THE CHEMICAL WEAPONS CONVENTION AND THE MILITARY COMMANDER: PROTECTING VERY LARGE SECRETS IN A TRANSPARENT ERA

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I. Introduction

In November of 1997, the United States was prepared to go to war with Iraq over a legal issue: compliance with United Nations Security Council Resolution 687, which requires intrusive verification of the eradication of Iraq's chemical and other weapons of mass destruction. Although Saddam Hussein's inappropriate behavior in the early 1990s has left Iraq *sui generis* under international law for the foreseeable future, growing international revulsion against these weapons, particularly those in the hands of unstable, militant tyrants, has made destroying these weapons a global priority.

The first great step taken in banning weapons of mass destruction since the end of the Cold War was ratifying the Chemical Weapons Convention (CWC).[2] This treaty not only outlawed an entire category of weapons of mass destruction, but in its Verification Annex, established a regime of unprecedented intrusiveness and transparency to meet this formidable challenge. The Verification Annex is a quantum leap from some of the scripted, occasionally theatrical verification regimes of the past, and is likely the model that future arms control treaties will follow.

This transparency will provide the moral foundation for the civilized world to demand that future malefactors, like Saddam, live up to these new

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2. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, 32 I.L.M. 800; S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) [hereinafter Chemical Weapons Convention], *reprinted in* WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION (1994).

minimum standards of customary international law. Further, it will be a basis for punishing them if they do not meet the standards.[3] This new moral authority has come at a price, however: legal, but still secret, national security programs have become far more difficult to protect from those exercising the CWC verification regime in good faith–or bad.

The military commander who is responsible for a highly classified, yet CWC-compliant, program is now faced with two conflicting legal obligations. First, he has a duty to protect specific classified national security information relating to his unit and its ability to accomplish its mission.[4] For this, he is responsible to his operational chain of command, beginning with his immediate superior and ending in the National Command Authorities (NCA), the collective name of the President and the Secretary of Defense. Second, he must uphold a treaty, now ratified and the law of the land, which calls for transparency *beyond* the line he has been trained to protect.[5] How to satisfy these two competing demands, and do it in the glare of the world press, calls, first of all, for a dispassionate analysis of the legal issues involved. Only then will the policymakers know the broad limits within which they may operate, and only then will the military commander know when to say "yes," "no," or "yes, but."

In the final analysis, the commanding officer of the inspected military facility is ultimately responsible for protecting the security of his unit's mission. Nothing in the CWC relieves him of that responsibility. The CWC, and the implementing domestic statutes and regulations, provide a good deal of "assistance" to the military commander in protecting the security of his unit's mission. The commander, however, retains the right and the duty to deny access to those classified portions of his facility that cannot be effectively protected from international inspectors. Only a lawful order from a superior officer in his operational chain of command, who

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3. Obviously, the CWC, in and of itself, is no more a deterrent to international "bad actors" than any other document of similar thickness. Its value lies in its status as an expression of the will of the civilized world. To the extent that the CWC is the template for forceful action by the States Parties, it will serve to deter rogue nations by focusing international animus on prohibited activities. While not a "silver bullet," it is a framework for inspiring, organizing, and applying the system-wide deterrence that will have a tangible effect on the world's remaining tyrants.

4. DEPARTMENT OF DEFENSE DIRECTIVE 5200.1-R, Aug. 1982, authorized by DEPARTMENT OF DEFENSE DIRECTIVE 5200.1, INFORMATION SECURITY PROGRAM REGULATION, June 7, 1982 [hereinafter DOD DIRECTIVE 5200.1-R].

5. *See generally* Chemical Weapons Convention, *supra* note 2, verification annex, pt. x.

possesses the authority to waive the appropriate classification guidance, may relieve the commanding officer of that responsibility.

Given the absolute nature of this legal obligation, it is imperative that the military commander of a sensitive facility be aware of the techniques of managing international access to his installation. Thus, he may comply with the requirements of the CWC and similar future treaties. By using all the legal tools at his disposal, the military commander can satisfy his obligations under the CWC and his duty as a commissioned officer.

II. The Treaty

A. Terms

The Convention, which entered into force on 29 April 1997, is remarkably straightforward. Its purpose is clearly laid out in the first Paragraph of Article I, General Obligations:

> 1. Each State Party to this Convention undertakes never under any circumstances:
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> a. To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or to transfer, directly or indirectly, chemical weapons to anyone;
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> b. To use chemical weapons;
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> c. To engage in any military preparations to use chemical weapons;
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> d. To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.[6]

The remainder of Article I obligates states to destroy chemical weapons[7] and production facilities located on their own territory,[8] to destroy chemical weapons abandoned on the territory of other states,[9] and to refrain from using riot control agents as a method of warfare.[10]

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6. Chemical Weapons Convention, *supra* note 2, art. I, para., 1; KRUTZSCH & TRAPP, *supra* note 2, at 11.

7. Chemical Weapons Convention, *supra* note 2, art. I, para., 1; KRUTZSCH & TRAPP, *supra* note 2, at 11.

8. Chemical Weapons Convention, *supra* note 2, art. I, para. 4; KRUTZSCH & TRAPP, *supra* note 2, at 11.

9. Chemical Weapons Convention, *supra* note 2, art. I, para. 3; KRUTZSCH & TRAPP, *supra* note 2, at 11.

B. Organization

To implement this broad goal, the CWC creates the Organization for the Prohibition of Chemical Weapons (OPCW).[11] It consists of three parts: the Conference of States Parties (analogous to the UN General Assembly), the Executive Council (similar to the UN Security Council), and the Technical Secretariat (modeled on the specialized, implementing arms of the UN, such as the World Health Organization).[12] The OPCW is located in The Hague[13] and is funded by the States Parties.[14]

The Conference of States Parties is the principal organ of the OPCW.[15] Although it consists of a representative from each State Party,[16] it does not remain in continuous session and few representatives remain in residence in The Hague. In addition to overseeing the other two components of the OPCW, it is responsible for monitoring implementation of and compliance with the treaty.[17]

The Executive Council, as the executive body of OPCW, is responsible for the day-to-day administration of organization business. It supervises the Technical Secretariat,[18] and handles any emergent noncompliance issues.[19]

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10. Chemical Weapons Convention, *supra* note 2, art. I, para. 5; KRUTZSCH & TRAPP, *supra* note 2, at 11.

11. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 1; KRUTZSCH & TRAPP, *supra* note 2, at 124.

12. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 4; KRUTZSCH & TRAPP, *supra* note 2, at 124.

13. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 3; KRUTZSCH & TRAPP, *supra* note 2, at 124.

14. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 7; KRUTZSCH & TRAPP, *supra* note 2, at 124.

15. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 19; KRUTZSCH & TRAPP, *supra* note 2, at 134.

16. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 9; KRUTZSCH & TRAPP, *supra* note 2, at 133.

17. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 20; KRUTZSCH & TRAPP, *supra* note 2, at 134.

18. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 31; KRUTZSCH & TRAPP, *supra* note 2, at 147.

19. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 35; KRUTZSCH & TRAPP, *supra* note 2, at 147.

The Technical Secretariat is responsible for verifying compliance with the CWC,[20] primarily through conducting inspections. This branch is more professional than political, and the composition of its inspectorate is based more on technical competence than geographical representation.[21]

C. Schedules

The CWC divided the monitored chemicals into four schedules. A Schedule 1 chemical meets one of three criteria: (1) it is either "developed, produced, stockpiled, or used as a chemical weapon,"[22] (2) it poses "a high risk to the object and purpose" of the CWC due to its "high potential for use in activities" prohibited in the CWC due to its chemical structure, "lethal or incapacitating toxicity," or its status as a "final single technological stage" precursor,[23] or (3) it "has little or no use for purposes not prohibited" under the CWC.[24] Schedule 1 chemicals are generally thought of as chemical weapons per se, and include sarin, tabun, VX, sulfur mustards, lewisites, nitrogen mustards, saxitoxin, ricin, and a number of precursors.[25]

A Schedule 2 chemical is one which meets one of four criteria, each criteria differs in degree from the Schedule 1 standards: (1) it poses a "significant risk to the object and purpose" of the CWC due to its toxicity,[26] (2) it may be used as a precursor "in one of the chemical reactions at the final stage of formation" of a Schedule 1 or 2A chemical,[27] (3) it poses a "significant risk" due to its importance in Schedule 1 or 2A (toxic) chemical production,[28] or (4) it "is not produced in large commercial quantities for

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20. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 37; KRUTZSCH & TRAPP, *supra* note 2, at 162.

21. Chemical Weapons Convention, *supra* note 2, art. VIII, para. 44; KRUTZSCH & TRAPP, *supra* note 2, at 163.

22. Chemical Weapons Convention, *supra* note 2, annex on chemicals, sec. A, para. 1(a), *in* KRUTZSCH & TRAPP, *supra* note 2, at 253.

23. *Id.* annex on chemicals, sec. A, para. 1(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 253.

24. *Id.* annex on chemicals, sec. A, para. 1(c), *in* KRUTZSCH & TRAPP, *supra* note 2, at 253.

25. *Id.* sec. B, sched. 1, *in* KRUTZSCH & TRAPP, *supra* note 2, at 254-55.

26. *Id.* annex on chemicals, sec. A, para. 2(a), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

27. *Id.* annex on chemicals, sec. A, para. 2(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

28. *Id.* annex on chemicals, sec. A, para. 2(c), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

purposes not prohibited under" the CWC.[29] Schedule 2 chemicals are generally referred to as dual-use. They include amiton, PFIB, BZ, and a number of precursors.[30]

A chemical may be listed as a Schedule 3 chemical if it meets one of four criteria: (1) it was at one time a chemical weapon,[31] (2) it poses "a risk to the purpose and object" of the CWC because of its toxicity,[32] (3) it poses "a risk" because of its importance in manufacturing Schedule 1 or 2B (precursor) chemicals,[33] or (4) it "may be produced in large commercial quantities for purposes not prohibited" under the CWC.[34] Schedule 3 chemicals are referred to as industrials. They include phosgene, cyanogen chloride, hydrogen cyanide, chloropicrin, and numerous precursors.[35]

For the first three years after the CWC's entry-into-force (29 April 1997), "declared" facilities producing or storing Schedule 1, 2, and 3 chemicals will be carefully inspected. "Declared" facilities are those facilities reported by the member states as having produced scheduled chemicals. From the fourth year on, however, the emphasis will switch to the "discrete organic compounds."[36] The CWC's Verification Annex defines them as "any chemical belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulfides, and metal carbonates . . . ."[37] These chemicals, based on the "PSF" compounds of phosphorous, sulfur, and fluorine,[38] will be monitored as the precursors to all CWC-concerned weapons.

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29. *Id.* annex on chemicals, sec. A, para. 2(d), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

30. *Id.* annex on chemicals, sec. B, sched. 2, *in* KRUTZSCH & TRAPP, *supra* note 2, at 255-56.

31. *Id.* annex on chemicals, sec. A, para. 3(a), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

32. *Id.* annex on chemicals, sec. A, para. 3(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

33. *Id.* annex on chemicals, sec. A, para. 3(c), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

34. *Id.* annex on chemicals, sec. A, para. 3(d), *in* KRUTZSCH & TRAPP, *supra* note 2, at 254.

35. *Id.* annex on chemicals, sec. b, sched. 3, *in* KRUTZSCH & TRAPP, *supra* note 2, at 256-57.

36. *Id.* verification annex, pt. IX, sec. C, para. 22, *in* KRUTZSCH & TRAPP, *supra* note 2, at 456.

37. *Id.* verification annex, pt. I, para. 4, *in* KRUTZSCH & TRAPP, *supra* note 2, at 271.

38. *Id.* verification annex, pt. IX, sec. A, para. 1(b), *in* KRUTZSCH & TRAPP, *supra* note 2, at 453.

D. Inspections

All declared facilities will be inspected and certified as compliant within three years of the treaty's effective date. From entry-into-force, however, any State Party may "challenge" any non-declared facility (any military or industrial facility reasonably able to contain militarily significant quantities of chemical weapons) in any signatory country–provided that State Party meets minimum criteria roughly equivalent to "probable cause." The actual standard, found in Part X of the Verification Annex, requires the challenging state to provide "all appropriate information on the basis of which the concern has arisen."[39] The commentators Krutzsch and Trapp, wrote that "a requesting State Party would not be obligated to spell out all its sources of information, [for example], intelligence sources."[40] While eyewitness or documentary evidence is obviously preferable for its clarity and directness, Krutzsch and Trapp suggest that circumstantial evidence of suspicious activities would be adequate. They give several examples of observed activities justifying a challenge under the CWC:

> [A] sudden increase of precursor chemicals produced or imported without any reasonable explanation about its non-prohibited purposes, the intensified supply of protective gear to the armed forces or the civil population, unexplainable chemical hazards in a certain place or extraordinary preparations against such hazards . . . .[41]

These are the qualitative indicators; the quantitative indicators are a product of militarily significant quantities of each chemical. For most chemical weapons, this is in the range of hundreds to thousands of tons.[42] As the inspection regime matures, the U.S. Coast Guard concept of "space accountability" may take hold. Under this concept, the Coast Guard must account for every space large enough to hold the contraband sought, usually narcotics. Similarly, under the CWC, inspectors may choose to account for every space capable of containing a militarily significant quan-

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39. *Id.* verification annex, pt. X, sec. A, para. 4(d), *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

40. KRUTZSCH & TRAPP, *supra* note 2, at 477.

41. *Id.* at 477-78.

42. J. CHRISTIAN KESSLER, VERIFYING NONPROLIFERATON TREATIES: OBLIGATION, PROCESS, AND SOVEREIGNTY (1995).

tity of the chemical sought. This will affect the degree of intrusiveness of each challenge inspection.

A distinguishing feature of the CWC is the short timeline for challenge inspections. This is necessary to afford the international community a chance to catch violators in the act, before they have time to hide or destroy evidence of production, storage, or use. The treaty allows only twelve hours notice of the arrival of a challenge inspection team at the inspected country's designated point of entry.[43] By contrast, the START[44] regime provides for "Special Access Visits," allowing seven days between the notification and U.S. acknowledgement and forty-five to sixty days before the inspectors arrive at the facility.[45] This notice will be transmitted from the OPCW to the Department of State Nuclear Risk Reduction Center and then through the Department of Commerce or Department of Defense to the target facility.[46]

At this point, the U.S. constitutional requirements for a legal search become operative. All U.S. citizens who have not consented to such a search (that is, as a condition of employment of access to the facility) retain their freedom from unreasonable search and seizure. This would include virtually all the personnel at private facilities and many at Department of Defense installations. To that end, the CWC recognizes the need to observe domestic constitutional requirements: "[T]he inspected State Party shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches or seizures."[47]

The current Director of the Arms Control and Disarmament Agency, the Honorable John D. Holum, addressed the CWC's threat to the Fourth Amendment:

> Of course the notion that a treaty could require us to violate the Constitution is a non-sequiter because the Constitution overrides

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43. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. B, para. 6, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

44. *See generally* Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitations of Strategic Offensive Arms (START I) art. 11 (July 31, 1991) *available at* <www.acda.gov>.

45. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, ARMS CONTROL INSPECTION PREPARATION, 7-8 (Feb. 13, 1996).

46. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, THE CHEMICAL WEAPONS CONVENTION: QUESTIONS FACING THE U.S. DEFENSE INDUSTRY 6-7 (May 1, 1996).

47. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 41, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

> any other law, including a treaty; hence, the worst that could happen would be that the Constitution would require us to violate the treaty. But that also doesn't arise because the CWC explicitly recognizes that member countries will use their constitutional rules in the inspection process. That means in the United States that any searches will be conducted either voluntarily or pursuant to a warrant. If the inspected facility were part of a heavily regulated industry, as chemical manufacturers tend to be, it would most likely be an administrative search warrant. In cases where that is not applicable, a criminal search warrant would be obtained. There will be no searches whatsoever under the CWC in the United States which are not either by consent or pursuant to a legally issued warrant.[48]

While this is a concise statement of the Administration's position, there are complicating factors. One commentator has pointed out that the Supreme Court, in dicta, has suggested that the chemical industry, as a whole, cannot be considered a closely regulated industry.[49] The point may be moot, in that when the Senate offered its advice and granted consent, it required that the searches be conducted only with consent or a search warrant.[50] Thus, any challenge inspection conducted within the United States,

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48. Interview by Spurgeon M. Keeny, Jr. & Erik J. Leklem with John D. Holum, Director, Arms Control and Disarmament Agency, in Washington, D.C. (Feb. 18, 1997), *in* ARMS CONTROL TODAY, Jan./Feb. 1997, at 6.

49. John Adams, *The Chemical Weapons Convention: Legal and Juridical Observations*, INT'L LAW & SEC. NEWS 12 (Fall 1996) (citing Dow v. United States, 476 U.S. 227 (1986)).

50. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378, sec. 2, para. (28)(A) (daily ed. Apr. 17, 1997):

> (A) IN GENERAL—In order to protect United States citizens against unreasonable searches and seizures, prior to the deposit of the United States instrument of ratification, the President shall certify to Congress that—
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> (i) for any challenge inspection conducted on the territory of the United States pursuant to Article IX, where consent has been withheld, the United States National Authority will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the person or things to be seized; and
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> (ii) for any routine inspection of a declared facility under the Convention that is conducted on the territory of the United States, where consent has been withheld, the United States National Authority first will obtain an administrative search warrant from a United States magistrate judge.

implicating the Fourth Amendment rights of a U.S. citizen, could only proceed with the citizen's consent or a criminal search warrant.

Once the inspection team has arrived and officially presented the inspection mandate to the inspected nation's representative, the host nation has only thirty-six hours to transport the inspection team to the vicinity of the inspection site.[51] At that point, the parties have twenty-four hours to complete the perimeter negotiation,[52] and then forty-eight more hours before the inspection team must be granted access to the site.[53] Once on site, the team has eighty-four hours to complete the inspection.[54] After the team completes the inspection, it must submit a preliminary report to the Director General of the Technical Secretariat within seventy-two hours,[55] a draft final inspection report to the inspected party within twenty days,[56] and the final report to the Director General within thirty days.[57]

Within this compressed timeline, the sequence of events begins when one State Party suspects another of violating the CWC. The challenging state must first confirm that the Technical Secretariat has a team available to conduct a challenge inspection.[58] If a team is available, the challenging state may then present its request to the Executive Council and the Director General of the Technical Secretariat.[59] That request must include:

> (a) The State Party to be inspected and, if applicable, the Host State;
> (b) The point of entry to be used;
> (c) The size and type of the inspection site;

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51. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, para. 18, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467-68.

52. *Id.* verification annex, pt. X, sec. B, para. 19, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

53. *Id.* verification annex, pt. X, sec. B, para. 21, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

54. *Id.* verification annex, pt. X, sec. C, para. 57, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

55. *Id.* verification annex, pt. X, sec. D, para. 60, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472-73.

56. *Id.* verification annex, pt. X, sec. B, para. 61, *in* KRUTZSCH & TRAPP, *supra* note 2, at 473.

57. *Id.* verification annex, pt. X, sec. B, para. 61, *in* KRUTZSCH & TRAPP, *supra* note 2, at 473.

58. *Id.* verification annex, pt. X, sec. B, para. 3, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

59. *Id.* verification annex, pt. X, sec. B, para. 4, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

> (d) The concern regarding possible non-compliance with this Convention including a specification of the relevant provisions of the CWC about which the concern has arisen, and of the nature and circumstances of the possible non-compliance as well as all appropriate information on the basis of which the concern has arisen; and
> (e) The name of the observer of the requesting State Party.[60]

Conspicuously absent from this list is the *specific* name of the facility to be inspected. The Director General has one hour in which to acknowledge receipt of the information above.[61] The requesting State Party, however, need not notify the Director General of the specific inspection site until only twelve hours before the team's arrival at the point of entry.[62] This serves to limit advance notice to the inspected state of the precise location until the last possible moment, increasing the chances of detecting a violation and, therefore, the deterrent value of the CWC.

Once the forty-one-member Executive Council receives this notification, it has twelve hours to exercise its veto over the challenge inspection. The request for an inspection may be denied if the Executive Council considers it to be "frivolous, abusive, or clearly beyond the scope of the CWC."[63] Such a veto, however, requires a three-fourths supermajority of all members (not merely those present).[64] According to one commentator, "most of the smaller countries do not have diplomatic missions resident in the Hague, [thus] it is highly unlikely that the Executive Council will be able to convene, much less act to block, a challenge inspection."[65] Even a less restrictive view of the requirement, reading it to permit a "virtual" convening of the members, would be difficult to accomplish. With members spread over most of the world's time zones, the twelve-hour limit imposes a severe limitation on gathering votes by video teleconference or even fax.

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60. *Id.* verification annex, pt. X, sec. B, para. 4, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

61. *Id.* verification annex, pt. X, sec. B, para. 5, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

62. *Id.* verification annex, pt. X, sec. B, para. 6, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

63. *Id.* verification annex, pt. IX, sec. B, para. 17, *in* KRUTZSCH & TRAPP, *supra* note 2, at 173.

64. *Id.* verification annex, pt. IX, sec. B, para. 17, *in* KRUTZSCH & TRAPP, *supra* note 2, at 173.

65. KESSLER, *supra* note 41, at 91.

Also due no later than twelve hours before the inspection team's arrival is the challenging party's requested perimeter.[66] This perimeter must be drawn as narrowly as possible to focus the inspection party's efforts, but broadly enough not to miss noncompliant activity in the vicinity. The CWC adds several technical requirements for the perimeter. It must: "(a) run at least a [ten] metre distance outside any buildings or other structures, (b) not cut through existing security enclosures, and (c) run at least a [ten] metre distance outside any existing security enclosures that the requesting State Party intends to include within the final perimeter."[67] This serves to protect the integrity of the facilities being inspected, and allows the existing fences and walls to delimit inspection boundaries. A requested perimeter that does not meet these requirements may be redrawn by the inspection team.[68]

If the inspected party does not approve of the requested perimeter, it may present an alternative perimeter.[69] This proposal must meet a series of criteria:

> It shall include the whole of the requested perimeter and should, as a rule, bear a close relationship to the latter, taking into account natural terrain features and man-made boundaries. It should normally run close to the surrounding security barrier if such barrier exists. The inspected State Party should seek to establish such relationship between the perimeters by a combination of at least two of the following means:
> (a) An alternative perimeter that does not extend to an area significantly greater than that of the requested perimeter;
> (b) An alternative perimeter that is a short, uniform distance from the requested perimeter;
> (c) At least part of the requested perimeter is visible from the alternative perimeter.[70]

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66. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. B, paras. 7, 10, 11, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466-67.

67. *Id.* verification annex, pt. X, sec. B, para. 8, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

68. *Id.* verification annex, pt. X, sec. B, para. 9, *in* KRUTZSCH & TRAPP, *supra* note 2, at 466.

69. *Id.* verification annex, pt. X, sec. B, para. 16, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467.

70. *Id.* verification annex, pt. X, sec. B, para. 17, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467-68.

If the alternative perimeter is acceptable to the inspection team, it becomes the final perimeter. If not, "the inspected State Party and the inspection team shall engage in negotiations with the aim of reaching agreement on a final perimeter."[71] If the perimeter negotiation cannot be resolved within seventy-two hours, the alternative perimeter (containing the whole of the requested perimeter) becomes the new perimeter.[72]

This perimeter negotiation is emblematic of the entire CWC. One of the hallmarks of the CWC is that it relies on on-site negotiations to resolve issues as they arise. This is necessary because of the comprehensiveness, complexity, and intrusiveness of the inspection regime. Unlike earlier treaties, which could more or less "script" the course of inspections at a limited number of facilities containing a limited number of large, easily identifiable weapons, the CWC relies on these negotiations to smooth any problems. This is also a dramatic departure in the area of personal responsibility for implementing arms control agreements.

In earlier days, executing a prearranged inspection could be almost completely planned, and the planning was done at the highest levels. Under the CWC, only so much planning can be done, and the rest must be dealt with as it emerges in the course of inspection and negotiation. On military bases, this negotiation is now conducted by the commanding officer of the unit being inspected–an officer with extensive experience in military operations, but precious little in this very new form of arms control. The commander's greatest asset in this difficult position is his training in decisively handling unexpected problems as they confront him.

The first phase of the inspection is perimeter monitoring. No later than twelve hours after the inspection team arrives at the vicinity of the inspection, the inspected country must begin monitoring traffic out of the facility.[73] Under the CWC, this may include "traffic logs, photographs, video recordings, or data from chemical evidence equipment . . . ."[74] This information must be turned over to the inspection team.

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71. *Id*. verification annex, pt. X, sec. B, para. 16, *in* KRUTZSCH & TRAPP, *supra* note 2, at 467.

72. *Id*. verification annex, pt. X, sec. B, para. 21, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

73. *Id*. verification annex, pt. X, sec. B, para. 23, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

74. *Id*. verification annex, pt. X, sec. B, para. 24, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468.

Once the perimeter negotiations are complete and the inspection team arrives at the perimeter, it will take over the monitoring function. Beyond the designated exits to the facility, "[t]he inspection team has the right to go, under escort, to any other part of the perimeter to check that there is no other exit activity."[75] In addition to the techniques already listed, the inspection team may use sensors, random selective access,[76] and sample analysis to confirm that the inspected country is not removing evidence of a violation.[77] For this reason, only non-private vehicles (that is, only those owned or operated by the facility being inspected) may be inspected, and then only while exiting the facility. Personnel in these vehicles are not subject to search.[78] All of these activities must be confined to a fifty-meter band outward from the perimeter, and, to the extent possible, be directed inward, toward the facility.[79] While these activities "may not unreasonably hamper or delay the normal operation of the facility," they may continue for the duration of the inspection.[80]

This fifty-meter band is absolutely vital in planning for a CWC challenge inspection. Within the perimeter, only those chemicals alleged present in the inspection mandate may be tested for, and only as the inspected country agrees in a case-by-case negotiation. Outside the fifty-meter band, obviously, the inspection team has no mandate to do any testing whatsoever. Within the fifty-meter band, however, there are very few restrictions on "general environmental sampling," and the inspection team is free to use all of its test equipment at all times.[81] The equipment itself is far more sophisticated than that employed in previous inspection regimes. According to the On-Site Inspection Agency:

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75. *Id.* verification annex, pt. X, sec. B, paras. 25, 26, *in* KRUTZSCH & TRAPP, *supra* note 2, at 468-69.

76. This technique, and all other managed access techniques, will be discussed more fully in the next section of this article.

77. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. B, para. 27, *in* KRUTZSCH & TRAPP, *supra* note 2, at 469.

78. *Id.* verification annex, pt. X, sec. B, para. 30, *in* KRUTZSCH & TRAPP, *supra* note 2, at 469.

79. *Id.* verification annex, pt. X, sec. B, para. 37, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

80. *Id.* verification annex, pt. X, sec. B, para. 31, *in* KRUTZSCH & TRAPP, *supra* note 2, at 469.

81. Specifically, Paragraph 36 of Part X of the Verification Annex allows "wipes, air, soil, or effluent samples," and the use of all monitoring instruments described in Paragraphs 27-30 of Part II of the Annex. These paragraphs simply describe the full range of permissible testing equipment, giving the inspection team a complete arsenal for sampling in the 50-meter band.

> CWC inspection equipment will include transportable satellite communications, binoculars, chemical agent detectors and monitors, gas chromatography/mass spectrometers, individual protective equipment, and computers. Non-destructive or non-damaging evaluation equipment such as neutron interrogation systems, ultrasonic pulse echo systems, and acoustic resonance spectroscopy will also be used . . . .[82]

In addition to this analytical equipment, the CWC also provides that inspectors may operate their own communications equipment, both among inspectors at the site and between inspectors and OPCW headquarters in The Hague.[83] This communications capability poses an additional security concern for facility security officials. The equipment must be certified by the OSIA as authentic, without the capability to collect or transmit more than normal voice or data communications.

The existence of the fifty-meter band is a compromise. It allows the inspected country to protect specific permissible trade and national security secrets within the perimeter, but allows the world community a chance to detect environmental clues that would betray a CWC-related violation. The line between these two concerns is not bright. Legitimate secrets may leave identifiable traces in the fifty-meter band. For example, a new industrial process that gives off minute quantities of a non-scheduled chemical would be safe from a chemical-specific test within the perimeter, but would be detected in trace amounts by the unrestricted environmental sampling in the fifty-meter band. Security officials need to plan for everything from wind patterns (that is, does the prevailing wind "footprint" bring protected material into the fifty-meter band?) to second and third level questions. These may arise from the detection of an innocent chemical in the fifty-meter band, but a chemical related closely enough to the production of scheduled chemicals that the inspection team would then have a good-faith basis for expanding the scope of the inspection required to satisfy the mandate. The only factor in favor of the inspected party regarding this band of enhanced scrutiny is that no buildings within the band may be entered without the host nation's approval.[84]

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82. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, ARMS CONTROL AND THE INSPECTOR 11 (Oct. 4, 1997).

83. Chemical Weapons Convention, *supra* note 2, verification annex, pt. II, sec. D, para. 44, *in* KRUTZSCH & TRAPP, *supra* note 2, at 297.

84. *Id.* verification annex, pt. X, sec. B, para. 37, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

The Senate's resolution of ratification contains an understanding that limits this sampling: "no sample collected in the United States pursuant to the CWC will be transferred for analysis to any laboratory outside the territory of the United States."[85] This would have no effect on tests for the presence or absence of a specific scheduled chemical on site, but would greatly inhibit secondary exploitation of materials for commercial or military purposes after the inspection.

As the perimeter activities continue, the inspection team has eighty-four hours to conduct the inspection.[86] The challenging state may attach an observer to the inspection process, but the observer is not a member of the inspection team. This, again, is a compromise between two competing interests: that of the challenging state, to ensure that its concerns are addressed, and that of the inspected state, to ensure that the challenging state is not launching the challenge inspection as a pretext for intelligence collection. Under Paragraph 55 of Part X, the observer may be present at the perimeter, and "to have access to the inspection site as granted by the inspected State Party."[87] In theory, the host nation could keep the challenging nation's observer at the front gate during the inspection, provided the observer was allowed regular communication with the inspection team. The inspection team is under an affirmative obligation to keep the observer informed, but must consider his recommendations only "to the extent it deems appropriate."[88]

Beyond specifying the duration of the inspection and the role of the observer, section C of Part X is divided into two parts: Managed Access, which will be addressed in the next section of this article, and General Rules. The General Rules begin: "The inspected party shall provide access within . . . the final perimeter. The extent and nature of access to a particular place or places within these perimeters shall be negotiated between the inspection team and the inspected State Party on a managed access basis."[89] The second sentence in that paragraph, perhaps the most

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85. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378, sec. 2, para. 18 (daily ed. Apr. 17, 1997).

86. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 57, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

87. *Id.* verification annex, pt. X, sec. C, para. 55, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

88. *Id.* verification annex, pt. X, sec. C, para. 55, *in* KRUTZSCH & TRAPP, *supra* note 2, at 472.

89. *Id.* verification annex, pt. X, sec. C, para. 38, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

important in the CWC, places the responsibility for a successful inspection squarely on the shoulders of the senior official present on behalf of the inspected nation. In the case of the military, the senior official present may not be the senior *responsible* officer in the operational chain of command, almost always the commanding officer of the base or facility being inspected. This split between authority and responsibility will be addressed in the final section of this article.

The host nation must provide access to the facility (within the final perimeter) no later than 108 hours after the inspection team's arrival at the point of entry,[90] and "may" provide aerial access to the inspection site.[91] The absence of the word "shall" suggests that this is merely another possibility to be negotiated, and not a requirement of the CWC.

Paragraphs 41 and 42 detail the requirements placed on the inspected party, emphasizing transparent compliance. Paragraph 41 provides:

> In meeting the requirement to provide access as specified in Paragraph 38, the inspected State Party shall be under the obligation to allow the greatest degree of access taking into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures. The inspected State Party has the right under managed access to take such measures as are necessary to protect national security. The provisions in this paragraph may not be invoked by the inspected State Party to conceal evasion of its obligations not to engage in activities prohibited under this Convention.[92]

Paragraph 42 directs: "If the inspected State Party provides less than full access to places, activities, or information, it shall be under the obligation to make every reasonable effort to provide alternative means to clarify the possible non-compliance concern that generated the challenge inspection."[93] The term "every reasonable effort" sets a high standard for compliance, but as Krutzsch and Trapp explain in their *Commentary*:

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90. *Id.* verification annex, pt. X, sec. C, para. 39, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

91. *Id.* verification annex, pt. X, sec. C, para. 40, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

92. *Id.* verification annex, pt. X, sec. C, para. 41, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

93. *Id.* verification annex, pt. X, sec. C, para. 41, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

> [T]he term 'reasonable' indicates that the specific activities in conformity with this right and obligation shall not be what speculative ingenuity may invent, but what *rational experience of relevant situations normally suggest*. An inspected State Party which implemented its obligation in making 'every reasonable effort' may rightly claim the benefit of the doubt, when some of the questions raised by the request have not been answered in a manner beyond any doubt.[94]

The *Commentary*, however, narrowly construes this benefit:

> However, the situation . . . would not allow the inspected State Party a significant margin of tolerance since rational experience would suggests in such a case, that if there was no clear and unambiguous proof to the contrary, the inspected State Party is hiding chemical weapons.[95]

This presumption, made clear throughout the Convention and the *Commentary*, places the burden of proof squarely on the shoulders of the inspected party providing less than full access.

The inspection team has complementary but lesser restrictions, primarily limiting the intrusiveness of the inspection.[96] Further, the inspection team has guidance to conduct the inspection in the least intrusive manner possible, while effectively and timely completing its mission.[97]

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94. KRUTZSCH & TRAPP, *supra* note 2, at 489 (emphasis in original).

95. *Id.*

96. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 44, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

> In carrying out the challenge inspection in accordance with the inspection request, the inspection team shall use only those methods necessary to provide sufficient relevant facts to clarify the concern about possible non-compliance with the provisions of this Convention, and shall refrain from activities not relevant thereto. It shall collect and document such facts as are related to the possible non-compliance with the provisions of this Convention by the inspected State Party, but shall neither seek nor document information which is clearly not related thereto, unless the inspected State Party expressly requests it to do so. Any materials collected and subsequently found not to be relevant shall not be retained.

Id.

97. *Id.* verification annex, pt. X, sec. C, para. 45, *in* KRUTZSCH & TRAPP, *supra* note 2, at 470.

These concepts bracket the responsibilities of the two parties to a challenge inspection, and frame the central issue: how much, and what kind of, compliance is required to satisfy an inspection mandate, without violating existing legal requirements to protect other sensitive information? The answer may be found, in part, in the mechanics of managed access.

III. Managed Access

The techniques of managed access were developed by the British in anticipation of intrusive arms control inspections. One commentator explained:

> In broad outline, under this approach a challenge inspection would be permitted "anywhere, anytime" but it would not involve unfettered access. Rather, the inspected state would have rights to limit access in certain respects. Inspectors would be permitted to perform those activities necessary to confirm that treaty violations were not being conducted at the inspected site but would not necessarily be able to determine what in fact did take place there.[98]

The CWC itself recognizes the need to protect certain information in the course of the inspection. It mandates that the inspection team consider modifying the plan based on proposals of the inspected State Party. These proposals are presumably made to protect sensitive equipment, information, and areas not related to chemical weapons.[99] A phrase used in this

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97. (continued)

> The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission. Wherever possible, it shall begin with the least intrusive procedures it deems acceptable and proceed to more intrusive procedures only as it deems necessary.

Id.

98. KESSLER, *supra* note 43, at 78-9.

99. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 46, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

section of the CWC is key: "at whatever stage of the inspection."[100] This process begins with the inspected party's managed access plan, but is carried out in a continuous negotiation or inspection that may run eighty-four hours. For the inspected party, having observant, intelligent escorts who can think on their feet and implement a full range of contingency plans in the course of a moving inspection is the most vital asset. Krutzsch and Trapp give a relevant example of the timing of a modification to the inspection team's proposed inspection plan:

> For example, an inspected State Party having a secret installation at an inspected site that is unrelated to chemical weapons and that it wants to protect may elect to announce this in the pre-inspection briefing. Or it may decide to wait to see whether the inspection team would actually encounter the object and request access, and then propose an alternative at that stage.[101]

The foundation of a successful managed access plan is a series of well thought-out opening and fallback positions for the Paragraph 47 negotiations, during which the inspection plan is crafted to suit both parties. The paragraph provides that the parties will negotiate the places and extent of access, as well as the particular inspection activities.[102] Once the inspected party has negotiated the best inspection plan it can, the next layer of defense is physically employing the techniques of managed access. The most prominent of these are listed in Paragraph 48:

> [T]he Inspected State Party shall have the right to take measures to protect sensitive installations and prevent disclosure of confidential information and data not related to chemical weapons. Such measures may include, *inter alia*:

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99. (continued)

> The inspection team shall take into consideration suggested modifications of the inspection plan and proposals which may be made by theinspected State Party, at whatever stage of the inspection including the pre-inspection briefing, to ensure that sensitive equipment, information or areas, not related to chemical weapons, are protected.

Id.

100. *Id.*

101. KRUTZSCH & TRAPP *supra* note 2, at 491 n.36.

102. Chemical Weapons Convention, *supra* note 2, verification annex, pt. X, sec. C, para. 47, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

> (a) Removal of sensitive papers from office spaces;
> (b) Shrouding of sensitive displays, stores, and equipment;
> (c) Shrouding of sensitive pieces of equipment, such as computer or electronic systems;
> (d) Logging off computer systems and turning off data indicating devices;
> (e) Restriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products;
> (f) Using random selective access techniques whereby inspectors are requested to select a given percentage or number of buildings of their choice to inspect; the same principle can apply to the interior and content of sensitive buildings;
> (g) In exceptional cases, giving only individual inspectors access to certain parts of the inspection site.[103]

All of these techniques are useful, but each has its limits. Subparagraphs (a) and (d) permit removing papers and turning of computer and equipment displays, but only those papers and displays that are not material to the inspection mandate. A roster of chemicals being delivered to a facility may prove that no prohibited activity is taking place, but it may also give away a proprietary chemical process worth millions to its owner. Similarly, a good-faith inspection of the plumbing in a chemical facility may be intended to merely confirm or rule out the presence of a scheduled chemical. However, this type of follow-the-pipes-wherever-they-lead ethic may take the inspectors far beyond boundaries acceptable to the host nation, perhaps revealing chemical equipment whose very configuration is an invaluable commercial asset for its developer.

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102. (continued)

> The inspected State Party shall designate the perimeter entry, exit points to be used for access. The inspection team and the inspected State Party shall negotiate: the extent of access to any place or places within the final and requested perimeters as provided in Paragraph 48; the particular inspection activities, including sampling, to be conducted by the inspection team; the performance of particular activities by the inspected State Party; and the provision of particular information by the inspected State Party.

Id.

103. *Id.* verification annex, pt. X, sec. C, para. 48, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

Subparagraphs (b) and (c) permit shrouding, or covering the equipment with opaque plastic or cloth, but even this is not an absolute protection. Paragraph 49 provides that the inspected State Party must make reasonable efforts to show that possible non-compliance is not occurring in places where access is restricted.[104] According to Paragraph 50, reasonable efforts include "partial removal of a shroud or environmental protection cover, at the discretion of the inspected State Party, by means of a visual inspection of the interior of and enclosed space from its entrance, or by other methods."[105]

Krutzsch and Trapp, commenting on Paragraph 48, specifically address a worst-case scenario in which an inspected party might attempt to deny *any* access to a particularly sensitive area:

> Without going into detail on the individual techniques listed, it should be mentioned that their common denominator is that access to buildings, structures and the like is *not denied as such, but limited in time, space, access degree or number of inspectors allowed*. [footnote omitted] A flat rejection of *any* access to a building or structure will not be in conformity with the provisions under managed access. If it would occur . . . the inspection team would have the right to photograph the object or building for clarification of its nature and function, inform the Technical Secretariat immediately, and include the photograph and the unresolved question related thereto in the inspection report.[106]

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104. *Id.* verification annex, pt. X, sec. C, para. 49, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

> The Inspected State Party shall make every reasonable effort to demonstrate to the inspection team that any object, building, structure, container or vehicle to which the inspection team has not had full access, or which has been protected in accordance with Paragraph 48, is not used for purposes related to the possible non-compliance concerns raised in the inspection request.

Id.

105. *Id.* verification annex, pt. X, sec. C, para. 50, *in* KRUTZSCH & TRAPP, *supra* note 2, at 471.

106. KRUTZSCH & TRAPP *supra* note 2, at 492.

Krutzsch and Trapp continue, citing the wording of Paragraph 50 as proof that partial removal of a shroud is partially within the control of the inspected party, but visual inspection of a space is not:

> [G]iven the placing of the words 'at the discretion of the inspected State Party' *before* the final half sentence, it is to be assumed that 'visual inspection of the interior of an enclosed space from its entrance' is the minimum alternative way of access the inspection team *will have to be provided with*.[107]

This reading of Paragraph 50 suggests that *no* areas may be totally hidden from an inspection team, but, at the very least, viewed from a doorway or through a window. This profoundly affects planning to protect national security and proprietary information during a challenge inspection.

The On-Site Inspection Agency, charged with advising U.S. government and private facilities on the fundamentals of treaty compliance, suggests additional managed access techniques:

> Careful inspection route planning is often the easiest and most economical method of protecting sensitive areas. By simply escorting inspectors on a pre-determined route, both between and within buildings, escorts can prevent the team from seeing some classified, sensitive or proprietary activities . . . . When the facility believes it cannot grant access into a building or area, an alternate means of demonstrating compliance must be suggested for those areas. Examples of such alternate means include showing inspectors convincing photographs or other documentation related to an inspector's concern. . . . In some cases, it may not be prudent to allow an inspector from a certain country to have access to a sensitive room or area . . . in extreme cases where route planning, alternative means and shrouding cannot be effective, it may be worthwhile to consider temporarily shutting down or moving operations in highly sensitive areas prior to allowing inspectors access.[108]

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107. *Id.* (emphasis in original).

108. ON-SITE INSPECTION AGENCY, SECURITY OFFICE, CHEMICAL WEAPONS CONVENTION: THE IMPACT 9-11 (Apr. 28, 1995).

These paragraphs show that there is no absolute, prearranged haven from challenge inspectors. The inspectors may request papers, read displays, and lift shrouds for a peek inside. Provided the concern is genuine and within the scope of the inspection mandate, it may be used to peer into areas which, under previous arms control inspection regimes, could be safely kept off limits at the inspected party's absolute discretion. This requires, then, that a managed access plan resemble not so much a linear script for a set-piece inspection, but rather a branching array of contingency plans that may have to be implemented on a moment's notice. It also requires escorts with the mental agility to recognize these situations as they arise, choose the best available back-up plan, or improvise one on the spot.

Interestingly, the CWC does not mention or prohibit operational deception, the intentional misleading of inspectors in areas not material to the object and purpose of the treaty. While deceiving the inspection team about possible non-compliance is a clear violation of the CWC, taking indicators of an unhideable national security secret, and adding to them deceptive indicators of a false secret, would deceive only those inspectors operating in bad faith as intelligence collectors.

The key to many of these managed access problems will be the precedent that evolves during the first challenge inspections. The On-Site Inspection Agency warns: "The U.S. representative must also consider any existing inspection precedents that may apply, as well as not setting a precedent that could be unacceptable to another U.S. facility during a future inspection."[109] The precedents that develop during the first challenge inspections will control the shape of all the following inspections. Many of today's theoretical concerns may be put to rest as the inspection teams negotiate away the potential problems we see today. However, it is also likely that numerous unanticipated problems will arise. The time to prepare for this formative period in arms control verification is now, allowing concerned parties to help shape, rather than merely follow, such precedent.

Arms control verification concerns were framed by the constitutional process of treaty ratification, specifically by three documents: Senate Resolution 75, providing the Senate's "understandings" of key provisions of the CWC upon its consent was conditioned;[110] the President's Certifica-

109. *Id.* at 21.

110. S. Exec. Res. 75, 105th Cong., CONG. REC. S3378, sec. 2, para. 18 (daily ed. Apr. 17, 1997).

tions and Report to Congress on the understandings;[111] and the Executive Order that implements the CWC and the Implementation Act.[112] These three documents provide some resolution to the issues raised in this article, but leave far more questions to be decided.

Section 2 of the Senate's resolution of advice and consent contains twenty-eight "understandings" of key provisions of the CWC.[113] Paragraph 3 states that fifty percent of outyear (beyond the current fiscal year) funds would be withheld from the U.S. contribution to the OPCW's operating budget if an independent internal oversight office were not established within that organization.[114] The Senate's principal concern was to insure that something resembling an inspector general would provide an extra layer of security for the protection of confidential information provided to the OPCW in the course of its inspections. Parallel to this concern is the provision in Paragraph 5, which governs intelligence sharing.[115] In this paragraph, the Senate forbids sharing intelligence information with the OPCW until formal procedures are established by the Director of Central Intelligence. The paragraph also calls for a number of reports, allowing the Senate to monitor closely the dissemination of this information.[116]

Paragraph 9 requires protecting the confidential business information of U.S. chemical, biotechnology, and pharmaceutical firms.[117] The Senate requires the Administration to certify annually that these industries are not being harmed by their compliance with the CWC.[118] The President's certification to the Senate included a paragraph specifically addressing this point, stating that these businesses "are not being significantly harmed" by their compliance.[119] The tenth paragraph of the Senate Resolution addresses compliance monitoring and verifying.[120] This understanding

111. President's Certifications and Report to the Congress in Connection with the U.S. Senate Resolution of Ratification of the Chemical Weapons Convention (Apr. 25, 1997), *available in The White House Virtual Library* (last modified Sept. 20, 1997) <http://library.whitehouse.gov> [hereinafter President's Certifications].

112. Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act, Exec. Order No. 13,128, 64 Fed. Reg. 34,703 (Jun. 28, 1999).

113. S. Res. 75, 105th Cong. at 2-63.

114. *Id*. at 3-6.

115. *Id*. at 7-14.

116. *Id*.

117. *Id*. at 21.

118. *Id*.

119. President's Certifications, *supra* note 111, at 1.

120. S. Res. 75, 105th Cong. at 21-29.

directs the President to provide a series of reports and briefings to the appropriate committee of Congress, keeping them fully informed on all aspects of compliance and attempts by signatories to circumvent the CWC.[121]

Paragraph 16 is intended to protect against the compromise of confidential business information, either from an unauthorized disclosure or a breach of confidentiality.[122] The former is, under the Senate understanding, a publication of confidential business information made by an OPCW employee and resulting in financial damage to the owner of the information.[123] The latter is an inappropriate disclosure of such information by an OPCW employee to the government of a State Party.[124] In both cases, the Senate states that it will withhold the standard punitive fifty percent of the annual dues to the OPCW until the offending party is made amenable to

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121. *Id*.

122. *Id*. at 43-48.

123. *Id*. at 44. The Senate Resolution states:

> (A) UNAUTHORIZED DISCLOSURE OF BUSINESS INFORMATION.—Whenever the President determines that persuasive information is available indicating that—
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> (i) an officer or employee of the Organization has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, and
>
> (ii) such practice or disclosure has resulted in financial losses or damages to a United States person,
>
> the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify the Congress in writing of such determination.

Id.

124. *Id*. at 46. The Senate Understanding states:

> (A) Breaches of confidentiality.—
>
> (i) CERTIFICATION.—In the case of any breach of confidentiality involving both a State Party and the Organization, including any officer or employee thereof, the President shall, within 270 days after providing written notification to Congress that the Commission described under Paragraph 23 of the Confidentiality Annex has been established to consider the breach.

Id.

suit in the United States or the injured party is otherwise made whole.[125] Executive Order (E.O.) 13,128 implementing the CWC addresses this issue in section 7:

> Sec. 7. The [United States National Authority, the State Department], in coordination with the interagency group designated in section 2 of this order, is authorized to determine whether disclosure of confidential business information pursuant to section 404(c) of the Act is in the national interest. Disclosure will not be permitted if contrary to national security or law enforcement needs.[126]

This language adds a step to the analysis: the executive branch is claiming the prerogative to first balance the consequences of challenging any given disclosure or breach against the interests of the nation as a whole, and only if the individual's interests preponderate will the Senate's procedure be followed. This issue may be hotly contested in the aftermath of a breach at a politically inopportune time.

As if to anticipate the contentiousness of the previous paragraph, Paragraph 17 of the Senate Resolution advances a controversial constitutional point, that the executive may not negotiate "no-amend-before-ratification" treaties, thereby depriving the Senate of its constitutional role of providing its advice and consent.[127] This is a much larger issue, and will not likely be settled within the context of the CWC.

Paragraph 18 is a straightforward prohibition against taking physical samples from an inspection site inside the United States to a laboratory outside the United States.[128] Given that a violative chemical substance can be identified on-site, this prohibition is a precaution against the "reverse engineering" of samples taken from sensitive government or commercial facilities. In its Certification, the Administration is in precise agreement with Congress on this point.[129] The absolute nature of this policy makes it simple for the commander on-scene to raise and enforce.

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125. *Id.* at 45-47.

126. Implementation of the Chemical Weapons Convention and the Chemical Weapons Convention Implementation Act, Exec. Order No. 13,128, 64 Fed. Reg. 34,703 (Jun. 28, 1999).

127. S. Res. 75, 105th Cong. at 48-50.

128. *Id*. at 51.

129. The Senate Resolution reads:

The Senate advises the Administration, in Paragraph 21, to make assistance teams from the On-Site Inspection Agency available to the owner or operator of any facility subject to routine or challenge inspections under the CWC.[130] Again, the President concurs, and he directs that such assistance be provided.[131]

Although no Fourth Amendment issues are raised when the federal government orders inspections of its own facilities, this is not the case when it orders inspections of privately owned sites. A treaty-imposed obligation, having been agreed to by the federal government, does not lift the prohibition against unreasonable searches and seizures. To address this concern in the context of the CWC, the Senate, in Paragraph 28, directed the Administration to obtain an administrative search warrant for a routine CWC inspection if the facility's owner refuses his consent (under the theory, apparently, that these former chemical weapons plants are part of a "closely-regulated industry").[132] The Senate further directed that the Administration obtain a criminal search warrant before conducting a CWC challenge inspection against a private owner's wishes.[133] The President, in his Certification, accepted this position and directed that such warrants be sought.[134]

Perhaps the only acceptable answer on constitutional grounds, this standard may be difficult to apply in the course of an actual inspection. The requirements for an administrative search warrant are not particularly onerous, and any private owners of former chemical weapons facilities are

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129. (continued)

> (18) LABORATORY SAMPLE ANALYSIS.—Prior to the deposit of the United States instrument of ratification, the President shall certify to the Senate that no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States.

Id. The Administration's Certification reads: In connection with Condition (18), Laboratory Sample Analysis, no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States. President's Certifications, *supra* note 111, at 2.

130. S. Res. 75, 105th Cong. at 52-53.

131. Exec. Order No. 13,128 at 2, 64 Fed. Reg. 34,703 (Jun. 28, 1999). The President actually authorizes a broader range of assistance, from "[t]he Departments of State, Defense, Commerce, and Energy, and other agencies, as appropriate . . ." *Id.*

132. S. Res. 75, 105th Cong. at 62-63.

133. *Id.*

134. President's Certifications, *supra* note 111, at 3.

not likely to refuse access after having been such an integral part of the CWC drafting and negotiation. The requirements for a criminal search warrant[135] are stricter. While the inspection mandate will state the chemical sought, it will not contain a full recitation of the evidence upon which the request is based. Indeed, such evidence would, by definition, have been gathered by a foreign sovereign for use against the United States in a good or bad faith attempt to search the facility in question.

Furthermore, the private owner of the facility would not have had anything to do with the chemical weapons program (all such facilities having been included within the routine inspection regime), and so would probably be less willing to consent to such a search. In addition, the director of such a facility would undoubtedly have confidential business information to protect, with a board of directors and a large number of shareholders looking over his shoulder. In this case, consent to search would be less likely, and the difficulty in meeting a mainstream judge's standard of probable cause could be problematic.

Finally, even if a federal judge could be found to issue a criminal search warrant for such an inspection, the prospect of a higher court staying the warrant for an interlocutory appeal could delay any outcome well beyond the negotiation period contemplated by the CWC. Given the constitutional standard which must be met, the prospect of forcing an uncooperative private party to undergo a challenge inspection is far more problematic than that of conducting a similar inspection at a government facility.

IV. The Commander's Dilemma

A. Protection of National Security Information

The legal authority requiring a commissioned officer to protect the national security information under his control is clear. Executive Order 12,958 governs classified national security information.[136] It is implemented through departmental regulations, such as *DOD 5200.1-R, the*

135. These requirements include: probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized. S. Res. 75, 105th Cong. at 62.

136. Classified National Security Information, Exec. Order No. 12,958, 3 C.F.R. pt. 333 (Apr. 20, 1995).

Department of Defense Information Security Program Regulation,[137] and the security instructions of the Departments of the Army, Navy, and Air Force. Under E.O. 12,958, the following categories of information are protected as national security information:

> (a) military plans, weapon systems or operation
> (b) foreign government information
> (c) intelligence activities (including special activities), intelligence sources or methods, or cryptology
> (d) foreign relations or foreign activities of the United States, including confidential sources
> (e) scientific, technological, or economic matters relating to the national security
> (f) United States government programs for safeguarding nuclear materials or facilities
> (g) vulnerabilities or capabilities of systems, installations, projects or plans relating to national security.[138]

These categories of information are, depending on their sensitivity, classified as CONFIDENTIAL, SECRET, or TOP SECRET. In addition to these vertical divisions, there are numerous horizontal divisions, or compartments, within any given level of classification. These restrict the flow of information relating to the most sensitive programs, known as special access programs.[139] Such programs are the most problematic for treaty verification purposes, in that very basic information about their nature is classified. The commanding officer of a ship, base, or unit charged with protecting such information is in a particularly precarious position.

Because military members may be charged under civilian statutes or the Uniform Code of Military Justice (UCMJ), there are two streams of legal liability for such an officer. First, under 18 U.S.C. § 793:

> (f) Gathering, transmitting, or losing defense information:
> Whoever, being entrusted with or having lawful possession or control of any . . . information, relating to the national defense,
> (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in viola

137. DOD DIRECTIVE 5200.1-R, *supra* note 4.

138. Classified National Security Information, Exec. Order No. 12,958, 3 C.F.R. pt. 333 § 1.5.

139. *Id.*

> tion of his trust . . . [s]hall be fined under this title or imprisoned not more than ten years or both.[140]

Second, under the UCMJ, a military member could be charged under Article 92, failure to obey order or regulation.[141] The security regulations of the Department of Defense and the military departments are regulations within the meaning of this article,[142] and so render the commanding officer liable to prosecution under Article 92(1). Conviction may carry a penalty of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.[143] Assuming the commanding officer of such a facility also received specific, lawful orders to protect the secrecy of his command, he would be further liable under Article 92(2). A conviction could result in a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months.[144]

Furthermore, the *Manual for Courts-Martial* specifies that a duty, for the purposes of Article 92(3), "may be imposed by *treaty*, statute, *regulation*, lawful order, standard operating procedure, or custom of the service."[145] Therefore, the commanding officer could be charged under Article 92(3) for either being derelict in performing his duties as specified in the security regulations, or for being derelict in performing his duties as specified in a treaty, the CWC. If the dereliction were through neglect or culpable inefficiency, the maximum penalty after conviction is forfeiture of two-thirds pay per month for three months and confinement for three months. If the dereliction was willful, the maximum penalty is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for

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140. 18 U.S.C.S. § 793(f) (LEXIS 1999).

141. U.C.M.J. art. 92 (LEXIS 1999).

> Any person subject to this chapter who—
> (1) violates or fails to obey any lawful general order or regulation;
> (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or
> (3) is derelict in the performance of his duties;
> shall be punished as a court martial may direct.

Id.

142. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 16c.(1)(a), at IV-23 (1998).

143. *Id.* para. 16e.(1), at IV-24.

144. *Id.* para. 16e.(2), at IV-25.

145. *Id.* para. 16c.(3)(a), at IV-24 (emphasis added).

six months.[146] In the face of these conflicting obligations, the ambiguity in the commanding officer's legal obligations does not benefit the commanding officer.

B. Chains of Command

The conduct of a CWC challenge inspection at a U.S. military facility is governed by *Chairman of the Joint Chiefs of Staff Instruction 2030.01, Chemical Weapons Convention Compliance Policy Guidance*.[147] The instruction first states that inspections of U.S. facilities overseas will be conducted pursuant to Host Country Agreements (HCAs) to be negotiated.[148]

Enclosure A to the instruction provides policy guidance. That guidance takes the form of a "Host Team Concept."[149] Paragraph (2)(c) of Enclosure A describes this concept:

> The unique and intrusive nature of inspections (especially challenge inspections) allowed for by the CWC and the requirement to maintain unity of command resulted in an expanded Host Team (HT) concept . . . that ensures compliance with the CWC without usurping military command authority. The HT will consist of a representative for the CJCS and/or [Office of the Undersecretary of Defense for Policy], the [Commander in Chief for that region of the world] and/or the Service combatant command component (in the case of [outside the United States] challenge inspection), each Service and DOD component with equities that are affected, the OSIA escort team chief, and the inspected installation/site/unit commander. The HT leader, for challenge inspections at military facilities, will normally be a CJCS representative of flag rank (or equivalent).[150]

While this concept does preserve the integrity of the operational chain of command, it does set up a parallel chain to the NCA. A flag officer or

146. *Id.* para. 16e.(3), at IV-25.

147. CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 2030.01, CHEMICAL WEAPONS CONVENTION (CWC) COMPLIANCE POLICY GUIDANCE (21 July 1997) [*draft*] [hereinafter CJCSI 2030.01].

148. *Id.* at 2.

149. *Id.* at A-2.

150. *Id.*

civilian of equivalent rank, will report to the Under Secretary of Defense for Policy. Although this is a path upward for passing information and not a path downward for passing orders, its existence and operation will present a strong force with which the unit commander will have to deal. Diffusing responsibility even further is the existence of the Compliance Review Group (CRG):

> A Department of Defense-wide working group, chaired by the [Office of the Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs], that conducts an executive-level review of Chemical Weapons Convention compliance issues. The Compliance Review Group meets on an as-needed basis to address key issues, such as challenge inspections.[151]

The CRG will be activated during challenge inspections, and the HT leader may well consult with that group on issues that cannot be resolved at the inspection site. As decisions emerge from the consensus of that group, recommendations will be prepared for the Undersecretary of Defense for Policy and the Secretary of Defense.

As the instruction itself points out, "[n]othing in this guidance . . . alters existing DOD command relationships or the operational chain of command. For inspections at service facilities . . . the unit commander retains ultimate responsibility for the safety and security of his . . . command."[152] The instruction continues:

> It is recognized that the obligation to demonstrate CWC compliance and a commander's responsibility for safety, security, and operations may, in some instances, impose what appear to be competing requirements. When necessary to resolve issues impacting compliance, the HT, which includes the unit commander, will coordinate consultation with higher authority. Resolution of the matter within the established operational chain of command, the CWCRG, or as coordinated with the arms control interagency will be transmitted via the respective operational chain of command to the HT for execution.[153]

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151. *Id.* at GL-II-3.
152. *Id.* at A-5.
153. *Id.*

However information reaches the NCA, once a decision has been made by the Secretary of Defense or his only superior, the President, then the decision will be passed back down the operational chain of command to ensure its legality and execution. This solves one problem but creates another. With multiple paths to the decision makers, the operational and parallel chains may, if competing equities are involved and because of time constraints, race to the NCA to get the desired decision first. With the military officers in the combatant commander's operational chain principally concerned with the security of the unit, and the political appointees in the HT structure principally concerned with compliant transparency under the CWC, the need for deconfliction by staffing is evident.

Adding another layer of confusion to an already difficult problem is the very nature of the Special Access Program community. The operational chain of command may be "program cleared" and aware of the peculiar security vulnerabilities of a particular ship, aircraft, or facility. But rarely, if ever, will any members of the parallel chain be cleared. In effect, their decisions will be made without what is probably the most relevant information. The only solutions are: (1) to "program clear" the members of this chain–unlikely given the requirement to keep those informed to an absolute minimum, or (2) to rely on the few program-cleared people in this parallel chain to speak up, to the extent they can, and to receive a large amount of deference from those not in the know.[154]

One safeguard is the normal staffing process, in which the affected service's representative on the CRG would argue against a CRG recommendation to the Secretary that the decision of a commander in the field be overturned. If such a decision were taken, the service representative would immediately report to his service, allowing a parallel reclama to make its way to the Secretary up the operational chain of command. Of course, this

154. The Navy's International Programs Office has a large, well-exercised program in place for protecting Service equities in the event of a CWC challenge inspection. However, even the best such program can protect only those secrets for which its members are cleared. It is likely that this office's personnel are not "read-in" to every such program, requiring short-notice clearance for Navy IPO advisers *after* the facility has been identified for inspection. This will leave minimal time for detailed preparation. *Executive Summary: Challenge Inspection Training Exercise*, Navy International Programs Office, September, 1998. The Army has a similar, well-thought out program, but, because the Army is responsible for the majority of declared sites in the United States, it has focused largely on scheduled inspections. The new Army Soldier, Biological, and Chemical Command at the Aberdeen Proving Grounds will assist in preparation of Army sites subjected to challenge inspections. *Army Challenge Inspection Preparations*, U.S. Army Soldier, Biological, and Chemical Command, April, 1999.

system works only if the service representative is sensitized to the value of the installation and the true reason for the commander's apparent intransigence.

One component of the HT concept preserves the unit commander's authority and enables him to raise compliance concerns. The HT concept calls for "consensus decision making."[155] That process is defined in the instruction's glossary:

> Resolution of all issues pertaining to DOD compliance with the CWC, the commencement and conduct of the inspection shall be accomplished by consensus among host team members. This will be interpreted more stringently than simple majority. All matters involving safety, operations, and security shall have the concurrence of all members of the host team, and if not, shall be referred to the operational chain of command [sic] for resolution.[156]

At the very least, then, the unit commander and program-cleared personnel can make their concerns known, in a general way, to the other members of the HT. The issue may then be raised to a level where the most senior program-cleared officials can evaluate the recommendations of the parallel chain with a fresh reminder of the true equities involved.

One additional solution may be found in the instruction's treatment of naval nuclear powerplants. The instruction includes this very specific black-letter exemption, which will serve, at a minimum, as the initial U.S. negotiating position in a future challenge inspection of a U.S. nuclear warship.[157] It is possible that other organizations with similar and perhaps even more firmly grounded concerns will carve out specific exemptions in the instruction's next revision. Of course, even the most definitive domestic exceptions, granted by the highest levels of the U.S. defense establishment, are merely opening positions in an international challenge inspection negotiation. The exceptions are also subject to reversal by the NCA at any time, based on any number of ephemeral policy considerations.

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155. CJCSI 2030.1, *supra* note 148, at A-3
156. *Id.* at GL-II-3.
157. *Id.* at A-6.

B. Recommendations

The commander's dilemma, then, is to provide the required compliance with the CWC, within the framework of the governing Chairman of the Joint Chiefs of Staff Instruction, without violating the very specific statutory and regulatory regime that requires him to protect national security information. In the most difficult cases, this information cannot be hidden as easily as locking a file cabinet or turning off a computer. These two competing requirements may not just abut on each other, but may actually overlap.

To make matters worse, traditional sources of expertise on treaty compliance will not be available. The On-Site Inspection Agency's Defense Treaty Inspection Readiness Program, created to address the broad problem of protecting proprietary or classified information within the inspection regime, is not staffed to handle the most highly classified or tightly compartmented programs. There are very few attorneys with access to such information, and fewer still with expertise in treaty compliance. What advice, then, could such an attorney offer to a client in such a difficult position?

Given the dual imperatives for protecting national security information and complying with the CWC, it is important that the military commander be given clear, authoritative guidance on his responsibilities.

It is a distraction to ask which legal obligation trumps the other. The legislation, executive orders, and departmental instructions that spell out the commander's duty to protect classified information are no more or less binding than the treaty, consented to by the Senate and signed by the President. Both are the law of the land, and both must be obeyed.

The key difference is not in the *priority* of compliance, but in the *nature* of compliance. The legal regime protecting national security information is very specific, leaving little or no flexibility for the commander. In short, the commander is not given the option of "trading" protected information for enhanced compliance. The commander may only be released from this obligation by a legal order from a superior in his operational chain of command, a superior who also has the legal authority to waive the requirements of the governing classification guide. Without such an order, these requirements are absolute limits within which the commander must navigate.

Treaty requirements, on the other hand, appear to be far more flexible. The terms of inspection are left open to on-site negotiation. The absolute legal requirement to reach the end of demonstrated compliance is balanced by flexible means of achieving it. Indeed, this flexibility is necessary to meet the myriad unanticipated situations that could arise under an inspection regime so wide-ranging and intrusive.

The answer, then, appears to be that the commanding officer of a sensitive facility should review program classification guidance in light of the character of the CWC and follow-on inspection regimes. Having identified the information which still requires absolute protection, the military can plan around these secrets to find creative alternative means to demonstrate compliance. This will be relatively easy for those activities whose secrets are located in computers that can be turned off or in file drawers that can be locked. For those activities whose classified missions are evident from their physical layout–that is, those facilities which have very large, obvious secrets to protect–such creative planning becomes a matter of national urgency.

Once this information has been identified, the commanding officer must make himself aware of his rights and responsibilities under the CWC. He should plan for every plausible contingency and, with the assistance of a program-cleared attorney, confront the major "what ifs" of a challenge inspection.

> What if the Inspection Team leader requests access to a space specifically protected by the commander's classification guidance?
>
> What if the Host Team leader, having decided what the Host Team's consensus will be, orders the commanding officer to grant access that the commander believes is not authorized?
>
> What if the Under Secretary of Defense for Policy, on hand to ensure a smoothly compliant inspection, orders the commanding officer to stand aside?
>
> What if the Secretary of State, telling the commander that she is the President's representative for chain-of-command purposes, orders him to grant access to the Inspection Team?

What if the commander's immediate superior in the operational chain of command orders him to grant access to the Inspection Team?

What if the theater commander in chief gives the order?

What if the Secretary of Defense gives the order?

The answer to all of these questions may be found in a single line of reasoning. The commanding officer of the facility is not legally bound to follow the orders of anyone outside his operational chain of command, no matter what that person's rank. That solves (legally, if not politically) the problem of the Inspection Team leader, the Host Team leader, the Under Secretary, and even the Secretary of State. Merely claiming representational authority does not confer it, and the operational chain of command remains intact.

Slightly more difficult are the cases in which the order comes from the commanding officer's immediate superior, the Secretary of Defense, or the commander in chief. Here, another requirement comes into play: the superior must not only be in the commanding officer's operational chain of command, but must be at the appropriate level to waive the applicable classification guidance. It is possible that a certain program's secrets may only be revealed at the discretion of the NCA, which would leave the hypothetical order from the Secretary of Defense as the only lawful order.

The military commander, then, must know his operational chain of command. He must know what particular pieces of classified information may be released by what level of authority. Further, he should always insist on getting such an order, even an apparently lawful one, in writing. This will inhibit the creativity of hindsight.

The bottom line for the commanding officer of a sensitive facility is that he remains responsible for the security of his mission; the statutory regime for the protection of classified information is specific and severe. He is also responsible for providing access to a challenge inspection team, but only within the bounds of unclassified information. For those times when he is unable to provide complete access to the inspection team, he must provide alternative means of satisfying their legitimate concerns. While this second responsibility is as legally binding as the first, it is far more flexible in the means by which it may be accomplished. The commander has the final say on access to his facility, and that say may be

reversed only by a superior in the operational chain of command who possesses the authority to waive the applicable classification guidance. All others present to "assist" him in demonstrating transparent compliance deserve a polite but firm "no."

Given the inevitable high profile of such an inspection, it will be an enormous professional challenge for the military, intelligence, and legal authorities in this field to protect these very large secrets and still provide the transparency required to maintain America's moral leadership in arms control.