

The Chemical Weapons Bill

[Bill 2 of 1995/96]

Research Paper 95/116

21 November 1995



The President of the Board of Trade presented the Chemical Weapons Bill on 16 November 1995. This paper outlines the provisions of the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (Cm 2331), more commonly known as the Chemical Weapons Convention (CWC) and comments on the Chemical Weapons Bill, which is designed to implement the CWC in the United Kingdom.

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I Introduction

After more than twenty years of negotiation, the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, henceforth called the Chemical Weapons Convention (CWC) or the Convention, was opened for signature in Paris on 13 January 1993. On 3 September 1992 the 39-nation Conference on Disarmament (CD) completed negotiations and sent the final text of the Chemical Weapons Convention to the United Nations General Assembly, where a draft resolution commending the CWC was adopted by the First Committee on 12 November. The Chemical Weapons Convention is of unlimited duration and is the first arms control treaty to seek to establish a verifiable ban on an entire class of weapons of mass destruction.¹ Hailed by the UN Secretary-General as a decisive advance along the road to disarmament,² it bans the development, production, stockpiling, transfer and use of chemical weapons and lays down a strict verification regime to ensure compliance and monitor production of chemicals that could potentially be diverted for use in weapons. It also contains provisions for chemicals that may be developed or present a risk in the future. The CWC is the first multilateral arms control agreement which provides for an intrusive verification regime. To implement the complex verification regime, the Convention provides for the creation of the Organisation for the Prohibition of Chemical Weapons (OPCW) in The Hague.

Given the dual-use character of many chemicals, monitoring chemicals used for peaceful purposes was an unavoidable element in the Convention. The CWC is also thus the first multilateral arms control agreement covering a whole and particularly important branch of the civilian economy. The close relationship which must be established between the international policing arm of the CWC, the Organisation for the Prohibition of Chemical Weapons (OPCW) and the civil chemical industry gives the CWC a particularly distinctive character. The Convention was sponsored by 144 nations and initially signed by 125.³ The CWC was not signed by several countries suspected of possessing, or seeking to possess, chemical weapons, such as North Korea and Vietnam. Most of the Arab states, including Iraq, Syria, Libya and Egypt also did not sign. This was seen as a significant blow as the Middle East has been the focus for concern about chemical weapons proliferation. The Arab states made their signature conditional on Israel's signature of the Nuclear Non-proliferation Treaty (NPT). The CWC denies non-signatories access to a wide range of chemicals vital to industry, which some see as a potentially effective sanction/inducement to sign.

¹ The only precedent for an outright ban of this kind is the Biological and Toxic Weapons Convention of 1972, but this failed to provide for verification. It is hoped, however, that if the Chemical Weapons Convention works, a similarly comprehensive ban on biological weapons may be politically feasible.

² The Chemical Weapons Convention, *FCO Background Brief*, June 1993

³ This number has now risen to 159.

Three countries admit to possessing chemical weapons: the United States, Russia and Iraq. By far the largest stockpiles are held by the US and Russia. Official figures for the US chemical weapon stockpile were given in the *FY (Fiscal Year) 1994 Arms Control Impact Statements* as 28,000 tonnes of mustard gas and nerve agents in munitions which have lost their utility and 3,200 tones of usable agents in artillery projectiles, spray tanks and bombs.⁴ In February 1992 Russian Foreign Minister Andrey Kozyrev told the Conference on Disarmament in Geneva that Russia had 40,000 tonnes of toxic agents in its possession.⁵ There has, however, been continuing discussion about the accuracy of this official figure, with the size of Russia's chemical weapons stockpile being estimated as much higher. Indeed, the State Duma Committee on International Affairs hearing on the CWC was told in March 1994 that the size of the actual stockpile amounted to 400,000 tonnes.⁶ The Chemical Weapons Convention stipulates that States Parties have to destroy any chemical weapons it abandoned on the territory of another State Party. In January 1992 the head of the Russian delegation to the Conference on Disarmament pointed out that all chemical weapons produced in the Soviet Union were now within the boundaries of the Russian Federation.⁷ Doubts have been expressed about this, however, and there have also been concerns about allegations that have been made concerning dumping operations by the former Soviet Union in the Baltic Sea.⁸ Neither the United States, nor the Russian Federation has yet ratified the Chemical Weapons Convention.

Despite the fact that only the US, Russia and Iraq admit to possessing chemical weapons, western experts believe that about twenty countries have chemical weapons, or active programmes to develop them.⁹ In 1994 allegations were made that Iran and North Korea possess chemical weapons.¹⁰ Other countries thought to have a chemical weapons capability or to be pursuing a programme to develop chemical weapons include Syria and Libya. In 1994 there were also allegations of past chemical weapons development programmes in the Czech Republic and Romania.¹¹

In a written answer in January 1992, Mr. Archie Hamilton said that "The United Kingdom abandoned all offensive chemical and biological weapons in the late 1950s. Since then the United Kingdom has been wholly concerned with chemical and biological defence, that is, the provision of effective protective measures for the United Kingdom armed forces".¹² During the Second World War the UK had manufactured 55,000 agent-tonnes of chemical weapons,

⁴ *SIPRI Yearbook 1994*, pp.331-332

⁵ *SIPRI Yearbook 1993*, p.277

⁶ *SIPRI Yearbook 1995*, p.347

⁷ *SIPRI Yearbook 1993*, p.265

⁸ *SIPRI Yearbook 1995*, p.353

⁹ *Statement on the Defence Estimates 1992*, Cm 1981, p.7, para. 104

¹⁰ *SIPRI Yearbook 1995*, p.339

¹¹ *ibid.*, p.340

¹² HC Deb, 20 January 1992, c.16W

the last of which were destroyed between 1957-1959.¹³ In March 1960 Minister of Defence, Mr. Watkinson, told the House of Commons:

"We are not stockpiling these weapons. We are of course bound by the Geneva Convention and our only purpose in the matter is...that we must assess the threat in order to prepare defences."¹⁴

The Convention will enter into force 180 days after 65 states have deposited their instruments of ratification.¹⁵ The Convention then allows ten years for the destruction of existing stocks of chemical weapons and chemical weapon production facilities.¹⁶ In the event of difficulties in destruction, there is a provision for a possible extension of this deadline to a maximum of 15 years after the Convention's entry into force.¹⁷ For the CWC to have come into effect on 13 January 1995 (i.e the requisite two years after it was opened for signature), 65 nations would have had to have ratified it by 18 July 1994. At the time of signature, it was expected that there would have been 65 ratifications by early mid-1994. This timetable has, however, proved overly ambitious. By September 1995, 38 countries had deposited their instruments of ratification with the UN Secretary-General in New York.¹⁸ In its September 1995 issue, the *Chemical Weapons Convention Bulletin* (CWCB) also provided a list of undeposited ratifications - ie countries which have completed the domestic ratification process, or are reportedly close to doing so. There are eleven of these countries.

II Historical Background

The Chemical Weapons Convention marks the culmination of a process to prohibit toxic warfare which began over 100 years ago: earlier prohibitions occur in Article 23(a) of the Hague Regulations of 1907 and 1899, in the Hague Gas Projectile Declaration of 1899 and in article 13(a) of the Brussels Declaration of 1874. The 1925 Geneva protocol, the treaty to which some 150 states are now parties, prohibits 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials and devices' and which also prohibits 'bacteriological methods of warfare'.¹⁹ The Geneva Protocol does not, however, restrict possession or development.

¹³ Memorandum to the Foreign Affairs Select Committee on CBW weapons proliferation and control, J. P. Perry Robinson, 24 February 1994.

¹⁴ HC Deb, 23 March 1960, c.497

¹⁵ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, United Nations 1993, Article XXI, paragraph 1

¹⁶ *Ibid.*, Article IV, para. 6

¹⁷ *Ibid.*, Verification Annex, para. 26. This was a late concession negotiated in 1992 in response to a plea from the Russian Federation.

¹⁸ *Arms Control Reporter 1995*. A list of ratifications and undeposited ratifications as of 20 September 1995 can be found in Annex I.

¹⁹ *SIPRI Yearbook 1993*, p.708

Chemicals weapons have been used for a long time and newly discovered chemicals have had a considerable influence on twentieth century warfare. It was the growth of industrial chemistry in Europe in the nineteenth century which modernised toxic weapons. The initial technology, for which Germany had a uniquely large industrial capacity at the outbreak of the First World War, concerned the liquefaction of chlorine gas and its packaging into pressure cylinders. Germany saw this as a means of counteracting the trench warfare that arose after the Battle of the Marne and experimented with this. The tactical surprise this achieved was subsequently built on as Germany attempted to exploit its industrial edge. It introduced toxic smoke capable of penetrating the respirators that had soon been introduced to protect soldiers against poison gas and mustard gas, which could attack the skin and linger as a liquid on surfaces for long periods of time.²⁰

With post-WWI military doctrine evolving under the influence of other forms of technological change, notably the tank and the combat aircraft, chemical weapons did not immediately become the weapons of the future as had previously been predicted. Chemical weapons were therefore not used to any significant extent during combat operations in the Second World War, the Korean War or the Arab-Israeli Wars. The commonly-held view in the aftermath of the Second World War was, indeed, that chemical warfare had become obsolete between belligerents equipped with the latest military technologies, given the availability of antichemical protection and the advances in atomic technology.²¹

Chemical weapons survived, however, and acquired a new military usefulness mainly due to research discoveries which promised an increase in the power and usefulness of toxic weapons. These were the discovery of new classes of fast-acting poisons, especially the organophosphorus anticholinesterase agents known as the "nerve gases" that were lethal in far smaller doses than existing chemical warfare agents. The second discovery concerned the feasibility of using certain pathogenic microbes as payload for weapons in much the same way as chemical-warfare agents, thus achieving in principle a huge increase in the casualty-producing power of individual weapons. The third discovery was that of lethal herbicides.²²

In the late 1960s the idea began to surface that renouncing chemical and biological weapons might be more beneficial for national security than retaining them. The East-West arms talks that had been proceeding in various fora since the Korean War provided a framework for the debate. The idea of a convention banning chemical weapons was conceived in 1968 when the United States and the Soviet Union accepted a Swedish proposal that chemical and biological weapons should be placed on the agenda of the multilateral disarmament conference. This had been prompted by the use of poison gas by Egypt in the Yemen and the upsurge in the

²⁰ *The 1993 Chemical Weapons Convention*, J P Perry Robinson, for the Harvard Sussex Programme (HSP) CBW Seminar, 10 January 1993.

²¹ *ibid.*

²² *ibid.*

chemical warfare which the United States was conducting with herbicides and irritants in Vietnam. In the event it, proved easier to negotiate a ban on biological weapons than chemical weapons and the Biological Weapons Convention was concluded in 1972. It contained a pledge that the parties would pursue the negotiation for a Chemical Weapons Convention.

III Negotiating the Chemical Weapons Convention

The first important step towards agreement came in April 1973 with the outline draft treaty put forward jointly by the neutral and non-aligned countries. The draft proposed a declarations-based international control system for a ban on chemical weapons, thereby opening up the possibility for constructive international discussion about the delicate issue of verification. The next important milestone came in July 1974 with the Nixon-Brezhnev communiqué from the summit meeting in Moscow envisaging a "joint initiative" focused on "the most dangerous, lethal means of chemical warfare" to be submitted to the Geneva conference. Nothing was heard of the joint initiative for two years until the United Kingdom presented a draft treaty of its own.

It was not until 1984, however, that negotiations for a comprehensive ban on chemical weapons began at the UN Conference on Disarmament in Geneva. The CD agreed that it should now move away from exploratory discussion and start its "final elaboration" of a chemical weapons ban, mandating its Ad Hoc Working Group, which had been set up in 1980 to define issues to be dealt with in the negotiations, accordingly. The negotiations got underway, spurred on by the submission of a new draft proposal by the United States and verification by the UN Secretary-General that Iraq had been using chemical weapons in its war against Iran, as well as fears of a renewed interest in chemical weapons by several other states. The six-monthly 'rolling text' which emerged from the multilateral negotiations effectively marked the progress of the expanding draft treaty whose outline was first agreed at the outset in 1984.

In 1987 Soviet Foreign Minister Eduard Shevardnadze opened up the Soviet negotiating position, announcing *glasnost* in the Soviet military chemical programmes and accepting the proposal for mandatory challenge inspection and other such intrusive inspection measures which the US had put forward in the 1984 draft convention. In 1989 the Paris Peace Conference on the Prohibition of Chemical Weapons was convened by Presidents Reagan and Mitterrand to secure a reaffirmation that the principles of the 1925 Geneva Protocol should be implemented and that early conclusion of the CWC would be the best way of assuring this. The Gulf conflict in 1990-1991 is seen as having given added momentum to the negotiations for a comprehensive ban on chemical weapons, as a result of Iraqi threats to use chemical weapons. These threats was viewed with the utmost seriousness, given Iraq's use of chemical weapons against the Kurds in Halabja in 1988. A major breakthrough came on 13 May 1991 when President Bush announced that the United States was willing to renounce the option of

retaliation in kind against chemical-warfare attack once the convention was in force. President Bush also announced that the US would be retaining 2% of its stockpile until all CW capable states had joined the Convention and offered to destroy all US chemical weapons within ten years of a global ban.

By the early 1990s, however, the 'rolling text' was a maze of brackets and footnotes embodying all the concerns and questions which inevitably accompanied the negotiating process and it became increasingly difficult to discern the clear outlines of a convention. An Australian initiative, Australia's "Model CW Convention", emerged as the first example of a comprehensive and coherent treaty text free from all alternative language, brackets and footnotes. It was presented by Australian foreign minister Gareth Evans to the CD on 19 March 1992. It was this that formed the basis of the 1993 CWC.

Although the Chemical Weapons Convention is the first multilateral arms treaty to impose such an intrusive verification regime, this was not the first time such intrusiveness had been incorporated into an arms control agreement. As a result of the changed relationship between the military superpowers in the late 1980s, a precedent for such intrusiveness had been set by several bilateral treaties, notably the INF (Intermediate Nuclear Forces) Treaty concluded between the United States and the then USSR in 1987.

IV Main provisions of the Chemical Weapons Convention²³

The text of the CWC comprises a preamble, 24 articles and three annexes.

A. The Prohibitions

Each state Party undertakes never, in any circumstances, to:

- develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- use chemical weapons, or engage in any military preparations for doing so; or

²³ Taken from *Chemical Weapons Convention Bulletin, Issue No. 18*, December 1992.

- assist, encourage or induce, in any way, anyone to engage in any activity prohibited by the CWC.

By "chemical weapons" the CWC means munitions or other devices specifically designed to cause death, temporary incapacitation or permanent harm to humans or animals through the action of chemicals on life processes. Such toxic chemicals on their own, as well as any other chemicals from which they can be made, are also defined by the CWC as "chemical weapons" - unless they are intended for purposes not prohibited by the CWC, as long as the types and quantities are consistent with such purposes. A "toxin" in the sense of the 1972 Biological Weapons Convention may also be a "chemical weapon" in the sense of the CWC. Toxicity to plants is not included in the CWC's definition of toxic chemicals, but the preamble expressly recognizes the prohibition in international law of the use of herbicides as a method of warfare.

The CWC lists the purposes it does not prohibit. They are industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; purposes related to protection against chemical weapons; military purposes not connected with the use of chemical weapons; and law enforcement including domestic riot control. The CWC states explicitly that "riot control agents" (which it defines) shall not be used as a method of warfare.

B. The disarmament stipulations

Each State Party undertakes to destroy, within ten years of the treaty entering into force,

- its chemical weapons;
- any production facilities it has designed, constructed or used at any time since 1 January 1946 to manufacture chemical weapons in quantities exceeding one tonne of chemicals per year;
- any chemical weapons it abandoned on the territory of another State Party.

Each State Party undertakes to accept international procedures, as detailed in the CWC, for verification of this disarmament. These procedures will also place access to the weapons and production facilities under international control from the initial months of the CWC entering into force.

Destruction of chemical weapons must take place in designated and appropriately designed facilities. How exactly this is to be done is for each State Party to decide, except that dumping in any body of water, land burial or open-pit burning may not be used. The CWC discourages but does not exclude the possibility of a production facility being converted to peaceful use rather than destroyed. An extension of the destruction period of up to five years may be allowed in exceptional cases.

C. Relationship to the Geneva Protocol and the Biological Weapons Convention

The CWC does not affect obligations assumed under either the 1925 Geneva Protocol (which prohibits use of chemical and biological weapons) or the 1972 Biological Weapons Convention. States Parties that are also parties to the Protocol would remain bound by it if they were to withdraw from the CWC. The CWC's prohibition of the use of chemical weapons under any circumstances renders nugatory any right of retaliation-in-kind claimed by parties to the Protocol.²⁴

D. The supervisory bodies

The CWC establishes a new international body to oversee its operation, the Organization for the Prohibition of Chemical Weapons. The OPCW is to be headquartered in The Hague and financed by States Parties in accordance with the UN scale of assessment, except for its destruction-related work which, as a general rule, is to be paid for directly by States Parties necessitating it. The highest organ of the OPCW will be the Conference of the States Parties, which will generally meet once a year. The executive organ of the OPCW will be the Executive Council, comprising 41 States Parties selected from each of the five regional groups by decision of each group. The day-to-day work of the OPCW will be done by the Technical Secretariat, which is to include an Inspectorate and have a Science Advisory Board composed of independent experts.

Each State Party undertakes to institute national measures to enforce the treaty, including penal legislation extending to activities of its citizens abroad. In order to fulfil its obligations under the CWC, each State Party must also create a National Authority. These national bodies are to serve as focal points for liaison with the OPCW and other States Parties.

²⁴ When the UK ratified the 1925 Geneva Protocol in 1930, it reserved the right to retaliation in kind in respect of a chemical or biological attack. In 1991, the Government announced that it "...had decided to withdraw that part of our reservation to the 1925 Geneva Protocol which maintained our right to retaliate in kind if biological weapons were used." (HC Deb, 16 October 1991, c156W.). There was no similar announcement for the renunciation of the right of retaliation if chemical weapons were used, but the CWC outlaws *all* use of chemical weapons.

E. Restraints on science, technology, industry and trade

The CWC extends to all toxic chemicals and their precursors, of which many millions are currently known. Fourteen families of them and another 29 individual chemicals are listed for international control by the OPCW.

Twelve are specified in 'Schedule 1', a status which effectively bans them from manufacturing industry and commerce. A State Party may possess no more than a tonne of Schedule-1 chemicals at any given time, and any production exceeding 10kg per year must take place within the one specially designated Single Small Scale Facility that the treaty allows. These SSSFs are to be kept under close surveillance by the OPCW Technical Secretariat. All the principal nerve and mustard gases and other chemical-warfare agents are listed in Schedule 1.

The other chemicals listed for international control by the OPCW are 'dual use' in the sense that they have well-established peaceful applications as well as chemical-warfare ones. They are not made subject to production limits, but a quantitative threshold is set beyond which a facility producing one or another of them must be declared to the OPCW. The aims, duration and possibility of recurrence of such inspection are greater for Schedule 2 chemicals than for Schedule 3 ones, the latter being produced in industry on a larger scale than the former. For Schedule 2, the reporting threshold ranges from one kilogram to one tonne per year, depending on the chemical, with the inspection thresholds ten times greater. For Schedule 3, the thresholds are 30 tonnes and 200 tonnes per year.

International transfers of Schedule 2 chemicals are to be prohibited except between States Parties once the CWC has been in force for three years, until which time the chemicals may be exported to non-parties only under end-use certification. Schedule 3 chemicals may be traded or transferred freely except that end-use certification must be obtained from non-party importers and except that States Parties are enjoined by the CWC to consider, after five years, whether further measures are needed. No role is specified for the OPCW in these transfer restraints.

All other plant sites where more than 30 tonnes per year of organic chemicals containing phosphorus, sulphur or fluorine are made, or ones making more than 200 tonnes per year of non-PSF organic chemicals, are also to be declared to the OPCW, except where the products are solely hydrocarbons or explosives. Such declared sites will become liable to routine inspection by the OPCW once the treaty has been in force for three years, unless the Conference of the States Parties expressly agrees otherwise. Depending on how many of these facilities and Schedule 3 ones a State Party declares, the OPCW may routinely inspect no more than 3-20 of them per year.

The CWC places no explicit restrictions on transfers of dual-use plant or equipment. It requires, moreover, that its provisions be implemented in a manner which avoids hampering the economic or technological development of States Parties. A State Party may nevertheless feel obliged to place national controls on the import or export of dual-use technology and chemicals as part of its general undertaking to implement the CWC's prohibitions.

Besides facility-specific data, the OPCW must also receive aggregate national data from States Parties each year on their production, import and export of scheduled chemicals. To this end, the National Authorities will have to impose reporting obligations and associated validation procedures upon research, industrial and trading concerns at quantitative thresholds substantially lower than those just noted.

Each State Party expressly undertakes to adopt measures necessary to ensure that toxic chemicals and their precursors are used within its jurisdiction only for non-prohibited purposes. The National Authorities may therefore be obliged to exercise general surveillance over unscheduled chemicals as well.

F. Verification of compliance

The CWC empowers the OPCW to operate two complementary systems for international verification of compliance. Under one system, routine verification, the Technical Secretariat receives data which States Parties have declared to the OPCW on particular topics specified in the CWC. The Technical Secretariat then validates those data through on-site inspections. Such routines are laid down by the treaty for monitoring compliance with its bans on stockpiling, retention and production, as in the civil industry controls just outlined. For the ban on development of chemical weapons, facilities that were once primarily used for such a purpose must be declared to the OPCW. States Parties must also make annual returns of information to the OPCW about their national programmes related to protective purposes. The Technical Secretariat may seek clarifications from States Parties about any of their declarations and it may receive communications from any State Party about implementation matters. Although the Technical Secretariat may not itself initiate inspections, except at declared sites, it must report to the OPCW Executive Council any doubts it may have about compliance.

Under the other system, verification by challenge, States Parties have undertaken to admit OPCW inspectors to any site at which another party has requested an inspection in order, solely, to resolve questions of possible non-compliance. The CWC places certain limitations upon this challenge process so as to reduce its potential for abuse or intrusion into domains of legitimate privacy. A period of up to 120 hours may elapse before a challenged State Party has to grant access to a challenged site after being notified of the challenge; and it may

'manage' the access, as by shrouding site equipment, to protect secrets. The possible time-lapse in regard to declared facilities is shorter. The CWC does not exclude the possibility of a State Party initiating a challenge inspection against itself, should it wish to demonstrate its compliance.

Compliance with the prohibition of use of chemical weapons is to be verified by the OPCW through a modified form of challenge inspection. Should states not parties to the CWC be involved in allegations of use, the OPCW is to co-operate with the Secretary-General of the United Nations, which has its own investigatory procedures for alleged violations of the 1925 Geneva Protocol.

G. Sanctions and assistance against non-compliance

Technical Secretariat reports on challenge inspections, as well as reports on routine inspections that have raised doubts about compliance which the prescribed consultative clarification procedures to do not resolve, are to be passed to the Executive Council, which must then consult with the States Parties involved. If the Executive Council finds it appropriate to do so, it must then set a deadline within which an apparently non-compliant State Party must take measures to redress the situation. Beyond that point, the Executive Council may refer the matter to the Conference of the States Parties, with or without recommendations. The Conference may then decide to recommend collective measures to States Parties - in other words, to recommend that they impose sanctions.

In cases of particular gravity, both the Conference and the Executive Council are empowered to bring the issue to the UN General Assembly and the UN Security Council.

The CWC creates an obligation upon States Parties promptly to provide assistance to a State Party that requests it. A State Party may request assistance if it has been attacked with chemical weapons or if it believes itself threatened by activities of a kind that would violate one or another of the main prohibitions of the CWC. The CWC establishes a voluntary fund and specifies procedures for the rapid provision of protective equipment, antidotes and other assistance to a requesting State Party.

H. Reviewing and amending the CWC

So as to review the operation of the CWC taking into account scientific developments, the Conference of the States Parties is to convene in special session at five-yearly intervals.

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Amendments to the CWC may be proposed by any State Party at any time. Articles of the CWC can be changed only by majority vote of all States Parties, if there are no negative votes, at a specially convened Amendment Conference. A simpler procedure is available for changes to the annexes of the CWC that would modify technical or administrative provisions, including the Schedules of controlled chemicals. For acceptance, each such proposed change requires a positive recommendation from the Executive Council acting on an evaluation by the Technical Secretariat; it will then automatically be adopted if no State Party objects within 90 days. Should there be an objection, the proposed change would then go before the next regular session of the Conference of the States Parties, where adoption, as on any matter of substance, would require a two-thirds majority of members present and voting.

Reservations to the CWC may be entered only in regard to the annexes, not the articles. They may not be incompatible with the object and purpose of the CWC.

I. Public information

There is to be a stringent classification and security regime for the OPCW data and documents. Information about implementation of the CWC, other than information of a general kind approved for release at the political level of the OPCW, is not to be disclosed to the general public except with the express consent of the State Party to which it refers. In cases where the "needs of the Convention" require it, classified information may be released according to procedures which the Preparatory Commission will be proposing.

But States Parties - meaning the National Authorities - are to be provided routinely by the OPCW with the data they require in order to be assured that other parties are in continued compliance. Such data are defined to include all the information which the CWC requires States Parties to declare.

V The Organs of the Chemical Weapons Convention

A. The Preparatory Commission (Prepcom)

The Convention requires a Preparatory Commission to be established to operate in the interim before the Chemical Weapons Convention enters into force. The aim of the Prepcom is to have the procedures worked out fully by the time the Convention enters into force. As such, it has to elaborate the OPCW's administrative procedures and develop guidelines for the various verification regimes created by the Convention. The Prepcom began work in The Hague in February 1993. At its first meeting, the Prepcom elected its officers, including Ambassador E. Azikiwe of Nigeria as its Chairman for the first six months and Ian Kenyon, formerly the Deputy Head of the British delegation to the Conference on Disarmament, as its Executive Secretary.

B. The Organisation for the Prohibition of Chemical Weapons

The CWC establishes the OPCW in The Hague as the international body to monitor compliance of the Convention. The OPCW will verify destruction programmes, inspect all military facilities and civilian plants producing chemicals that could be used for armaments and carry out routine monitoring and random checks on other civilian chemical installations. In carrying out its work, it must protect the confidentiality of the data collected. It will be financed by States Parties in accordance with a modified UN scale of assessment, except for its destruction-related work which, as a general rule, is to be paid for directly by the States Parties necessitating it. The OPCW comprises several organs:

1. The Conference of the States Parties

The Conference of the States Parties is the principal organ of the OPCW and can consider any matter within the scope of the Convention, including the powers and functions of the Executive Council and the Technical Secretariat (see below). It will be composed of one representative²⁵ with one vote²⁶ from all States Parties and its main role will be to oversee implementation and review compliance with the Convention. The Conference will adopt its own rules of procedure and elect a chairman and other officers at the beginning of each regular session. It will also appoint the Director-General of the Technical Secretariat and

²⁵ Who may be accompanied by alternates and advisers (*SIPRI Yearbook 1993*, p. 721)

²⁶ A simple majority will constitute a majority for the purposes of a quorum. Matters of procedure will require a simple majority. Matters of substance should be dealt with by consensus where possible, but if not decided in 24 hours, the matter will be decided by a two-thirds majority.

instruct him to establish a Scientific Advisory Board consisting of independent experts and it will elect members to the Executive Council. Other duties will consist of adopting reports, programmes and the budget; deciding on the scale of financial contributions; and constituting relevant subsidiary organs.²⁷ The Conference will usually meet annually²⁸ and the first session will be convened not later than 30 days after the Convention enters into force.

2. The Executive Council

The Executive Council is the executive organ of the OPCW and will comprise 41 States Parties selected from each of the five regional groups. Each State Party has the right to serve and election will be for a two-year period. The distribution of seats is as follows:

- (i) 9 States Parties from Africa, 3 of whom have the most significant chemical industry;
- (ii) 9 States Parties from Asia, 4 of whom have the most significant chemical industry;
- (iii) 5 States Parties from Eastern Europe, 1 of whom has the most significant chemical industry;
- (iv) 7 States Parties from Latin America and the Caribbean, 3 of whom have the most significant chemical industry;
- (v) 10 States Parties from among Western European and other states, 5 of whom have the most significant chemical industry; and
- (vi) 1 State Party to be designated consecutively by States Parties from Asia and from Latin America and the Caribbean.²⁹

Twenty members will initially be elected to the Executive Council for one year. The composition of the Executive Council may then be reviewed after full implementation of Articles IV and V of the Convention. It will meet as often as required with each member

²⁷ *SIPRI Yearbook 1993*, p.721

²⁸ be dealt with by consensus where possible but if not decided in 24 hours, the matter will be decided by a two-thirds majority.

Under certain circumstances, special sessions can be convened: Article XV stipulates that the Conference can be convened as an Amendment Conference.

²⁹ *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, United Nations 1993, Article VIII, para. 23

having one vote and a two-thirds majority will be needed for decisions on matter of substance. The main tasks of the Executive Council will include:

- supervision of the Technical Secretariat;
- co-operation with National Authorities;
- concluding agreements with states and international organisations with the approval of the Conference of the States Parties;
- approving arrangements for implementation of verification activities.

The Executive Council will have special responsibilities in the consideration of concerns relating to compliance and non-compliance. In cases of particular gravity it will be able to bring an issue to the attention of the General Assembly and Security Council of the United Nations.

3. The Technical Secretariat

The Technical Secretariat will be the operational arm of the OPCW. It will comprise a Director-General and a unit of inspectors (the Inspectorate) who will conduct the inspections called for in the Annex on implementation and verification of the Convention. The Inspectorate is responsible for verifying that States Parties are implementing the Convention and are in compliance with their CWC obligations. In conducting its inspections, the OPCW will enjoy the legal capacity and such privileges and immunities as are necessary to carry out its function in the territory of or any place under the jurisdiction of a State Party. Designated inspectors and assistants will have the same inviolability and protection as diplomats.

The Technical Secretariat will provide technical assistance and technical evaluations to States Parties in the implementation of the provisions of the Convention and it will prepare the OPCW's draft programme and budget. Other functions of the Technical Secretariat will include negotiating agreements relating to implementation with the approval of the Executive Council; informing the Executive Council of any problems especially those relating to uncertainty about compliance; establishing the stockpiles of supplies for emergency and humanitarian assistance required under Article X; and administering a voluntary fund, financed by member states, to assist States Parties if they are attacked or threatened with chemical weapons.

VI The Verification Regime

Unlike the Biological Weapons Convention (BWC), the Chemical Weapons Convention establishes an intrusive verification regime. Ronald Lehman, director of the US Arms Control and Disarmament Agency, argues that it is "*the* most intrusive inspection regime ever established in an arms control agreement."³⁰ At the time of signature of the CWC, UK officials also said that, despite the compromises that had to be made to establish consensus³¹, the Convention's verification regime should "deter all but the most determined evaders."³²

There are four principal verification tasks:

- (a) The control of all chemical weapons stockpiles;
- (b) The destruction of chemical weapons;
- (c) The control and destruction of all chemical weapons production facilities except single small-scale production facilities (SSSFs); and
- (d) the control of chemicals deemed to pose a significant risk to the Convention.

The definition of a chemical weapon in the Convention covers both chemicals and potential delivery systems. The formulation is broad and because of the dual use of many toxic chemicals, the focus is not on the actual chemicals themselves, but on their *intended use*. This is known as the General Purpose Criterion. It is this which enables the Convention to achieve its disarmament purpose without interfering in the peaceful applications of dual-use chemicals, such as phosgene which is used in the production of plastics, but can also be a blistering agent.

A. Routine Monitoring and Inspections

There are two levels of verification: routine and challenge inspections. The OPCW is assigned particular responsibility for the routine monitoring of 43 specific chemicals or families of

³⁰ *Financial Times*, 13 January 1993

³¹ For an example of such a compromise, see page 14.

³² *Financial Times*, 13 January 1993

chemicals listed in the three schedules in the annex of the Convention.³³ These 43 chemicals constitute the key to verification. In principle, however, the Convention covers all toxic chemicals and their precursors and the OPCW will also carry out routine inspections of any site. The National Authorities are charged with reporting on their domestic chemical industries to the OPCW.

B. Challenge Inspections

Intrusive challenge inspections are the core of the Convention's verification regime. They are there to fill the gaps in the routine inspection infrastructure. The need for intrusiveness is clear: the more intrusive the challenge regime, the more difficult it is for a State Party seeking to evade the provisions of the Convention to conceal its prohibited activities. The onus of a challenge inspection is clearly on the inspected state to satisfy the concerns of the challenging country and the OPCW. Article IX, paragraph 11 of the CWC states that following a request for a challenge inspection, the inspected State Party shall have "the right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention". Ideally, suspect installations should be subject to inspection without warning, "at any time, in any place", as the then Vice-President George Bush initially proposed in 1984. Since this time, however, concerns about the potential threats to commercial and military secrets have meant that compromises have had to be made and the Convention now gives governments up to 120 hours to negotiate the terms of UN access.

C. The National Authorities

Article VII.4 of the Chemical Weapons Convention requires each State Party to establish a National Authority to fulfil its obligations under the Convention and act as the focal point for liaison with the OPCW. The Convention makes no further stipulation as to what exactly these bodies are to do, nor does it offer any guidance. The primary purpose of the OPCW verification regime is predicated upon a division of labour between the international and national levels of verification - ie between the National Authorities and the OPCW.

³³ It has been estimated that approximately 108,000 chemicals could be covered by entries 1-3 of Schedule 1 alone (*SIPRI Yearbook 1993*, p.726)

VII The Chemical Weapons Bill

A. Delay in ratification

In March 1995 the then Secretary of State for Defence, Malcolm Rifkind, told the House of Commons that '...the President of the Board of Trade, who is responsible for ratification in this sphere, attaches considerable importance to early ratification of the treaty.³⁴ On several occasions, HMG has asserted that it would introduce the necessary implementing legislation "when parliamentary time permits".³⁵ Concern has been expressed in some quarters at the amount of time it was taking to introduce the necessary legislation, however. According to Lord Mayhew, for example, "...It would be a great pity if the excellent work of the Foreign Office and the Ministry of Defence was now spoilt by the dilatory action of the DTI."³⁶ This concern was also reflected in the report of the Foreign Affairs Select Committee on weapons proliferation, which states:

"We are very concerned that the legislation to permit United Kingdom ratification of the Chemical Weapons Convention...has not yet been introduced despite the fact that this Convention was opened for signature over two years ago.....there is the risk that the United Kingdom's diplomatic efforts to promote the Convention may be undermined by its own apparent reluctance to ratify."³⁷

In an Adjournment debate on chemical weapons, the Parliamentary Under-Secretary of State for Trade and Technology, Mr. Ian Taylor, maintained, however:

"I do not accept the strictures in the Foreign Affairs Select Committee report..., because I believe that the timetable that I have announced will satisfy it and does not in any way undermine our diplomatic efforts to promote the treaty. I am satisfied therefore that we shall continue to be influential and that our voice will be heard on unresolved industry matters. We are a participant in the discussion in The Hague. Indeed, we chair the expert group on industrial issues in The Hague."³⁸

Although the United Kingdom pledged to become an original State Party at the London Economic Summit of the G-7 in July 1991, there have been concerns about the penalties which the UK may incur by delaying ratification. In a discussion paper for the Harvard

³⁴ HC Deb, 18 March 1995, c.817

³⁵ For example, HC Deb, 23 November 1993, c.13W, HC Deb, 8 December 1994, c.297

³⁶ HL Deb, 8 June 1994, c.1225

³⁷ Foreign Affairs Committee, Second Report, *UK Policy on Weapons Proliferation and Arms Control in the Post-Cold War Era*, Vol. I, Session 1994-95, 34-I, p. xxx, para 81.

³⁸ HC Deb, 24 April 1995, c.640

Sussex Program London CBW Seminar held at King's College London on 27 September 1995, J. P. Perry Robinson outlined the following potential penalties:

"States that fail to ratify by the time the Convention enters into force will lose influence on the treaty regime and be otherwise disadvantaged.³⁹ They will suffer adverse trade relations and be obliged to remain outside the decision-making structures of the Convention. Their nationals will not be employable as inspectors of for other jobs created by the treaty."⁴⁰

In the same adjournment debate on chemical weapons, Mr. Taylor affirmed:

"I do not believe that we shall fail to be part of the first 65 states. Therefore, I believe that we shall have a seat on the Executive Council, although I am aware of and shall be watching the rate of progress in the next few months. I can confirm to the hon. Member for Ilford, South (Mr. Gapes) that I am aware of the consequences of late ratification, which is why, as a new Minister, I have endeavoured to make as speedy progress as possible. Therefore, I think that we shall be a founder state party to the Convention."⁴¹

At the same time, Mr. Taylor sought to justify the length of time it was taking the DTI to introduce the necessary implementing legislation:

"The Bill covers a subject matter that is more complex than may be widely realised."⁴²

On a general level, the editors of the quarterly journal *Chemical Weapons Convention Bulletin* (CWCB) attribute the delay in ratification primarily to the fact that it is taking longer than anticipated for prospective States Parties to undertake the necessary measures to prepare for domestic implementation of the CWC prior to ratification.⁴³ They illustrate the example of Australia. Despite a highly favourable environment for ratification, it still took the Australian government 16 months to ratify the Convention. The Australian government, for example, was very familiar with the text of the Convention, had a good idea of its implications for national implementation, had already begun dialogue with industry to prepare for implementation, possessed no chemical weapons or chemical weapons related facilities and only had a fairly modest chemical industry.⁴⁴

³⁹ By forfeiting a seat on the Executive Council, for example.

⁴⁰ Memorandum to the Foreign Affairs Select Committee, 24 February 1994

⁴¹ HC Deb, 24 April 1995, cc.640-641

⁴² *Ibid.*, c.638

⁴³ *Chemical Weapons Convention Bulletin*, September 1994

⁴⁴ *Ibid.*

SIPRI Yearbook 1995 offers the following explanation for the slow pace of ratification:

"There are various reasons for the slow pace of the ratification process. Signatory states are currently in the process of establishing national implementation, a process involving legislation and administrative measures and often new mechanisms for industrial reporting. The Chemical Weapons Convention is a complex, technically detailed document, which may present difficulties for legislators who are not chemical weapons experts."⁴⁵

B. The Bill

Under Article VII of the Chemical Weapons Convention, on National Implementation Measures, a State Party is required to adopt all necessary measures to implement its obligations in accordance with its constitutional processes. In particular, States Parties have to adopt measures to prohibit any person (natural or legal) on its territory or in any place under its jurisdiction from undertakings which are prohibited by the Convention. Article VII calls on States Parties to adjust or apply their penal legislation to any national who might be involved in prohibited activities.

In the United Kingdom primary legislation is needed in order to implement certain provisions of the Chemical Weapons Convention, including the prohibition of chemical weapons, granting powers of entry, access to information and immunities and privileges of the inspection team. The DTI is the government department responsible for introducing the necessary implementing legislation. In view of the substantial impact that the Chemical Weapons Convention will have on the chemical industry, in January 1995 the Department of Trade and Industry issued a consultation document which explained the main requirements of the Convention for industry. The DTI then published a draft Bill on 19 July 1995, which took account of comments received from industry and invited further comments by 29 September 1995. It then published a revised draft Bill on 31 October 1995. The Chemical Weapons Bill was subsequently presented to Parliament by the President of the Board of Trade on 16 November 1995 and will have its second reading on 23 November. The Chemical Weapons Bill does not contain all of the provisions of the Chemical Weapons Convention, since some parts of the Convention can be implemented using prerogative powers.

The purpose of the Bill is to give domestic effect to the obligations set out in the Chemical Weapons Convention. The *Explanatory and Financial Memorandum* which accompanies the Bill states the purpose of the Bill as follows:

⁴⁵ *SIPRI Yearbook 1995*, p. 726

"The Bill is concerned with the implementation in the United Kingdom of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Convention) which was signed in Paris on 13 January 1993 (Cm 2331). The Bill makes provision for the control of chemical weapons and certain toxic chemicals and precursors. It will enable the United Kingdom to ratify the Convention."

The Chemical Weapons Bill has 38 clauses:⁴⁶

Clause 1: provides definitions of the key terms used in the Bill. It broadly follows the definitions found in Article II of the Chemical Weapons Convention. The DTI commentary on the original draft Bill stated:

"This clause provides definitions of the key terms used in the Bill. It follows the definitions found in Article II of the CWC. The CWC definition of a chemical weapon has not been followed in its entirety, however, because it contains an element of circularity. It defines them, inter alia, as toxic chemicals except where intended for purposes not prohibited under the Convention. Yet the definition of "purposes not prohibited" includes references to chemical weapons. The Bill avoid this difficulty."⁴⁷

Clause 2: prohibits the use, development, production, possession and transfer of chemical weapons and military preparations for their use. Contravention is an offence punishable by a maximum term of imprisonment for life.

Clause 3: provides for clause 2 to apply to acts done in the United Kingdom and to acts done outside it by United Kingdom nationals and other entities subject to UK jurisdiction.

Clause 4: provides that if the Secretary of State has grounds to suspect an object is a chemical weapon and is considering its destruction he may seek information by serving a notice on any interested person, who appears to have the object in his possession or who appears to have an interest which is materially affected by the notice. It allows for any person on whom notice has been served may make representations to the Secretary of State that the object is not a chemical weapon.

⁴⁶ A description of the contents of the clauses of the Bill can also be found in the *Explanatory and Financial Memorandum* which accompanies the Chemical Weapons Bill. The original draft Bill had 27 clauses. The difference in the number of clauses is attributable to the fact that the Chemical Weapons Bill contains more definitional clauses.

⁴⁷ *Consultation Paper on a Bill to implement the Chemical Weapons Convention in the UK*, p.3.

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Clause 5: provides that where there is reasonable cause to believe (that is, something more than suspicion) that an object is a chemical weapon, the Secretary of State may authorize a person to enter premises, search for and remove or immobilise the object.

Clauses 6 & 7: allow the Secretary of State to authorize the destruction of an object or substance after the expiry of a six-month period to allow objections to be made and empowers the Secretary of State to recover costs for the removal and destruction from the 'responsible person' (ie 'any person who had possession of the object immediately before its removal'). Before the Secretary of State makes a decision to authorize destruction, he must allow any person who has been served a copy of a notice time to respond and he must take into account any objections made to the object's proposed destruction.

Clause 8: allows certain interested persons to apply to the court for compensation (for destruction) if the proper procedure for serving notice had not been complied with and the decision to destroy the object found to be a chemical weapon led to material loss.

Clause 9: creates offences, such as wilful obstruction of an authorised person and giving false information. A person guilty of wilful obstruction or interference with a warning is liable to a fine of an amount not exceeding the statutory maximum. A person guilty of making a false or misleading statement is liable to a fine not exceeding the statutory maximum, to imprisonment for a term not exceeding two years, or both.

Clause 10: provides supplementary information on destruction and defines "premises" referred to in clauses 5 to 9 as 'land (including buildings), moveable structures, vehicles, vessels, aircraft and hovercraft'.

Clause 11: prohibits the construction or alteration of premises and the installation, construction or alteration of equipment for the purpose of producing chemical weapons. Contravention is an offence punishable by a maximum term of imprisonment for life.

Clause 12: provides that if the Secretary of State has grounds to suspect any equipment or building is a chemical weapons production facility, he may seek information by serving a notice on any interested person.

Clauses 13 to 15: apply where the Secretary of State has reasonable cause to believe (that is, something more than suspicion) that any equipment or building is a chemical weapons production facility. He may require its destruction or alteration by serving a notice on

interested persons. If the notice is not complied with, or no interested person can be found, a person may be authorised to destroy or alter the facility.

Clause 16: allows certain interested persons to apply to the court for compensation in respect of equipment or buildings and has similar effects to clause 8.

Clauses 8 and 16 would apply in the event that a manufacturer inadvertently creates a product which falls within the definition of a chemical weapon or a production unit capable of creating a chemical weapon, but has not been given the opportunities to respond which are created by the notice-serving procedure of clauses 4 and 6 (for substances) and clause 13 (for buildings and equipment).

Clause 17: creates offences, such as failure to comply with a notice requiring destruction or alteration, wilful obstruction of an authorised person and giving false information. Penalties for wilful obstruction and making a false or misleading statement are the same as those provided in clause 9.

Clause 18: provides closer definitions of a chemical weapons production facility and of the terms 'destroyed' and 'destruction'.

Clauses 19 & 20: provide that it is an offence to use, produce or possess Schedule 1 toxic chemicals or precursors even for permitted purposes without the authority of a licence granted by the Secretary of State. Permitted purposes (defined in *clause 1*) are purposes such as peaceful purposes. Contraventions are liable to a fine and a person who knowingly makes a false or misleading statement for the purpose of obtaining, renewing or varying a licence is liable to a fine or imprisonment for a term not exceeding two years, or both.

Clause 21: enables the Secretary of State to obtain information where he has grounds to suspect an offence is being or has been committed under the Bill.

Clause 22: gives the Secretary of State the power to require persons to keep records and to provide him with information needed for the purposes of the Convention.

Clause 23: empowers the Secretary of State to make regulations which will require persons to identify themselves to him if it is likely that the Secretary of State will want to serve a notice on them under *clause 22*.

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Clause 24: provides definitions of terms used in *clauses 25 to 28*.

Clause 25: provides that the Secretary of State may authorize routine, challenge or assistance inspections (pursuant to parts II and IX; II and X; and II and XI of the CWC's Verification Annex respectively) and may authorize inspection teams to exercise the rights of access, entry and unobstructed inspection and carry out other measures specified in the Verification Annex of the Convention.

Clause 26: creates various offences, such as failure/refusal to facilitate the inspection and wilful obstruction of a member of an inspection team. The penalty for these offences is a fine.

Clause 27: confers the same privileges and immunities (such as immunity from jurisdiction) on members of inspection teams and observers as are enjoyed by diplomatic agents in accordance with the Articles set out in Schedule 1 to the Diplomatic Privileges Act 1964. Similar privileges and immunities have already been conferred on inspectors and observers for other arms control agreements under the Arms Control and Disarmament (Privileges and Immunities) Act 1987.

Clause 28: provides that the Secretary of State may reimburse any person for any expenditure incurred in connection with a routine, challenge or assistance inspections.

Clauses 29 to 31: contain a number of provisions relating to offences, such as a power to enter and search premises if offences are suspected, a power for a court to order forfeiture of objects relating to offences and restrictions on proceedings for offences.

Clause 32: provides for confidentiality of the information obtained, subject to eight exceptions and provides for penalties for disclosing information. Broadly speaking, commercially sensitive information is to be protected from disclosure *unless* disclosure becomes necessary for the enforcement of the Act and the Convention. This confidentiality clause reflects one of the main concerns expressed by industry on the need to protect commercially confidential information.

Clause 33: provides details of how a notice under any provision of the Act may be served on a person.

Clause 34: provides for an amendment of the Army, Air Force and Naval Discipline Acts to ensure that service personnel committing any of the more serious offences under the Bill would be tried by a civil court, rather than by Court Martial.

Clause 35: empowers the Secretary of State to amend the Act by Order in Council in order to apply any future amendments to the Convention. Amendments to the Schedules, for example the addition of new toxic chemicals and precursors, could be enacted by the negative statutory instrument procedure - ie they could enter into force immediately subject to retrospective annulment by Parliament. Any other amendments would have to follow the affirmative procedure - ie they would have to be approved in draft by both Houses of Parliament.

Clause 36: binds the Crown, subject to certain qualifications.⁴⁸

Clause 37: provides for any expenses incurred by the Secretary of State to be paid out of money provided by Parliament and for any sums received by the Secretary of State in consequence of the Act to be paid into the Consolidated Fund.

Clause 38: provides for the Act (except for this section) to come into force 'on such day as the Secretary of State may appoint by order made by statutory instrument', declares that the Act extends to Northern Ireland and provides for Her Majesty to make provision, through Order in Council, for extending any of the provisions of the Act to any of the Channel Islands, the Isle of Man or any colony. It finally provides for the Act to be cited as the Chemical Weapons Act 1995.

The Explanatory and Financial Memorandum attached to the Bill also provides some information on the financial effects of the Bill and the UK's ratification of the CWC. It states:

"The annual costs resulting from the provisions contained in the Bill will amount to £650,000. It is estimated that, once the Convention is ratified, the cost of the United Kingdom's annual contribution to the international organisation to be established under the Convention, which is payable in accordance with the United Nations' scales of assessment, will be around £3 million. These costs will be payable from the Consolidated Fund and will be authorised through the Department of Trade and Industry Vote."

⁴⁸ See Section VIII C

Other information provided in the Explanatory Memorandum include the fact that seven additional departmental staff will be required and that it is estimated that the annual cost to business of providing information under the terms of the Bill and receiving inspections will amount to £8.1 million.

VIII Commentary on the Bill

Since the first draft Bill was published in July 1995, experts on chemical weapons and the CWC have had an opportunity to analyse the provisions of the draft Bill and compare these with the stipulations of the Convention. Following the presentation of the Chemical Weapons Bill, it is now possible to compare the comments made on the draft Bill and see if they still apply to the provisions of the actual Bill. One of the first remarks to be made about the commentaries on the original draft Bill is that the majority expressed disappointment that the government appeared to be taking a 'minimal' approach to national legislation. It was pointed out that the draft Bill, and now the actual Bill, make no reference to several of the rigorous requirements on national implementation measures contained in Article VII of the Convention.⁴⁹

In its *Consultation Paper on a Bill to implement the Chemical Weapons Convention in the UK*, the DTI emphasised:

"It is our intention to implement the requirements of the Convention but not to step beyond them. We wish to keep the burden placed on business to the minimum necessary."⁵⁰

In an adjournment debate on chemical weapons, Mr. Taylor told the House of Commons:

"We have found that industry particularly wants to avoid avoidable burdens and wants other burdens to be minimised."⁵¹

Not much has been published on the comments made by industry on proposed UK legislation and, indeed, the DTI received only 33 responses. In a written answer in July 1995, Mr. Heseltine maintained, however, that "The responses, overall, supported the approach my Department proposes to adopt in implementing the Convention."⁵²

⁴⁹ For example, see the *Discussion paper for the Harvard Sussex Program London CBW Seminar session on 'UK implementation of the Chemical Weapons Convention* by Nicholas A. Sims, King's College London, 27 September 1995

⁵⁰ *Consultation Paper on a Bill to implement the Chemical Weapons Convention in the UK*, Introduction, para. 2

⁵¹ HC Deb, 24 April 1995, c.640

⁵² HC Deb, 3 July 1995, c.67W

Concern about perceived deficiencies in the draft Bill fell into the following three main areas of concern:

A. The National Authority

One of the principal concerns about the Bill concerned the UK's National Authority. The Convention requires each State Party to establish a National Authority to act as the focal point for liaison with the OPCW. In the DTI's Consultation Paper, it is announced that:

"In the UK we intend that the National Authority should be established within the DTI and will not be a separate body or agency. Its functions will therefore be vested in the Secretary of State."⁵³

One of the consequences of this decision is that there is no need to establish a statutory framework for a new body.

In his discussion paper on 'UK implementation of the Chemical Weapons Convention', Nicholas Sims contends that most of the elements of national implementation of the CWC - the National Authority and its strategies for prevention, accountability, transparency, parliamentary involvement and statutory independence of the National Authority investigating governmental, as well as industrial and academic activity - which have been identified as essential to a healthy division of labour between the national and international levels of control are not mentioned in the draft Bill. They are not mentioned in the actual Bill either. Julian Perry Robinson contends that verification will prove impossible if these National Authorities are mere 'bureaucratic ciphers'.⁵⁴ In a discussion document published in September 1995, Julian Perry Robinson contends:

"The concept of a national compliance-monitoring system is not visible in the draft Bill. Nor is it at all obvious that the additional powers proposed in the draft would suffice for the creation of an effective compliance-monitoring system even if the DTI were nevertheless to be contemplating such a system."⁵⁵

In a Memorandum to the Foreign Affairs Select Committee, Nicholas Sims maintains:

⁵³ *Ibid.*, Introduction, para. 4

⁵⁴ The 1993 Chemical Weapons Convention, J. P. Perry Robinson, *Bulletin of Arms Control*, 1 February 1993

⁵⁵ *Ibid.* (reverse with 34)

"The UK appears to have opted for a small secretariat located within the Department of Trade and Industry. This choice accords with a perception of the National Authority's role as, in effect, little more than that of a collator of industrial data enabling the UK to supply the OPCW with accurate declarations as required under the Convention...Such a narrow conception of what the National Authority is all about does not appear justified when its role is analysed in the context of Article VII as a whole."⁵⁶

One of the problems arising from having the DTI as the UK's National Authority is the question of parliamentary scrutiny, transparency and accountability. By designating the Department of Trade and Industry, this means that the DTI will be accountable to Parliament for UK compliance with the Convention through its Ministers. One of the questions posed by Julian Perry Robinson in this regard is whether the DTI will have sufficient powers to discharge the obligations of the Convention. Another is whether the Convention-related activities of the DTI will be sufficiently transparent to Parliamentary oversight for enough assurance of UK compliance to be forthcoming. After applying four tests of adequacy to the draft Bill, Julian Perry Robinson concluded that in fact the DTI would not have sufficient powers if the draft Bill were to proceed in its present form. In particular, he concludes that the DTI would be unable to validate by on-site inspection or other such methods the information supplied to it by industry and the scientific community for declaration to the OPCW⁵⁷. On the second point, he concludes that the activities of the National Authority will not be sufficiently transparent to Parliamentary oversight if transparency is to stem solely from the accountability of DTI Ministers to Parliament.⁵⁸

One suggestion which has been made is that the DTI should be required to produce an annual report on its activities⁵⁹ in order to improve openness and accountability. Julian Perry Robinson also suggests that a second transparency mechanism would be to constitute an Advisory Board, composed of representatives of the various communities affected by the implementation of the CWC and which would receive a report from the National Authority twice a year.

⁵⁶ Memorandum to the Foreign Affairs Committee: Inquiry into weapons proliferation and control, Nicholas A. Sims, 21 February 1994

⁵⁷ For example, nowhere in the Bill are there powers to verify the accuracy of requisitioned information (including null returns).

⁵⁸ Discussion Paper for the HSP London CWC Seminar, 'A commentary on the legislation needed to implement the Chemical Weapons Convention in the United Kingdom, by J. P. Perry Robinson, King's College London, 27 September 1995

⁵⁹ Mooted on p.20 of the DTI's discussion document

B. Gaps in the General Obligations

Clause 2(1) of the original draft Bill did not stay very close to paragraphs two to four of the Chemical Weapons Convention's General Obligations.⁶⁰ These paragraphs embody the obligations of States Parties to destroy chemical weapons, chemical weapons abandoned by one State Party on the territory of another State Party and chemical weapons production facilities, respectively. In the draft Bill provisions for the destruction of 'prohibited objects' are found in *clauses 4-7*. In the Chemical Weapons Bill itself, *clauses six and seven* provide for the destruction of chemical weapons and *clauses 13 to 15* provide for the destruction (or conversion) of chemical weapons production facilities. There is no mention, however, of provisions for destroying chemical weapons abandoned by the UK on the territory of another State Party. Since the UK abandoned its chemical weapons programme and destroyed its stocks of chemical weapons in the 1950s, it can, of course, be argued that there is no need for an inclusion of this provision in the Bill.

Another area of the draft Bill where commentators did not stick closely enough to the wording of the Chemical Weapons Convention was in the case of *transfer*. Section 1 (a) of Article I states that:

"1. Each State Party to the Convention undertakes never under any circumstances:

(a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or *transfer, directly or indirectly, chemical weapons to anyone;*"

This was omitted from the draft Bill. In its commentary on the Bill, the DTI claimed that "Clauses 2 and 3 of the Bill fulfil these commitments in respect of Article 1 of the Convention. We believe that the CWC requirement to prohibit the acquisition, stockpiling, retaining and transfer of chemical weapons is covered by the wording of clause 2 that no person shall possess chemical weapons or have them under their control."⁶¹ In his discussion paper for the HSP London CBW seminar in September 1995, Nicholas Sims commented:

"... this departs from the principle, tenaciously defended by Ministers in committee during the passage of the Biological Weapons Bill in 1973-74, that national legislation must reproduce the language of international treaty prohibitions exactly⁶², even when scientific precision would...demand better wording than that of the treaty."⁶³

⁶⁰ Enshrined in Article I of the Chemical Weapons Convention

⁶¹ *Consultation Paper on a Bill to implement the Chemical Weapons Convention in the UK*, commentary on clauses 2 and 3.

⁶² As a result, the UK's Biological Weapons Act 1974 corresponds to the terminology of the Biological Weapons Convention.

⁶³ Discussion paper for the Harvard Sussex Program London CBW Seminar session on 'UK implementation of the Chemical Weapons Convention', Nicholas A. Sims, p.4

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Clause 2 (d) of the Chemical Weapons Bill duly states that:

"2.- (1) No person shall-

...

(d) *participate in the transfer of a chemical weapon;*"

The General Obligation in Article I.1d, "never under any circumstances...to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention", is not covered in the Chemical Weapons Bill. In its Consultation Paper, the DTI explained that this was because "the effect of the general criminal law is that it will also be an offence to assist anyone to [produce, possess or use chemical weapons]".⁶⁴

Another area covered in the General Obligations of the Convention not mentioned in the draft Bill and in the Chemical Weapons Bill itself concerns *riot control agents*. Article I (5) of the Chemical Weapons Convention states:

"Each State Party undertakes not to use riot control agents as a method of warfare."

Nicholas Sims points to other countries' national legislation which does translate this prohibition into domestic law: The Australian Chemical Weapons (Prohibition) Act 1994 stipulates:

"A person must not, intentionally or recklessly ... use riot control agents as a method of warfare."

The Canadian Chemical Weapons Convention Implementation Act 1995 stipulates:

"No person shall use a riot control agent as a method of warfare."⁶⁵

In his discussion document, Nicholas Sims provided the following redraft of Clause 2(1) to bring it closer to the wording of the CWC's General Obligations:

"No person shall

- (a) use a chemical weapon;
- (b) develop or produce a chemical weapon;
- (c) have a chemical weapon in her or his possession, or under her or his control;

⁶⁴ *Consultation Paper on a Bill to implement the Chemical Weapons Convention in the UK*, p.3.

⁶⁵ *Ibid.*, pp.3-4

- (d) *transfer a chemical weapon to anyone, directly or indirectly;*
- (e) *engage in any military preparations to use a chemical weapon;*
- (f) *use a riot control agent as a method of warfare;*
- (g) *in any way assist, encourage or induce anyone to engage in any activity prohibited to a State Party under the Convention.*"⁶⁶

C. Binding the Crown

Clause 26 of the original draft Bill regarding binding the Crown was criticized by several commentators for the fact that it hardly bound the Crown at all. In the DTI commentary on the draft Bill in its Consultation Paper, Crown immunity was justified on the basis that "...the international obligations on the UK suffice."⁶⁷ It was pointed out that the UK provision for binding the Crown fell far short of the provisions in the national legislation of Canada⁶⁸ and Australia. Canada chose to bind the Crown following a recommendation by disarmament workshop in order to "...ensure that national penal legislation enacted under Article VII of the CWC be sufficiently comprehensive to bind government officials, military personnel and political leaders without exception."⁶⁹

The Chemical Weapons Bill appears to have partially taken into consideration the above concerns about the need for an improved clause 26.⁷⁰ Clause 36⁷¹ of the Chemical Weapons Bill, which binds the Crown, again subject to certain qualifications, states:

"36.-(1) Subject to the following provisions of this section, this Act binds the Crown.

(2) No contravention of the Crown of a provision made by or under this Act shall make the Crown criminally liable; but the High Court or in Scotland the Court of Session may, on the application of a person appearing to the Court to have an interest, declare unlawful any act or omission of the Crown which constitutes such a contravention.

⁶⁶ *Ibid.*, p.5. Italics have been used by the author to highlight those provisions that are lacking from clause 2(1) of the Chemical Weapons Bill.

⁶⁷ *Consultation Paper on a Bill to implement the Chemical Weapons Convention in the UK*, p.6

⁶⁸ Which, like the UK, belongs to a legal tradition in which laws do not bind the Crown unless it is expressly stated that they do.

⁶⁹ Discussion paper for the Harvard Sussex Program London CBW Seminar session on 'UK implementation of the Chemical Weapons Convention', King's College London, 27 September 1995, by Nicholas A. Sims, p.6

⁷⁰ Although it does not go the full way to meeting the need set out in Nicholas Sims' discussion paper (p.7) for binding the Crown "in all its capacities."

⁷¹ The content of which is completely different to clause 26 of the draft Bill, which dealt exclusively with crown lands.

(3) Notwithstanding subsection (2), the provisions made by or under this Act apply to persons in the public service of the Crown as they apply to other persons.

(4) Nothing in this section affects Her Majesty in her private capacity; and this subsection shall be construed as if section 38(3) of the Crown Proceedings Act 1947 (meaning of Her Majesty in her private capacity) were contained in this Act."

It appears that while Ministers, acting in the name of the Crown, have immunity from criminal prosecution, the courts can declare unlawful any act or omission on their part which constitutes a contravention of the Act. *Administrative Law* states that such declarations, are "...a particularly suitable way to settle disputes with governmental authorities, since its involves no immediate threat of compulsion, yet is none the less effective."⁷² Section (3), however (which refers to 'persons in the public service of the Crown') would appear to include Ministers in their personal capacity.

IX Conclusion

Now that the number of ratifications of the CWC has increased to 38, with a further eleven states having announced that the domestic ratification process has been completed, or is near completion, there could be a rush for other signatories to complete their domestic ratification process in the near future, with a view to becoming one of the original 65 States Parties needed for the Convention to enter into force. Notwithstanding this potential rush to ratify, it looks as if the United Kingdom will indeed be an original State Party, despite the length of time that it has taken to introduce the necessary implementing legislation. Depending on the continuing rate of ratification, the Chemical Weapons Convention could enter into force some time in the latter half of 1996.

FMW/JML

⁷² *Administrative Law, Seventh Edition*, H. W. R. Wade & C. F. Forsyth, Clarendon Press 1994

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Annex I

Deposited CWC Ratifications as of 20 September 1995

Fiji	20 January 1993
Mauritius	9 February 1993
Seychelles	7 April 1993
Sweden	17 June 1993
Norway	7 April 1994
Australia	6 May 1994
Albania	11 May 1994
Maldives	31 May 1994
Cook Islands	15 July 1994
Spain	3 August 1994
Bulgaria	10 August 1994
Germany	12 August 1994
Sri Lanka	19 August 1994
Mexico	29 August 1994
Turkmenistan	29 September 1994
Uruguay	6 October 1994
Paraguay	1 December 1994
Lesotho	7 December 1994
Greece	22 December 1994
Tajikistan	11 January 1995
Mongolia	17 January 1995
Armenia	27 January 1995
Finland	7 February 1995
Oman	8 February 1995
Romania	15 February 1995
France	2 March 1995
Switzerland	10 March 1995
Croatia	23 May 1995
Monaco	1 June 1995
Netherlands	30 June 1995
Denmark	13 July 1995
Peru	20 July 1995
Algeria	14 August 1995
Austria	17 August 1995
Poland	23 August 1995
Ecuador	6 September 1995
South Africa	13 September 1995
Japan	15 September 1995

Undeposited CWC Ratifications

Some states in which the domestic ratification process has been completed, or is reportedly close to being so.

Argentina

Belarus

Benin

Cameroon

Canada

United Arab Emirates

Côte d'Ivoire

Czech Republic

Italy

Saudi Arabia

Slovak Republic

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