

Tackling ambiguities: lessons for the Review Conference from the Chemical Weapons Convention negotiations

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There are many issues that will come up for discussion in and around the second CWC Review Conference being held this month. Some relate to ‘ambiguities’ in the CWC text that remain unresolved more than ten years after the Convention’s entry into force. Such ambiguities include terms such as ‘law enforcement’, ‘as a method of warfare’ and ‘domestic riot control’. The purpose of this paper is not to rehearse the arguments that support each perspective on these ambiguities as they are published widely. Instead it is to take a brief exploration of how they came to be and what might be done to bring things closer to a resolution. The issues surrounding so-called ‘non-lethal’ weapons have been the subject of contention for at least six decades and so it is not surprising that there is no simple solution that would remove these ambiguities and bring about a new consensus in the short term.

There is an emerging view that perhaps the Convention was not negotiated as well as it might have been, resulting in the ambiguities appearing. Alternatively, there is a different view that the Convention was drafted with ambiguities deliberately inserted as this was the only way to conclude the negotiations. In order to have a clearer idea of how the highlighted terms ended up in the Convention – and so understand whether this was the result of poor drafting or clever drafting – it is necessary to reflect on how consensus is reached.

Reaching consensus

It might be self-evident that consensus for a treaty text has to be consensus for the complete text – sections of the text cannot be reliant on being supported by a majority vote.

There are essentially six methods for achieving consensus, only five of which are useful for a treaty. The sixth – ‘some say this, some say that’, essentially agree to disagree – cannot be used in for a treaty text that has the force of law. The other five are: persuasion, bargaining, deletion, deferral and ambiguity

Persuasion

Persuasion is, in essence, convincing others of the correctness of a position through rational argument. The key to persuasion is that nothing is expected in return, other than that which flows from what is agreed. However, this can include persuasion through deception or inclusion of inaccurate information that is only discovered later. It may also include the introduction of subtle or clever phrasing to remove logjams on earlier terminology.

Bargaining

Bargaining involves exchange – ‘if you do this, we’ll do that’. Mostly used to pursue trade-offs within a set of negotiations, but often includes elements outside of the policy area under direct

discussion. It is worth noting that threats or coercion can also be included in this category – ‘unless you do this, we’ll do that!’

Deletion

If you can’t agree to a section, delete it – when a section is not of crucial importance to any side involved in negotiations, this is often a simple, rule to reduce disagreements. This can benefit from having someone assertive chairing the negotiations, but over-assertiveness can lead to too many details being deleted out of draft text that can bring problems later.

Deferral

Putting off a decision to a later stage can be a useful method to speed up the conclusion of negotiations, but it is best used for more technical matters. A ‘defer to implementation’ option is impossible to use if matters of deeply-held principle are concerned.

Ambiguity

The deliberate creation of a text that is understood to mean different things to different people – or which can be presented as meaning different things to different audiences – is sometimes called ‘constructive ambiguity’ (although this term is also used to refer to other occasions where deliberate doubt is created). In these circumstances, delegations holding each perspective can return home claiming they got what they wanted. There are risks involved in using ambiguity as a negotiating tactic as the differing understandings can continue for some time.

Historical context

After decades of negotiation, there was only a small window of opportunity to conclude a convention. There was a clear sense that if no treaty text had been agreed by the end of 1992 then there might have been no treaty at all. Without inclusion of the highlighted issues there was no possibility of agreement of a CWC.

It became clear as the negotiations were coming to a close, the options for dealing with the highlighted issues were becoming limited. It was not possible for one side to persuade the other on where the limits to the use of so-called ‘non-lethal’ weapons should lie. The issues were considered sufficiently important that there was nothing of equal importance to bargain with. Most negotiators agreed that there had to be some text on the subject in the Convention, so deletion of the entire section would not have been acceptable. The issues were seen as involving significant matters of principle and so deferral to the implementation phase or some other date would have been impossible. This left ambiguity as the only approach available.

Benefits of concluding the CWC

The CWC has brought with it many benefits, from the global level with chemical weapons destruction and non-proliferation (more accurately called ‘non-acquisition’) measures to the national level by creating international agreed standards for countries to implement controls. Article XI (Economic and Technological Development) was also enacted. As all of this was only possible through the insertion of ambiguities in the Convention text, the question of whether the ambiguity is a small price to pay for consensus or whether there is a greater longer-term price that needs to be addressed. The cost-benefit balance may not be immediately apparent.

In order to examine some of the less well-known benefits of agreeing the CWC in 1992, a couple of case studies might be useful. In the case of country A, it had declared in

1984-85 that it would not introduce export controls on dual-use chemicals unless there was a global chemical weapons convention. However, it discovered in the late 1980s that it was on the export end of a significant dual-use chemical trade that was growing substantially with states having possible chemical weapons programmes. There would have been an obvious difficulty of resolving these positions if no CWC had been agreed promptly. In the case of country B, it discovered that an apocalyptic sect, describing itself as a religious group, was manufacturing and using toxic chemicals as a terror weapon. There was domestic controversy over legal controls on religious groups. The legislative framework that was introduced was based on the CWC and so by-passed some of the controversies.

Without the ambiguities, there would almost certainly not have been a CWC. But was ambiguity: (a) a small price to pay for consensus; (b) a ticking time-bomb with potential to blow apart the Convention; (c) a source of slow decay that might undermine the Convention over a number of years; (d) a simple question of juggling so the 'balls' remain in the air; or (e) a combination of all four? It would take a paper many times the length of this one to explore all of these possibilities, but it worth all those concerned about the future of the Convention to make their own evaluation of their significance.

Tackling the ambiguities

As unambiguous compliance needs unambiguous obligations, the ambiguities that remain in the Convention must be tackled at some stage. It might seem that the ideal solution might be instant resolution of all outstanding ambiguities, unlikely as this might be. However, a distinct hazard with such a rapid process is that decisions might be made on short-term priorities. A solution through persuasion rather than bargaining would be preferable for the long-term.

With no 'best' option available, it is worth exploring what might be a 'least worst' option. This will need a medium-term approach to (i) reduce the scope of ambiguities where possible and (ii) encourage action to prevent ambiguities getting worse (in other words to prevent irreversible actions that may make the situation deteriorate). The worst option would certainly be to do nothing and take a risk on the future of the Convention.

Virtue from possible necessity

Events in one State Party may affect one of the influences that led to some of the ambiguities. One interpretation is that chemicals for law enforcement use should be 'non-lethal' or low lethality. A further interpretation is that law enforcement chemicals can only be those falling within the definition of 'riot-control agents' under the Convention. The counter argument is that this is not possible as the 'law enforcement' clause is the only exemption for use of toxic chemicals that would allow for lethal injection to carry out the death penalty.

The subject of judicial execution falls within the realm of national politics and is not suitable subject for the Review Conference itself. However, national actions on this subject could have international benefits. The US Supreme Court started a review of lethal injection in January this year, with the result expected in June. If the Court were to declare lethal injection to be unconstitutional (or if the Court were to declare the current lethal injection protocol unconstitutional and there was no replacement protocol suggested) the US would no longer require this interpretation of 'law enforcement' in the CWC. At this point, it could make a virtue of a necessity.

However, additional countries have recently been exploring the use of lethal injection.

Actions for the Review Conference

With the Second CWC Review Conference upon us, there is a need for at least a basic discussion on these subjects as ignoring these issues would be counter-productive. A

non-decision-making issue cluster within the Review Conference could be used to discuss issues about which consensus is not likely to be reached, similar to those used in the Biological Weapons Convention Review Conference in 2006. It might also be possible to introduce a 'some say this, some say that' text in Review Conference report that recognises that ambiguities exist and which encourages States Parties to inform themselves of the differing interpretations that exist when considering their own interpretations of the ambiguities.

Such a text might read:

The Conference recognised that certain terms used in the text of the Convention such as 'law enforcement', 'as a method of warfare' and 'domestic riot control' are subject to differing interpretations between States Parties.

The Conference noted these differing interpretations have existed since the negotiations for the Convention and that ambiguity in such terminology contributed to achieving consensus.

The conference encouraged States Parties to inform themselves of the differing interpretations that exist when considering their own interpretations and requested States Parties to consider with care any activities that might make future resolution of the ambiguities more difficult.

Conclusions

The ambiguities in the text of the Chemical Weapons Convention result from clever, not clumsy, negotiation and were a price to pay for consensus. The price paid so far has brought the world the benefits of the Convention. The longer-term price is that ambiguous issues will have a negative impact on the Convention – even if the scale of impact may be disputed – and this must be addressed at some stage, although a rapid solution is extremely unlikely. In cases where circumstances have changed, individual states might be able to revise elements of their past positions. There is some urgency to have some discussion on the relevant subjects in order to try to find common understandings where possible. This might be prompted by publicly recognising that the ambiguities exist; that there is difficulty in reconciling them; and that there is a need to ensure the divergence of views on the ambiguities does not get wider.

[This paper is based on a lecture given at the OPCW, 24 January 2008]