmental Law and Development (FIELD), c/o United Nations Environment Programme (UNEP), Nairobi, Kenya

The national legislation project was initiated in 1992 in the belief that many Parties had not enacted adequate legislation to implement the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Conference Resolution establishing the project[102] directed the Secretariat to identify Parties whose legislation did not enable them to:

i) designate at least one Management Authority and one Scientific Authority;
ii) prohibit trade in specimens in violation of the Convention;
iii penalise such trade; or
iv) confiscate specimens illegally traded or possessed;

and to report to the Executive CITES Standing Committee and the ninth meeting of the Conference of the Parties (COP9).

The project has been divided into three phases. IUCN's Environmental Law Centre and TRAFFIC USA[103], which work closely with the CITES Secretariat, analysed national legislation from 81 Parties and territories in Phase I, dividing it into three categories:

1) legislation believed generally to meet the requirements for CITES implementation;
2) legislation believed generally not to meet all the requirements; and
3) legislation believed generally not to meet the requirements.[104]

Only 15 Parties met the requirements, while 27 fell in to category 3 and the remainder in to category 2.[105]

Decisions concerning measures to be taken with respect to Parties falling in to categories 2 and 3, drafted by the Secretariat, were approved largely unamended at COP9. Decision 6 stated that category 3 Parties "should" introduce (submit to the legislature) implementing legislation by COP10 and report to the Secretariat before the meeting.[106] With respect to Parties that had not taken positive steps to implement this recommendation, Decision 7 stated that COP10 "shall consider appropriate measures, which may include restrictions on the commercial trade in specimens of CITES-listed species to or from such Parties".[107] Decision 8 stated that category 2 Parties "should" take steps to improve their legislation in indicated areas of weakness and report to the Secretariat before COP10.[108] Phase II of the project – the analysis of legislation in a further 44 Parties – was initiated after COP9,[109] and Parties were invited by the Secretariat to send requests for technical assistance in developing legislation.[110]

By COP10, while a number of Phase I Parties in categories 2 or 3 had enacted new legislation and been re-categorised, the majority had not. At the suggestion of the Standing Committee, the Secretariat indicated seven Parties falling into category 3 also having a significant level of wildlife trade – Egypt, Guyana, Indonesia, Malaysia – Sabah, Nicaragua, Senegal and Zaire.[111] Another series of Decisions were approved. In Decision 10.18, concerning the seven targeted Parties, the COP approved that "all Parties should, from 9 June 1998, refuse any import from, and export and re-export to, these countries of CITES specimens, if so advised by the Standing Committee".[112] The Secretariat was directed to report to the Standing Committee on progress in the seven Parties by 9 June.[113] In Decision 10.19, it was stated that other Phase I Parties in categories 2 and 3 "should" ensure imple-

menting legislation was "in effect" by COP11 and report to the Secretariat before the meeting.[114] With respect to those Parties that do not take positive steps to implement this, "the Conference of the Parties at its 11th meeting shall consider appropriate measures, which may include restrictions on the commercial trade in specimens of CITES-listed species to or from such Parties".[115]

Of the 44 Phase II Parties, 20 fell into category 3 and 15 into category 2.[116] Decisions on measures similar to those taken at COP9 were approved at COP10.[117] The Secretariat was instructed to begin Phase III – the analysis of legislation in remaining Parties – and to provide technical assistance to those Parties requesting it, giving priority to Phase I Parties still in category 3.[118]

By June 1998, five of the seven targeted Phase I Parties remained in category 3.[119] A postal vote on whether trade should be suspended was inconclusive, so the matter was referred to the 41st Standing Committee meeting in February 1999 where the first measures were approved under the project in response to non-compliance. Measures differed according to the circumstances of the Parties.[120] Since Indonesia had provided the Secretariat with copies of recent legislation, it was removed from the list, along with Nicaragua and Malaysia-Sabah. Egypt and Senegal made strong representations in an attempt to avert trade restrictions, and succeeded in buying some time to comply. Guyana and the Democratic Republic of Congo (formerly Zaire) did not attend.

The strongest measures were recommended for Egypt and Guyana – that trade in CITES specimens be suspended from 30 September 1999 unless in the meantime the Secretariat verified that adequate legislation had been enacted. The grace period was approved despite Secretariat advice that COP10 Decisions allowed the Standing Committee little discretion. It was agreed to defer a suspension of trade in CITES specimens with Senegal until 30 September, with an opportunity to reassess the situation at the 42nd Standing Committee meeting. The softer measure recognised potentially adequate draft legislation handed by Senegal to the Secretariat at the meeting. Egypt, however, had clearly made little progress, while Guyana had still not enacted draft legislation for which it had received considerable technical assistance from the Secretariat prior to 1997. The state of war in the Democratic Republic of Congo led to deferral of a decision until the Standing Committee meeting prior to COP11 in 2000, when there is a chance that the Congo may be represented.

The Secretariat reported to the 42nd Standing Committee meeting in September 1999 that, following high level consultations with the Secretary General and assistance from a Secretariat mission, Egypt had managed to enact implementing legislation in time.[121] Furthermore, Egypt attended the meeting as an observer, tabling a document detailing its new legislation and announcing the establishment of an Egyptian CITES Standing Committee and the holding of future workshops.[122] Senegal and Guyana, however, had failed to notify the Secretariat as to whether draft legislation had been passed. The Standing Committee therefore noted that the recommendation to suspend trade in CITES specimens would be in effect as of 30 September 1999.[123]

Currently in Phase III of the project, the Secretariat is continually reviewing up-dated legislation and re-categorising it as necessary, as well as reviewing legislation of new Parties.[124] Recognising, however, that indefinite continual review of new legislation is impractical, the Secretariat has proposed evolving towards a legal capacity building strategy in Phase IV. Through regional models of law developed by regional workshops, the strategy would aim to achieve harmonisation of laws and procedures implementing CITES. Responsibility for developing national laws would rest not with consultants, but with national experts who would receive training and technical assistance from the Secretariat.[125] While the proposal has been endorsed by the Standing Committee, it was made clear that the "stick and carrot" mechanism to deal with persistent non-compliers that are also significant traders should continue.[126]

The national legislation project is unique among MEAs. It has revealed that about 75% of Parties reviewed did not have the full range of national legislative and administrative measures needed to implement all aspects of CITES.[127] Responding to the combination of "stick and carrot", Parties have slowly improved their implementing legislation. After 7 years, the project is poised to move into a capacity building phase, while for the first time in CITES history trade restrictions have been recommended for inadequate legislation. At COP11, the Secretariat intends to report more category 3 Parties that engage in significant trade, which could become subject to trade restrictions before COP12.

102 CITES Resolution Conf. 8.4 'National Laws for Implementation of the Convention' in *CITES Resolutions*, p. 33, available from the CITES Secretariat.
103 IUCN is the International Union for the Conservation of Nature, while TRAFFIC stands for Trade Records Analysis of Flora and Fauna in Commerce. Both IUCN and TRAFFIC are non-governmental organisations.
104 CITES Secretariat (1997) Doc. 10.31 (Rev.) 'National Laws for Implementation of the Convention', prepared for the 10th meeting of the Conference of the Parties 9-20 June 1997.
105 CITES Secretariat (1994) Doc. 9.24 (Rev.) 'National Laws for Implementation of the Convention' in *Proceedings of the Ninth Meeting of the Conference of the Parties,* 7-18 November 1994 (CITES Secretariat), p. 575.
106 Decision 6 Directed to the Parties 'Regarding Implementation of Resolution Conf. 8.4' in *Proceedings of the Ninth Meeting of the Conference of the Parties,* 7-18 November 1994 (CITES Secretariat), p. 123.
107 Decision 7 Directed to the Parties 'Regarding implementation of Resolution Conf. 8.4' in *Proceedings of the Ninth Meeting of the Conference of the Parties,* 7-18 November 1994 (CITES Secretariat), p. 123.
108 Decision 8 Directed to the Parties 'Regarding implementation of Resolution Conf. 8.4' in *Proceedings of the Ninth Meeting of the Conference of the Parties,* 7-18 November 1994 (CITES Secretariat), p. 123.
109 CITES Secretariat (1995) Notification to the Parties No. 846 'Analyses of National Legislation for Implementation of the Convention: Second Phase of the Project', 18 April 1995.
110 CITES Secretariat (1995) Notification to the Parties No. 845 'National Legislation for Implementation of the Convention', 18 April 1995.
111 CITES Secretariat (1997) Doc. 10.31 (Rev.) 'National Laws for Implementation of the Convention', prepared for the 10th meeting of the Conference of the Parties, 9-20 June 1997.
112 Decision 10.18 Directed to the Parties 'Regarding Implementation of Resolution Conf. 8.4 – Parties whose legislation was analysed during Phase I' in *CITES Decisions: Decisions of the Conference of the Parties to CITES that remain in effect after the 10th meeting* (hereinafter *'CITES Decisions'*), p. 5.
113 Decision 10.115 Directed to the Secretariat 'Regarding implementation of Resolution Conf. 8.4' in *CITES Decisions*, p. 20.
114 Decision 10.19 Directed to the Parties 'Regarding Implementation of Resolution Conf. 8.4 – Parties whose legislation was analysed during Phase I' in *CITES Decisions*, p. 5.
115 Decision 10.20 Directed to the Parties 'Regarding Implementation of Resolution Conf. 8.4 – Parties whose legislation was analysed during Phase I' in *CITES Decisions*, p. 5.
116 CITES Secretariat (1997) Doc. 10.31 (Rev.) 'National Laws for Implementation of the Convention', prepared for the 10th meeting of the Conference of the Parties 9-20 June 1997.
117 Decision 20.21 states that Phase II category 3 Parties should introduce (submit to the legislature) implementing legislation by COP11, and report to the Secretariat before the meeting. With respect to those that have not taken positive steps to implement this, COP11 *"shall consider appropriate measures, which may include restrictions on the commercial trade in specimens of CITES-listed species to or from such Parties"* (Decision 10.22). Decision 10.23 states that category 2 Parties should take steps to improve their implementing legislation in areas of weakness and report to the Secretariat before COP11. Decisions Directed to the Parties 'Regarding Implementation of Resolution Conf. 8.4 – Parties whose legislation was analysed during Phase II' in *CITES Decisions*, p. 5-6.
118 Decision 10.115 Directed to the Secretariat 'Regarding implementation of Resolution Conf. 8.4' in *CITES Decisions*, p. 20.
119 Nicaragua and Malaysia-Sabah had adopted new legislation and the Secretariat considered that they could be removed from the list; CITES Secretariat (1998) 'Implementation of Decision 10.18', circulated to the Standing Committee by the Chairman, 19 June 1998.
120 Comments in the following paragraphs on the measures agreed for the Democratic Republic of Congo, Egypt, Guyana and Senegal at the 41st Standing Committee meeting are taken from the author's notes (the author attended as an observer for Zambia). For the text of the agreed measures, see Notification to the Parties No. 1999/18 'Executive Summary of decisions taken at the 41st meeting of the Standing Committee', 12 March 1999 (CITES Secretariat).
121 CITES Secretariat (1999) Doc. SC.42.12.2 'Implementation of Decisions 10.18 and 10.64' prepared for the 42nd meeting of the Standing Committee, 28 September – 1 October 1999. See CITES website **http://www.wcmc.org.uk/CITES**. Up-date on Egypt from Hepworth, R., Chairman CITES Standing Committee (1999), pers. comm and Vasquez, J., CITES Secretariat (1999), pers. comm.
122 R Hepworth, Chairman CITES Standing Committee (1999) pers. comm.
123 R Hepworth, Chairman CITES Standing Committee (1999) pers. comm.
124 CITES Secretariat (1997) Doc. 10.31 (Rev.) 'National Laws for Implementation of the Convention', prepared for the 10th meeting of the Conference of the Parties 9-20 June 1997.
125 CITES Secretariat (1999) Doc. SC.42.12.1 'National Legislation Project: Progress and Future Development' prepared for the 42nd meeting of the Standing Committee, 28 September – 1 October 1999. See CITES website (**http://www.wcmc.org.uk/CITES**).
126 R Hepworth, Chairman CITES Standing Committee (1999) pers. comm.
127 CITES Secretariat (1999) Doc. SC.42.12.1 'National Legislation Project: Progress and Future Development' prepared for the 42nd meeting of the Standing Committee, 28 September – 1 October 1999. See CITES website (**http://www.wcmc.org.uk/CITES**).

WORKSHOP ON NON-COMPLIANCE

1 Non-compliance: What are the responses? View of a disarmament expert

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There are two basic categories of means to ensure compliance: those which are in treaties and those outside them.

The first category includes:

- Verification.
- The right of withdrawal from an agreement in case of non-compliance.
- Review mechanisms.
- Consultative bodies.
- Implementation organisations with compliance enforcement functions, including sanctions.

The second category:

- The UN Security Council.
- The UN General Assembly.
- Pressure (economic, political, military) upon a violator by groups of States and individual States, as well as negotiations, when appropriate.

1.1 Verification

Effective verification is an important deterrent to violations of an agreement. Any detection of a breach of an arms control agreement implies that as a result of such detection a violator would be under certain political pressure. The more evident and better proven the breach, the stronger is the pressure. Cheating is a very serious international "offence" and States are understandably extremely hesitant to be taxed with it. Verification also has a confidence building effect, which generates an international belief in the viability of the arms control measures and contributes to their compliance. Weak verification usually produces mutual suspicions and mistrust.

There were always suspicions about compliance under the Biological Weapons Convention (BWC), particularly after the anthrax accident in Sverdlovsk in 1979. In 1992 the Russian authorities admitted that a breach of the BWC had been committed. However, suspicions remain that Russia has not stopped its BW programme. The ineffectiveness and weakness of the Convention's verification system make it impossible either to confirm or to deny these suspicions.

The Partial Test Ban Treaty (1963) does not provide for any verification measures. It just implies that each Party could use its own national means of verification. This resulted in numerous mutual accusations of violations of the Treaty by the USSR and the US. Political motives caused by the Cold War could clearly be seen behind these accusations. However, in some cases it was a linguistic discrepancy between English and Russian versions of the Treaty which facilitated such accusations: for the case of underground explosions, the former prohibits nuclear explosions which cause "radioactive **debris**" to be present outside the territorial limits of the State under whose jurisdiction or control such explosions are conducted, while the latter uses a word which if correctly translated into English means, "radioactive **fallout**", and this includes, besides debris, some other radioactive materials as well.

Some arms control agreements, concluded during the Cold War, suffer from lack of adequate verification. It is important, therefore, to develop their verification systems.

A positive example in this respect is the development of the International Atomic Energy Agency (IAEA) safeguards, which have already passed through several stages in their adjustment to new realities and requirements.

With help from American and other intelligence data, the IAEA discovered that for many years Iraq had been building and operating a very large, clandestine nuclear weapon programme – a programme that the IAEA's Non-Proliferation Treaty safeguards had entirely failed to detect. The routine application of 1971 IAEA safeguards was not equipped to detect the use of these clandestine plants which did not depend on foreign supplies of nuclear fuel and did not involve any safeguarded nuclear material. When it was discovered, new elements were introduced into the activities of the IAEA: the right of the Agency (i) to make a special inspection anywhere in the inspected country but not only at declared facilities; (ii) to receive intelligence information; (iii) to have the full support of the Security Council if the State concerned frustrated its safeguards.

These requirements were soon put to the test in 1992-93, when the Agency discovered that North Korea had not disclosed all the plutonium it had produced in one of its two research reactors. The IAEA demanded a special inspection, North Korea refused, and the IAEA declared North Korea in violation of its safeguard agreement and reported this violation to the Security Council.

A further important step was made by the IAEA in 1997 when the Agency adopted the Strengthened Safeguards System, which took full account of its experience in Iraq and North Korea, as well as in South Africa, where the IAEA verified the termination of the South African nuclear weapons programme.

1.2 The right of withdrawal

All arms control agreement recognise the right of each State Party to withdraw, if it decides that extraordinary events, related to the subject of the agreement, jeopardise its supreme interests. Non-compliance with a treaty by another Party/other Parties to the treaty might be interpreted as jeopardy to supreme interests. Some arms control treaties (the Treaty on Conventional Forces in Europe, the South Pacific Nuclear Free Zone Treaty) directly provide for the right of withdrawal in case of a violation of a respective treaty.

Withdrawals might be regarded as the last resort. They could lead to a situation when discontinuing a treaty stops its implementation. Probably, this explains why there have been no precedents of this measure in the field of arms control so far.

However, there are precedents of warning in advance of possible withdrawal if certain conditions appear. In 1991 the USSR stated that it would withdraw from START, if the US withdrew from or perpetrated material breaches of the ABM Treaty. The Russian President, in his message presenting of START II to the Duma, made a similar statement.

1.3 Review mechanism

The Treaty on Non-Proliferation of Nuclear Weapons (NPT) provides for regular (each 5 years) Review Conferences. In 1995 the NPT Extension and Review Conference decided to strengthen this review process with a view to ensuring that "the purposes of the Preamble and the provisions of the Treaty are being realised." Regular Preparatory Committee meetings during the three last years before a Review Conference are supposed to be a forum to stimulate the implementation of all the purposes and provisions of the Treaty.

Other arms control treaties also provide for Review Conferences, though their review mechanisms are not as strong as that of the NPT.

1.4 Consultative bodies

Treaties with limited participation (2-5 Parties) usually provide for joint consultative commissions. They are:

- Standing Consultative Commission (ABM Treaty, Art. XIII).
- Special Verification Commission (INF Treaty, Art. XIII).
- Joint Compliance and Inspection Commission (START, Art. XV).
- Bilateral Implementation Commission (START II, Art. V).

The major function of these joint commissions is to resolve questions relating to compliance with the obligations assumed. They are much less open to the public than review conferences provided for by multilateral international agreements. However, these commissions might be used as a strong tool of political pressure.

The Treaty on Conventional Forces in Europe provides for a similar body – the Joint Consultative Group (CFE, Art. XVI).

In the 1980s, the US unleashed a wide political campaign against the construction of a phased-array radar by the Soviet Union near Krasnoyarsk. It was regarded by the US as a violation by the USSR of the ABM Treaty, because it was constructed at a location inside the national territory, but not along the periphery, as the Treaty requires. This issue was discussed at numerous Standing Consultative Commission meetings; the US President and other American officials of various levels raised this point in public statements. It was a broad and very noisy campaign. As a result, the Soviet Union was forced to destroy the station.

The USSR had reciprocated with accusations that the US had constructed large phased-array radars at Thule, Greenland, and near Fylingdales, England, contrary to the ABM Treaty. This point was dropped after the USSR admitted that the Krasnoyarsk radar was a violation.

In 1999 Russia raised some points of non-compliance with START I by the US which were considered at JCIC meetings. Some leakage was made to the mass media. But Russia did not make it too public and tried to solve the issues in confidential consultations.

1.5 Compliance enforcement organisations

The Chemical Weapons Convention (CWC) and the Comprehensive Nuclear-Test-Ban Treaty (CTBT), which were signed respectively in 1993 and 1996, i.e. after the end of the Cold War, provide

for much stronger measures on compliance than the earlier agreements do. They contain articles on measures to ensure compliance, including sanctions. Under both agreements special organisations were established to ensure the implementation of their provisions: the Organisation for the Prohibition of Chemical Weapons and the Comprehensive Nuclear-Test-Ban Treaty Organisation.

These organisations might:

(a) provide a forum for consultation and co-operation among States Parties;
(b) decide to restrict or suspend a State Party violating CWC or CTBT from the exercise of its rights and privileges under a respective agreement (participation in decision-making and fact-finding – under both CWC and CTBT; receiving assistance for its economic and technological development as well as assistance and protection against chemical weapons – under CWC);
(c) recommend "collective measures which are in conformity with international law" to States Parties;
(d) bring the issue, including relative information and conclusions, to the attention of the United Nations.

In the case of the NPT, compliance enforcement can be exercised through the International Atomic Energy Agency (IAEA), which concludes safeguards agreements with States Parties to the NPT. The IAEA itself can impose certain restrictions on its members (it may curtail or suspend assistance, suspend membership) or it can bring the case of any apparent violation to the attention of the UN Security Council. The first such case happened in 1993, when a violation of the safeguard agreement by North Korea was referred to the Council.

Decision-making procedures in implementation organisations are rather complicated (usually they require consensus or, at least, a 2/3 majority). Enforcement measures include the possibility "to restrict or suspend rights and privileges" and to appeal to the UN Security Council. The latter shows that inside tools are not sufficient.

Thus, arms control agreements provide for very limited tools for the enforcement of compliance. They are mainly of a consultative nature. Therefore, more effective possibilities to ensure compliance must be found outside the treaty.

1.6 Role of the UN Security Council and General Assembly

The UN Security Council remains the only body which has basic authority to consider matters pertaining to compliance enforcement of arms control and disarmament agreements. This authority derives from the fundamental functions and powers conferred on the Security Council in the Charter of the United Nations. Some arms control agreements provide that violations can or must be referred to the Security Council. As far as other arms control agreements are concerned, cases of non-compliance with them might be referred to the UN by any UN Member State as a threat to international security under the UN Charter. However, they do not specify what actions the Council should take. The Council itself must decide on the appropriate action in each specific case in accordance with its primary responsibility for the maintenance of international peace and security.

The veto power of the five permanent members, which often creates problems for taking decisions by the Council, might also be an obstacle to taking decisions on enforcement measures in cases of non-compliance. There are attempts to eliminate this veto power. However, it is highly unlikely that such a reform could raise the efficiency of the Security Council's decisions, because disagreement of any Permanent Member(s) would make compliance with such a decision very problematic.

Decision-making on the basis of veto power is, of course, a complicated process, and it requires a lot of negotiating effort. However, when a decision is taken, it is much more effective than one adopted by simple voting. The UNSCOM, which was created by UN Security Council res. No 687 (1991) with the task of eliminating Iraq's chemical and biological weapons and missiles, functioned with a certain success (in December 1998 it stopped its activities after the accusation was made that some of its members abused their positions for intelligence purposes).

The UN General Assembly also has the right to consider and take decisions in case of non-compliance. It requires a 2/3 majority, just as for recommendations on peace and security matters, which is not easy to obtain. Such recommendations are not binding.

1.7 Reaction to non-compliance outside the UN

Any arms control treaty is part of a texture of inter-State relations, which cannot be ignored by potential violators. All compliance enforcement measures provided for by treaties appeal in the long run to the reaction of the States concerned. Political, economic and financial pressure upon violators are the most feasible and effective means of compliance enforcement.

There were attempts to use military force as well to prevent proliferation of weapons of mass destruction. In 1981, Israel bombarded a large French-supplied research reactor in Iraq. The Israelis suspected that the Iraqi government intended to use the reactor to produce plutonium for a nuclear weapons programme. The destruction of the reactor apparently persuaded the Iraqi authorities to abandon the plutonium route to the bomb and to try other routes, namely the clandestine use of various enrichment technologies. These routes did not depend on foreign supplies of nuclear fuel and did not involve any safeguarded nuclear material.

In 1993 the US proclaimed the Defence Counterproliferation Initiative, at the heart of which is a drive to develop new military capabilities, to deal with the non-proliferation threat. It provides, in particular, for the possibility of using military force. As the case of the Israeli bombardment of the Iraqi reactor in 1981 shows, the use of military force might be counterproductive, not to mention the illegitimacy of such measures if they are undertaken without a UN mandate.

More productive are methods which combine political and economic pressure with meeting some legitimate concerns of a State in question. When in 1993 North Korea suspended its participation in NPT, besides a strong pressure upon the North Korean government the US started negotiations with North Korea and concluded an agreement under which North Korea stopped its nuclear weapons programme, agreed to dismantle its elements, including plutonium producing reactors, and resumed its participation in the NPT. In return, North Korea received two light-water reactors (they cannot produce plutonium) and, as compensation for the period of their construction, 500 000 tons of oil annually (Japan and South Korea participated financially in the deal).

1.8 Conclusions

The experience of the implementation of arms control and disarmament shows that:

- Compliance is a matter of a primarily political nature. Though some arms control agreements provide for measures for solving non-compliance issues, key factors of compliance are outside agreements. They lie in inter-State relations, which cannot be ignored by any State. Further involvement of all States in the system of international political and economic relations, and the growth of interdependence of States in this system are the most effec-

tive way of improving compliance with treaties. This does not mean, of course, that treaties should not contain provisions aimed at strengthening compliance with them. On the contrary, in parallel with this process, more effective procedures of compliance in treaties should be negotiated.

- Verification should be effective enough to assure that possible accusations are well founded. In this case a violator would be under a stronger pressure.
- The language and provisions of an agreement should be as precise and clear as possible to exclude different interpretations.
- Unilateral use of force, without appropriate decisions of the UN Security Council, which is the only international body universally recognised as responsible for peace and security, could have negative implications both for the compliance under an agreement and for the international political climate.
- The best result might be achieved by a combination of political and economic pressure with measures which could serve the interests of a violator ("stick and carrot" approach).
- Methods of compliance enforcement (sanctions, etc.) should be elaborated in the course of negotiations on an agreement and included in the text of the agreement or fixed in some other international document.
- It is important to distinguish between different types of non-compliance. There might be (i) slight procedural deviations, (ii) unilateral interpretations of some actions as violations, which might be based on different interpretations of an agreement; (iii) non-compliance with main provisions of an agreement ("material breaches", as the Soviet statement on the ABM Treaty says). Reaction to non-compliance should be adequate to each specific case.

2 Inability to enforce compliance with arms control agreements renders verification purposeless

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Verification has a confidence-building function. By providing evidence that the Parties are fulfilling their obligations and by confirming that the prohibited activities are not taking place, verification helps to generate an international belief in the viability of arms control measures and to instil trust in participating States that their national interests are protected. Nevertheless, even governments which were well-intentioned at the time of signing an arms control agreement may, at a later stage, change their mind and prove unable to resist temptations to engage in outlawed activities. A government determined to derive significant advantages from non-compliance may take the risk that its felony would be detected.

Once a breach has been definitely established, it is up to the cheated Party or Parties to react. Their responses may range from deliberately overlooking certain occurrences for overriding political or security reasons (for example, the unwillingness to reveal the source of information) to abrogating the treaty, followed by some punitive action. Between these extremes there exists a possibility of using diplomacy to effect a change in the behaviour of the guilty party. Thus, violations may lead some States to recall their ambassadors, reduce the staff of their embassies and even sever diplomatic relations with the violator. In addition, international organisations may pass condemnatory resolutions. However, all these steps may not suffice to make the violating State rectify its behaviour.

If a competent body makes a finding that a State has violated an arms control agreement, the UN Security Council may, if so requested, consider the matter. This possibility is provided for in a number of agreements. The Council is not authorised by the UN Charter to take action against violators of arms control obligations, but if it finds that the situation brought about by the violation could lead to international friction it may, under Chapter VI of the Charter, recommend to the State or States concerned "appropriate procedures or methods of adjustment". The Council may also decide that a specific violation, or a certain type of violation, constitutes a "threat to the peace". For example, in 1992, the President of the Council stated, on behalf of its members, that proliferation of weapons of mass destruction would constitute such a threat. The Council could then, under Chapter VII of the UN Charter, call on all UN members (not only Parties to the violated agreement) to apply sanctions, economic or even military, against the violator. In practice, however, it is hard to gain approval for such drastic measures from the Security Council members not directly concerned. Even with the requisite two-thirds majority, the Council may prove unable to act if one of its permanent members decides to use its statutory right of veto to defend its own interests, or those of its allies, to the detriment of other States. The relevant provisions of the UN Charter can, therefore, and quite often actually did, turn out to be ineffective. It is true that Iraq, which had committed a breach of the 1968 Non-Proliferation Treaty (NPT), was forced under the 1991 Security Council Resolution 687 to dismantle or destroy the key elements of its nuclear weapons development programme. However, these sanctions were imposed chiefly because Iraq had committed aggression against Kuwait in violation of the UN Charter. The incapability of another international organisation – the International Atomic Energy Agency (IAEA) – to enforce compliance has been illustrated by the case of North Korea, which was able to refuse international inspection of suspect facilities without provoking immediate and effective sanctions.

The 1993 Chemical Weapons Convention (CWC) and the 1996 Comprehensive Test Ban Treaty (CTBT) provide for collective action "in conformity with international law", if a Party engages in ac-

tivities which can cause damage to the objects and purposes of these agreements. However, the majority needed to set in motion a collective action against a violator would not be easy to achieve. Moreover, the nature of the envisaged measures is not specified.

In bilateral relations, the threat of abrogation is the primary means of enforcing a treaty, for it may deprive the violating nation of the advantages it has gained from entering it. In multilateral relations, however, abrogation of a treaty in response to a violation would in most cases be self-defeating; it could lead to the unraveling of the treaty to the disadvantage of the complying Parties.

For the reasons explained above, collective enforcement measures against a culprit State should be applied automatically, without the need for an international decision being taken in each individual case. Such measures must be agreed in advance, and in devising them, a distinction should be made between different types of violation. For violations can vary from inaccurate or incomplete reporting to non-observance of procedural clauses, to offences resulting from misunderstanding or misinterpretation of the terms of the treaty, up to obstruction of the control system and material breaches of bans on possessing or using certain weapons, on deploying armed forces and armaments in certain areas, or on engaging in dangerous military activities. Further differentiation is necessary between intentional and unintentional breaches. The latter – usually easier to remedy – may result from sheer negligence. Some breaches may be reversible; others may not be.

The most appropriate approach would be to make agreed responses to possible violations part and parcel of the complex of obligations contracted by the Parties, with the exception of the use of force which may be decided solely by the UN Security Council. The responses, different for different treaties, but proportionate to the offences, could be listed in the text of the treaty or in an accompanying protocol. They would have to be graduated from mild to severe, so as to increase pressure on the violator over time and eventually compel it to mend its ways.

The very existence of a list of envisaged responses would fulfil the function of deterrence, whereas a government refusing to take action against a violator and abstaining thereby from upholding the validity of an arms control agreement, to which it is Party, would expose itself to both international censure and domestic criticism. It appears essential that a principle be established that no country, militarily strong or weak, economically rich or poor, should be immune from deserved penalties.

3 Non-compliance and human rights treaties

By Mr Ben Kioko, Chief of Legal Affairs, Organisation of African Unity (OAU), Addis Ababa, Ethiopia

3.1 Introduction

Mechanisms for non-compliance in the human rights field are not as elaborate as those available in other areas such as arms control. The human rights, treaties generally set out standards and obligate States Parties to give recognition to "the rights, duties and freedoms" enshrined in the treaty and "to undertake to adopt legislative or other measures and to give effect to them"[128] In addition, human rights treaties generally require States Parties to submit, within specified periods, "a report on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter".[129]

The reports submitted by States Parties are examined by treaty bodies. The reports are intended to provide a picture of the status of implementation of the provisions of the treaties. Some of the treaty bodies allow submissions and oral testimonies from non-governmental organisations. This has been found to be quite helpful in providing the other side of the coin. These bodies have no enforcement mechanisms and normally make non-binding recommendations, unless the UN Security Council ultimately takes up the matter.

Most of the human rights treaty bodies have used the mechanisms of fact-finding missions and Special Rapporteurs. For example, the African Commission has used all the aforementioned mechanisms as well as visits by individual Commissioners to States they are assigned to cover. The missions result in recommendations to the Commission. All the missions are made with the consent of the States concerned. The Charter does not stipulate any sanctions for non-compliance with the human rights standards set out in the Charter or with the recommendations made by the Commissioners. However, the Commission, in its consideration of State reports, invariably uses information gathered during promotional and protective activities and fact-finding missions. The information gathered includes the input of NGOS. The Commission could also take into account such information in formulating its findings and recommendations to the Assembly. Unfortunately, the findings are confidential and cannot be published before approval by the Assembly. Some of the recommendations made have been implemented by the countries concerned, for example those made to Mali by the Special Rapporteur on Prison Conditions in Africa, working closely with Penal Reform International. Experience shows that all the findings or recommendations the Commission makes to the Assembly are approved without debate. However, there is not enough follow-up, except during examination of the State reports. Thus, the mechanism for dealing with non-compliance, although both preventive as well as curative, is very weak.

3.2 Human Rights Courts

Some jurisdictions have human rights courts. This is the case, for example, with the European Court of Human Rights, which has been merged with the commission into a single institution. The Inter-American human rights system retains both the Court and the Commission. In Africa, a protocol establishing an African Court on Human and Peoples' Rights was adopted in June 1998, with the clear intention that the Commission and the Court would complement each other. The African Court is intended to fill the void arising from the absence of enforcement mechanisms. It is expected to play an important role in ensuring compliance, since its jurisdiction extends not just to the Charter and the Protocol, but also to other relevant human rights instruments ratified by the States concerned. The Protocol provides that the Court may make appropriate orders to remedy violations, including pay-

ment of fair compensation or reparation. Furthermore, in cases of extreme urgency, and when necessary to avoid irreparable harm to persons, the Court may adopt provisional measures. The Court may entitle NGOs with observer status before the Commission, and individuals to institute cases directly before it, provided the State concerned has made a declaration accepting the competence of the Court to deal with such cases. Out of the two States that have ratified the Protocol, one has made the declaration.

Unlike those on human rights, the regional treaties adopted by African countries dealing with the environment and arms control provide for verification and inspection mechanisms. This is the case with the Bamako Convention on Harzadous Waste, wherein the Secretariat is empowered to undertake verification missions. Furthermore, no reservations may be made to the treaty. Similarly, the African Nuclear Weapons-Free-Zone Treaty (Treaty of Pelindaba) establishes a mechanism for compliance, and obligates States Parties to conclude a safeguards agreement with the IAEA.

3.3 Conclusion

In conclusion, there are no sanctions for non-compliance envisaged or provided for under the African human rights treaty regime. It may be that the lead given by the Council of Europe is worth emulating, wherein states cannot be admitted as members of the Council unless they have ratified specified conventions. As is the case elsewhere, the visits and missions referred to above are undertaken on the basis of soft law. The elaborate system of visits provided for in the European Convention against Torture is not to be found in any of the OAU human rights treaties. Indeed, there is no regional convention against torture, although a proposal to elaborate a protocol to the African Charter against torture has been put forward. Thus, as far as visiting and verification mechanisms are concerned, the field of human rights is the poor cousin to arms control and the environment. It seems that in matters affecting individual rights, States tend to lack the same level of political will that they evince towards arms control. Furthermore, the threat of reciprocity that has been used effectively in other areas would simply not work in human rights.

128 The African Charter on Human and Peoples' Rights was adopted in 1981 and entered into force in 1986. The charter stipulates that "all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel or inhuman or degrading punishment and treatment shall be prohibited". Although not providing specifically for visiting mechanisms at a level equivalent to the International Convention or the European Convention against Torture, it does set up a Commission with a mandate, *inter alia, t*o "collect documents, undertake studies and researches" and ensure the protection of human and peoples' rights. The Commission may also undertake, with the consent of the Assembly of Heads of State and Government (The Assembly), an 'in-depth study of these cases and make a factual report". Thus, whatever may be comparable to visiting mechanisms under other treaty regimes is to be found in the practice rather than the substantive provisions.

129 Article 62, The African Charter on Human and Peoples' Rights.

4 Mechanisms to address non-compliance under multilateral environmental agreements

By Professor Greg Rose, Associate Professor, University of Wollongong,
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Mechanisms to address non-compliance under multilateral environmental agreements (MEAs) have been adopted in the last decade. They remain controversial and, as environmental management issues become increasingly complex, some governments now seem less enthusiastic to expose their non-performance to international scrutiny. Nevertheless, the increasing need to ensure the effectiveness of MEAs suggests the further, inevitable development of strengthened non-compliance mechanisms.

4.1 Conceptual framework

International non-compliance can be defined as the non-performance of one or more specific commitments under a treaty. Non-compliance may occur where a Party fails to perform its commitments, irrespective of whether it has enacted appropriate domestic statutes, adopted domestic policies or exercised its best endeavours. Relevant commitments necessarily include specific substantive and procedural obligations.

A non-compliance mechanism is a sub-system of rules among a broader regime of international environmental norms. To enable a non-compliance mechanism to operate, it is essential that it be based upon a broader regime which encompasses rules capable of being performed (primary norms) as well as data gathering and feedback procedures which detail the quality of that performance (compliance information systems).

4.2 Compliance information systems

The availability of information is essential to identify a baseline from which performance begins and thereafter to measure progress at regular intervals in accordance with commitments. This paper focuses on the informational basis for operation of a non-compliance mechanism.

Most MEAs establish a body with responsibility for advising the Parties on scientific and technical (S&T) matters relevant to the effectiveness of the MEA. That body will assemble S&T information describing the causes of the relevant environmental problem, the current situation, progress in resolving it and further remedial measures which need to be taken. Most information is derived from semi-independent national sources, such as research institutes, and is shared through a co-ordinating focal point, such as the elected chair of the MEA S&T body. For example, under the Montreal Protocol, findings on ozone depleting chemical replacements technologies are studied through Technical Advisory Panels.

Although they may establish the baselines that assist in the evaluation of performance, MEA S&T bodies do not themselves monitor the performance of Parties. It will often be necessary to draw together a combination of several sources of information to create a reliable compliance information package. MEAs have formulated various such packages.

Compliance information collection

Annual national reports

Information concerning the performance by a Party of its central commitments over time is obtained primarily through annual reports submitted by the Party itself, such as under the Basel Convention. These are sometimes late, anodyne and not transparent. Under the Montreal Protocol non-compliance procedure, a Party can notify that it is in non-compliance, independent of submission of its national annual report.

Annual report independent verifications

Annual national reports are not usually verified by other Parties or by the treaty secretariat. The FCCC regime is exceptional, as Parties' annual inventories of greenhouse gas emissions and sinks are subjected to desk review annually by the secretariat. They are further verified through secretariat in-country visits undertaken periodically to consult with Parties concerning national communications. There may be scope in the future for requiring the auditing of some MEA national annual reports – which could be undertaken by private firms or independent governmental authorities.

Self-monitoring of operations

Particular operations may be subject to specially verified performance information requirements. This is so where the operations' consequences are sensitive to other Parties and there is little trust, as in international fishing activities. In the case of fishing within the CCAMLR area, for example, each Party is to ensure that vessels under its flag keep catch logbooks.

Foreign surveillance of operations

Foreign inspectors may be permitted to examine fishing vessels' logbooks, equipment and catch. CCAMLR requires Parties to allow their fishing vessels to be inspected at sea by persons designated by other Parties and listed on a register of inspectors. It also facilitates foreign observations by requiring the use of prescribed vessel markings and vessel-based satellite transponders. (Vessel transponders allow real time data transfer and rapid collation.) The La Jolla Agreement requires that each fishing vessel carry an accredited observer and make a financial contribution to its observer programme. In the case of the International Convention for the Regulation of Whaling, foreign inspectors were placed upon a flag State's whaling vessel on a reciprocal basis. In relation to vessel sources of marine pollution, the UN Convention on the Law of the Sea provides that Parties must allow their vessels to be inspected by coastal States where those vessels are suspected of having polluted coastal waters.

Transnational co-ordination of information

International networks of port authorities have been established in European, Latin American, Caribbean, Asia-Pacific, Indian Ocean, Mediterranean and West African waters to strategically inspect the safety and pollution control systems of vessels entering their ports. Information on vessels which are not compliant with international safety and pollution standards is shared throughout the network and suspect vessels are targeted for continuing inspections. In the South Pacific, a register of vessels fishing in the region has been established and information on breaches of coastal fishing laws is shared among Parties (so that non-compliant vessels can be black-listed from fishing throughout the region). CCAMLR Parties are also currently considering the establishment of a regional fishing register.

International direct collection of information

Collection of information directly by international organisations may occur in the form of collation of data within or sharing of data between MEA secretariats. For example, under the Montreal Protocol, on the basis of data it has assembled, the secretariat can notify that a Party is non-compliant. Although harmonisation of data formats may pose a challenge, there is potential for information exchange arrangements between secretariats to further disclose non-compliance. Inter-secretariat MoUs entailing modest information exchange arrangements have been adopted between the secretariat of the Convention on Biological Diversity and the secretariats of the Bonn Convention on Migratory Species and the Cartagena Protocol on Specially Protected Areas (Caribbean).

Access to satellite-sourced imagery and a wide range of statistical databases also offers increasing opportunities for international organisations to engage directly in collection of compliance information. Desk reviews conducted by the FCCC secretariat may require independent information sources, for example. It is notable also that the OECD secretariat undertakes in-country visits to collect information for environmental performance reviews as part of its programme to strengthen member country environmental management capacity.

NGOs play a growing role in international information collection. For example, TRAFFIC provides reports to CITES parties, which are tabled as formal; CITES documents on illegal trade in endangered species. A similar but less formal role is played by NGOs, which publicise breaches of some MEAs.

International market surveillance

Market-based measures require that goods be certified as produced in accordance with norms set in place under the relevant MEA. As the product of some ecologically unsustainable economic activity regulated by MEAs enters the international market place, market monitoring is emerging as a useful method to identify non-compliance. CITES institutes certification processes, which require that the scientific authorities responsible in each of the States of export and of import of a specimen of an endangered species certify that the specimen is to be traded in accordance with CITES criteria. Both certifications must be issued prior to export; all non-certified trade is prohibited and customs officers are to monitor goods movements.

Surveillance at sea to ensure that fisheries are harvested in accordance with MEA conservation requirements is expensive and difficult. Therefore fisheries regimes are also currently adopting certification procedures for legally harvested fish products. This requires a chain of authentication based upon a statistical documentation programme. Comparisons are made between documents accompanying the fish product, data in records of fish catch landed in port and data reported in vessel logbooks and by on-board observers. Certification of bluefin tuna and yellowfin tuna is currently required under the International Convention for the Conservation of Atlantic Tunas and the La Jolla Agreement respectively. Certification of bluefin tuna, is also being considered under the Convention for the Conservation of Southern Bluefin Tuna and CCAMLR is likely to approve certification for Patagonian toothfish.

4.3 Compliance information evaluation

Centralised evaluation of non-compliance information is the task of Parties in consultation with the defaulting Party within a subordinate institution established for that purpose within the MEA regime. For example, an Implementation Committee is established under the Montreal Protocol,

comprised of 10 Parties which meet approximately twice a year to consider non-compliance information. The La Jolla Agreement requires that the compliance performance of each fishing vessel be reviewed by an international panel which meets three times a year and which includes relevant experts, representatives of parties and of environmental interest groups. Approaches to compliance evaluation are currently being negotiated under the Basel Convention and FCCC.

4.4 Non-compliance response

After non-compliance has been established, an institutional response is necessary. Where certification procedures apply, market access is automatically blocked for illegally produced goods. Under the Montreal Protocol, the Implementation Committee can recommend that Parties provide assistance to, issue cautions to or suspend the rights (including rights to trade in regulated substances) of a non-compliant Party. The usual responses are to urge better compliance or to recommend assistance. The non-compliance mechanism being negotiated under the FCCC Kyoto Protocol may entail responses including some suspension of rights.

Mechanisms which promote performance of commitments are conceptually distinguishable from *post hoc* mechanisms, which apply after the default on commitments has been established. The former strengthen compliance, while the latter respond to non-compliance. However, they are interrelated in effect, as the threat of a reliable *post hoc* penalty might also prevent future non-compliance. Similarly, assistance serves both to strengthen compliance and to respond to non-compliance.

Finally, after a response has been made to identify non-compliance, all compliance experience should feed back into the MEA to enable the Parties to make design improvements in its primary norms, and in its non-compliance response mechanism.

4.5 Conclusion

Non-compliance mechanisms in MEAs utilise a wide range of performance information sources. Trends appear to be towards collating data from several sources through a central secretariat. Information on non-compliance is then submitted to a subsidiary organ of the MEA, which is comprised of selected Parties, which deliberate on a response. This trend in MEA non-compliance information gathering seems appropriate, as a cross-balanced package of sources is likely to be more robust than a single one in reviewing the complex socio-economic behaviours that cause environmental problems.

5 Additional paper: Verification, monitoring, and prevention mechanisms under the ozone protection regime

By Mr Gilbert Bankobeza, Legal Officer, Ozone Secretariat (OS), Nairobi, Kenya

5.1 Introduction

The Montreal Protocol on Substances that Deplete the Ozone Layer addresses the issues of prevention, verification, and monitoring compliance in various ways. The overall purpose of the Protocol is to phase-out ozone-depleting substance emissions which endanger human health and the environment. Articles 2 and 5 of the Protocol specify the schedule for gradual reduction of both production and consumption until final phase-out of all ozone-depleting substances by each Party to the Montreal Protocol.

Implementation of the phase-out schedule of each ozone-depleting substance by each Party is monitored by the Secretariat through analysis of data reports on production, import, and export of each ozone-depleting substance submitted by each Party to the Ozone Secretariat, in accordance with Article 7 of the Protocol.

The information reported to the Ozone Secretariat is analysed in order to determine compliance with the provisions of the Montreal Protocol. Although there is no verification mechanism of the data and information reported to the Secretariat, the data are checked by the Secretariat for consistency and Parties asked for clarifications as necessary.

Article 8 of the Protocol provides for Parties to approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Protocol and for treatment of Parties found to be in non-compliance. The Protocol's non-compliance procedure that was adopted on an *interim* basis in 1990, developed permanently in 1992 and reviewed in 1998, does not contain any verification mechanism to monitor compliance.

5.2 The non-compliance procedure of the Montreal Protocol

The non-compliance procedure of the Montreal Protocol may be invoked in any of the following situations: (a) if one or more Parties have reservations regarding any other Party's implementation of its obligations under the Protocol; (b) where the Secretariat becomes aware of possible non-compliance by any Party with its obligations under the Protocol; and (c) where a Party states that, despite having made its best, *bona fide* efforts, it is unable to comply fully with its obligations under the Protocol. Issues of non-compliance arising in any of these situations have to be referred to the Implementation Committee for its consideration.

How the Implementation Committee operates

The Implementation Committee consists of 10 Parties elected by the Meeting of the Parties for two years, based on equitable geographical distribution. Its role is to consider the non-compliance or failure on the part of Parties to implement the obligations under the Montreal Protocol by receiving, considering and reporting on any submission in situations pointed out in paragraph 4. The Implementation Committee makes appropriate recommendations to the Meeting of the Parties to the Protocol which adopts final decisions on issues of non-compliance.

Measures that might be taken by Parties to bring compliance:

The non-compliance procedure contains an indicative list of measures that might be taken by a Meeting of the Parties in situations of non-compliance. These measures include:

a. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training;
b. Issuing cautions;
c. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalisation, production, consumption, trade, transfer of technology, financial mechanisms and institutional arrangements.

Other mandates of the Implementation Committee include: (i) requesting, where it considers necessary, further information on matters under its consideration; (ii) identification of the facts and possible causes relating to individual cases of non-compliance and making recommendations to the Meeting of the Parties; and (iii) undertaking, upon the invitation of the Party concerned, information-gathering on the territory of that Party for fulfilling the functions of the Committee.

5.3 Verification and monitoring in Practice

Both the Montreal Protocol and the non-compliance procedure rely on the data provided by the Parties under Article 7 and do not provide a mechanism for verification of the data unless authorised by a Party. Even if the Implementation Committee concludes that there should be information-gathering on the territory of the Party or Parties concerned, this can only happen at the concerned Party's invitation. The non-compliance procedure does not provide instances or situations which may compel either the Implementation Committee or any Party to carry out on-site visits on the territories of Parties which are the subject of the Committee's consideration.

In the case of the Montreal Protocol, the issue of verification, monitoring, and preventing the continued production and consumption of ozone-depleting substances may be categorised as short-term because of the specific dates set in the Protocol by which the controlled substances have to be phased out. Also, because of other mechanisms built into the Protocol, like prevention of trade with non-Parties in ozone-depleting substances, the Parties to the Montreal Protocol are able to limit non-compliance by monitoring and preventing illegal trade in ODS within the framework of the non-compliance procedure without necessarily carrying out on-site verification visits to countries. They know well that even those instances of non-compliance are short-lived because of the shrinking market for ozone-depleting substances and products made of those substances and the extensive promotion of ozone-friendly products and technologies which are increasingly becoming cheaper. The financial mechanisms established under the Protocol for the purpose of providing financial and technical assistance including the transfer of technologies have also enabled compliance with the Montreal Protocol. The Multilateral Fund and the Global Environment Facility (GEF) have to date provided assistance of about 1 billion US dollars to developing countries and the countries with economies in transition to phase out ODS.

Technical and financial assistance to developing countries and countries with economies in transition to implement the Montreal Protocol is co-ordinated by the implementing agencies (UNEP, UNDP, UNIDO and World Bank). The technical experts of these agencies visit the countries frequently

to prepare projects to introduce alternatives to CFCs and to implement these projects. During these visits, the agencies collect field information which, *inter alia*, is useful for validation of data submitted by the Parties. This, in a way, renders on-site verification visits by the Implementation Committee unnecessary. Since 1992, the Implementation Committee has been inviting the implementing agencies to participate in its meetings for the purpose of providing clarificatory information to the Committee and apprising it on the activities being carried out to enable Parties to comply with the Montreal Protocol. This innovative practice, in addition to the power of the Implementation Committee to invite any Party whose non-compliance with the Protocol may be a subject of deliberation in its meeting to appear before it, has functioned very well.

The lack of field visits by the Implementation Committee may be attributed to its mandate whose overall purpose is to secure an amicable solution of the matters before it on the basis of respect for the provisions of the Protocol. This is also true for the Meeting of the Parties which, after receiving a report by the Committee, may decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol and to further the Protocol's objectives.

5.4 General observation

The thrust of the non-compliance procedure was intended to be conciliatory and non-confrontational and to provide an amicable solution to problems of non-compliance with the Protocol. It is not a substitute for the provisions of Article 11 of the Vienna Convention for the Protection of the Ozone Layer on settlement of disputes, which the Parties may still apply if any issues are not resolved amicably under the non-compliance procedure. And thus far, it has indeed functioned very well to provide an amicable solution to compliance problems in respect of a global environmental issue.

WORKSHOP ON EXPERIENCES FROM THE FIELD

1 Experiences from the field from a human rights perpectives

By Mr Leon Wessels, National Commissioner, South African
Human Rights Commission (SAHRC), Johannesburg, South Africa

1.1 Introduction

The objective is to prevent human rights violations.

My "experiences from the field" are based on informal research visits to some countries in Southern Africa, enquiring into states of emergency in those counties, as well as experiences in South Africa before and after the constitutional negotiations.

1.2 Planning and preparation

Mandate

It is important to understand one's brief. The powers that a delegation has must be properly defined. The lack of any powers and the risks that go with it must be considered.

Legal framework

It is useful to understand the legal framework of the country to be visited. This will not only ensure a better understanding of the situation but may also be used to the advantage of the visit and the victims of human rights violations.

Political dynamics in a country

A picture of the political landscape and fields of operation of the various NGOs will help to avoid some unnecessary pitfalls.

Logistics

What logistics are available? Are there any alternative options available should the expected arrangements not live up to expectations?

Establish independence

The independence of the visit should be established during the planning phase and not be compromised. It will be impossible to undo a wrong decision taken during this stage of the inquiry because the opportunity to listen to all sides and to observe objectively may be fatally damaged.

Objective

What are the detailed objectives of the visit? Develop a checklist.

Hang-time

Normally every minute of a visit is planned and no provision is made for opportunities to deal with the unexpected eventualities – additional information, an informal discussion or an opportunity for a surprise visit here or there. [MBA – Managing By Walking Around]

1.3 The visit

In a repressive State the priority is to document and monitor the violations as they occur and where possible to communicate the violations as they occur and, where possible, communicate the information to people at home and abroad.[130]

- Information is vital; it must be accurate, objective and clear
- BECAUSE IT IS VITAL, IT IS SOMETIMES DANGEROUS TO POSSESS IT. WITNESSES ARE OFTEN SCARED, AND EVERYONE IS VULNERABLE
- Information is useless unless it is communicated

1.4 States of emergency

"According to a narrow interpretation of the international instruments for the protection and promotion of human rights, international monitoring of their enforcement only applies to times of peace and normality and many governments considered that in times of crisis when national security or the stability of the regime was at stake, the authorities should be unencumbered by any form of domestic or international monitoring and free to any means or instrument to overcome the crisis."[131]

The legal provisions governing states of emergency are briefly considered against the international law standards that have to be adhered to under these circumstances.

1. The principle of exceptionable threat
- International standard

It must be a public emergency that threatens the life of the nation.

2. The principle of proclamation
- International standard

The rationale is to reduce the incidence of *de facto* states of emergency.

3. The principle of notification
- International standard

States Parties must immediately, through the Secretary–General of the United Nations, inform other States of the derogations it has made, including the reasons therefor and the date by which the derogations must be terminated. On this basis other States have a legal standing to object, or to raise concern.

4. The principle of non-derogability
- International law

Certain rights are recognised as not being subject to derogation during national emergencies. These rights are considered to be absolutely fundamental and indispensable to the protection of the human being.

5. The principle of proportionality
- International law

Derogations are permitted only to the extent required by the exigencies of the situation.

6. The principle of non–discrimination
- International Law

The measures taken to deal with the emergency must not discriminate on the grounds of race, colour, sex, language, religion, or social origin. Any difference of treatment in this respect must be justified. It is not entirely clear whether the grounds on which non-discrimination is prohibited in situations of emergency include those of political or other opinion, national origin, property, birth or other status under the International Covenant on Civil and Political Rights (ICCPR).

7. The principle of consistency
- International law

Measures of derogation must not conflict with a State's other obligations under international law, whether these be by treaty or customary international law.

A few disconcerting observations

- The constitutional history of some countries is often poorly documented. There are no up-to-date constitutional textbooks; court judgements are not properly recorded and archived.
- International law can be placed before the courts, but is often not understood or considered.
- The Human Rights Committee under the ICCPR once questioned the independence of the judiciary of a particular country. A lawyer alleged, "I had the feeling that he (a judge) did not listen to me during argument, because he (the judge) wanted to impress somebody elsewhere (somebody in authority)".
- The effective enforcing of international human rights is still a matter of contention.

1.5 Report

The information gathered in the course of monitoring builds up a picture of the human rights situation in the country or region. This information – if accurate – challenges, or supports, the legitimate claim of a government to govern. A critical report places the burden on the government to answer or remedy the situation. A refusal by governments to do anything puts their legitimacy in question.[133]

1.6 Final comments

I recently discovered a very interesting and active "community visiting-system" functioning in Kimberley in South Africa. Advertisements were placed in the local newspapers, inviting people to serve on this "community visitors committee". Thirty people applied, of whom four were appointed. The committee is representative of race and gender and has been appointed for two years. It is invited to visit police cells [places of detention/holding] whenever it wishes, to speak with detainees and to file complaints/reports after such visits.

This practice has contributed to the well being of those persons held in detention as well as the development of a sound relationship between the police and the communities it serves.

The Premier of the Northern Cape Province in South Africa, Mr Manna Dipico, has formed a committee that is unique in South Africa. This is a crime prevention committee chaired by a judge of the High Court, Mr A P Steenkamp. All the relevant government departments such as justice, police services, defence force, correctional services and the welfare departments serve on this committee. This committee formed a section 21 company (this is a company without financial gain). This committee engages in a number of activities: it organises workshops for stakeholders, raises funds for the police service, organises and participates in human rights awareness campaigns, encourage the civil society to assist the police in crime prevention.

During times of crisis, security services are called upon to exercise vast discretionary powers – protecting life and property, maintaining law and order under severe pressure. These powers are often abused at a human rights cost. Human rights awareness and training should therefore take place when everything is peaceful and tranquil. It is impossible to run human rights workshops and seminars for security personnel in the eye of the storm: prevention is better than cure.

I am attracted by the idea of "preventive dialogue" through visits as explained by Dr Malcolm Evans in his briefing paper. This approach ensures that the intention of the **Draft Declaration on Human Rights Defenders**, namely "… that the primary responsibility and duty to promote and protect human rights and fundamental freedoms lie with the State" is kept in focus.

130 English and Stapelton, *The Human Rights Handbook*, Juta & Co, Ltd (1997), p. 84
131 Paper recently delivered by Professor Kamel Filali during a conference in Dakar organised by the ACHPR on "Emergency situations, special courts, military regimes and the right to a fair trial in Africa."
132 English and Stapelton, *op. cit*.

2 Practical experience with visiting mechanisms in international environmental law

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2.1 Introduction

In general, visiting mechanisms in international environmental law have developed within wider systems designed to improve compliance of Parties with their obligations. The necessary elements of such a compliance system have been suggested as:

- monitoring and gathering of information;
- evaluation of the information by a body of experts;
- if necessary, supplementary *ad hoc* procedures, such as inspection, enquiry or fact-finding; and
- compliance-related response and follow-up measures.[133]

Thus, visiting mechanisms are considered one component but are not a central feature of international environmental law.

Given the diversity and multitude of multilateral environmental agreements (MEAs), it is not possible to discuss practical experience in visiting mechanisms with them all. Instead, a few have been chosen from different areas, including the atmosphere, marine biological diversity and wildlife trade. In addition, two case studies from which lessons may be drawn are presented in the areas of wildlife trade and whaling.

2.2 1946 International Convention for the Regulation of Whaling

The ICRW was concluded "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry".[134] To enable the realisation of this objective it established the International Whaling Commission (IWC), which has met annually over 51 years.

Initially there was no international inspection scheme, just national inspectors who could be assigned to a ship for several voyages. In what has been referred to as the "whaling Olympics", States enjoyed a virtual free-for-all. There was extensive non-compliance. National inspectors were believed, and in some cases shown, to be compromised,[135] while whaling nations were suspected of under-reporting, and in the 1960s non-IWC or "pirate" whaling began to appear. Following calls for independent, international inspection of whaling operations, an international observer scheme (IOS) was introduced in 1971. Member States would receive voluntarily observers nominated by other Member States on board factory ships and whaling stations.[136] A bilateral observer "exchange" scheme developed whereby, Japan, for example, received inspectors from Russia, and *vice versa*, while Australia and South Africa exchanged observers.

On paper, the IOS seemed successful in that no serious breaches were reported. In 1995, Russian scientists, releasing previously unobtainable data on Soviet Antarctic whaling, revealed massive under-reporting of whale catches prior to the IOS. During the 1960s, for example,152 blue whales had been reported killed, when in fact 7,207 were taken. The report commented that when international whaling inspectors appeared on board Soviet whaling ships in 1972, a great deal of the "poaching" was halted.[137]

There were, however, several criticisms of the IOS, among them lack of coverage of all whaling operations and the voluntary nature of the scheme. Despite recommendations to increase coverage, many operations remained outside the scheme up until the 1985/86 seasons, when the moratorium on commercial whaling came into effect. NGOs suspected that abuse of the IOS was widespread.

Amendment of the IOS is currently under discussion in the IWC in the context of the Revised Management Scheme (RMS). Earlier this year, Japan presented a draft revision of the inspection and observation scheme to the Working Group on the RMS and pressed for its early finalisation to allow a resumption of commercial whaling.[138]

2.2.1 Case study – The Philippines

In 1983, The Philippines, a member of the IWC, set up what it claimed to be a coastal whaling operation. Since IWC rules did not permit the use of a dual-purpose factory/catcher ship, whales were claimed to be brought ashore for processing at a landing station. Following information from an NGO indicating that the Philippine whaling ship was probably a factory/catcher, the IWC resolved to send an international observer to inspect the landing station. In the event, Japanese inspectors were sent to carry out the inspection.

On the basis of affidavits from former crew members interviewed separately, as well as photographs and documentary evidence, an on-site investigation by an NGO, in which the author participated, determined that the landing station did not exist. Conclusive evidence showed that whaling was being carried out by a factory/catcher and that a group of Japanese nationals was behind the operation.[139] In anticipation of the inspectors' visit, a barge had been towed out to Homonhon Island, Eastern Samar. A whale was killed, then towed for 30 hours to be flensed on the barge, where photographs were taken for the benefit of the inspectors. The whale, the only one to be processed on the barge, was putrid and had to be dumped at sea before they arrived. Apart from the photographs, the inspectors saw only skin remains and blubber left on the barge, yet reported that the operation was within IWC rules.

2.3 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is a conservation and trade instrument, whose objective is ensuring "the international co-operation of Parties to prevent international trade in specimens of wild animals and plants from threatening their survival".[140] It establishes a permit system to control trade in species listed in three Appendices depending on their status.

There are no formal provisions in the Convention for an inspection or visiting mechanism. However, as part of the CITES compliance system, which has evolved over 25 years through practice and resolutions of the Conference of the Parties (COP), the Secretariat conducts "missions" to the territories of Parties.[141] Under this system, the Secretariat initially attempts to work together with Parties experiencing major problems with implementation. A mission may be conducted at this stage to gather information and provide advice to the relevant national authorities. If little is achieved, the Secretariat reports the matter to the executive CITES Standing Committee with recommendations for action. Trade sanctions have been recommended against several non-compliant Parties on the basis of Secretariat advice.[142] Bolivia, Italy and Greece provide case examples where Secretariat missions yielded information on non-compliance, which contributed in part to the eventual recommendation for trade restrictions.

Secretariat country missions also play a role in assessing progress with the implementation of CITES on the territories of Parties subject to trade restrictions for non-compliance, and in assisting national authorities. In the cases of Thailand and Italy, Secretariat "review missions" led to recommendations to lift trade restrictions, which subsequently were approved by the Standing Committee.

Experience under CITES has shown that recommending trade restrictions in cases of serious non-compliance, combined with Secretariat assistance to improve implementation, generally produces a positive response from the targeted Party (see the case study of Italy below). Only once was this not the case. With the United Arab Emirates (UAE), a recommendation that trade sanctions be imposed for non-compliance resulted in their withdrawal from CITES (though they have since re-adhered). A Secretariat mission sent to the UAE as part of an effort to open a dialogue failed. The government declined to meet with the Secretariat staff member.

A unique feature of the CITES compliance system is the active role of NGOs, in particular the TRAFFIC network.[143] TRAFFIC has provided information to the Secretariat on illegal wildlife trade since 1976, giving CITES one of the best operational information sources of any MEA.[144] Information from TRAFFIC about illegal trade in Thailand, combined with information from other sources, eventually led to a recommendation for trade restrictions by the Standing Committee. Similarly, TRAFFIC was instrumental in providing information on illegal trade in Italy, but also assisted the Secretariat and the Italian CITES Management Authorities to enable Italy's eventual compliance.

Another form of "visiting mechanism" under CITES is the organisation of training seminars by the Secretariat on the territories of Parties for the benefit of officials from Customs, CITES Management Authorities, and other wildlife law enforcement agencies. By 1997, 74 seminars had been organised in which over 4,000 people had participated.

Secretariat "verification missions" have also played a role in the recent sale of raw ivory to Japan from three southern African countries – the first such trade since 1989. The Secretariat was charged with verifying through on-site visits that the Parties concerned had complied with conditions imposed by the COP for resumed sales. It was then charged with verifying compliance with conditions for the sale and shipment of the ivory in April this year.

2.3.1 Case study – Italy[145]

In 1991, the Secretariat expressed its concern to the Standing Committee about weaknesses in the implementation of CITES in Italy over a number of years. Despite having sent repeated communications about alleged infractions, it had received no reply. The problems included:

- inadequate legislation;
- lack of inspection at border points; and
- issuing CITES documents without ascertaining the legality of the shipment.

As a result, Italy was being used by wildlife smugglers to gain access to the European Union and obtain legal documents for illegally obtained CITES listed specimens.

The Secretariat had tried to provide technical assistance in the form of a training seminar in Milan for officials from Management Authorities, but no one even attended from the Ministry responsible for issuing import permits. In one notorious case, four chimpanzees, listed on Appendix I and in which all commercial trade is banned, were exported from Italy in view of Customs officials, despite border posts having been informed that the animals should not be allowed to leave the coun-

try. They had been seized (with the help of the Italian office of TRAFFIC) but subsequently released because of the lack of legislation to penalise CITES violations.

In June 1992, two Secretariat members visited Italy to examine the status of CITES implementation. They reported that, while a new law had been adopted which partially implemented CITES, inspection at border posts was still inadequate and irregular permits were still being issued. A new problem was also identified during a visit to the Customs office – original permits were being left with the importer, increasing the chances of fraud.

Following the visit, the Secretariat recommended the suspension of trade in CITES specimens with Italy to the Standing Committee which subsequently approved the measure.[146] It was supported by Italian civil servants who were reported as stating that the government would do nothing without the imposition of trade restrictions.

In November 1992, the Secretariat conducted a "review mission" to Rome, Milan and Pisa and met with all national authorities in charge of implementing CITES – the Ministries of Agriculture, the Environment and External Trade, and Customs. During a high level meeting with the Minister of the Environment they were informed that a new law decree was being submitted, and that sanctions were creating a problem for the Italian economy. The Secretariat confirmed by checking export and re-export certificates from other countries that most Parties, except Switzerland and the US, had implemented the recommended sanctions. Complaints in meetings with reptile skin traders further confirmed that sanctions were having an effect.

Border controls were found to have improved tremendously. Only 12 border posts were allowed to clear CITES specimens. Furthermore, 100 student volunteers had been selected from a police corps (the Corpo Forestale), and specially trained and assigned to the posts. The Secretariat observed inspection procedures developed by Customs officials and new Corpo Forestale officers and described them as "excellent". A meeting with the Italian CITES Scientific Authority, however, confirmed that it was not functioning satisfactorily, and ways to improve it were discussed.

As a result of the mission, the Secretariat wrote to the Minister of the Environment specifying conditions that still had to be met before it could recommend to the Standing Committee a suspension of the recommended trade restrictions. By February 1993, the Secretariat had received responses on all points. It was recommended that sanctions could be suspended. Their complete withdrawal, however, was dependent on approval of the new legislation by Parliament and confirmation by a mission that Italy was implementing the new regulations and procedures correctly. It was emphasised to Italy that suspension was temporary and that a failure to approve the law decree would result in an automatic re-imposition of sanctions. In its report, the Secretariat acknowledged that it had "benefited greatly from the assistance of TRAFFIC Europe – Italy Office".[147]

In February 1994, the Secretariat conducted a training seminar in Italy, which differed markedly from the previous occasion. Not only was it funded by Italy, but it was attended by more than 120 Customs and Corpo Forestale officers.

A third Secretariat mission to review Italy's implementation of CITES was conducted in March 1995. Again the delegates met with senior officials from relevant ministries. On examination, all import and export permits were found to be valid. CITES controls at Naples airport were inspected and a meeting held with reptile skin traders at the Milan leather show. The mission was particularly impressed with the work of the Corpo Forestale, describing it as having reached "a very high standard of achievement, which in our opinion figures among the best in the world".[148] The computer system

was apparently the best ever seen, and the enforcement section had initiated several investigations with "outstanding results".[149]

On the basis of the mission, the Secretariat recommended to the Standing Committee the permanent withdrawal of its recommendation for trade sanctions.

2.4 1987 Montreal Protocol on Substances that Deplete the Ozone Layer

The Montreal Protocol is the only Protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer. Widely perceived as successful, it sets firm targets for the reduction and eventual phase-out of the production and consumption of certain ozone depleting substances (ODS). Under amendments to the Protocol, an innovative non-compliance procedure (NCP) and financial mechanisms, including a Multilateral Fund, were established, both of which have played important roles in the implementation of the Protocol. The provision of financial mechanisms, at the time an innovative step in international environmental law, has been the key to the success of the regime. It provides a large "carrot" to induce compliance, and the unspoken "stick" that funds will be removed if countries do not comply.

The Implementation Committee set up under the NCP to receive and consider information on non-compliance and make recommendations to the Meeting of the Parties (MOP) has the power to "undertake, upon the invitation of the Party concerned, information gathering in the territory of that Party".[150] This provision, however, has never been used, and, in contrast with the CITES Secretariat, the Ozone Secretariat does not conduct missions to verify implementation.[151]

Instead, the "visiting mechanism" under the Montreal Protocol has evolved under the Multilateral Fund (MF) and its implementing agencies – UNEP, UNDP, the World Bank and UNIDO.[152] Through the MF, all the "incremental costs" of Parties operating under Article 5 (which provides for differential obligations for developing countries) are met; i.e. extra costs incurred in the conversion of factories to the use of alternative technology, and the compensation of manufacturers forced to close down their facilities. The MF implementing agencies carry out extensive visits to developing countries under contracts negotiated with Article 5 Parties. The contracts typically provide for inspection. All the major installations using or producing ODS are visited. Consultants are used both to prepare projects and verify that obligations under contract have been met. Thus, the function of visiting as practised under the ozone regime is not so much to detect and follow-up cases of non-compliance, but to ensure that projects to phase out ODS production and use are carried out according to contract.

While the Ozone Secretariat does not work as closely with NGOs as the CITES Secretariat, it has developed a relationship with those that provide information. Information supplied is taken seriously and on the basis of it communications sent out to relevant Parties. To date, however, there has not been enough evidence for the Implementation Committee to proceed on the basis of information originating from NGOs.[153]

2.5 1992 United Nations Framework Convention on Climate Change (UNFCCC) and 1997 Kyoto Protocol

The UNFCCC commits its more than 170 Parties to the "ultimate objective" of stabilisation of atmospheric concentrations of Green House Gases (GHG) at safe levels. Criticised for its lack of legally binding commitments on the reduction of GHG emissions, the 1997 Kyoto Protocol to the UNFCCC, with its targets and timetables and flexible mechanisms to enable Parties to meet their commitments, was adopted to respond to this inadequacy. Together, the two instruments make up the climate change regime.

The only visiting mechanism that has evolved to date under the regime is the conduct of country visits under the in-depth review (IDR) process. Established by a Decision of the first Conference Of the Parties (COP) to the UNFCCC, the process submits to an in-depth review the national communications of Parties in Annex I to the Convention (developed country Parties) by a review team of experts nominated by Parties and international organisations. Experts are not allowed to participate in review teams for their own country's national communication. The reviews, to be undertaken within a year of the receipt of the national communication by the Secretariat, aim at providing a "thorough and comprehensive technical assessment of the implementation of the Convention" by individual Parties.[154]

The IDR process initially provided for country visits as an option, with prior approval of the Party concerned, "if deemed helpful". But, in practice, every IDR of the first national communications included a country visit.[155] Their perceived usefulness led to the CP approving country visits for the IDRs of second national communications from Annex I Parties "as a general rule".[156]

Out of the total 42 IDRs conducted as of September 1999, all but one has involved a country visit. Consisting of between 3 and 6 persons, and co-ordinated by the UNFCCC Secretariat, the teams visit the country's capital for usually 4-5 days near the beginning of the IDR, and meet with relevant government officials, members of the academic and scientific community and business and environmental NGOs. The IDRs to date have lasted from 3 to 17 months, at the end of which a report is produced to a standard format, including, *inter alia*, detailed information on inventories of GHG emissions and removals, policies and measures, projections of emissions, expected impacts of climate change and adaptation measures.

IDRs have provided a sound basis of technical information on which to assess implementation of the UNFCCC by developed country Parties. Their success, and in particular the value of visits, is reflected in a comment by the US that the "[IDR] report could not have been developed in the same comprehensive and thorough manner without the advantage of a country visit. ….our own domestic preparation for the country visit caused us to re-examine many of the underlying materials that were used in the preparation of the [national] communication. In short, the review process, while still only in its formative stages, clearly serves a valuable purpose."[157]

The Kyoto Protocol extends and strengthens the expert review process by additionally requiring teams to review information required under the Protocol and by empowering them to identify potential problems with the fulfilment of commitments. Questions of implementation in the reports shall be listed by the Secretariat for further consideration by the CP.[158] The Protocol further provides for the elaboration of procedures and mechanisms to address non-compliance.[159] The agenda has been set, but no system agreed to date, and therefore no formal provision for a visiting mechanism in connection with non-compliance.

It is likely that visiting mechanisms will also evolve under the procedures being elaborated under the innovative mechanisms for implementing the Kyoto Protocol, such as joint implementation and the Clean Development Mechanism, through the use, for example, of independent certifiers such as accounting firms.

2.6 1995 UN Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks[160]

The Agreement for the Conservation and Management of Straddling and Highly Migratory Fish Stocks is not yet in force, and so no practical experience with regard to visiting or inspection has been acquired, but a brief mention of its inspection provisions is useful because of their potentially far reaching nature.

The Agreement provides minimum substantive standards for the conservation and management of straddling and highly migratory fish stocks, breaking new ground in subjecting access to high seas fisheries to membership by Parties of regional fisheries management regimes. It advances considerably the jurisdictional provisions of the 1982 Law of the Sea Convention, providing a party to both the Agreement and the relevant regional regime with the right to board and inspect any suspicious vessel flying the flag of a Party to the Agreement.[161] If an inspection provides clear evidence that a vessel has engaged in fishing activities contrary to the Agreement's provisions, the flag State can conduct its own investigation or authorise the inspecting State to investigate. If a flag State fails to initiate an investigation, inspecting State officers may remain on board to secure evidence. For serious violations, inspectors can require a vessel to be taken to the nearest port.

In another major jurisdictional advance, the Agreement develops the rights of port States with respect to inspection. Port State control has already proved itself to be an effective method for securing compliance with international standards for commercial shipping. The Straddling Stocks Agreement provides that port States may inspect documents, fishing gear and catches while vessels are voluntarily in their ports or offshore terminals.[162]

2.7 Comments and conclusions

- Visits by consent

It is important to note that, with the exception of the mechanism provided for under the Straddling Stocks Agreement, visits generally take place with the consent of the Party concerned. In the case of CITES and the UAE, a visit without consent failed in its objective since the government refused to meet with the Secretariat.

- The role of "soft" law

"Soft" law has played an important role in the development of compliance systems and associated visiting mechanisms in international environmental law. In both the ozone and climate change regimes, visiting mechanisms have been established by decisions of the MOP and CP respectively. Meanwhile, an actively implemented practice of Secretariat missions has evolved under CITES despite the lack of any formal provision for such practice under the Convention.

- Advantage of working with NGOs

Experience gathered under CITES and the IWC demonstrates the advantage of working with NGOs. Acknowledging that some NGOs have a tendency to exaggerate, in general they are well informed and often in a far better position to gather certain types of information than national officials or international secretariats. Furthermore, as shown by the case study of Italy in which TRAFFIC assisted the Secretariat with improving the implementation of CITES, some NGOs have the potential to play a more active role than simply providing information.

While the ozone and climate change regimes have not developed such a close working relationship with NGOs, their importance is still recognised. The Ozone Secretariat receives and acts on information from NGOs, while country visits by the review teams under the Climate Change Convention always include meetings with relevant environmental and business NGOs.

- Independence of observers

The impartiality and independence of observers is crucial to the success of a visiting mechanism, and as the case study of Italy shows, in the long-run it benefits the Party receiving the visit as well as the objectives of the Convention. Experience under CITES in general demonstrates the advantage to be gained from an active visiting mechanism involving the Secretariat – as long as the Secretariat remains independent in the execution of its duties. In contrast, the case study of the Philippines demonstrates the obvious weakness of relying on nominated observers with an interest in the outcome of the inspection or visit. The review teams under the climate change regime include not only observers nominated by Parties but also representatives from the UNFCCC Secretariat and other international organisations, enhancing the independence and impartiality of the team.

- Effectiveness of trade restrictions

While other MEAs use trade restrictions as a tool to achieve their objectives, notably the Montreal Protocol and the Basel Convention on hazardous waste trade[163], the extent to which they have been used under CITES as a stick to induce compliance is unique among MEAs. With the exception of the UAE, experience under CITES is that recommending sanctions, and in some cases just threatening sanctions, has successfully improved implementation of the Convention in the countries targeted. It has also notably strengthened the Secretariat's hand during subsequent review missions.

- Role of visiting mechanisms in international environmental law

In CITES, *ad hoc* country visits and training seminars have been used increasingly over the years to enhance implementation. Under the climate change regime, visits have evolved from being an optional part of in-depth reviews to taking place as a general rule. Under the Montreal Protocol, extensive visiting is carried out by the implementing agencies of the Multilateral Fund. In the IWC, acceptance of an improved inspection procedure is considered a key part of the Revised Management Scheme. Lastly, the Straddling Stocks Agreement, when it comes into force, will have a far reaching inspection scheme as one of its tools to deal with non-compliance, advancing considerably jurisdictional provisions under current international law.

In conclusion, visiting mechanisms may not be a central feature of international environmental law, but they play an uncontroversial role in several regimes and are an accepted feature of compliance systems. Practical experience demonstrates that implementation of international obligations can be greatly enhanced through their use.

133 K Sachariew (1991) "Promoting Compliance with International Environmental Standards: Reflections on Monitoring and Reporting Mechanisms" *Yearbook of International Environmental Law* 2, p. 31-52.
134 Preamble to the 1946 ICRW.
135 The whaling ship belonging to Aristotle Onassis, *Olympic Challenger*, carried a Panamian flag. A Norwegian investigation of the operation exposed reports by Panamanian inspectors as false. L A Carter (former investigator into non-IWC whaling), pers. comm.
136 Section V of the ICRW Schedule, "Supervision and Control", provides for an international inspection scheme. The Schedule, which establishes detailed regulations and obligations, is part of the ICRW.
137 Soviet Antarctic Whaling Data 1947-1972, Moscow 1995, Centre for Russian Environmental Policy, ISBN 5-88587-013-6.
138 Draft Chairman's Report of the 51st Annual Meeting of the IWC, Section 13.1 "Report of the Working Group on the Revised Management Scheme"; Draft of the Revised Chapter V of the Schedule proposed by the Government of Japan.
139 R Reeve, (1986) *Japanese Whaling in the Philippines*, a report for Greenpeace (UK) Environmental Trust.
140 Organisation for Economic Co-operation and Development report (1997) *Experience with the Use of Trade Measures in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).*
141 The CITES Secretariat role has evolved under a "catch-all" provision in the Convention that the Secretariat shall "perform any other function as may be entrusted to it by the Parties." (Article XII).
142 Parties which have been subject to trade restrictions for serious lack of implementation of CITES include the United Arab Emirates (1985-90), Bolivia (1986-87), Thailand (1991-92), Italy (1992-93) and Greece (1998-99). Bolivia was the only case which was the subject of a COP resolution recommending trade sanctions. The others were dealt with by the Standing Committee acting on Secretariat advice.
143 Trade Records Analysis of Flora and Fauna in Commerce.
144 P H Sand, (1997) "Commodity or Taboo? International Regulation of Trade in Endangered Species", *Green Globe Yearbook 1997*. Sand was the first Secretary-General of CITES.
145 Information compiled for this case study comes from reports of the CITES Secretariat to the Standing Committee.
146 The legal basis for recommending trade sanctions is Article XIV of CITES which enables Parties to impose stricter domestic measures than those provided for in the Convention.
147 Report from the Secretariat to the Standing Committee "Follow-up of Discussions and Decisions on CITES Implementation: Italy", Doc. SC. 29.17, March 1993.
148 Report of the CITES Secretariat to the Standing Committee, "Implementation of CITES in Italy", Doc. SC.35.13, March 1995.
149 See note 17.
150 See the non-compliance procedure as outlined in Decision IV/5 of the Fourth Meeting of the Parties to the Montreal Protocol'; amended by Decision X/10 of the Tenth Meeting of the Parties.
151 M Sama, Executive Secretary, Ozone Secretariat, pers. comm.
152 The acronyms stand for the United Nations Environment Programme, United Nations Development Programme and the United Nations Industrial Development Organisation.
153 M Sama, Executive Secretary, Ozone Secretariat, pers. comm.
154 Decision 2/CP.1, "Review of first communications from the Parties included in Annex I to the Convention". All documents in relation to the climate change regime can be obtained from the Secretariat's website (**http://www.unfccc.de**).
155 Reports of all IDRs can be found at <**http://www.unfccc.de**>.
156 Decsion 6/CP.3, "Communications from Parties included in Annex I to the Convention".
157 "Report on the in-depth review of the national communication of the United States of America", FCCC/IDR.1/USA.
158 Article 8, Kyoto Protocol.
159 Article 18, Kyoto Protocol.
160 The full title is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.
161 Article 21, the Agreement for the Conservation and Management of Straddling and Highly Migratory Fish Stocks.
162 Article 23, the Agreement for the Conservation and Management of Straddling and Highly Migratory Fish Stocks.
163 1989 Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

SUMMARY OF DISCUSSIONS FOLLOWING WORKSHOPS 3 AND 4 ON NON-COMPLIANCE AND EXPERIENCES FROM THE FIELD

The discussions addressed mainly the issue of detail of the agreements and measures to ensure compliance.

In human rights treaties, provisions on the treaty body mainly concern its composition and its general prerogatives. There is little detail on the way it will function in practice.

The example of the CPT is interesting in this respect. The European Convention for the Prevention of Torture does not define any rights which would form the object of the CPT's scrutiny. The Convention is more a framework for the Committee's operation, for the manner in which it will carry out its duty. The Convention has broad provisions: Article 1 states that the Committee shall examine how persons deprived of their liberty are treated; Article 2 states that each State Party will permit visits to such places; and Article 7 states that the Committee shall organise the visits. Article 8 is one of the more detailed articles of the Convention, as it establishes that the State will provide the necessary facilities for the Committee to carry out its tasks: free movement on the territory, full information, full access, and private interviews.

This is done in a very unregulated manner. It is up to the Committee and the national authorities to work out the details. For example, while no advance notice is provided for in the Convention, the practice of the Committee has been to give prior notice: this can be one week, one day, or just a few hours.

The solution or precise response to what may arise in the course of the Committee's operation is to be decided between the Committee and the authorities. One of the main principles established by the European Convention is co-operation; the Convention provides very generally that "the Committee and the national authorities shall co-operate". The requirement of co-operation is also implicitly mentioned in Article 10(2), which provides that the States Parties shall co-operate in the implementation of the Committee's recommendations.

In practice, certain difficulties have arisen for the Committee at the lower level, not necessarily at the higher level. For example, detainees have been removed from police premises to prevent the CPT from interviewing them. The response of the Committee has simply been to pursue them, sometimes travelling many kilometres to another establishment to find the prisoner and obtain information on his/her treatment. On certain occasions, information about particular places of detention has been concealed (sometimes the lists had not been submitted): the CPT placed pressure on the authorities to reveal all the establishments, or discovered such places through interviews with persons deprived of their liberty or through information from NGOs. Normally the Committee finds sufficient information as to the likelihood or credibility of the allegations that have been made (to verify the veracity of allegations and information submitted to it).

Despite the lack of detail in the provisions of the Convention, the difficulties faced by the Committee in practice have been minor, and those encountered have been sorted out without major difficulties (even if this sometimes involves delay in visiting a place, or a specific detainee, or obtaining access to certain information).

Another participant identified the intervention of the CPT representative as one of the challenges presented by Thérèse Delpech: the agreement on high principles, without guidance on practical solutions. However, in the case of the ECPT, it works nonetheless. The reasons for its success can

be varied: either it is this particular Convention, or it is the defined organisation, the Council of Europe, where States have to conform to certain principles of democracy and accountability to join, which explains its success. It was noted that the broad sanctions and political consequences of not belonging to that family are rather great. It is not certain that the model of the ECPT can be transposed at the global level, because there attention to details of access will be greater.

In the environmental treaties, there is generally a provision that the Meeting of States Parties must negotiate the details. This is because, at the time of the negotiations, that is all the States can agree to. These Meetings of States Parties have developed non-compliance procedures, the last negotiations being on the Climate Change Convention. Sometimes the agreement on principles without outlining the way to achieve them may be the realistic way to do things. Environmental law is essentially about framework conventions complemented by protocols. If some States do not want to go too far, at least others can go forward.

These experiences are very different from the disarmament field. In this area, there is a lot of technical detail in the agreements because one is dealing with technical issues. It was also noted that it is the purpose of the visit that makes the difference. Relating to the experience of the negotiations of the CWC, and the question of details, it was remarked that at the First Conference of States Parties, the States Parties were unable to agree on about 160 points that more or less related to the conduct of inspections. Despite these disagreements, the inspections started and were conducted quite successfully. It became apparent that a great number of these points were not relevant on an operational basis, and did not lead to any problems in practice.

In human rights and humanitarian law, the difficulty is not so much a technical one. The difficulty lies in getting access to people to help or save them, or to witness what is going on. On the question and principle of access, the confidence people have in international organisations and the UN differs. In the human rights field, many States do not trust the United Nations and the current system. In many settings, the ICRC has higher confidence and co-operation than the UN would have: this is the other side of keeping absolute confidentiality, and that there is trust based on that confidentiality.

On the issue of non-compliance and measures to ensure compliance, two different means were mentioned: 1) funding, as a means to serve as an incentive for entering an agreement and to ensure compliance; 2) trade-related measures, or trade privileges to achieve the same purpose.

The discussions were mainly based on the experiences in the environmental field. The example of China was given in the context of the Montreal Protocol. Initially, China did not want to participate in the Montreal Protocol. With the creation of the Multilateral Fund under the Protocol, China finally decided to join, and now accepts inspectors under contract on its territory. Therefore funding can provide a good incentive. Funding can be helpful for both compliance and co-operation.

In the field of disarmament, the question of funding is not a new one. Funding is often given to States to help them disarm. Certain problems arise with the question of sharing technology. These measures certainly do represent an incentive to encourage States to participate in a treaty regime.

In addition to the use of funding, an environmental expert presented the method of trade privileges, such as exist under CITES, the Montreal Protocol, and the Kyoto Protocol (Climate Change). In human rights, such measures could be applied to trade in products of child or prison labour. This would amount to making trade in a specific product the object of a privilege. The non-compliance procedures provide for the suspension of these rights in case of non-compliance (Montreal Protocol/Kyoto Protocol).

Trade-related privileges are not new in disarmament. Under the CWC, there is a similar trade-regulated mechanism: the prohibition of trade with non-Parties. There are thresholds in the trade in the chemicals of Schedules 2 and 3. Some States, though, trade under the thresholds that are declarable under the CWC, thus using the loophole that still exists.

Additionally, there is the establishment of codes of conduct linking the arms trade directly with human rights compliance. These codes of conduct are there to ensure that trade in some kinds of weapons does not take place with States that grossly violate human rights.

Part III

General report and future challenges to visiting mechanisms

1 General report

By General Rapporteur: Dr Malcolm Evans, Professor of Public International Law, University of Bristol, Department of Law, Bristol, United Kingdom

1.1 Introduction

The international community now employs visiting mechanisms as an aid to achieving compliance with international obligations in a number of discrete fields of operation. The purpose of this workshop was to explore the practical dimensions of the work of visiting mechanisms operating in the areas of disarmament, human rights, and environmental protection. The aim was to see if there were any themes or issues which were common to their work and whether there were any lessons that could be learnt for the more effective operation of mechanisms in one sphere from the experiences gained in another.

The papers presented in this workshop report form a valuable source information, setting out in detail the background to the establishment of various mechanisms, their *modus operandi*, and, where appropriate, practical experiences. The Rapporteurs of the various workshops have already drawn together the threads of discussion relative to the particular matters addressed. It is not the function of a general report to recapitulate what has already been said elsewhere in an even more summary fashion. Nor is it possible to draw the discussions together in such a way as to produce a "common template" that has some general validity across the spectrum of activity under review. There is no lowest common denominator that has a universal validity. Rather, this report will seek to indicate and comment upon what has emerged as the principal points of contact between the experiences of the various mechanisms. It would be premature and presumptuous to do more at this stage. However, it is clear that there are lessons to be learnt from the experience of others and that there is much to be gained by building on this workshop and exploring further these issues of mutual interest and importance. At the same time, it is evident that there is a consensus around a number of general points concerning the nature and function of visiting mechanisms and their status and role within the international community. This report will seek to highlight the most important of these.

1.2 Establishing the ground rules for dialogue

One problem that has to be noted at the outset concerns the practical difficulty of engaging in such a dialogue at all. Although similar terminology is used, it is understood differently in the various areas under consideration. For example, it is commonplace in the human rights sphere to differentiate "visiting mechanisms" from "reporting mechanisms" (on the basis that the former base themselves on the material found in the course of visits to the country concerned whereas the latter are responding to information submitted to them) and to treat both as distinct from "complaints procedures". Of course, when pressed, it is readily acknowledged that these distinctions are not at all clear cut: for example, visiting mechanisms respond to information received as well as to the information that they themselves collect; fact finding also takes place in the context of complaints procedures, etc. Nevertheless, the general perceptions of the roles – though blurred at the edges – is reflected in their form of classification and this is itself a reflection of the historical and practical development of the mechanisms in question. These, then, are descriptive labels which have a certain relevance within the sphere in which they function, but they do not necessarily equate to the functions of other bodies which are described in a similar fashion but which operate in other spheres, where the factors which have shaped their development are very different. This is clearly illustrated by contrasting the human rights experience with that of the disarmament sphere, where a much more sophisticated schema has evolved, and the environmental sphere, where practice that equates to the operation of "visiting mechanisms" as understood in the human rights field does exist but tends not to be described in this way at all.

There is, then, a need to be clear about what is being spoken of. Indeed, the very term "visiting mechanisms" seems apt to mislead and is too crude a description. Although it will continue to be used as a convenient "catch-all" for the purposes of this report, it is important to note that it would be desirable to differentiate between forms of mechanisms on the basis of the functions they fulfil. The practice in the disarmament sphere is particularly illuminating here. This task of methodological refinement is clearly one which needs addressing. Functions that need to be separated out include:

- Acquiring information
- Verifying information

This then needs to be considered in the light of the purpose for which the information is sought. Possible purposes may include:

- Verifying compliance
- Assisting compliance
- Enforcing compliance

The outcomes may be achieved through a number of means, including

- Technical assistance
- Recommendations
- Collateral confidence building measures
- Dispute settlement

These might be backed by means of

- Quasi-judicial determination
- Judicial determination
- Economic sanctions
- Military sanctions

A further example of relevant sets of factors concerns the nature of the mechanism itself. For example, is it:

- Permanent
- *Ad hoc*
- *Post hoc*

Is it comprised of:

- Politicians
- Governmental representatives
- Independent members
- Independent technical experts

A further important distinction concerns the nature of the decision making process:

Do the members of the visiting team determine the resulting action?

Are the findings of the visiting team subject to scrutiny before a resulting course of action is determined upon? (and what is the nature of that scrutiny?)

It would be possible to continue such lists of questions, but is unprofitable to do so here. The examples given are sufficient to demonstrate that it is facile to seek to compare "visiting mechanisms" as if they were all of an essentially similar nature. They are not. Yet the very range of issues already identified indicates the way forward. Each mechanism should be tailored towards the optimum realisation of the purpose for which it is established, taking account of the particular framework within which it is to function. For example, just because some mechanisms find confidentiality of their findings as essential to the performance of their functions, this does not mean that it is an essential pre-requisite for others. There is a complex matrix of factors which combine to produce the optimum model and this will inevitably vary from case to case and, indeed, from time to time.

It might, then, be thought that there is little point in reflecting further upon the outcome of the workshop since the only lesson to be learnt is that there are no common lessons. This would be an unduly negative conclusion. On the contrary, it is apparent that the experiences of others is of great interest to those operating in other fields, providing examples of how alternative models might work, where balances between competing factors have been struck in quite different fashions. It is ultimately for those who are expert in each of the various spheres to consider how these experiences might usefully be allowed to cross-fertilise with their own needs, and the difficulty – arguably, impossibility – of undertaking that task at a generalised level does not mean that this has been a fruitless exercise. Indeed, it reinforces its practical significance. Moreover, there are a number of general points which have emerged and which concern the general concept of all such mechanisms, rather than particular aspects of their functioning. These will be the subject of the remainder of this report.

1.3 Sovereignty

In the eyes of some, issues of sovereignty go the heart of all matters pertaining to visiting mechanisms. Others see sovereignty as a barrier that needs to be broken and in consequence consider it a mistake to be overly deferential to arguments based on the need to respect it. It can readily be accepted that sovereignty is neither an absolute nor a static principle. However, for current purposes, and for good or ill, it provides the framework within which it is necessary to work, and little is gained by refusing to recognise this. Moreover, such polarised positions are unjustified by the evidence. It is quite true that issues related to sovereignty manifest themselves at all stages in the life cycle of a visit mechanism of whatever form. The remaining sections of this report will all address, in different ways, aspects of what is seen – wrongly, it will be argued – as the tension between sovereignty and visiting mechanisms. There are, however, a number of critical points in that life-cycle at which these arguments seem to assume a particular importance and it is therefore appropriate to address them at the outset. This will make it clear that the tensions are not in fact as significant as is often assumed.

1.3.1 Creation

It is clear that the very creation of mechanisms that have the capacity to conduct visits and engage in various functions within the territorial jurisdiction of a State has a relationship with the exercise of sovereignty. The real question is whether there is a conflict between visiting mechanisms and State sovereignty. The clear evidence flowing from the material presented at this workshop is that there is no such conflict. The very fact the such mechanisms now function in so diverse a range of spheres as disarmament, environmental protection, and human rights indicates the general recognition of the role that they play within the international system. While it would be wrong to say they

are commonplace, it would be equally wrong to claim that they are unorthodox. It seems that it is no longer legitimate to argue that visiting mechanisms by their very nature are an intrusion into and an erosion of the sovereignty of a State. They are merely one of a whole host of potential means of effecting compliance with international obligations, and they are regarded as wholly compatible with the system of sovereignty as recognised by contemporary international law.

1.3.2 *Modus operandi*

Although the fact of establishing visit mechanisms generally gives no legitimate cause for concern on the grounds of State sovereignty, the manner in which such mechanisms carry out their functions can give rise to greater concerns. It is here that problems are most likely to occur, and in consequence it is necessary to pay the most careful attention to ensuring that there is an appropriate balance between the anticipated output or outcome of the body and the means placed at its disposal. Assuming that the projected outcomes are legitimate in terms of international law, if the operational capacities of the visit mechanisms are appropriately tailored to achieve those purposes, and those purposes alone, then this should ensure that, once again, there can be no legitimate objection to the operation of such mechanisms on the grounds that they intrude upon the sovereignty of the State. It is, however, vital that those responsible for constructing the mandate and establishing the *modus operandi* do not seek to exceed those powers which are truly necessary to achieve the legitimate outcomes; otherwise they run the risk of forfeiting their legitimacy and will indeed render the operation of the mechanism subject to legitimate complaint.

1.3.3 Confrontation

Another general theme which emerged in discussion concerned the perception that visit mechanisms were often perceived by States as confrontational. Although in the human rights sphere confrontation is generally presumed to be a barrier to effectiveness, this is not necessarily the case in other spheres. It is interesting to note that visits triggered by particular concerns are sometimes termed "challenge" visits in the disarmament sphere, something that would be unthinkable for human rights mechanisms. Once again, this suggests that thinking in the human rights sphere – by both visiting mechanisms and by States – is still comparatively underdeveloped and overly influenced by outmoded preconceptions of the nature and legitimacy of various models and approaches. Indeed, it may well be that confrontation is the desired outcome in certain circumstances.

That being said, the effective operation of such mechanisms does, by and large, depend on the establishment of a good working relationship between the State and the visiting mechanism and a sense of trust that the legitimate boundaries of action of either side will not be trenched upon. In practical terms, this is often reflected in debates concerning the nature of the consent that may be required in order for a visit to be conducted. For some, particularly in the human rights sphere, the requirement of a generalised consent given in advance – consent *ante hoc* – is an essential pre-requisite for the success of a visiting mechanism. Whether this is in fact true will depend on the precise purpose of the visit and the nature of the obligation in question (considered in the following section). It may not always be the case. What is true, however, is that by giving consent *ante hoc* to the entry of visiting mechanisms States make a valuable contribution to reducing the degree of confrontation that might otherwise result.

It is sometimes claimed that, in order to show proper respect for the sovereignty of States, visit mechanisms should seek the consent of the State in advance of each visit, a form of *ad hoc* consent. In truth, however, visits conducted on the basis of *ad hoc* consent will rarely be seen by the requested State as being entirely non-judgmental. Nor, indeed, are they. In reality, permission to conduct a visit

on this basis will usually be motivated by some suspicion that the State in question is in violation of some relevant obligation and the purpose of such a visit will inevitably be seen by the State – usually correctly – as designed to determine the facts prior to some form of "finding" or "denunciation" of a violation. The result is that the entire process becomes far more confrontational than it need be. The insistence that prior consent be given for each visit, then, actually contributes to the perceived "diminution of sovereignty", since it places the emphasis on the confrontational and accusatory potential of visit mechanisms. This is confirmed by the current practice in the human rights sphere where the very term "*ad hoc* visit" carries this connotation, even when such visits are conducted on the basis of a pre-existing consent given *ante hoc*. (It should be noted, however, that in the disarmament sphere it is the "challenge" visit that carries this implication, the description of a visit as "*ad hoc*" being related to its timing and carrying no such implication).

There would seem to be at least two answers to this conundrum. The first is that visit mechanisms could seek to conduct frequent visits to States even in times when there is no suspicion of any particular form of violation. Under such circumstances, it should be evident that there are no legitimate grounds for refusing consent. In practice, the denial of consent would become limited to special cases. The alternative, indeed, the mirror image, would be for states to agree to *ante hoc* consent, it being acknowledged that such consent might be withdrawn in special cases.

The first approach would probably require large and well funded mechanisms, able to be seen to be conducting a considerable number of visits over a prolonged period of time, if they were to be able to achieve the goal of establishing the desired pattern of activity that would convince the State of its non-confrontational nature. For reasons of economy alone, then, States might find it better to adopt the model of consent *ante hoc*. This is supported by a second prudential concern. As was pointed out in Section 2 of this report, different types of visit may require different sets of structures to achieve their purposes. Visits which are conducted on the basis of an *ad hoc* or *post hoc* consent, in the face of suspicions of violations, are likely to be more intrusive and invested with greater powers than those of a more routine nature. Once again, the State may well conclude that, notwithstanding initial appearances, visits conducted on the basis of a general regime of *ante hoc* consent are both less confrontational and are more compatible with the exercise of sovereignty than those authorised on other bases.

1.4 The nature of the obligations in question

As has already been hinted at, another important strand of thinking concerns the nature of the obligation that the visit mechanism is to concern itself with. This has important consequences in a number of areas important to the functioning of the mechanisms.

1.4.1 The creation of the mechanism

The profile of the issue that the mechanism is intended to address and the prevailing circumstances at the time of its creation are vital factors. For example, if one is dealing with a visiting mechanism created in the aftermath of an international armed conflict and it is intended that it should verify compliance with disarmament provisions in a peace treaty, then it is highly likely that a very intrusive mandate could be constructed and, indeed, applied in practice. The same outcome could not be expected from a negotiated verification regime concluded in more amicable circumstances concerning, say, human rights matters. It is most important that when setting up a mechanism those with the greatest ability to apply pressure to shape the mandate do not press for a more intrusive approach than is necessary to achieve the agreed outcomes relative to the obligation in question. Otherwise, and as already mentioned, the result may be that the mechanism loses legitimacy and is

unable to function properly or, indeed, at all. There is, then, a need for clarity when determining what is to be achieved and how this is to be brought about. There is also a need for restraint and for ensuring that the legitimate boundaries of action in both the construction and operation of mandates are not overreached. Simply because circumstances make it possible to take a particular course of action does not mean that it is a wise course of action to take.

1.4.2 Who is the "violator"?

One reason why the attitudes of States to visit mechanisms vary concerns the nature of their interest in the obligation in question. In general terms, States have a high degree of self interest in disarmament, to ensure that other States abide by the same commitments as they themselves have undertaken. They are, then, more likely to consent to intrusive inspection regimes irrespective of the highly sensitive nature of the installations in question. An exception concerns those States which are being forced to submit to intrusive regimes following military defeat, which have very little self interest in compliance (unless there are collateral incentives). In the human rights sphere, a very different pattern emerges. States have a comparatively low self interest in ensuring compliance with international human rights standards in other States, although they have a certain self interest in ensuring that their own human rights record is at least better than that of (certain) other States. It is for this reason that visit mechanisms aimed at assisting States with their own compliance are likely to hold a greater appeal to States than those which are constructed to determine violations in others. Certainly, States have an extremely low self interest in visit mechanisms which are designed to determine whether the State to be visited is in breach of its own international obligations. This goes some way towards explaining the different dynamic between the disarmament field, with its emphasis on verification and compliance, and the human rights field, with its emphasis upon technical assistance and prevention.

In the environmental sphere, the nature of the State interest is once again very different. The principal actors will often be private or commercial. The burden of intrusion and compliance is, then, less likely to fall on the State which may therefore feel it has little self interest in hindering the operation of visit mechanisms but, as in the disarmament field, consider that it has considerable self interest in ensuring that commitments are met by other States, in order to ensure that it is not placed at an economic disadvantage. There may, therefore, be considerable potential for developing visit mechanisms in the environmental sphere.

1.4.3 The range of possible sources of information

A third matter that flows from the nature of the obligation concerns the potential sources of information. This has an effect upon what is to be expected from a visit mechanism. For example, in both the disarmament sphere and, to a lesser extent, the environmental sphere, a great deal of information can be obtained by remote sensing and related surveillance techniques. In consequence, the role of visiting veers towards verification of facts or situations which are already known or suspected, rather than discovering what the situation actually is. Visits can be targeted and focussed. There are other information sources that can also provide very reliable indica of practices, such as trading and economic data. This is particularly relevant in the environmental field. In the human rights field, the sources of information are likely to be very different. National and international NGOs are likely to be relatively more significant sources of information, but there may be a greater need to verify the accuracy of this material than there is in the case of data gathered from other sources. The quality and objectivity of the information may be more variable and, of course, may be entirely lacking in respect of some countries where there are few NGOs and in an ill-developed civic society. In such circumstances, there may be a greater need to establish visit mechanisms with a mandate structured more towards monitoring than investigating.

One point is clear, however. The need for on-site visits across all the fields is uncontested. The availability and nature of the sources of information can certainly influence the purpose and *modus operandi* of a visit mechanism, but there is widespread consensus that such mechanisms are a vital element in establishing the information and the forms of relationship that are best suited for bringing about compliance with the international obligations in question.

1.4.4 The characterisation of the finding and the response: the output of the mechanism

It goes without saying that obligations created by international law provide the backdrop to all the visit mechanisms under consideration. Nevertheless, it is also true that although these obligations are usually found in legally binding instruments, they are perceived by States in slightly different ways.

Human rights obligations are perceived as being quintessentially judicial. Thus the output of any form of consideration by an international body or mechanism – no matter how it is phrased – is ultimately considered to be in the nature of a "finding" of whether there has been a violation. An evaluation of the worth of a mechanism is, in consequence, usually focussed upon the question of "ensuring compliance" with findings. Measured on such a basis, the record of human rights mechanisms is generally poor. They have few "teeth" and those which they have rarely seem capable of biting. Visit mechanisms are no different from other forms of human rights mechanisms in this regard. Conceptualising the outcomes of human rights processes in judicial terms serves to emphasise the gulf between obligations and compliance.

In the disarmament field, however, the response to a finding of a violation of an international obligation is seen in different terms. The failure to comply is seen as the trigger for a process of engagement with the State in order to encourage compliance. This is usually built around a "carrot and stick" approach, offering incentives and issuing threats of contrasting weight and potentially backed up by the use of military force by the international community in the final instance. One might debate the manner in which these balances are struck, but it is evident that the output of any visiting procedure is not seen or evaluated in judicial or quasi-judicial terms. The criteria for judging "success" or "failure" are very different.

Once again, the environmental sphere appears to straddle these two positions. Findings tend to be seen in a more judgmental light than in the disarmament sphere, but the nature of the reaction is seen to lie through economic and political pressure, rather than in the simple acceptance of the findings as if they were a judicial judgement.

A number of consequences flow from this which negatively impact upon an assessment of the achievements in the human rights sphere. First, outputs of mechanisms, including visit mechanisms, which are not judicial in nature tend nevertheless to be treated as if they are. Secondly, and as an consequence, there is a general – and unrealistic – expectation that a State will simply accept the outcomes of human rights mechanisms. When they do not, this is seen as amounting to a failure. The non-judicial characterisation of outputs in the other fields under consideration means that they do not suffer from this weakness. Rather, their findings are seen as the trigger to a host of other forms of pressure being placed on the State to bring about compliance, via political and economic means. In the human rights sphere, to fall back on political means of achieving compliance tends to be regarded as evidence of the failure of the mechanism. For visit mechanisms in the human rights sphere to achieve their full potential, it may be necessary for this cycle of negative associations to be broken and the fallacy that there is a conflict between judicial and political outcomes to be laid to rest.

1.5 Some areas for further thought

In the course of the workshop, and in the body of this report, a number of quite practical issues were explored and many interesting examples of experiences were shared. Whilst it is evident that many of these will not be easily transposed into other fields, it seems that there are grounds for thinking that there is more scope for innovation and development of existing practices than might previously have been contemplated. This section contains a miscellany of possibilities.

1.5.1 The range of institutional support

Visiting mechanisms need not attempt to undertake all tasks themselves. They are currently used to acquiring information from a variety of sources, but there is scope in increasing the range. For example, the full potential of "open source" data is probably not being utilised as effectively in the human rights sphere as it is in the environmental sphere. In both the disarmament and environmental spheres domestic agencies/NGOs are given formal roles within the verification framework. Again, this is something which might be contemplated within the human rights sphere. The human rights sphere seems to be more adept at extracting information from NGOs but seems less able to utilise it for other more sophisticated and complementary functions.

1.5.2 Confidentiality

Confidentiality is a "key to open the door" to a constructive engagement with a State. It should not become a bar to the practical effectiveness of a mechanism. This means that there must at all times be a clear vision of what a mechanism is setting out to achieve and the role that confidentiality can or must play in bringing this about. It may become necessary to change the expectations regarding both the nature of the outcomes and the degree of confidentiality over time if it becomes apparent that the current balance is not yielding the appropriate results. In short, it is a tool or a method to assist the realisation of objectives, not a principle that has to be respected in the development of such mechanisms as a matter of course. It is also important to bear in mind the impact of confidentiality upon the sources of information. The manner in which this is handled by the various mechanism which currently exist seems to vary in detail and could well be an area in which a more common approach could usefully be developed.

1.5.3 Avoiding over-specificity in operating procedures

It is evident from all that has been said that there is great merit in constructing visiting mechanisms in ways which leave as much scope for flexible development of the *modus operandi* as possible. Since the essence of such mechanisms lies in the relationships forged, there must be plenty of scope for creativity. The very existence of "visit mechanisms" in the environmental sphere has much to do with incremental development rather than formal construction. As is apparent from the experience in the disarmament sphere, more specificity does not necessarily translate into more effective instruments. Those who wish to obstruct will always manage to do so and a detailed mandate will not prevent this. It may, however, act as a barrier in instances where there is the possibility for the deepening of a relationship, since both sides – the States and the mechanisms – might be reluctant to overstep very clearly defined limitations or procedures. Where possible, there is merit in allowing working of mechanisms to evolve in the light of the possible rather than fettering their freedom of action.

It is equally pertinent to point out that, just as what works well in one of the areas under consideration does not necessarily work well in the others, mechanisms which reflect balances struck at the regional level are not necessarily workable at the global. Nor should it be assumed that mecha-

nisms which work well in one region will operate equally well in another. Much depends upon the degree of specificity involved. The more general the governing framework, the more likely it is to be capable of transposition. Uniformity of approach is not an end in itself.

1.6 Conclusion

There are more lessons to be learnt and further observations that could be made. However, enough has already been said to make the essential lessons of this workshop clear and to provide a platform for future development. By way of conclusion, it seems appropriate to reiterate the central theme that emerged in the course of the exercise: that State has nothing to fear from visit mechanisms and much to gain. If their purposes are clearly understood and their *modus operandi* properly geared towards the achievement of them, visit mechanisms do not represent an intrusion into the domain of sovereignty. This is an ill-informed caricature. Rather, they represent a potent means through which States can assist and be assisted in the realisation of their international obligations, and by endorsing them they demonstrate and manifest their commitment to the maintenance of the international rule of law. As far as the mechanisms themselves are concerned, it is important that they too remember that their role is to work with the States and not against them. This is particularly important in the human rights field, where the entire structure of the discourse is permeated by either the language or the perceptions of quasi-judicial determination. Both sides of the dialogue need reminding that the essential function of visit mechanisms is to assist in achieving compliance. As indicated in section 2 of this report, there is no single or ideal prescription for bringing this about. The baseline is the genuine desire to achieve this goal. Given the widespread recognition of the role to be played, and the proven track record, of visiting mechanisms in facilitating this outcome, any failure by a State to endorse this methodology in principle or any attempts to undermine them in practice must call their commitment to fulfilling their international obligations into question.

2 Future challenges of visiting mechanisms in international law

By Ms Thérèse Delpech, Director, Atomic Energy Commission (AEC), Paris, France

I. When I accepted the invitation extended to me for this international workshop, I did it because of the established ties in the programme between verification, human rights, environmental law, arms control and disarmament. It is time to undertake a serious effort to strengthen these ties. Let me give a number of reasons for that:

- As exemplified by Somalia, Rwanda, the Congo, Sierra Leone, Bosnia, Kosovo, East Timor, massive violations of human rights follow anarchic stockpiling of illegal weapons.
- Good governance based on popular citizen participation and accountability is more likely to provide a good basis for compliance with arms control.
- The preservation of international peace and security and of fundamental human rights and freedoms are two equally important aims of the Charter and can hardly be separated.
- Environment and human rights are so intertwined in some regions of the world that environmental activists are often put in jail. Such is the case in Africa. Protests concerning the environment are not tolerated in China, either.
- Finally, the terrible ecological situation in some former testing sites devoted to nuclear, chemical or biological tests, particularly in the former Soviet Union, call for a more integrated approach of arms control and environmental issues.

It is against this background that I will speak on future challenges to visiting mechanisms.

II. Why are visiting mechanisms important under international law? They became increasingly important in the last decades, progressively allowing a genuine dialogue during the Cold War between the two superpowers, but also contributing to the universalisation of some fundamental norms of human behaviour defining good governance.

- They provide access to victims in case of massive violations of human rights. Written reports, photographic documents, even television reports could lie. On-site visits are more difficult to deceive, if the relevant questions and the necessary information have been gathered by the time the inspection is prepared.
- They allow suspicion of non-compliance with international law to be confirmed or dissipated. Opposite examples are available: North Korea's two suspect sites in Yongbyong have not been inspected so far, and the amount of plutonium reprocessed by North Korea in 1989, 1990 and 1991 therefore remains unknown, with all the relevant consequences concerning DPRK's nuclear capabilities. This is an obvious example of failure. On the contrary, the Russian inspection team coming to the United States in December 1991 to check any residual military biological activity is a famous example of success. At Fort Detrick, Maryland, the Russian team understood that there was no longer any American biological military programme, contrary to what they had been told for years in the Soviet Union. Ken Alibeck, deputy director of Biopreparat, defected soon afterwards to the United States and disclosed the extent to which the Soviet Union and then Russia violated the Biological Weapons Convention. Boris Yeltsin thereafter declared publicly the violation of the BWC during 20 years.
- They help build regional and international confidence. In a world where transparency is increasingly a shared value, visiting mechanisms can dispel distrust, misunderstanding, false assessments, particularly among neighbours. Such is the case, particularly, in regions of tension.
- They constitute a significant deterrent for non-compliant behaviour. The large scope of national and international means to detect non-compliant with international law does com-

plicate seriously the ambitions of possible violators. At the very least, they have to put in place costly deceptive and concealment measures.
- They call for legitimacy and accountability against abuse of sovereignty, as well as against permanent postponement of human rights and democracy as luxuries to be sacrificed until people are sufficiently advanced economically.

III. What are the challenges before us?

- The first challenge is the tendency to agree on high principles, leaving the matter of enforcement unresolved. In the Universal Declaration of Human Rights, there was nothing which could permit intervention in States' affairs to prevent abuses. The United Nations Charter does recognise sovereignty (Article 2.7) and human rights (preamble) as core principles, but does not deal with possible conflicts between the two. It appears increasingly important to reconcile both principles in international law. Sovereignty has always been accompanied in political thought by the notions of responsibility and legitimacy. Massive violations of human rights deprive a State of both.
- A second challenge is the improvement of concealment mechanisms and deception strategies by possible violators. The Iraqi case is particularly telling. Numerous concealment plans have been put in place, including "double" facilities in different sites, use of civilian sites like farms, schools or even cemeteries, decoys of different kinds, and permanent dissimulation of relevant data.
- A third challenge is the tendency to adopt *ad hoc* solutions in cases of non-compliance, irrespective of international treaties, with provisions lessening the scope of verification measures. Such is the case in North Korea. The IAEA has a limited access to the nuclear related facilities and will most probably not be in a position to give a clean bill to Pyongyang when the dual use items necessary for the KEDO project will have to be shipped to North Korea. In the meantime, North Korea is improving its offensive capabilities at least in the ballistic missiles area, and constitutes an ever-increasing threat to its neighbours.
- A fourth challenge is technological in nature. Increasingly, the idea that everything is possible "from above", from the air, with satellites and planes, constitutes a threat to on-site inspections, but also to the protection of civilians. Remote monitoring, remote verification, are part of improved verification mechanisms provided by new technological means. But they can also provide a false sense of confidence. To take only one example, ordinary intelligence and surveillance techniques cannot prove the existence of a biological warfare programme. Even the highest resolution satellite imagery cannot distinguish between a large pharmaceutical plant and a weapons complex.
- A fifth challenge is political in nature. At a time of national identity crisis and contested sovereignty, international visiting mechanisms could be seriously challenged by growing nationalisms and narrow conceptions of sovereignty; internal pressures against the State in many parts of the world often engender, as a reaction, increased rigidity in international relations;
- In the event of a clear violation, the backing of the Security Council, in which the enforcement power of the United Nations system resides, will remain essential. But the UN Security Council does not currently function in a satisfactory fashion, and is suspected of being increasingly unable to maintain international peace and stability.
- The last challenge is of a moral nature: people are simply getting accustomed to seeing thousands of people killed in Africa, the Balkans, and now Indonesia. The psychological foundation of moral indignation in the case of massive killings is probably weakening. This is why initiatives to protect civilians, like the one recently announced by the United Nations Secretary-General, is a major step forward. People are also getting accustomed to learning,

since Iraq and then North Korea were found to be in violation of the NPT, that international treaties are not complied with by many countries. Moral determination in the case of treaty violation is also weakening. A recent example is enlightening: in his most recent book, Ken Alibek describes with chilling details the Soviet and then Russian military biological programme, taking into account that the USSR was one of the three depositary States of the BWC. Which government has asked for explanations? Which one has dared to ask what is still being done in Russia today? What sites have been targeted for possible on-site inspections?

In sum:

- The role of civil society should increase. States have no dignity, but do not like to be embarrassed. Citizens do have dignity and must embarrass States when necessary.
- A redefinition of national sovereignty in international law is needed, compatible with the protection of human rights.
- Violations benefit greatly from opacity, and transparency should therefore be encouraged.
- A more decisive support should be given to the idea that humanitarian law is a component of peace and security in international relations.
- The protection of civilians in armed conflicts is a priority if we want to prevent a world where soldiers are increasingly protected and unprotected civilians increasingly massacred.

Annexes

Annex 1: Programme

WORKSHOP
Visits under international law: Verification, Monitoring and Prevention
Geneva, 23-24 September 1999

General Chairperson of the Workshop: Ambassador Johan Molander, Permanent Mission of Sweden to the United Nations

General Rapporteur of the Workshop: Dr Malcolm Evans, University of Bristol

23 September 1999

8.30 – 9.30
Registration

09.30 – 10.30
Welcome and General Introduction to the Workshop
Mr Marco Mona, President of the Association for the Prevention of Torture
Ambassador Walter Gyger of the Permanent Mission of Switzerland to the United Nations
Ambassador Johan Molander

10.30 – 10.50
Coffee break

10.50 – 11.30
Presentations of Briefing Papers
Disarmament: Dr Trevor Findlay, Director, VERTIC
Human Rights Law: Dr Malcolm Evans, University of Bristol
Environmental Law: Dr Paolo Galizzi, University of Nottingham
Humanitarian Law: Professor Githu Muigai, Kenyan Law School

11.30 – 13.00
Parallel workshops:

1) **Framework (incl. Scope of Application) and Process**
Chairperson: Mr Marco Mona
Rapporteur: Mr Peter Lawrence, First Secretary, Permanent Mission of Australia to the United Nations
Dr Patricia M Lewis, Director, UNIDIR
Dr Iwona Rummel-Bulska, Chief,Compliance and Enforcement of Environmental Conventions Unit, UNEP
Ms Claudine Haenni, Secretary-General of the APT

2) **Confidentiality/Use of Data Obtained During a Visit**
Chairperson: Ms Mona Rishmawi, Director of the Centre for the Independence of Judges and Lawyers, International Commission of Jurists
Rapporteur: Ms Laura Dupuy-Lasserre, Second Secretary, Permanent Mission of Uruguay to the United Nations
Mr Bruno Pellaud, Former Deputy Director General, Department of Safeguards, International Atomic Energy Agency

Mr Jan Malinowski, European Committee for the Prevention of Torture
Dr Paolo Galizzi
Mr Philippe de Sinner, Director of the Centre suisse de formation pour le personnel pénitentiaire
Mr Raphaël Gailland, International Committee of the Red Cross

13.00 – 15.00
Lunch

15.00 – 16.00
Presentation of Summary Observations by the Rapporteurs of Workshops 1 and 2 and Discussion

16.00 – 16.30
Coffee break

16.30 – 18.00
Panel Discussion on the Role of Domestic Legislation
Chairperson: Professor Walter Kälin
Rapporteur: Dr Ibrahim Salama, Counsellor, Permanent Mission of the Arab Republic of Egypt to the United Nations

Dr. Trevor Findlay
Mr Bruce Broomhall, Senior Coordinator, Lawyers Committee for Human Rights
Ms Maria Teresa Dutli, International Committee of the Red Cross

18.00 – 20.00
Reception/Cocktail

24 September 1999

9.00 – 10.30
Parallel workshops:

3) Non-compliance
Chairperson: Mr Markus Schmidt, Office of the High Commissioner for Human Rights
Rapporteur: Mr David Atwood, Quaker United Nations Office Geneva

Ambassador Yuri Nazarkin, Geneva Centre for Security Policy
Mr Jozef Goldblat, Resident Senior Fellow of UNIDIR, Vice-President of GIPRI
Mr Ben Kioko, Legal Division, Organisation of African Unity
Professor Greg Rose, University of Wollongong
Professor Githu Muigai, Dean, Kenyan Law School

4) Experiences from the field:
Chairperson: Professor Peter Thomas Burns, President of the Committee against Torture
Rapporteur: Mr Pascal Daudin, International Committee of the Red Cross

Mr Tim Trevan
Mr Adv. Leon Wessels, South African Human Rights Commission
Dr Rosalind Reeve, FIELD

10.30 – 11.00
Coffee Break

11.00 – 12.00
Future Challenges to Visiting Mechanisms in International Law
Speaker: Ms Thérèse Delpech, Director for Strategic Affairs, Atomic Energy Commission

12.00 – 13.00
Presentation of Summary Observations by the Rapporteurs of Workshops 3 and 4 and the Panel Discussion of the Role of Domestic Legislation, and Discussion

13.00 – 14.30
Lunch

14.30 – 16.30
Panel Discussion on Future Perspectives of Visiting Mechanisms in View of the Workshop Deliberations
Dr Trevor Findlay
Mr Jan Malinowski
Mr Pascal Daudin

16.30 – 17.00
Coffee Break

17.00 – 17.45
Presentation of Preliminary Over-All Observations by the General Rapporteur
Dr Malcolm Evans

17.45 – 18.00
Concluding Remarks and Closing of Workshop
Ambassador Walter Gyger
Ambassador Johan Molander
Ms Claudine Haenni

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