

Emergency assistance under Article X of the Chemical Weapons Convention

Some scenarios and thoughts

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Introduction

The 1993 Chemical Weapons Convention (CWC) is a global disarmament treaty. The application of the CWC is not limited to a particular geographical area and any state may join it. It consequently encompasses a variety of existing security relations. States may have active security interactions with each other or not. Within a given set of security interactions all, some or none of the participating states may possess chemical weapons (CW). For each state the reasons for possessing or not possessing these weapons may differ. The relative importance attached to the arsenal furthermore depends on whether the state in question views itself as a global, regional or subregional actor. This means that many states first assess the impact of the global convention on their regional or subregional security condition and not from the perspective of global benefits the CWC offers. States may thus have different security expectations from the disarmament treaty.

Disarmament, as distinct from arms control, has profound national security implications. Under an arms control agreement a party agrees to certain quantitative or qualitative limitations on a particular weapon category but retains a residual capability to meet its security needs. Arms control treaties thus seek to manage levels of arms but do not necessarily eliminate the weapons. By joining a disarmament treaty a state commits itself to dispose of the weapon category entirely. Parties to the CWC are thus committed to destroying existing stocks of CW and CW-related installations and equipment. They furthermore pledge never to acquire or assist anybody in acquiring CW. As it can no longer retain a residual capability—not even for deterrence or retaliation—it must ensure its security requirements through alternative means. The alternatives can be diverse. For instance, novel, non-prohibited weapons may take over the functions of CW in the military doctrine of a state. Notwithstanding such unilateral options, the treaty itself can also extend security guarantees.

Universality of the convention, for instance, is an important security guarantee. It greatly strengthens the conventional prohibition and raises the opportunity costs for any state acting against that norm. As the CWC must cover a broad array of existing security interactions, it has to provide states with incentives to join. To attract the ratifications of states that do not possess CW or have not been exposed to CW threats, Article XI of the CWC requests all parties to implement the convention in a manner which avoids hampering the economic and technological development of other states parties. The article also encourages international cooperation in the field of chemical activities for purposes not prohibited under the CWC.¹ In addition, Article VI grants state parties the right to have access to certain dual-use chemical compounds and technologies for purposes it does not prohibit. Eventually, states parties will be forbidden to export some of these commodities to non-states parties, while other chemicals will be subjected to an export control regime specified in the convention. However, mutual suspicions between regional actors

may be strong and make them hesitate to join the CWC. To overcome this hesitation the CWC also extends positive and negative security guarantees. Negative security assurances lie at the heart of the CWC: states parties cannot use CW under any circumstances against another state party or a non-state party. The verified destruction of CW and related facilities and the permanent monitoring of non-production of CW reinforce the absolute ban on chemical warfare. The possibility nevertheless exists that a state party is attacked with CW or faces a threat with CW from a non-state party or a state party violating or defecting from the convention. To meet this eventuality the CWC gives states parties positive security guarantees by entitling them to receive assistance and protection against the use or threat of use of CW and to develop, produce, acquire and use means of protection against CW. These guarantees are contained in Article X of the CWC.

Universality, however, is not just a territorial concept; it also has a time dimension. The CWC must be able to offer the parties sufficient security guarantees over a prolonged period. As a social construct the convention cannot be assumed to be static. The strength of the treaty regime will inevitably evolve as a consequence of intrinsic and extrinsic factors. The intrinsic strength is derived from the way in which the CWC can oversee its implementation and compliance and react against direct threats such as violations. Extrinsic challenges relate to the environment in which the convention must operate. Certain developments, such as discoveries or the growing importance of new political actors, can render the treaty irrelevant or at least undermine it seriously if it cannot adapt itself. The international community must redefine the international norm continuously so that the norm remains applicable under all, even unforeseen, circumstances. States seek meaningful guarantees not only at the time of the entry into force of the convention but also for a prolonged period afterwards.

This paper describes the role of Article X of the CWC. Next, it analyses the various circumstances under which a state party can invoke the article and identifies many gray areas which have to be dealt with during the preparations for effective implementation. Finally, the paper looks at the long-term utility of the article in view of the fact that successful implementation of the convention will automatically reduce the threat of chemical warfare. It argues that knowledge and expertise accumulated by the Organisation for the Prohibition of Chemical Weapons (OPCW) while preparing implementation of Article X can be made available to deal with security conditions not explicitly mentioned in the convention, such as terrorist threats, or meet other contingencies involving chemical activities permitted under the CWC.

The relevance of Article X

Article X 'Assistance and protection against chemical weapons' is rooted in the principle of collective defence as defined and recognized in the Charter of the United Nations and depends for its effectiveness on international cooperation. Such cooperation underscores the international opposition against chemical warfare and reinforces the legal norms in the CWC. The organization of the cooperation through the offices of the OPCW means that assistance and protection will not be hostage to the geopolitical interests of a particular country.² In past conflicts the unwillingness of the international community to act against perpetrators of chemical warfare seriously undermined the authority of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. An international conference had to be convened in Paris in January 1989 so that states could reaffirm their commitment to the Geneva Protocol after the gross failure by the international community to formally condemn Iraq's violation of the agreement in the 1980–88 war against Iran and the CW attacks against the Iraqi Kurds.

Defence and protection against chemical warfare agents has been a central pillar in all preparations for chemical warfare. The toxicants are released into the environment before they act on the target. Placing a barrier between the agent and the target—gas mask, protective suit, individual or collective shelters, skin ointments, and so on—greatly negates the impact of the agent. After an attack with chemical weapons, equipment exists to decontaminate people, materiel and the surroundings. Should an individual nonetheless be exposed the chemical warfare agents, prophylaxis, antidotes and medication is available to help victims. Devices furthermore provide early detection and warning of the presence of chemical warfare agents in the environment. Since World War I the offensive and defensive aspects of chemical warfare have always been in stiff competition with each other and it is widely accepted that the defence has the edge. The relative ease with which even novel agents can be countered—certain protective measures are generic to all agents—has been a major contributing factor to the lack of or limited assimilation of CW into the arsenals and military doctrine of most countries. The positive security assurances extended by Article X derive their relevance to a great extent from the advantage of defence over offence.

Apart from the political and technical relevance of Article X, its significance to the overall treaty regime is also determined by the nature of the cases to which it is applicable. A state party may request and receive assistance in the three following circumstances: (a) CW have been used against it; (b) riot control agents have been used against it as a method of warfare; and (c) it is threatened by actions or activities of any state that are prohibited under the CWC.³

Based on the historical record, the following types of situations may occur in which CW are used or threatened to be used:

- Ⓒ wars between states (e.g., World War I; the 1980–88 Gulf war; the 1990–91 Gulf war)
- Ⓒ wars involving foreign intervention in domestic conflicts (e.g., the Western intervention in the 1919–21 Russian civil war; the 1962–75 war in Indochina; the 1963–67 war in Yemen)
- Ⓒ wars involving uprisings against ruling foreign powers (e.g., the 1922–27 war in Spanish Morocco; the 1936–37 war in Abyssinia)
- Ⓒ wars involving uprisings against national rulers (e.g., the 1984–88 Kurdish uprisings in Iraq)
- Ⓒ peacekeeping operations (e.g., use of riot control agent by UN forces in Gaza, 10 March 1957; and by SFOR forces in Bosnia on 28 August and 1 September 1997)
- Ⓒ acts of terrorism (e.g., the Aum Shinrikyo sarin attacks in Matsumoto in 1994 and the Tokyo underground system in 1995)

Article X, however, is not applicable to every mentioned circumstance (See table).

First, the right to request and receive assistance is explicitly limited to states parties only,⁴ a logical consequence of the fact that international conventions are signed and ratified by states. Non-state parties and sub-state actors who are the victim of chemical warfare are consequently excluded.

Second, the CWC does not apply to wars involving non-states parties only or conflicts between a non-state party and sub-state actors in a non-state party. In such conflicts, the Secretary-General of the United Nations can take the initiative to conduct investigations into the use or alleged use of CW.⁵ The OPCW will closely cooperate with him and, if so requested, put its resources at his disposal.⁶ From the language it appears that the initiative lies with the UN Secretary-General and that, following a request, emergency assistance and protection can be provided. The CWC does not contain any explicit procedures for releasing emergency assistance or protection in such a situation, although it does appear that any such release would be contingent on a decision taken by the Executive Council of the OPCW.⁷ The options of the UN Secretary-General are nonetheless limited by the sovereignty of UN member states and these have to give explicit permission for a UN investigative team to enter their territory. The measure can thus be of questionable utility, especially if a non-state party wages chemical warfare against non-state actors on its own territory.

Assistance and protection through OPCW in case of use or threat of use of CW

User \ Victim	State Party	Non-State Party	Terrorist Organization	Other Non-state actor
State party				
Non-state party				
Non-state actor		?		

Legend

	Applicability of Article X
	Possible applicability of Article X
	Option of challenge inspection (Article IX); Article XII measures
	Cooperation with the Secretary-General of UN (Verification Annex, Part XI, § 27)

Third, if a state party resorts to CW against a non-state party or a non-state actor, a challenge inspection may be launched upon the request of a state party⁸ and the Conference of States Parties, the principal organ of the OPCW, can take measures to redress and remedy any situation which contravenes the prohibitions in the CWC.⁹ While a non-state party or a non-state actor cannot formally lodge a complaint with the OPCW, indications of use or threat of use of CW by a state party clearly means that that state party is in violation of its general obligations contained in Article I of the CWC.

Several grey areas regarding the applicability of Article X nonetheless remain. For instance, the use or threat of use of CW by a terrorist organization or any other non-state actor is not specifically addressed. The CWC as an international agreement regulates behaviour between states and requires state parties to enact penal legislation to ensure that no individual, whether a

national or an alien, or organization acts against the convention. The issue of sub-state proliferation of CW is thus dealt with through domestic laws. As indicated above, according to Article X, § 8 a state party can request assistance and protection in three circumstances. The first two—the belief that CW have been used against it or that riot control agents have been used against it as a method of warfare—are sufficiently general to cover use by political entities other than states. However, the third circumstance—the threat posed by actions or activities of *any state*—seems to underscore that § 8 as a whole must be understood in the context of inter-state behaviour.

Another grey area is the use of riot control agents in peacekeeping operations. In particular, questions arise to what extent peacekeeping or peace enforcement actions can be considered as law enforcement or *domestic* riot control, the stipulation in the CWC¹⁰, in view of the foreign nationality of the troops involved. Further questions relate to the identity of the competent political authority that can authorize the release of riot control agents to peacekeeping or peace enforcement troops: the United Nations Security Council, the regional security organization acting on behalf of the United Nations, or the legislative and executive bodies of the state providing troops for these missions? When the United Nations Emergency Force used tear gas in Gaza on 10 March 1957, it had assumed responsibility for civil affairs in the Gaza strip with approval of the UN headquarters. However, when NATO-led SFOR (Stabilization Force) units resorted to tear gas in Bosnia in two incidents in August and September 1997, SFOR had not received responsibility for civil affairs.¹¹ Such units can easily be drawn or provoked into conflict situations resembling warfare. In this particular case, Serbia is not a state party to the CWC, but use of riot control agents against nationals of a state party could provoke a serious crisis for the OPCW, especially in view of the long-standing political controversy regarding the interpretation of the use of riot control agents as chemical warfare.

As the OPCW implements Article X of the CWC and prepares the decision-making procedures for various contingencies, these grey areas can and should be clarified before they erupt in a major political issue during a crisis situation.

The future: a dynamic implementation of Article X

The possibility of a dynamic implementation of Article X follows from the changes in the context in which the CWC will function. For the first 10 to 15 years after entry into force the bulk of the activities and allocation of resources of the OPCW relate to the verified destruction of CW and CW-related installations and the continuous monitoring of treaty-relevant activities in the states parties. As the verified destruction of CW arsenals worldwide progresses the threat of use of these weapons shrinks accordingly. While the possibility of a threat by a non-state party, a

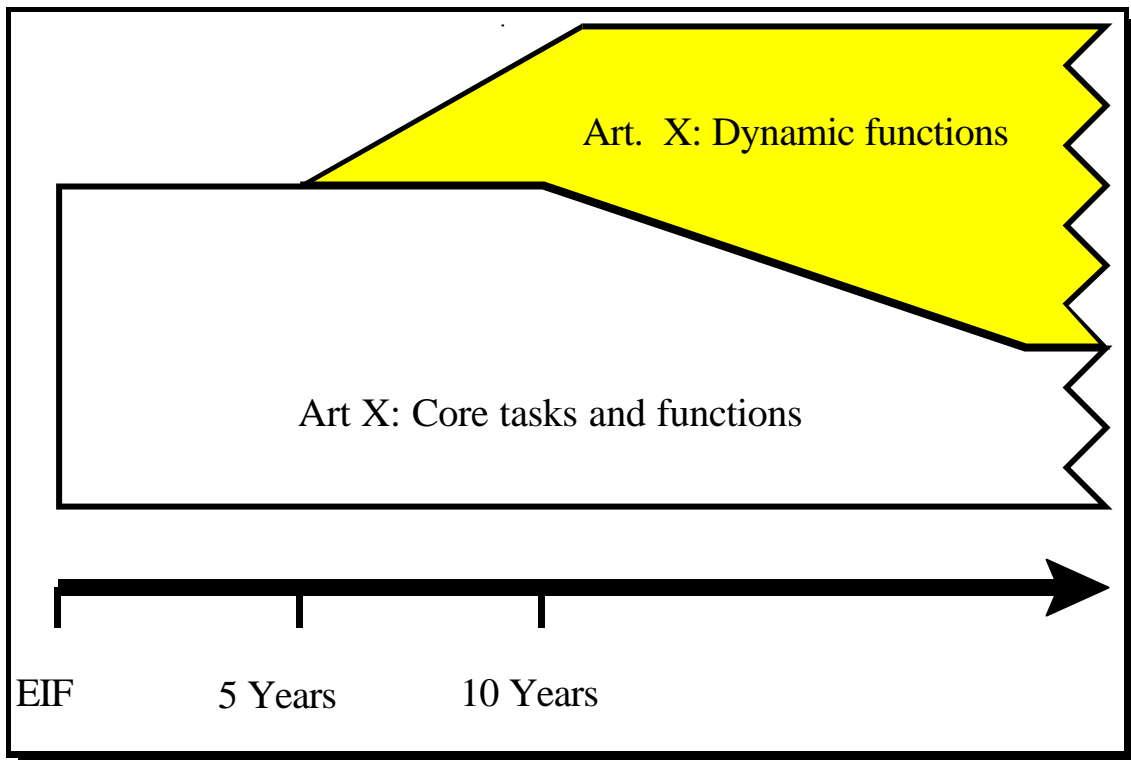


Figure 1 Model of dynamic implementation of Article X of the CWC

terrorist organization or a state party violating or defecting from the CWC will always exist, the preparations under Article X will take on a different character. Meanwhile, as a consequence of the concrete implementation of Article X, the OPCW will have collected a great quantity of data and expertise with respect to the sudden release of toxic chemicals into the environment. This collection may at one point be unique and the question arises whether eventually it may not be applied to a wider context than the strict domains defined by the CWC. In a narrow interpretation of the convention this will, of course, be impossible. In a broader interpretation, this may offer states further gains and consequently make the CWC more attractive for both states parties and non-states parties over a longer period, especially when the formal threat of CW will be seen to decrease. This in turn reinforces the goal of universality and maintains the relevance of the convention.

After entry into force of the convention on 29 April 1997, states parties with CW stockpiles and CW-related installations and production facilities began the destruction process. Destruction should be completed within 10 years after entry into force of the CWC (i.e., 29 April 2007).¹² Should a state party encounter serious problems, an extension of up to five years can be granted.¹³ During this process, states parties must meet several deadlines and weapons must be destroyed in a particular order.¹⁴ In other words, the material threat posed by CW will be reduced in a highly visible way within specified time frames. This affects the context for which

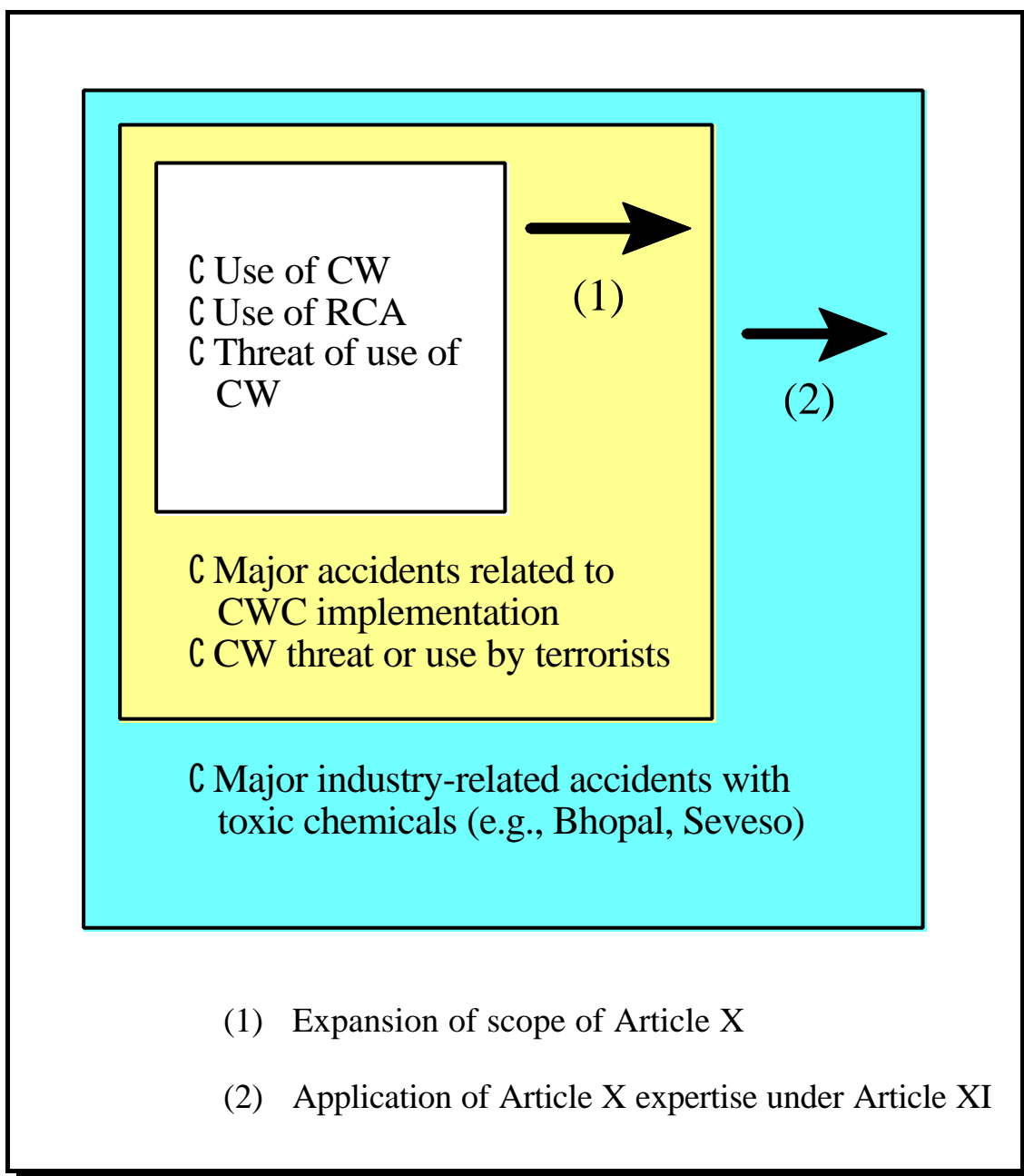


Figure 2 Possible expansion of scope of Article X

Article X was designed. In view of the relevance of the article for the treaty regime as a whole, a gradual dynamic development of functions might be attempted, while the core tasks and functions are not neglected (Figure 1).

Figure 2 illustrates one possible scenario for the development of dynamic functions under Article X. It should be stressed that the potential widening of domains does not follow from provisions in the CWC, but solely from the knowledge base, expertise and materiel built up by the OPCW in order to implement Article X. The Technical Secretariat must create and maintain

a data bank containing freely available information or information provided by states parties concerning various means of protection. This database is available for use by any state party. At the request of a state party the Technical Secretariat must also, within the resources available to it, be able to provide expert advice and assistance on how to implement programmes for the development and improvement of a protective capacity of that state party.¹⁵

In a first phase expansion would be restricted to issues close to the core of the CWC. For instance, the grey area of states parties falling victim to terrorism with CW could be clarified in an unambiguous way and procedures to deal with such an eventuality can then be drawn up. One type of terrorist organization might cross the threshold of non-conventional weapons is a grouping that opposes the hegemonic policies of an outside power and seeks to inflict indiscriminate casualties outside the territory of its domestic constituency on which it relies for its support. The strike with CW can occur on the home territory of the hegemonic power or against any of its institutions in third countries, which may or may not be state parties to the CWC.¹⁶ This scenario alone involves many possible situations for the OPCW. In particular, should the attack occur on the territory of a non-state party but against the interests of a state party, can the OPCW with its unique expertise and stockpile of emergency equipment remain uninvolved?

Furthermore, contingency plans could be devised to respond to a major accident which happened as a consequence of implementing the CWC. An explosion in a destruction installation, a disaster during transportation of CW or a serious leakage at a storage facility threatening the civilian population is not inconceivable. The emergency could be beyond the capabilities of the state party.

In a second phase the expertise and so on accumulated over the years could be offered to states parties under Article XI of the CWC as part of the promotion of international cooperation in the field of chemical activities for non-prohibited purposes. In particular, under § 2 (b) states parties 'undertake to facilitate, and have the right to participate in, the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry' for non-prohibited purposes. Here, emergency assistance and protection could fulfil a major supportive role in major industry-related accidents with toxic chemicals. Both the 1976 accident in Seveso, Italy and the 1984 catastrophe in Bhopal, India illustrate that emergency services can be overwhelmed in a civilian accident and that the rapid availability of expertise and emergency equipment saves lives. Acceptance of such a role by the states parties to the CWC would definitely enhance the profile of Article XI, which, it was noted in the introduction, is one of the key provisions for long-term viability of the CWC.

Conclusions

Article X undeniably plays a major role in the establishment of a security regime under the CWC. In particular, by extending positive security assurances states parties do not feel entirely vulnerable when abandoning the entire class of chemical weapons. Especially during the formative years of the new treaty regime, when CW are still present in many countries, the right to request and receive emergency assistance or equipment in the case of chemical warfare or the threat of use of CW helps to bridge this initial phase.

However, the greater the success of the CWC the smaller the threat with CW will become. The context in which Article X must operate will change as destruction deadlines are being met. The traditional functions of Article X must be maintained, because some states believed to possess CW will not become a state party in the foreseeable future and because the possibility of a state party violating or defecting from the treaty can never be excluded. Maintaining preparedness under Article X reduces the advantages of possessing CW for a non-state party, a violator or a defector considerably and thus contributes significantly to the permanent intrinsic strength of the treaty regime.

At the same time, creative implementation of Article X can offer states parties advantages beyond meeting the threat of chemical warfare. In this way, Article X can extend the relevance of the CWC—both as a security regime and a successful regime of international cooperation for non-prohibited purposes—well into the future. This would be a major contribution to ensuring that the scourge of chemical warfare never returns.

Notes

The opinions in this paper are those of the author and do not necessarily reflect the views of SIPRI or the OPCW.

- ¹ The role of Article XI in establishing the CWC treaty regime is discussed in detail in Zanders, J. P. and French, E. M., 'Article XI of the Chemical Weapons Convention: Between irrelevance and indispensability', *Contemporary Security Policy*, vol. 20, no. 1 (April 1999) (Forthcoming).
- ² The Director-General of the OPCW must initiate within 24 hours of receipt of a request for assistance and protection an investigation to see whether any further action is required. This investigation is to be completed within 72 hours, after which a report must be submitted to the Executive Council of the OPCW. (Extensions not exceeding 72 hours are possible and each extension must be followed by a report to the Executive Council.) The Executive Council is a sub-group of the Conference of States Parties consisting of 41 members and is composed on the basis of equitable geographical distribution. Each member of the Executive Council has one vote. (Article VIII, §§ 23 and 29) It decides with a simple majority within the next 24 hours on whether to instruct the Technical Secretariat to provide supplementary assistance. (Article X, §§ 9 and 10) If immediate action is indispensable, the Director-General shall notify all states parties and take emergency measures of assistance, using the resources the Conference of States Parties has placed at his disposal for such contingencies. (Article X, § 11)
- ³ Article X, § 8.
- ⁴ Article X, § 1.
- ⁵ UN General Assembly Resolution 42/37 C, 30 Nov. 1987 and Resolution 44/115 B, 15 Dec. 1989. For discussion see Krutzsch, W. and Trapp, R., *A Commentary on the Chemical Weapons Convention* (Martinus Nijhoff Publishers: Dordrecht, 1994), p. 208, fn. 12.
- ⁶ Verification Annex, Part XI, § 27.
- ⁷ Article X, § 10.
- ⁸ Article IX, § 19 and Verification Annex, Part XI. It should be noted that the provisions of the Verification Annex, Part II apply to all types of inspections conducted pursuant to the CWC, except where they differ for the specific types of inspections specified in Part XI of the Verification Annex, in which case the latter provisions take precedence (Verification Annex, Part II, § 66).
- ⁹ Article XII.
- ¹⁰ Article II, § 9(d).
- ¹¹ Zanders, J. P. and Hart, J., 'Chemical and biological weapon developments and arms control', *SIPRI Yearbook 1998: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 1998), pp. 467–69.
- ¹² Article IV, § 6.
- ¹³ Verification Annex, Part IV (A), §§ 24–28.
- ¹⁴ E.g., for CW, Verification Annex, Part IV (A), §§ 15–18; for production facilities, Verification Annex, Part V, §§ 28–31.
- ¹⁵ Article X, § 5.
- ¹⁶ For broader discussion, see Zanders, J. P., 'Chemical and biological weapon terrorism: Assessing the challenges from sub-state proliferation', paper presented to 'Chem-Bio '98: Combatting the terrorist threat', Conference organized by Jane's Information Group, Washington, DC, 6–7 October 1998.