

# Responsibility in Verification Procedures under the Chemical Weapons Convention\*

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## 1. INTRODUCTION

Responsibility is generally understood as the consequence of a breach of an obligation. On the international scene, the International Law Commission (ILC) contributed to the codification of law on the international responsibility of states and international organisations (IOs) by putting together comprehensive drafts to summarize customary rules governing international responsibility. The ILC adopted the Draft Articles on the Responsibility of International Organisations (ARIO)<sup>1</sup>, which is considered as a normative standard for the responsibility of all IOs.

Under the ARIO, in order for an IO to be held responsible under international law, the following circumstances need to be established: (i) the IO is in breach of a norm of international law; (ii) the IO is a subject of rights and obligations under international law; (iii) the act is attributable to the IO; and (iv) the wrongfulness of the act cannot be precluded.<sup>2</sup> Further, the ARIO sets forth the legal consequences of an internationally wrongful act, which are generally (i) the cessation of the internationally wrongful act; (ii) the reparation of the injury caused.<sup>3</sup>

This paper wishes to test certain rules of the ARIO against the verification activities of the Organisation for the Prohibition of Chemical Weapons (OPCW), the IO established by the Chemical Weapons Convention (the 'CWC' or the

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\* The views expressed in this article are those of the author.

<sup>1</sup> Draft articles on the responsibility of international organizations adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, para. 87). The report appeared in *Yearbook of the International Law Commission*, 2011, vol. II, Part Two. (hereinafter: ARIO)

<sup>2</sup> Chrysanthi Samara: International Responsibility of International Organizations (The Draft Articles of the International Law Commission). <https://ssrn.com/abstract=3480061> (2023.05.27.).

<sup>3</sup> Ibid.

‘Convention’)<sup>4</sup> to ensure and oversee the implementation of the CWC and to conduct the international verification of States Parties’ compliance. The author focuses on the verification activities of the OPCW in light of the fact that the OPCW is the first and only IO created on the arms control filed with the purpose to supervise the elimination of a complete category of weapons of mass destruction, chemical weapons (CW). To achieve this end, the OPCW was granted unprecedented powers to conduct various verification activities which are highly intrusive to the sovereignty of States Parties to the Convention in the form of on-site inspections.

First, we test the applicability of the ARIIO to the OPCW and briefly summarise the functioning of the OPCW to understand the rights and obligations of its organs as well as the division of responsibilities between the OPCW, its organs and States Parties. Second, we will take a closer look at the verification procedures established by the CWC and examine the three phases of verification: (i) decision-making on the conduct of verifications; (ii) the conduct of on-site inspections, with special attention paid to the privileges and immunities granted to the members of the OPCW inspection team; and (iii) the decision-making on the results of inspections.

The author wishes to put forward that certain aspects of the below assessment are based on analogies and presumptions applied by the author for the case of the OPCW, as certain questions examined in this article are uncharted territory in literature and international legal practice relating to the responsibilities of the OPCW.

## 2. THE APPLICABILITY OF THE ARIIO

Article 1 of the ARIIO provides that the rules of the ARIIO shall apply to the international responsibility of an IO for an internationally wrongful act. In addition, the ARIIO shall apply to the international responsibility of a state for an internationally wrongful act in connection with the conduct of an IO. With respect to international organisations, the ARIIO presents a uniform approach<sup>5</sup> defining an ‘international organisation’ as an organisation established under international law in possession of its own international legal personality.<sup>6</sup> Accordingly, as a preliminary question, we shall understand the legal personality and the functions of the OPCW.

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<sup>4</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Sept. 3, 1992. (hereinafter: CWC) The Convention opened for signature on 13 January 1993 and entered into force on 29 April 1997.

<sup>5</sup> Noemi Gal-Or – Cedric Ryngaert: From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organisations (DARIO) – The Responsibility of the WTO and the UN. *German Law Journal* 2012. No. 3. p. 515

<sup>6</sup> ARIIO Art. 2 (a)

The international legal personality of the OPCW is not expressly stated in the CWC 'as such', however, based on the provisions of the Convention, it is possible to establish that the OPCW is entrusted with municipal legal personality and international legal personality.

The municipal personality of the OPCW is granted by Article VIII(48) of the CWC, based on which the OPCW "shall enjoy on the territory any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions". In addition, Article VIII(50) clarifies that "[t]he legal capacity, privileges and immunities [...] shall be defined in agreements between the Organisation and the States Parties".<sup>7</sup> The referenced agreements between the OPCW and States Parties are *in concreto* the Headquarters Agreement and the Privileges and Immunities Agreements, the latter being concluded based on a model agreement. These bilateral agreements enable the OPCW to contract, to acquire and dispose of movable and immovable property and to institute and act in legal proceedings.<sup>8</sup> It shall be emphasized that the municipal personality of the OPCW may be exercised within the scope of its mandate under the aforementioned agreements.

Concerning the establishment of the international legal personality of the OPCW, the Convention grants a wide range of rights and obligations to the OPCW. Namely, the OPCW has the right to be party to a lawsuit both as claimant or defendant, the OPCW may enter into international agreements with states and other IOs, and the OPCW's independence from its member states is expressly stipulated in the CWC. Further, OPCW organs have the competence to make decisions on their own (as detailed below under chapter 3), which is considered as an indication of the existence of *volonté distincte* of the organs as well as the OPCW.<sup>9</sup>

As demonstrated above, the OPCW has an international legal personality and can act independently from its members on the international scene. This means that the OPCW is covered by the definition of 'international organisation' as defined by the ARIO, in other words, the OPCW is within the material scope of the ARIO and thus the rules of the ARIO are applicable to the OPCW. It also follows, that as an international legal person independent from its members in possession of its *volonté distincte*, the OPCW must itself bear the consequences of any of its illegal actions causing damage to others, which is commonly referred to as *responsabilité distincte*.<sup>10</sup>

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<sup>7</sup> Bimal N. Patel: The Accountability of International Organisations: A Case Study of the Organisation for the Prohibition of Chemical Weapons. *Leiden Journal of International Law* 2000. No. 3. p. 578.

<sup>8</sup> Alberto E. Dojas: The Privileges and Immunities of the Organisation for the Prohibition of Chemical Weapons. *International Organizations Law Review* 2015. No. 1. p. 247

<sup>9</sup> Patel: op. cit. p. 579

<sup>10</sup> Niels Blokker: International Organizations and their Members. 'International Organizations Belong to All Members and None' - Variations on a Theme. *International Organizations Law Review* 2004. No. 1.

### 3. CHAIN OF RESPONSIBILITY AMONG THE ORGANS OF THE OPCW

Despite its unprecedented mandate<sup>11</sup>, the structure of the OPCW was built on the basic tripartite model of international organisations.<sup>12</sup> Accordingly, the OPCW has a plenary organ with the most extensive competence, the Conference of the States Parties (CSP); an independent secretariat, the Technical Secretariat (TS); and a non-plenary, executive organ, the Executive Council, representing only a section of members responsible for dealing with current issues in the period between the meetings of the CSP and supervising the activities of the TS.<sup>13</sup>

The CSP is composed of all members of the Organisation with each State Party having one representative.<sup>14</sup> The majority of the members constitute the quorum for the CSP and each member has one vote. As a general rule, the CSP shall take decisions on procedure by a simple majority and – as far as possible – by consensus on matters of substance. If consensus is not attainable, the Chairman of the CSP shall defer any vote for 24 hours and during such deferral, shall make every effort to achieve consensus. In case consensus is still not possible, the CSP can adopt the decision by a two-thirds majority of members present and voting.<sup>15</sup> Apart from its exclusive competences<sup>16</sup>, any questions, matters or issues within the scope of the CWC fall within or could be drawn in the competence of the CSP.<sup>17</sup>

The Executive Council consists of 41 members who are elected by the CSP for a term of 2 years. During the election of members, due regard must be paid to equitable geographical distribution, to the importance of the chemical industry of States Parties, to political and security interests.<sup>18</sup> Each member of the Executive Council has one vote and, as a general rule, the Executive Council adopts its decisions by a two-third majority of all of its 41 members.<sup>19</sup> The Executive Council is – as indicated by its name – the executive organ of the OPCW, which is responsible to the CSP. Its functions are defined by the Convention, in addition to which the CSP may delegate certain additional tasks.<sup>20</sup>

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p. 158

<sup>11</sup> Cf. CWC Art. VIII(1) and (5)

<sup>12</sup> Treasa Dunworth: *Towards a Culture of Legality in International Organizations: The Case of the OPCW*. *International Organizations Law Review* 2008. No. 1. p. 121.

<sup>13</sup> *Blokker*: op. cit. p. 148

<sup>14</sup> CWC Art. VIII(9)

<sup>15</sup> CWC Art. VIII(16)-(18)

<sup>16</sup> E.g. adoption of the programme and budget of the Organization, decision on financial contributions, election of the Executive Council, appointment of the Director-General, etc. See CWC Art. VIII(21)

<sup>17</sup> CWC Art. VIII(19)

<sup>18</sup> CWC Art. VIII(23)

<sup>19</sup> CWC Art. VIII(29)

<sup>20</sup> CWC Art. VIII(30)-(34)

The main task of the TS is to assist the CSP and the Executive Council in the performance of their functions and to carry out the verification measures.<sup>21</sup> Apart from the regular administrative, technical and support functions, the TS has a remarkable authority in connection with scheduling and conducting verifications. The head and chief administrative officer of the TS is the Director-General who is appointed by the CSP upon the recommendation of the Executive Council. Accordingly, the Director-General is responsible to the CSP and the Executive Council.<sup>22</sup>

As Patel explains, there are three aspects indicating the strength of internal accountability within an international organisation. These are, the structure of the IO, the operation of institutional law principles in the functioning of the IO and the nature of the IO's decision-making processes. Examining these factors against the OPCW, it can be established that the OPCW meets the representativeness criterion with regard to the composition of the CSP and the Executive Council, as discussed above. Further, the CWC explicitly states that decisions of the political organs of the OPCW of substance shall be based on consensus, enhancing the credibility and the legitimacy of such decisions. The chain of responsibility among OPCW organs provides a system of checks and balances which also support the accountability of the OPCW itself.<sup>23</sup>

On the negative side, there are two aspects where the OPCW could strengthen the soundness of its internal and external international accountability. These are transparency regarding the operations of the Organisation and building up a culture of legality. Regarding the former, transparency is naturally limited by the politically sensitive nature of military, trade and business activities<sup>24</sup>, however, without prejudice to keeping military, trade and business secrets confidential, it can be argued that transparency of the activities of the OPCW and the information it possesses should be presented to the international community in a wider and more systematic manner to build confidence concerning the activities of the OPCW. Concerning the latter, the lack of legality in the OPCW could be grasped in the number of questions relating to the precise powers of the OPCW organs, especially with regard to the division of responsibilities. For example, the CWC provides that the CSP shall be responsible for overseeing the implementation of the Convention and to accept the annual budget of the Organisation, which sets financial limitations on the number of verifications, however, it is the Technical Secretariat which is entrusted by the CWC with the exclusive responsibility to carry out the verification measures by determining the frequency and location of inspections.<sup>25</sup>

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<sup>21</sup> CWC Art. VIII(37)

<sup>22</sup> CWC Art. VIII(41)-(44)

<sup>23</sup> *Patel*: op. cit. p. 581-582

<sup>24</sup> *Patel*: op. cit. p. 582

<sup>25</sup> *Dunworth*: op. cit. p. 121-122

#### **4. VERIFICATION MEASURES – A BRIEF SUMMARY**

By way of background, it is commonly understood that the most crucial part of the CWC's compliance management regime is verification through on-site inspections, which is performed by the Technical Secretariat. The CWC's Verification Annex sets out detailed rules on the conduct of inspections, which are complemented by the bilateral facility agreements the OPCW has entered into with States Parties.<sup>26</sup>

There are three types of inspections established by the Convention: (i) routine inspections, (ii) challenge inspections and (iii) investigations of alleged use. The purpose of routine inspections is twofold: on the one hand, routine inspections aim to verify the declarations on the destruction of chemical weapons, storage facilities and chemical weapons production facilities; and on the other hand, inspections are targeted at verifying that the industrial activities of States Parties relating to Scheduled chemicals are in compliance with the restrictions of the Convention, i.e. that Scheduled chemicals are used for peaceful purposes.<sup>27</sup> Challenge inspections and investigations of alleged use are irregular verification measures which are intended to detect and clarify States Parties' potential non-compliance with the provisions of the CWC. Accordingly, for the purpose of assessing questions relating to responsibility of stakeholders, we will divide verification measures into two categories – routine inspections and non-routine inspections<sup>28</sup> – on the basis of the different functions they are intended to fulfil and the fact that decision-making processes differ in line with such functions.

#### **5. RESPONSIBILITY FOR DECISION-MAKING ON THE CONDUCT OF VERIFICATIONS**

##### **5.1. Routine inspections**

The basis of planning routine inspections is the declarations submitted by States Parties both with respect to destruction activities as well as activities concerning Scheduled chemicals. The declarations regime of the CWC constitutes the basis of the OPCW's monitoring system, under which States Parties are obliged to submit detailed initial and annual declarations to the OPCW. It is noted that as the destruction phase reaches its end<sup>29</sup> the focus of routine inspections inevita-

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<sup>26</sup> See e.g. Ralf Trapp: Compliance Management under the Chemical Weapons Convention. UNIDIR, Geneva 2019.

<sup>27</sup> See the CWC Verification Annex for more details.

<sup>28</sup> I.e., challenge inspections and investigations of alleged use.

<sup>29</sup> 99% of the chemical weapons stockpiles declared by possessor states have been verifiably destroyed according to the official records of the OPCW. Source: OPCW by the Numbers <https://opcw.org> (2023.03.12.).

bly shifts to the regular inspection of the chemical industry of States Parties. Due to the fact that routine inspections are conducted on the basis of States Parties' declarations and on the Schedules of the Convention listing dangerous chemicals with the highest potential to being used as chemical weapons, declarations shall be carefully reviewed as they might give rise to the liability and/or responsibility of the submitting State Party if a declaration contains false information or if the submitting State Party fails to provide all relevant information.<sup>30</sup>

The particular facilities to be inspected to verify the destruction of chemical weapons are chosen by the Technical Secretariat in a way to preclude the prediction of the precise date of the inspection. The guidelines for the frequency of systematic on-site inspections is determined by the TS taking into consideration the recommendations of the CSP.<sup>31</sup> The TS shall prepare a draft inspection plan which need to be agreed with the inspected State Party. Any differences between the TS and the inspected State Party shall be resolved through consultations, and, if necessary, the matter may be forwarded to the Executive Council for appropriate action.<sup>32</sup> The agreed verification plan needs to be approved by the Executive Council. If there are objections by any member of the Executive Council that cannot be resolved through consultation with the TS, the matter shall be referred to the CSP.<sup>33 34</sup>

The verification of the activities of the chemical industries of States Parties concerning Scheduled chemicals is also carried out through on-site inspections at the declared plant sites. The programme and the budget adopted by the CSP contains a separate item for the programme and budget for verification of the chemical industries of States Parties. It is clear from the text on the Convention that the planning and conduct of inspections is the task of the TS. During the selection of plant sites for inspection and the decision-making on the frequency and intensity of inspections, the TS considers the risk level of the object, the characteristics of the plant site and the nature of activities carried out there, also taking into account the facility agreement entered into with State Parties respectively.<sup>35</sup> In case of plant sites producing Schedule 3 chemicals, the Technical Secretariat randomly selects sites for inspection by using a specially designed computer software weighing equitable geographical distribution of inspections, the chemicals in question, the characteristics of the plant site and the nature of

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<sup>30</sup> *Patel*: op. cit. p. 584-585

<sup>31</sup> CWC Verification Annex Part IV(A)(44)

<sup>32</sup> CWC Verification Annex Part IV(A)(53)

<sup>33</sup> CWC Verification Annex Part IV(A)(56)-(58)

<sup>34</sup> A similar multi-level procedure involving the three organs of the OPCW as well as States Parties is established for planning the inspection of the destruction of CW production facilities [See CWC Verification Annex Part V(B)(36)-(39)]

<sup>35</sup> CWC Verification Annex Part VII(B)(13)-(14), (20)

the activities carried out there.<sup>36</sup> In principle, no plant site should receive more than two regular inspections per calendar year.<sup>37</sup>

It can be concluded from the above that, primarily, it is the responsibility of the Technical Secretariat to select the facilities that are to be inspected. Accordingly, the TS shall ensure that due regard is paid to the fundamental principles – impartiality and independence – applicable to verification. Therefore, a potential controversy in the selection process of inspections lies in the fact that the CSP, the political organ of the OPCW has powers to interfere with the selection of sites for inspection using (or potentially abusing) its powers relating to the approval of the annual budget of the OPCW that could restrict the conduct of regular inspections. By way of an example, the CSP adopted budgets in the early years of the OPCW's existence, in 1999 and 2000, reserving 50 budgeted inspections for States Parties that had not made declarations until that point based on the CSP's understanding that the chemical industries of more developed States Parties are planned to be subject to more inspections from the TS. This tension between the CSP and the TS indicated early on that questions regarding the powers and responsibilities of OPCW organs are yet to be resolved. A more current example relates to the selection process used by the TS to define which sites are to be selected and in what frequency. This process is entirely within the competence of the TS without any review mechanism being established by the Convention. In the absence of review mechanisms, at the very least, transparency should be strengthened in relation to the selection processes applied by the Technical Secretariat to strengthen its accountability.<sup>38</sup>

## 5.2. Non-routine inspections

The CWC provides that a State Party, before requesting a challenge inspection shall first make every effort to clarify and resolve the issue through exchange of information and consultations among themselves concerning any doubts relating to potential non-compliance with the Convention.<sup>39</sup> States Parties also have the right to turn to the Executive Council to assist in clarifying any ambiguous situation concerning the possible non-compliance of another State Party.<sup>40</sup> If the matter cannot be resolved by the actions of the Executive Council, the Executive Council can request a special session of the CSP to consider the matter and recommend any measures the CSP deems appropriate to resolve the situation<sup>41</sup> with consensus or, if consensus is not possible, with a two-thirds majority

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<sup>36</sup> CWC Verification Annex Part VIII(B)(14)

<sup>37</sup> CWC Verification Annex Part VII(B)(22) and Part VIII(B)(15)

<sup>38</sup> *Dunworth*: op. cit. p. 122-123

<sup>39</sup> CWC Art. IX(2)

<sup>40</sup> CWC Art. IX(3)-(5)

<sup>41</sup> CWC Art. IX(7)



of members present and voting. Since the main element of the actions of the Executive Council and the CSP in this regard is decision-making, the author's assessment of responsibility-related questions in the decision-making process presented under chapter 7 also apply to this aspect.

The CWC grants States Parties the right to request an on-site challenge inspection on the territory of another State Party on an "any place, any time" basis to clarify any resolve any questions concerning potential non-compliance with the provisions of the Convention. The challenge inspection request with supporting evidence shall be presented to the Executive Council and the Director-General for immediate processing. It is the competence of the Director-General and the Technical Secretariat, and, more closely, the inspectors selected by the Director-General to conduct challenge inspections under the consideration of the Executive Council.<sup>42</sup> However, in the absence of any actual challenge inspections being completed during the existence of the OPCW, the extent of the Executive Council's revision powers remains unclear. The only clear power of the Executive Council in relation to challenge inspections is its right to decide by a three-quarters majority of all its members against carrying out the challenge inspection if it considers the inspection request to be frivolous or clearly beyond the scope of the Convention. Neither the requesting not the inspected State Party shall participate in the decision-making on such question.<sup>43</sup>

The requested State Party has the right and the obligation to demonstrate its compliance and does not have the right to refuse the challenge inspection on its territory, regardless of its political, economic or military status. This means that States Parties are treated equally by the CWC during a potential challenge inspection.<sup>44</sup> Further, the Convention is drafted to prevent any potential abuse of voting rights during the Executive Council's vote on vetoing the conduct of a challenge inspection by defining the composition of the Executive Council taking into account the equitable distribution of powers regarding geographical, political, security and chemical industry interests<sup>45</sup> and setting a higher minimum for successful decision-making requiring three-quarters majority of all Executive Council members instead of the general majority of two-thirds defined by the CWC for deciding on matters of substance.

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<sup>42</sup> CWC Art. IX(8), (16)

<sup>43</sup> CWC Art. IX(17)

<sup>44</sup> *Patel*: op. cit. p. 586

<sup>45</sup> Cf. CWC Art. VIII(23)

## 6. RESPONSIBILITY IN CONNECTION WITH THE CONDUCT OF ON-SITE INSPECTIONS

The conduct of – both routine and non-routine – on-site inspections by OPCW inspectors is guaranteed by the detailed privileges and immunities the Convention accords to inspectors and inspection assistants. Generally speaking, the immunities of international organisations (and their representatives) is initially developed through the established system of sovereign immunities, however, the underlying rationale of the immunities accorded to IOs differ significantly. The foundation of the immunities of IOs is the doctrine of functional necessity, according to which they are entitled to privileges and immunities that are necessary for the fulfilment of their purposes laid down by their mandates. Functional necessity grants a positive right to IOs to carry out their tasks independently and a negative obligation on member states to respect the independence of the IO to act in their common interest.<sup>46</sup>

The constitutive documents of IOs, such as the CWC in case of the OPCW, lists specific privileges and immunities accorded to the IO and its representatives. A notable distinguishing element of the immunities of IO representatives is that they have the right to invoke them against their state of nationality or residence as well.<sup>47</sup> The importance of this kind of protection was confirmed by international judicial practice on several occasions.<sup>48</sup>

The most important legal source of the privileges and immunities of OPCW inspectors is Part II(B) of the Verification Annex of the CWC. On that basis, each State Party shall provide the visas and other documents necessary for inspectors and inspection assistants to enter/exit and reside on the territory of the State Party to enable them to conduct on-site inspections in line with their mandate. Further, members of the inspection team shall be accorded the inviolability granted to diplomatic agents by Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961. Inviolability protects the living quarter and office premises, the papers and correspondence, samples and equipment, etc. which belong to the inspection team in connection with their inspection mandate.<sup>49</sup>

The obligations of inspectors are also aimed at ensuring their independence from the inspected State Party. Accordingly, members of the inspection team are not allowed to engage in any professional or commercial activity for their per-

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<sup>46</sup> Teresa F. *Mayr*: Where Do We Stand and Where Do We Go. The Fine Balance between Independence and Accountability of United Nations Experts on a Mission. *International Organizations Law Review* 2018. No. 1. p. 137

<sup>47</sup> *Mayr*: op. cit. p. 138

<sup>48</sup> See e.g. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion) [1989] ICJ Rep 177 ('Mazilu').

<sup>49</sup> CWC Verification Annex Part II(B)(10)-(11)

sonal benefit on the territory of the inspected State Party and they are obliged to respect the laws and regulations of the inspected State Party, further, they shall refrain from interfering in the internal affairs of the inspected State Party.<sup>50</sup>

In addition to the provisions of the Convention, Privileges and Immunities Agreements (PIAs) and Facility Agreements (FAs) contain detailed, state-specific rules for on-site inspections, including regulations on the privileges and immunities of the members of the inspection team.<sup>51</sup>

The Convention specifies a primary method for the settlement of disputes that arise in relation to the privileges and immunities of inspectors on-site. Questions relating to the privileges and immunities of OPCW inspectors are closely related to the accountability and/or responsibility of the OPCW, since the actions of inspectors as the professional staff of the OPCW within their mandates are attributable to the OPCW. If the inspected State Party or host State Party considers that there has been an abuse of privileges and immunities on the inspectors' side, first, consultations shall be held between the State Party and the OPCW Director-General to determine whether any such abuse has occurred and, if so, to prevent a repetition. As an *ultima ratio* the Director-General has the right to waive the immunity of a member of the inspection team when the Director-General considers that there has been an abuse of privileges and immunities or in case of a serious breach of confidentiality<sup>52</sup> and the immunity would impede the course of justice. The waiver of immunity shall always be express and without prejudice to the provisions of the Convention.<sup>53</sup>

The model Privileges and Immunities Agreement (commonly referred to as the 'MAPI') contains specific provisions for the case when an OPCW expert may be required to leave the territory of the State Party on account of any activities concluded by him/her in his/her official capacity in case of an abuse of privileges committed outside official functions. The request should come from the Government of the State Party in question, more precisely, the order to leave the country issued by the territorial authorities need to be approved by the Foreign Minister of the State Party. Such approval of the Foreign Minister can only be given in consultation with the OPCW Director-General. In case expulsion proceedings are initiated against the OPCW inspector, the Director-General may act in such proceedings on behalf of the OPCW inspector against whom the proceedings are instituted.<sup>54</sup>

Article 8 of the MAPI clarifies the procedure to follow in case of abuse of privileges. It repeats the provisions of the CWC that on the first place, consultations shall be held between the state party and the OPCW (represented by the

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<sup>50</sup> CWC Verification Annex Part II(B)(11), (13)

<sup>51</sup> *Dojas*: op. cit. p. 244-245

<sup>52</sup> CWC Confidentiality Annex Part D(20)

<sup>53</sup> CWC Verification Annex Part II(B)(13)-(14)

<sup>54</sup> MAPI Art. 8(2)

Director-General) if there has been an alleged abuse of a privilege or immunity to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. In addition, the MAPI sets a procedure for the settlement of disputes relating to the abuse of privileges and immunities if such consultations fail to achieve a resolution satisfactory to both parties. Pursuant to Article 10(2) of the MAPI, disputes which cannot be settled amicably shall be referred for a final and binding decision to a tribunal of three arbitrators at the request of either the OPCW or the affected State Party. Each party has the right to appoint one arbitrator and the third arbitrator, who is the chairman of the tribunal, is chosen by the two arbitrators appointed by the parties.

The basic rules and principles of the arbitration procedure are also recorded in the MAPI. Regarding the composition of the tribunal, if one of the parties fails to appoint an arbitrator and has not taken steps to do so within 2 months following a corresponding request from the other party, the other party may request the President of the International Court of Justice (ICJ) to make such appointment. In case the two arbitrators appointed by the parties of the dispute fail to agree on the person of the third arbitrator within 2 months from their appointment, both parties have the right to turn to the President of the ICJ to appoint the third arbitrator. The tribunal should conduct the arbitration procedure in line with the Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organisations and States as in force on the date of entry into force of the individual PIA in respect of each State Party involved in the dispute. The tribunal adopts its decision by a majority of votes.<sup>55</sup>

Mayr highlights the principle that a harmony between independence and accountability is desirable in case of on-site missions.<sup>56</sup> Although her article focuses on UN experts on mission, her findings on the requirements of dispute settlement relating to immunities, such as a need for the involvement of a competent judicial body, could also be applied to OPCW inspectors because of the similarities between the position of UN experts on mission and OPCW inspectors concluding on-site inspections. Based on that, it is the view of the author that the CWC and the related individual agreements concluded between the OPCW and States Parties constitute a comprehensive system to ensure accountability during the conduct of on-site inspections.

## **7. RESPONSIBILITY FOR DECISION-MAKING ON THE RESULTS OF INSPECTIONS**

As discussed above, the conduct of verification is within the Technical Secretariat's competence. Following the chain of responsibilities between OPCW organs,

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<sup>55</sup> MAPI Art. 10(3)-(6)

<sup>56</sup> *Mayr*: op. cit. p. 157

the Technical Secretariat reports to the Executive Council on the implementation of the Convention, which includes a yearly report on its regular verification activities.<sup>57</sup> Following due consideration, the Executive Council submits the draft report on the activities performed by the TS as well as about its own activities to the CSP.<sup>58</sup> The CSP then considers and adopts the report at its regular sessions<sup>59</sup> based on consensus – as it has been the practice – or, if consensus is not possible, by a two-thirds majority of members present and voting.

The CWC also provides for a specific procedure to be followed in case of decision-making on the results of challenge inspections. After the conclusion of the on-site inspection, the inspection team prepares a final report on the factual findings and the assessment by the inspection team on the circumstances of the inspection. The Director-General transmits the final report to the Executive Council and States Parties (including the requesting and the inspected States Parties as well). The Director-General also circulates any comments received from any of the States Parties. Then, based on the report and the comments, the Executive Council shall address concerns as to whether non-compliance has occurred on the inspected State Party's side, whether the request of the requesting State Party had been within the scope of the CWC and whether the right to request a challenge inspection had been abused. If the Executive Council considers that further action is necessary, it shall take appropriate measures to redress the situation and to ensure compliance with the CWC, including specific recommendations to the CSP to decide on.<sup>60</sup>

The potential measures to redress a situation and ensure compliance are set forth by Article XII of the Convention. On this basis and with regard to its general competence to review compliance, the CSP may take necessary measures to ensure compliance<sup>61</sup>, *inter alia*, (i) upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under the CWC until it undertakes the necessary actions to comply with its obligations; (ii) recommend collective measures to States Parties in cases of serious damage to the object and purpose of the CWC; and (iii) bring the issue to the attention of the United Nations General Assembly and the United Nations Security Council in cases of particular gravity.<sup>62</sup>

It is demonstrated above, that there are clear obligations imposed on the OPCW and its organs by the CWC in connection with decision-making on the results of verification activities. Failure to comply with such international ob-

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<sup>57</sup> CWC Art. VIII(38)(b)

<sup>58</sup> CWC Art. VIII(32)(b)

<sup>59</sup> CWC Art. VIII(21)(a)

<sup>60</sup> CWC Art. IX(21)-(24)

<sup>61</sup> Mika Hayashi: *Reacting to the Use of Chemical Weapons: Options for Third States. Journal on the Use of Force and International Law* 2014. No. 1. p. 101

<sup>62</sup> CWC Art. XII(1)-(4)

ligations could lead to the responsibility of the OPCW, since conducts of organs of IOs, more closely, the conducts of OPCW organs in the performance of their functions shall be attributed to the Organisation itself.<sup>63</sup>

The question of piercing the corporate veil<sup>64</sup> inevitably arises during the decision-making of the CSP and even the Executive Council. The CWC provides that in the performance of their duties, the Director-General, the inspectors and other members of OPCW staff (the “officials of the organisation”) shall act independently from outside sources, including governments or their state of nationality.<sup>65</sup> Although the CWC obliges States Parties to respect the exclusively international character of the responsibilities of the Director-General, the inspectors and other members of the staff<sup>66</sup>, no such obligation exists in connection with members of the Executive Council, and the CSP. Hence, the action of the officials of the OPCW acting within the scope of their mandate and functions shall be attributed to the Organisation, whereas in the Executive Council and the CSP, where States Parties act through their official representatives, States Parties may conceivably be liable for their behaviour if inconsistent with international law.<sup>67</sup>

The author agrees with Murray, that the doctrine of abuse of rights serves to limit the manner of state discretion exercised during the decision-making process of an IO by preventing the exercise of state discretion maliciously, arbitrarily or unreasonably.<sup>68</sup> It comes from the provisions of the ARIO that acts of member states of an IO in accordance with the rules of the IO shall not, in itself, engage the international responsibility of that member state.<sup>69</sup> The qualifying characteristics needed to establish member state responsibility lie in the amount of influence or control that a particular member state has over the decision-making process and whether such influence or control allows the decision to be altered in line with the interests of that member state within the voting system of the IO or IO organ in question.<sup>70</sup>

It is argued by d’Aspremont that the abuse of legal personality of an IO at the decision-making level can hardly be addressed through the current rules pertaining to the attribution of conduct. Applying the above assessment to the decision-making process of the OPCW CSP and Executive Council on the results of verification (as well as on other subject matters), when a State Party has an effective and overwhelming control over the decision-making process of the CSP or the Executive Council, the legal personality of the OPCW can no longer serve

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<sup>63</sup> ARIO Art. 4 and Art. 6

<sup>64</sup> Establishment of the responsibility of member states of an IO.

<sup>65</sup> CWC Art. VIII(46)

<sup>66</sup> CWC Art. VIII(47)

<sup>67</sup> Odette Murray: Piercing the Corporate Veil: The Responsibility of Member States of an International Organization. *International Organizations Law Review* 2011. No. 2. p. 340

<sup>68</sup> Murray: op. cit. p. 299

<sup>69</sup> ARIO Art. 58 and 59

<sup>70</sup> Murray: op. cit. p. 328-329

as a shield behind which the influencing State Party can evade responsibility.<sup>71</sup> The actual abusiveness of the control exercised by a State Party shall be decided on a case by case basis taking into account the voting mechanisms of the CSP and the Executive Council. Accordingly, the influence exercised by a State Party could be considered overwhelming in case of decisions on the results of verifications, if suitable to alter or block the adoption of a decision in the CSP – with a two-thirds majority of members present and voting – and in the Executive Council – with a two-thirds majority of all 41 members.<sup>72</sup>

## 8. CONCLUSION

The legal personality of the OPCW was duly demonstrated through various provisions of the CWC, constituting the basis for the possibility to attribute responsibility to the OPCW under the material scope of the ARIO. However, a multitude of questions may be raised on the practical application of the provisions of the ARIO as well as on the establishment of responsibility of the OPCW in a given case. The fact that literature and legal practice on the subject is found to be limited, the purpose of this paper was to contribute to initiating further discussion on the application of the ARIO to specific international organisations, notably, the OPCW, noting that the conclusions of the author are subject to analogies and presumptions.

First, we examined the OPCW's structure and mandate, the functions of its organs as a preliminary question necessary to understand the various responsibilities of the organs of the OPCW and the Organisation itself. Although the OPCW's structure follows the basic tripartite model of IOs, which has its advantages of not having to reinvent the wheel, however, there are questions and uncertainties as to the exact division of responsibilities between the OPCW organs which arise from the wording of the Convention and the tasks specific to the OPCW. As a result of the assessment of the OPCW's internal and external accountability, it can be established that the CWC established a comprehensive system with checks and balances in place in the operation of the Organisation. Two aspects were found, where the OPCW's accountability in general could be enhanced: strengthening legality and increasing transparency of its operations.

Following the aforementioned preliminary assessment, we could turn our attention to specific questions relating to the question of responsibility in verification procedures in the context set out in the first two chapters.

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<sup>71</sup> Cf. Jean d'Aspremont: Abuse of the Legal Personality of International Organizations and the Responsibility of Member States. *International Organizations Law Review* 2007. No. 1.

<sup>72</sup> A notable example from the earlier days of the OPCW relating to the potential abuse of rights was the dismissal of the Director-General in April 2002 at the insistence of the US, which was deemed illegal by the Administrative Tribunal of the International Labour Organisation.

Verification procedures can be divided into three phases: (i) decision-making on the conduct of verifications; (ii) conduct of on-site inspections; and (iii) decision-making on the results of inspections.

Tasks and responsibilities of stakeholders are different in phase (i) depending on whether decision shall be made on the conduct of routine or non-routine inspections. In case of routine inspections, it is the Technical Secretariat's competence and responsibility to decide on scheduling inspection visits. The CSP may influence the work of the TS in an indirect manner, notably, through the allocation of the budget, which is considered an unnecessary intrusion from the OPCW's political organ. In order to potentially strengthen confidence in the operations of the TS, increasing transparency about how the selection of inspected sites works could be an agreeable solution. During decision-making on non-routine inspections, the Convention entrusts the Executive Council with the authority to block the conduct of a challenge inspection. The increased majority required for such veto and the composition of the Executive Council are aimed at preventing any abuse of voting rights during such decisions. It is also important that the CWC treats all States Parties, including the requesting and the inspected State Party, as equals.

The conduct of on-site inspections are similar in case of routine and non-routine inspections from the perspective of the rights and responsibilities of the inspectors and the inspected State Party. The question of responsibilities can be grasped through the immunities of IOs and their representatives, which is based on functional necessity. The principle of functional necessity is reflected in the rules applicable to the OPCW, which are governed by a comprehensive system established by the CWC and Privileges and Immunities Agreements conducted between the OPCW and States Parties individually. Emphasis shall be added to the need for harmony between the independence and accountability of inspectors. The independence of OPCW inspectors is guaranteed by the privileges and immunities they enjoy when acting within their functions, in which case, their actions are attributable to the OPCW. In case of an (alleged) abuse of privileges and immunities of an inspector, the model Privileges and Immunities Agreement provides detailed rules for an arbitration procedure to be followed between the affected State Party and the inspector (who may be represented by the OPCW Director-General). The author praises the system established for the settlement of disputes that may arise in connection with the privileges and immunities of OPCW inspectors and believes that this system could serve as a useful precedent for procedures relating to the privileges and immunities of other experts or representatives acting on behalf of an IO.

Finally, we looked at the responsibilities of the OPCW and States Parties for decision-making on the results of inspections. Concerning the tasks of the TS, in which the staff must be independent from any Governments or their state



of nationality, the responsibility of the OPCW may be established based on the attribution of the conduct of TS staff to the OPCW. The case of the CSP, and even the Executive Council is, however, different, since members of the CSP as well as the TS are delegates of States Parties. In the latter case, the question of member state responsibility could arise if a member of the CSP or the Executive Council abuses its voting rights and as a result, possesses an effective and overwhelming control on the outcome of the decision, e.g. by influencing the decision of other States Parties. It is noted that the findings of this chapter applies to decision-making on all subjects, and, as such, are applicable to decision-making on the results of inspections.