

**Pugwash Study Group on the Implementation of the Chemical and Biological Weapons
Conventions**
CWC Implementation: Balancing Confidentiality and Transparency
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Report by Daniel Feakes

This was the fifth of the current Pugwash CBW workshop series, held in collaboration with the Harvard Sussex Program, to be hosted by the Netherlands Pugwash Group. The workshop was held at De Baak Conference Centre in Noordwijk. Participating by invitation were 45 people from 20 countries (Belgium, Bulgaria, Canada, Chile, China, Ethiopia, France, Germany, India, Iran, Israel, Italy, Netherlands, New Zealand, South Korea, Russian Federation, Switzerland, United Kingdom, United States and Zimbabwe), all of them doing so in their private capacities. The present report is the responsibility only 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.

The workshop was concerned with the implementation of the Chemical Weapons Convention (CWC) in general, and with the balance between confidentiality and transparency in particular. The CWC's implementing body at the international level, the Organization for the Prohibition of Chemical Weapons (OPCW), has been operational for over a year, and the workshop discussed how it has dealt with the issues of confidentiality and transparency. In order to see what the OPCW could learn from other international organizations, the workshop heard presentations from the International Atomic Energy Agency (IAEA) and the United Nations Special Commission on Iraq (UNSCOM) on their experiences in balancing confidentiality and transparency. Workshop participants also heard presentations on transparency and confidentiality issues from the perspectives of the chemical industry, the media and academic and public interest NGOs. The subject of the workshop was also studied from the point of view of entities associated with the OPCW, namely the national authorities, the Scientific Advisory Board and the Confidentiality Commission.

The workshop noted that confidentiality and transparency cannot be studied in isolation from each other, as the two concepts, rather than being separate, are in fact closely related. It was observed that the OPCW could learn a great deal from the experiences of other international organizations active in the field of disarmament and its verification. But differences between the verification regime established for chemical weapons and those used by the IAEA and UNSCOM were also pointed out. Both the IAEA and UNSCOM have extensive experience in dealing with confidential information and its protection, and with balancing this against the need for transparency, both within and beyond the Organization. It was noted that the OPCW's confidentiality regime was devised primarily to protect confidential business information gathered from the chemical industry against release and was never intended to perpetuate secrecy in the field of chemical weapons. Transparency in relation to chemical weapons programmes was considered to be essential in order to build confidence between states and to inform the general public that the aims of the CWC are being fulfilled. Workshop participants heard that in its first year, the OPCW had erred on the side of caution in regard to protecting confidential information in order to convince states parties and the chemical industry that confidential information can be adequately protected. It was pointed out that, as confidentiality and transparency are different extremes on a scale, the balance between them can be readjusted in the light of events and experience gained by the OPCW.

The workshop opened with reports on the work of international bodies relevant to the implementation of the CBW conventions. The first report concerned the activities of the OPCW during its first year of operations. Several staff members of the organization were among the workshop participants. The report on the OPCW's activities highlighted the progress made in its first twelve months of activities. Since the entry into force of the CWC in April 1997, 20 more states have ratified the Convention, bringing the total membership of the OPCW to 110 states. A much clearer picture of the quantity and locations of chemical weapons activities in the world has emerged, with two more states joining the USA and the Russian Federation in declaring the possession of chemical weapons. The workshop heard that OPCW inspectors have conducted almost 200 inspections to chemical weapons facilities and industrial facilities in 25 countries.

On a slightly less positive note, the workshop was informed that a significant number of states parties have yet to submit their initial declarations, or have submitted only partial declarations, to the OPCW. Many member states have also yet to submit administrative and procedural information on their implementation of the CWC to the Organization. The Executive Council has held nine regular sessions, and has taken a number of important decisions relating to the implementation of the CWC. The Council also receives detailed reports on the status of implementation of the CWC and on the OPCW's verification activities. The workshop learned that the OPCW's Technical Secretariat is approaching its fully budgeted complement of 491 staff members and will have a new group

of inspectors starting work in July. Challenges still remain though, the workshop was told, particularly in achieving full universality. In this regard, it was reported that in less than two years time states which are not party to the CWC will be affected by restrictions on the import of certain chemicals.

On the subject of the workshop, the participants heard that the OPCW was still gathering experience in order to identify the correct point of balance between confidentiality and transparency. One year has not been long enough for the OPCW to assess what each side entails; for example how an emphasis on transparency might affect the national interests of states parties or how focusing on confidentiality might impact on the credibility of the OPCW. However, developing a culture of transparency, while at the same time protecting confidential information, continues to be a priority for the OPCW. In order to have credibility as an organization overseeing the elimination of chemical weapons, the OPCW must be able to provide information on the progress being made in identifying and destroying programmes and stockpiles. It was also stated that restrictions on information publicly available did not mean that the CWC was not being implemented properly.

Workshop participants then heard a presentation on progress being made in the Ad Hoc Group of States Parties (AHG) in Geneva, which is drafting a legally binding instrument to strengthen the 1972 Biological and Toxin Weapons Convention (BWC). The AHG has so far held 10 sessions and it appears that the main elements of a draft legally binding instrument could be finalised by the end of 1998. It was reported that all the essential elements of a strengthened protocol to the BWC are now incorporated into the latest version of the rolling text {BWC/AD HOC GROUP/39, dated 2 February 1998 as updated by BWC/AD HOC GROUP/40, dated 17 March 1998}. These elements include an organization to oversee the implementation of the protocol, a three pillar system of verification (declarations, visits and investigations) and various measures to improve the implementation of Articles III, IV and X of the BWC.

Provisions for a BWC organization are included in the rolling text, and it was reported that there is now considered to be no credible alternative to the creation of such an organization. The functions of a BWC organization would include receiving and processing declarations from state parties and undertaking verification of those declarations through on-site visits and investigations.

It was stressed that declarations should be mandatory only for those activities and facilities of greatest relevance to the BWC, rather than for all facilities of possible relevance. On the subject of visits, the workshop heard that the current rolling text envisages four types of visit: random, clarification, voluntary and voluntary confidence-building. Non-challenge visits to declared facilities are now more widely accepted as integral to an effective BWC verification regime. The current version of the rolling text also includes language on three types of investigations into alleged breaches of the BWC; field investigations, facility investigations and investigations where there is concern that a transfer has taken place in violation of Article III.

The implementation of the non-transfer provisions of Article III could be strengthened as in the draft text by requiring annual declarations from states parties and through the development of guidelines for the transfer of biological agents, toxins and equipment. The workshop was told that additional work needed to be done on measures for the national implementation of the protocol and BWC (Article IV), such measures could include the enactment of penal legislation and the designation or establishment of national authorities by states parties. To date, there has been little consideration of specific measures to ensure the implementation of Article X, but such measures might usefully include the harmonization of national, regional and international safety rules, developing cooperative arrangements with relevant organizations and introducing measures to promote scientific and technological exchanges.

The workshop next heard a presentation on the recent activities of UNSCOM. Attention focused on the crises between Iraq and the UN in October 1997 and February 1998, their implications for UNSCOM itself and for the credibility of other verification regimes. The workshop heard that although political issues such as the composition of inspection teams and the inspection of presidential sites were highlighted during the crises, UNSCOM's main concerns prior to the crises were of a more technical nature, as reflected in UNSCOM's report to the Security Council in October 1997 {S/1997/774}. A series of Technical Evaluation Meetings (TEMs) were held between UNSCOM and Iraq in an attempt to resolve some of these technical issues: one in Baghdad on special warheads; the second also in Baghdad on Iraqi activities related to VX and the third in Vienna on Iraq's biological weapons programme.

While the series of TEMs did little to resolve the technical problems, the Memorandum of Understanding which was signed between Saddam Hussein and Kofi Annan ending the crisis, resolved some of the political issues. The hope was expressed that an emphasis on political issues would not divert attention from the technical problems and undermine UNSCOM's work in identifying and eliminating Iraq's chemical and biological weapons stockpiles. The workshop noted that although UNSCOM is a unique case in the arena of CBW verification, it does nonetheless

provide lessons for the international verification regimes for chemical and biological weapons. The workshop heard that even when UNSCOM is able to verify the destruction of all Iraqi chemical weapons, there will still be a requirement for the ongoing monitoring of Iraq's chemical industry, perhaps by an organization such as the OPCW.

The workshop next received a report on a meeting convened by the Swedish Pugwash Group in Stockholm, immediately prior to the 6th International Symposium on Protection Against Chemical and Biological Weapons. The main topic of the meeting was international cooperation and assistance under the CWC and BWC. Besides people attending the Symposium, participants in the meeting included staff members of the OPCW and delegates to the AHG. Discussion at the meeting focused on international cooperation and dealt with its promotional aspects, for example encouraging trade between states, and its regulatory aspects, in particular the issue of export controls. The meeting heard that the OPCW has implemented a number of promotional measures, but was told that progress on the regulatory side is slower. International cooperation is an important aspect of the strengthening of the BWC, but the workshop heard that it is also necessary to ensure that a future BWC organization does not duplicate existing measures and networks. It was recognised that the international regulatory system cannot be changed overnight, but that change over time must happen. A relaxation in regulatory arrangements could possibly be achieved through the application of more transparency within the various regimes.

The final report presented to the workshop updated participants on developments in the field of international law which relate to chemical and biological warfare. In Rome from 15 June - 17 July a United Nations conference of plenipotentiaries will meet to adopt a convention establishing an International Criminal Court (ICC). The ICC will be able to try individuals for certain crimes wherever they were committed in the world. In its section on war crimes, the draft statute of the ICC {A/CONF.183/2/Add.1} prohibits the use of chemical and biological weapons in international armed conflicts, but the workshop heard that agreement on a number of issues had still to be reached. For example, it is not yet clear whether the prohibitions in the draft ICC statute will apply in non-international armed conflicts, which make up the majority of conflicts in the world today. Ambiguities also exist in the way in which certain options under discussion for inclusion in the draft statute define chemical and biological weapons. While prohibiting the use of chemical and biological weapons by individuals in armed conflict, the draft ICC statute also does not make provision for prohibiting the development of such weapons, thus creating inconsistencies with the regimes established by the CWC and BWC.

It was noted that these differences and inconsistencies are emerging in part because of the lack of interaction between the arms control and international law communities. In response to this situation, the Harvard Sussex Program has produced a draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons. This proposed convention goes considerably beyond the provisions dealing with chemical and biological weapons in the Convention for the Suppression of Terrorist Bombings or in the draft ICC statute by making it an offence to develop, produce, acquire, stockpile, retain or transfer chemical or biological weapons. The convention would make it an offence for any person to order, direct, or knowingly participate or render substantial assistance in the development, production, acquisition, stockpiling, retention, transfer or use of chemical or biological weapons. To date, seven international treaties have established universal jurisdiction for crimes such as aircraft hijacking, hostage taking, torture and piracy. Once further drafting and consideration of the proposed convention has been undertaken, it is intended, with the support of several governments, to bring it before the UN General Assembly for consideration and negotiation.

Following these initial reports, the workshop moved on to its main business, a discussion of transparency and confidentiality as they relate to the OPCW and the implementation of the CWC.

The workshop first heard a presentation outlining the history of the OPCW's confidentiality regime and describing its main provisions. During the negotiations on the CWC in Geneva the safeguard regulations of the IAEA were used as a model for the CWC's confidentiality provisions. The negotiators worked towards a balance between effective verification on the one hand, and the protection of confidential information submitted by states parties on the other. The final text of the CWC as negotiated in the Conference on Disarmament included provisions on confidentiality and an annex devoted to the issue. The text of the CWC set out general principles of confidentiality relating to the conduct of verification measures by the OPCW and to the protection of confidential information by states parties. The Confidentiality Annex elaborated these principles and laid down general procedures in case of a breach or alleged breach of the confidentiality provisions of the CWC. Following the signature of the CWC, the Preparatory Commission for the OPCW was tasked to develop a confidentiality policy, to be approved by the first session of the Conference of the States Parties. The OPCW Policy on Confidentiality detailed a classification system for confidential information and elaborated further the procedures which apply when confidentiality is breached, including the establishment of the Confidentiality Commission. As at all stages of the negotiation of the CWC's confidentiality provisions, reaching a balance between the protection of confidential information and maintaining the integrity of inspections was a guiding principle of the Confidentiality Policy.

The next presentation dealt with the concept of transparency as it relates to the CWC and identified two aspects of transparency; an informational one and an institutional one. Within these aspects there are two hierarchies which determine the extent of transparency - one within the OPCW, namely its member states, and one which covers those organizations, entities and individuals beyond the OPCW. Within the OPCW the dissemination of information on national chemical weapons programmes to member states is an essential part of compliance-monitoring and confidence-building between states parties. The release of information by the OPCW allows interested parties outside of the organization to ensure that the CWC is being implemented as intended by its negotiators and it also allows the OPCW to maintain popular support for its activities.

Institutional transparency depends a great deal upon the process of decision-making within the OPCW. The workshop heard that, because of the sensitive nature of many issues, discussions between the Technical Secretariat and states parties often take place bilaterally and issues are sometimes reported to the wider membership without naming the states party or parties involved. For those beyond the organs of the OPCW, access to the policy-making organs of the organization, particularly to the Executive Council, is especially limited. Interested parties outside of the OPCW also include the chemical industry, which is often affected by decisions taken within the organization and which therefore needs to be involved in the decision-making process.

During the discussion which accompanied these presentations, the workshop heard that transparency is a particularly complex concept. Although it is only mentioned once in the text of the CWC, transparency is one of the foundations upon which the Convention was built and is intimately linked to the concept of compliance. However, the workshop also heard that there are wide differences in perceptions between states parties; for example information which one government considers to be highly sensitive could be considered as not sensitive by another. For the moment it appears that the OPCW has adopted a rather restrictive interpretation of transparency, but it was suggested that this was done to establish states parties' confidence in the confidentiality regime, and that, as further experience is gained, a more flexible approach could be adopted. It was stated that a more transparent policy towards organizations and individuals beyond the OPCW depends, to some extent, upon the evolution of the organization's internal confidentiality measures, and, of course, upon the political will of member states. The workshop heard that, in an era which is witnessing the creation of multilateral bodies in many fields including disarmament, restrictions on the public release of information can be seen as a mark of primitiveness. It is a positive step that new possessor states have come forward, but the OPCW's credibility is undermined by the fact that it cannot name them openly.

The workshop then moved on to study the lessons which could be learned from the experience of comparable international organizations, namely the IAEA and UNSCOM.

The workshop heard a detailed presentation on the IAEA and the way in which the Agency balances confidentiality and transparency in the implementation of its safeguards agreements with member states. With a much longer history than the OPCW, the IAEA has been through periods in which the point of balance between confidentiality and transparency has shifted, often in response to external events. Initially, the issue of protecting confidential information under the Agency's comprehensive safeguards system was addressed by the development of a "negotiated access system". However, comprehensive safeguards had their limitations, which were highlighted by events in Iraq, South Africa and North Korea in the early 1990s. Taken together with new attitudes emerging at the end of the Cold War, these events shifted the balance in favour of transparency, as states wanted more information on compliance by their counterparts.

Under the system of strengthened safeguards, developed in response to these events, states parties were required to provide more information on their present and planned nuclear programme, the IAEA was given broader access to locations for on-site verification and the Agency developed evaluations for each inspected state, based on so-called physical models. In order to balance this expansion in transparency, the Model Additional Protocol included a strict confidentiality regime and provisions for managed access within facilities. The IAEA's classification system is more streamlined than that of the OPCW with one, instead of three, classification categories. It was suggested that excessive compartmentalization within organizations such as the IAEA and OPCW for security reasons can lead to inefficient working practices. The workshop learned that confidentiality has become much less of an issue within the IAEA over the years, because member states have confidence that the Agency can adequately protect the information which they submit to it.

A presentation on UNSCOM's experience of balancing transparency and confidentiality followed. UNSCOM receives sensitive information both from Iraq in the form of declarations and also from the intelligence agencies of other states. Much of this information needs to remain confidential for reasons of national security, commercial sensitivity or because it relates to the planning of UNSCOM inspection missions. Information gathered by UNSCOM is distributed in two ways; through the half-yearly reports which UNSCOM submits to the UN Security Council and also through briefings given to supporting governments. The presentation highlighted the differences

between the OPCW and UNSCOM with regard to internal transparency, which was not an especially relevant concept for UNSCOM. Whereas the CWC contains obligations under which certain information has to be disseminated to its states parties, the prime reason that UNSCOM releases information is to maintain the support of governments and the general public.

It was commented that there were more similarities between the OPCW and UNSCOM and areas where lessons could be learned, in relation to the control and processing of confidential information and in relations with the media. It was noted that a key factor in the provision of information to UNSCOM by states, is the fact that it was granted operational independence by the UN Security Council and has therefore been able to maintain its independence and credibility. It was suggested that, as a much younger organization, the OPCW, and particularly its Technical Secretariat, will need to work hard to maintain its independence and impartiality.

The workshop then heard two presentations from the perspective of the chemical industry, both of which emphasised chemical industry's long history of support for the CWC. Within the chemical industry, confidentiality has long been a major concern and effective provisions for the protection of confidential business information were a prerequisite of industry's support for the CWC. However, the workshop was told that confidentiality is now a much less important issue for the chemical industry as it considers the CWC's confidentiality provisions as adequate and the OPCW has, over the past year, convinced industry that it can be trusted with confidential information. It was noted that the CWC itself does not define what is meant by confidential business information, but that definitions have been included in the implementing legislation of some states.

In contrast to the declarations made to the OPCW on chemical weapons by states parties, declarations related to industrial facilities do not require as much detail and are not automatically disseminated to other states parties. Some transparency mechanisms in the CWC have been affected by the application, in states parties' initial and annual declarations to the OPCW, of different criteria relating to low concentrations and aggregate national data, making it very difficult to gain a clear picture of chemical transfers between states parties and also to non-states parties, and the precise number of declarable facilities in each country. The effectiveness of these confidence-building measures depends upon the harmonization of national regulations, but it was suggested that this could become more difficult to achieve as regulations become entrenched in national legislation. A further presentation compared the provisions made in the various national regulations available thus far. This review demonstrated significant variations and underlined the particular importance of successful harmonization of national regulations in contributing to the overall uniform and effective implementation of the CWC.

On the subject of inspections to industrial facilities, it was noted that the CWC sets out to minimise their intrusiveness and that the inspection process is based on cooperation from both sides and a willingness by the inspected facility to demonstrate compliance with the CWC. Information collected by the inspectors which is relevant to the CWC is discussed with the state party and included in the final inspection report, but the workshop learned that differences had emerged on whether notes taken by inspectors, for example on the cooperation of the inspected state party or on methods for future inspections, should be considered to be inviolable. Experience from other comparable organizations suggests that granting states parties access to inspectors' notes could undermine deterrence by revealing the investigative techniques used by inspection teams.

National authorities are an essential component of the regime established by the CWC. The workshop heard the experiences of the Swiss national authority in the first year of implementation of the CWC. The protection of confidential business information has not been considered a problem, provided the facility decides what information is really confidential before the inspectors arrive. While the company involved might not like to see information publicly available, information which it supplies to the OPCW should not be of a type to seriously harm business if accidentally divulged. The presentation then went on to share the experiences of the Swiss national authority with respect to the composition of escort teams, the actual conduct of OPCW inspections and declaration related issues. Future actions include nationally making another effort to ensure that all industries related to chemicals are identified and internationally recommending common rules for low concentrations and the collation of aggregate national data on chemical transfers.

The workshop then heard a detailed presentation on the role and establishment of the OPCW Scientific Advisory Board (SAB). The presentation outlined the main provisions in the CWC relating to the SAB and then went on to provide a commentary on the SAB's terms of reference, which were agreed at the second session of the Conference of the States Parties in December 1997. The workshop heard that the SAB is intended to be an independent and impartial body outside of the influence of the political organs of the OPCW. As such it is a purely consultative body and does not have any decision-making powers.

The workshop was informed that the negotiations on the composition of the SAB were controversial as a balance had to be struck between appointing experts with access to the most recent scientific and technological

developments and appointing experts on the basis of an equitable geographic distribution. Under its terms of reference, the SAB operates as a college of experts which coordinates the work of a decentralised system of subject-specific temporary working groups. It is in these groups, the workshop was told, that most of the work of the SAB will actually be done. The terms of reference of the SAB leave to the Director-General the precise definition of which scientific and technological fields relevant to the Convention the SAB should report on. However, the SAB is specifically charged with advising on changes to the Annex on Chemicals and on matters related to cooperation and assistance.

The presentation went on to assess the experiences of other scientific advisory bodies, the Scientific Advisory Committee of the IAEA, the Technological and Economic Assessment Panel of the Montreal Protocol and the scientific advisory bodies under the Biodiversity and Climate Change Conventions. It was concluded that, it is to the advantage of an international organization to have a scientific advisory body which is as de-politicised as possible, through members acting in their own personal capacities and through a functional structure which protects the body and its members from political influence. On the subject of transparency, it was pointed out that the SAB's terms of reference do not address whether its meetings will be open to observation and whether its reports and recommendations will be accessible to the public, as in other comparable bodies. The ramifications for transparency if the OPCW has to go through informal rather than formal channels for scientific advice were also mentioned.

The workshop then discussed the establishment and activities of the OPCW Confidentiality Commission (CC). The CC was created by a decision of the second session of the Conference of the States Parties in December 1997. Workshop participants heard that the Commission had decided to establish a registry outside of the OPCW, in the International Bureau of the Permanent Court of Arbitration, in order to enhance the Commission's independence from the Technical Secretariat of the OPCW, which could feasibly be one of the parties to a dispute before the Commission. In a similar way to the negotiations on the composition of the SAB, the negotiators of the CC's terms of reference also had to balance the needs for an equitable regional distribution against the need for members who are independent of the OPCW and its member states. Also important in the composition of the CC is the requirement to create a balance between experience and a rotation of members. The workshop was told that while some members are independent experts, others have close connections to their governments or national delegations to the OPCW. It was stated that it is particularly important for the impartiality of the CC that its members are seen as being independent of the parties, both the member states and the Technical Secretariat, involved in a dispute.

The workshop then looked at the balance between confidentiality and transparency from the perspectives of academic and public interest NGOs and the media. A number of NGOs have been actively involved in the evolution of the regimes covering chemical and biological weapons for many years, and have a keen interest in following the activities of the organizations and entities established to implement those regimes. The workshop heard a detailed presentation on the history of the involvement of Pugwash in the CBW field. This involvement began with the 1959 Fifth Pugwash Conference and has continued in various formats ever since. A particular principle of Pugwash's work on CBW has been the fundamental importance of openness in national CBW-related activities. It was suggested that secrecy, however justifiable in terms of national security or commerce, can engender suspicion and mistrust which could undermine any international agreement. Another principle has been to ensure that there is as little divergence and fragmentation as possible between the chemical and biological elements of the international CBW regime.

From the perspective of the media the workshop heard that the provision of facts and figures by the OPCW and other comparable organizations was an important part of transparency. The OPCW Media and Public Affairs Policy lists certain types of information which can be routinely released beyond the organization. It was suggested that the media would also be particularly interested in being provided with more information on OPCW field operations, especially inspections.

During its final session the workshop discussed what it could address at its future meetings. Numerous topics for future workshops were suggested on both the CWC and the BWC, in addition to broader issues which cover the whole spectrum of the CBW field.