

3rd Workshop of the HSP Pugwash Study Group on the Implementation of the Chemical and Biological Weapons Conventions

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This was the second CBW workshop to be hosted by the Dutch Pugwash Group. A seaside conference centre, 'De Baak', was the venue, as it had been for most of the first workshop a year previously. Participating by invitation were 45 people from 17 countries (Australia, China, Cuba, Czech Republic, Ethiopia, Finland, France, Germany, India, Italy, Netherlands, Russia, Sweden, Switzerland, UK, USA and Zimbabwe), all of them doing so in their private capacities. The present record is the responsibility solely of its two authors, who were asked by the meeting to prepare a joint report. It does not necessarily reflect a consensus of the workshop as a whole, or of the Study Group.

The Study Group had once again chosen as the main topic for its workshop an implementation issue having both technical and rather delicate political considerations intertwined with one another, an issue which has therefore received less attention in international fora than it ought to be getting. It has to do with what is called the General Purpose Criterion, on which turns the status under the Chemical Weapons Convention (CWC) of chemicals that are not listed in its Schedules. In fact a similar issue confronts the work being done to strengthen the Biological Weapons Convention (BWC), as that treaty also uses a purpose criterion to define the scope of its obligations. The present workshop, however, was focused on the chemical treaty.

The Workshop began with a welcoming address from the Chairman of Pugwash Nederland. This was followed by reports on what has been happening recently in the three main international fora where implementation of the CBW conventions is being pressed forwards: the Preparatory Commission for the OPCW (the Organization for the Prohibition of Chemical Weapons) based in The Hague, the Ad Hoc Group of BWC States Parties, and the UN Special Commission on Iraq (UNSCOM). A further report addressed progress of the CWC towards entry into force. These presentations stimulated discussion of possible ways of overcoming current obstacles.

The Chemical Weapons Convention now has 159 signatory states, of which, at the time of the workshop, 27 had deposited instruments of ratification. Several more have completed their ratification processes, but some of them may well be delaying decisions to deposit until the stance of other countries has become clearer. The governments of Russia and the United States, where the Convention is currently before the respective legislatures, have declared their intention of ratifying as soon as possible. Present expectations in The Hague are that the "trigger date" -- deposit of the 65th instrument of ratification, signalling commencement of the 180-day grace-period before entry of the Convention into force -- will be reached by the end of the year. In anticipation of the recruitment for the OPCW inspectorate which will then begin, some 1500 applications from 81 countries are being processed by the OPCW Provisional Technical Secretariat. The short-listing is already far advanced, and interviewing is expected to be completed in October; the candidacy of applicants from countries that had not yet ratified the CWC will be problematic. Pilot training courses have been running in India, the Netherlands and the United States. The Netherlands has also run a training course for National Authority personnel, and has a second one scheduled for September.

In the discussion on progress towards entry into force of the CWC, general dissatisfaction was expressed by participants with the pace of ratification of the Convention. It was agreed that it would be important to ensure that foreign officials meeting with highly-placed persons in the foreign-policy establishment of key laggard countries, especially the United States, emphasized the importance of prompt ratification. Presented during this discussion was a working paper from the Harvard Sussex Program on the implications of the position recently expressed by the Russian Federation on the inspection and conversion of Chemical Weapons Production Facilities: a position which had attracted fierce adverse criticism from all sides during the last session of the OPCW Preparatory Commission, in April. The presentation stimulated work at the margins of the meeting.

Following the presentation on the BWC, participants were also able to discuss findings from the recently completed round of 'practice compliance inspections' conducted by the British government in pharmaceutical and vaccine-production facilities of four private-sector companies. The findings identified not only particular sensitivities of biotechnological industry towards outside inspection but also ways in which such inspection could be effective for

BWC purposes without at the same time necessarily trampling on industry sensitivities. The prospects for real progress by the Ad Hoc Group were therefore judged to be promising.

As to the work of UNSCOM, the workshop learnt that the Commission was now pretty sure that Iraq no longer possessed either chemical weapons or chemical weapons production facilities. Some uncertainty still attached, however, to the final disposition of supplies of three dual-use chemicals -- chloroethanol, phosphorus pentasulphide and diisopropylamine -- known to have been exported to Iraq and which could have been used to produce as much as 400 tons of the persistent nerve-gas VX; likewise the 8 tons of imported dicyclohexylcarbodiimide, a chemical known to have utility in, inter alia, stabilizing nerve agents in storage. The UNSCOM 'ongoing monitoring and verification' regime is now being applied to 57 sites of chemical- industry activity in Iraq, with 40 cameras installed, and Iraq is co-operating well in the establishment of the associated chemical import/export control regime. UNSCOM is less confident that Iraq retains no biological-weapons capability. Some 17 tonnes of imported complex growth media remain unaccounted for, and, although no actual biological weapons have been found, UNSCOM has encountered several indicators of possible agent-weaponization work, including parachute-retarded devices -- apparently developmental munitions -- at Muthanna which might have been suitable (on droplet-size considerations) for disseminating BW agent, or else a very persistent CW agent.

The Workshop then moved into its main agenda item. It received a presentation on the origins of the CWC Schedules from one of the negotiators who had had responsibilities for developing the concept originally. The key point here was that the Schedules were never intended to define the chemical weapons that the Convention was to ban, nor now did they; the chemicals listed in the Schedules are merely illustrative examples intended to expedite the treaty's routines, especially in regard to verification of compliance. It is the General Purpose Criterion which sets the scope of the Convention, as was explained in the next presentation. The Criterion works as follows. The test of whether an activity involving a chemical -- an activity such as development or production or trade -- is banned or otherwise restricted by the Convention is whether the intended purpose of the activity is or is not among the "purposes not prohibited under this Convention", and, if it is, whether the "types and quantities [of the chemical involved in the activity] are consistent with such purposes" (the quotations here are from CWC Article II.1(a)). So purposes are the objects of the treaty's primary limitations, not chemicals per se. This is what gives the purpose-criterion approach its central importance: it means that the scope of the Convention extends to chemicals that are still secret or not yet discovered; and it means that worthwhile peaceful applications even of highly toxic chemicals can proceed unhindered by the strictures of the treaty.

The next presentations dealt with the manner in which the Schedules are being put into effect in the government-to-industry CWC outreach programmes of different countries, and in associated legislative initiatives. What became very clear was that current implementation efforts are in practice focused on chemicals per se, notwithstanding the General Purpose Criterion. Indeed, the workshop learnt that in one country's draft implementing legislation (in fact Italy's) chemical weapons are defined solely in terms of the Schedules. Such legislation would thus apparently have the effect of, for example, denying would-be terrorists access to the nerve-gas GB (sarin) but not to the nerve-gas 'GP' (a supertoxic anticholinesterase from the family of O-dialkylaminoalkyl N,N-dialkyl phosphoramidofluoridates described in one of the workshop papers), for only the former, not the latter, is included in the Schedules. Participants recognised that, while there was still time for such defects in national draft legislation to be put right, this particular example was symptomatic of a wider and less easily remedied problem: the sheer awkwardness of having to administer anything as open-ended as a purpose criterion. It is so much easier for administrators and for industry to work with straightforward lists of controlled chemicals. So the Schedules inevitably place the authority of the General Purpose Criterion in some jeopardy. It was observed by more than one participant that, were the Criterion no longer to be recognized as the arbiter of the treaty's scope, the Chemical Weapons Convention might swiftly fall victim to technological obsolescence, maybe eventually coming to be seen, in its application to civil industry, as a useless and expensive burden. The notion of protecting the General Purpose Criterion thus emerged for discussion, as is described later in this report.

The Workshop then moved into consideration of practical problems of implementing the Convention in regard to unscheduled chemicals, beginning with a presentation that led into discussion of the possibilities for amending the Schedules once the Convention was in force. The recommendation emerged that the formal amendment procedures should be tested early in the lifetime of the treaty, before the Schedules had come to be regarded as graven in stone. The original proposer of this recommendation recalled the problems encountered with the supposedly amendable control lists that directed the CBW work of the old Armaments Control Agency of the Western European Union: history suggested that, if the amendment procedures still remained untested after the CWC had been in force for, say, six months, Schedule-amendments would become progressively harder to effect. The same was perhaps true also of the challenge- inspection procedures.

The second presentation on the unscheduled-chemicals problem addressed disabling chemicals, a matter treated in some depth during the 1994 workshop. There was the familiar problem of riot-control agents. In addition, but

closely related, was the question of whether the General Purpose Criterion would ensure that the Convention was properly responsive to the emergent feasibility of novel immobilizing but not necessarily lethal chemical weapons; weapons based on, say, opioids from the fentanyl or medetomidine families that were known still to be interesting at least one CW defence laboratory. This led into discussion of the possible use by UN peacekeeping forces of disabling chemical projectiles, and this prompted several of the participating CWC negotiators to recall that the idea of exempting such uses of chemical incapacitants from the scope of the Convention had indeed been voiced during the negotiation but had been unanimously rejected.

Next, discussion turned to the implications for international trade of export/import controls on unscheduled chemicals. This was a topic which opened up the thorny issue of relations between the Convention and the Australia Group, and here the proceedings were particularly rich. They began with three presentations, for all of which there were accompanying working papers.

The first, by a representative of a developing-country chemical industry, began by noting that the non-discriminatory character of the CWC had been a fundamental assumption during the treaty's negotiation; restrictions on trade between States Parties contradicted this assumption and so were inconsistent with the Convention. The presentation then questioned the motives of the small groups of states that apply common export control policies (an allusion, this, to the Australia Group), suggesting that these groups may in fact have been established for protectionist purposes. The presentation suggested, further, that export controls on equipment, though portrayed as being intended to prevent assistance to chemical and biological weapons programmes, were in fact unlikely to be effective, and therefore seemed more likely to be intended to interfere with the development of competing chemical industries. For this reason also, the presenter said, controls on exports of equipment or of unscheduled chemicals were inconsistent with the Convention. Addressed in the presentation was the particular case of phosphorus pentasulphide, a dual-use chemical which does not appear on the Schedules and which had figured in the report on the recent work of UNSCOM. Pressure on firms to interrupt shipments of this chemical for which they possessed a valid end-use certificate was inappropriate even now, it was argued, and would if anything be still less appropriate once the Convention had entered into force.

The second of the three presentations, by a representative of a developed-country chemical industry, set out the view that, following entry of the CWC into force, it would be difficult for other chemical export control regimes to continue among states parties to the CWC. It noted that the present export-control procedures presented operational obstacles to chemical trade, and that some states have responded to these controls by establishing their own production capabilities or by establishing new channels of procurement. It observed that the CWC provided an extensive set of verification procedures, including reporting and inspection procedures, that should generate confidence in compliance. The presentation suggested that signatory states that do not consider themselves threatened by chemical weapons are likely to see little advantage in ratifying the Convention unless they are assured that burdensome limitations on trade, including technology transfer and investment, will be lifted. It was also observed that if distrust of other member states leads to a reluctance to lift controls, this distrust may itself undermine the Convention. The presentation concluded by observing that the Convention would represent a considerable reduction in the operational restrictions imposed upon the chemical industry, assuming that the OPCW were successful in recruiting qualified inspectors and in preserving the confidentiality of industrial data.

The third presentation, by a representative of the Harvard Sussex Program, outlined the general debate on trade matters under the CWC, and presented a typology of trade measures, dividing them into those directed at reassurance (such as transparency-oriented measures) and those directed at denial (such as nation-specific licensing procedures). It then set forth the legal rationale under CWC Articles I, VI, and VII for monitoring trade in CWC-relevant goods, including, because of the General Purpose Criterion, unscheduled chemicals. It also gave practical reasons for such monitoring, such as the absence of reporting and verification rules applicable to unscheduled chemicals. The presentation then asserted that Article XI of the Convention can be best read as requiring that trade measures not be disproportionately burdensome, and therefore requires that states be cautious in imposing controls of this type. So the presenter put forward the following proposal: that the OPCW Executive Council should establish a committee that would be charged with clarifying the Convention's trade provisions. The tasks envisaged for this 'Transfer Committee' included consideration of what reassurance-oriented trade measures would be appropriate under the Convention (for, inter alia, scheduled chemicals, unscheduled chemicals and equipment); assisting states to improve and harmonize their trade measures (rather than exclusively criticizing such measures); and preventing disputes (rather than resolving them after they occur). It was further suggested that the Committee operate by reviewing reports from states on their implementation of the Convention's trade provisions. The accompanying paper provided a list of possible reassurance-oriented measures that states might apply between themselves, and noted that the Committee could discuss these measures, as well as (probably more extensive) measures applicable with respect to non-parties. Finally, it was argued that the application of denial measures should be done through the compliance mechanisms of the Organization.

The ensuing discussion dwelt on the purpose and utility of export control measures. A number of participants endorsed the view that the Convention required a monitoring of trade in unscheduled chemicals, one speaker stating that the Australia Group's activities are relatively prosaic, and should not prompt concern on the part of non-members. Another participant noted that the use of the Australia Group's processes instead of those of the CWC would be likely to have a corrosive effect on confidence in the Convention. Participants also considered the adequacy of verification measures as substitute for export-control measures. It appeared to be generally agreed that the IAEA's failure to detect Iraq's nuclear-weapons programme was attributable to a lack of political will to use the IAEA's verification capabilities, which would have permitted inspections at Iraq's undeclared sites. It was noted that the capabilities had in fact been used in North Korea, and that North Korea's refusal to accept special inspections at all sites had helped to provide the basis for general consensus on the need to bring North Korea into compliance with the NPT. As for the use of the Convention's factfinding and dispute-resolution processes in resolving trade-related compliance questions, it was noted that the challenge inspection device might be very helpful for finding facts to substantiate allegations that an importing state was not in compliance with the Convention. Also considered was whether a state that wished to challenge the application of a trade measure against it would do so under the Convention's dispute-resolution provision, Article XIV, in which case the matter would be addressed bilaterally, or under Article IX of the Convention, on questions regarding compliance, in which case the matter would be addressed multilaterally; views were expressed in favour of each approach.

With respect to the 'Transfer Committee' proposal, some speakers stated that the processes of the Convention alone, such as its compliance and dispute-resolution provisions, would suffice to resolve trade questions. Others took the view that a specialized committee would indeed be useful, as it would ensure that trade-related questions could be addressed and resolved at the working level, rather than being addressed only at higher political levels. It was also suggested that a committee of this type could be useful for harmonizing trade policy with respect to states not party to the Convention. However, a group focused principally on resolving disputes would be most effective if it consisted largely of experts capable of communicating very rapidly with one another (for example by fax), as trade questions would require expertise and would be likely to be presented on short notice. For one participant the proposal for the establishment of a Transfer Committee evoked a committee that had been established in the nuclear field which made him believe that permanent bodies of this type were likely to be unsuccessful. Another participant noted that the body need not be permanent, as it could be convened only when necessary, or only provided with a limited period in which to conduct its work.

Work on the main agenda item concluded with presentations stimulating discussion on possible ways of safeguarding the General Purpose Criterion. Whether the Criterion lay in jeopardy merely because of the practical difficulties of implementing it properly or, more ominously, because of positive interest in some quarters in preserving certain break-out options, the fact remained that the future integrity of the treaty rested on the Criterion. Its proper protection would, it was generally agreed, be a matter of getting the priorities right. The top priority must be ensuring that the military, as potential users of chemical weapons, fully comprehend the Criterion, recognising that the Convention prohibits the use against combatants of all toxic chemicals, not just those in the Schedules. The next priority -- because it safeguards the top priority -- must be ensuring universal recognition that challenge inspections under the CWC are no less admissible in regard to unscheduled chemicals than they are in regard to scheduled chemicals. Third, and just as indispensable, is the necessity of ensuring that the penal legislation enacted by States Parties in their domestic implementation of the Convention under Article VII defines chemical weapons in terms of the General Purpose Criterion, not in terms solely of the Schedules: national policing machinery must be empowered to track down illicit activities involving unscheduled chemicals. Existing powers may in some countries suffice, but it is clearly preferable, in the international context, that the Convention should be recognised as the overarching legitimization of them.

Beyond those three areas, a fully implemented General Purpose Criterion would not, it was generally agreed, be anything like so essential, and might even have negative value. If applied to routine verification in the chemical industry, for example, it would simply stir up misunderstanding, resentment and ridicule. Much better, therefore, to channel efforts in defence of the Criterion to the three top priorities: protection, in other words, not of the Criterion per se, but of the heart of the Convention.

The final session of the Workshop directed attention to what the Study Group might usefully do in the future. Two further workshops were currently being planned. One, to be devoted primarily to BWC implementation, would be held in Geneva during 1-2 December 1995, thus coinciding with the third session there of the BWC Ad Hoc Group. A preliminary agenda and possible participation-list was now being developed. The second projected workshop was scheduled for mid-May 1996 and would again be hosted by the Netherlands Pugwash Group in Noordwijk, focusing on the CWC. For it, participants proposed a variety of specific workshop topics, recognising, however, that imminence of entry into force of the CWC should be the dominant influence on topic selection. The topics suggested were as follows:

Achieving universality for the CWC

Chemical terrorism

Financing the destruction of chemical weapons

Chemical demilitarization and remediation National Authorities and the CWC

Arising problems of industry in the implementation of the CWC

The CWC and world chemical trade

The CWC and chemical academic and professional organizations

The CWC and the media

Outstanding problems from old and abandoned chemical weapons

Technological challenges to the CWC.

One further area in which much future work, though not necessarily by Pugwash, was widely regarded as essential for harmonious implementation of the treaty was the writing of a reliable and detailed account of the CWC's negotiating history. Such work could not be entrusted to any one individual, however closely that person might have been involved in the negotiation, simply because the negotiation had had too many participants and had been too complex, conducted on too many levels, for a single individual to have comprehended it all. Nor could such an enterprise be left solely to future historians having access to archives, for what the relevant state papers would in the main reveal would be interchanges between capitals and negotiators limited to controversial matters. So participants put forward the suggestion that Pugwash should exert itself to stimulate some collective CWC historiography, a project that should be set in motion very soon, before participants' memories had faded irretrievably.