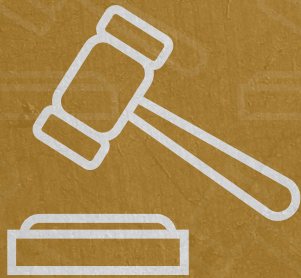


WMD COMPLIANCE & ENFORCEMENT SERIES

PAPER TEN



# **TOOLS FOR COMPLIANCE AND ENFORCEMENT**

FROM BEYOND WMD REGIMES

**JAMES REVILL, REBECCA KATZ, ELENA  
FASOLI, JENS HILLEBRAND POHL, EINAS  
MOHAMMED, HIMAYU SHIOTANI &  
ADITYA MENON**



**UNIDIR** UNITED NATIONS INSTITUTE  
FOR DISARMAMENT RESEARCH



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## ABOUT UNIDIR

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## ABOUT THE AUTHORS

**ADITYA MENON** is a Senior Legal Officer with the International, Impartial and Independent Mechanism for the Syrian Arab Republic (IIIM). Prior to joining the IIIM, he served as Prosecution Appeals Counsel with the International Criminal Tribunal for the former Yugoslavia (ICTY). He has a Juris Doctor degree from the University of Wisconsin–Madison.

**EINAS MOHAMMED** is a Researcher in the Conventional Arms Programme at UNIDIR. She joined UNIDIR after nine years of working on defence and security affairs at the African Union (AU). During her career, she spearheaded several projects on inter-African cooperation in mine action, improving management of recovered arms in AU Peace Support Operations and ammunition safety management. She also worked extensively on promoting the implementation of the African Nuclear-Weapon-Free Zone Treaty and United Nations Security Council resolution 1540 (2004).

**ELENA FASOLI** is Associate Professor of international law at the University of Trento. Prof. Fasoli has worked as an external consultant to both the Ministry of the Environment of Italy and the United Nations Economic Commission for Europe. Between 2014 and 2017, she was a member of the Aarhus Convention Compliance Committee. She obtained her Ph.D. in international law at the University of Milan with a thesis on reparations for non-material damages in inter-State relations.

**HIMAYU SHIOTANI** is Programme Lead for the Conventional Arms Programme at UNIDIR. Prior to his work with UNIDIR, he was a Researcher at the James Martin Centre for Nonproliferation Studies (CNS) in Monterey, California. Shiotani holds a master's degree in International Policy Studies, with a Certificate in Nonproliferation Studies, from the Monterey Institute of International Studies.



**JAMES REVILL** is a Researcher with UNIDIR's Weapons of Mass Destruction and Other Strategic Weapons Programme and is primarily responsible for its compliance and enforcement work. His prior research focused on the evolution of the chemical and biological weapons regimes, on which he has published widely. His PhD from the University of Bradford focused on the evolution of the Biological and Toxin Weapons Convention (BTWC).

**JENS HILLEBRAND POHL** is a Research Fellow with the Institute for Globalization and International Regulation (IGIR), Maastricht University. He is also Course Director at the Academy of European Law in Trier, Germany. Prior to his doctoral research, he completed postgraduate studies at Oxford University and Harvard University and practiced law in the private and public sectors, gaining experience from a wide range of international commercial, financial and insolvency matters.

**REBECCA KATZ** is a Professor and Director of the Center for Global Health Science and Security at Georgetown University Medical Center. Since 2007, much of her work has been on the domestic and global implementation of the International Health Regulations as well as global governance of public health emergencies. From 2004 to 2019, Dr. Katz was a consultant to the United States Department of State, working on issues related to the BTWC, pandemic influenza and disease surveillance.

## ABBREVIATIONS AND ACRONYMS

<b>BTWC</b>	Biological and Toxin Weapons Convention
<b>COVID-19</b>	Coronavirus 2019
<b>CWC</b>	Chemical Weapons Convention
<b>DSS</b>	Dispute-settlement system
<b>ICC</b>	International Criminal Court
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>IHR</b>	International Health Regulations
<b>JIM</b>	Joint Investigative Mechanism (Chemical Weapons)
<b>JVT</b>	The Joint Verification Team (Somalia Sanctions)
<b>MOP</b>	Meeting of the Parties (Aarhus Convention)
<b>OPCW</b>	Organisation for the Prohibition of Chemical Weapons
<b>PHEIC</b>	Public health emergency of international concern
<b>POE</b>	Panel of Experts
<b>WHA</b>	World Health Assembly
<b>WHO</b>	World Health Organization
<b>WTO</b>	World Trade Organization

## SUMMARY

- In seeking fresh ideas for 21st century WMD arms control and disarmament, there is value in looking beyond the WMD treaty regimes. Tools and approaches found in other regimes could be adapted and developed to enhance compliance and enforcement in contemporary WMD-related regimes. To this end, this report comprises a series of short essays that outline tools for treaty compliance or enforcement in regimes dealing with the environment, public health, small arms, international trade and core international crimes.
- The **Aarhus Convention** on environmental matters illustrates how treaty bodies can address public concerns over non-compliance in a transparent and rigorous manner. Any effort to develop channels for the submission of public concerns related to WMD-treaty non-compliance would be highly contentious. However, as dual-use technologies diffuse and democratize, it could be useful to consider systems for channelling public concerns over treaty violations further in the future.
- The report illustrates how the **International Health Regulations (IHR)** make use of unofficial reports of public health events based on open-source data. The use of such data has advantages over traditional means of public health surveillance and may provide useful insights for WMD-related agreements. The IHR also makes use of an agreed algorithm or flow chart for deciding whether a certain event should trigger an international response. States are unlikely to defer to decisions taken by intergovernmental bodies when key national interests are at stake. Nonetheless, some form of algorithm could be a useful model for WMD regimes to consider.
- The **Joint Verification Team in Somalia** provides an example of a cooperative model for achieving greater accountability in small arms supply chains. Such a model could be useful to consider in seeking to advance peaceful cooperation and technology transfers in WMD regimes. **Panels of Experts (POEs)** serve as the “eyes and ears on the ground” for United Nations Sanctions Committees. These panels collect and analyse a wide range of information of relevance to treaty compliance and provide insights for future investigative mechanisms.
- Arbitration and adjudication are frequently used to resolve economic and territorial disputes under other international agreements. Some treaties concerned with curbing WMD make provision – directly or indirectly – for arbitration mechanisms. States have largely found alternative, political ways to resolve sensitive disagreements. However, adjudication and arbitration models, such as those used by the **World Trade Organization (WTO)**, could nevertheless be useful in future efforts to resolve long-standing treaty disagreements that impinge on compliance.
- The **comprehensive prosecution of international crimes** is often a complex and expensive process requiring collaborative work between a range of different actors. Prosecutions – in tribunals such as the International Criminal Court (ICC) – often take place years, if not decades, after their perpetration. As such, treaty enforcement and international criminal prosecution have a tenuous relationship. There is, nonetheless,



value in further exploration of how States might harmonize and integrate international criminal law with WMD treaty regimes. This is made particularly pertinent by recent experiences with WMD regimes that have shown the limits of enforcement in the absence of Security Council unity.

- A review of these regimes illustrates how States have leveraged reputational pressure to encourage compliance with multilateral agreements. This has largely been successful in the case of the Aarhus Convention and WTO dispute-settlement bodies. However, other cases illustrate how domestic politics and geostrategic tension can diminish the effect of State-level reputational pressure. There are lessons to be learned from each of these cases for improving compliance with and enforcement of WMD-related international regimes.

# 1. INTRODUCTION

In seeking innovative ideas and “fresh perspectives”<sup>1</sup> on WMD arms control and disarmament, there is value in looking at other international treaty regimes. Tools and lessons from these other regimes can provide new ideas for States seeking to enhance compliance with and enforcement of WMD-related treaties, such as the 1968 Non-Proliferation Treaty (NPT), the 1972 Biological and Toxin Weapons Convention (BTWC) and the 1993 Chemical Weapons Convention (CWC).

To this end, this report provides an outline of selected compliance and enforcement mechanisms employed in international treaties dealing with topics other than WMD. The report is comprised of a series of short essays covering innovative tools or important lessons learned from regimes in diverse issue areas. These essays are written by leading international experts in their respective fields. At the end of each of the essays, James Revill of UNIDIR provides an editorial note on the relevance of these examples for WMD compliance and enforcement.

In the first essay, Elena Fasoli of the University of Trento looks at the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). This short case study provides a concrete example of how members of the public have triggered compliance reviews by the Aarhus Convention Compliance Committee.

In the second essay, Rebecca Katz, Director of the Center for Global Health Science and Security at Georgetown University Medical Center, discusses the 2005 revision of the International Health Regulations (IHR). It provides an overview of mechanisms designed to encourage compliance with the IHR.

Himayu Shiotani and Einas Mohammed of UNIDIR co-authored the third essay, which looks at how United Nations arms embargoes address compliance issues. It outlines the role played by Panels of Experts as the “eyes and ears on the ground” of sanctions regimes on small arms. It also discusses innovative practices in small arms embargoes, such as the generation of greater accountability through the establishment of a Joint Verification Team.

The fourth essay is by Jens Hillebrand Pohl, adjunct lecturer in the Department of International and European Law at Maastricht University. It looks at the dispute-settlement system of the World Trade Organization (WTO) and shows how States have successfully resolved trade-related disputes through adjudication.

Aditya Menon, a Senior Legal Officer with the International, Impartial and Independent

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<sup>1</sup> United Nations Office for Disarmament Affairs, *Securing Our Common Future: An Agenda for Disarmament*, 2018, <https://www.un.org/disarmament/wp-content/uploads/2018/06/sg-disarmament-agenda-pubs-page.pdf>, p. x.

Mechanism for the Syrian Arab Republic and a former Prosecution Appeals Counsel with the International Criminal Tribunal for the former Yugoslavia (ICTY), wrote the fifth essay. This essay draws from his experience with the ICTY and looks at the roles of different actors, including the International Criminal Court (ICC), in providing accountability for core international crimes.



## 2. THE AARHUS CONVENTION

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted on 25 June 1998.<sup>2</sup> At the time of writing there are 47 parties to the Aarhus Convention. The Convention is based on three pillars: the procedural rights of access to information; public participation in decision-making; and access to justice in environmental matters.<sup>3</sup> It also addresses the persecution, penalization and harassment of persons seeking to exercise these rights. The Convention is open to accession by any United Nations Member State.

Similar to other multilateral environmental agreements, the Aarhus Convention has an established procedure to ensure compliance with its provisions. This procedure operates in the space between conciliation mechanisms and traditional dispute-settlement functions. The procedure draws on findings developed by a Compliance Committee that are reviewed and, typically, endorsed by the Meeting of the Parties (MOP), which acts as a governing body of the Convention. Collectively these components form a “compliance mechanism” for the Aarhus Convention, which has successfully reviewed the compliance of parties to the Convention since 2004.

### 2.1. THE COMPLIANCE COMMITTEE

The legal basis for the establishment of the compliance mechanism by the parties is article 15 of the Aarhus Convention, which deals with “Review of Compliance”. This article calls upon parties to establish “optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention”. In accordance with article 15, at its first session in 2002, the MOP established the Compliance Committee and decided on its structure, functions and procedures.<sup>4</sup>

The Committee is comprised of nine “persons of high moral character” with relevant expertise who, importantly, operate in their personal capacity.<sup>5</sup> The Committee’s roles include considering individual cases of non-compliance and, where necessary, making “recommendations if and as appropriate”.<sup>6</sup> It also increasingly plays an advisory role,

2 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted 25 June 1998, <https://www.unece.org/env/pp/treatytext.html>.

3 United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2014, [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf). See also M. Lee and C. Abbot, “The Usual Suspects? Public Participation under the Aarhus Convention”, *Modern Law Review*, vol. 66, no. 1, 2003, pp. 80–108, <https://doi.org/10.1111/1468-2230.6601004>.

4 Aarhus Convention Meeting of the Parties, “Review of Compliance”, Decision I/7, 21–23 October 2002, United Nations Economic Commission for Europe, ECE/MP.PP/2/Add.8, 2 April 2004, <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>. See also United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide*, 2014, [http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus\\_Implementation\\_Guide\\_interactive\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf), p. 18.

5 Aarhus Convention Meeting of the Parties, “Review of Compliance”, Decision I/7, 21–23 October 2002, United Nations Economic Commission for Europe, ECE/MP.PP/2/Add.8, 2 April 2004, <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>, annex, paragraphs 1–2.

6 *Ibid*, annex, paragraph 14.

providing advice and assistance to Parties at their request (see section 2.4).<sup>7</sup>

Following adoption by the Committee, all findings are transmitted to the MOP for endorsement. In accordance with long-standing practice, the MOP endorses findings by consensus.<sup>8</sup> Findings endorsed by consensus have the status of “subsequent agreement” or “subsequent practice” by parties to the Convention in future interpretations of the Convention. This is consistent with article 31(3) of the 1969 Vienna Convention on the Law of Treaties.<sup>9</sup>

The transparent nature of the process and its active and participatory procedures for follow-up help the Committee in enforcing the Convention. The overall compliance mechanism also draws from State-level reputational pressure. Collectively, these measures have largely proven effective and there are many cases where the Aarhus Convention has facilitated changes in government or industry policies.

## 2.2. PUBLIC TRIGGER

One of the main features of note of the Aarhus Convention is that members of the public can trigger a review of compliance by the Compliance Committee.<sup>10</sup> To date, the public have brought 183 cases related to a party’s compliance to the Committee.<sup>11</sup> The cases vary considerably in terms of subject matter. However, a typical case could, for example, result from a group of citizens complaining that their national authorities have refused their requests for access to environmental information; or a group could have been denied the opportunity to effectively participate in or to have access to justice regarding a decision to permit a proposed activity that would have a significant effect on the environment.

Before the Committee begins its process of examining the substance of a communication conveying a public request for a review, it must first determine whether the communication is admissible on a preliminary basis. The grounds for inadmissibility are set out in decision I/7; they include that the communication is “anonymous”, “manifestly unreasonable” or “inconsistent with the provisions of [decision I/7] or the Convention”.<sup>12</sup> Examples of being

<sup>7</sup> Ibid, annex, paragraph 36(a).

<sup>8</sup> E.g. the statement by Norway in Aarhus Convention Meeting of the Parties, Report of the sixth session, United Nations Economic Commission for Europe, ECE/MP.PP/2017/2, 21 December 2017, [https://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents\\_aec/ece.mp.pp.2017.2\\_aec.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ece.mp.pp.2017.2_aec.pdf), paragraph 64. Although see also Aarhus Convention Compliance Committee, “Datashet”, ACCC/C/2004/09, 1 December 2004, <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2004-09/DatasheetC-2004-09v01.12.04.doc>; and E. Fasoli and A. McGlone, “The Non-Compliance Mechanism Under the Aarhus Convention as ‘Soft’ Enforcement of International Environmental Law: Not So Soft After All!”, *Netherlands International Law Review*, vol. 65, no. 1, 2018, pp. 27–53, <https://doi.org/10.1007/s40802-018-0102-0>.

<sup>9</sup> Ibid, p. 38; and 1969 Vienna Convention on the Law of Treaties, adopted 23 May 1969, [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf), article 31(3), (a) and (b).

<sup>10</sup> A review of a specific party’s compliance may be triggered in five ways: (a) a party may make a submission about compliance by another party; (b) a party may make a submission concerning its own compliance; (c) the secretariat may make a referral to the Committee; (d) members of the public may make communications concerning a party’s compliance with the Convention; or (e) the MOP may request the Committee to examine a party’s compliance with the Convention.

<sup>11</sup> United Nations Economic Commission for Europe, “Communications from the Public”, 14 December 2020, <https://unece.org/env/pp/cc/com.html>.

<sup>12</sup> Aarhus Convention Meeting of the Parties, “Review of Compliance”, Decision I/7, 21–23 October 2002, United

“inconsistent with the provisions of [decision I/7]” include where a communication is not supported by corroborating information<sup>13</sup> or where the communicant has failed to demonstrate that it has used available domestic remedies.<sup>14</sup>

At the time of writing, 50 of the 183 communications from the public had been dismissed as “not admissible”.<sup>15</sup> Such dismissals are often made on the grounds that the communicant has not made “sufficient use of available domestic remedies”.<sup>16</sup> Scholars of this process contend that since 2015 the Committee has become more stringent “in ensuring that communicants effectively make use of the remedies already in place”.<sup>17</sup>

### 2.3. FOLLOW UP ON NON-COMPLIANCE<sup>18</sup>

The Aarhus Convention also contains rigorous and transparent procedures for following-up on non-compliance (see Table 1), which are detailed in the Guide to the Aarhus Convention Compliance Committee. They serve as food for thought for other organizations seeking to enhance compliance.

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Nations Economic Commission for Europe, ECE/MP.PP/2/Add.8, 2 April 2004, <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>, annex, paragraph 20. See also United Nations Economic Commission for Europe, *The Guide to the Aarhus Convention Compliance Committee*, 2nd edn, May 2019, <http://www.unece.org/index.php?id=54512>, paragraphs 97–100.

13 Ibid, Decision I/7, annex, paragraph 19. See also Ibid, *The Guide to the Aarhus Convention Compliance Committee*, paragraph 98.

14 Ibid, Decision I/7. See also Ibid, *The Guide to the Aarhus Convention Compliance Committee*, paragraphs 99–100.

15 United Nations Economic Commission for Europe, “Communications from the Public”, 14 December 2020, <https://unece.org/env/pp/cc/com.html>.

16 E.g. Aarhus Convention Compliance Committee, “Datasheet”, ACCC/C/2004/09, 1 December 2004, <https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2004-09/DatasheetC-2004-09v01.12.04.doc>.

17 E. Fasoli and A. McGlone, “The Non-Compliance Mechanism Under the Aarhus Convention as ‘Soft’ Enforcement of International Environmental Law: Not So Soft After All!”, *Netherlands International Law Review*, vol. 65, no. 1, 2018, pp. 27–53, <https://doi.org/10.1007/s40802-018-0102-0>, p. 52.

18 United Nations Economic Commission for Europe, “Implementation of Decisions of the Meeting of the Parties on Compliance by Individual Parties”, <https://unece.org/implementation-decisions-meeting-parties-compliance-individual-parties>.



**TABLE 1.** *Summaries of selected follow-up procedures in cases of non-compliance with the Aarhus Convention*<sup>19</sup>

FOLLOW-UP PROCEDURE	SUMMARY
Recommendations directly to the party concerned	In circumstances where the Compliance Committee finds non-compliance, “it may, subject to the agreement of the Party concerned, make recommendations to the Party concerned”. Subsequently, the Committee invites the State in question to “provide progress reports on its implementation of the Committee’s findings and recommendations”. <sup>20</sup>
Consideration by the Meeting of the Parties	In advance of the MOP, the Convention’s Bureau prepares and submits to the MOP a draft decision on the concerned party’s compliance for consideration and possible adoption by the States parties. Notably, decisions of the MOP “are communicated directly to the parties and made public”. <sup>21</sup>
Review by the Committee of the implementation of decisions of the Meeting of the Parties on compliance	The Compliance Committee “prepares periodic progress reviews which examine the extent to which the Party concerned has by that date fulfilled the recommendations” set out in the decision of the MOP. Progress is discussed in an open session of a meeting of the Compliance Committee. <sup>22</sup>
Report to the Meeting of the Parties on the implementation of its decision on compliance	The Committee sets out its findings on “the extent to which the Party concerned has met each of the measures set out in the decision” in a final report to the MOP. Notably, “If the Committee finds that the Party concerned remains in non-compliance, the Committee’s report will also include recommendations to the [MOP] on how that non-compliance should be addressed”. <sup>23</sup>
Issuance of a caution	“In exceptional circumstances, the Compliance Committee may . . . recommend that the [MOP] issue a caution to a Party concerned”. Since 2005, the Committee has recommended the issuance of a caution in relation to four parties. <sup>24</sup>

19 Notably, this table provides only a synthesis of key points and, moreover, excludes the follow-up section on “Any developments subsequent to the finalization of the Committee’s report to the Meeting of the Parties”. Further details of these measures can be found in United Nations Economic Commission for Europe, *The Guide to the Aarhus Convention Compliance Committee*, 2nd edn, May 2019, <http://www.unece.org/index.php?id=54512>, paragraphs 204–223.

20 Ibid, paragraphs 204–205.

21 Ibid, paragraph 210.

22 Ibid, paragraph 211.

23 Ibid, paragraphs 216–219.

24 Ibid, paragraph 223.

## 2.4. ADVICE AND ASSISTANCE

A further innovative feature of the Compliance Committee is its role in providing advice and facilitating assistance to individual parties at their request regarding the implementation of the Convention. This may include the making of recommendations to the party concerned.<sup>25</sup>

A party may request the Committee to provide advice or assistance on how to correctly implement the Aarhus Convention at any time. Such requests may be made as a free-standing request for advice or assistance<sup>26</sup> or in the context of the Committee's follow-up on a case of non-compliance by that party.<sup>27</sup>

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25 Aarhus Convention Meeting of the Parties, "Review of Compliance", Decision I/7, 21–23 October 2002, United Nations Economic Commission for Europe, ECE/MP.PP/2/Add.8, 2 April 2004, <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>, annex, paragraph 36(a), (b). See also United Nations Economic Commission for Europe, *The Guide to the Aarhus Convention Compliance Committee*, 2nd edn, May 2019, <http://www.unece.org/index.php?id=54512>, paragraph 15.

26 United Nations Economic Commission for Europe, "Requests from Parties for Advice or Assistance", <http://www.unece.org/env/pp/cc/assistance.html>.

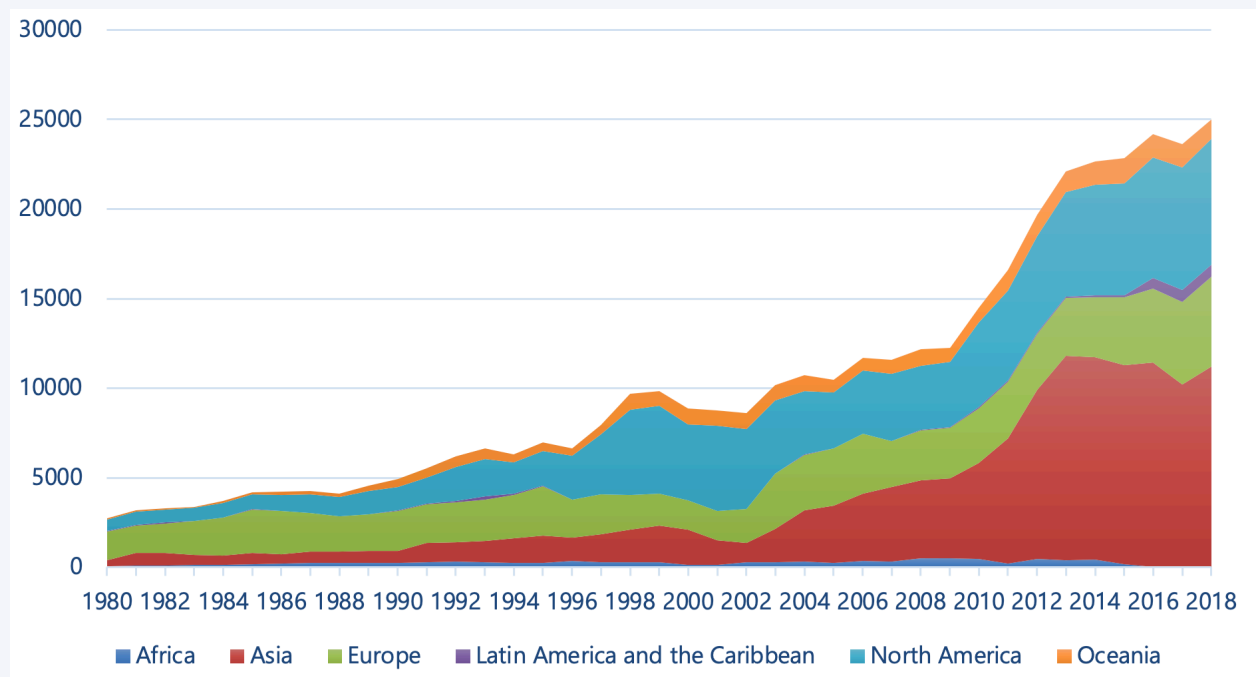
27 United Nations Economic Commission for Europe, "Implementation of Decisions of the Meeting of the Parties on Compliance by Individual Parties", <https://unece.org/implementation-decisions-meeting-parties-compliance-individual-parties>.

## UNIDIR RESPONDENT'S NOTE ON THE RELEVANCE OF THE AARHUS CONVENTION TO WMD COMPLIANCE AND ENFORCEMENT

Compliance in the Aarhus Convention depends on a cooperative process between the 47 like-minded and mutually supportive parties to the Convention. It is difficult to envisage the processes to address compliance in the Aarhus Convention regime being applied to a WMD treaty regime. Such a development would involve a State party accused of non-compliance joining a consensus on a finding by some kind of investigative committee. It may be theoretically possible to devise a process whereby the accused State party (and perhaps also the accusing party or parties) would sit outside the consensus process and would not participate in decision-making. However, even if States parties could agree to such a process, it would still be vulnerable to interference by powerful States acting individually or in collusion.

On the use of public submissions, one of the main criteria for exclusion of a public submission – that domestic remedies have not been fully utilized – would generally not be applicable for WMD disarmament treaty regimes. Moreover, any effort to develop channels for public submissions of concerns related to WMD treaty non-compliance would be highly contentious.

FIGURE 1. *Biotechnology patent grants, by region, 1980–2018*<sup>28</sup>



<sup>28</sup> This figure is based on WIPO data for 'biotechnology' patents.

Nevertheless, there are aspects of the approach to compliance in the Aarhus Convention that might be taken up in certain WMD-related regimes such as the Biological and Toxin Weapons Convention (BTWC). The global landscape of dual-use research and development is evolving, with a growing number of actors now capable of exploiting new technologies for hostile purposes. For example, between 1990 and 2018, the number of authors around the world publishing scholarly articles on the topic of biotechnology increased from 664 to 14,668 and the number of institutions with authors publishing on the topic of biotechnology grew from 297 to 3998.<sup>29</sup> An order of magnitude increase is also evident in the number of biotechnology patents granted by certain regional offices (see Figure 1).

The expansion of those with the potential to exploit dual-use biotechnology for hostile purposes may present a significant challenge to existing capabilities, to the extent they exist, to detect the development of biological weapons. As such, in the future, WMD-related treaties, such as the BTWC, may benefit from wider channels through which individual members of the public can raise compliance concerns. Under such circumstances, systems for attending to such public concerns in an objective and rigorous manner could be useful. The Aarhus Convention provides one approach to achieving this and might inform future initiatives in this area.

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<sup>29</sup> Based on a search under the topic of “Biotechnology” of the Web of Science Core Collection.

### 3. THE INTERNATIONAL HEALTH REGULATIONS

States have long supported efforts to collaborate on the prevention of infectious diseases across borders. Over the course of the past two centuries, such measures became formalized and codified through international agreements, from the first International Sanitary Conference in 1851 to the 1969 International Health Regulations (IHR). Over time, the limitations of these agreements became apparent. New diseases emerged and spread across borders, and States demonstrated limited compliance with – or even acknowledgement of – global governance of disease regimes.<sup>30</sup>

Accordingly, in 2005, the member States of the World Health Assembly (WHA) radically revised the IHR, drawing on the lessons of the 2002–2003 outbreak of severe acute respiratory syndrome (SARS), as well as the spread of HIV around the world and the emergence of viral haemorrhagic fevers, such as Ebola.<sup>31</sup> While the 1969 IHR covered only a narrow selection of diseases, the revised regulations covered a broad range of public health emergencies. They were designed to “prevent, protect against, control and provide a public health response to the international spread of disease”.<sup>32</sup>

Several novel features were incorporated into the revised regulations. These include the obligation upon States to develop minimum core public health capacities to prevent, detect and respond to emerging public health threats; and the legally binding obligation upon States to notify the World Health Organization (WHO) of events that may constitute a public health emergency of international concern (PHEIC) in a timely fashion.<sup>33</sup> Additionally, the revised regulations authorized the WHO to use unofficial reports on disease outbreaks, thereby permitting the use of third-party sources to inform analysis and awareness of novel public health events.<sup>34</sup>

#### 3.1. COMPLIANCE AND CORE PUBLIC HEALTH CAPACITIES

Under the revised IHR, the 196 States parties are legally obligated to develop their respective public health infrastructure to meet core capacity requirements for public health, as defined by annex 1 of the IHR. The WHO Secretariat interpreted annex 1 to delineate a series of now 19 core capacities. These include national legislation to implement obligations under the IHR; indicator- and event-based surveillance systems;

<sup>30</sup> The limitations include, for example, the limited scope of diseases covered (i.e. cholera, plague and yellow fever) and lack of compliance with reporting even the limited diseases to WHO.

<sup>31</sup> L.O. Gostin and R. Katz, “The International Health Regulations: The Governing Framework for Global Health Security”, *Milbank Quarterly*, June 2016, vol. 94, no. 2, pp. 264–313, <https://doi.org/10.1111/1468-0009.12186>.

<sup>32</sup> World Health Organization, “International Health Regulations (2005)”, 3rd edn, 2016, <https://www.who.int/ihr/publications/9789241580496/en/>, p. 1.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*



laboratory diagnostic capacity; sufficient human resources; and the establishment of response mechanisms.<sup>35</sup>

Developing core public health capacities imposes a heavy and expensive burden on States, especially those from the Global South. Many States had fallen short in meeting their obligations under IHR 2005.<sup>36</sup> There were often too many competing needs for population health. External funding was often available only for “vertical” disease programmes (i.e. those that focus on specific diseases), rather than developing wider public health capacities.<sup>37</sup>

By 2012, only 42 of the then 192 WHA member States had fulfilled their obligations under the IHR. This number had increased only marginally by the end of 2014.<sup>38</sup> It is also unclear if the metrics used to assess IHR compliance were actually indicative of the ability of a State to prevent, detect and respond to public health emergencies. For example, some countries with high IHR implementation scores have faced significant challenges in response to COVID-19, while others with lower scores have responded in exemplary fashion.

Indicators suggest that global implementation of core public health capacities “remains patchy”.<sup>39</sup> Moreover, the IHR lacks the necessary powers to enforce implementation or, indeed, the resources necessary to bring States into compliance with its core capacity obligations. The latter is important. As Wilson et al. remarked over a decade ago, the “Key to progress on these obligations is technical assistance and financial resources from developed countries, the availability of which would be linked to measurable improvements in the minimum core surveillance and response capacities mandated by the regulations”.<sup>40</sup>

35 L.O. Gostin and R. Katz, “The International Health Regulations: The Governing Framework for Global Health Security”, *Milbank Quarterly*, June 2016, vol. 94, no. 2, pp. 264–313, <https://doi.org/10.1111/1468-0009.12186>.

36 N. Kandel et al., “Health Security Capacities in the Context of COVID-19 Outbreak: An Analysis of International Health Regulations Annual Report Data from 182 Countries”, *The Lancet*, vol. 395, no. 10,229, 2020, pp. 1047–1053, [https://doi.org/10.1016/S0140-6736\(20\)30553-5](https://doi.org/10.1016/S0140-6736(20)30553-5); J.E. Fischer and R. Katz, “Moving Forward to 2014: Global IHR (2005) Implementation”, *Biosecurity and Bioterrorism*, vol. 11, no. 2, 2013, pp. 153–156, <https://doi.org/10.1089/bsp.2013.0030>; and R.L. Katz, J.A., Fernandez and S.J.N. McNabb, “Disease Surveillance, Capacity Building and Implementation of the International Health Regulations (IHR[2005])”, *BMC Public Health*, vol. 10, supplement no. S1, 2010, <https://doi.org/10.1186/1471-2458-10-S1-S1>.

37 G. Ooms et al., “The ‘Diagonal’ Approach to Global Fund Financing: A Cure for the Broader Malaise of Health Systems?”, *Globalization and Health*, vol. 4, 2008, article 6, <https://doi.org/10.1186/1744-8603-4-6>.

38 A.B. Suthar et al., “Lessons Learnt from Implementation of the International Health Regulations: A Systematic Review”, *Bulletin of the World Health Organization*, vol. 96, no. 2, p. 110, <https://doi.org/10.2471/BLT.16.189100>.

39 H. Kluge et al., “Strengthening Global Health Security by Embedding the International Health Regulations Requirements into National Health Systems”, *BMJ Global Health*, vol. 3, supplement no. 1, 2018, p.e000656, <http://doi.org/10.1136/bmjgh-2017-000656>, p. 3.

40 K. Wilson, J.S. Brownstein and D.P. Fidler, “Strengthening the International Health Regulations: Lessons from the H1N1 Pandemic”, *Health Policy and Planning*, vol. 25, no. 6, 2010, pp. 505–509, <https://doi.org/10.1093/heapol/czq026>, p. 508.

### 3.2. COMPLIANCE WITH IHR REPORTING REQUIREMENTS

Article 6 of the IHR 2005 obligates States parties to notify the WHO of events that constitute a potential PHEIC.<sup>41</sup> Timeliness and transparency of reporting outbreaks is important in the early detection of public health events as well as their prevention and containment. However, in the past, some States delayed reporting disease outbreaks, in part due to concerns over the impact on travel and trade.<sup>42</sup> To address this, the revised IHR provides timelines stipulating that States, operating through national focal points (NFPs), must notify the WHO of events within 24 hours of conducting an assessment of any potential PHEIC.<sup>43</sup>

Compliance with the reporting requirements under the IHR has been mixed; as one recent WHO report stated, “data reporting by Member States under the IHR needs further improvement in terms of speed, consistency and completeness”.<sup>44</sup> Limitations are particularly acute in circumstances where transparent and timely reports threaten national security or economic stability.

### 3.3. USE OF UNOFFICIAL REPORTING OF PUBLIC HEALTH EVENTS

The revised IHR has benefited from the addition of mechanisms whereby the WHO can now use unofficial reports of public health events. The reports draw on sources such as the Program for Monitoring Emerging Diseases (ProMED)<sup>45</sup> and EpiCore.<sup>46</sup> The use of unofficial reports has empowered the WHO and reduced its dependency on official information from member States to assess an event, a step that had slowed down responses to earlier disease outbreaks.<sup>47</sup>

41 “Each State Party shall notify WHO, by the most efficient means of communication available, by way of the National IHR Focal Point, and within 24 hours of assessment of public health information, of all events which may constitute a public health emergency of international concern within its territory in accordance with the decision instrument.” World Health Organization, “International Health Regulations (2005)”, 3rd edn, 2016, <https://www.who.int/ihr/publications/9789241580496/en/>, article 6.

42 J. Wise, “UK Steps Up Its Global Health Security”, *Lancet Infectious Diseases*, vol. 8, no. 6, 2008, p. 350, [https://doi.org/10.1016/S1473-3099\(08\)70111-7](https://doi.org/10.1016/S1473-3099(08)70111-7).

43 World Health Organization, “Notification and Other Reporting Requirements under the IHR (2005)”, IHR Brief no. 2, 2007, [https://www.who.int/ihr/publications/ihr\\_brief\\_no\\_2\\_en.pdf?ua=1](https://www.who.int/ihr/publications/ihr_brief_no_2_en.pdf?ua=1).

44 Independent Oversight and Advisory Committee for the WHO Health Emergencies Programme, “Interim Report on WHO’s Response to COVID-19 January–April 2020”, World Health Organization, 2020, [https://www.who.int/about/who\\_reform/emergency-capacities/oversight-committee/IOAC-interim-report-on-COVID-19.pdf?ua=1](https://www.who.int/about/who_reform/emergency-capacities/oversight-committee/IOAC-interim-report-on-COVID-19.pdf?ua=1), paragraph 9.

45 The Program for Monitoring Emerging Diseases (ProMED) is a programme of the International Society for Infectious Diseases (ISID). ProMED was launched in 1994 as an Internet service to identify unusual health events related to emerging and re-emerging infectious diseases and toxins. For more on this see M.P. Pollack, “Detection of Emerging Infections and Outbreaks: Reflections from ProMED-mail”, ProMED-mail, 2018, [https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/44A557050CF6B2E7C125837D004071CC/\\$file/ProMED-Pollack.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/44A557050CF6B2E7C125837D004071CC/$file/ProMED-Pollack.pdf).

46 “EpiCore draws on the local knowledge of a global community of volunteer human, animal and environmental health professionals (called responders) to verify reports from formal and informal sources on disease outbreaks in their own geographical region. They respond to requests for information sent by ProMED moderators (called EpiCore requesters) via a secure online networking and reporting system.” T.S. Lorthe et al., “Evaluation of the EpiCore Outbreak Verification System”, *Bulletin of the World Health Organization*, vol. 96, no. 5, 2018, pp. 327–334, <https://doi.org/10.2471/BLT.17.207225>, p. 328.

47 F.C. Goldizen, “From SARS to Avian Influenza: The Role of International Factors in China’s Approach to Infectious Disease Control”, *Annals of Global Health*, vol. 82, no. 1, 2016, pp. 180–188, <http://doi.org/10.1016/j.aogh.2016.01.024>.

Some argued that this measure also incentivized participation in the IHR. Certainly, Dr Guénaël Rodier, former Director of WHO's communicable disease surveillance and response unit, remarked in 2007 that:

*"WHO and its partners have a powerful system of gathering intelligence that will pick anything up immediately ... One of the incentives for countries to report such events is that these will already have been reported via the electronic highway ... The fear of being named and shamed by the media and other countries concerned by the situation is in itself an incentive."*<sup>48</sup>

Yet, even with the threat of "naming and shaming", the WHO has struggled to get its member States to confirm or even acknowledge unofficial reports of a potential public health emergency.<sup>49</sup>

### 3.4. PUBLIC HEALTH EMERGENCIES OF INTERNATIONAL CONCERN

Annex 2 of the IHR provides an algorithm for determining if an event in a country is a PHEIC (reproduced in Figure 2). This algorithm illustrates the different pathways to determine whether WHO notification of a public health event is required under the IHR. Once a national government determines that an event constitutes a potential PHEIC, it is reported to the WHO. The WHO then determines if an Emergency Committee should be assembled to assess the evidence and provide recommendations to the WHO Director-General.

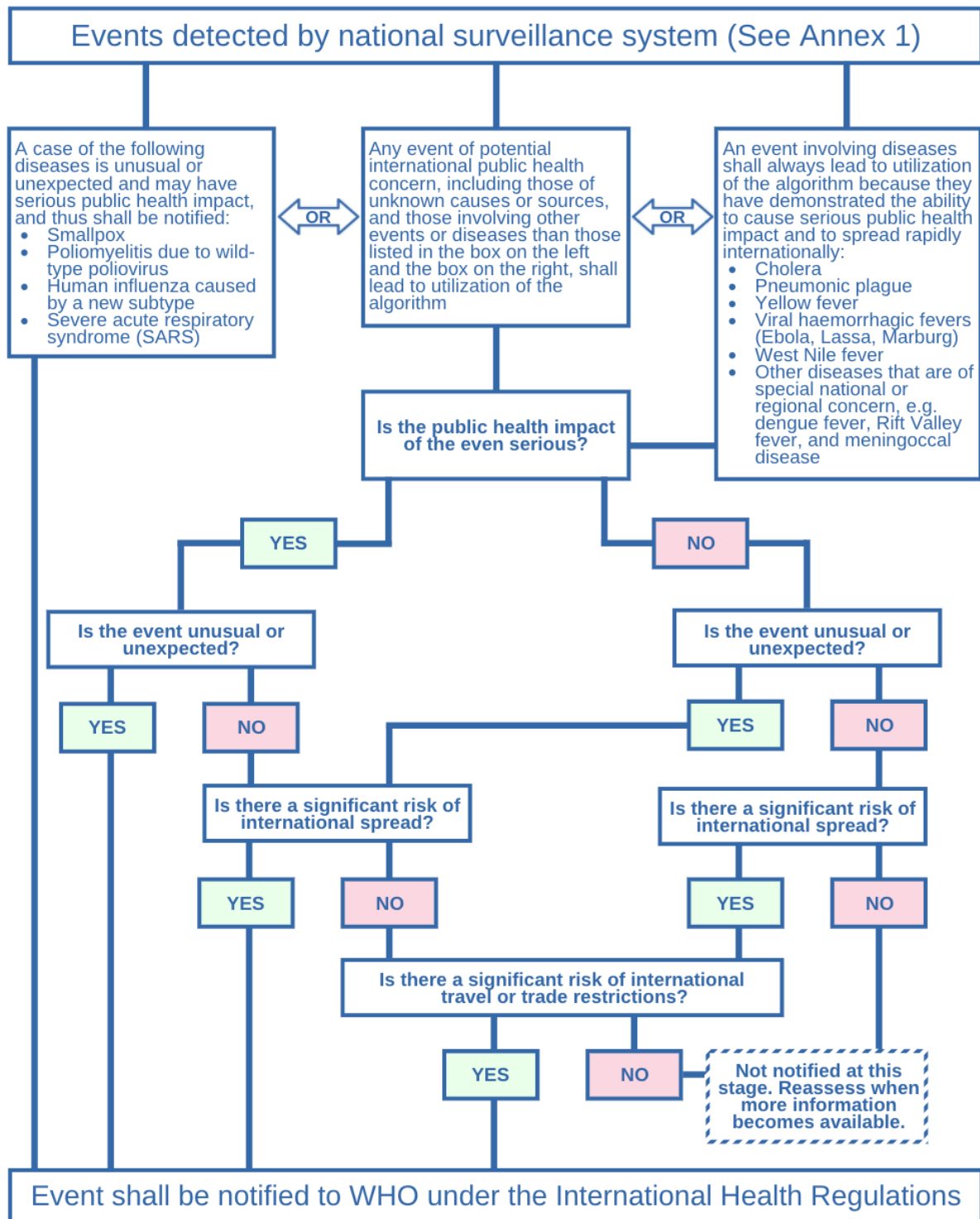
The bar for a PHEIC declaration is very high. Despite hundreds of potential PHEICs reported to the WHO every year, the Director-General has only declared a PHEIC on six occasions: H1N1 (2009), polio (2014), Ebola in West Africa (2014), Zika (2016), Ebola in the Democratic Republic of the Congo (2019) and COVID-19 (2020). This is in part perhaps because decision makers feared that PHEIC declarations would lead to travel and trade restrictions that could hinder public health efforts. Scholars, however, claim that the reticence to declare PHEICs – even during events that would seemingly warrant the declaration – has weakened the regime.<sup>50</sup> There is an ongoing debate about whether to revise the IHR to include multiple tiers of PHEICs.

48 G. Rodier, "New Rules on International Public Health Security", *Bulletin of the World Health Organization*, vol. 85, no. 6, 2007, pp. 428–430, <https://www.who.int/bulletin/volumes/85/6/07-100607/en/>, p. 428. See also J.E. Fischer, S. Kornblet and R. Katz, *The International Health Regulations (2005): Surveillance and Response in an Era of Globalization*, Stimson Center, June 2011, <https://www.stimson.org/2011/international-health-regulations-2005-surveillance-and-response-era-globalization/>.

49 E.g. D. Pilling, "WHO Criticises Tanzania for Withholding Ebola Information", *Financial Times*, 22 September 2019, <https://www.ft.com/content/1b3b2922-dd13-11e9-9743-db5a370481bc>.

50 D.P. Fidler, "To Declare Or Not to Declare: The Controversy over Declaring a Public Health Emergency of International Concern for the Ebola Outbreak in the Democratic Republic of the Congo", *Asian Journal of WTO and International Health Law and Policy*, vol. 14, no. 2, 2019, pp. 287–330, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3460190](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3460190), p. 287.

FIGURE 2. IHR decision instrument for the assessment and notification of a public health emergency of international concern



### 3.5. IHR DISPUTE-SETTLEMENT PROCESSES

Disagreement over a State's compliance with the IHR can have major implications that affect relations between friends and adversaries alike, and which could potentially even result in armed conflict should a State's health security be significantly affected.<sup>51</sup> This places a premium on measures to restore compliance and resolve differences, including through dispute-settlement mechanisms.

Fortunately, as Hoffman points out, the IHR has two mechanisms through which disputes can be resolved, both located in article 56. The first serves as an initial step to settling disputes "through negotiation or any other peaceful means of their own choice, including good offices, mediation or conciliation".<sup>52</sup> The second involves recourse to the WHO Director-General, "who shall make every effort to settle" a dispute.<sup>53</sup> States parties to the IHR also have the option to accept arbitration under article 56, which is conducted in accordance with the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States.<sup>54</sup>

Even with these measures, some have proposed that it is necessary to take disputes outside the IHR, including potentially to the World Trade Organization (WTO), if parties are members, or to a body like the International Criminal Court (ICC). This tactic, however, has yet to be employed, but some are questioning whether it could be used in relation to the COVID-19 pandemic.<sup>55</sup>

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51 S.J. Hoffman, "Making the International Health Regulations Matter: Promoting Compliance through Effective Dispute Resolution", In S. Rushton and J. Youde (eds.), *Routledge Handbook of Global Health Security*, 2014, <https://doi.org/10.4324/9780203078563>, p. 240.

52 World Health Organization, "International Health Regulations (2005)", 3rd edn, 2016, <https://www.who.int/ihr/publications/9789241580496/en/>, article 56(1).

53 *Ibid*, article 56(2).

54 *Ibid*, article 56(3).

55 D. Fidler, "COVID-19 and International Law: Must China Compensate Countries for the Damage?", *Just Security*, March 2020, <https://www.justsecurity.org/69394/covid-19-and-international-law-must-china-compensate-countries-for-the-damage-international-health-regulations/>.



## UNIDIR RESPONDENT'S NOTE ON THE RELEVANCE OF THE INTERNATIONAL HEALTH REGULATIONS TO WMD COMPLIANCE AND ENFORCEMENT

The IHR requires States to meet several core public health capacity requirements. It is therefore somewhat analogous to the national implementation provisions and accompanying procedures of WMD treaties. For example, the Organisation for the Prohibition of Chemical Weapons (OPCW) monitors the development of national legislation by its member States and provides assistance as required. As such, developing international compliance procedures as an extension of national implementation, as is done by the IHR, provides a possible model for other WMD regimes.

The use of an agreed flow chart or algorithm for deciding whether a certain event should trigger an international response may also be a useful model for WMD regimes to pursue. However, there are limits to the willingness of States to defer to decisions taken by intergovernmental bodies when key national interests are at stake and public pressure is high. This has been illustrated by the challenges that the IHR has encountered when faced with the COVID-19 pandemic. In such circumstances, State-level reputational pressure – or, to quote Rodier, the “fear of being named and shamed” – is limited in encouraging compliance.<sup>56</sup> This is further borne out in more recent scholarship that highlights the limits of reputational pressure as a mechanism to encourage compliance.<sup>57</sup>

Finally, the IHR also shows how international organizations have used unofficial, open-source reports as alerts for public health-related events. Open-source tools, such as ProMED, are likely to provide the first indication of a chemical or biological event. These tools have several advantages over traditional forms of surveillance: they are quicker, cheaper and more transparent.<sup>58</sup> However, such open-source tools also have disadvantages, including inaccuracies and potential bias resulting from language, sensationalism and politics.<sup>59</sup> Third party or open-source data on its own is therefore often insufficient to trigger a response from international organizations or States parties. Nonetheless, it would be remiss for stakeholders to entirely ignore the potential of such indicators as they can provide an early warning of suspicious public health incidents potentially connected with the development or use of WMD.

<sup>56</sup> It is of note that this scepticism has emerged in yet other regimes. For example, the financial crisis of 2008 illustrated how a system of financial regulation based on “[a] system of voluntary commitments provides effectively no deterrence to noncooperation in times of crisis”. See E.F. Greene and J.L. Boehm, “The Limits of Name-and-Shame in International Financial Regulation”, *Cornell Law Review*, vol. 97, no. 5, 2012, pp. 1083–1140, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3244&context=clr>, p. 1139.

<sup>57</sup> R. Brewster, “The Limits of Reputation on Compliance”, *International Theory*, vol. 1, no. 2, 2009, pp. 323–333, <http://doi.org/10.1017/S175297190999008X>, p. 327.

<sup>58</sup> M.P. Pollack, “Detection of Emerging Infections and Outbreaks: Reflections from ProMED-mail”, *ProMED-mail*, 2018, [https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/44A557050CF6B2E7C125837D004071CC/\\$file/ProMED-Pollack.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/44A557050CF6B2E7C125837D004071CC/$file/ProMED-Pollack.pdf).

<sup>59</sup> *Ibid.*

## 4. UNITED NATIONS ARMS EMBARGOES

Arms embargoes designed to halt the flow of conventional weapons and associated materiel form an essential, and increasingly common, sanction used by the United Nations Security Council to exert pressure on States and non-State actors to comply with its objectives. The design and implementation of these arms embargoes have evolved considerably since sanctions regimes began in 1966.<sup>60</sup> Experiences from these arms embargoes reveal variation in the effectiveness of their implementation.<sup>61</sup>

This short essay, which draws on earlier work by UNIDIR researchers,<sup>62</sup> outlines changing practices and innovative approaches to strengthening the monitoring and implementation of arms embargoes. There are many useful practices and approaches that the United Nations Security Council employs to support the design, implementation and reassessment of arms embargoes that could be discussed.<sup>63</sup> However, the essay focuses on two particular elements: the role of Panels of Experts (POEs) and the work of the Joint Verification Team (JVT) under the Somalia sanctions regime since 2014.

### 4.1. THE PANEL OF EXPERTS: THE EYES AND EARS OF SANCTIONS COMMITTEES

Among the wide range of information sources available to Sanctions Committee members to monitor the implementation of arms embargoes, POEs are often considered the most informative. Since 2000, these panels have become increasingly important<sup>64</sup> as the Security Council's "eyes and ears on the ground".<sup>65</sup> Currently 11 of the 14 sanctions regimes employ POEs or monitoring teams.<sup>66</sup>

The United Nations Secretary-General can establish a POE at the Security Council's request. The panels are typically comprised of a small group of fewer than 12 independent consultant experts who are given responsibility for monitoring the implementation of

60 United Nations Security Council, "Sanctions", <https://www.un.org/securitycouncil/sanctions/information>.

61 E.g. there have been blatant violations of the arms embargo on Libya by various parties to the conflict as witnessed and reported in 2020 by the Panel of Experts. In contrast, a more cooperative approach towards implementation has been achieved in other arms embargos, for example the benchmarking model between the Sanctions Committee and the Central African Republic to assess the arms embargo since 2018.

62 E.g. S. de Tessières et al., *Applying Conventional Arms Control in the Context of United Nations Arms Embargoes*, UNIDIR, 2019, <https://www.unidir.org/files/publications/pdfs/applying-conventional-arms-control-in-the-context-of-united-nations-arms-embargoes-en-718.pdf>.

63 For a more comprehensive study on practices and approaches by the United Nations Security Council to support the design, implementation and re-assessment of arms embargoes, see *Ibid.*

64 E. LeBrun and C. Rigual, *Monitoring UN Arms Embargoes: Observations from Panels of Experts*, 2016, Small Arms Survey, <http://www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP33-UN-Arms-Embargoes.pdf>.

65 United Nations General Assembly, "Compendium of the High-level Review of United Nations Sanctions", A/69/941-S/2015/432, 12 June 2015, <http://undocs.org/A/69/941>.

66 United Nations Department of Political and Peacebuilding Affairs, "Subsidiary Organs of the United Nations Security Council", Fact sheet, 22 September 2020, [https://www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/subsidiary\\_organ\\_factsheets.pdf](https://www.un.org/securitycouncil/sites/www.un.org/securitycouncil/files/subsidiary_organ_factsheets.pdf).

sanctions. To achieve this, the panels collect a wide range of types of information from multiple sources on events, trends, individuals and entities of interest to the Sanctions Committee. This includes “physical, photographic, audio, video and/or documentary evidence”.<sup>67</sup>

POEs often seek to gain access to persons and entities involved in sanctions violations in order to obtain information, either directly or indirectly via individuals with direct knowledge, such as government officials, civil society and humanitarian actors, diplomats and industry representatives.<sup>68</sup> The panel collectively assesses the information for credibility (and the reliability of sources), drawing from methodological standards outlined by the Informal Working Group of the Security Council on General Issues of Sanctions.<sup>69</sup>

The POEs provide an informative source of data and complementary analysis. This is particularly useful for States with limited national technical means of gathering information.<sup>70</sup> Research reveals that the work of a POEs is most effective when it forms part of a broader information-gathering and assessment effort by the United Nations Security Council that also includes Secretary-General’s reports, mandated United Nations assessments and assessment visits by the Chairs of Sanctions Committees.<sup>71</sup>

The reports that these POEs prepare can have a significant impact on the work of the Security Council. In some cases, POE reports have resulted in the extension, modification or development of key arms embargo provisions.<sup>72</sup> However, on other occasions, the ability of POE reports to inform changes in arms embargoes has been limited.<sup>73</sup> In some cases, United Nations Security Council members have rejected POE reports.<sup>74</sup> On occasion

67 E.g. United Nations Security Council, “Final Report of the Panel of Experts on Somalia”, S/2019/858, 1 November 2019, <http://undocs.org/S/2019/858>, paragraph 5(e).

68 Ibid, paragraphs 5-8.

69 United Nations Security Council, “Report of the Informal Working Group on General Issues of Sanctions”, S/2006/997, 22 December 2006, <https://undocs.org/S/2006/997>, paragraphs 17–30.

70 S. de Tessières et al., *Applying Conventional Arms Control in the Context of United Nations Arms Embargoes*, UNIDIR, 2019, <https://www.unidir.org/files/publications/pdfs/applying-conventional-arms-control-in-the-context-of-united-nations-arms-embargoes-en-718.pdf>.

71 Ibid, pp.13–15.

72 Examples include the case of Liberia in 2003, when the United Nations mission was mandated with arms inspection responsibilities; the case of Cote d’Ivoire in 2006, when the United Nations mission established a dedicated arms embargo cell; and the case of the Central African Republic in 2015, which brought to the Security Council’s attention the increased need to address threats associated with illicit small arms and light weapons in the country, resulting in the introduction of a range of arms control measures in subsequent sanctions-related resolutions. See respectively United Nations Security Council, “Report of the Panel of Experts Concerning Liberia”, S/2003/937, 28 October 2003, <https://undocs.org/en/S/2003/937>, paragraph 10(b); United Nations Security Council, “Report of the Group of Experts Concerning Côte D’Ivoire”, S/2006/964, 12 December 2006, <https://undocs.org/S/2006/964>, paragraph 32; and United Nations Security Council, “Final Report of the Panel of Experts on the Central African Republic”, S/2014/762, 29 October 2014, <https://undocs.org/S/2014/762>.

73 E.g. in the case of Libya between 2011 and 2013, arms embargo restrictions were eased despite repeated reporting by the Panel of Experts of wide-spread proliferation of arms and risks to civilians in the country. See S. de Tessières et al., *Applying Conventional Arms Control in the Context of United Nations Arms Embargoes*, UNIDIR, 2019, <https://www.unidir.org/files/publications/pdfs/applying-conventional-arms-control-in-the-context-of-united-nations-arms-embargoes-en-718.pdf>, annex 4.

74 The Russian Federation has previously raised questions over the veracity of Panel reports in the case of Yemen, suggesting that “information must be verified”. United Nations, “Unanimously Adopting Resolution 2402

they have even blocked the appointment of certain panel members.<sup>75</sup>

#### **4.2. THE JOINT VERIFICATION TEAM: AN INNOVATIVE APPROACH**

A more recent innovation designed to improve the implementation of arms embargos is the Joint Verification Team, which was applied as part of the partial suspension of the arms embargo on Somalia. The JVT was established in 2014 and built on lessons from past experiences. Specifically, it was designed to support more comprehensive supply chain security through the integration of control measures at the point of importation and after the distribution of small arms to different units of the Somali security forces.

To do this, the JVT is mandated to “conduct routine inspections of government security forces’ stockpiles, inventory records and the supply chain of weapons” in order to mitigate the risk of their diversion.<sup>76</sup> The JVT consolidates data on all weapon imports, conducts inventory counts at armouries and verifies stocks against distribution lists. The team also conducts spot checks. The JVT is meant to complement the work of the Panel of Experts, which has limited capacity to physically verify the import and distribution of weapons in Somalia.<sup>77</sup>

The JVT is also novel as it provides increased accountability for small arms control at different levels. The team is formed of independent experts and members of the Federal Government of Somalia’s security forces.<sup>78</sup> This joint composition is important. On the one hand, involving national experts fosters national ownership and accountability for the management of weapons and ammunition.<sup>79</sup> On the other hand, the inclusion of independent international technical experts can build confidence in the team’s objectivity and independence, while concurrently providing mentoring and training to local counterparts.

Between its inception in 2015 and mid-2019, the JVT conducted more than 30 site visits and verified weapons and ammunition in dozens of police or military units.<sup>80</sup> This has not always been easy. The JVT has faced difficulties in gaining access to armouries due to diffuse command and control structures.<sup>81</sup> It is further confronted with the challenge of physically verifying materiel in an operational context in which weapons and ammunition

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(2018), Security Council Renews Sanctions against Yemen, Rejects Alternate Draft after Veto by Russian Federation”, SC/13225, 26 February 2018, <https://www.un.org/press/en/2018/sc13225.doc.htm>.

75 United Nations Security Council, “Final Report of the Panel of Experts on Somalia”, S/2019/858, 1 November 2019, <http://undocs.org/S/2019/858>.

76 United Nations Security Council, Resolution 2182, S/RES/2182 (2014), 24 October 2014, [http://undocs.org/S/RES/2182\(2014\)](http://undocs.org/S/RES/2182(2014)), paragraph 7.

77 United Nations Security Council, “Letter Dated 3 April 2014 from the Secretary-General Addressed to the President of the Security Council”, S/2014/243, 3 April 2014, <https://www.undocs.org/S/2014/243>.

78 J. Leff and H. Shiotani, *Towards a National Framework for Arms and Ammunition Management in the Federal Republic of Somalia: A Narrative Report 2014–2017*, UNIDIR, 2017, <https://unidir.org/files/publications/pdfs/narrative-report-2014-2017-en-695.pdf>.

79 United Nations Security Council, “Letter dated 30 July 2019 from the Secretary-General addressed to the President of the Security Council”, 1 August 2019, S/2019/616, <https://undocs.org/S/2019/616>, p. 9.

80 Ibid, p. 9.

81 Ibid, p. 9.

move rapidly and frequently through the supply chain.<sup>82</sup> The JVT has also been unable to fulfil some of the administrative requirements and further capacity-building work has been recommended.<sup>83</sup>

Nonetheless, the mechanism demonstrates innovation in the sanctions framework. It provides an example of a cooperative compliance-assessment mechanism in which the State assumes responsibility for assessment of verification in partnership with international experts and in conjunction with additional layers of scrutiny provided through the POEs and the Sanctions Committee.

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82 J. Leff and E. Mohammed, *An Innovative Approach to United Nations Arms Embargoes*, UNIDIR, 15 September 2020, <https://www.unidir.org/publication/innovative-approach-united-nations-arms-embargoes>.

83 E.g. there have been challenges with cross-referencing “the serial numbers of weapons documented . . . with available Federal Government of Somalia records detailing the distribution of arms to the security forces”. United Nations Security Council, “Final Report of the Panel of Experts on Somalia”, S/2019/858, 1 November 2019, <http://undocs.org/S/2019/858>, paragraph 192(e).



### **UNIDIR RESPONDENT'S NOTE ON THE RELEVANCE OF MECHANISMS UNDER UNITED NATIONS ARMS EMBARGOES TO WMD COMPLIANCE AND ENFORCEMENT**

The experience with the JVT shows how changing political contexts can facilitate the establishment of cooperative accountability mechanisms for supply chain security. This model provides insights that could aid efforts to relax WMD-sanctions regimes and facilitate international technology transfer for peaceful purposes.

Panels of Experts have been employed as the “eyes and ears on the ground” in efforts to collect and analyse a wide range of information of relevance to treaty compliance. These panels share some similarities with the United Nations Secretary-General’s Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons and with the ad hoc hybrid United Nations–Organisation for the Prohibition of Chemical Weapons mechanisms set up to investigate chemical weapon use in the Syrian Arab Republic. They offer a model and precedent for future ad hoc investigations when existing WMD treaty mechanisms cannot resolve WMD non-compliance allegations for one reason or another. However, using POEs in this way would involve the same kinds of political problem found in other investigative mechanisms, particularly when permanent members of the Security Council have a stake in the issue in question. Nonetheless, it could be possible to develop specific measures along these lines under a particular WMD treaty, either as politically binding procedures agreed at a Review Conference or as a legally binding addition or amendment to a treaty.

## 5. THE DISPUTE-SETTLEMENT SYSTEM OF THE WORLD TRADE ORGANIZATION

In the area of international trade, the World Trade Organization (WTO) has established a unique system of inter-State dispute resolution. This system, known as the WTO dispute-settlement system (DSS), is characterized by its exclusive, compulsory and contentious jurisdiction. WTO members – most of the world’s States – are, with limited exceptions, obliged to settle their disputes relating to the 1994 WTO Agreement within the framework of the DSS and not to resort to other means of dispute resolution.<sup>84</sup>

The WTO Agreement is broad in scope and incorporates several international agreements on trade in goods and services, notably the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). To the extent that a dispute relates to rights and obligations arising under the WTO Agreement, the DSS has exclusive jurisdiction.

### 5.1. THE DISPUTE-SETTLEMENT SYSTEM

The DSS encompasses several different dispute-resolution techniques. All disputes are subject to consultation or, in other words, bilateral negotiation. This is a prerequisite for invoking adjudicatory remedies, and disputants resolve a large proportion of disputes at the consultation stage.<sup>85</sup> However, if States cannot resolve a dispute this way, a complainant may request the establishment of a panel. The Dispute Settlement Body, which administers the DSS, will then establish an ad hoc panel (typically composed of three experts) to hear a specific dispute and adjudicate on factual and legal aspects of the case (see Figure 3).

The findings of a panel are known as a panel report, which is essentially a judgment “as to whether the claims of the complainant are well founded and the measures or actions being challenged are WTO-inconsistent”.<sup>86</sup> These reports can also make “recommendation[s] for implementation by the respondent”.<sup>87</sup>

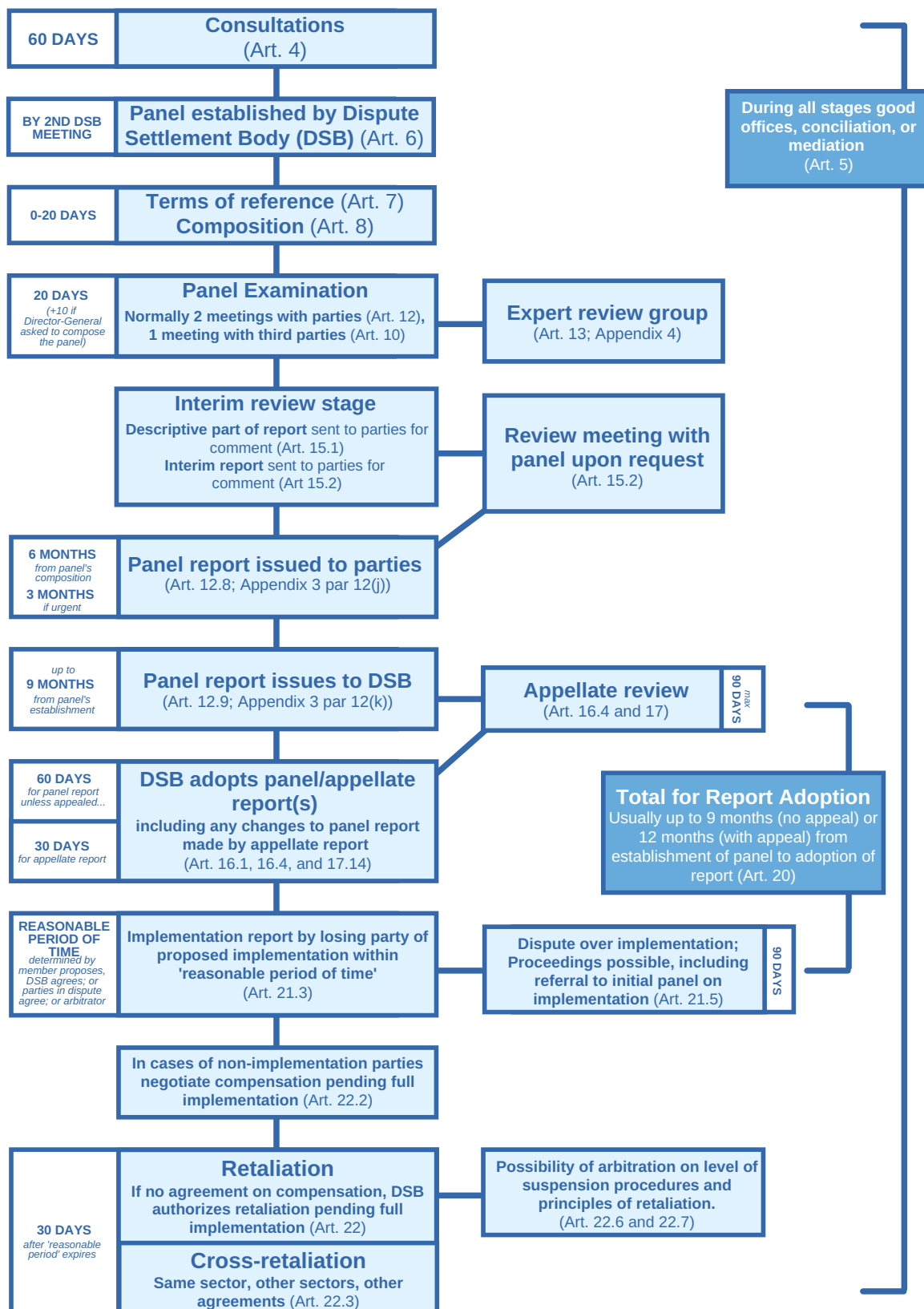
84 Agreement Establishing the World Trade Organization, adopted 15 April 1994, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_disputes\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_disputes_e.htm).

85 As the WTO indicates, “Of the 500 cases filed, almost half never reached the panel adjudication stage and were resolved instead through a process of ‘consultations’ among the parties involved in the dispute”. World Trade Organization, “Briefing note: Dispute Settlement”, November 2015, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_disputes\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_disputes_e.htm).

86 World Trade Organization, “WTO Bodies Involved in the Dispute Settlement Process: Panels”, Dispute Settlement System Training Module, Chapter 3, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s3p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm).

87 Ibid.

FIGURE 3. Flow chart of the WTO dispute-settlement process<sup>88</sup>



88 World Trade Organization, "The Process – Stages in a Typical WTO Dispute Settlement Case", Dispute Settlement System Training Module, Chapter 6, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm).

Dissatisfied WTO members can appeal panel reports to the Appellate Body, a standing tribunal of seven members. A panel report subject to appeal cannot be enforced while the case is pending before the Appellate Body. For that reason, the appellate procedure is meant to be swift.

The DSS also foresees good offices, conciliation and mediation as alternative means of dispute settlement. Although these tools have not been used, WTO members have used arbitration mechanisms to determine the time frame within which WTO members have to comply with WTO rulings, as well as the authorized level of retaliation (see below).

As an alternative to the panel procedure, WTO members can also use arbitration to settle disputes, although this route has been used only once since the establishment of the WTO. In contrast, WTO members often use the panel procedure, and over time an increased proportion of panel cases have been appealed. The panel procedure differs from arbitration in that the disputing parties have limited autonomy over the procedural framework. Unlike the bilateral arbitration process, the panel and Appellate Body procedure is multilateral, which means that the respective reports are binding on all WTO members.

Until recently, the DSS boasted a very satisfactory track record of compliance. This was an impressive feat given that the remedies available to complainants are forward-looking and do not offer compensation for past harm. Indeed, the principal remedy is “suspension of concessions”, commonly referred to as “retaliation”. In practical terms, this means that a successful complainant may be authorized to raise tariffs to offset the ongoing damage that it has been deemed to suffer.

## **5.2. THE CURRENT CRISIS OF THE WTO DISPUTE-SETTLEMENT SYSTEM**

The DSS is currently in a deep and systemic crisis caused by the persistent refusal of one member State to agree to initiating the procedure to appoint new members of the Appellate Body.<sup>89</sup> WTO members decide such appointments by consensus, meaning that each member effectively has a veto. Since 2017, the number of Appellate Body members has dwindled as their terms of office have expired without reappointment. The term of office of the final member of the Appellate Body expired on 30 November 2020.<sup>90</sup> Three members are necessary for a quorum. As such, the Appellate Body is currently unable to hear new cases.

To make matters worse, the paralysis of the Appellate Body also affects cases before panels. As a result, appealed cases currently end up in a growing queue of unheard and

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<sup>89</sup> E.-U. Petersmann, “The ‘Crown Jewel’ of the WTO Has Been Stolen by US Trade Diplomats – And They Have No Intention of Giving It Back”, In D. Prévost, I. Alexovičova and J.H. Pohl (eds.), *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche*, 2018, p. 105; and W.A. Reinsch, J. Caporal and J. Heering, “Article 25: An Effective Way to Avert the WTO Crisis”, Center for Strategic and International Studies (CSIS), 24 January 2019, <https://www.csis.org/analysis/article-25-effective-way-avert-wto-crisis>.

<sup>90</sup> World Trade Organization, “Appellate Body Members.”, December 2020, [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)

unenforced cases. It effectively means that any respondent dissatisfied with a panel ruling can simply appeal the ruling to avoid complying with it.

### 5.3. LESSONS TO BE DRAWN

For most of its existence, the WTO DSS functioned with unparalleled success. It produced hundreds of rulings that interpreted and applied the WTO Agreement. Moreover, to a large extent, members complied with these rulings.<sup>91</sup> The forward-looking remedies effectively “nudged” if not compelled members toward compliance. As the WTO indicates, of the approximately 500 cases addressed, the “compliance rate with dispute settlement rulings is very high, at around 90 per cent”.<sup>92</sup> This success is due, in part, to concerns over the reputational costs of non-compliance with a ruling of the Dispute Settlement Body.<sup>93</sup> The process of appointing Appellate Body members stands out as a design flaw. Unlike many other types of decision, it is not possible to resort to voting to break a deadlock; instead, each member State carries a veto. If the system were redesigned, this loophole would need to be addressed.

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91 There is a small number of repetitive non-compliance cases, notably the so-called “zeroing” cases involving the United States of America as a respondent. See P. Van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization*, 4th edn, 2017, <https://doi.org/10.1017/9781316662496>, p. 712.

92 World Trade Organization, “Briefing note: Dispute Settlement”, November 2015, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_disputes\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_disputes_e.htm).

93 X. Zhang and X. Li, “The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China”, *Journal of Contemporary China*, vol. 23, no. 85, 2014, pp.143–160, <https://doi.org/10.1080/10670564.2013.809986>.

## UNIDIR RESPONDENT'S NOTE ON THE RELEVANCE OF THE DISPUTE-SETTLEMENT SYSTEM OF THE WTO TO WMD COMPLIANCE AND ENFORCEMENT

The WTO dispute-settlement mechanism provides an interesting example of States parties granting a treaty-implementing organization broad powers to adjudicate disputes, with States parties generally agreeing to be bound by the resulting decisions. The negotiation of WMD-related agreements often requires a degree of constructive ambiguity.<sup>94</sup> A process of adjudication or arbitration (as provided for in the WTO Agreement and in article 56 of the International Health Regulations) could thus be useful in resolving differing interpretations of WMD-related agreements.

Indeed, some existing WMD-related treaties contain provisions for dispute settlement. For example, the International Atomic Energy Agency (IAEA) safeguards explicitly include arbitration clauses,<sup>95</sup> while the Chemical Weapons Convention (CWC) indirectly provides "for the possibility of international arbitration".<sup>96</sup> However, States have used neither arbitration nor adjudication to settle differences in these agreements. This is perhaps because of their reluctance to treat national security questions in the same way as trade disputes and "submit politically sensitive" disagreements to arbitration<sup>97</sup> or adjudication.<sup>98</sup> Nevertheless, it is tantalizing to imagine compliance with WMD treaties one day being subject to such a process. Possible mechanisms that might address at least some of the common political concerns therefore warrant further consideration.

<sup>94</sup> As Trapp remarks in an earlier paper in this series, "Different national interpretations of CWC provisions had led to uneven implementation in such areas as opening parts of the chemical industry to inspections, or declaring aspects of past [chemical weapon] activities such as [chemical weapon] development facilities. The First Review Conference urged the Executive Council to speedily conclude these unresolved issues, a task that has yet to be completed at the time of writing." R. Trapp, *Compliance Management under the Chemical Weapons Convention*, WMD Compliance and Enforcement Series no. 3. UNIDIR, 2019, <https://doi.org/10.37559/WMD/19/WMDCE3>, p. 15.

<sup>95</sup> L. Rockwood, *Legal Framework for IAEA Safeguards*, International Atomic Energy Agency, 2013, [https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1608\\_web.pdf](https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1608_web.pdf), p. 24. For a specific example see International Atomic Energy Agency, "The Text of the Safeguards Transfer Agreement Relating to the Bilateral Agreement Between China and the United States of America", INFCIRC/72, 14 December 1965, <https://www.iaea.org/publications/documents/infcircs/text-safeguards-transfer-agreement-relating-bilateral-agreement-between-china-and-united-states-america>, article VI.

<sup>96</sup> J.D. Fry, "Arbitrating Control Arms Disputes", *Stanford Journal of International Law*, vol. 44, no. 2, 2008, pp. 359–422, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/stanit44&div=14>. Article XIV of the CWC provides that "The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate". Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted 13 January 1993, <https://www.opcw.org/chemical-weapons-convention/articles/article-xiv-settlement-disputes>, article XIV(3).

<sup>97</sup> J.D. Fry, "Arbitrating Control Arms Disputes", *Stanford Journal of International Law*, vol. 44, no. 2, 2008, pp. 359–422, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/stanit44&div=14>, p. 360.

<sup>98</sup> This is because "The resolution by third-party adjudication . . . of issues arising from indeterminate language in the arms control context generally represents an unacceptable threat to the sovereignty and national security of states, particularly the most powerful." J.M. Beard, "The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention". *American Journal of International Law*, vol 101, no. 2, 2007, pp. 271–321, <https://www.jstor.org/stable/4492892>.



## 6. ACCOUNTABILITY FOR CORE INTERNATIONAL CRIMES

Accountability for core international crimes (i.e. war crimes, crimes against humanity and genocide) depends on the efforts of, and collaboration between, a variety of actors. Traditional criminal justice actors at the international and domestic levels play a fundamental role. However, international crimes are unique. They are often prosecuted years after they happened and, in some cases, in courtrooms far removed from where the crimes were physically committed. As such, criminal justice actors cannot operate in isolation. Their ability to deliver justice will often depend on collaboration with a broad array of international, non-governmental and civil society actors that collect, preserve and analyse evidence.

This essay examines the role and connections between different entities within the accountability sphere. It first begins with an overview of the jurisdiction of the permanent International Criminal Court (ICC). It then addresses the role – and limits – of criminal justice actors at the domestic level. It concludes with remarks on the role of non-governmental organizations (NGOs), civil society actors, and fact-finding and hybrid entities formed by international organizations (section 6.3).

### 6.1. THE INTERNATIONAL CRIMINAL COURT

The ICC is a permanent treaty-based judicial body. It began functioning in 2002 with jurisdiction to investigate and prosecute core international crimes.

The ICC is an important pillar of the accountability framework. Yet there are limits on its ability to exercise jurisdiction. Far from being universal, the ICC's jurisdiction to investigate and prosecute is generally only exercised when it possesses a personal or territorial basis to do so. For the ICC to proceed on the basis of personal jurisdiction, the suspect must be a national of either a State party to the ICC's founding Statute, the 1998 Rome Statute, or a State that has otherwise accepted the ICC's jurisdiction.<sup>99</sup> The ICC's exercise of territorial jurisdiction requires that the underlying crime be committed on the territory of either a State party or a State that has otherwise accepted the ICC's jurisdiction.<sup>100</sup>

The ICC may only exercise jurisdiction irrespective of either a territorial or personal basis when the United Nations Security Council refers a situation to the ICC Prosecutor pursuant to a resolution under Chapter VII of the United Nations Charter.<sup>101</sup> Only two situations have been referred to the ICC Prosecutor by the Security Council: the first concerned the situation in Darfur, Sudan, since 1 July 2002; and the second related to the situation

<sup>99</sup> Rome Statute of the International Criminal Court, adopted 17 July 1998, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, articles 12(2)(b), 12(3).

<sup>100</sup> Ibid, articles 12(2)(a), 12(3).

<sup>101</sup> Ibid, article 13(b).

in Libya since 15 February 2011.<sup>102</sup> Even when the ICC possesses jurisdiction, it serves as a court of last resort, exercising jurisdiction only when domestic authorities fail to prosecute because they are unwilling or incapable of doing so.<sup>103</sup>

## 6.2. DOMESTIC CRIMINAL JUSTICE ACTORS

Given the nature of the ICC's jurisdiction, domestic criminal justice actors have an important role to play in investigating and prosecuting international crimes. However, domestic actors may not always be able to conduct the full range of prosecutions necessary to ensure comprehensive accountability. This will especially be the case where crimes are linked to long-standing armed conflicts wherein a variety of crimes have been committed by a range of perpetrators holding different positions.

Comprehensive prosecutions in the context of protracted armed conflicts are resource intensive and often require years of dedicated investigative and prosecutorial activity. This is evident in the work of the tribunals for Cambodia, Sierra Leone, Rwanda and the former Yugoslavia.<sup>104</sup>

The most complex and essential prosecutions will inevitably involve senior-level suspects who may not have been physically present at crime sites but are instead alleged to have orchestrated or otherwise contributed to the broader criminal campaign through the exercise of their powers and functions. In these types of cases, proof of underlying crimes can often be distinct from proof of a suspect's participation in the crimes. The latter will often require access to sensitive forms of evidence such as insider witnesses and documentation capable of addressing how chains of command functioned, how criminal objectives were formulated and implemented, and how information regarding events on the ground reached senior officials.

The nature of the underlying crimes can also increase the overall complexity of individual cases. For instance, in cases involving prohibited means and methods of warfare, proving underlying crimes may require access to various types of witnesses, including victims, bystanders and experts. In these cases, the evidence of witnesses will also tend to be usefully complemented by other forms of evidence, including video and photographic

102 These were referred to the ICC by, respectively, United Nations Security Council, Resolution 1593, S/RES/1593 (2005) 31 March 2005, [http://undocs.org/S/RES/1593\(2005\)](http://undocs.org/S/RES/1593(2005)); and United Nations Security Council, Resolution 1970, S/RES/1970 (2011), 26 February 2011, [http://undocs.org/S/RES/1970\(2011\)](http://undocs.org/S/RES/1970(2011)).

103 Rome Statute of the International Criminal Court, adopted 17 July 1998, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, articles 17, 18. See also ICC Office of the Prosecutor, "The Principle of Complementarity in Practice", Informal expert paper, 2003, <https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>, paragraph 1.

104 The complexity of a single trial involving a leadership figure is illustrated by the case against Radovan Karadžić, the former President of the Serbian Republic of Bosnia and Herzegovina (also known as Republika Srpska), at the International Criminal Tribunal for the Former Yugoslavia. The case included charges of war crimes, crimes against humanity and genocide in relation to crime sites across Bosnia and Herzegovina over a four-year period, 1992–1995. The presentation of evidence by the prosecution and the defence took nearly four years. In total, 434 witnesses testified before the Trial Chamber hearing the case and another 152 witnesses testified in written form. A total of 11,469 exhibits amounting to 191,040 pages were admitted into evidence during the trial. See International Criminal Tribunal for the Former Yugoslavia, "Prosecutor v. Radovan Karadžić", Case no. IT-95-5/18-T, Judgement, 24 March 2016, [https://www.icty.org/x/cases/karadzic/tjug/en/160324\\_judgement.pdf](https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf), paragraphs 6, 6136, 6145.

evidence. The complexity of a given case will also grow as the scope of the charged crimes grows.

The capacity of domestic actors to investigate and prosecute complex cases will vary from jurisdiction to jurisdiction. Therefore, in the context of long-standing armed conflicts involving a variety of crimes and perpetrators, domestic actors are likely to be most effective in delivering accountability when their efforts are complemented by an international jurisdiction.

### 6.3. INTERNATIONAL ORGANIZATIONS, NGOS AND CIVIL SOCIETY

International organizations, NGOs and other civil society actors also play an important role within the accountability framework. United Nations and other mandated bodies have been created to respond to situations involving violations of international humanitarian law, international human rights law and other related norms.<sup>105</sup> For example, in the context of the Syrian situation, the efforts of the United Nations have been complemented by the Organisation for the Prohibition of Chemical Weapons (OPCW), which has established entities mandated to investigate and report on the use of chemical weapons.<sup>106</sup> These bodies play an important role in collecting and preserving evidence soon after violations are reported and, in certain contexts, visiting crime sites that may not otherwise be accessible to traditional criminal justice actors.<sup>107</sup> NGOs and local civil society actors can also play an important role in collecting, preserving and analysing evidence related to international crimes.

105 For a list of relevant United Nations mandated institutions see United Nations Library & Archives at Geneva, "International Commissions of Inquiry, Fact-finding Missions: Chronological list", <http://libraryresources.unog.ch/factfinding/chronolist>. In the Syrian context, the United Nations Security Council established the Joint Investigative Mechanism (JIM) in collaboration with the OPCW. The JIM's mandate was "to identify to the greatest extent feasible individuals, entities, groups, or governments who were perpetrators, organisers, sponsors or otherwise involved in the use of chemicals as weapons, including chlorine or any other toxic chemical, in the Syrian Arab Republic where the OPCW [Fact-Finding Mission (FFM)] determines or has determined that a specific incident in the Syrian Arab Republic involved or likely involved the use of chemicals as weapons, including chlorine or any other toxic chemical". United Nations Security Council Resolution 2235, S/RES/2235 (2015), 7 August 2015, [https://undocs.org/S/RES/2235\(2015\)](https://undocs.org/S/RES/2235(2015)), paragraph 5.

106 The OPCW Fact-Finding Mission (FFM) was initially established on 29 April 2014 with a mandate "to establish the facts surrounding allegations of the use of toxic chemicals, reportedly chlorine, for hostile purposes in the Syrian Arab Republic". OPCW, "Summary Report of the Work of the OPCW Fact-Finding Mission in Syria", Note by the Technical Secretariat, S/1191/2014, 16 June 2014, [https://www.opcw.org/sites/default/files/documents/S\\_series/2014/en/s-1191-2014\\_e\\_.pdf](https://www.opcw.org/sites/default/files/documents/S_series/2014/en/s-1191-2014_e_.pdf), paragraph 1. The OPCW's Investigation and Identification Team was established pursuant to a Decision of the OPCW's Conference of States Parties on 27 June 2018 with a mandate "to identify the perpetrators of the use of chemical weapons in the Syrian Arab Republic by identifying and reporting on all information potentially relevant to the origin of those chemical weapons in those instances in which the OPCW Fact-Finding Mission in Syria determines or has determined that use or likely use occurred, and cases for which the OPCW-UN Joint Investigative Mechanism has not issued a report". OPCW, Conference of the States Parties, "Addressing the Threat from Chemical Weapons Use", Decision, C-SS-4/DEC.3, 27 June 2018, [https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3\\_e\\_.doc.pdf](https://www.opcw.org/sites/default/files/documents/CSP/C-SS-4/en/css4dec3_e_.doc.pdf), paragraph 10.

107 United Nations General Assembly, "Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013", A/67/997-S/2013/553, 16 September 2013, <http://undocs.org/S/2013/553>, p. 6 (referring to the onsite investigation conducted by the Mission). See also OPCW, "Report of the Fact-Finding Mission Regarding the Incident of Alleged Use of Toxic Chemicals as a Weapon in Douma, Syrian Arab Republic, on 7 April 2018", Note by the Technical Secretariat, 1 March 2019, [https://www.opcw.org/sites/default/files/documents/2019/03/s-1731-2019\(e\).pdf](https://www.opcw.org/sites/default/files/documents/2019/03/s-1731-2019(e).pdf), paragraph 8.1 (referring to onsite visits carried out by the FFM).

Regardless of the source, evidence must be assessed for credibility and reliability before being used in a criminal case. These types of assessments may be informed by a variety of factors that entities involved in collecting evidence should be mindful of, including provenance, a verifiable chain of custody and consistency with other evidence. The United Nations General Assembly created the International, Impartial and Independent Mechanism for the Syrian Arab Republic and the United Nations Human Rights Council created the Independent Investigative Mechanism for Myanmar to perform these assessments in support of criminal justice entities. These mechanisms provide an important bridge between, on the one hand, international organizations, NGOs and other documenters and, on the other, traditional criminal justice actors. They do this by serving as central repositories that preserve and analyse evidence, fill gaps through targeted investigations, and provide support for immediate and long-term criminal justice objectives.<sup>108</sup>

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<sup>108</sup> International, Impartial and Independent Mechanism for Syria, “Terms of Reference”, <https://iiim.un.org/terms-of-reference-of-iiim/>; and Independent Investigative Mechanism for Myanmar, “Terms of Reference”, annex to United Nations General Assembly, A/73/716, 21 January 2019, <https://undocs.org/en/A/73/716>.

### **UNIDIR RESPONDENT'S NOTE ON THE RELEVANCE OF THE ACCOUNTABILITY FOR CORE INTERNATIONAL CRIMES TO WMD COMPLIANCE AND ENFORCEMENT**

The comprehensive prosecution of international crimes is a complex and expensive process requiring collaborative work between a range of different actors. Prosecutions often take place years, if not decades, after the crimes were allegedly perpetrated. The relationship to monitoring and enforcement of compliance with WMD treaties is therefore somewhat complex and tenuous. This is further complicated by two factors: (1) the fact that international crimes are likely to be limited to cases of actual use of WMD, rather than development or possession (although evidence of development or possession is likely to be important); and (2) the political implications of using criminal law as a separate channel to pursue alleged violators of WMD treaties.

There is, nonetheless, value to further exploring how States might harmonize and integrate international criminal law with WMD treaty regimes, particularly as recent experiences with WMD regimes have shown the limits of enforcement in the absence of Security Council unity. As Trapp notes, when the Security Council is divided, "narrow national interest and geopolitical considerations can become predominant and collectively enforcing the law becomes increasingly difficult".<sup>109</sup>

Existing proposals have already considered this idea. For example, in 2011, Robinson outlined a proposal to criminalize chemical and biological armaments at the international level. This proposal sought to make it "an offence for any person, regardless of official position, to order, direct or knowingly to participate or render substantial assistance in the development, production, acquisition, stockpiling, retention, transfer or use of biological or chemical weapons".<sup>110</sup> International criminalization of chemical and biological armaments would clearly require thorough legal analysis as well as deeper reflection on the practice of prosecuting international crimes. However, the credible threat of criminal prosecution could strengthen the norm against chemical and biological weapons and serve as a deterrent to anyone considering the development or use of these weapons.

109 R. Trapp, *Compliance Management under the Chemical Weapons Convention*, WMD Compliance and Enforcement Series no. 3, UNIDIR, 2019, <https://doi.org/10.37559/WMD/19/WMDCE3>, p. 32.

110 J.P. Robinson, "Criminalization of Biological and Chemical Armament", *CBW Conventions Bulletin*, Special Issue, February 2011, pp. 1–5, [http://www.sussex.ac.uk/Units/spru/hsp/documents/CBWCB\\_Special\\_Issue.pdf](http://www.sussex.ac.uk/Units/spru/hsp/documents/CBWCB_Special_Issue.pdf), p. 4. Notably, this builds on a body of work by Robinson, Meselson and others at the Harvard Sussex Program on Chemical and Biological Weapons.





## 7. FINAL WORD

As part of a “new vision”<sup>111</sup> for arms control and disarmament, fresh thinking is needed to improve compliance and enforcement of regimes related to weapons of mass destruction. Otherwise, these regimes are at risk of decline with implications for the wider rules-based international order. While this report indicates that States cannot copy-and-paste the tools and approaches discussed above into existing WMD-related agreements, they do provide examples of useful ideas and insight. As such, the report should be thought of as providing a sample of possible processes and precedents from other multilateral issue areas, rather than an exhaustive survey. For ease of reference, these examples are outlined in Table 2.

TABLE 2. *Selected processes and precedents from other issue areas*

Aarhus Convention	Compliance Committee
	Public triggers of compliance concerns
	Follow-up mechanisms for addressing non-compliance
International Health Regulations (2005)	Use of unofficial third-party sources
	Algorithm for triggering an international response
	Arbitration
United Nations arms embargoes	Joint Verification Mechanism
	Panels of Experts
World Trade Organization dispute settlement	Adjudication
International crimes	International criminal law

The disarmament community of practice tends to evolve cautiously. If past historical form is a guide, the community is thus unlikely to readily embrace new tools such as these uniformly in the short term. Nonetheless, for those committed to WMD treaty compliance and enforcement, tools from beyond WMD regimes can provide a useful source of ideas to inform their future thinking on ways to improve these mechanisms.

111 United Nations, “UN chief launches new disarmament agenda ‘to secure our world and our future’”, 24 May 2018. <https://news.un.org/en/story/2018/05/1010551>



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Exploring the Future of WMD Compliance and  
Enforcement: Workshop Report

Science and Technology for Monitoring  
and Investigation of WMD Compliance

The Role of International Organizations in WMD Compliance and  
Enforcement: Autonomy, Agency and Influence

**Tools for Compliance and Enforcement from  
Beyond WMD Regimes**

WMD Compliance and Enforcement in a  
Changing Global Context

Tools for Restoring Compliance and  
Enforcing WMD-related Regimes

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