thereby also opening up the possibility of a Chapter VII–based referral under Rome Statue Article 13(b) in such scenarios. As we have seen, however, it remains doubtful whether such a referral in the future would cover, in noninternational armed conflicts, the war crimes newly added in Kampala.

Given the nature of chemical weapons, their use might nevertheless, depending on the circumstances of such use, also constitute cruel treatment under Rome Statute Article 8(2)(c)(i), intentional attacks against a civilian population under Article 8(2)(e)(i), or, if the requirement of a widespread or systematic attack against a civilian population is satisfied, a crime against humanity under Article 7(1)(a) or (k). Any punishment under these provisions, however—apart from being more difficult to prove—would not cover the specific wrongfulness inherent in the use of chemical weapons.

Under these circumstances, and given the abhorrent nature of chemical weapons, it may be desirable for the contracting parties of the Rome Statute to address the matter in due course. They might usefully clarify—for example, by adopting a decision establishing their agreement, within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties[69]—that what was agreed in Kampala regarding the court's jurisdiction pursuant to Security Council referrals for the crime of aggression applies mutatis mutandis to the amendment concerning Article 8 for chemical weapons. The appropriate timing might be when the contracting parties come together, after January 1, 2017, to decide on activating the court's jurisdiction as to the crime of aggression under Article 15 *bis*(3) of the Rome Statute.

THE OPCW'S ARRANGEMENTS FOR MISSED DESTRUCTION DEADLINES UNDER THE CHEMICAL WEAPONS CONVENTION: AN INFORMAL NONCOMPLIANCE PROCEDURE

*By Masahiko Asada**

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1993,[1] or Chemical Weapons Convention (CWC), represented a major (and at the time, not uncontroversial) innovation in global treaty making. Covering a whole class of weapons of mass destruction, it mandated an immediate and comprehensive ban on use and acquisition, coupled with phased destruction and buttressed by an extensive and intrusive verification system administered by a substantial and specialized international organization. The goal was the total elimination of this particular type of weapon.

[69] May 23, 1969, 1155 UNTS 331.

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[1] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 UNTS 317. The CWC documents cited in this article are generally available on the website of the Organisation for the Prohibition of Chemical Weapons (OPCW), http://www.opcw.org/.

Membership in the convention is nearly universal. The accession by Syria in 2013 brought the number of states parties to 190. States not parties are Angola, Egypt, Israel, Myanmar, North Korea, and South Sudan.[2]

Article I of the CWC sets forth the main obligations that its states parties have assumed under the convention.[3] They include (1) not to develop, produce, otherwise acquire, stockpile, or retain chemical weapons (CWs), or transfer them to anyone, (2) not to use CWs, (3) to destroy CWs that each state party owns or possesses or that are located in any place under its jurisdiction or control, (4) to destroy CWs that each state party abandoned on the territory of another state party, and (5) to destroy CW production facilities that each state party owns or possesses or that are located in any place under its jurisdiction or control. Thus, the CWC establishes not only arms control and disarmament law (nonproduction/possession and destruction of weapons) but also armed conflict law (nonuse of weapons).

The importance of the CWC was underscored in 2013 in connection with the UN action following the use of CWs in Syria, which at the time was not party to the CWC. With the consent of the Syrian government, the United Nations in August 2013 sent to Syria an investigation team, which subsequently produced a report saying that "chemical weapons have been used in the ongoing conflict between the parties in the Syrian Arab Republic" and that "surface-to-surface rockets containing the nerve agent Sarin were used . . . in the Ghouta area of Damascus."[4] This UN investigation was conducted in collaboration with the implementation organization of the CWC—the Organisation for the Prohibition of Chemical Weapons (OPCW).

The United Nations and the OPCW collaborated closely in the subsequent removal and destruction (in third countries or on U.S. vessels) of all declared Syrian CWs and precursor chemicals, estimated to be about 1300 tons. UN Security Council Resolution 2118, adopted on September 27, 2013, "[d]ecide[d] that the Syrian Arab Republic shall comply with all aspects of the decision of the OPCW Executive Council of 27 September 2013,"[5] which provided that Syria "shall . . . complete the elimination of all chemical weapons material and equipment in the first half of 2014."[6] The OPCW decision, not necessarily legally binding *in itself*, was given an undoubtedly legally binding force on Syria by the Security Council resolution (into which the OPCW decision was incorporated as Annex I).

Less noticed but also of considerable legal significance have been the OCPW's innovations in managing the serious problems of major member states in not meeting the prescribed deadlines for destroying CWs that they possess and have declared to the OPCW. These innovations are the subject of this article.

[2] Status of Participation in the Chemical Weapons Convention as at 14 October 2013, OPCW Doc. S/1131/2013 (Oct. 14, 2013).

[3] Chemical Weapons Convention, *supra* note 1, Art. I

[4] Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013, paras. 27–28, UN Doc. A/67/997-S/2013/553 (Sept. 16, 2013).

[5] SC Res. 2118, para. 6 (Sept. 27, 2013).

[6] OPCW Executive Council Decision, Destruction of Syrian Chemical Weapons, para. 1(c), OPCW Doc. EC-M-33/DEC.1 (Sept. 27, 2013) (incorporated into Security Council Resolution 2118 as Annex I).

According to CWC Article IV, paragraph 6, each state party is obligated to destroy its CWs not later than ten years after the convention enters into force,[7] with different detailed destruction deadlines set forth for each of the three categories of CWs.[8] The convention's Verification Annex, Part IV(A), paragraphs 24 and 26,[9] offered a possibility of extending the deadline for Category 1 CWs, though not beyond fifteen years after the convention enters into force. As the CWC entered into force on April 29, 1997, the Article IV–based, initial destruction deadline and the final extended deadline were set for April 29, 2007, and April 29, 2012, respectively.

Eight states parties have declared possession of CWs to the OPCW: Albania, India, Iraq, Republic of Korea, Libya, Russia, Syria, and United States.[10] Of these, Albania, India, and the Republic of Korea completed destruction by 2009.[11] Albania technically violated its destruction obligation, in a de minimis way, when completion overran the deadline by some ten weeks.[12]

[7] Chemical Weapons Convention, *supra* note 1, Art. IV, para. 6, provides: "Each State Party shall destroy all chemical weapons . . . . Such destruction shall begin not later than two years after [the] Convention enters into force for it and shall finish not later than 10 years after entry into force of [the] Convention."

[8] According to the Chemical Weapons Convention, *supra* note 1, Verification Annex, Part IV(A), para. 17, "Category 1" CWs (those on the basis of Schedule 1 chemicals, such as sarin, VX, and mustards) shall be destroyed not later than ten years after the CWC enters into force; "Category 2" CWs (those based of all other chemicals) shall be destroyed not later than five years after the CWC enters into force; and "Category 3" CWs (unfilled munitions and devices) shall be destroyed not later than five years after the CWC enters into force.

[9] Paragraph 24 provides:

> If a State Party believes that it will be unable to ensure the destruction of all Category 1 chemical weapons not later than 10 years after the entry into force of [the] Convention, it may submit a request to the Executive Council for an extension of the deadline for completing the destruction of such chemical weapons.

Paragraph 26 provides:

> A decision on the request shall be taken by the Conference [of the States Parties] at its next session, on the recommendation of the Executive Council. Any extension shall be the minimum necessary, but in no case shall the deadline for a State Party to complete its destruction of all chemical weapons be extended beyond 15 years after the entry into force of [the] Convention.

All declared CW possessor states except Albania, Iraq, and Syria requested and were granted extensions of destruction deadlines. *See infra* note 10 and accompanying text. For Russia, OPCW Doc. C-11/DEC.18 (Dec. 8, 2006), and the United States, OPCW Doc. C-11/DEC.17 (Dec. 8, 2006), the deadline was extended to April 29, 2012; for the Republic of Korea, to December 31, 2008, OPCW Doc. C-11/DEC.12 (Dec. 8, 2006); and India, to April 28, 2009, OPCW Doc. C-11/DEC.16 (Dec. 8, 2006). These extensions were all granted by separate decisions of the Conference of the States Parties (CSP), as adopted in December 2006. *See generally* OPCW Doc. C-16/DG.16, para. 2 (Nov. 16, 2011).

For the OPCW's efforts to eliminate CWs in Libya, see the appendix.

[10] *See* Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction in 2009, paras. 1–2, OPCW Doc. C-15/4 (Nov. 30, 2010); Letter Dated 27 November 2013 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2013/700 (reporting submission of Syria's initial declaration).

[11] Albania, India, and the Republic of Korea completed the destruction of their CW stockpiles by July 2007, March 2009, and July 2008, respectively. OPCW Doc. RC-3/S/1, para. 2.6 (Mar. 12, 2013). India and the Republic of Korea joined the CWC as original states parties (for which the CWC entered into force on April 29, 1997). Each is estimated to have declared about two thousand tons of CWs. Paul F. Walker, *Abolishing Chemical Weapons: Progress, Challenges, and Opportunities*, ARMS CONTROL TODAY, Nov. 2010, at 25, 27.

[12] Albania, which joined the CWC in 1994, came to acknowledge in 2003 its possession of sixteen tons of CWs (mostly under Category 1). In accordance with the CWC, its destruction deadline was set for April 29, 2007. Two days before the deadline, Albania formally notified the Executive Council that it would be unable to complete the

Iraq acceded to the CWC in January 2009 and declared possession of CWs in March of the same year.[13] A state that joins the CWC after April 29, 2007, such as Iraq or Syria, is subject to a special regime because the deadlines for the prescribed Article IV–based destruction and for submitting an extension request would already have passed.[14] According to CWC Article IV, paragraph 8, such a state party shall destroy its CWs "as soon as possible," with the "order of destruction" to be determined by the Executive Council. Iraq, because of the hazardous condition of its CW storage site,[15] has been unable even to conduct a detailed inventory. A detailed destruction plan has therefore yet to be formulated.[16]

The use of CWs in Syria that led to the U.S.-Russia agreement on the destruction of Syrian CWs,[17] coupled with the international political pressure that resulted in Syria acceding rapidly to the CWC in September 2013, opened a new horizon for the CWC regime in several respects. With regard to destruction of its CWs, as noted earlier, the OPCW Executive Council adopted a decision, incorporated into Security Council Resolution 2118, demanding that Syria complete destruction within the ambitious time frame of nine months.[18] Although the CWC was not formally in force for Syria when this decision was adopted,[19] the decision was, in effect, an "order of destruction" specified by the Executive Council under Article IV, paragraph 8, as Syria had already declared that it would apply the CWC provisionally pending the convention's entry into force for it.[20] The destruction operation was delayed by several months, principally because the ongoing civil war in Syria interfered with the removal of declared CWs and precursor chemicals. The removal of these materials to foreign ships was, in fact, achieved by the prescribed deadline of June 30, 2014, though the failure to actually destroy the materials violated Security Council Resolution 2118 and the OPCW Executive Council decision.

task on time, but it never submitted a formal request for extension. Thus, it technically violated its destruction obligation under the CWC. It is said that the reason for the delay was that its high-temperature incinerator "burned out." Martin Matishak, *One Year to U.S., Russian Chemical Weapons Disposal Deadline*, GLOBAL SECURITY NEWSWIRE (Apr. 29, 2011), *at* http://www.nti.org/gsn/article/one-year-to-us-russian-chemical-weapons-disposal-deadline/. This case can potentially be understood as involving a force majeure.

[13] *See* Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction in 2012, para. 1.7, OPCW Doc. C-18/4 (Dec. 4, 2013).

[14] According to the Chemical Weapons Convention, *supra* note 1, Verification Annex, Part IV(A), para. 24, a request to extend the deadline for completing the destruction of chemical weapons must be made not later than nine years after the CWC entered into force—that is, by April 29, 2006.

[15] Iraq declared possession of an unspecified quantity of CWs, entombed in two large underground bunkers at Muthanna that had been bombed by U.S. and other coalition forces during the 1991 Gulf war. Walker, *supra* note 11, at 25; David A. Koplow, *Train Wreck: The U.S. Violation of the Chemical Weapons Convention*, 6 J NAT'L SECURITY L. & POL'Y 319, 350 (2013).

[16] OPCW Doc. C-16/CRP.1, para. 1.7 (July 13, 2011). The Iraqi case might also be seen as an application of a noncompliance procedure of the sort discussed later in this article. Legally, however, Iraq is covered by the special rules applicable to states that join the CWC ten years or more after its entry into force, by virtue of which Iraq is not noncompliant. *See* Chemical Weapons Convention, *supra* note 1, Art. IV, para. 8.

[17] Framework for Elimination of Syrian Chemical Weapons (Sept. 14, 2013), OPCW Doc. EC-M-33/NAT.1, annex (Sept. 17, 2013).

[18] Destruction of Syrian Chemical Weapons, *supra* note 6.

[19] When the Executive Council adopted the decision on September 27, 2013, the CWC was not in force for Syria, as it deposited its instrument of accession to the CWC on September 14, 2013, with the consequence that the CWC entered into force for it on October 14, 2013.

[20] SC Res. 2118, *supra* note 5, pmbl., para. 5.

The other three declared possessor states—that is, Libya,[21] Russia,[22] and the United States[23]—all failed to fulfill the obligation of destroying CWs by the treaty-determined deadlines, notwithstanding that all of them were granted extensions in full to April 29, 2012. The OPCW was faced with the difficult question of how to deal with the advance notice given by these member states that they would not be in a position to comply with their CWC obligations.

This article analyzes the legal foundation and legal implications of the OPCW's approach to these cases of prospective noncompliance—particularly in relation to Russia and United States as very large holders of CWs. Part I analyzes the relevant legal provisions of the CWC.[24] Part II describes the OPCW decision, which effectively allowed the states parties concerned to modify their legal obligations under the CWC, and then considers three sets of interconnected issues: first, whether the legal arrangements imposed by the OPCW decision have the effect of de facto amending the CWC or, instead, can be seen as involving an implied new mechanism based on existing CWC provisions; second, how to describe the actual legal implications for the affected states parties themselves; and third, how the OPCW's approach to these destruction cases compares with the noncompliance procedures present, with varying degrees of specificity, in the texts of, or practices under, international environmental treaties or their supplementary documents. Part III explores, albeit more briefly, the OPCW's approach to managing destruction deadlines for abandoned, rather than stockpiled, CWs. This area presents similar kinds of issues concerning destruction deadlines, though under a somewhat different legal scheme than for stockpiled CWs.[25] Problems concerning abandoned CWs have yet

[21] Libya, which had acceded to the CWC in January 2004, declared its possession of approximately 1400 tons of CWs (mostly under Category 2). By February 2011, when its destruction operations were halted due to the breakdown of a heating unit in a disposal station, Libya had destroyed about 13 tons (51 percent) of Category 1 CWs and 556 tons (40 percent) of Category 2 CWs. OPCW Doc. C-18/CRP.1, para. 1.9 (July 19, 2013). Due to the UN sanctions imposed on Libya which prevented importation of components for the disposal facilities, as well as the civil war that broke out in the country in that year, Libya was unable to complete the destruction of its CWs by April 29, 2012. Security Council Resolution 2009, paras. 4, 15, 13(a) (Sept. 16, 2011), not only virtually recognized the National Transitional Council as Libya's legitimate government but also partially lifted UN sanctions—which was to enable Libya to resume CW destruction operations. Xiaodong Liang, *OPCW Chief Eyes Libyan Chemical Stocks*, ARMS CONTROL TODAY, Oct. 2011, at 30; Martin Matishak, *Chemical Weapons Monitor Confident on Security of Libyan Stockpile*, GLOBAL SECURITY NEWSWIRE (Aug. 26, 2011), *at* http://www.nti.org/gsn/. Libya actually resumed destruction of CWs in April 2013. OPCW Doc. EC-72/NAT.2, para. 3.3 (Apr. 24, 2013). International law rules concerning circumstances precluding wrongfulness—in particular, force majeure—may be relevant, depending on the precise facts in the case.

[22] Russia declared its possession of approximately 40,000 tons of CWs (almost all under Category 1). At the end of 2010 and 2011, it had destroyed nearly 20,000 tons (49 percent) and 24,000 tons (60 percent), respectively, of its declared CWs. OPCW Doc. C-16/CRP.1, *supra* note 16, para. 1.9; OPCW Doc. C-17/CRP.1, para. 1.11 (July 11, 2012).

[23] The United States declared its possession of approximately 28,000 tons of CWs (almost all under Category 1). At the end of 2010 and 2011, it had already destroyed about 23,000 tons (83 percent) and 25,000 tons (90 percent), respectively, of its declared CWs. OPCW Doc. C-16/CRP.1, *supra* note 16, para. 1.10; OPCW Doc. C-17/CRP.1, *supra* note 22, para. 1.12.

[24] For a comprehensive account of noncompliance-related provisions of the CWC, see Allan Rosas, *Reactions to Non-compliance with the Chemical Weapons Convention*, *in* THE NEW CHEMICAL WEAPONS CONVENTION: IMPLEMENTATION AND PROSPECTS 415 (Michael Bothe, Natalino Ronzitti & Allan Rosas eds., 1998). *See also* Eric Myjer, *Non-compliance Procedures and Their Function in International Law: The Case of the Chemical Weapons Convention, in* CONTEMPORARY INTERNATIONAL LAW ISSUES: NEW FORMS, NEW APPLICATIONS 355 (Wybo P. Heere ed., 1998).

[25] In terms of destruction, the CWC distinguishes three different types of CWs: stockpiled CWs, abandoned CWs, and old CWs. The last category of CWs, which are dealt with under the Verification Annex, Part IV(B), is further divided into two subcategories: CWs produced before 1925 and those produced between 1925 and 1946 "that have deteriorated to such extent that they can no longer be used as chemical weapons." Chemical Weapons

to produce the same level of active legal controversy within the OPCW as those concerning stockpiled CWs, but given the extent of abandoned CWs, these issues might well come to be much more prominent central in the future.

I. Violation-Related Provisions of the Chemical Weapons Convention

Like most other arms control and disarmament treaties, the CWC contains provisions that can be invoked when a state party violates its obligations. Those provisions specify, in particular, what the two main organs of the OPCW—the Conference of the States Parties (CSP), comprising all states parties to the CWC, and the Executive Council, comprising forty-one of those states[26]—can do in such circumstances.

With regard to the Executive Council, Article VIII, paragraph 36, stipulates:

> In its consideration of doubts or concerns regarding compliance and cases of non-compliance, . . . the Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, *inter alia*, one or more of the following measures:
>
> (a) Inform all States Parties of the issue or matter;
>
> (b) Bring the issue or matter to the attention of the Conference [of the States Parties];
>
> (c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

Paragraph 36 further specifies that "in cases of particular gravity and urgency," the Executive Council "shall bring the issue or matter . . . directly to the attention" of the UN General Assembly and Security Council.[27]

With regard to the CSP, Article VIII, paragraph 21(k), provides that it shall "[t]ake the necessary measures to ensure compliance with [the] Convention and to redress and remedy any situation which contravenes the provisions of [the] Convention, in accordance with Article XII."

Article XII, in turn, enumerates in its paragraphs 2 to 4 the measures available to the CSP in such cases:

Convention, *supra* note 1, Art. II, para. 5. Old CWs in the former subcategory are treated as "toxic waste," and the state party concerned is obligated to inform the OPCW of the steps being taken to destroy or otherwise dispose of such old CWs in accordance with its national legislation. *Id.*, Verification Annex, Part IV(B), para. 6. Old CWs in the latter subcategory are to be destroyed as CWs, albeit with the potential of being subject to a relaxed time limit and order of destruction. *Id.*, Part IV(B), para. 7. Furthermore, special rules apply to abandoned CWs that also meet the definition of the latter subcategory of old CWs. *Id.*, para. 17.

[26] Article VIII, paragraph 23, specifies that the forty-one members of the Executive Council are made up as follows: nine members from Africa; nine from Asia; five from Eastern Europe; seven from Latin America and the Caribbean; ten from Western European and other states; and one rotating member from Asia and Latin America and the Caribbean.

[27] It is envisaged in the CWC that the Executive Council's action may be prompted by the Technical Secretariat of the OPCW:

> The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with [the] Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.

Id., Article VIII, para. 40.

2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference [of the States Parties] may, *inter alia*, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under [the] Convention until it undertakes the necessary action to conform with its obligations under [the] Convention;

3. In cases where serious damage to the object and purpose of [the] Convention may result from activities prohibited under [the] Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law;

4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

As is apparent from the provisions above, important parallels exist between the measures available to the Executive Council and those available to the CSP.[28] First, for both organs the available measures are incremental, depending upon the degree of gravity. Second, both organs have the authority, in "cases of particular gravity [and urgency]," to bring the issue (or matter) to the attention of the General Assembly and Security Council.[29] Third, the measures to be taken by the two organs are, to some degree, linked. The Executive Council may *request* the state party concerned to take measures to redress the situation *within a specified time*;[30] and subsequently, the CSP may restrict or suspend the state party's rights and privileges under the CWC if the state party fails to take the *requested* measures *within the specified time*.[31]

A closer look at these provisions, however, reveals some nuanced differences between the two organs regarding both the situations within their purview and the measures available to them. In terms of jurisdiction, the Executive Council can consider not only "cases of non-compliance" but also situations involving "doubts or concerns regarding compliance," with the latter reasonably interpreted to include cases falling short of actual noncompliance.[32] By contrast, the CSP is expected to "[t]ake the necessary measures to ensure compliance with [the] Convention and to redress and remedy any situation which contravenes the provisions of [the] Convention."[33] This nuanced difference might also be reflected in the descriptions of the situations to be dealt with by the respective organs: an "issue or matter" for the Executive Council,[34] versus an "issue" for the CSP.[35]

[28] In an early draft of the CWC, what eventually became Article XII regarding the measures to be taken by the CSP was included in Article VIII side by side with Article VIII, paragraph 36, regarding the measures to be taken by the Executive Council. *See*, *e.g.*, Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on Its Work During the Period 8–18 January 1991, CD Doc. CD/1046, Appendix I (Jan. 18, 1991).

[29] Chemical Weapons Convention, *supra* note 1, Art. VIII, para. 36; *id.*, Art. XII, para. 4.

[30] *Id.*, Art. VIII, para. 36.

[31] *Id.*, Art. XII, para. 2.

[32] *Id.*, Art. VIII, para. 36.

[33] *Id.*, Art. VIII, para. 21(k).

[34] *Id.*, Art. VIII, para. 36.

[35] *Id.*, Art. XII, para. 4.

As far as the measures are concerned, those to be taken by the Executive Council are described in a relatively general way,[36] thus leaving the council with a certain discretion, whereas those to be taken by the CSP are more specific and can at least be partially characterized as sanctions, as the title of the relevant article itself suggests.[37]

II. The Conference of the States Parties' Decision of December 2011

Russia and the United States, after joining the CWC in 1997, declared to the OPCW their possession of some 40,000 and 28,000 tons of CWs, respectively,[38] which were initially supposed to be destroyed by April 29, 2007. In response to their requests made pursuant to the Verification Annex, Part IV(A), paragraph 24, the OPCW CSP decided in 2006 to extend those destruction deadlines, which would be final, to April 29, 2012.[39]

Two years before the extended deadlines would be reached, however, the Executive Council was already discussing the problem that the deadlines would not be met. By February 2011, Russia had destroyed only about 49 percent of its CW stockpile.[40] Mainly due to its insufficient national financial resources (hence the need for programs such as the United States' Nunn-Lugar Cooperative Threat Reduction Program, established in 1991,[41] and G-8's Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, established in 2002[42]), Russia had not begun the actual destruction of its CW stockpile until December 2002, more than five years after the CWC entered into force for it.[43]

The United States had destroyed nearly 86 percent of its stockpile as of April 2011 but projected that disposal would not be completed until 2021, due to the delay in constructing the necessary destruction facilities (located in Pueblo, Colorado, and Blue Grass, Kentucky) that would incorporate novel, untried neutralization technologies.[44] Complicating factors included the following: federal legislation banning interstate transportation of chemical munitions; state opposition to the U.S. Army's incineration plans; safety, health, and environmental concerns raised by state and local authorities and by residents living near CW storage and destruction facilities.[45]

Against this backdrop, the OPCW Executive Council in October 2009 asked its chairperson to engage in informal consultations on how and when to initiate discussion concerning the final

[36] *Id.*, Art. VIII, para. 36.

[37] The title of Article XII is "Measures to Redress a Situation and to Ensure Compliance, Including Sanctions." During the negotiations of the CWC, concern was raised that measures under Article XII might infringe upon the prerogatives of the UN Security Council under Chapter VII of the UN Charter. Walter Krutzsch & Ralf Trapp, A Commentary on the Chemical Weapons Convention 220 (1994).

[38] OPCW Doc. C-16/DG.16, *supra* note 9, para. 24 (Russia); *id.*, para. 33 (United States).

[39] OPCW Doc. C-11/DEC.18, *supra* note 9 (Russia); OPCW Doc. C-11/DEC.17, *supra* note 9 (United States).

[40] Matishak, *supra* note 12.

[41] Amy F. Woolf, The Nunn-Lugar Cooperative Threat Reduction Programs: Issues for Congress 1 (2003).

[42] The G-8 leaders committed to raise up to $20 billion over the next ten years to support the project, including the destruction of CWs. *Statement by G8 Leaders: The G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction* (June 27, 2002), *at* http://www.g8.utoronto.ca/summit/2002kananaskis/arms.html.

[43] Koplow, *supra* note 15, at 344–46; Walker, *supra* note 11, at 26.

[44] Matishak, *supra* note 12; *Pentagon Warns of Extended Chemical Weapons Destruction Time Line*, Global Security Newswire (June 22, 2011).

[45] Koplow, *supra* note 15, at 335–43; OPCW Doc. C-15/NAT.3, at 3 (Nov. 29, 2010); Walker, *supra* note 11, at 25.

extended deadlines with interested delegations,[46] including those of Russia and the United States; at that time Libya was seen as able to meet its deadline.[47] He started the consultations in January 2010.[48] It was assumed, however—as with the previous extensions of destruction deadlines beyond ten years after the CWC entered into force—that any decision regarding missed final extended deadlines would be made not by the Executive Council but by the CSP as the principal organ of the OPCW. The functional deadline for the CSP decision was November–December 2011, when it would be meeting for the last time (its sixteenth session) before the final extended deadline. But before that, the Executive Council needed to make its recommendation to the CSP.

After nearly two years of consultations, the Executive Council decided upon its recommendation on November 24, 2011, only a few days before the CSP was scheduled to meet.[49] The ensuing CSP decision of December 1 (CSP decision)[50] contained the following elements:

- The destruction of the remaining chemical weapons in the possessor States concerned [that is, Libya, Russia, and the United States][51] shall be completed in the shortest time possible in accordance with the provisions of the Convention and its Verification Annex and under the verification of the Technical Secretariat of the Organisation [for the Prohibition of Chemical Weapons] as prescribed under the Convention and its Verification Annex.[52]
- Each possessor State concerned is to submit a detailed plan for the destruction of its remaining chemical weapons . . . to the Sixty-Eighth Session of the Executive Council. The plan submitted by each possessor State . . . is to specify the planned completion date by which the destruction of its remaining chemical weapons is to be completed . . . .[53]
- Each possessor State concerned is to report . . . at each regular session of the Executive Council on the progress achieved towards the complete destruction of remaining stockpiles . . . .[54] Each possessor State concerned is to provide an annual report to the Conference of the States Parties . . . on the progress in the destruction of its remaining stockpiles . . . .[55] [T]he possessor States concerned [are to provide reports to the Review Conference] on the progress achieved to meet the planned completion date.[56]
- The Conference of the States Parties is to undertake an annual review of the implementation of this decision at a specially designated meeting(s) of the Conference.[57]

[46] OPCW Doc. EC-58/9, para. 5.18 (Oct. 16, 2009).

[47] *See supra* note 21.

[48] OPCW Doc. EC-59/3/Rev.1 (Feb. 26, 2010).

[49] OPCW Doc. EC-M-31/DEC.3 (Nov. 24, 2011).

[50] OPCW Doc. C-16/DEC.11, para. 3 (Dec. 1, 2011). For the sake of simplicity, the five-point summary below (in the main text) melds elements directly quoted from different paragraphs, as indicated, of the CSP decision.

[51] The expression "possessor States concerned" is perhaps used in order to limit the application of the CSP measures to the three states indicated, and to exclude Iraq from their application for the reasons stated earlier.

[52] OPCW Doc. C-16/DEC.11, *supra* note 50, para. 3(a).

[53] *Id.*, para. 3(c). The Executive Council session was scheduled to be held immediately after the expiry of the final extended deadline.

[54] *Id.*, para. 3(d).

[55] *Id.*, para. 3(f).

[56] *Id.*, para. 3(h)(i).

[57] *Id.*, para. 3(f).

The Review Conference is to conduct a comprehensive review on the implementation of this decision at a specially designated meeting(s) of the Conference.[58]

– The possessor States concerned are to invite the Chairperson of the Executive Council, the Director-General [of the Technical Secretariat of the OPCW] and a delegation representing the Executive Council to undertake visits to obtain an overview of the destruction programmes being undertaken.[59]

This decision was taken by a roll-call vote requested by the United States, the result of which was 101 to 1 (Iran).[60] It is rare for the CSP to take a decision by vote. But the central question is how to characterize the decision itself—that is, whether it is a de facto amendment of the CWC without following the formal amendment procedure, as it apparently allows the relevant possessor states to follow new destruction plans developed by themselves after missing the CWC-prescribed deadlines. As a first step, a consideration of the drafting history will prove useful.

A de Facto Amendment?

In May 2011, after one and a half years of consultations, the chairperson of the Executive Council, who had been entrusted with the task of addressing the problem of missed final deadlines, produced a report presenting three options,[61] involving the respective application of CWC Articles XV, paragraph 4 (amendments), XII (measures to be taken by the CSP), and VIII, paragraph 36 (measures to be taken by the Executive Council).

The first of the three options was to apply Article XV, paragraph 4, which governs the simplified amendment (called "change") procedure[62] for certain provisions of the CWC's annexes (but not its articles). Pursuant to that paragraph, changes can be made if they are "related only to matters of an administrative or technical nature."[63] Although the provisions for extending a destruction deadline are contained in the Verification Annex and are not specified in Article XV, paragraph 4, as being outside the process for changing annexes,[64] the question of addressing missed destruction deadlines cannot reasonably be interpreted as related to an "administrative or technical" matter. It would therefore not be subject to the "change" procedure. A consideration reinforcing this conclusion is that the obligation to destroy CWs not later than

[58] *Id.*, para. 3(h).

[59] *Id.*, para. 3(j).

[60] OPCW Doc. C-16/5, para. 9.4 (Dec. 2, 2011).

[61] OPCW Doc. EC-64/5, para. 6 (May 3, 2011).

[62] The procedure for "change" is relatively simple. After receiving a proposed change, the Executive Council examines the proposal and notifies its recommendation to all states parties. If the Executive Council recommends that the proposal be adopted, it is deemed to be approved if no state party objects to it. If the council recommends that the proposal be rejected, it is deemed to be rejected if no state party objects to the rejection. If a recommendation of the Executive Council does not meet with the required acceptance, the proposal will be considered as a matter of substance by the CSP at its next session. Changes approved under this procedure shall enter into force for all states parties 180 days after the director-general has notified states parties of the approval. Chemical Weapons Convention, *supra* note 1, Art. XV, para. 5.

[63] *Id.*, Art. XV, para. 4.

[64] Paragraph 4 provides that "[s]ections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes."

ten years after the CWC's entry into force—the initial deadline—is not itself subject to the "change" procedure, as that obligation is stipulated in Article IV, not an annex.[65]

The second option was to apply Article XII of the Convention entitled, "Measures to Redress a Situation and to Ensure Compliance, Including Sanctions." This article indicates what the CSP can do when compliance issues arise. Paragraph 1 provides that the CSP shall take "the necessary measures . . . to ensure compliance with [the] Convention and to redress and remedy any situation which contravenes the provisions of [the] Convention."[66] The specific measures available to the CSP are enumerated in paragraphs 2, 3, and 4, respectively:[67] "restrict or suspend the State Party's rights and privileges under [the] Convention"; "recommend collective measures to States Parties in conformity with international law"; and "bring the issue . . . to the attention of the United Nations General Assembly and the United Nations Security Council." According to the chairperson's report, this second option was also not considered "viable," presumably because the specific measures available under this option (that is, sanctions) were considered politically difficult to agree upon.[68]

The third option involved Article VIII, paragraph 36, which indicates the measures available to the Executive Council. As already noted, this paragraph has a wider scope of application than Article XII. According to its first sentence, paragraph 36 deals not only with "cases of non-compliance" but also "doubts or concerns regarding compliance," which may fall short of noncompliance as such. The measures under this paragraph also have a wider and more flexible scope than those under Article XII, and include, "*inter alia*," the following: "(a) Inform all States Parties of the issue or matter; (b) Bring the issue or matter to the attention of the [CSP]; (c) Make recommendations to the [CSP] regarding measures to redress the situation and to ensure compliance."

[65] Chemical Weapons Convention, *supra* note 1, Art. IV, para. 6.

[66] *Id.*, Art. XII, para. 1.

[67] *Id*. Precisely speaking, however, the measure set forth in Article XII, paragraph 2 (namely, restricting or suspending the state party's rights and privileges under the CWC), is provided not as an exclusive measure but as an example of measures that can be taken under that paragraph; the provision states that "the Conference [of the States Parties] may, *inter alia*, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under [the] Convention." The phrase "*inter alia*" suggests that the CSP may also take other measures under this paragraph. It would be wrong to infer, however, that the December 2011 CSP decision was therefore taken under this paragraph. First, any other measures taken under the paragraph should be similar to the measure expressly provided, whereas the measures in the 2011 decision are significantly different. Second, Article XII, paragraph 2, provides that the CSP may take such measures in cases "where a State Party has been *requested by the Executive Council to take measures* to redress a situation raising problems with regard to its compliance, and where the State Party *fails to fulfil the request within the specified time*" (emphasis added), but the Executive Council had made no such request in this case. Third, as noted in the text, the Executive Council itself did not consider the option of applying Article XII to be viable. Incidentally, KRUTZSCH AND TRAPP, *supra* note 37, at 222–23, discuss various interpretations based on the understanding that "*inter alia*" refers and relates to the phrase "upon the recommendation of the Executive Council." Yet it seems clear from the sentence itself and its drafting history that "*inter alia*" refers and relates to the part "restrict or suspend the State Party's rights and privileges under [the] Convention." An earlier draft of the CWC provided that "the Conference of the States Parties may—inter alia,—restrict or suspend the State Party's rights and privileges under the Convention." CD Doc. CD/1046, *supra* note 28, Appendix I. There, the phrase "*inter alia*" was used clearly in relation to the measure to be taken by the CSP. *See also* Rosas, *supra* note 24, at 439.

[68] OPCW Doc. EC-64/5, *supra* note 61, para. 7. It is clear from the chairperson's report that this second option, under Article XII, was taken to include only the options specified in paragraphs 2, 3, and 4, as described in the text—which do not extend to the measures actually ordered by the CSP in its December 2011 decision. *See also supra* note 67.

This third option—involving measures authorized under Article VIII, paragraph 36—appears to be the one that the CSP adopted in its December 2011 decision. A potential problem arises, however, since Article VIII, paragraph 36, describes measures available to the Executive Council, not the CSP. The parallel article for the CSP is Article XII, whose three categories of available measures do not include those indicated in the CSP's December 2011 decision.

That said, one might nevertheless point to Article VIII, paragraph 19, which provides for the *general* powers and functions of the CSP.[69] Even here, though, the paragraph does not appear to provide the requisite legal foundation for the CSP's decision. Paragraph 19 does establish a residual legal power for the CSP to act regarding matters that are not explicitly dealt with elsewhere in the CWC—including the dismissal of a director-general,[70] for example—but there is no basis for arguing, based on the drafting history or otherwise, that the paragraph was intended to cover situations that are already explicitly addressed in the CWC's other provisions, such as matters of noncompliance.

How, then, should we understand the CSP's 2011 decision? Perhaps the best place to start is with the language of Article VIII, paragraph 36, which, though explicitly concerned with the Executive Council, is flexible enough to accommodate a wide range of situations and measures. Of special relevance is paragraph 36(c), which authorizes the Executive Council to "[m]ake recommendations to the [CSP] regarding measures to redress the situation and to ensure compliance." This provision seems to be the ultimate legal basis for the CSP's 2011 decision. Indeed, the CSP's decision was based directly on the text of a draft decision recommended by the Executive Council,[71] which is exactly what Article VIII, paragraph 36(c), provides. That paragraph can thus be seen as a general provision enabling the CSP to take any measures recommended by the Executive Council to redress the situation and to ensure compliance—

[69] Paragraph 19 provides that the CSP

> shall consider any questions, matters or issues within the scope of [the] Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to [the] Convention raised by a State Party or brought to its attention by the Executive Council.

[70] In a conspicuous example invoking a general provision of the CWC to accomplish what is not specifically authorized by the CWC, the CSP endeavored to remove José Mauricio Bustani from his position as director-general of the Technical Secretariat. The relevant decision was taken in accordance with Article VIII, paragraph 19, of the CWC; the second preambular paragraph of the decision

> [r]ecall[ed] that, in accordance with Article VIII, Paragraph 19 of the Convention, the Conference of the States Parties shall consider any questions, matters or issues within the scope of the Convention . . . and that it may make recommendations and take decisions on any questions, matters or issues related in [sic] the Convention raised by a State Party or brought to its attention by the Executive Council.

OPCW Doc. C-SS-1/DEC.1 (Apr. 22, 2002). Bustani disputed that decision before the International Labour Organization Administrative Tribunal, which partly upheld Bustani's claims. The CSP's decision to removeBustani was "set aside," and the OPCW was ordered to pay him material and moral damages. Bustani v. OPCW, Judgment No. 2232, paras. 15–16 (ILO Admin. Trib. July 16, 2003). Notably, the tribunal's judgment was based on the failure to provide Bustani with the procedural guarantee of due process, a procedure "enabling the individual concerned to defend his or her case effectively before an independent and impartial body." *Id.* The tribunal did not, however, find that the CSP's decision had been ultra vires. The tribunal recognized that the "Conference does indeed have a broad competence, under Article VIII, paragraphs 19 and 21, of the Convention, to examine all problems lying within the scope of the Convention," and it also conceded that the "possibility that a measure of the kind taken against the complainant may, exceptionally, be justified in cases of grave misconduct cannot be excluded." *Id.*

[71] OPCW Doc. EC-M-31/DEC.3, *supra* note 49.

measures that go beyond those specifically enumerated in Article XII. In particular, whereas the CSP, under Article XII, paragraph 1, can deal only with a "situation which contravenes the provisions of [the] Convention"—that is, an actual contravention case—it can also, by acting on an Executive Council recommendation under Article VIII, paragraph 36(c), address a situation that is still at the stage of "doubts or concerns."

If so, it would follow that the CSP is capable of acting not only reactively but proactively, and that the CSP decision of December 2011 was not a de facto amendment of the CWC but an application of its provisions.

Implications for States Parties Concerned

As examined above, the CSP decision of 2011 can be understood as flowing from the CWC provision that authorizes the Executive Council to make recommendations to the CSP regarding measures to redress the situation and ensure compliance. So far, so good, but this simple assertion still fails to capture the exact legal nature of the 2011 decision.

A baseline consideration is that the CSP cannot, through its actions, change the states parties' rights and obligations under the CWC—especially the central obligations as defined by Article I as "General Obligations"—except through the amendment procedure or other explicit provisions of the convention. It immediately follows that, in the present case, the CSP could not change the obligation of the possessor states to destroy their CWs in accordance with the CWC (and at the longest, within the time frame of any final extended deadlines of fifteen years after the convention's entry into force).

Accordingly, in the present context, the demand in the CSP's December 2011 decision that the possessor states "[destroy their] remaining chemical weapons . . . in the shortest time possible in accordance with the provisions of the Convention and its Verification Annex"[72] clearly expresses a *legal* obligation; it does no more than express an existing legal requirement of the CWC itself. By contrast, the demand that the states in question submit "detailed plan[s] for the destruction of [their] remaining chemical weapons" and specify "planned completion date[s]"[73] obviously goes beyond what can be legally mandated under the CWC—especially since those plans and dates presuppose that the fifteen-year final extended deadline will already have passed. Moreover, defaulting states obviously have no power to change their treaty obligations as they wish.

With regard to the reporting requirements newly introduced by the CSP decision, they may be either legal or political. Article VIII, paragraph 36(c), does not preclude the Executive Council from recommending the CSP to take "measures" that are legally binding on the relevant states parties, nor does it preclude that those measures be politically binding.[74] Whether a particular measure decided upon by the CSP is legally or politically binding or no more than recommendatory is ultimately contingent on the intention of the CSP.

[72] OPCW Doc. C-16/DEC.11, *supra* note 50, para. 3(a).
[73] *Id.*, para. 3(c).
[74] HUMAN RIGHTS MONITORING: A FIELD MISSION MANUAL 49–50 (Anette Faye Jacobsen ed., 2008).

The CSP does not itself seem to have viewed its December 2011 demand for reporting as defining legal obligations. Not only does the December 2011 decision provide no such indication, but the new reporting requirements are described as follows: "Each possessor State concerned *is to* report," and "Each possessor State concerned *is to* provide an annual report."[75] This mode of expression contrasts with how the CSP stated its demand to destroy the remaining chemical weapons in the December 2011 decision: "The destruction of the remaining chemical weapons in the possessor States concerned *shall* be completed in the shortest time possible."[76] It is reasonable to conclude that the new reporting requirements do not define legal obligations under the CWC.

Comparison to Noncompliance Procedures in International Environmental Treaties

The CSP decision of 2011 does not present itself as an effort to address a treaty violation or to impose sanctions. The decision's preamble notes that the Executive Council "has already been addressing the *concern* in accordance with Paragraph 36 of Article VIII of the Convention that the final extended deadline of 29 April 2012 may not be fully met and that the matter has also been brought to the attention of the Conference."[77] The decision chooses the word *concern*, not *noncompliance*, among the situations covered by Article VIII, paragraph 36 (which refers to "doubts or concerns regarding compliance and cases of non-compliance"). In fact, the decision makes no reference at all to any violation of, or noncompliance with, the convention. It simply refers to the possibility that "the final extended deadline . . . may not be fully met."[78] This intentional omission was, indeed, precisely the reason why Iran voted against the 2011 decision (as noted earlier, the only negative vote),[79] though technically, no *actual* violation had yet occurred at the time of that decision since the final extended deadline had yet to expire.

The preamble to the decision, after noting that the three states parties concerned have reiterated their "unequivocal commitment" to destroy their remaining CWs, also notes that those

[75] OPCW Doc. C-16/DEC.11, *supra* note 50, para. 3(d), (f) (emphasis added).

[76] *Id.*, para. 3(a) (emphasis added).

[77] *Id.*, pmbl., para. 6 (emphasis added).

[78] *Id.*

[79] Iran stated that

> the text of the decision has still fallen short of some important elements in accordance with the Convention as follows:
>
> – Necessity of recognition of the situation of non-compliance.
>
> – Necessity to report the situation of non-compliance to the United Nations organisation due to the threat to international peace and security.
>
> – Setting a very limited time-frame for destruction of all remaining stockpiles and avoiding an open-ended time frame.
>
> – Convening a special Conference to review the implementation of the decision.

Explanation of Vote by Iran on the Draft Decision on the Final Extended Deadline of 29 April 2012, at 2, OPCW Doc. C-16/NAT.13 (Dec. 1, 2011). Iran also stated during the general debate of the 2011 session of the CSP that "[i]t is unfortunate that the United States has explicitly stated that it cannot meet the deadline, which is a clear-cut case of non-compliance. As per the Convention, the non-compliance should be brought to the attention of the international community including the United Nations Organisation." Statement by H. E. Kazem Gharib Abadi, Ambassador and Permanent Representative of the Islamic Republic of Iran to the Organisation for the Prohibition of Chemical Weapons at the Sixteenth Session of the Conference of the States Parties, at 3, OPCW Doc. C-16/NAT.17 (Nov. 28, 2011).

states' inability to fully meet the final extended deadline would come about "due to reasons that are unrelated to the commitment of these States Parties to the General Obligations for the destruction of chemical weapons established under Article I of the Convention."[80] Thus, the decision takes the view that despite the states' prospective failures to conform with CWC provisions, no deliberate violation or malicious intentions are involved.

This situation is reminiscent of the mechanisms that exist in the international environmental law field: noncompliance procedures. In order to understand the similarities and differences between the CSP's December 2011 decision and existing noncompliance procedures in international environmental treaties,[81] it is worth considering a typical example of the latter: the Non-compliance Procedure of the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer. Under this mechanism the initiating party that submits a case may be (1) the noncomplying state party ("self-party trigger"), (2) other states parties ("party to party trigger"), or (3) the treaty secretariat ("secretariat trigger").[82] Although not explicitly empowered to do so by the text of the protocol's noncompliance procedure, the protocol's Implementation Committee has the authority to address not only actual noncompliance cases but also prospective cases in which a party will be unable to fully comply with its protocol obligations.[83] After receiving a submission, the Implementation Committee reports to the Meeting of the Parties and includes any recommendations that it considers appropriate—in response to which the parties may decide upon, and call for, steps to bring about full compliance with the protocol.[84] The measures may include (1) providing "[a]ppropriate assistance, including assistance for the

[80] OPCW Doc. C-16/DEC.11, *supra* note 50, pmbl., para. 9.

[81] According to Malgosia Fitzmaurice, noncompliance procedures primarily aim at encouraging "a non-complying State to return to compliance without accusing it of wrongdoing, or holding it to account for the consequences that entail from wrongdoing." Malgosia Fitzmaurice, *The Kyoto Protocol Compliance Regime and Treaty Law*, 2004 SING. Y.B. INT'L L. 23, 25.

[82] Non-compliance Procedure (1998), paras. 1, 3, 4, *in* Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, Annex II, UN Doc. UNEP/OzL.Pro.10/9 (Dec. 3, 1998); *see also* Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, pt. VI, para. 1, *in* Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its First Session, add., pt. 2, Decision 27/CMP.1, annex, UN Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar, 30, 2006); Mechanism for Promoting Implementation and Compliance, para. 9, *in* Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Decision VI/12, appendix, UN Doc. UNEP/CHW.6/40, annex (Feb. 10, 2003); Implementation Committee, Its Structure and Functions and Procedures for Review, paras. 4, 5, *in* Economic Commission for Europe (UN), Executive Body for the Convention on Long-Range Transboundary Air Pollution, Report of the Executive Body on Its Twenty-Fourth Session, add., pt. 2, Decision 2006/2, UN Doc. ECE/EB.AIR/89/Add.1 (Feb. 5, 2007); Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, paras. 15–18, *in* Economic Commission for Europe (UN), Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Report of the First Meeting of the Parties, add., Decision I/7, annex, UN Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004).

[83] The Implementation Committee took a statement (request for a grace period) by Russia at a Meeting of the Parties in 1994 as constituting a self-trigger submission and, after some exchanges with Russia, reported its recommendations to the next Meeting of the Parties. The measures imposed included implied trade-restriction measures—at a time when Russia was not yet formally found in noncompliance (its deadline for compliance was still a few weeks away). Jacob Werksman, *Compliance and Transition: Russia's Non-compliance Tests the Ozone Regime*, 56 ZAÖRV 750, 764–65, 768 (1996). Noncompliance procedures in other environmental treaties are more explicit in this respect. *See* Mechanism for Promoting Implementation and Compliance, *supra* note 82, para. 9(a); Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, *supra* note 82, pt. IV, para. 6; Implementation Committee, Its Structure and Functions and Procedures for Review, *supra* note 82, para. 4(b); Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, *supra* note 82, para. 16.

[84] Non-compliance Procedure (1998), *supra* note 82, para. 9.

collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training," (2) "[i]issuing cautions," and (3) "[s]suspension, in accordance with the applicable rules of international law . . . ,[85] of specific rights and privileges under the Protocol."[86]

Thus, the main characteristics of this procedure are as follows: (1) initial notices of noncompliance might come not only from other parties but from the defaulting party itself; (2) the procedure may be applied both to actual noncompliance and to prospective noncompliance; and (3) the measures available include both sanctions and assistance.

As a matter of actual practice, most cases involving noncompliance procedures have been initiated by the noncomplying states themselves,[87] and most cases have met with a response of assistance rather than sanctions.[88] Hence, the procedures have been characterized as "soft" and "non-confrontational."[89]

What is noteworthy, as discussed below, is that the characteristics of noncompliance procedures in international environmental law are largely shared by the process followed, and the measures taken, by the OPCW in dealing with the three possessor states parties' prospective failures to meet the final extended destruction deadlines. And what makes this similarity not

[85] [Editor's note: This qualification is necessary because the protocol itself does not authorize the suspension of the rights and privileges of a state party, whereas the CWC explicitly mentions such a possibility. Chemical Weapons Convention, *supra* note 1, Art. XII, para. 2.]

[86] Indicative List of Measures That Might Be Taken by a Meeting of the Parties in Respect of Non-compliance with the Protocol, *in* Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, Annex V, UN Doc. UNEP/OzL.Pro.4/15 (Nov. 25, 1992); *see also* Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, *supra* note 82, pt. XIV, paras. (a)–(d); *id.*, pt. XV, paras. 1, 5; Mechanism for Promoting Implementation and Compliance, *supra* note 82, paras. 19, 20; Implementation Committee, Its Structure and Functions and Procedures for Review, *supra* note 82, para. 11; Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, *supra* note 82, para. 37.

[87] Gerhard Loibl, *Compliance Procedures and Mechanisms, in* RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 434 (Malgosia Fitzmaurice, David M. Ong & Panos Merkouris eds., 2010); *see also* Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum, *Conclusions Drawn from the Conference on Ensuring Compliance with MEAs, in* ENSURING COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS: A DIALOGUE BETWEEN PRACTITIONERS AND ACADEMIA 365 (Ulrich Beyerlin, Peter-Tobias Stoll & Rüdiger Wolfrum eds., 2006); Tullio Treves, *Introduction, in* NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS 6 (Tullio Treves, Laura Pineschi, Attila Tanzi, Cesare Pitea, Chiara Ragni & Francesca Romanin Jacur eds., 2009).

[88] Most prominently, such has been the practice under the noncompliance procedure of the Montreal Protocol. M. A. Fitzmaurice & C. Redgwell, *Environmental Non-compliance Procedures and International Law*, 2000 NETH. Y.B. INT'L L. 35, 51. One of the few exceptions involved Russia's noncompliance with the London Amendment of the Montreal Protocol, where the measures taken in response by the parties to the protocol can arguably be taken to have included certain trade restrictions against Russia. *See* Werksman, *supra* note 83, at 766–69.

[89] The Declaration by the Ministers of the Environment of the Region of the United Nations Economic Commission for Europe (UN/ECE) and the Member of the Commission of the European Communities Responsible for the Environment, para. 23.1 (Apr. 30, 1993), *at* http://www.unece.org/env/efe/historyofefe/history.en2011_2.html, urges contracting parties to environmental conventions in the UN/ECE region to develop noncompliance regimes that are, inter alia, nonconfrontational and transparent. The 2002 Report of the Conference of the Parties to the Basel Convention provides that the "mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention." Mechanism for Promoting Implementation and Compliance, *supra* note 82, para. 2 ("Nature of the Mechanism"). The Report of the First Meeting of the Parties to the Aarhus Convention provides that the Meeting of the Parties may take "such other non-confrontational, non-judicial and consultative measures as may be appropriate" in addition to, or instead of, the specific measures listed. Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, *supra* note 82, para. 37(h); *see also* Fitzmaurice & Redgwell, *supra* note 88, at 39; Fitzmaurice, *supra* note 81, at 25; Loibl, *supra* note 87, at 427, 435; Treves, *supra* note 87, at 2.

just noteworthy but striking is that, during the negotiations leading up to the CWC, there was no actual discussion of a noncompliance procedure as such; a reasonable explanation is that allowing the additional five-year extension, as provided in the Verification Annex, was considered adequate to cover cases in which the initial destruction deadline had been missed.[90]

First, in the CWC situation being considered here, the states parties themselves formally or informally declared to the secretariat in advance that they would be unable to meet the destruction deadline. In a 2010 speech to the First Committee of the UN General Assembly, the director-general of the OPCW Technical Secretariat stated that Russia and the United States had "indicated that they will not be able to meet the final destruction deadline in April 2012 as set under the Convention."[91] And in the director-general's opening statement at the 2011 session of the CSP, he noted that Libya had "advised the OPCW that it will not be able to meet the destruction deadline of 29 April 2012."[92] The states parties concerned thus acted in a manner similar to the "self-party trigger" system under environmental noncompliance procedures. It is also typical that they announced their noncompliance prospectively rather than after the fact and that the organization's decision in response to those notifications was taken before the states parties were actually noncompliant. A relevant example in environmental noncompliance procedures can be seen in relation to Russia's advance request for a grace period under the Montreal Protocol's noncompliance procedure.[93]

Second, the CSP decision notes the three possessor states' "unequivocal commitment" to their obligations to destroy their remaining CWs, and it observes that the states' inability to fully meet the final extended deadline would come about for reasons "unrelated to the commitment of these States Parties."[94] This response by the CSP reminds us again of the "self-party trigger" system under the Montreal Protocol, which is to be applied "[w]here a Party concludes that, despite having made its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol."[95]

Third, in terms of the measures taken, the CSP decision does not contain anything that can be characterized as sanctions. The decision's newly introduced measures consist essentially of reporting requirements on the progress made in implementing the destruction obligations. These measures look very much like the reporting system of the compliance procedure under

[90] According to the recollection of the present author, who participated in the CWC negotiations from March 1991 to September 1992—the very final stage of the negotiations—there was no discussion for including any sort of noncompliance procedure in the CWC. Perhaps the negotiators thought that the possibility of missing the destruction deadline was already covered by the provisions in the Verification Annex that allow such a deadline to be extended.

[91] Statement by H. E. Ambassador Ahmet Üzümcü, Director-General of the Organisation for the Prohibition of Chemical Weapons, Sixty-Fifth Session of the United Nations General Assembly, First Committee (Oct. 13, 2010), *at* http://www.opcw.org/index.php?eID=dam_frontend_push&docID=14087. Indeed, the United States had already made clear, in its request for the extension of its CW destruction deadline in 2006, that "at this time we do not expect to be able to meet the proposed April 29, 2012 deadline for destruction of the U.S. declared stockpile of CW" and that "[t]he Executive Council may wish to consider how best to address this situation closer to the deadline." OPCW Doc. EC-45/NAT.3, at 3 (Apr. 26, 2006).

[92] OPCW Doc. C-16/DG.18, para. 40 (Nov. 28, 2011).

[93] *See supra* note 83.

[94] OPCW Doc. C-16/DEC.11, *supra* note 50, pmbl., para. 9.

[95] Non-compliance Procedure (1998), *supra* note 82, para. 4 (emphasis added); *see also* Mechanism for Promoting Implementation and Compliance, *supra* note 82, para. 9(a); Implementation Committee, Its Structure and Functions and Procedures for Review, *supra* note 82, para. 4(b); Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, *supra* note 82, para. 16.

the Kyoto Protocol to the 1997 UN Framework Convention on Climate Change. This latter procedure requires noncomplying parties to submit regular or annual progress reports on implementing compliance plans to the enforcement branch of the Compliance Committee.[96]

Thus, what happened in the OPCW in (and before) December 2011 concerning the three possessor states paralleled what happens under the noncompliance procedures of international environmental treaties.

These environmental treaties' noncompliance procedures do include the possibility of imposing coercive measures, such as suspending specific rights and privileges under the relevant treaties.[97] Likewise, the CWC system has a parallel in Article XII, which contemplates measures such as restricting or suspending state parties' rights and privileges under the CWC. These CWC measures, in combination with the kinds of measures in the CSP's December 2011 decision, thus present a closer parallel to the measures available under the noncompliance procedures of environmental treaties.

A potentially significant difference is that, whereas the 2011 CSP decision makes no mention of noncompliance, violations, or breaches, some noncompliance procedures in other systems do require that the fact of noncompliance be expressly stated.[98] One reason for the CSP not making any such mention was that most states parties wanted to address the situation in as low-key a manner as possible. Another reason may relate to what is arguably the CWC's general policy that OPCW organs should not formally determine noncompliance with CWC obligations. Such a policy can be detected in the wording of some CWC provisions. Certain provisions in Article XII and also Article IX are relevant in this context. Article XII, paragraph 1, employs the word "contravention" rather than "violation" by providing that the CSP "shall take the necessary measures . . . to redress and remedy any situation which *contravenes* the provisions of [the] Convention."[99] Such wording was apparently used to escape the impasse stemming from the disagreement as to whether the CSP should have the authority to determine whether a state party had violated a CWC obligation.[100] Similarly, Article IX, paragraph 22, which defines the Executive Council's role in relation to challenge inspections, states that the council, in reviewing the final report, "shall . . . address any concerns as to: (a) Whether any non-compliance has occurred." This wording, which has been taken to preclude the Executive Council from making a specific determination as to a state party's compliance or noncompliance,[101] seems to have been chosen in order to avert situations in which a council determination

[96] Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, *supra* note 82, pt. XV, paras. 3, 7; *see also* Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, *supra* note 82, para. 37(c).

[97] *See*, *e.g.*, Indicative List of Measures That Might Be Taken by a Meeting of the Parties in Respect of Noncompliance with the Protocol, *supra* note 86; Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, *supra* note 82, pt. XV, para. 5(c).

[98] Under the compliance procedure of the Kyoto Protocol, for instance, the enforcement branch of the Compliance Committee is to make an express declaration when it has determined that a party is noncompliant. Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol, *supra* note 82, pt. XV, paras. 1, 5.

[99] Chemical Weapons Convention, *supra* note 1, Art. XII, para. 1 (emphasis added).

[100] Krutzsch & Trapp, *supra* note 37, at 221.

[101] The article-by-article analysis prepared by the U.S. Department of State argues that the phrase "address any concern" does not provide for the Executive Council to decide whether noncompliance with the convention has occurred. *Article-by-Article Analysis of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, *in* S. TREATY DOC. NO. 103-21, at 66 (1993) [hereinafter Article-by-Article Analysis]. *But see infra* note 102.

that a particular state party was not noncompliant would prevent other states parties from taking unilateral measures against the challenged state party.

Despite the CWC's general policy, described above, that OPCW organs should not determine the existence or nonexistence of noncompliance, some CWC provisions run counter to this policy. For instance, Article VIII, paragraph 36, states that "[i]n its consideration of . . . cases of non-compliance," the Executive Council shall, "as appropriate, request the State Party to take measures to redress the situation." Although this provision does not explicitly authorize the council to make determinations about noncompliance, the council presumably needs to have made such a determination before requesting the state party to take redress measures. And even the compromise language of Article XII, paragraph 1, as discussed above, basically embraces what are de facto determinations of violations when it authorizes the CSP to take appropriate measures regarding situations that *contravene* the CWC.[102] Thus, despite the CWC's general policy that OPCW organs are not to determine whether a state party has violated its CWC obligations, the convention implicitly recognizes that OPCW organs will sometimes end up doing just that. The discontinuity with the noncompliance procedures of environmental treaties is, from this perspective, more apparent than real.

Coming at this same question from the opposite direction, it is also worth noting that in the noncompliance procedures of environmental treaties, mandatory declaration of noncompliance is not necessarily a rule. In some noncompliance procedures, such declarations are available but not required,[103] and still others make no express provision for such declarations.[104] More generally, the purpose of making declarations of noncompliance is generally to exert pressure on the state concerned rather than to establish res judicata. The main goal of noncompliance procedures is to bring the noncomplying state (back) to compliance, and not to determine that a breach has been committed and to assign legal responsibility.

One actual difference—and not just a soft or apparent one—between the CWC and environmental treaties can be seen in relation to assistance. Neither the measures taken by the CSP in 2011 nor other CWC measures concerning noncompliance (prospective or otherwise) include assistance,[105] which is a most distinctive feature of environmental treaties' noncompliance procedures.[106] The reason for the lack of assistance offered in the 2011 decision and the CWC generally is that the CWC considers the possessor state to have exclusive responsibility for destruction since the possessor state itself chose to possess these weapons as a means

[102] With regard to Article IX, paragraph 22, mentioned above, even the United States—the champion of the view that only individual states may determine compliance/noncompliance question in each individual case—admits that that paragraph is a "compromise" between "certain developing countries that wanted an international body to decide whether a violation had occurred" and "other negotiating states, including the U.S., that wanted decisions on violations to be left up to each State Party itself to determine." Article-by-Article Analysis, *supra* note 101, at 66. As such, the provision may potentially be interpreted either way.

[103] *See* Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, *supra* note 82, para. 37.

[104] *See* Mechanism for Promoting Implementation and Compliance, *supra* note 82, paras. 19–20; Indicative List of Measures That Might Be Taken by a Meeting of the Parties in Respect of Non-compliance with the Protocol, *supra* note 86, Annex V.

[105] CWC Article X provides for "assistance," but outside the context of noncompliance. "Assistance" for the purpose of Article X means the "coordination and delivery to States Parties of protection against chemical weapons."

[106] *Cf.* Ronald B. Mitchell, *Comment on the Paper by Patrick Széll, in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 111 (Winfried Lang ed., 1995).

to enhance its own national security. The CWC thus provides,[107] as does the CSP decision of December 2011,[108] that the costs of destruction are to be borne by possessor states, and so are, in principle, the costs of verifying destruction. In the future, however, it is possible that the CSP might decide to give assistance to noncomplying states parties. The wording of Article VIII, paragraph 36(c), which specifies the basis for Executive Council recommendations to the CSP, is flexible enough to accommodate any such measures.[109]

Overall, although the CSP decision of 2011 did not formally incorporate into the OPCW framework a noncompliance procedure precisely like those in environmental treaties, the relevant provisions of the CWC are so general and flexible that such a result now seems possible in OCPW practice. The December 2011 CSP decision was, as we have seen, most likely based on a general provision of CWC Article VIII regarding the powers and functions of the Executive Council. In effect, the OPCW, faced with the issue of missed final extended deadlines for CW destruction, used the available latitude in the CWC to create an ad hoc noncompliance arrangement. For many practical reasons, that decision was a sensible one. Most importantly, other possible approaches, such as suspending states parties' rights and privileges under the convention, would not have resolved the problems and actually may have worsened them, even to the point of undermining the CWC regime. In acting upon this broader understanding of the situation and taking what was, under the circumstances, the approach most likely to generate the desired result, the CSP's approach in its December 2011 decision was closely comparable to approaches taken under international environmental treaties.

A crucial difference, however, is that the OPCW has not formalized this approach as one that might now be applied in other cases, and it has also not deliberated on, and set bounds to, the approach through careful construction of a text. The absence of an enabling provision in the CWC does not directly pose a problem. In international environmental treaties, not all noncompliance procedures are based on such explicit provisions; for example, some of them, such as that of the Basel Convention, rely on a general organizational provision.[110] The CWC's lack of a detailed, textual noncompliance procedure may potentially raise problems for the OPCW and the CWC regime in the future.

[107] CWC Article IV, paragraph 16, provides as follows: "Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise."

[108] Paragraph 3(b) of the 2011 CSP decision provides: "The costs for the continued destruction of the chemical weapons by the possessor States concerned and the verification of their destruction shall continue to be met in accordance with Paragraph 16 of Article IV of the Convention."

[109] Although in the context of Libya's declarations of November 2011 and February 2012 on its not-previously-declared CWs (meaning that Libya violated declaration obligations), *see* Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction in 2012, *supra* note 13, para. 1.10, it is worth noting that the Executive Council, in its decision adopted in March 2012, "[u]rge[d] all States Parties who are in a position to do so to provide bilateral assistance, upon request of the Libyan authorities and in accordance with the provisions of the Convention, to support the efforts of Libya for the destruction of all its chemical weapons." OPCW Doc. EC-67/DEC.9, para. 6 (Mar. 27, 2012).

[110] The legal foundation for the Basel Convention's noncompliance mechanism was its Article 15, paragraph 5(e), which authorized the Conference of the Parties to "[e]stablish such subsidiary bodies as are deemed necessary for the implementation of [the] Convention." Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 UNTS 57; Mechanism for Promoting Implementation and Compliance, *supra* note 82, para. 1.

III. Destruction Deadline for Abandoned Chemical Weapons

One major compliance issue that is already raising legal questions within the CWC framework—and that could pose problem in the future because of the convention's lack of a formally specified noncompliance procedure—concerns obligations to destroy abandoned CWs (that is, under Article II, paragraph 6, CWs "abandoned by a State . . . on the territory of another State without the consent of the latter"). Four states parties have declared that abandoned CWs are located on their territories: China, Italy, Panama, and Syria[111] (though other states parties having such CWs may not have declared them). Japan is the only state party, however, that has declared its responsibility for abandoned CWs (in particular, those located in China).[112] Thus, the only case of abandoned CWs currently being actively addressed within the purview of the OPCW is that of the weapons abandoned by Japan in China around the end of World War II. At first sight, it appears that the OPCW has been taking an approach similar to the one it had followed regarding the CWs of Libya, Russia, and the United States.[113] But legally, the treatment approach to the abandoned CWs in China is fundamentally different: in the case of the abandoned CWs, there has arguably been no failure to comply—either by China or Japan—with any obligation to destroy CWs under the CWC.

The deadline for destroying abandoned CWs has been controversial ever since the adoption of the CWC, particularly because of complications in interpreting the relevant provisions. On the one hand, Article IV, paragraph 1, provides regarding the destruction of CWs that the "provisions of this Article and the detailed procedures for its implementation [that is, the provisions of the Verification Annex, Part IV(A)] shall apply to all chemical weapons . . . , except old chemical weapons and abandoned chemical weapons to which Part IV(B) of the Verification Annex applies." On the other hand, the Convention also provides in the Verification Annex, Part IV(B), paragraph 17, that, "[s]ubject to paragraphs 8 to 16, Article IV and Part IV(A) of [the] Annex [concerning stockpiled chemical weapons] shall also apply to the destruction of abandoned chemical weapons."

It may appear circular: Article IV provides that abandoned CWs are dealt with in Part IV(B) of the Verification Annex as a special regime, and the latter states that Article IV and Part IV(A) of the Verification Annex for stockpiled CWs also apply to abandoned CWs. But the provisions are not actually circular. A natural interpretation of the two provisions above is that the destruction scheme for abandoned CWs under the CWC is the same as that for stockpiled CWs except insofar as the former is modified by paragraphs 8 to 16 of Part IV(B) of the Verification Annex. One salient example of such a difference is that, "[f]or the purpose of destroying abandoned chemical weapons, the Abandoning State Party shall provide all necessary financial, technical, expert, facility as well as other resources."[114]

[111] Note by the Director-General: Summary of Verification Activities in 2007, annex, para. 5.3, OPCW Doc. S/784/2009 (Aug. 7, 2009); OPCW Doc. C.19/CRP.1, para. 1.35 (July 11, 2014).

[112] Note by the Director-General, *supra* note 111, annex, para 5.3.

[113] In fact, the director-general of the OPCW Technical Secretariat apparently treated the question of the destruction of abandoned CWs in a manner similar to that of stockpiled CWs. In his statement made after the April 29, 2012, deadline passed, Director-General Üzümcü noted that "the deadline for the destruction of [abandoned CWs], as established by the [Executive] Council at its Forty-Sixth Session, has not been fully met." OPCW Doc. EC-68/DG.9, para. 6 (May 1, 2012); *see also* OPCW Doc. EC-68/DG.6, para. 9 (Apr. 26, 2012).

[114] Chemical Weapons Convention, *supra* note 1, Verification Annex, Part IV(B), para. 15.

As for the destruction deadline for abandoned CWs, since no provision in paragraphs 8 to 16 *explicitly* modifies what is stipulated in Article IV or Part IV(A) of the Verification Annex, it follows that the destruction deadlines for abandoned CWs are, in principle, the same as for stockpiled CWs. Accordingly, China and Japan in May 2006 jointly requested that the destruction deadline for Japan's abandoned CWs in China be extended to April 29, 2012, and the Executive Council granted the request in July of the same year.[115] It is clear that both the states parties concerned and the Executive Council considered that the destruction deadlines for stockpiled CWs under Article IV and Part IV(A) of the Verification Annex—that is, ten years and a maximum of fifteen years, respectively, after the CWC's entry into force—also apply to abandoned CWs, though the particular provisions of the CWC on the basis of which the extension of deadline was granted in this case were different from those for stockpiled CWs.[116]

If the destruction deadlines for abandoned CWs are essentially the same as those for stockpiled CWs, then it would be reasonable to assume that, just as the destruction deadlines for stockpiled CWs needed to be addressed by the CSP at its 2011 meeting, so would the destruction deadlines for the abandoned CWs in China need to be addressed at that same meeting. The Executive Council did, in fact, express concern in both July and October 2011 that the extended deadline for the abandoned CWs in China would not be fully met,[117] but at its meeting later that year, in which the decision concerning the missed destruction deadlines for stockpiled CWs was made, the CSP adopted no decision concerning those abandoned CWs. The conference merely recorded in its report that the "delegation of China referred to the destruction-related issue of particular interest to it on the territory of China" and that the "delegation of Japan stressed the particular role of the [Executive] Council on this issue."[118]

Subsequently, in February 2012—two months before the extended destruction deadline for the abandoned CWs in China was set to expire at the end of April—the Executive Council adopted a decision (Executive Council decision) stating that "the destruction [of Japan's abandoned CWs in China] will continue based on the destruction plan jointly reported to the Council by Japan and the People's Republic of China."[119] The destruction plan, annexed to the Executive Council decision, included the following time frames for destroying the abandoned CWs. (1) Using its mobile destruction facilities,[120] Japan would make its fullest possible

[115] OPCW Doc. EC-46/DEC.4, para. 2 (July 5, 2006).

[116] The preamble to the 2006 decision by the Executive Council on extending the deadline for Japan's abandoned CWs in China refers to paragraph 17 of the Verification Annex, Part IV(B). Paragraph 17 provides that Article IV and Part IV(A) of the Verification Annex also apply to the destruction of abandoned CWs in principle and that the Executive Council—upon the request of the territorial state party, independently of, or together with, the abandoning state party—"may in exceptional circumstances modify the provisions on the time-limit and the order of destruction," bearing in mind that any such request "shall contain specific proposals for modification of the provisions and a detailed explanation of the reasons for the proposed modification." *See* OPCW Doc. EC-46/DEC.4, *supra* note 115, pmbl., para. 4. The same preamble also notes that, "in accordance with the aforementioned provisions," China and Japan submitted a joint request to the Executive Council that it "modify the provisions on the time-limit" and grant an extension of the destruction deadline to April 29, 2012. *Id.*, pmbl., para. 5.

[117] OPCW Doc. EC-65/4, para. 6.18 (July 15, 2011); OPCW Doc. EC-66/4, para. 6.24 (Oct. 7, 2011).

[118] OPCW Doc. C-16/5, *supra* note 60, para. 9.7.

[119] OPCW Doc. EC-67/DEC.6, para. 2 (Feb. 15, 2012).

[120] Abandoned Chemical Weapons Office (Japan), *Destruction Operation by Mobile Destruction Facilities*, *at* http://wwwa.cao.go.jp/acw/en/jigyobetsu/jigyobetsu_ido_syorijigyo.html.

efforts to destroy, preferably by the end of 2016, the abandoned CWs that were located in Chinese storehouses and that had been declared to the OPCW as of April 29, 2012.[121] (2) In consultation with China, Japan would draw up, preferably within three years of launching excavation and recovery operations, a destruction plan for the abandoned CWs in Haerbaling (Jilin Province).[122] Although details of the actual destruction plan depend upon uncertainties such as the actual number of the abandoned CWs buried there, the goal is to complete destruction of abandoned CWs in Haerbaling by the end of 2022.[123]

What, then, are the implications of the Executive Council decision in relation to the extended deadline for the abandoned CWs in China? The extended deadline of April 29, 2012, was not, of course, actually met, but the Executive Council, in its decision of February 15, 2012, approved the bilateral China-Japan arrangement *before* the extended deadline had even been reached (and therefore before it had even been violated). The Executive Council decision and the destruction plan annexed thereto thus effectively replaced the prior destruction scheme, including the extended deadline of April 29, 2012.

The Executive Council's action raises the question of how it could be legally justified, especially in view of the CWC provisions that "[a] decision on the request [for an extension of the destruction deadline] shall be taken by the Conference [of the States Parties] . . . on the recommendation of the Executive Council" and that "in no case shall the deadline for a State Party to complete its destruction of all chemical weapons be extended beyond 15 years after the entry into force of [the] Convention"?[124] The answer can be found in paragraph 18 of the Verification Annex, Part IV(B), which stipulates:

> States Parties may conclude between themselves agreements or arrangements concerning the destruction of abandoned chemical weapons. The Executive Council may, upon request of the Territorial State Party, individually or together with the Abandoning State Party, decide that selected provisions of such agreements or arrangements take precedence over provisions of this Section, if it determines that the agreement or arrangement ensures the destruction of the abandoned chemical weapons in accordance with paragraph 17.

These provisions of paragraph 18 allow the *Executive Council* to decide that a bilateral destruction arrangement (China-Japan in this case) takes precedence over any provision of Part IV(B)(C) of the Verification Annex (the section on abandoned CWs), including paragraph 17, which provides for the application of Article IV and Part IV(A) of the Verification Annex to abandoned CWs), *if* the Executive Council determines that the arrangement ensures the destruction of the abandoned CWs in a way that "would not pose a risk to the object and purpose of [the] Convention," as paragraph 17 requires.[125] Paragraph 18 reflects the general feeling shared by CWC negotiators that the disposal of abandoned CWs is essentially a bilateral question for the territorial and abandoning states parties and that their bilateral agreement should be respected as long as the proper destruction of abandoned CWs is ensured.

[121] OPCW Doc. EC-67/DEC.6, *supra* note 119, annex, para. 1.
[122] *Id.*, annex, para. 2.
[123] *Id.*
[124] Chemical Weapons Convention, *supra* note 1, Verification Annex, Part IV(A), para. 26.
[125] *Id.*, Verification Annex, Part IV(B), para. 18.

In the present case, the Executive Council must have felt the same way. In particular, when it expressed concern in July and October 2011 that the extended deadline of April 29, 2012, would not be fully met, it also "encouraged [Japan] to consult with [China] on the future destruction programmes" and again "requested [Japan] to further consult with [China] with a view to expeditiously finalising the bilateral consultations for facilitating an appropriate decision in the OPCW related to the deadline."[126] Thus, in its February 2012 decision, the Executive Council explicitly recognized that the destruction would proceed according to the jointly reported plan. One can safely assume that the council believed that this plan posed no risk to the object and purpose of the CWC.

From the above, the present author infers Japan has not been noncompliant with its obligation to destroy its abandoned CWs in China even though the destruction was not completed by April 29, 2012. That said, it remains open as to whether other states parties may be in violation of their parallel obligations, since the Executive Council has made no related decisions.

IV. Conclusion

Although the failures of Libya, Russia, and the United States to meet the destruction deadlines may well be regarded as violations of the CWC,[127] the 2011 CSP decision does not contain anything that can be characterized as sanctions, and no mention is made of any violation, breach, noncompliance, or contravention, even with the adjective "potential." Rather, the decision simply obligates the states parties concerned to destroy their remaining CWs stockpiles in the shortest time possible, with the specific timeline to be determined by the states

[126] The first quotation is from OPCW Doc. EC-65/4, *supra* note 117, para. 6.18, and the second from OPCW Doc. EC-66/4, *supra* note 117, para. 6.24. The "destruction plan jointly reported to the [Executive] Council by Japan and the People's Republic of China," to which the Executive Council decision of February 2012 refers, was reported to the council at its own encouragement and request. In that sense, the Executive Council decision of February 2012, OPCW Doc. EC-67/DEC.6, *supra* note 119, is different in character from the Executive Council decision of July 2006, which extended the destruction deadline to April 29, 2012, OPCW Doc. EC-46/DEC.4, *supra* note 115. Whereas the latter decision was based on the request by China and Japan to modify and extend the time limit for destruction in accordance with paragraph 17 of the Verification Annex, Part IV(B), the former decision endorsed the bilateral destruction arrangement that had been encouraged and facilitated by the council itself. This council-motivated process, resulting in the China-Japan bilateral arrangement, had a stronger affinity to the provisions of paragraph 18 than to those of paragraph 17.

[127] An alternative view, on which this article does not dwell, may be that as far as the United States is concerned, it has not violated its CWC obligations. It may be argued that the United States has complied with Article IV, paragraph 10, which stipulates: "Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions." It is unclear, however, whether this provision could trump the obligation to destroy CWs within the time frame prescribed by the CWC. Also of relevance is that, at the CSP meeting in 2011, the United States did not explicitly rely on this paragraph or otherwise attempt to justify its failure to meet the final extended deadline, though it mentioned the challenge of safe and environmentally sound destruction of more than 27,000 tons of CWs. OPCW Doc. C-16/NAT.31, at 1 (Nov. 29, 2011). Even assuming that it had relied on Article IV, paragraph 10, and that other states parties had accepted its doing so, the 2011 CSP decision cannot be seen solely in that light. That decision covers not only the case of the United States but also those of Libya and Russia, and the above argument based on paragraph 10 cannot apply to these two states. Finally, the United States presented no argument explicitly raising a claim of supervening impossibility of performance or fundamental changes of circumstances.

themselves.[128] The only substantive additional requirements are to submit detailed plans for destruction and periodic progress reports, and to receive visits from the OPCW.

This flexible approach was made possible by the general provision of Article VIII, paragraph 36(c), of the CWC. Whether the drafters of the convention so intended or not, this provision is so flexible that the states parties were able to adopt a low-key strategy for addressing the difficult issue of missed destruction deadlines—which are technically violations but not nearly as serious as a deliberate breach of the CWC. It is, indeed, important to distinguish between malicious violations committed in bad faith and understandable violations that occur despite good faith. In this context, the CSP decision is not only legally justifiable under the CWC, but sensible. The approach taken in the CSP's 2011 decision may thus serve as a workable precedent for possible similar situations in the future, both within the CWC framework and elsewhere.

In effect, the CSP's decision establishes an informal noncompliance procedure similar to those formalized in the environmental law field. Those formal procedures typically deal with noncompliance cases by downplaying the consequences, avoiding accusations and sanctions, and even providing assistance to enable states to return to compliance. The procedures have been perceived and appreciated as both effective and nonconfrontational. Although the CSP's 2011 decision largely incorporated the same elements, informal procedures pose risks. Developing formal procedures would considerably strengthen both the OPCW and the CWC regime.

[128] In their submitted destruction plans, Libya, Russia, and the United States indicated December 2016, December 2015, and September 2023, respectively, as their planned completion dates. Address by Ambassador Ahmet Üzümcü, Director-General of the Organisation for the Prohibition of Chemical Weapons, 15th Chemical Weapons Demilitarisation Conference, at 2–4 (May 22, 2012), *at* http://www.opcw.org/fileadmin/OPCW/ODG/uzumcu/DG_CWD_Glasgow_May_2012.pdf.

APPENDIX

THE OPCW'S EFFORTS TO ELIMINATE LIBYA'S CATEGORY 2 CHEMICAL WEAPONS

The Conference of the States Parties (CSP) granted several extensions to Libya for destroying its Category 1 chemical weapons: to December 31, 2010, in 2006;[1] to May 15, 2011, in 2009;[2] and to April 29, 2012, in 2011.[3] With regard to Libya's Category 2 CWs, the CSP's decision of 2006 "[c]all[ed] upon" Libya to complete the destruction of those weapons "as soon as possible, but in any case no later than 31 December 2011."[4] This new "deadline" (though understood here, in the context of Category 2 CWs, as not the same as a legally mandated deadline) was modified in 2011 by another CSP decision, again "[c]all[ing] upon" Libya to complete such destruction "as soon as possible, but in any case, by no later than 29 April 2012."[5] These decisions on the destruction of Libya's Category 2 CWs invite questions concerning the interpretation and implementation of the CWC: Why did the decisions "call upon" Libya to destroy, rather than to require it to destroy, those weapons? And why did they not characterize the time frames in the decisions as "extensions" of deadlines? The answers are complex.

Paragraph 17 of the CWC's Verification Annex, Part IV(A), provides that the states parties are obligated to complete the destruction of *Category 2* CWs not later than "five years" after the CWC's entry into force (that is, April 29, 2002) and not "10 years," as in the case of *Category 1* CWs. Libya acceded to the CWC on January 6, 2004, which is later than the destruction deadline for Category 2 CWs. Paragraph 8 of CWC Article IV recognizes that certain states with CWs might accede to the CWC after the convention's defined destruction deadline: "If a State ratifies or accedes to [the] Convention after the 10-year period for destruction . . . , it shall destroy chemical weapons . . . *as soon as possible*. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council" (emphasis added). A ten-year period is invoked in this paragraph presumably because the same article, in paragraph 6, provides that states parties are obligated to "finish" the destruction of all CWs "not later than 10 years after entry into force of [the] Convention." These paragraphs reflect the destruction scheme for *Category 1* CWs; since the permitted period for destruction of CWs in this category is the longest among the three categories of CWs, weapons in all three categories should presumptively be destroyed by the end of that ten-year period. The paragraphs do not seem to take into account, however, the particular situation in which a state possessing *Category 2* CWs accedes to the CWC *after* the defined destruction deadline has passed for that category (five years after the CWC's entry into force) but *before* paragraph 8 of Article IV becomes applicable (ten years after the CWC's entry into force). There is a lacuna here. If a state accedes to the CWC before the five-year period expires, the five-year rule for destroying Category 2 CWs applies; and if the accession is later than ten years after the CWC's entry into force, paragraph 8 of Article IV applies. But no provision covers the period in between five and ten years. It is precisely during that period—in 2004, between April 29, 2002, and April 29, 2007—that Libya acceded to the CWC.

[1] OPCW Doc. C-11/DEC.15 (Dec. 8, 2006).
[2] OPCW Doc. C-14/DEC.3 (Dec. 2, 2009).
[3] OPCW Doc. C-16/DEC.3 (Nov. 29, 2011).
[4] OPCW Doc. C-11/DEC.15, *supra* note 1, para. 3.
[5] OPCW Doc. C-16/DEC.3, *supra* note 3, para. 2.

The CSP seems to have extrapolated from paragraph 8 of Article IV, which defines what happens regarding a state's *Category 1* CWs if a state accedes to the CWC after the defined, *ten-year* period for destroying Category 1 CWs has passed, to an equivalent rule defining what happens to a state's *Category 2* CWs if a state accedes to the CWC after the defined, *five-year* period for destroying Category 2 CWs has passed.[6] This interpretation fits with the CSP decisions of 2006[7] and 2011[8] regarding Libya's Category 2 CWs—which merely "[c]all[ed] upon" Libya to destroy these weapons (since there is no legal basis in the CWC to obligate Libya to destroy them by a certain date) "as soon as possible." This phrase is precisely the same as paragraph 8 of Article IV. Accordingly, the CSP would have had some discretion in determining Libya's destruction deadline (more precisely, "order of destruction," as paragraph 8 of Article IV provides) for Category 2 CWs, just as the Executive Council has such a discretion under paragraph 8 of Article IV. If so, the CSP decision of 2011 that the deadline should be April 29, 2012, which is the same as the final extended deadline for Category 1 CWs, was a product of just that discretion. Likewise, the CSP seems able to modify such a deadline as it wishes. And as long as the CSP formally decides to modify the deadline and Libya meets it, Libya will not have violated its destruction obligation for Category 2 CWs, even if such a deadline is beyond April 29, 2012. Somewhat telling in this context is that the director-general's note on the failure of the three possessor states concerned (Libya, Russia, and the United States) to meet the final extended deadline said nothing about the Libyan *Category 2* CWs even though those weapons, like the Category 1 CWs of all three states, still needed to be destroyed.[9]

[6] The reason that the CSP, rather than the Executive Council, made the decisions on the new deadlines for destroying Libya's Category 2 CWs—contrary to what was done with regard to extending the deadlines for destroying Category 1 CWs—is presumably that, in the absence of any explicit provision in the CWC on this matter, it was considered safe for the CSP, as the OPCW's principal organ, to decide on it. From a more practical perspective, it must also have been convenient to deal with this matter in the same CSP decision that extended Libya's deadline for destroying its Category 1 CWs.

[7] OPCW Doc. C-11/DEC.15, *supra* note 1.

[8] OPCW Doc. C-16/DEC.3, *supra* note 3.

[9] OPCW Doc. EC-68/DG.7, paras. 7–8 (May 1, 2012).