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THE POTENTIAL CONTRIBUTION OF THE CHEMICAL WEAPONS CONVENTION TO COMBATting TERRORISM†

*Cecil Hunt**

The Chemical Weapons Convention¹ (hereinafter Convention or CWC) is an ambitious step forward in the establishment of international disciplines and mechanisms to protect mankind against a frightful type of weaponry. Chemical weapons can be part of a terrorist arsenal, as evidenced in the 1995 release of sarin nerve gas in a Tokyo subway station by the AUM Shinrikyo cult—an act that captured the attention of the world. This paper will examine the significance of the Convention in relation to one of the post-Cold War international security threats to be addressed in this symposium: terrorism. It will examine features of the CWC that could serve to counter the threat of terrorist use of chemical weapons, but will also note the Convention's shortcomings.

The preamble to CWC states the considerations and objectives the drafters had in mind, without a reference to terrorism. In transmitting the CWC to the Senate for its advice and consent to ratification, President Clinton referred to “nonproliferation” objectives and to the Convention's being “designed to exclude the use or threat of use of chemical weapons, thus reflecting a significant step forward in reducing the threat of chemical *warfare*.” (Emphasis added.) The transmittal does not mention terrorism. The CWC features that are noted below as having the potential to strengthen safeguards against terrorist use of chemical weapons cannot be said to be the product of a deliberate effort toward that goal.

This paper will not include any extensive presentation of what the CWC requires and how it works. There is a growing body of literature on this subject.² A brief overview of the basics of the CWC should

† This paper represents the views of the author, and it is not an official statement or interpretation of legal provisions nor of government policy.

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1. The Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, *opened for signature* January 13, 1993, 32 I.L.M. 800 (1993).

2. See, e.g., WALTER KRUTZSCH AND RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994); BARRY KELLMAN ET AL., MANUAL FOR NATIONAL IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION (1993); Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U.L. REV. 755 (1994); Kevin J. Fitzgerald, Note, *The Chemical Weapons Convention: Inadequate Protection from Chemical Warfare*, 20 SUFFOLK TRANSNAT'L L. J. 425 (1997); Rex J. Zedalis, *New Export*

suffice as an introduction to consideration of how certain features of the Convention can have antiterrorism utility.

The CWC prohibits the development, production, acquisition, stockpiling, retention, and transfer of chemical weapons and their use against anyone, including retaliatory use.³ The CWC prohibits the assistance, encouragement, or inducement of anyone to engage in activities prohibited to States Parties.⁴ The CWC requires the declaration of chemical weapons possessed by States Parties⁵ and provides for internationally monitored destruction of such weapons and the elimination or conversion of chemical weapons production facilities.⁶ A novel and significant aspect of the treaty structure is its extension to “precursors” of a toxic chemical and inclusion of listed precursors in the verification scheme to ensure that they are used only for purposes not prohibited under the Convention.⁷

The CWC breaks new ground in what it requires of States Parties with respect to arms control, disarmament, and nonproliferation. As the focus of this article is on the potential impact of the treaty on actors—“terrorists”—that are not States, it should suffice here to cite but a few examples of how the CWC extends the scope of international commitments of State Parties to restrict their own means of warfare.

Arms control. Moving beyond commitment of parties to the 1925 Geneva Protocol⁸ not to use chemical or biological weapons against one another in warfare, the CWC bars any use of chemical weapons, including use against a state that is not a party. This broad ban on use can be viewed as a declaration by all signatory states that these are pariah weapons.

Disarmament. Whereas the Non-Proliferation Treaty⁹ (hereinafter NPT) permitted for an indefinite period the continued possession of nuclear weapons by States Parties who are declared nuclear weapons states, the CWC requires all adherents to carry out within a set timetable

Controls for Chemicals on the Horizon? 30 INTL' LAWYER 141 (1996); David G. Gray, Note, “Then the Dogs Died: the Fourth Amendment and Verification of the Chemical Weapons Convention,” 94 COLUM. L. REV. 567 (1994); *Global Proliferation of Weapons of Mass Destruction, Pt. I: Hearing Before the Perm. Subcomm. on Investigations of the Senate Comm. on Gov. Aff.*, 104th Congr., 1st Sess. (1995).

3. Convention, *supra* note 1, art. I, ¶ 1(a).

4. *Id.* at art. I, ¶ 1(d).

5. *Id.* at art. III, ¶ (1)(a)(iii).

6. *Id.* at art. III, ¶ (1)(c)(i).

7. *Id.* at Preamble.

8. Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571.

9. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

the complete and verified destruction of all chemical weapons in their territory or under their control.

Nonproliferation. Both the NPT and the CWC were designed to address the situation in which the parties need to allow for benign use of materials, technologies, and equipment that can be applied either to weapons-related or to peaceful pursuits. The CWC moves beyond the NPT in ways that are especially significant. Whereas the NPT has a commitment only in general language not to assist in the acquisition of nuclear weapons capability by a non-nuclear weapons state, the CWC not only prohibits assistance by a State Party, it also commits the parties to impose on persons subject to their jurisdiction a system to prevent proliferation. That system is to encompass a means for accounting and restricting trade in precursors.

What follows is an identification and brief assessment of features of the CWC that could be helpful in dealing with the danger of use of chemical weapons in terrorist activity. They are presented under six headings which should be viewed as theses. For some of these theses this paper can offer little support, but points, instead, to missed opportunities and to the need for further efforts.

1. Activities of Terrorism Concern are to be Outlawed by National Legislation

Each State Party is required to apply its penal legislation to prohibit any activity prohibited to a State Party by the Convention if undertaken on its territory or, in conformity with international law, anywhere by a natural person possessing that state's nationality.¹⁰ Note the activities that are prohibited to States Parties and consider how the enforcement of national laws that extend these prohibitions to non-state actors could assist in the effort to prevent terrorist use of chemical weapons.

States Parties must make it unlawful to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone."¹¹ Further, States Parties must make it unlawful to "assist, encourage or induce, in any way, anyone to engage in" any such prohibited activity.¹²

It is important that the terms of these prohibitions are such that preventive and punitive action could be taken if preparatory activity were uncovered that had not advanced to the point of possession of weaponized material. First, although the basic prohibition refers to "chemical weapons", general conspiracy and attempt provisions in most

10. See Convention, *supra* note 1, art. VII, ¶ 1.

11. Convention, *supra* note 1, art. I, ¶ 1(a).

12. Convention, *supra* note 1, art. I, ¶ 1(d).

legal systems would permit charges to be brought and sustained on the basis of evidence of the actor's weapons objective, even if the objective had not been attained. Second, the "assist, encourage or induce" provision should produce penal laws that reach persons whose involvement in a terrorist group's chemical weapons acquisition efforts is too limited to sustain a conspiracy charge, but who can be shown to have "assisted" with knowledge of the objective by supplying a precursor chemical, specialized equipment, or by providing financial support.

2. Destruction of Stockpiles Will Make it More Difficult for Terrorists to Acquire Chemical Weapons

The acquisition of existing chemical weapons clearly would provide a terrorist group with a drastic short-cut to frightful capability in their terrorist acts. It has been stated that some 22 countries possessed or were believed to be trying to develop chemical weapons near the time that the CWC was about to be negotiated.¹³ Most of these countries are now parties to the CWC, but the hold-outs include a few significant countries: Iraq, Libya, and North Korea. Nonetheless, the States Parties have committed themselves to forgo these weapons. In Article I, parties agree to destroy all of their chemical weapons. Article IV states that destruction shall begin not later than two years after the Convention enters into force and shall finish not later than ten years after entry into force. Article III requires States Parties to declare chemical weapons to the Organization for the Prohibition of Chemical Weapons (OPCW) and to specify their precise location, aggregate quantity, and detailed inventory.

Locations at which chemical weapons are stored or destroyed are made subject to verification through on-site inspection and monitoring.¹⁴ States Parties must continue physical security activities at storage facilities pending the destruction of the chemical weapons that are stored there.¹⁵ The purpose of the systematic verification of storage facilities by the OPCW "shall be to ensure that no undetected removal of chemical weapons from such facilities takes place."¹⁶ The Verification Annex also states that the order of destruction of chemical weapons "takes

13. See *Global Spread of Chemical and Biological Weapons: Hearings Before the Senate Comm. on Gov'tal Affairs*, 101st Cong., 1st Sess. 55, 57, 605, 613 (1989) (statement of and exhibit for Elisa D. Harris) (noting the difficulties in categorizing and confirming a country's chemical weapons status).

14. See Convention, *supra* note 1, art. IV, ¶¶ 1–5.

15. See Convention, *supra* note 1, Annex on Implementation and Verification [hereinafter Verification Annex], Part IV (A), ¶ 9.

16. Convention, *supra* note 1, Verification Annex, Part IV (A), ¶ 41.

into account the interests of States Parties for undiminished security during the destruction period.”¹⁷

This expression of concern for the security of chemical weapons stockpiles pending their destruction implies that the drafters were thinking of the risk that persons not under the control of the State Party that had declared the weapons might attempt to acquire them. Even if such efforts by terrorists or by non-Party states were a secondary consideration in a treaty that focused on disarmament by States Parties, the CWC provisions that are noted above can be put to good use in guarding against diversion to terrorist use. Verification of the adequacy of physical security arrangements will properly be part of the mandate for inspectors from the Technical Secretariat of the OPCW. The inspectors shall have the right to install and use continuous monitoring instruments.¹⁸ If a monitoring system indicates any anomaly (which could include attempts to circumvent storage facility security or monitoring devices), the Technical Secretariat is required to take action, including on-site inspection, to ascertain the situation and to assist in resolution.¹⁹ One can envision a situation in which a well-intentioned State Party that lacks the resources to put strong physical security measures in place would welcome, and even solicit, the installation of monitoring devices. The Technical Secretariat, assuming it is given the funds, could even provide technical assistance to help the State Party enhance physical security.²⁰

3. The Monitoring of Sensitive Permitted Activities Can Make It More Difficult For Terrorists To Acquire The Means of Making Chemical Weapons

The design of the CWC had to accommodate the fact that much of what goes into making chemical weapons can also be put to benign use. The core of this part of the Convention is Article VI, “Activities not prohibited under this Convention.” A State Party retains the right, subject to the provisions of the Convention, to develop, produce, otherwise

17. Convention, *supra* note 1, Verification Annex, Part IV (A), ¶ 15.

18. See Convention, *supra* note 1, Verification Annex, Part III, ¶ 10.

19. See Convention, *supra* note 1, Verification Annex, Part III, ¶ 16.

20. It is not clear that physical security of storage facilities of weapons awaiting destruction is contemplated in the assistance provisions in Article X. The term “assistance” seems to be defined with reference to protection against the *use* of chemical weapons, but the references are nonexclusive, and the broad term “protective measures,” coupled with the responsibility of the Technical Secretariat to assist in the resolution of anomalies in the monitoring of storage facilities, gives some support to reading “assistance” as including measures to prevent the diversion of chemical weapons. Convention, *supra* note 1, art. IV, ¶ 1.

acquire, retain, transfer, and use toxic chemicals for purposes not prohibited under the Convention. Such purposes are specified in the CWC and include industrial, agricultural, and medical use, as well as use for protection against toxic chemicals or chemical weapons. The verification procedures of the CWC apply to facilities involved with chemicals listed in Schedules 1, 2, and 3, and to plant sites that produce specified levels of certain unscheduled discrete organic chemicals. Starting with Schedule 1, these groupings generally proceed in descending order of toxicity or suitability for use as a weapon and in ascending order of the extent of the non-weapons usefulness and of the quantities that will trigger a declaration requirement and make a facility subject to systematic verification measures under the CWC. It is principally outside of Schedule 1 that one finds the "precursors"; chemical reactants that take part in the production of a toxic chemicals, including key components of binary chemical weapons.

The CWC and related national legislation should make it more difficult for terrorists (or non-party states that might become a weapons source for terrorists) to acquire the chemicals and equipment needed to produce a chemical weapon. Persons properly involved with permitted use of controlled materials will be operating in an environment that should induce them to take great care to account for the disposition of controlled chemicals. Those operators that exceed the threshold quantities that require declaration of a facility and subject it to systematic inspection will realize that they may be required to allow access to inspectors to verify that there has been no diversion of a declared chemical.²¹

Transfers of Schedule 1 chemicals are made subject to a strict regime. No transfer, domestic or international, may be made except for the narrow range of applications that the treaty permits. Schedule 1 chemicals may be exported only to a State Party, and only after thirty-days notice to the Technical Secretariat.²²

As for Schedule 2 and Schedule 3 chemicals, State Parties will need to subject the chemicals to export control in order to meet their obligations under the CWC. Beginning in April 2000, three years after entry into force of the CWC, Schedule 2 chemicals may be traded only between State Parties.²³ Schedule 3 chemicals may be exported to states that are not parties to the CWC, but only with undertakings from the

21. See, e.g., Convention, *supra* note 1, Verification Annex, Part VII, ¶ 26.

22. See Convention, *supra* note 1, Verification Annex, Part VI, ¶¶ 1-5.

23. See Convention, *supra* note 1, Verification Annex, Part VII, ¶ 31.

recipient state that they will be used only for purposes not prohibited under the Convention.²⁴

For States Parties to implement in their laws such restrictions on the use and disposition of scheduled chemicals is one thing. However, it is less certain that all States Parties will have the resources and the political will to enforce those restrictions effectively, thereby frustrating attempts by terrorists to acquire the means to produce chemical weapons. Terrorists might be able to exploit a State Party that is deficient in enforcement capability. Therefore, one must examine the CWC features that could possibly aid a better-equipped "watch-dog" State Party to act against such exploitation.

4. The CWC Has A Modest Legal Assistance Provision, But The Treaty Can Indirectly Support Law Enforcement Cooperation and Extradition

Paragraph 2 of Article VII of the CWC reads:

Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.²⁵

This sole provision on legal assistance can be seen as disappointingly modest and imprecise when contrasted with provisions in some treaties directed at terrorist activity. For example, the Hague Aircraft Piracy Convention, requires "the greatest measure of assistance"²⁶ in connection with covered criminal proceedings and contains an "extradite or prosecute" obligation.²⁷ There are attendant provisions requiring that each Contracting State take measures as necessary to establish its criminal jurisdiction,²⁸ plus provisions for taking offenders into custody.²⁹

The modest CWC provisions on cooperation and legal assistance should, however, be viewed in light of the political significance of the Convention and against the background of legal assistance agreements to which State Parties to the CWC adhere. Consider, for example, how the CWC may interact with the 1976 European Convention on the Suppression of Terrorism. That Convention requires that Contracting States

24. See Convention, *supra* note 1, Verification Annex, Part VIII, ¶ 26.

25. Convention, *supra* note 1, art. VII. ¶ 2.

26. Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, art. 10 [hereinafter Aircraft Piracy Convention].

27. Aircraft Piracy Convention, *supra* note 26, art. 4(2).

28. See Aircraft Piracy Convention, *supra* note 26, arts. 4, 7.

29. See Aircraft Piracy Convention, *supra* note 26, arts. 6, 8.

afford one another “the widest measure” of mutual assistance in criminal matters involving covered offenses. Assistance may not be refused on the sole ground that it concerns a “political offense”, but the requested State may refuse assistance if it has substantial grounds for believing that the race, religion, nationality or political opinion of the accused prompts the charges or may prejudice the position of the accused in the proceeding.³⁰

With the arrival of the CWC, however, it becomes less likely that legal assistance would be refused according to this “out” in the European Terrorism Convention in a case involving chemical weapons related activity. Every Party to the CWC has undertaken to outlaw, within its jurisdiction, the acquisition, retention, transfer, or use of toxic chemicals and their precursors except for purposes not prohibited under the Convention. These commitments should serve to give chemical weapons-related requests for legal assistance a presumption of legitimacy and to place a heavy burden on a requested State that would challenge the request as prejudiced.

Although the CWC contains no reference to extradition, the existence of the Convention supports it. First, by fulfilling their obligation under the CWC to extend their penal legislation to prohibited activity, the States Parties may satisfy, regarding extradition requests between them, any “dual criminality” requirement contained in national legislation or applicable international agreement. It is necessary to say that a dual criminality requirement “may” be satisfied, because the use of the term “penal” legislation in paragraph 1(a) of Article VII of the Convention was understood by the negotiators to encompass criminal, civil and/or administrative legislation, so long as penalties are involved.³¹ Section 201(a) of the United States implementing legislation provides for both criminal and civil penalties.³²

Another important consideration is the impact of the CWC on the “political offense” basis for refusing an extradition request. Whether the criminal actor’s political motivation or the nexus of the criminal conduct to a political disturbance is looked to in defining the political

30. See European Convention on the Suppression of Terrorism, 15 I.L.M. 1272 (1976), signed by 17 member states of the Council of Europe, Strasbourg, January 27, 1977, 16 I.L.M. 233 (1977), art. 8 [hereinafter European Terrorism Convention].

31. See Senate Treaty Doc. 103-21, Article-by-Article Analysis, p. 40, (accompanying the November 20, 1993 Letter of Submittal from the Acting Secretary State to the President, accompanying the November 23, 1993 transmittal of the CWC by the President to the Senate for its advice and consent to ratification).

32. See Chemical Weapons Convention Implementation Act of 1998, Pub.L. 105-277, Div.I, Title II, Subtitle A, § 201(a) adding § 229 A to Title 18 United States Code [hereinafter the Act].

offense exception, it can reasonably be asserted that the exception should not apply when the crime involves activity prohibited pursuant to the CWC, when the requesting and requested States are parties to the CWC, they have agreed to exercise their jurisdiction to outlaw chemical weapons related activity. These are offenses that can be objectively defined. Given this, it is hard to conceive of a requested State finding that it is in its own interest to give weight to the motive or context of a person's attempt to acquire weapons which that State Party has itself given up.

5. The CWC May Help to Establish Chemical Weapons-Related Activity as a "Universal Offense," But Further Steps are Needed to Provide the Basis for the Aggressive Assertion of Jurisdiction Over Terrorist Actors

Notwithstanding the broad participation in the CWC—as of early 1999, over 120 nations have ratified the Convention and some fifty more have signed but not yet ratified—there remains the possibility of the need to take enforcement action against a non-state actor that is not a national of nor operating within the territory of a State Party. Consider this scenario: A terrorist group operating in an Asian country that is not a party to the CWC obtains precursor chemicals in that country and produces a chemical weapon. The United States authorities obtain evidence of this activity and alert the government of a European party to the CWC. The European party government then apprehends a participant in the weapons project as that person is in transit through that European country. What effect, if any, does the CWC have on the ability of either that European government or the United States to punish that participant in chemical weapons activity?

The preamble to the CWC includes the declaration that the State Parties are—“*Determined* for the sake of all mankind, to exclude completely the possibility of the use of a chemical weapons . . .”.³³ The Convention goes on to bar not only the use of chemical weapons, but also the development or possession of such weapons. Can the broad adherence to the CWC be said to mark the development and possession of chemical weapons as “offenses recognized by the community of nations as of universal concern”?³⁴ This is language used in the Restatement to describe “universal crimes”,³⁵ as to which a state has jurisdiction to

33. Convention, *supra* note 1, at Preamble.

34. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 404 (Tentative Final Draft 1985) (1986).

35. Restatement, *supra* note 34, § 423.

define and adjudicate with respect to conduct that has no jurisdictional links to that state. The Restatement says that "perhaps [certain acts of] terrorism" are recognized as universal offenses. The comment to § 404 says that there has been wide condemnation of terrorism, but it notes that inability to agree on a definition of the offense has been an obstacle to international agreements to punish terrorism.³⁶ However, this definitional difficulty is not an obstacle to characterizing as universal offenses the chemical weapons-related conduct that is outlawed under the CWC. The CWC makes irrelevant considerations that bedevil attempts to define terrorism, for objectively defined conduct is addressed without regard to motivation or circumstances.

It is important to note, however, that the drafters of the CWC did not include an obligation of a State Party to take measures to establish its jurisdiction over a suspected offender with respect to conduct occurring outside of its territory. Such an obligation is found in conventions on terrorism and air piracy, but these obligations are connected to a "prosecute or extradite" provision, whereas the CWC, as already noted, does not address extradition.³⁷ The absence of such a jurisdictional provision should not prevent the CWC from being compelling evidence of the recognition of chemical weapons-related activity as a universal offense.

Whatever the ability of the European state in the scenario to prosecute the accused offender under its laws, the United States would not be able to do so if that person were apprehended in or brought to the United States. Although international law is law of the United States, an international offense must be defined under and the punishment established by United States statute law before it can be prosecuted in U.S. courts.³⁸ In implementing the CWC, the Congress extended penal jurisdiction no further than the Convention required, reaching conduct in the United States, conduct by or against a U.S. national, wherever occurring, and conduct committed against property, wherever located, that is owned, leased, or used by the United States.³⁹ Jurisdiction without such links has been provided by U.S. legislation for the universal offenses of aircraft piracy⁴⁰ and hostage taking.⁴¹ The intensity of the abhorrence of chemical weapons is such that the Convention could have supported

36. *Id.*, § 404 cmt. A.

37. See, e.g., Aircraft Piracy Convention, *supra* note 26, art. 4(2), and European Terrorism Convention, *supra* note 30, art. 6(1).

38. See *U.S. v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

39. See Act, *supra*, note 32, § 201(a).

40. See 49 U.S.C. § 46502 (b)(2).

41. See 18 U.S.C. § 1203 (b)(1)(B); see *United States v. Yunis*, 681 F. Supp. 896, 904 (D.D.C. 1988), *aff'd*, 924 F.2d 1086, 1090 (C.A.D.C. 1991).

strong provisions with respect to jurisdiction, extradition, and legal assistance. This matter merits further attention, both as to possible future amendment of the CWC and with reference to the current negotiations that seek to strengthen the Biological Weapons Convention of 1972.⁴² In fact, the extraordinary difficulty of achieving acceptable and effective methods for systematic verification with respect to biological weapons and toxins could increase the importance of adding treaty provisions in order to bring to justice non-state actors found to be involved with these weapons.

6. Trade Restrictions Will Help to Promote Participation in and Observance of the CWC

The CWC provisions that bar trade in controlled chemicals between State Parties and non-parties are outlined above in section three. These trade restrictions can have a serious impact on a non-party. There is a high percentage of participation in the CWC among the countries in Europe, Asia, and the Americas that are significant producers of industrial chemicals. Moreover, many products that require chemicals covered by the CWC are produced in countries that must import these chemicals. This dependence and vulnerability to the cut-off of chemicals needed for industrial uses will be a strong incentive for countries so situated to become a party to the Convention.

Although each State Party undertakes never to assist anyone to engage in activity prohibited under the Convention, the trade restrictions in the CWC do not extend beyond listed chemicals. The Convention does not reach and restrict trade in production equipment or technology, in the absence of intent or knowledge that the equipment or technology will be used for chemical weapons purposes. It is worth noting, however, that there is international cooperation through the Australia Group that seeks to restrict the proliferation of chemical weapons production capability through harmonized export controls that cover not only listed chemicals, but also technology and key dual-use equipment.⁴³

The desire to avoid being cut off from trade in chemicals covered by the CWC gives a State incentive not only to become a party, but also to avoid sanctions for failure to comply with its obligations under the CWC. Paragraph 2, Article XII of the Convention, "Measures to

42. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature*, April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

43. See Frederick P. Waite and M. Roy Goldberg, *Responsible Export Controls or "Nets to Catch the Wind"? The Commerce Department's New U.S. Controls on Exports of Chemical Precursors, Equipment, and Technical Data Intended to Prevent Development of Chemical and Biological Weapons*, 22 CAL. W. INT'L L.J. 193, 197-98. (1991).

Redress a Situation and to Ensure Compliance, Including Sanctions”, provides that the Conference of State Parties may restrict or suspend rights and privileges of a State Party that fails to fulfill a request from the Executive Council that it take measures to redress a situation raising problems with respect to its compliance. Thus, a State Party that persists in ignoring its obligation under the Convention to curb prohibited trade by persons subject to its jurisdiction could find itself the object of trade sanctions imposed through the Convention’s own machinery.

Although it seems reasonable to conclude that the CWC will make it harder for terrorists to acquire chemical weapons, the possibility of such acquisition remains. Opportunities for terrorists to procure or to produce chemical weapons will exist, in part, because some States that are believed to possess or to be seeking such weapons have not signed the CWC and appear to be unlikely to do so in the foreseeable future. Even if one of these States were not complicit in enabling a non-state actor to obtain chemical weapons, the existence of a weapons stockpile in that State would provide a tempting target. Moreover, it seems unrealistic to expect that non-party States will be completely deprived of the means of producing chemical weapons. Even if a non-party State must import precursor chemicals, it will be extremely difficult for the States Parties to the CWC to achieve completely diversion-proof trade controls.

The continuation of this residual risk makes it all the more disappointing that the negotiators of the CWC missed the opportunity to do more with respect to cooperative enforcement. There is an imbalance in the consequences facing States and non-State actors. A state that introduces the use or the threat of use of chemical weapons into the world environment created by the broad adherence to the CWC must expect forceful counter-measures, including military action, through the United Nations process or otherwise. The Convention contemplates that the Conference of State Parties will respond to serious cases by going beyond the suspension of CWC benefits and recommending collective measures or by referring the case to the United Nations General Assembly and Security Council.⁴⁴

Non-State actors contemplating terrorist activity using chemical weapons do not face a significantly greater risk of detection and punishment by reason of enforcement mechanisms established by the CWC. The intensity of shared concern might have been expected to inspire the negotiators to break new ground in fashioning treaty provisions to

44. See Convention, *supra* note 1, art. XII, ¶¶ 3 and 4.

strengthen enforcement of the penal provisions the State Parties were to put in place. What we have, instead, is a “to do” list for future attention:

- (1) Require State Parties to *criminalize* chemical weapons development, possession or use;
- (2) Establish mechanisms for cooperation in investigating possible CWC-related crimes;
- (3) Have State Parties extend their jurisdiction universally;
- (4) Provide for extradition, without a political offense exception.