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**TOWARD AN EFFECTIVE VERIFICATION
REGIME FOR THE CONVENTION
ON CERTAIN CONVENTIONAL
WEAPONS:
THE OUTLINE OF AN INCREMENTAL
APPROACH**

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Principal Findings and Conclusions

Central Argument

- The central argument of this report is that a revised CCW Convention will require an effective verification regime to provide all participating states with reasonable assurances that parties are in compliance. Such a regime will likely be modest at first, but may become more rigorous as states become more aware of the benefits verification can confer. As a first step in the process of regime formation, this report advocates the creation of a two-track verification regime. The first track, dealing with *international* conflicts, will involve the creation of a Verification Commission comprising representatives of the States Parties to the CCW Convention and the use of fact-finding missions to investigate allegations of non-compliance. The second track, dealing with *non-international* conflicts, will involve confidence-building measures. It is envisaged that, over time, as all Parties become more comfortable with CCW verification, these two tracks will converge. The end product will be a verification regime that is both effective and comprehensive, and that enjoys the support and confidence of all the States Parties.

Main Points

- Verification is a process which establishes whether parties are complying with their obligations under an agreement. Verification measures are important for three principle reasons:
 1. they can instill confidence within participating states that other states are meeting their obligations under a treaty;
 2. they can discourage non-compliance;
 3. they can contribute to the creation and reinforcement of international norms.
- In the CCW context, verification is deemed to be "effective" if it can demonstrate a consistent pattern of gross and reliably attested violations of the Convention.
- The ideal verification process involves several stages:
 1. The "**trigger**" stage during which the verification process is initiated.
 2. The **initial review stage** during which frivolous, unfounded or otherwise inadmissible allegations are screened out.
 3. The **investigation stage** during which the verification authority uses a variety of means to collect and compile data regarding a case. These means range from interviews and hearings to on-site fact-finding missions.
 4. The **evaluation stage** during which a decision is made

whether non-compliance has occurred. This process can be judicial, quasi-judicial or political in nature.

- Experience suggests that, to be most effective, verification systems should have several specific features. These include:
 1. a broad-based complaints system;
 2. an effective screening process;
 3. an ability to detect systematic violations; and
 4. a quasi-judicial evaluation process.
- While a rigorous regime based on these elements may be desirable, it is important to recognize that less ambitious arrangements undertaken now can lead to significant improvements over time, particularly if the "first phase" package is perceived by the majority of participants to be fair and beneficial.
- An incremental approach, involving phased improvements in the effectiveness of the regime as well as a gradual extension of its scope of application, would seem to offer benefits for creating an effective CCW verification regime.
- There need be no pre-determined end point to this incremental process. The regime and its specific elements need only evolve to the point where they are as effective as the international community agrees is adequate.
- As the first step in this incremental process, a two-track approach is recommended. The **first track**, dealing with *international* armed conflict, would start with:
 1. a modest "states-plus" triggering mechanism;
 2. a states-based initial screening process; and
 3. the use of on-site fact-finding procedures in the context of international armed conflict.
- Over time, these measures should be amended to redress deficiencies in this first phase regime.
- The **second track**, dealing with *non-international* armed conflicts, would involve largely voluntary confidence building measures.
- At set intervals (presumably at periodic Review Conferences) the Parties to the Convention could decide to extend the verification provisions covering international armed conflict to various types of non-international armed conflict as well.
- Movement toward a more comprehensive regime would be based on progress in building confidence. *Inter alia*, one aspect of confidence-building in the CCW context would involve successfully transforming ideas and beliefs about the "risk" posed by intrusive compliance monitoring measures.

- Movement toward a more comprehensive verification regime might also be facilitated by the use of confidence building measures involving exchanges of technical information and material assistance that would help States Parties to comply with the restrictions/requirements of Protocol II.
- A possible first phase verification arrangement for the CCW Convention is outlined in Annex 1 of this report.
- A step-by-step description of how this arrangement would work is provided in Annex 2 of this report.

I. Introduction and Background

1. General Assembly Resolution 48/79 of 16 December 1993 requested the Secretary-General to establish a Group of Experts to prepare for a Review Conference on the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (the Certain Conventional Weapons or CCW Convention). Following the last session of this Group of Experts (8-19 August 1994), the Chair issued an integrated draft "rolling text" of amendments to Protocol II of the Convention (dealing with landmines, which has been the primary focus of the Group of Experts' deliberations). This rolling text, which records the state of negotiations regarding proposed amendments to the Convention and its Protocols, will be the basis for further discussions at the next session. The Review Conference is scheduled to take place sometime during the period 25 September to 13 October 1995.

2. The draft rolling text addresses several outstanding issues. To start, it reflects an ongoing concern with the scope of application of the Convention. Although many States recognize the importance of extending the scope of the Protocol to "non-international" conflict, as of the last session no agreement had been reached in this regard.

3. A proposal to amend the Convention to regulate not only use but also the *development, production, stockpiling and transfer* of landmines, while supported by several States, was not agreed by the Group and will be reviewed at the January 1995 session.

4. As reflected in the rolling text, no agreement has been reached regarding verification of either the Convention as a whole or Protocol II. Two basic views on the nature of future CCW verification are reflected in the rolling text. On the one hand, there is the view that an effective verification regime needs to be put in place if the Convention is to be meaningful. Adherents to this view agree that an effective verification system would be beneficial, but sometimes disagree over the precise nature of such a system (ie. its triggering mechanisms, screening procedures, etc.).

5. On the other hand, there is the view that an effective verification regime is neither necessary nor practicable. According to this view, such a regime would be problematic for several reasons: it would deter potential signatories from becoming parties to the Convention; it would be unduly intrusive; and it would violate national sovereignty. While some effort has been made to find common ground between these positions, at the moment there is no consensus on the issue of verification. This topic will be taken up again at the January session.

6. The Group also considered proposals to encourage the provision of technical and material assistance for de-mining. No agreement was reached with respect to this proposal.

7. Finally, proposals were advanced to amend the Convention to cover blinding weapons, certain types of small-arms and naval mines. These proposals have not yet elicited consensus.

II. Scope and Objectives of the Report

8. Against this background, the objective of this report is to advance some practical proposals for a CCW Convention verification regime. The report's central argument is that a revised CCW Convention will require an effective verification regime to provide all participating states with reasonable assurances that parties are in compliance. Such a regime will likely be modest at first, but may become more rigorous as states become more aware of the benefits verification can confer. As a first step in the process of regime formation, this report advocates the creation of a two-track verification regime. The first track, dealing with *international* conflicts, will involve the creation of a Verification Commission comprising representatives of the States Parties and the use of fact-finding missions to investigate allegations of non-compliance. The second track, dealing with *non-international* conflicts, will involve confidence-building measures. It is envisaged that, over time, as all Parties become more comfortable with CCW verification, these two tracks will converge. The end product will be a verification regime that is effective and comprehensive, and that enjoys the support and confidence of all the States Parties.

9. It should be noted at the outset that the focus of this report is on landmines, reflecting the main focus of the Expert Group meetings to date. Outside of the technical dimension, however, there seems to be little in the logic of either the basic argument or its particulars that could not apply to other types of weapons as well: most of the arguments for and against an effective verification regime apply whether one is verifying obligations governing landmines, blinding weapons or any other category of weapon regulated/proscribed by the CCW Convention.

10. This report also deals with issues related to CCW verification in non-international conflicts. Although the existing Convention applies only to international conflicts, an important thrust of the expert group meetings has been to extend its scope to cover non-international conflicts as well; for it is generally acknowledged that it is in the course of these conflicts that landmines are most frequently used in an indiscriminate and inhumane fashion. The extension of the scope of the Convention in this way is problematic, however. Nor is there agreement regarding the creation of an effective verification regime empowered to investigate alleged violations of the Convention, particularly in the context of non-international conflicts. This report will seek to address questions regarding the utility and feasibility of a verification regime, focusing in particular on the possibility that such a regime could evolve over time to cover both international and non-international armed conflicts.

III. The Nature of Effective Verification

A. The Nature of Verification

11. Broadly speaking, verification is a process which is intended to confirm that parties are complying with their obligations under an agreement. The 1990 Group of Experts Report on the Role of the United Nations in the Field of Verification¹ describes verification as a three-stage process involving the collection of relevant information, the analysis of that information, and the rendering of judgements regarding compliance.

12. The verification process is important for several reasons. First, verification measures can instill confidence within participating states that other states are meeting their obligations under a treaty. An important element of this confidence-building process is the ability to gather credible information relative to the agreement in question that will confirm compliance. Confidence can also be generated when verification provisions allow states to demonstrate clearly that they are in compliance.

13. Second, well-designed verification procedures are important in that they can discourage non-compliance. In connection with inhumane weapons, potential violators may be deterred if they have foreknowledge that verification measures will generate clear and unambiguous evidence that can be used in diplomatic and public forums.

14. Third and finally, verification measures are important because they can contribute to the creation and reinforcement of international norms. In the longer-term, weapons such as landmines can probably only be regulated effectively if the "public conscience" can be mobilised in a way which effectively stigmatises their indiscriminate use. The status and importance of the public conscience was one of the more important factors in bringing the use of chemical and biological weapons under control. Accordingly, one of the functions of any CCW verification regime should be to create/reinforce the normative belief that the indiscriminate use of weapons such as landmines is "inhumane" -- ie. different from their legitimate use by virtue of the unnecessary and unacceptable nature of the suffering they cause.

B. Effective Verification in the CCW Context

15. In the context of the CCW Convention, an effective verification regime is one which provides for the ability to demonstrate a consistent pattern of gross and reliably attested violations of the Convention, because it is only these types of violations that are demonstrably deliberate acts of policy.

¹UN Document A/45/372,28 August 1990.

16. To be most effective, a CCW verification regime would have to apply to non-international as well as international conflicts as it is generally acknowledged that it is in the course of the former that landmines are most frequently used in an indiscriminate and inhumane fashion. While limiting the scope of the Convention/Protocol and its verification regime to international conflict might be necessary in the short run, ultimately the greatest humanitarian returns will be realised if it is extended to cover non-international armed conflicts as well.

C. *A Incremental Approach to Effective Verification*

17. An effective CCW verification system is only possible once all states are confident that such a system will not have harmful consequences and that it will in fact provide net benefits.

18. Experience in the realm of arms limitation and disarmament strongly suggests that the development of such a perception can best be achieved by initiating a confidence-building process. The goal of confidence-building in this context would be to build trust between all parties to the regime, reassuring everyone that the operation of the Convention/Protocol and its verification system would provide net benefits to all.

19. As confidence-building measures begin to produce results, more ambitious verification measures can then be implemented. As the benefits deriving from these measures are realised, and as all parties come to recognize the advantages of a more effective verification regime, more rigorous measures can be gradually introduced.

20. This suggests the utility a phased or "incremental" approach, in which a verification regime could develop along two axes. First, there could be a gradual strengthening of verification with respect to *international* conflict. Second, there could be an incremental extension of the verification regime to *non-international* conflicts.

21. Such an incremental approach would have two principal advantages. First, it would help eliminate one of the more commonly cited disincentives to becoming party to the Convention/Protocol. It is generally accepted that universality is an important goal of the Review Conference; for the more states that can be brought into the Convention/Protocol, the greater the potential humanitarian payoff. Against this backdrop, the argument is sometimes made that an effective (and especially an intrusive) CCW verification regime is undesirable because it would tend to deter some states from signing on to the Convention/Protocol.

22. In the event that an effective verification mechanism *might* deter some states from becoming parties to the Convention/Protocol an incremental approach could prove useful. Such an approach is premised on a simple assumption: that each step toward effective verification must be predicated on achieving broad agreement among

the States Parties. Thus, an incremental approach would envisage that the scope of the verification regime would only be extended from international to non-international armed conflict once confidence-building measures had provided a level of assurance that this would not unduly compromise the sovereignty or security of any State Party. An incremental approach to CCW verification could encourage non-parties to join by allowing them to become participants in the confidence-building process.

23. Second, an incremental approach would allow the verification mechanisms associated with any future CCW Convention to be tailored to the actual requirements of that Convention. At present, for example, it is unknown precisely how intrusive CCW fact-finding will have to be in order to be effective. Over time, practical experience will provide a better appreciation of the degree of intrusiveness required. Additionally, learning-by-doing will illuminate those practices which work well and those which are less effective. As this process continues, the incremental nature of the regime will allow it to evolve organically, with verification practices and institutions developing over time as operational requirements indicate and political circumstances permit.

24. An important corollary of this argument is that there is no fixed or pre-determined end point to this process. The regime and its specific elements need only evolve to the point where they are as effective as the international community agrees is adequate.

III. The Verification Process

25. Typically, verification involves several stages. The first stage is the **trigger stage** during which the verification process is initiated. After this comes the **initial review stage**. At this stage, frivolous, unfounded or otherwise inadmissible complaints are screened out. Following the initial review stage comes the **investigative stage**. During this part of the verification process, investigating authorities use a variety of means to collect and compile the facts regarding a case. These means range from interviews and hearings to fact-finding missions *in loco*. Finally (and not in all cases), a decision is made regarding the truth of the allegations. This is the **evaluation phase**. The process of evaluating alleged violations can be judicial, quasi-judicial or political in nature.

26. To maximize effectiveness, verification systems have to have several specific features. These include: a broad-based complaints system, an effective screening process, an ability to detect systematic violations, and an independent (ie. quasi-judicial) evaluation process. While in principle a system incorporating these elements would undoubtedly enhance the effectiveness of verification in the CCW context, such a system may prove difficult to implement in the short run. Moreover, experience may indicate that such an elaborate and/or rigorous regime is not necessary to uncover patterns of gross and reliably attested violation.

27. These considerations suggest the utility of an incremental approach to verification -- ie. an approach which starts off with generally acceptable confidence-building measures and evolves over time (and in ways agreeable to the international community) into a more comprehensive and effective regime. It bears repeating that there need be no fixed end-point to this process; the regime can evolve as circumstances require and permit.

28. A crucially important element of this approach is "confidence building". Confidence building should be thought of as,

...a process that, by its very nature, can help change, in a positive direction, the way participants think about important issues associated with a negotiation, its resulting agreement, and its subject matter.... Thus, confidence building not only can lead to the production of useful information relevant to an international undertaking -- including its verification -- but it can help to develop constructive new ideas about how to make those undertakings more effective by encouraging the development of shared ideas, approaches, and norms.²

29. In the CCW context, in addition to helping to provide information to support verification, confidence building can help to transform ideas and beliefs about the "risks" posed by intrusive compliance monitoring measures, whether these are understood in terms of challenges to sovereignty or risks of abuse. Over time, states would be assured that verification measures do not unduly compromise sovereignty and/or security, and that -- as part of a comprehensive regime -- they can actually provide net benefits.

30. An incremental approach would involve two tracks: one dealing with international armed conflict, and the other dealing with non-international armed conflict. With respect to the former, verification would initially involve minimally-intrusive verification measures. In the context of the latter, the emphasis would be initially on confidence-building. At set intervals, and as circumstances required and permitted, the parties to the Convention could decide to enhance CCW verification in both contexts. Over time, the two tracks could be expected to converge.

31. Movement toward a more comprehensive verification regime might also be facilitated by progressive exchanges of technical information and material assistance, coordinated through the use of confidence building measures, that would help States parties to comply with the restrictions/requirements of Protocol II. Indeed, the provision of assistance to help repair/prevent damage caused by non-compliance would seem to be dependent on there being in place a credible process to determine whether a violation had in fact occurred.

²Jim Macintosh, *The Role of Confidence Building in the Convention on Conventional Weapons*, a report prepared for the Canadian Department of Foreign Affairs and International Trade, December 1994, p.5.

IV. Triggering Mechanisms

A. Introduction

32. Several different mechanisms could be used to trigger an inquiry into alleged violations of the CCW Convention. These include: complaints from individuals, complaints from non-governmental organisations, inter-state complaints, requests from international organization such as the UN General Assembly or Security Council, and initiatives on the part of the verification authority itself (ie. initiatives taken in *proprio motu*).

33. While all of these have been used as part of the verification regimes associated with various international agreements, at the moment support for a modest "states-plus" triggering procedure seems strongest.

B. A Broad-Based Mechanism

34. In the CCW context, the most effective verification system would probably have a triggering mechanism that would allow the investigation process to be initiated by complaints from a broad range of sources (including individuals, non-governmental organisations, states, international organisations such as the UN, and the verification authority itself). If the application of the CCW Convention were restricted to international conflicts only, a mechanism based on complaints by states would probably be adequate because in this type of conflict landmines are usually used in theatres of combat removed from the civilian population, and non-state actors are typically not in a position to observe patterns of use. If, however, the scope of the CCW Convention is extended to cover non-international conflicts as well, then a more broadly-based complaints mechanism might prove to be a more useful means of determining the extent to which agreed rules pertaining to the possession and/or use of certain categories of landmines have been systematically violated. This is so because, in non-international conflicts, civilians, aid workers, UN peacekeepers, etc. are often in the middle of the theatre of combat, and are therefore well placed to observe patterns of landmine use.³ A broad-based complaints mechanism could permit non-combatants to report these observations to a verification authority which could use them to help establish the extent to which the provisions of the CCW Convention had been violated.

35. At the current juncture it seems unlikely that such a maximally effective triggering mechanism will prove universally

³See Annex II, "Symposium of Military Experts on the Military Utility of Anti-Personnel Mines, Report of the International Committee of the Red Cross for the Review Conference of the 1980 United Nations Convention on Prohibitions or Restrictions on the of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, pp. 52-53.

acceptable because there is some concern that the creation of broad-based triggering mechanisms will open the door to abuse in the form of frivolous and nuisance allegations.

36. Such concerns, however, are not borne out by experience in the field of international human rights law. In addition, there are a number of screening systems that can be put in place to filter out frivolous and nuisance complaints. Finally, and this may be the crux of the matter, if the international humanitarian and human rights law record tells us anything it is that states are unenthusiastic about filing complaints against other states (except where it serves some specific domestic or foreign policy interest), and that therefore a states-based complaints mechanism is unlikely to prove effective.

37. If it is decided that a broad-based triggering mechanism is inappropriate for the first phase of the CCW verification regime, two alternative (though less effective) triggering mechanisms might be considered. Implementing either of these alternatives as part of an initial CCW verification regime does not rule out the possibility that, as confidence in the regime develops, a broad-based complaints system might evolve over time.

C. A "States Plus" Mechanism

38. The first alternative to a broad-based mechanism is a "states plus" system. Under this type of arrangement, states parties and a limited number of other actors would have standing to lodge a complaint. These alternative actors might include specific NGOs, the authority charged with monitoring compliance with the CCW Convention and/or the UN Secretary General. Such a system would reduce the scope for frivolous or nuisance complaints, but still allow non-state actors to have some input into the compliance monitoring process. This approach might be considered a compromise between a completely open system and one in which only states parties would have standing to make an allegation of non-compliance.

39. There are two variations of states-plus mechanism: comprehensive and modest. The former would grant States parties and a wide range of other actors standing to make allegations of non-compliance. The latter would reserve that right to States parties and the international community as embodied in the UN General Assembly.⁴ A modest states-plus mechanism might also permit

⁴There is precedent for allowing the UN General Assembly to call for an investigation into alleged grave breaches of international humanitarian law, specifically the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. This Protocol, as is generally known, contains no specific provisions for verifying compliance. In the early 1980s, however, as the result of a number of alleged violations, the UN General Assembly adopted a resolution authorising the Secretary-General to assemble a team of qualified experts to conduct an investigation.

the UN Secretary-General to file a complaint, but only when the alleged violation affects peacekeepers under his control.

40. A modest states-plus mechanism is recommended by the fact that, while limiting the scope for frivolous or nuisance complaints, it avoids the potential paralysis of the strictly states-based system (see below).

D. A States-Based Mechanism

41. A second alternative to a broad-based triggering mechanism is a states-based one that would permit only states to initiate an inquiry. Broadly speaking, there are four basic variants of the states-based approach. Each would grant standing to initiate an inquiry to a different type of state party. The different types are:

- States Parties to the Convention that are belligerents;
- States Parties that are non-belligerents;
- Any state that is a belligerent, including non-Parties;
- Any state (Party to the CCW Convention or not, belligerent or not).

42. There are problems with all four of these variants that reduce their potential effectiveness in the CCW context. With respect to arrangements where only belligerent have standing, a verification regime would likely become highly adversarial as allegations and counter-allegations were levelled against the backdrop of armed hostilities.

43. Where all states have standing to initiate inquiries there are also potential problems. At one level, this approach is attractive in that it assigns a "watchdog" role to the international community. In practice, however, the experience of international humanitarian and human rights law suggest that states are very reluctant to lodge complaints against other states, except where it serves some specific domestic or foreign policy interest. No inter-state case, for example, has ever been brought before the International Covenant on Civil and Political Rights; and only two cases have ever been brought by states before the European Commission of Human Rights.

44. In all four versions of states-based triggering mechanisms, the traditional reluctance of states to lodge complaints may be exacerbated in the context of a future CCW Convention which evolves to cover non-international conflicts. Widespread sensitivity regarding interference in the internal affairs of sovereign states, coupled with the legal and customary prohibitions against such interference, would likely render the incidence of states-based inquiries extremely low.

E. Recommended "First Phase" Procedure

45. Based on the foregoing analysis, this report recommends that:

- A modest "states-plus" triggering mechanism be included in the initial CCW verification package. This would grant standing to trigger an inquiry to (a) States parties, (b) the UN General Assembly and/or the UN Security Council and (c) the UN Secretary-General (the latter only where alleged violations of the Convention/Protocol affect peacekeeping forces under his control).

V. Initial Review Procedures

A. Introduction

46. Because of the possibility of frivolous or manifestly unfounded allegations, as well as the potential for other abuse, some triggering mechanisms require that allegations be passed through a "filtering" process. Such a process is intended to establish the admissibility of a particular complaint, as judged against the relevant provisions of the treaty or convention in question.

47. It would seem essential for the effectiveness of any filtering procedure (and, indeed, for the effectiveness of the verification regime overall) to designate some individual or authority to provide a focal point for receiving complaints and convening the verification authority. This function might be assigned to any one of a variety of actors, from the UN Secretary-General (or his designate) to a specified member of the verification authority. This individual would operate, on a more or less permanent basis, to review allegations of non-compliance, and to refer those allegations which meet pre-established criteria of admissibility to the verification authority.

48. At some future date, as experience is gained in the CCW verification process, the States Parties may wish to give this individual greater authority in reviewing compliance. Such an approach may prove to be more cost-effective in that the full verification authority would not have to be convened as frequently.

49. The following section examines several types of filtering mechanism, considering them in light of their applicability in the CCW Convention context.

B. An Independent Screening Mechanism

50. An independent screening mechanism is typically a permanent body charged with determining whether to refer to the verification authority particular situations which appear to reveal a consistent

pattern of gross and reliably attested violations of the agreement in question.

51. In international human rights law, such mechanisms are usually subsidiary organs of the bodies responsible for implementing and monitoring compliance with specific treaties or conventions. So, for example, the so-called 1503 Procedure authorises the Sub-Commission on Prevention of Discrimination and Protection of Minorities (a subsidiary organ of the UN Commission on Human Rights) to establish a five member working-group to receive and examine communications and complaints in order to determine "whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights...."⁵ Those communications which the working-group deems to fulfil the conditions of admissibility are forwarded to the Sub-Commission, which then considers the complaint. Where warranted, the Sub-Commission then refers the case to the Commission on Human Rights, which in turn is empowered to authorize a "thorough study" or investigation of the situation.

52. The 1503 Procedure is a relatively complicated, multi-stage process. In principle, however, there is no reason why generically similar processes could not work -- as they sometimes do in the field of international human rights law -- with a single "special rapporteur in new communications" (perhaps with a small secretariat or with the assistance of the UN secretariat) screening frivolous and otherwise inadmissible complaints. Perhaps this function could even be performed by the UN secretariat itself. To a certain extent, of course, the size of the screening committee and/or secretariat is dependent on the number of complaints filed. If complaints are received regularly and in large numbers, then a larger committee and/or secretariat might be needed.

C. *A States-Based Initial Review Procedure*

53. An alternative to an independent body would be a committee of states representatives. This may be a standing "verification commission" comprising states representatives (see Chairman's Rolling Text Appendix I, Article 10, first para. 1) or a committee convened on a case-by-case basis (see Chairman's Rolling Text, Appendix I, Article 10, second para. 1). Such a committee/commission would also be responsible for deciding whether an allegation warrants further investigation. It should be noted that a verification regime in which the screening committee is convened on a case-by-case basis would seem to be workable only if the volume of complaints were very low. One approach might be to convene a verification committee on a case-by-case basis unless and until the volume of complaints made this unworkable, at which point a standing commission might be established. Over time (if

⁵For the terms of reference of the Sub-Commission see Resolution 1503, 2-18.

circumstances warranted and permitted), the international community might convert this commission into a more independent body (ie. one similar to that discussed above in para. B).

D. *Recommended First Phase Procedure*

54. As an initial step, this report recommends:

- That the initial screening of complaints be done by states representatives acting through a "Verification Commission". Consideration should be given to designating a specific individual (either a member of the Commission or the UN Secretary-General) to receive allegations of non-compliance.
- That, on receipt of an alleged violation of the CCW Convention, this Commission be convened in order to determine, within 48 hours of being assembled, whether specific allegations of gross violations of the Conventions warrant further investigation.
- That, if the Commission decides that a further investigation is warranted, it inform the States Parties of its decision and then commence the inquiry.
- That if the volume of allegations proves to be too high to be handled in this fashion, provision be made for the creation of a "CCW Verification Office" within the UN secretariat to provide a permanent capacity to screen allegations and convene the Verification Commission.

VI. *Investigative Procedures*

A. *Introduction*

55. A third element of an effective CCW verification regime would be an investigative capacity capable of collecting and compiling data as to whether widespread grave breaches were occurring. There are two principal investigative methods that could be employed in the context of monitoring compliance with the CCW Convention. These include, in descending order of effectiveness (a) on-site fact-finding missions, and (b) hearings and similar investigative procedures. These will be addressed in turn.

B. *On-site Fact-Finding*

56. These fact-finding missions typically involve investigations *in loco* by a group of experts (acting in their personal capacities or as representatives of parties to the agreement). In the field of international humanitarian and human rights law, there are several organisational models for fact-finding missions. *Inter alia*, these include the International Fact-Finding Commission

established by Article 90 of Protocol I additional to the Geneva Conventions, *ad hoc* Commissions of Experts established by the UN Secretary-General (to investigate alleged violations of the 1925 Geneva Protocol, for example), the Inter-American Commission on Human Rights, and the *ad hoc* investigative body established by the 1503 Procedure. These fact finding missions vary according to composition and selection.

57. In an operational sense, on-site fact-finding is most effective when:

- missions are composed of members who are serving in their personal capacity and who are respected for their integrity, impartiality, competence and objectivity;
- there is equitable geographic representation among the mission members;
- missions can be quickly assembled and transported to the site of the alleged violation;
- States Parties are not permitted to deny missions access to their territory;
- missions have the freedom to determine their own programme, itinerary and methods;
- missions have freedom of movement;
- the safety and security of members (and their premises, possessions and records) is assured;
- the privacy of interviews is guaranteed; and
- the safety and security of witnesses is ensured.

58. There is some concern that, in order to be effective, fact-finding in the CCW context would necessarily be unduly intrusive. This echoes concerns raised in connection with the negotiation of the Chemical Weapons Convention and other arms limitation and disarmament agreements. In these cases, the view was expressed that the level of intrusiveness required to monitor compliance effectively would (a) constitute unwarranted interference in the internal affairs of states, (b) reveal militarily-relevant information beyond that required by the terms of the agreement, and (c) in the case of verifying limits on production, expose confidential proprietary information not directly related to the terms of the agreement.

59. It should be noted that sovereignty as a legal principle and a political institution has never been an impediment to states entering into binding international agreements. Indeed, such agreements and their verification provisions are an expression (and not a violation) of states' sovereignty. It is, of course, true that, such agreements do constrain states in the conduct of their

domestic affairs and international relations. But this is one of the reasons why states enter into them: in order to ensure that the conduct of all parties to an agreement is constrained in ways that benefit everyone.

60. With respect to the two remaining arguments, it is clear that monitoring compliance with restrictions on landmine use is not the same as verifying restrictions on the possession, trade, production and development of certain weapons. As the CCW Convention is likely to continue to regulate use only, its verification will not involve on-site inspections of production facilities or storage sites (ie. military installations). Thus, fact-finding in the CCW Convention is much less likely to involve the potential exposure of military or commercial secrets. Parenthetically, one might note that in the sphere of arms limitation and disarmament, concerns regarding intrusiveness have been addressed by carefully regulating the activities of inspectors. As this problem does not pose an insurmountable obstacle to compliance monitoring in the arms limitation context, it should not be considered a serious impediment to compliance monitoring in the CCW context.

61. In the initial phase of establishing a CCW verification regime, it may prove desirable to implement a two-track system in which on-site investigations are permitted in the context of international armed conflicts, but not in the context of non-international conflicts. This might be accomplished by temporarily suspending the on-site fact-finding provisions of the verification regime as they pertain to non-international armed conflict. It should be noted that military experts believe that, in order to monitor effectively compliance with restrictions on the use of landmines, on-site investigations are absolutely essential. Other types of fact-finding are definitely "second-best" options.

C. Hearings and Similar Investigatory Procedures

62. This procedure involves the solicitation of documentation and other information from various sources relating to the situation under investigation. This information can include:

- written material and documentary evidence;
- evidence in the form of films, videos, sound-recordings, and photographs.

63. It also involves hearings, either public or private. The purpose of this information-gathering exercise varies from case to case. In the context of the CCW Convention, however, the purpose would be to help establish the degree to which the Convention had been breached -- ie. to establish whether it had been widely and consistently violated.

D. Confidence Building Measures

64. Confidence building measures are measures intended to help demonstrate that a State Party is in compliance with an agreement. As such measures are discussed at length in a separate paper⁶, they will not be afforded detailed attention here.

65. It should be noted that confidence building measures are based on the assumption that states are in compliance and wish to demonstrate that fact to other States Parties. This being the case, (essentially voluntary) confidence building measures are unlikely to be able to detect deliberate and purposefully concealed non-compliance, and may therefore be ineffective as a means of verifying the CCW Convention. They can, however, be crucially important to the confidence-building process.

E. Recommended First Phase Procedure

66. Based on the foregoing analysis, this report recommends that:

- A two-track approach be adopted in which international and non-international armed conflicts are initially treated differently.
- With respect to verifying CCW compliance in the context of international armed conflict, on-site fact-finding and confidence buildings be adopted.
- With respect to non-international armed conflict, only confidence buildings be implemented.
- With respect to both types of conflict, confidence building measures be implemented to reduce perceptions that intrusive compliance monitoring is a "risk" to any state's sovereignty or security.
- That provision be made for the gradual extension of the more effective on-site verification measures to non-international armed conflicts.

VIII. The Evaluation Process

A. Introduction

67. The final phase of the verification process is the evaluation phase. It is at this point that a determination is made regarding the extent to which allegations of non-compliance are true. It should be noted that not all verification regimes require a decision to be made. Some merely require the facts to be disseminated to the parties to allow them to come to a decision.

⁶ *Supra*, note 2.

Broadly speaking, there are three types of evaluative mechanism: compulsory adjudication, the UN Security Council, and treaty-specific bodies.

B. Compulsory Evaluative Mechanism

68. The participants at the Montreux Symposium identified several possible "compulsory" evaluative mechanisms: The International Court of Justice, international arbitration, the International Criminal Court, and a treaty-specific court (such as the European Court of Human Rights). Although there were advantages and disadvantages associated with each of these compulsory mechanisms, the expert consensus was that "it was unlikely that States would accept compulsory adjudication as this does not at present exist in any international humanitarian law treaty".⁷

C. United Nations Security Council

69. The Symposium also examined the possibility that in the absence of a compulsory adjudication mechanism, the UN Security Council might be called upon to evaluate complaints of grave breaches of the Convention. The Symposium concluded that this would depend to a large extent on the political will of the members of the Council. At the current juncture it is unlikely that the UNSC has the time, resources or inclination to act as the decision-making organ of the CCW Convention; for the simple reason that, compared to other pressing issues on the international agenda, the landmine problem simply does not have the gravity to command the Council's attention. Accordingly, at least for the near-to-medium term, the Security Council should probably not be considered a candidate for this role.

D. A Treaty-Specific Evaluative Body

70. Treaty-specific evaluative bodies typically function in one of two ways. On the one hand, they may be quasi-judicial in nature, operating as does the European Commission on Human Rights. These quasi-judicial bodies render findings of compliance or non-compliance that are, to varying degrees, legally binding. They tend to be relatively small, and to the extent possible, insulated from political influence. On the other hand, some treaty-created evaluative bodies are less judicial than political, essentially involving a forum of the States Parties where compliance issues can be raised and discussed. This type of body is more commonly found in the arms limitation and disarmament context. Both of these, in their respective spheres, can be effective.

⁷ICRC, *Report of the International Committee of the Red Cross for the Review Conference.....*, op. cit., p. 23.

E. *Recommended First Phase Procedure*

71. Based on the foregoing analysis, this report recommends that:

- As part of the first phase procedure, a treaty-specific verification commission be established to conduct investigations into alleged violations of the CCW Convention.
- This commission be charged with establishing the facts of the allegations before it.
- In the second phase of the evolution of the CCW verification regime, this commission also be given responsibility to render a decision as to whether non-compliance has occurred.
- The commission report its findings and decision, with such recommendations as it may deem appropriate, to the States Parties.
- Provision be made for periodically enhancing the adjudicative powers of the verification commission, as circumstances warrant and conditions permit.

Annex 1: A Possible Verification Arrangement for the CCW Convention (for insertion into the Chair's Rolling Text)

The following text establishes the framework for an evolving CCW verification regime. It also specifies the arrangements that would be operable during the first phase in the evolution of this regime.

Although the preceding discussion refers almost exclusively to monitoring compliance with those elements of the CCW Convention that pertain to the use of landmines, the following proposed amendment could be inserted into the Convention itself (rather than any specific Protocol); for there is no reason to suppose that its mechanisms would not allow for verification in connection with other regulated and/or prohibited weapons as well.

Alternatively, it could be inserted as an alternative text to Articles 10, 11 and 12 of the Chair's Rolling Text.

1. (a) Within [_____] after entry into force of this Article, the Depositary shall convene a meeting in New York of Parties bound by this Article, which shall designate [_____] of their number to serve as a Verification Commission (hereinafter referred to as "the Commission"). The Commission shall take all of its decisions by consensus if possible, but otherwise by a majority of members present and voting.
- (b) The members of the Commission shall serve for two-year periods and shall be eligible for re-election.
- (c) At the election, the High Contracting Parties shall ensure that the persons elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured.
- (d) Members of the Commission shall designate one on their number to act as Chairman. The Chairman will receive allegations of non-compliance.
- (e) Upon the request of the Chairman, the Commission will convene within a period of one week in order to clarify and resolve any questions relating to possible non-compliance with the provisions of this [Convention/Protocol]. Each High Contracting Party shall be entitled to ask the Chairman to convene the Commission. [The General Assembly of the United Nations shall also be entitled to ask the Chairman to convene the Commission.]

- (f) The Depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.
2. (a) The High Contracting Parties at the time of ratifying the Convention are deemed to have recognised *ipso facto* and without special agreement the competence of the Commission to enquire into allegations by States party to this Convention, [the General Assembly of the United Nations, and/or the United Nations Secretary General. The Secretary-General may request the convening of a Commission only in cases where alleged violations of the Protocol affect peacekeeping forces under his control.]
- (b) The High Contracting Parties, at the time of ratifying the Convention, further recognize *ipso facto* that the standing of a Party to file a petition is conditioned solely on that Party having direct and reliable knowledge of a violation.
- (c) The cause of action of any Party to file a petition with the Commission is based on showing a consistent pattern of gross and reliably attested violations of the Convention and its Protocols.
- (d) The Commission is competent to:
- (i) enquire into facts alleged to be a grave breach as defined in the Convention and its Protocols or other serious violation of this Convention and its Protocols.
 - (ii) decide, not later than 48 hours after it has been convened, whether to pursue an inquiry.
 - (iii) if appropriate, conduct that inquiry. After informing the Depositary of its decision, the Commission can solicit documentation and other information from various sources relating to the matter under investigation in order to establish the degree to which the Convention has been breached, and by whom.
 - (iv) conduct *in loco* investigations in support of that inquiry. If the Commission decides that an *in loco* investigation is required, it shall notify the party to the conflict concerned of the decision to send a team of experts to conduct a fact-finding mission (see paragraph 3) at least 24 hours before the team is expected to arrive. It shall inform all states parties of the decision taken as soon as possible.
 - (v) upon completion of an enquiry, submit to the depositary a report on its findings of fact. If a fact-finding mission established pursuant to paragraph 2(iv) is unable to secure sufficient evidence for factual and

impartial findings, the Commission shall state the reasons for that inability.

(e) The Commission is further responsible for:

(i) establishing its rules of procedure;

(ii) establishing and periodically revising procedures for conducting enquiries into allegations of violations in accordance with the Convention;

(iii) periodically reviewing scientific and technical developments which could affect monitoring compliance with the Convention and its Protocols.

3. (a) For the purposes of paragraph 1 of this Article, the Chairman shall prepare and periodically update a list of qualified experts. The experts shall be designated with due regard to the particular fields of expertise that could be required in a fact-finding mission concerning the alleged use of weapons regulated by this Convention and its Protocols.

(b) Upon receiving a request from the Commission, the Chairman [or the UN Secretary-General] shall appoint and supervise a team of experts to conduct a fact-finding mission at the site of the alleged incident. Experts who are nationals of States parties involved in the armed conflict concerned or of States parties which requested the inquiry shall not be chosen. The team of experts shall be dispatched at the earliest possible opportunity taking into account the safety of the team.

(c) The High Contracting Parties, upon ratification of the Convention, undertake *ipso facto* to afford the Commission every assistance in the conduct of an investigation, including affording access to all areas and installations where evidence of violation of this Protocol could be collected. The party to a conflict concerned may make any arrangements it considers necessary for the protection of sensitive equipment, information and areas unconnected with the subject of the fact-finding mission or for any constitutional obligations it may have with regard to proprietary rights, searches and seizures or other constitutional protections. In that event, it shall make every reasonable effort to satisfy the legitimate needs of the team of experts through other means.

(d) Upon ratification, the Parties also accept *ipso facto* that, although they may refuse to invite a fact-finding mission onto their territory, they may be obliged to receive such a mission if [] Parties, none of which are parties to the conflict, support such a decision.

- (e) After having completed its fact-finding mission, the team of experts shall submit a report to the Commission not later than one week after leaving the territory of the State party in question. The report shall summarize the factual findings of the mission related to the alleged non-compliance with the Protocol.
4. (a) The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties in accordance with the United Nations scale of assessments, adjusted to allow for differences between the number of States members of the United Nations and the number of High Contracting Parties, and by voluntary contributions.
5. (a) Each of the High Contracting parties undertakes to facilitate the fullest possible exchange of technological information in order to assist State parties to comply with the restrictions and requirements of this Protocol.
6. (a) The competence of the Verification Commission to enquire into alleged grave breaches in the context of non-international conflicts is suspended for a period of [_____] years [until the next Review Conference].
- (b) During this period, each of the High Contracting Parties, affirming the recognised objective of prohibiting the indiscriminate use of landmines, shall provide to the UN Secretary-General on a voluntary basis information related to:
- (i) Progress on implementation of the Convention and Protocol II.
- (ii) Information on the recovery, destruction and clearance of landmines after military use.
- (iii) Information on civilian casualties incurred due to deployment of such mines in its territory.
- (c) [At the end of this period, the suspension of application pursuant to 7(a) will lapse, unless the Review Conference decides that it should remain in effect. This decision will be taken on the basis of consensus if possible, but otherwise by a 2/3 majority of the members present and voting. If the suspension is lifted, the Review Conference will decide how the verification regime will be applied in the non-international context].

or

- (c) [At the end of this period, a Review Conference will decide whether this suspension will be lifted. This decision will be taken on the basis of consensus if possible, but otherwise by a majority of members present and voting. If the suspension is lifted, the Review Conference will decide how the verification regime will be applied in the non-international context]
7. (a) The High Contracting Parties undertake to provide/exchange information with other Parties to promote transparency and credibility for wider adherence to this Convention and its Protocols.
8. (a) The High Contracting Parties undertake at each Review Conference to consider and implement measures to improve the verification process.

Annex 2: Assuring Compliance with the CCW Convention: Proposed First Phase Process

The following verification process describes the sequence of events that would be triggered by an allegation of a grave breach of Protocol II of the CCW Convention in the context of *international armed conflict*. It identifies eight steps in the verification process.

- Step 1 *Possibility of a Grave Breach Arises* The possibility arises that a grave breach of Protocol II might have occurred.
- Step 2 *Complaint is Filed* A party with standing under the Convention lodges a complaint with the Chairman of the Verification Commission.
- Step 3 *The Verification Commission is Convened* The Chairman convenes the full Verification Commission. The Commission decides, not later than 48 hours after it has been convened, whether to pursue an inquiry.
- Step 4 *Basic Inquiry is Conducted* The Commission hears the evidence, calls witnesses, etc. and either renders a finding or decides that an *in loco* investigation is necessary. At this point, a consultative process might be initiated providing an opportunity for national inputs from States Parties as well as alleged violators. If an *in loco* investigation is not required, Steps 5&6 are bypassed.
- Step 5 *In Loco Investigation is Conducted* If the Commission decides it is necessary, an on-the-spot investigation takes place. The suspected violator may decline to invite a fact-finding mission onto its territory, but it may be obliged to receive such a mission if a certain number of Parties support such a decision.
- Step 6 *Report to the Commission* After having completed its fact-finding mission, the team of experts submits a report to the Commission not later than one week after leaving the territory of the State party in question. The report summarises the factual findings of the mission related to the alleged non-compliance with the Protocol.

- Step 7 *Final Evaluation and Report to the States Parties*
Upon completion of its inquiry, the Commission submits to the States Parties a report on its findings of fact. If the Commission is unable to secure sufficient evidence for factual and impartial findings, it states the reasons for that inability.

- Step 8 *Action* On the basis of the Commission's findings, the States Parties decide on an appropriate course of action.

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