

Implications of CWC implementation for the BWC Protocol negotiations

11th Workshop of the Pugwash Study Group on the Implementation of the Chemical and Biological Weapons Conventions

Noordwijk, The Netherlands, 15-16 May 1999

RAPPORTEUR'S SUMMARY

by Daniel Feakes

This was the sixth of the current Pugwash CBW workshop series, held in collaboration with the Harvard Sussex Program, to be hosted by Pugwash Netherlands. Financial assistance was provided by the Dutch ministries of foreign affairs, economic affairs and defence. The meetings were held at De Baak Conference Centre in Noordwijk. Participating by invitation were some 27 people from 13 countries (Belgium, China, Czech Republic, Germany, India, Netherlands, New Zealand, Russia, Switzerland, Taiwan, UK, USA and Zimbabwe), all of them doing so in their private capacities. The present report is the sole responsibility of its author, who was asked by the meeting to prepare a report in consultation with the Steering Committee. It does not necessarily reflect a consensus of the workshop as a whole, or of the Study Group.

In its discussions the workshop focused on the implementation of the Chemical Weapons Convention (CWC) over the past two years, and the implications for the ongoing negotiations to strengthen the Biological and Toxin Weapons Convention (BWC). The discussions were greatly facilitated by the presence of a number of individuals directly involved in either subject. It was recognised that there were many similarities between the two treaties and therefore many areas in which the negotiators in the Ad Hoc Group could learn from the experiences of the Organisation for the Prohibition of Chemical Weapons (OPCW). However, the differences between the CWC and BWC were also emphasised and it was recognised that solutions could not simply be copied from the CWC into the BWC protocol. On a number of occasions the workshop discussed the apparent divergence between the technical and political aspects of chemical and biological disarmament and arms control. While issues may not be technically contentious, they have become politicised or have been affected by unrelated external events. The workshop saw that this is true of both CWC implementation and BWC protocol negotiations and of UNSCOM's work in Iraq. The workshop discussed ways and means by which political processes could be brought back into convergence with technical developments.

Reports from international CBW bodies

As is the custom within the Study Group, the workshop opened with brief reports on activities relevant to the implementation of the CBW conventions.

CWC: progress in implementation

The first report concerned progress in the implementation of the CWC. The workshop heard that the treaty's implementing body, the OPCW, had carried out around 470 inspections of chemical weapons and chemical industry facilities around the world. The OPCW now has 121 member states and 48 signatory states. However, it has been realised that not only quantitative, but also qualitative factors are important in assessing CWC implementation. Recently therefore, the OPCW has focused on improving the quality of its operations, for example by revising the inspection manual and standard operating procedures and by enhancing the flow of information to the Executive Council. While a total of 121 member states is impressive, more attention is now being focused on ensuring that once they have ratified or acceded to the CWC, states parties actually fulfil all their obligations and implement the Convention effectively. Another noteworthy area is the implementation of Article X of the CWC which deals with assistance and protection against chemical weapons. The OPCW is currently running a programme to improve its capability to investigate allegations of use of chemical weapons. Simultaneously, the OPCW is also supporting national capacity-building in the area of protection against chemical weapons through national training courses. With regard to international cooperation, which is covered by Article XI, the workshop was told that the programmes run by the OPCW have become an accepted part of its mandate, although funding any expansion in the programmes is a problem.

The report also addressed the institutional development of the OPCW. The dialogue between the main organs of the OPCW - the Technical Secretariat, the Executive Council and the Conference of the States Parties - has been widened and deepened answering criticism which emerged from some quarters during the third session of the Conference in November 1998. Early 1999 saw major changes in the working methods of the Council, whereby if agreement on a particular issue cannot be reached during a regular session, ad-hoc meetings are scheduled to address the issue. This practice has been successful in a number of cases, for example the request for the conversion of a chemical weapons production facility in Russia. The Scientific Advisory Board has also begun to play a constructive role and is now beginning to address substantive scientific issues. With regard to the Technical Secretariat itself, implementation of the classification review of posts undertaken in 1998 has been frozen and the staff regulations, including the important matter of tenure policy, have not yet been agreed upon. The lack of progress has begun to negatively affect staff morale, with a higher rate of resignations in the first months of 1999 than in the whole of 1998.

The workshop was then informed of some political trends which, taken together, could undermine the long-term viability of the CWC. The view seems to be developing, at least in some capitals, that the OPCW is merely a mechanism for inspections and declarations, and that as such, its activities should be held in check. Some states parties also seem keen to restrict the OPCW's attention to the verification of scheduled chemicals. This could be a reflection of the low level of political interest which the OPCW attracts. Without a higher profile, the OPCW will struggle to become an effective tool of international security, disarmament and non-proliferation. This lack of political attention also impacts on efforts to encourage compliance with, and the universality of, the CWC.

BWC: work of the Ad Hoc Group

The workshop next received a presentation on the status of the negotiations within the Ad Hoc Group which is working to draft a verification protocol to the BWC. The workshop heard that

political momentum towards the completion of the negotiations had increased during 1998 and early 1999, with the protocol being addressed by a number of high-level meetings. Within the Ad Hoc Group itself, a growing consensus on the essential elements of the protocol could be observed and the rolling text was being developed to show proposals for further consideration. During 1999 the Ad Hoc Group is scheduled to meet for 16 weeks of negotiations organised into five sessions. There seems to be an opportunity to complete the substantive work on the protocol before the attention of many national arms control experts is drawn to the NPT review conference in 2000.

An overview of the negotiations since they began in 1995 shows that the protocol is gradually maturing and that a number of issues are reaching completion. Negotiators have now passed the stage of adding text and are well into the stage of reducing options and removing square brackets. On a number of protocol articles negotiations are as good as completed, while others are on the way to completion. However, additional provisions, particularly those related to compliance, confidence-building measures and definitions are still a long way from finalisation. It is likely that such issues will finally be resolved during the endgame of the negotiations.

UNSCOM

Discussion in the workshop then moved on to the subject of UNSCOM and the future of the international inspection regime in Iraq. The workshop heard that the salient events of 1998 were mainly political rather than technical. Although the breakdown in Security Council consensus grabbed the headlines, UNSCOM did also achieve a number of successes before its withdrawal from Iraq in late 1998. The presentation and the discussion which followed highlighted the dislocation between the technical and political aspects. On a technical level, UNSCOM's findings are not contested, even by its strongest critics. The panel of independent disarmament experts which was established by the Security Council in early 1999 endorsed UNSCOM's conclusions. However, while it is widely accepted that Iraq still possesses proscribed weapons or proscribed weapons components, the Security Council has lost its earlier consensus and therefore also lost the political ability to act. During the crisis in late 1998, the Security Council could only agree to state that Iraq was in "flagrant violation", rather than the much stronger "material breach", of the 1991 ceasefire resolution. Despite its unambiguous technical findings, UNSCOM itself has therefore become a "bit player" as the issue of the disarmament of Iraq has become a highly politicised one.

Many workshop participants therefore expressed the opinion that the critical dimension which needs addressing is the political, rather than the technical level. Technically, UNSCOM has fulfilled its mandate by reporting Iraq's non-compliance to the international community. However, the international community has proven politically unable to deal with the consequences. This raises the question of how it would respond in future if a state was found to be in non-compliance with the CWC or BWC. Part of the problem seems to be that there is no agreed method by which compliance can be judged, particularly in an ad-hoc case, such as Iraq and UNSCOM. Judging compliance with treaties such as the CWC and BWC is easier as procedures are formalised and all states parties have a voice in assessing non-compliance. Workshop participants pointed out a number of major differences between UNSCOM and the OPCW, particularly the fact that states join the CWC voluntarily. Additionally, UNSCOM, in contrast to the OPCW, did not have a national layer between it and the Security Council. While this allows for quick and effective reporting, it also means that disagreement in the Security Council directly affects UNSCOM's operations. On the other hand, UNSCOM's direct link to

the Security Council ensured that its activities would attract a high level of political and public interest, whereas the OPCW has much more trouble attracting political and public attention.

HSP international criminal law initiative

The final report presented to the workshop provided an update on the Harvard Sussex Program's international criminal law initiative. The workshop heard that the draft convention on the prevention and punishment of the crime of developing, producing, acquiring, stockpiling, retaining, transferring or using biological or chemical weapons builds upon the provisions of the CWC and the BWC. It is also based upon the precedents set by other international treaties on crimes such as torture, piracy, slavery and hijacking. As the report pointed out, and as illustrated during the discussion on UNSCOM, taking action against a non-compliant state is a major undertaking, perhaps even involving military action. For this reason, action is often unlikely to be carried out. In contrast, taking action against an individual, as provided for by this draft convention, is much less costly and therefore more likely to be invoked. The draft convention will fill loopholes in the CWC, the BWC and the new statute of the International Criminal Court. The workshop heard that the ICC statute only covers the use of poison weapons. It does not refer to the development, production, acquisition, storage or transfer of CBW weapons and does not refer to biological weapons at all. Actions other than the use of weapons were excluded from the statute as international humanitarian law traditionally only applies to those actions which actually cause harm. Biological weapons were not included as some states linked their inclusion to the inclusion of nuclear weapons, a linkage which was strongly opposed by the nuclear powers.

Implementation of the CWC

OPCW experience

The first main item on the workshop's agenda opened with a detailed presentation on the current status of implementation of the CWC followed by a discussion on the experiences of the OPCW during its first two years. Between entry into force and April 1999, the OPCW had received initial declarations from 91 states parties, only 75 per cent of its membership. Declarations in the chemical industry area were particularly lacking in detail, as many states parties had not passed the legislation required to collect information from private companies. This applies in particular to the USA, which has only recently passed the necessary legislation. The workshop was told that many declarations received from states parties contained ambiguities. Such ambiguities can arise for a number of different reasons; the absence of implementing legislation, differing interpretations of CWC requirements and technical and administrative problems. The clarification process used by the OPCW in such cases was of particular interest to workshop participants, in the light of discussions on this subject in the Ad Hoc Group. The OPCW Technical Secretariat frequently writes to states parties to clarify their declarations and amendments are often submitted. Some problems are picked up by other states parties and discussed bilaterally, while others only come to light following the initial inspection of a facility. The workshop was told that the process for clarifying declarations should remain very flexible and should not be codified, lest it becomes confused with the formal provisions for assessing non-compliance.

The widespread lack of implementing legislation means that many states parties can only declare those facilities and activities of which they were already aware, and have no legal authority to actively seek out additional facilities which should also be declared. This could

partly explain why the declared number of industrial facilities is far below that assumed before the CWC entered into force. Despite the difficulties, the workshop was told that these problems can also be seen in a positive light, as they encourage interaction between the OPCW and the national authorities and between national authorities and their own chemical industry. To remind states parties of their obligation to implement the Convention nationally, the OPCW always provides information on legislation at its outreach events.

Universality

The workshop was told that 121 states had ratified or acceded to the CWC and 48 states were signatories to the treaty. Such a level of support is unprecedented for an international disarmament agreement so early in its life. However, a number of states remain outside the CWC regime. The main area of concern in this respect is the Middle East where a number of states have linked their accession to the CWC to Israel's accession to the NPT. The Middle East also includes a number of states suspected of possessing chemical weapons. Efforts to construct a dialogue between the OPCW and North Korea have borne little fruit. In the remaining non-states parties the problems appear to be mainly bureaucratic or financial, or due to a simple lack of awareness of the CWC. Achieving universality is important for a number of reasons, not least for ensuring that all states with chemical weapons stockpiles are covered by the Convention. Also important is providing a level playing field for chemical industry, particularly for companies which operate in more than one country.

The OPCW has therefore taken a number of steps to further encourage the universality of the CWC. Its outreach activities include regional seminars, dedicated workshops, bilateral visits and briefings to those states which do not have a permanent presence in The Hague. However, an international organisation such as the OPCW is limited in the influence which it can exercise upon states. It was noted that states parties should therefore play a greater role in encouraging other states to ratify or accede to the CWC. While some states parties have indeed engaged in demarches encouraging universality, it was suggested that their effectiveness would be greater if they were addressed at a higher political level. Notably, certain provisions of the CWC act as a negative incentive to states to join the Convention. From its entry into force, the CWC prohibited trade in Schedule 1 chemicals with non-states parties. A similar restriction on trade in Schedule 2 chemicals will be introduced in April 2000 and in April 2002 states parties will decide whether to also ban trade in Schedule 3 chemicals with non-states parties. Workshop participants pointed out that the BWC protocol is unlikely to include any similar transfer restrictions which could act as an incentive to encourage universality. Other ways will have to be found to promote the universality of the protocol. Much emphasis is therefore being placed on its international cooperation and assistance aspects.

General purpose criterion

The workshop next discussed the importance of the general purpose criteria in both the CWC and the BWC and the relevance of its implementation by the OPCW to the BWC protocol. Some workshop participants warned that the general purpose criterion should not be neglected in CWC implementation and that the OPCW should not become too focused on the routine verification of scheduled chemicals. However, an international organisation such as the OPCW does not have the legal authority to look into the furthest reaches of a state's chemical industry, so oversight of such activities must therefore be undertaken by national authorities. However, this depends on implementing legislation being in place to allow national authorities to oversee their respective chemical industries. At the time of the workshop, only 40 states parties had

informed the OPCW of their national implementing legislation. Currently, oversight of the general purpose criterion seems to have been left to international and national advisory boards and to NGOs while the OPCW and national authorities concentrate on the technicalities of the verification regime. In the light of these experiences, it was questioned whether the BWC protocol should also rest upon a general purpose criterion, but no effective alternative was apparent. In this situation, the workshop discussed how to ensure that the national authorities established under the BWC protocol address the general purpose criterion and that the BWC keep pace with the rapid changes in the biotechnology field.

Unresolved issues

The workshop was given a presentation which detailed the remaining unresolved issues with which the OPCW has to contend. Many of these date from the time of the Geneva negotiations and the Preparatory Commission. At this stage it is therefore more appropriate to talk of unresolved old issues, as a number of new issues, which have yet to be resolved, have arisen during the implementation of the CWC. Since entry into force, the unresolved old issues have been addressed in the Committee of the Whole, allowing all OPCW members states to participate. However, new methods of addressing the unresolved old issues are currently under consideration. It is possible that the forthcoming fourth session of the Conference will decide to refer some unresolved old issues to the relevant organs of the OPCW, usually the Scientific Advisory Board or the Council, and remove the others from consideration. Among the most important unresolved old issues are: guidelines for low concentrations, the usability of old and abandoned chemical weapons, issues related to Articles X and XI and sampling procedures. New issues which arise during CWC implementation are addressed within the appropriate organ of the OPCW.

Implications for the BWC Protocol Negotiation

The second main item on the workshop's agenda opened with a general presentation on the problem of biological weapons. The presentation contrasted the trend towards the abandonment of biological weapons programmes on the one side, with the biotechnology revolution on the other, and argued that the latter almost implies the development of new forms of biological weapons. The latest developments in biotechnology have not changed delivery methods or the efficiency of agents. What they are changing however, is the capability of agents to manipulate human life processes themselves. In conjunction with these technological advances, the major states appear to be trimming back their support for a strong BWC protocol. This is all the more worrying as it is traditionally the major states which shape future developments. It was argued that rather than emphasising the threat to individual nations, states and the public should see biological weapons as a global threat to the human species. The most effective response to such a threat should therefore be to strengthen the international norm against biological weapons.

The principal elements of the emerging protocol

The Ad Hoc Group held its first session in January 1995 and has now held 14 sessions. In July 1997 the Ad Hoc Group successfully transitioned to the negotiation of a rolling text of the draft protocol, which is now in its eighth version. In June 1998 the friends of the chair began producing papers showing in a transparent way how the rolling text might be developed to remove the square brackets. An overall assessment of the rolling text shows that in a number of areas such as legal issues, confidentiality, organisation, national implementation, assistance

and investigations the text is well developed. More work remains to be done in three areas -- compliance measures, technical cooperation and definitions.

The workshop heard that the principal elements of the draft protocol are the following -- declarations, visits, investigations, organisation, national implementation and Article X measures. A number of triggers for declaration have been defined, many of which however remain in square brackets. The draft protocol currently envisages three types of on-site visits - random, clarification and voluntary. Together these should contribute to an effective integrated regime ensuring that declarations are both complete and accurate. There is provision for three types of investigation -- field, facility and investigations where there is a concern that a transfer had taken place in violation of Article III -- with a few issues yet to be resolved. The draft protocol provides for a small organisation to oversee the implementation of the protocol. The organisation is likely to be about half the size and budget of the OPCW and be based in either Geneva or The Hague. Specific measures to implement Article X have been suggested, such as the strengthening of disease surveillance networks, promotion of biosafety and national regulations for work on pathogens, improved national controls on handling, use and transfer of pathogens and the promotion of pharmaceutical good manufacturing practice. The draft protocol includes guidelines for transfers which would require the provision of information on the agent/toxin to be transferred, equipment for use in a BL-4 laboratory and technology related to means of delivery. The draft protocol currently has weaker language than the CWC when it comes to national implementation, with the requirement to enact penal legislation still in square brackets.

Implications for the verification system

For a number of reasons, the draft protocol makes no provision for routine inspections styled on the CWC. However, as the workshop heard earlier, the OPCW experience has shown that declarations will contain numerous mistakes and that there is therefore a need for a follow-up to declarations. In addition, challenge inspections will rarely, if ever, be used. It was argued that this shows the need for a limited number of non-intrusive visits to ensure that there is a possibility for on-site inspections. The workshop then heard brief descriptions of the three types of visits currently envisaged in the protocol. Random visits would confirm that declarations are consistent with the protocol obligations and to deter the abuse of declared sites as a cover for prohibited activities. Their number would be relatively low, they would have a low level of intrusiveness and be carried out under strict procedures to protect confidential business information. Clarification visits would be intended to address questions related specifically to a states party's declaration. As such they would represent the final stage of a clarification process which would be likely to solve most problems. Such visits could also take place to sites which should have been declared but were not, although this concept is opposed by some as introducing "challenge light" inspections. The third category is voluntary visits. These would be designed to assist states parties and facilities in complying with the protocol, or with their obligations under Article X. They could also be offered by states parties during the clarification process or when there is a concern about compliance. However, it was stressed that voluntary visits should not be used instead of other types of visits, or an investigation. The modalities of all of these visits are still under discussion within the Ad Hoc Group.

The workshop heard that the pharmaceutical and biotechnological industries support the CWC and think that it can serve as a model for the BWC protocol. However, this does not mean that the declaration and verification provisions of the CWC can be copied into the protocol. The industries argue for controls which are administratively manageable, not overly burdensome in

terms of cost and manpower, safeguard confidential information and respect the principle of a level playing field. Triggers for declarations should not cover facilities irrelevant to the object and purpose of the BWC. In industry's view, the key declaration trigger should be work with listed agents and toxins. The protection of confidential business information is an even bigger concern for the pharmaceutical and biotechnological industries than it was for the chemical industry. In order to protect such information, declaration forms should be as specific as possible so that there is no risk of the facility misunderstanding what is required. Although declarations are not expected to contain confidential business information, it is intended that they will nonetheless contain meaningful information, such as production capacity within ranges.

Some sectors of the pharmaceutical and biotechnological industries, particularly in the USA, have expressed concern at the concept of on-site visits as currently envisaged in the protocol. Frustration has been gradually building, within the European chemical industry in particular, that while they are hosting numerous OPCW inspections, their competitors in the USA have so far not had to bear the same burden. While it is widely accepted that routine CWC-style inspections are not a useful concept for the BWC protocol, it is clearly necessary to make the concept of visits, particularly random visits, more attractive to industry as the support of industry will be vital during the ratification and implementation of the protocol. In this light, some workshop participants suggested that visits could begin some time after entry into force, rather than at the same time. The experience of the OPCW has shown that, despite the lengthy period prior to entry into force, the "front-loading" of the CWC, with declarations, inspections and the establishment of the Organisation all happening at once, did cause some problems. The industry views clarification procedures as a useful instrument, while stressing that on-site clarification visits should be the option of last resort.

Implications for improving implementation of the BWC

The workshop next heard a series of presentations on different aspects of BWC implementation. The first dealt with the future BWC organisation and the lessons which could be learnt from the evolution of the OPCW. Although it is important to maintain the distinction between the two treaties, there are a great number of procedures and practices which the BWC organisation could adapt from the OPCW. In view of the desire to keep costs as low as possible, it would make sense for the BWC organisation to avoid starting afresh and therefore to cooperate closely with the OPCW. However, it was noted that such cooperation would also be contingent upon a number of other factors, such as the location of the two organisations, political factors, the scope of the two treaties and even personalities.

The next presentation noted that, in one of the formulations offered by the Friend of the Chair for Definitions, the protocol would prohibit the use of biological weapons only against states. Its definition of "hostile purposes" does not include the use of biological weapons by a state against a population on its own territory or otherwise under its jurisdiction or control. Therefore a state could develop, produce, stockpile, acquire or retain biological weapons as long as the hostile purpose was not to harm another state. Such actions would seem to be entirely contradictory to the intention of the framers of the BWC. However, the presentation did note that this definition of "hostile purposes" is still in square brackets, indicating that it has not achieved consensus within the Ad Hoc Group.

The final presentation to the workshop examined the long-term viability of both the CWC and the BWC. The presentation first assessed the intrinsic strengths and weaknesses of the CWC

and BWC, concluding that the BWC was weaker due to the lack of a verification regime. The presentation then turned to examine the extrinsic factors affecting the treaties, such as changes within the international system, the loss of functional equivalence, the impact of the CWC and BWC themselves on the security environment and the influence of the "new security agenda". It was noted that all of these factors play a role in influencing the survivability and adaptability of the CWC and BWC.

The presentation was followed by a wide-ranging discussion on the political circumstances surrounding CWC implementation and the BWC protocol negotiations. It was argued that there are few technical reasons as to why an effective protocol cannot be completed soon. The main obstacles appear to be primarily political. In contrast to the CWC, which was negotiated in a positive international climate with the support of chemical industry, the BWC protocol is under negotiation at a time of uncertainty in international relations, rapid developments in biotechnology and with little support from industry. As in earlier presentations, it was noted that one of the main problems appears to be a dislocation between the technical and political aspects of the negotiations. It has already been recognised that technically the BWC protocol cannot simply copy elements from the CWC, and it is now becoming clearer that imitation would not work politically either. Some workshop participants even predicted an approaching crisis of multilateralism in the twenty-first century. They argued that the current window of opportunity to improve the BWC is already closing and therefore everything should be done to complete the protocol soon. In this light, the discussion turned to the role which the general public and NGOs could play in this process. So far, the protocol negotiations have been seen as a technical issue and have raised little political or public interest. Those involved in the negotiations believed that the endgame of the negotiations would be helped by pressure from the general public.

Future work of the Study Group

The closing session of the workshop considered topics for possible inclusion in future agendas. Suggested topics included definitions and focusing on the importance of legislation and implementation, in addition to ratification. It was also proposed that attendance at future workshops by individuals with different points of view and from different disciplines be encouraged and that public awareness of CBW issues be increased.

The workshop will hold its twelfth meeting from 25-26 September in Geneva where the topic of discussion will be "The BWC Protocol: Entering the Endgame?".