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Chemical Warfare, II: Legal Aspects.
The Chemical Weapons Convention in a changing political context.

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Dr Matousek has talked about technical aspects of chemical warfare and in so doing he has explained the chief provisions of the 1993 Convention on the Prohibition of Chemical Weapons, the 'CWC'. My task is to address legal aspects relating to the CWC. I shall focus on one particular relationship: the treaty and its changing political context. My underlying theme will be this. The institution created by the CWC should be thought of as a living organism that has to be nurtured and allowed to adapt to changing circumstances, in recognition, however, that there are limits to change. Block adaptation or, alternatively, allow undue change in the institution, and the CWC may fade into insignificance, increasingly disregarded, increasingly under-resourced and increasingly violated. The emergent interest, especially in the United States, in creating special exemptions for so-called 'non-lethal' weapons may be pushing the Convention into this dangerous area.

The CWC as bargain

The CWC is an internationally negotiated treaty, in other words a bargain struck by its member states amongst themselves. States joined it because they judged themselves to be better off inside than outside. They continue to be members because they reckon that the costs of belonging to an institution that places demands upon their resources and that imposes constraints upon their behaviour are outweighed by the benefits flowing from this regime when all its member states implement its provisions. Within their polities, the assessment that the institution and membership of it are worthwhile became and evidently still remains the dominant assessment of the CWC.[1] Such dominance can be expected to continue for as long as the circumstances surrounding the assessment of cost and benefit remain largely as they were when the original bargain was signed and sealed, in 1993.

The 1993 bargain had four main elements. Three comprised the variables that the negotiators had been able to adjust so as to secure agreement on the final package, while the fourth was the basic norm of behaviour that had made multilateral agreement seem possible in the first place. The norm is expressed in the Preamble of the CWC, where it states that the CWC reaffirms the principles and objectives of an earlier international treaty outlawing resort to chemical weapons, the 1925 Geneva Protocol, which had

[1] For more on this better-in-than-out concept of CWC regime formation, see J P Perry Robinson, *Chemical-warfare arms control: a framework for considering policy alternatives* [SIPRI Chemical & Biological Warfare Studies no 2] London: Taylor & Francis, 1985.

characterized the use of such weapons as "*justly condemned by the general opinion of the civilized world*". The norm was thus associated with that ancient cross-cultural taboo against the use of poison (and disease) as a weapon of war, of which the Geneva Protocol was the latest codification.[2] The Preamble goes on to state the purpose of the CWC as being, "*for the sake of all mankind, to exclude completely the use of chemical weapons, through implementation of* [its] *provisions, thereby complementing the obligations assumed under the Geneva Protocol*". The norm stated in the CWC and on which the bargain rests is thus a reaffirmation of a pre-existing norm of behaviour, expressed, however, in modern language. Whereas the Geneva Protocol had referred not to chemical weapons but to "*asphyxiating, poisonous or other gases, and … all analogous liquids, materials or devices*", the CWC characterizes the 'chemical weapons' that it outlaws as ones "*dependent on the toxic properties of chemicals as a method of warfare*", with toxicity being understood to mean "*chemical action on life processes* [that] *can cause death, temporary incapacitation or permanent harm to humans or animals*". The norm of behaviour that underpins the institution created by the CWC is the norm that renounces weaponization of toxicity. The precise words in which it is expressed in the CWC required negotiation, but the concept to which those words gave form had long been embedded in the practice of states. Although armament for chemical warfare had nevertheless sometimes occurred and even been used, it remained ignominious and reprehensible, justifiable in public only as safeguard against the chemical armament of enemies.

Besides the norm, the other three elements were these. First, a set of 'negative obligations', which are the rules obliging member states not to do certain things that would be incompatible with the norm, such as developing, producing, stockpiling or using chemical weapons or helping other states to do so. Second, a set of 'positive obligations', which are the rules requiring member states to take certain actions to support the norm, such as destroying any chemical weapons or factories for making them that they might possess; ensuring within their jurisdictions that all toxic chemicals are used only for purposes that the CWC does not prohibit; and participating in the various arrangements set out in the CWC for verifying compliance with its provisions. Third, a set of procedures, which are the internationally agreed mechanisms for implementing the rules in furtherance of the norm – procedures for verifying compliance, for example, or resolving disputes or making collective decisions. Included among these procedures was the establishment and operation of a new international organization that would provide oversight of implementation, the 'OPCW' (Organization for the Prohibition of Chemical Weapons), now with a €75M annual budget and a 500-strong headquarters establishment in The Hague, including a 200-person inspectorate. It took the negotiators from 1983 to 1992, after a decade of prior exploratory talks, to adjust these elements into a set of acceptable packages. It then took a further four years, from the opening of the CWC for

[2] Earlier codifications of the taboo included Article 23(a) of the Regulations Respecting the Laws and Customs of War on Land, appended to Hague Convention IV of 1907 and to Hague Convention II of 1899, stating that it is especially forbidden "to employ poison or poisoned weapons"; the Hague Declaration of 1899 Concerning Asphyxiating Gases, in which the "contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases"; and Article XIII(a) of the International Declaration Concerning the Laws and Customs of War signed at Brussels in 1874, stating that "employment of poison or poisoned weapons" is "especially forbidden". These Nineteenth Century European antecedents themselves reflected earlier formulations of the taboo, as in Hugo Grotius, *De Jure Bellis et Pacis* (1625), which, expounding Roman law, disallowed use of poison or poisoned weapons in war. Miguel Marin, in his "The evolution and present status of the Laws of War" [Academie de Droit international, *Receuil des Cours* vol 92 (1957), pp 633-754] notes several non-European codifications including ones of great antiquity -- for example in Islamic laws of war of Islam recorded in the Thirteenth Century and in the *Laws of Manu*, a Sanskrit treatise from perhaps three millennia or ago that laid a foundation for Hindu law, and included a proscription of poisoned arrows.

signature in January 1993 to its entry into force in April 1997 -- 180 days after 65 of the signatures had been ratified -- to convert the treaty into an institution for implementing its provisions, in other words into a functioning international regime.[3] The process of mutual accommodation among member states continues to this day as new or hitherto unresolved problems of treaty interpretation or implementation are sorted out within the OPCW.

In order for the CWC to continue to thrive and achieve universality, that process of mutual accommodation must continue, for circumstances change and so too, therefore, may the balance of cost and benefit that originally led each member state to sign up. If member states are unable to reconcile continuing membership with changing circumstances – with political developments, national or international, and with technological developments especially – they may be forced to question their continuing participation, their continued incurring of regime costs through the positive obligations and their continuing acceptance of the constraints embodied in the negative obligations. Come 9 October 2003, there will be 154 states parties to the CWC, not yet including Egypt, Israel, Libya, North Korea, Syria and 35-odd other states. If the CWC institution is not able to adapt itself to political or technological change, wider universality may remain elusive. The quality, moreover, of member-state participation may deteriorate: OPCW delegations may behave poorly, even obstructively; payment of assessments may become yet further delayed; domestic implementation of CWC provisions may be skimped or ignored; the OPCW Technical Secretariat may be deprived of good-quality recruits; there may be corruption or abuse of regime procedures; technical non-compliance may increase; substantive non-compliance may set in; and there may be withdrawals. Thus could the CWC die. To forestall this, there may have to be adaptive change. Neither the provisions of the treaty nor the features of its institution should be conceived as immutable, graven in stone.

Mechanisms of change

Four different mechanisms exist whereby adaptive change can be brought about. Two involve revision of the CWC text. The other two are inherent in the procedures of the regime.

The first two mechanisms are provided for in Article XV of the CWC. Formal amendment of the treaty requires the convening of an Amendment Conference, passage without dissenting vote of the proposed amendment, and subsequent ratification by all those member states that voted in favour of the amendment. The sheer difficulty of satisfying these requirements and their various pre-conditions would seem to render amendment of the CWC virtually impossible.

The other Article XV mechanism is for ‘change’ rather than amendment, but it is restricted to the Annexes of the CWC that set out the detailed procedures of the regime. Thus far, the change mechanism has been activated twice, with one success and one failure, both involving the saxitoxin specified in Schedule 1 of the Annex on Chemicals. The success was the insertion of a new paragraph into Part VI of the Verification Annex, revising the notification procedure for international transfers of saxitoxin. The original procedure had obstructed timely shipment of diagnostic kits for Paralytic Shellfish Poisoning. In September 1997, Canada first suggested the change, which was formally proposed in December 1998 and effected in October 1999. The failure concerned an

[3] I owe this concept of regime as institution, and not as organization, say, or accretion of codified rules, to Dr Alexander Kelle, currently at the University of Bradford, UK.

associated proposal for a change that would have expressly allowed re-export of saxitoxin in tritiated form. This did not attract consensus and was withdrawn.

Yet tritiated saxitoxin is currently available on the world market, even though that *de jure* change to the Convention did not happen. This is because another mechanism was successfully invoked – the informal mechanism of unchallenged interpretation. Canada and the United Kingdom maintained that the salt form in which the saxitoxin is sold, either for use in PSP diagnostic kits or for tritiation, is not the same as the free-base form corresponding to the CAS number identifying saxitoxin in Schedule 1. Even though the OPCW Scientific Advisory Board has recommended that salts and their free bases should be treated identically under the Convention, no state party to the CWC has challenged the sales of saxitoxin as a violation of the treaty – no doubt because the quantities involved are minute and therefore insignificant in military or other weapon-related terms.

The fourth mechanism is also political, and involves altering the relative emphases in implementation of the treaty's many provisions – stressing or prioritizing one set of provisions rather than another by changing the resources devoted to it. Changes of this type often underlie the annual negotiation within the OPCW of its Programme of Work and Budget for the year ahead.

In practice, therefore, the institution created by the CWC is not immutable. Healthy adaptation to a changing environment is possible.

Conceivable types of change

My argument is not that further changes are now needed. It is instead that they must not be ruled out. In principle, what types of change might be contemplated? One way of conceiving them is to consider the different benefits that OPCW member-states might have valued most highly when choosing to join or stay inside the OPCW – the benefits for which they have been willing to incur substantial costs and which they will therefore wish to maximize. These benefits correlate somewhat to the four 'pillars' of the CWC institution that Dr Matousek mentioned: destruction of existing chemical weapons; non-production of new ones (non-proliferation); mutual assistance in the event of chemical attack or threat thereof; and mutual technological cooperation.

- If *disarmament* is seen as the primary purpose of the CWC and, when collectively instituted through the elimination of stocks of chemical weapons and of factories for making them, it is seen as the primary source of benefit, then changes may be favoured that serve to expedite that elimination, which is taking taking far longer than originally anticipated, in the face of ever increasing environmental protection.
- If *elimination of a weapon of mass destruction* is seen as the primary objective, then changes may be sought that would serve to accelerate the destruction of stocks of lethal chemical weapons.[4]
- If *non-armament*, then changes might be advocated that shift OPCW resources from disarmament work to routine industry verification and to preparedness for challenge inspection.

[4] In the original 1947/48 United Nations parlance that used the concept of 'weapons of mass destruction' (WMD) to differentiate conventional weapons from other types of weapon so as to facilitate work on the system for the regulation of armaments required under Article 26 of the UN Charter, chemical weapons were included in the negotiated formal definition of WMD, but only 'lethal' ones. Arguably, therefore, the WMD concept of a chemical weapon is narrower than the norm against weaponization of toxicity, lethal and non-lethal, that underpins the CWC.

- If *non-proliferation*, then changes that enhance technology-transfer controls might be favoured.
- If *assistance* or *technological cooperation,* then changes that better resource the implementation of Articles X and XI, or that promote research and development in the field of protection, may be advocated.
- If *suppression of industry abuse* (suppression of the downside of dual use), then changes that would promote full implementation of the Article VI.2 chapeau – the positive obligation upon states parties to "adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained or transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention".
- If *denial of safe haven to chemical terrorists*, then changes that would promote breadth of scope in domestic implementation, including full attention to the 'general purpose criterion' just quoted.
- If *suppression of new utilities for CW,* then changes to ensure that OPCW resources are not consumed by efforts to suppress obsolete utilities.

Other types of change can be contemplated. Those listed are simply examples. An important question to ask of each one is whether it would be *evolutionary* or *revolutionary* – would it involve a change of emphasis within the institution or a change of structure? I shall return to this later. The more pertinent question now is: Are any of these changes in fact being sought by CWC states parties?

Changes being sought by CWC states parties

State behaviour in this regard is not easy to discern. There are two places to look. One is the agenda of the OPCW Executive Council – the 41-nation executive organ of the OPCW whose job it is to promote effective implementation of the CWC and to "supervise the activities of the Technical Secretariat, cooperate with the National Authority of each State Party and facilitate consultations and cooperation among States Parties at their request". But the proceedings of the Executive Council are largely opaque to the outside world, held secret chiefly because of the CWC Confidentiality Annex and rules developed by the OPCW Preparatory Commission so as to allay concerns of the chemical industry about its proprietary information. To the outside world, moreover, the Executive Council does not seem to be an agile rapid-response body, attuned to the need for adaptive change or capable of delivering it in a timely fashion. As the number of still-unresolved issues before the Council indicates, its default decision is to defer, not to resolve. Perhaps some of the possible changes I have just exemplified are currently under consideration within the Council, or within consultations it has sanctioned. If so, we cannot see it: we are blind to the actions our governments, through their delegations to the OPCW, are taking on behalf of states parties.

The other place to look is in the proceedings of the OPCW Conference of the States Parties, which is the principal organ of the OPCW and to which the Executive Council reports. The Conference ordinarily meets only once a year and, like the Council, tends to focus its efforts on the immediate or short-term business of the OPCW. However, every so often (twice a decade) it is required to convene in special session to review the operation of the Convention, taking into account any relevant scientific and technological developments. The first such review conference took place during 28 April to 9 May earlier this year, and it was unique occasion for OPCW member states to look beyond their

immediate preoccupations into the longer term future of the CWC institution. The agreed final report of the review conference incorporates the 'Review Document' on which member states had begun work in January -- much later than expected, largely on account of the tumultuous activities of 2002 associated with the ouster of the first Director-General, José Bustani -- and which ended up including many recommendations and requests for action. More than 35 of those requests require new action by the Council and the Technical Secretariat,[5] and the ordinary session of the Conference later this year is expected to formalize a plan for advancing at least some of the requests.

Each requested action aims for some sort of alteration to the existing CWC regime. In most cases, however, the objective is not actually change but is instead proper implementation of what was agreed in the Convention. There seem to be two main reasons why the CWC has not always been implemented as intended. One is that the text contains a good many 'constructive ambiguities'.[6] They result from the failure of the negotiators to have reached consensus on certain matters, meaning that, under pressure of deadline, they agreed to wording that could accommodate differing positions on the matter. The OPCW Preparatory Commission did not resolve all of these ambiguities. The other main reason is that, on several matters, states parties seem not to have recognised their obligations. Provisions of Article VII are especially notable for their neglect, for example those that require states parties to adopt implementing legislation that both criminalizes violations of the Convention by natural persons and empowers the designated National Authority to gather the often privately owned quantitative and other data necessary for its declarations to the OPCW. At the last count, it seems that only 42 (28 percent) of the states parties had full-scope implementing legislation in place. The positive obligations set out in Article VII are what govern the interactions between National Authorities and the Technical Secretariat on which the treaty's international verification system rests. So this dereliction by a hundred-odd states parties is a very serious matter indeed, not at all the overlooking of a trivial formality apparently seen by some.

The Review Document drew special attention to the Article VII derelictions, and, if all goes well, a plan of action is soon to be agreed by the Conference of the States Parties on securing full implementation of Article VII obligations. This must be regarded as a major success of the Review Conference. However, another feature of the Review Conference was that certain issues did not surface at all, apparently because they were considered too controversial, meaning that their presence on the agenda might have proved counterproductive. These issues thus have the potential for festering on unresolved, possibly bringing about more damage to the CWC institution in the long term than they seemed to threaten in the short term.

Issues disregarded by the First CWC Review Conference

I shall mention two. First, there is the issue of safeguarding organs of the OPCW, especially the Technical Secretariat, against corruption, including improper political interference. Professor Robert Neild observes in his most recent book that there are certain features of intergovernmental organizations today that are notably "conducive to corruption".[7] Mainly he was referring to the feature of poor public accountability, but he

[5] The 35-plus requests for action are set out in tabular form in *The CBW Conventions Bulletin* no 60 (June 2003) pp 2-5, and progress on them is to be monitored in subsequent issues.
[6] They are noted in Walter Krutzsch and Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht: Nijhoff, 1994.
[7] Robert Neild, *Public Corruption: The Dark Side of Social Evolution*, London: Anthem Press, 2002, pp 144-46.

also places emphasis on what he calls the "habit of mendacity" that grew up during the cold war as governments on either side sought to conceal their covert operations, not so much from the cold-war enemy against which they were directed, but rather from their own people. The upshot, Neild writes, was "that ministers and government employees, civil and military, acquired the habit of misleading the public on an extraordinarily large scale for an extraordinarily long time; and official secrecy, which is used and abused to prevent the public knowing the truth, became entrenched".[8] It cannot be doubted that a culture of secrecy conducive to mendacity prevails within the OPCW; and in the CWC institution there exist no transparency mechanisms or other forms of protection against falsehood and deception in the utterances of states within its organs. To point at the ouster of the first Director-General as evidence of such corruption may be thought extreme, yet when Ambassador Bustani complained to the Administrative Tribunal of the International Labour Organization that he had been wrongfully dismissed by the OPCW Conference of the States Parties, the Tribunal not only upheld his complaint, awarding him material damages, moral damages and costs, but also included in its judgement language imputing improper behaviour by the state party that had instigated the ouster.[9] The judgement reaffirmed the principle that the independence of international civil servants is essential to the proper functioning of international organizations, whose officials must not be vulnerable to political pressure. This principle will surely remain under threat for as long as the practices displayed for scrutiny in that judgement are not seen to be corrupt.

The second disregarded issue on which I shall comment is the growing concern about possible break-out from the CWC regime by states parties wishing to acquire chemical weapons for which new utilities are emerging. In this morning's discussion of the 'revolution in military affairs' there were indeed hints that chemical weapons might serve novel roles in the 'new wars'. The utility of chemical weapons in the 'old wars' was largely determined by the likely frequence of battlefield scenarios in which chemical weapons would be more cost-effective than the equivalent conventional weapons, and so much more cost-effective as to be worth incurring the political costs of resort to an illegal method of warfare. For this, rather few chemicals displayed sufficient aggressivity – that combination of toxicity and the various chemical and physical properties responsible for such characteristics as percutaneous action, stability, persistence &c – maybe no more than a few mustard and nerve gases, perhaps one or two others. Nowadays, however, the criteria for utility seem to be changing, dictated by the modalities and asymmetries of 'new wars' such as the deliberate targeting of noncombatants and resort to terrorization. As was seen in, for example, the wars of the disintegration of Yugoslavia, the toxic chemicals that sometimes found application as weapons did so less because of their aggressivity than because they were accessible, ready to hand. Thus it is that TICs (toxic industrial chemicals) are now up there with mustard and nerve gases as primary threats against which anti-CW preparedness measures must be directed, not least measures against acts of chemical terrorism. My point in mentioning this is not to remind you of the possible value of chemical weapons to terrorists. It is instead to pick up on a point introduced earlier in this session by Dr Inch: the utility of chemical weapons *against* terrorists. The fact that several states parties are developing, even using, counter-terrorist chemical weapons, and the consequences thereof for the future of the CWC regime, were

[8] Neild, *op cit* pp 134-36.
[9] International Labour Organization Administrative Tribunal (95th session), Judgement No. 2232, *In re* Bustani, adopted on 15 May 2003, delivered in public in Geneva, 16 July 2003. The Judgement is reproduced in OPCW document C-8/1 dated 24 July 2003.

not among the topics taken up by the Review Conference. The subject was, in fact, actively suppressed.

Counterterrorist chemical weapons

The counterterrorist utility of chemical weapons is not itself new. During the last century, colonial powers such as Britain, France, Italy and Spain tended to characterize those against whom they used chemical weapons as 'terrorists'. What is new now is the emergence of a new category of terrorist -- the *suicidal* terrorists. This has generated a requirement for counterterrorist weapons that can take effect over a substantial area within a very short time and which can be used in close proximity to civilian bystanders.[10] In the Moscow theatre siege of October 2002, we saw how fentanyl-based weapons were used to meet this requirement.

Those who applauded that action by Russian special forces are sometimes conscious that it does not sit easily with the provisions of the CWC. Some are therefore led to argue that the CWC is "a mistake".[11] Not yet has this view been expressed within the OPCW by any member state, nor has there been any call for changes that would loosen CWC constraints upon the newly attractive category of counterterror chemical weapon. But both investment in and perceived need for such weapons are growing, so it can only be a matter of time before special exemptions are sought. The spin that protagonists will give to their case is that the new weapons are 'non lethal' and that it would be both illogical and inhumane to stand in the way of such change. Actually a case can be made without resorting to any such spin, or even without calling for adaptive change. The difference between a toxic chemical and a chemical outlawed by the CWC is whether the chemical is "intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes", this being the 'general purpose criterion' I referred to earlier; and, among the 'purposes not prohibited', the Convention lists "Law enforcement including domestic riot control purposes". So, should counterterrorist chemical weapons be seen as instruments of law enforcement, in which case they might not be chemical weapons within the meaning of the CWC; or should their use be regarded as a method of warfare dependent on the toxic properties of chemicals, in which case the norm on which the CWC regime rests would be violated?

Conclusion

We are thus brought back to the distinction I drew earlier between evolutionary and revolutionary change, for any attempt to change the norm on which the CWC institution rests would, by definition, be revolutionary, not adaptive. I would argue that any such normative change could be fatal for the Convention. An amendment to or alteration of the regime that had the effect of legitimizing some form of exploitation of toxicity for hostile purposes should be regarded as unacceptable, even unthinkable. There is a firebreak here that must be maintained without compromise. We ought not to move towards a regime that, instead of seeking to preclude the weaponization of all toxic chemicals, would control only some toxic chemicals. That way lies confusion and terminal erosion of the CWC.

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[10] John B Alexander, "Less lethal weapons in the war on terror", a paper presented at the 2nd European Symposaium on Non-Lethal Weapons, *Non-Lethal Capabilities Facing Emerging Threats,* Ettlingen, Germany, 13-14 May 2003.

[11] Alexander, *op cit*.