

# Non-Compliance with the Chemical Weapons Convention

Lessons from and for Iraq

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## Preface

This SIPRI Policy Paper is designed to bring to a wider readership the results of a study carried out by the Institute's CBW research team at the end of 2002 with the generous support of the Swedish Ministry for Foreign Affairs. The study originally focused on whether Iraq's accession to the 1993 Chemical Weapons Convention (CWC) could contribute to the resolution of uncertainties and concerns about that country's activities in the field of chemical weapons. As the work progressed, its context was significantly changed first by UN Security Council Resolution 1441, which sent the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) back to Iraq with a new mandate: and then by the military attack on Iraq in March 2003, the fall of the Ba'ath Party regime of President Saddam Hussein, and the occupation of the country primarily by US and British forces.

While world attention currently focuses on the evidence of Iraq's actual CW capacity or its absence, a more serious question for the long term is how the country can be made and kept free from all weapons of mass destruction (and related technologies).

Any reliable solution will need to draw on the experiences of UNMOVIC and its predecessor the United Nations Special Commission on Iraq (UNSCOM), as well as on general considerations about the value of multilateral arms control and disarmament agreements for resolving such questions. The aim of this study in its current form is to promote an understanding of how such agreements, notably the CWC, are and could be applied at the operational level: while drawing attention to other practical and political factors relevant to handling the Iraqi case. While much of the information and analysis offered might help in addressing other cases of concern as well, it should be stressed that the challenge of Iraq has taken on many unique features in recent years. It does not necessarily hold up an accurately reflecting mirror to the general potential, nor the optimum roles, of the various players addressed in this study.

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Alyson J. K. Bailes  
Director, SIPRI  
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## Acronyms

BDA	Bilateral Destruction Agreement
BTWC	Biological and Toxin Weapons Convention
BW	Biological weapon
CBW	Chemical and biological weapons
CSP	Conference of the States Parties
CW	Chemical weapon
CWC	Chemical Weapons Convention
DOC/PSF	Discrete organic chemical/phosphorus, sulphur or fluorine
EC	Executive Council
EIF	Entry into force
EU	European Union
EURATOM	European Atomic Energy Community
FFCD	Full, final and complete disclosure
GCC	Gulf Cooperation Council
GPC	General Purpose Criterion
GRL	Goods Review List
IAEA	International Atomic Energy Agency
ISG	Iraq Survey Group
MET	Mobile Exploitation Team
MOU	Memorandum of Understanding
NBC	Nuclear, biological and chemical
NNWS	Non-nuclear weapon state
NPA	New Partnership Approach
NPT	Non-Proliferation Treaty
NTM	National Technical Means
OMV	Ongoing monitoring and verification
OPCW	Organisation for the Prohibition of Chemical Weapons
R&D	Research and development
SARS	Severe acute respiratory syndrome
SSSF	Single small-scale facility
TS	Technical Secretariat
UN	United Nations
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission
UNSCOM	United Nations Special Commission on Iraq
VIR	Verification Implementation Report
WEU	Western European Union



# 1. Introduction

Since the end of military action in Iraq and the formation of the Coalition Provisional Authority in May 2003, most debate on the future of Iraq has focused on the short-term problems of governance, internal security and economic reconstruction in that country. In addition to the immediate problems, there is also a need to address long-term issues, such as what role Iraq will play in multilateral bodies. Although some issues can only be resolved in the long term, others will require initial decisions to be taken in the near future. In the very long term (measured in terms of decades) there is no option other than for Iraq to be involved in multilateral controls on chemical weapons (CW). However, in the medium term (measured in years) it is unclear what the best method would be to take Iraq from its current situation—as an occupied state with, at the very least, a past CW programme of which knowledge is incomplete—to a new situation where an Iraqi Government commits Iraq to membership of and adherence to multilateral disarmament regimes.

This policy paper studies the options for bringing Iraq into the multilateral fold and examines the advantages and drawbacks of some of the options, against a background of the history of general and specific controls on Iraq. Special attention is paid to the procedures of the 1993 Chemical Weapons Convention (CWC)<sup>1</sup> and the manner in which its procedures might cope with a determined violator.

## Background

In April 1991 the United Nations Security Council issued Resolution 687, which specified the terms for the cessation of the hostilities between Iraq and UN coalition forces that began as a result of the 1990 invasion of Kuwait by Iraq.<sup>2</sup> Resolution 687 included provisions for the verified disarmament of Iraq's nuclear, biological and chemical (NBC) weapons and of ballistic missiles with a range greater than 150 km. The international control mechanisms for these weapon systems that existed at the time differed considerably. The acquisition of nuclear weapons was prohibited for non-nuclear weapon states (NNWS) under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT) and a system of safeguards was operated by the International Atomic Energy Agency (IAEA) to monitor compliance with the obligation that nuclear materials only be

<sup>1</sup> The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (corrected version), is reproduced at URL <<http://projects.sipri.se/cbw/docs/cw-cwc-texts.html>>. The 31 Oct. 1999 amendment to Part VI of the Verification Annex of the CWC is reproduced at URL <<http://projects.sipri.se/cbw/docs/cw-cwc-verannex5bis.html>>. Complete lists of parties, signatory and non-signatory states are available on the SIPRI CBW Project Internet site at URL <<http://projects.sipri.se/cbw/docs/cw-cwc-mainpage.html>>.

<sup>2</sup> UN Security Council Resolution 687, 3 Apr. 1991.

## 2 NON-COMPLIANCE WITH THE CWC

used for peaceful purposes in these states. The use of chemical and biological weapons (CBW) was prohibited under the 1925 Geneva Protocol, but not their possession. Some parties also attached reservations to their instruments of ratification saying that they would not consider themselves bound to the treaty's provisions if they themselves were attacked with CW or were engaged in a military conflict with states that had not ratified the protocol. The possession of biological weapons (BW) was prohibited by the 1972 Biological and Toxin Weapons Convention (BTWC).<sup>3</sup> However, neither of these treaties included any institutional verification measures. A treaty to prohibit CW had been under negotiation for some two decades but had not yet been concluded. There were no multilateral treaty-based controls on missiles. At the time of the Kuwait invasion, Iraq was a NNWS party to the NPT, a party to the Geneva Protocol and a signatory to the BTWC.

This variation in existing international measures, and in Iraq's obligations under them, was reflected in the provisions of Resolution 687, which invited Iraq to 'reaffirm' its existing obligations with regards to NBC weapons and to ratify the BTWC. Because the IAEA safeguards regime already existed, the Security Council decided to make that agency responsible for the 'destruction, removal or rendering harmless' of the elements of Iraq's nuclear weapon programme. However, in the absence of any operative agency in the other fields of concern, the Security Council established the UN Special Commission on Iraq (UNSCOM), which would be responsible for 'destruction, removal or rendering harmless' the elements of the Iraqi CBW programme and the programmes for missiles with a range greater than 150 km.

When Resolution 687 was negotiated it was believed that the main task of UNSCOM would be to verify the accuracy of Iraq's declarations, after which the matter could be quickly resolved. However, Iraq's obstructionist policies and inaccurate reports on the status of its CBW and ballistic missile holdings and programmes forced UNSCOM to transform itself into an investigative arm of the Security Council, seeking out weapon stockpiles and components of armament programmes. Both the duration of the UNSCOM mandate and the determination of the point at which Iraq could be declared to have met its obligations under Resolution 687 became uncertain, and resulted in contentious discussions in the Security Council. UNSCOM ceased to operate on Iraqi territory from December 1998 and was replaced by the UN Monitoring, Verification and Inspection Commission (UNMOVIC) in December 1999. Under a new United Nations Security Council Resolution 1441<sup>4</sup> UNMOVIC carried out investigations on Iraqi territory from

<sup>3</sup> The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction is reproduced on the SIPRI Chemical and Biological Warfare Project Internet site at URL <<http://projects.sipri.se/cbw/docs/bw-btwc-text.html>>. Complete lists of parties, signatory and non-signatory states are available on the SIPRI CBW Project Internet site at URL <<http://projects.sipri.se/cbw/docs/bw-btwc-mainpage.html>>.

<sup>4</sup> UN Security Council Resolution 1441, 8 Nov. 2002.



November 2002 to March 2003 when the country was attacked by forces of the United States and the United Kingdom, and their partners.

The CWC negotiations were successfully concluded in September 1992 and the convention was opened for signature in January 1993. It entered into force on 29 April 1997. The CWC is the most developed and intrusive verification and inspection regime of the multilateral arms control and disarmament treaties open to universal membership and bans an entire category of weapons. Its Organisation for the Prohibition of Chemical Weapons (OPCW) is an international body which implements the provisions of the convention.<sup>5</sup>

There are considerable differences between the verification and inspection mandates of the OPCW and those of UNSCOM and UNMOVIC. UNSCOM and UNMOVIC operated in a hostile political environment in Iraq while all parties to the CWC, by virtue of having voluntarily ratified the convention, agree to cooperate with the OPCW. This is a fundamental difference between the general and specific inspection regimes and practices.

As long as the Security Council retains responsibility for the elimination of Iraq's non-conventional weapons, the involvement of the OPCW in the dismantlement of Iraq's CW programmes will require specific agreements between the UN and the OPCW on verification and inspection mandates and modalities. Unless the Security Council changes the mandate of UNMOVIC, it will remain the sole internationally recognized body that can deal with outstanding questions regarding Iraq's CBW or ballistic missile programmes.

### **The current situation**

After the 2003 war in Iraq it is unclear what role the UN and other international organizations will play in the final confirmation of Iraq's compliance with Resolution 687. The USA has, thus far, refused to allow the return of the UN inspectors and has sought to limit UN involvement in the reconstruction of Iraq to a supporting role. The USA brought in its own units in an attempt to uncover Iraq's holdings of non-conventional weapons—the Mobile Exploitation Teams (MET), which were attached to the coalition forces. In May 2003 the MET were replaced by the Iraq Survey Group—some 1500 people, including civilian personnel and former UNSCOM and UNMOVIC inspectors. As of 2 October 2003 these units had not found CBW, evidence of recent research and development (R&D) or of production programmes.<sup>6</sup>

<sup>5</sup> For additional information see the OPCW Internet site, URL <<http://www.opcw.org>>.

<sup>6</sup> On 2 Oct. 2003 an interim progress report on the work of the Iraq Survey Group was issued. Central Intelligence Agency, Statement by David Kay on the Interim Progress Report on the Activities of the Iraq Survey Group (ISG) before the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, 2 Oct. 2003, URL <[http://www.odci.gov/cia/public\\_affairs/speeches/2003/david\\_kay\\_10022003.html](http://www.odci.gov/cia/public_affairs/speeches/2003/david_kay_10022003.html)>.

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Chapter 2 of this policy paper provides background on UNSCOM and UNMOVIC with a preliminary analysis of their respective experiences and impact. Chapter 3 describes the CWC and its mechanisms for dealing with suspected or known non-compliance. Chapter 4 analyses issues arising from the UNSCOM and UNMOVIC experiences and their implications for the use of CWC mechanisms in parallel cases. Chapter 5 describes the applicability of the CWC to a post-conflict Iraq and presents three possible scenarios. The policy paper's conclusions are presented in chapter 6. The first two appendices provide details of key UN Security Council Resolutions on Iraq and the obligations of states parties under the CWC. Appendix 3 discusses possible non-compliance scenarios under the CWC and appendix 4 discusses a possibly useful precedent for the relationship that might come into being between the UN Security Council and the OPCW.

## 2. The UNSCOM and UNMOVIC mandates

The UNSCOM mandate in UN Security Council Resolution 687 called for complete access for UNSCOM inspectors to any and all sites in Iraq and for comprehensive and detailed declarations of past weapon programmes and holdings. It also included the authority for inspectors to inspect several sites simultaneously, in an attempt to hamper efforts by Iraqi officials to ‘manage’ the inspection process.<sup>7</sup> However, this did not prevent Iraq from effectively obstructing many inspections.

From the beginning, Iraq obstructed the inspectors’ work despite a declared and frequently reiterated policy of cooperation. In August 1991, UN Security Council Resolution 707 declared that Iraq was in ‘material breach’ of Resolution 687 and implied that military operations might be resumed under Chapter VII of the UN Charter.<sup>8</sup> Although all Security Council resolutions authorizing enforcement measures were passed under Chapter VII, in practice the deeply divided Security Council was unable to coordinate an effective and sustained response to Iraq’s violations and policy of systematic obstruction.<sup>9</sup> The effective end of UNSCOM was signified by the Memorandum of Understanding (MOU) agreed between UN Secretary-General Kofi Annan and the Government of Iraq on 23 February 1998.<sup>10</sup> The negotiations were undertaken following an impasse over whether UNSCOM inspectors should be granted access to so-called presidential sites and, if so, whether any restrictions should apply. By limiting the inspectors’ right to enter such sites, the MOU broke with the fundamental principle of ‘unfettered’ access to any site at any time. The MOU in effect enabled Iraq to bypass UNSCOM and made Annan and his senior envoys intermediaries in discussions of Iraq’s compliance.<sup>11</sup> The fact that Iraq remained in non-compliance with Resolution 687 was relegated to secondary importance and effectively became irrelevant, at the operational level, in terms of enforcing inspector access.

It was only a matter of months before Iraq violated the MOU. However, by that time UNSCOM’s authority and that of the earlier Security Council resolutions had been totally compromised. In December 1998 UNSCOM inspectors were with-

<sup>7</sup> UNSCOM, ‘UNSCOM mandate’, URL <<http://www.un.org/Depts/unscom/unscom.htm#MANDATE>>.

<sup>8</sup> UN Security Council Resolution 707, 15 Aug. 1991; and United Nations, United Nations Charter, Chapter VII, ‘Action with respect to threats to the peace, breaches of the peace, and acts of aggression’. URL <<http://www.un.org/Overview/Charter/chapter7.html>>.

<sup>9</sup> Duelfer, C., ‘The inevitable failure of inspections in Iraq’, *Arms Control Today*, vol. 32, no. 7, (Sep. 2002), URL <[http://www.armscontrol.org/act/2002\\_09/duelfer\\_sept02.asp](http://www.armscontrol.org/act/2002_09/duelfer_sept02.asp)>.

<sup>10</sup> Memorandum of Understanding between the United Nations and the Government of Iraq, 23 Feb. 1998, URL <<http://www.un.org/NewLinks/uniraq.htm>>. According to the MOU, inspectors at certain sites must be accompanied by members of a ‘special group’ of diplomats, and must also notify Iraq in advance of any inspection and disclose the composition of the inspection team.

<sup>11</sup> Duelfer (note 9), pp. 8–11.

drawn because they were unable to fulfil their allocated tasks owing to persistent obstruction from the Iraqi authorities. The USA and the UK then launched Operation Desert Fox—a series of air strikes against Iraq. The operation further polarized the Security Council: the UNSCOM inspectors were never able to return because of the lack of effective, unified Security Council support.

In December 1999 UN Security Council Resolution 1284<sup>12</sup> created UNMOVIC to replace UNSCOM. UNMOVIC was given the powers and responsibilities that UNSCOM had just before its demise, inheriting also the changes made by the MOU.<sup>13</sup> Although UNMOVIC staff trained and prepared for inspections in Iraq, none took place until after the adoption of Security Council Resolution 1441 in November 2002.<sup>14</sup> This resolution was unanimously adopted and backed by strong language warning of ‘serious consequences’ in the event that Iraq failed to cooperate. Resolution 1441 also removed the constraints of the 1998 MOU and thus significantly reduced Iraq’s opportunities to negotiate terms and obstruct inspectors.<sup>15</sup>

### **Declaration obligations**

Resolution 687 required Iraq to submit a declaration stating the location, size and type of CBW, stocks of biological and chemical agents and all related sub-systems and components as well as the location and type of R&D and manufacturing facilities.<sup>16</sup> Because of dissatisfaction in the Security Council regarding earlier declarations by Iraq, Resolution 707 demanded that Iraq provide a ‘full, final, and complete disclosure’ (FFCD).<sup>17</sup> Iraq was required to provide such a declaration as the basis for ongoing monitoring and verification (OMV) and on-site inspections. The primary task of the UNSCOM inspectors was to verify the accuracy of the declaration and the destruction of the prohibited weapons. According to a plan

<sup>12</sup> Eleven states—Argentina, Bahrain, Brazil, Canada, Gabon, Gambia, Namibia, the Netherlands, Slovenia, the UK and the USA—voted in favour and 4 states—China, France, Malaysia and Russia—abstained. United Nations, Press Release: Security Council establishes new monitoring commission for Iraq adopting Resolution 1284 (1999) by vote of 11–0–4, UN document SC/6775, 17 Dec. 1999; and ‘A year after US–UK bombing of Iraq, Security Council adopts new resolution without support of China, France & Russia’, *Disarmament Diplomacy*, URL <<http://www.acronym.org.uk/42iraq.htm>>. See also Wahlberg, M., Leitenberg, M. and Zanders, J. P., ‘The future of chemical and biological weapons disarmament in Iraq: from UNSCOM to UNMOVIC’, *SIPRI Yearbook 2000: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2000), p. 565.

<sup>13</sup> UN Security Council Resolution 1284, 17 Dec. 1999, para. 1.

<sup>14</sup> UN Security Council Resolution 1441 (note 4); and United Nations, ‘Letter dated 16 September 2002 from the Secretary-General addressed to the President of the Security Council’, UN document S/2002/1034, 16 Sep. 2002. The text of the letter is available at URL <<http://www.un.org/Depts/unmovic/chronology/1034.pdf>>.

<sup>15</sup> UN Security Council Resolution 1441 (note 4).

<sup>16</sup> UN Security Council Resolution 687 (note 2), section C, paras 8(a) and 9(a).

<sup>17</sup> UN Security Council Resolution 707 (note 8) para. 3(i).

formulated in accordance with Security Council Resolution 715<sup>18</sup> the declaration obligation was extended and Iraq was obliged to provide, on a regular basis, full, complete and timely information on activities, sites, facilities, materials or other items that might be used for activities prohibited under Resolution 687.<sup>19</sup> This created the basis for a new, integrated OMV system which was accepted by Iraq on 26 November 1993.<sup>20</sup> The declaration obligation for Iraq remained in place under Resolution 1284. This resolution also stated that UNMOVIC must submit a work programme for implementation and that what was ‘required of Iraq for the implementation of each task shall be clearly defined and precise’.<sup>21</sup> This, in effect, shifted some responsibility for Iraq’s efforts to declare its capabilities by placing pressure on UNMOVIC to take a more active role in identifying the country’s weapon capabilities.

The main problem with Iraq’s declarations was their inaccuracy and incompleteness, which resulted in considerable discrepancies between them and UNSCOM’s findings.<sup>22</sup> Resolution 1441’s list of declaration obligations was more specific than those of previous Security Council resolutions.<sup>23</sup>

### **Compliance measures and penalties**

Various instruments of enforcement were available to the Security Council with regard to Iraq, including economic sanctions such as the oil embargo and the threat of military force under Chapter VII of the UN Charter. Resolutions were passed on the basis of Chapter VII of the UN Charter.<sup>24</sup> This implies that the resolutions are legally binding and, if the Security Council finds Iraq in material breach of them, the Security Council can take enforcement action, including authorizing the use of military force.<sup>25</sup>

Sanctions and an oil embargo were imposed on Iraq as a consequence of its 1990 invasion of Kuwait in UN Security Council Resolution 661.<sup>26</sup> They were intended

<sup>18</sup> UN Security Council Resolution 715, 11 Oct. 1991.

<sup>19</sup> United Nations, Report of the Secretary-General transmitting the plan, revised pursuant to the adoption of Security Council Resolution 707 (1991), for future monitoring and verification of Iraq’s compliance with the destruction or removal of weapons specified in Security Council Resolution 687 (1991), UN Security Council Document S/22871/Rev.1, 2 Oct. 1991, para. 16.

<sup>20</sup> ‘Iraq accepts the OMV system required in UN Security Council Resolution 687’, IAEA, ‘Chronology of main events’, URL <<http://www.iaea.or.at/worldatom/Programmes/ActionTeam/chronology.html>>.

<sup>21</sup> UN Security Council Resolution 1284 (note 12), para. 7.

<sup>22</sup> Wahlberg, Leitenberg and Zanders (note 12), pp. 560–77.

<sup>23</sup> UN Security Council Resolution 1441 (note 4), para. 3.

<sup>24</sup> Most of the key resolutions on Iraq state that the Security Council is ‘Acting under Chapter VII of the Charter’. However, Resolution 687 states ‘Conscious of the need to take the following measures acting under Chapter VII of the Charter’.

<sup>25</sup> United Nations Charter, Chapter VII (note 8), URL <<http://www.un.org/aboutun/charter/>>.

<sup>26</sup> UN Security Council Resolution 661, 6 Aug. 1990.

to remain in place until Iraq complied fully with Resolution 687 and other relevant resolutions.<sup>27</sup> The nature of these measures evolved as a result of the oil-for-food programme<sup>28</sup> and the debate regarding the effectiveness and humanitarian consequences of sanctions. The oil-for-food programme was significantly changed with the introduction of ‘smart sanctions’ in 2002. A Goods Review List (GRL) was established as part of a new, more streamlined, export control system for Iraq.<sup>29</sup> Sanctions were revised to ensure the rapid and unimpeded flow of civilian goods while maintaining critical controls on ‘militarily useful’ items.<sup>30</sup> This was the second major change in the programme following the adoption of Resolution 1284, which stated that sanctions would be suspended for a period of 120 days if the IAEA and UNMOVIC reported full cooperation by Iraq.<sup>31</sup> This was intended as an incentive for Iraq to cooperate with the inspectors. UN Security Council Resolution 1483 lifted the economic sanctions after the declared cessation of hostilities in May 2003.<sup>32</sup> Sanctions on military equipment remain in place.

### **Inspection modalities**

While UNMOVIC, as explained above, had initially inherited the limitations imposed on UNSCOM by the MOU concluded by Kofi Annan in February 1998, Resolution 1441 removed this anomaly. UNMOVIC was again required to report directly to the Security Council rather than to the Secretary-General. This severely limited Iraq’s opportunity to negotiate compromises with organizations or individuals or bypass the Security Council. Resolution 1441 also restored the principle of ‘full and unconditional’ access that was required in Resolution 687, and gave UNMOVIC additional powers. For instance, it was given the authority to freeze sites and block movement in and out of inspection areas.<sup>33</sup> This provision was included in order to avoid a repetition of the experience of the IAEA and UNSCOM when inspectors were kept waiting at the gate to a site while Iraqi vehicles loaded with banned equipment, materials and paperwork left the premises through a rear exit.<sup>34</sup> The UNMOVIC inspectors also regained the right of unre-

<sup>27</sup> UN Security Council Resolution 687 (note 2), para. 22.

<sup>28</sup> The ‘oil-for-food’ humanitarian programme modified the sanctions regime imposed in 1990 by Resolution 661 and was ‘a temporary measure to provide for the humanitarian needs of the Iraqi people’. UN Security Council Resolution 661 (note 26); UN Security Council Resolution 986, 14 Apr. 1995; and Office of the Iraq Programme Oil-for-Food Internet site, URL <<http://www.un.org/Depts/oip/>>.

<sup>29</sup> UN Security Council Resolution 1409, 14 May 2002.

<sup>30</sup> United Nations Fact Sheet, ‘Goods Review List for Iraq’, US/UN Press Release no. 68 (02), 14 May, 2002, URL <[http://www.un.int/usa/02\\_068.htm](http://www.un.int/usa/02_068.htm)>.

<sup>31</sup> UN Security Council Resolution 1284 (note 12), para. 33.

<sup>32</sup> UN Security Council Resolution 1483, 22 May 2003.

<sup>33</sup> UN Security Council Resolution 1441 (note 4), paras 5 and 7.

<sup>34</sup> ‘Flashback: Inspecting Iraq’, *BBC News*, 18 Nov. 2002, URL <<http://news.bbc.co.uk/2/hi/middleeast/2489153.stm>>.

stricted movement in Iraq and no longer had to notify the Iraqi authorities in advance of the identity of any inspection site.<sup>35</sup>

Initially, the inspection schedule was drawn up on the basis of the amount of time estimated to be needed in order to verify the disarmament of Iraq—although none of the resolutions that govern the work of UNMOVIC set a date for the completion of the work.<sup>36</sup> When UNSCOM left Iraq in late 1998 it had spent over seven years inspecting and monitoring without an end to the inspections in sight. Resolution 1284 assumed that UNSCOM had achieved most of its disarmament goals, and UNMOVIC was therefore expected to be able to identify and complete the remaining disarmament tasks within 12–18 months.<sup>37</sup> Resolution 1284 envisaged that 60 days after entering Iraq the IAEA and UNMOVIC would submit a work programme to the Security Council implementing a reinforced system of OMV. The sanctions were to be lifted 120 days after OMV became fully operational, provided that Iraq had demonstrated its full cooperation.<sup>38</sup> When inspectors were allowed back into Iraq under Resolution 1441 they worked under great time pressure as a consequence of the continuing US and British preparations for military action. However, Resolution 1441 did not contain a schedule for the end of the inspections.

### Derivation and use of information

During the UNSCOM years accusations were frequently made by Iraq that inspectors were spying on behalf of their governments. Some UNSCOM staff members had shared their findings with their national governments. There were strong ties between governments and their nationals as a consequence of the fact that their salaries were paid by their governments in almost all cases.<sup>39</sup> UNMOVIC personnel, by contrast, are UN employees and, as such, are not supposed to take instructions from individual governments. Their salaries are paid from the oil-for-food programme.<sup>40</sup> Iraq was unable to refuse to accept an UNMOVIC inspector on the basis of his or her nationality.

UNSCOM experienced problems with regard to the use of information caused by a two-way flow of intelligence. UN Security Council Resolutions 1284 and 1441

<sup>35</sup> UNSCOM (note 7).

<sup>36</sup> UNMOVIC draft work programme, 17 Mar. 2003, para. 7, URL <[www.un.org/Depts/unmovic/documents/draftWP.pdf](http://www.un.org/Depts/unmovic/documents/draftWP.pdf)>.

<sup>37</sup> Cortright, D., 'The legal basis for UN weapons inspections', *Iraq: A New Approach* (Carnegie Endowment for International Peace: Washington, DC, 2002), URL <<http://www.ceip.org/files/publications/iraq/cortright.htm>>.

<sup>38</sup> UN Security Council Resolution 1284 (note 12), paras 7 and 33.

<sup>39</sup> The only exceptions were a small number of inspectors who were permanent UN staff seconded to UNSCOM, and Russian inspectors who were not paid and who lived on travel and subsistence allowances paid to all UNSCOM personnel by the UN. Former UNSCOM official, private communication with J. Hart, Aug. 2003.

<sup>40</sup> United Nations, 'UNMOVIC basic facts', URL <<http://www.un.org/Depts/unmovic/>>.

specified that information should flow from individual governments to UNMOVIC only—a practice similar to that of the IAEA.<sup>41</sup> Both resolutions request states to provide relevant intelligence information and to cooperate and fully support the implementation of their respective mandates.<sup>42</sup> However, countries were not always willing to reveal the sources of intelligence information, or the methods used for its collection, in a multilateral framework. Perceived subjective elements in national intelligence assessments also affected the credibility of the intelligence.<sup>43</sup> These factors caused great concern among some members of the Security Council, which was not privy to all the information shared between a relatively small number of countries, such as the USA and the UK, and UNSCOM staff. However, under the new information-sharing arrangements, UNSCOM also found states unwilling to provide unlimited intelligence, mainly because of the suspicion that it might leak to the Iraqi authorities and hamper the inspections or reveal intelligence sources and methods to Iraq. In the case of UNMOVIC, the quality of some intelligence provided by the UK and the USA was criticized by UNMOVIC's Executive Chairman Hans Blix as incorrect or of dubious value.<sup>44</sup>

### **Integration of Iraq into the international community: confidence-building measures and ongoing monitoring and verification**

The UNMOVIC mandate incorporates elements of UNSCOM (inspections, the disposal of prohibited weapon holdings and related infrastructure) and the establishment of a long-term verification regime—the OMV programme.<sup>45</sup> The OMV programme was introduced in Resolution 715<sup>46</sup> and further elaborated in the UNMOVIC mandate as defined in Resolution 1284. Although the task of destroying Iraq's weapons was retained in the UNMOVIC mandate, the focus shifted from past weapons to the monitoring of current and future activities.<sup>47</sup> Resolution 1441 refocused on the declarations made by Iraq and verification of their accuracy. Because Resolution 1441 did not replace Resolution 1284 the OMV remained part

<sup>41</sup> United Nations, Organizational Plan for the United Nations Monitoring, Verification and Inspection Commission, UN document S/2000/292, 6 Apr. 2000, para. 37; and UN Security Council Resolution 1441 (note 4), para. 10.

<sup>42</sup> UN Security Council resolutions 1284 (note 12), para. 10; and 1441 (note 4), paras 9 and 10.

<sup>43</sup> McCarthy, T., 'Intelligence in arms control and disarmament', ed. T. Findlay, *Verification Yearbook 2000* (VERTIC: London, 2000), pp. 249–51, available at URL <[http://www.vertic.org/assets/VY00\\_McCarthy.pdf](http://www.vertic.org/assets/VY00_McCarthy.pdf)>.

<sup>44</sup> 'Hans Blix criticises "quality" of intelligence', *BBC News*, 6 June 2003, URL <<http://news.bbc.co.uk/2/hi/programmes/breakfast/2967764.stm>>.

<sup>45</sup> *The United Nations and the Iraq–Kuwait Conflict 1990–1996* (United Nations: New York, 1996), pp. 76–78; and UN Security Council Resolution 715 (note 18).

<sup>46</sup> UN Security Council Resolution 715 (note 18).

<sup>47</sup> 'Shifting priorities: UNMOVIC and the future of inspections in Iraq, an interview with Ambassador Rolf Ekeus', *Arms Control Today*, vol. 30, no. 2 (Mar. 2000), pp. 3–6, URL <[http://www.armscontrol.org/act/2000\\_03/remr00.asp](http://www.armscontrol.org/act/2000_03/remr00.asp)>.



of the UNMOVIC mandate. It was nevertheless placed under great strain by the demand in Resolution 1441 that Iraq disclose its weapon capabilities or face serious consequences. During the current military occupation of Iraq the focus is still very much on discovering hidden CBW holdings, and the occupying powers have yet to formulate a programme for the long-term monitoring of relevant activities in Iraq.

The OMV programme is critical for the establishment of lasting confidence in Iraq's adherence to international norms and thus to its reintegration into the international community. Its implementation depends on a historically accurate accounting of Iraq's past CBW programmes, its use of CW during the 1980–88 Iraq–Iran War and the verified destruction of its weapon holdings after that war. Before Resolution 1441, the OMV programme had been viewed as an incentive for Iraq to abide by UN resolutions, which could then lead to the lifting of sanctions and its gradual return to active participation in the international community.<sup>48</sup>

Although the OMV programme is a potential instrument for facilitating Iraq's reintegration, the question remains whether the OMV tasks as regards CW could be accomplished by the OPCW (assuming that Iraq were to become a party to the CWC).<sup>49</sup> This option would require a sufficient complementarity of goals and instruments between UNMOVIC and the CWC verification regime, and an agreement between the UN and the OPCW on which procedures to follow in particular cases.<sup>50</sup> The issues involved are further examined in chapter 5.

<sup>48</sup> Center for Nonproliferation Studies, Monterey Institute of International Studies, 'UNSCOM's comprehensive review, Iraq: ongoing monitoring and verification', URL <[http://cns.miis.edu/research/iraq/ucreport/mon\\_intr.htm](http://cns.miis.edu/research/iraq/ucreport/mon_intr.htm)>.

<sup>49</sup> There is no comparable regime for BW.

<sup>50</sup> This option would work only if UNMOVIC were given full access to Iraq, which is not being considered by the USA and the UK, as occupying powers, at the time of writing.

### 3. The objectives of the CWC

The CWC prohibits the development and acquisition of CW and requires the elimination of CW stockpiles and production facilities within established time-frames. The CWC defines all toxic chemicals as chemical weapons unless they are held for legitimate purposes and held in types and quantities appropriate for such a purpose. This is known as the General Purpose Criterion (GPC) and is the key yardstick for judging whether any activity in a state is compliant with the CWC.<sup>51</sup>

The OPCW, located in The Hague, oversees the implementation of the convention. It consists of the Conference of the States Parties (CSP), the Executive Council (EC) and the Technical Secretariat (TS). The CSP is the highest decision-making body. It usually meets annually but it can also be convened in special session if circumstances require.<sup>52</sup> Every five years it meets in special session to review the operation of the convention (review conferences).

The EC is a representative body consisting of 41 states parties, who are elected from five regional groups.<sup>53</sup> Its main task is to oversee the operational aspects of CWC implementation, and it also has special responsibilities relating to non-compliance concerns. The EC informs and consults with the parties involved in such cases. It can request clarification and take other steps, as necessary, to remedy the situation within a specified time. The EC is required to notify the CSP about compliance issues and it recommends measures to deal with them. In the event of an incident which is of ‘particular gravity and urgency’, the EC may notify the Security Council and/or the General Assembly.<sup>54</sup> The EC thus plays an important role in the peaceful settlement of disputes between the parties to the CWC by providing a forum for cooperative clarification and consultation.<sup>55</sup>

The TS, which is headed by the Director-General, is responsible for the practical work of the OPCW, including the day-to-day implementation of the convention. It also assists the CSP and the EC in their work. The TS informs the EC about its activities and any difficulties it encounters, including those related to compliance.<sup>56</sup>

#### Reporting requirements

Within 30 days of the CWC entering into force for a particular party, that party is required to report whether it ‘owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or

<sup>51</sup> CWC, Article II, para. 1.

<sup>52</sup> CWC, Article VIII, para. 12.

<sup>53</sup> The 5 regional groups are Africa, Asia, Eastern Europe, Latin America and the Caribbean, and the Western European and Other States.

<sup>54</sup> CWC, Article VIII, para. 36.

<sup>55</sup> CWC, Article IX, paras 3–7.

<sup>56</sup> CWC, Article VIII, paras 38 and 40.

control'.<sup>57</sup> The parties are also required to declare current and former CW production facilities that have operated at any time since 1 January 1946 as well as facilities used at any time since 1 January 1946 for the development of CW. Parties possessing CW, or CW production facilities, must therefore submit detailed annual destruction plans and reports to the OPCW. The parties are also required to declare any chemicals they may hold for riot control purposes. Possessor states must submit detailed annual destruction plans thereafter.

Parties are required to provide annual declarations on *inter alia* defence-related activities and the production, consumption and transfer of certain chemicals; CW-related facilities, including CW storage and destruction facilities; and facilities producing small quantities of chemical warfare agents for research, medical, pharmaceutical or protective purposes.

The CWC requires that CW stockpiles be destroyed by 29 April 2007, 10 years after the entry into force of the CWC, regardless of when states became parties to the convention. A party may request extensions, which must be approved by the CSP, of up to five years or until 29 April 2012. OPCW inspection teams are present at all times during destruction operations. Former CW production facilities must be either destroyed, temporarily converted for use as CW destruction facilities and then destroyed, or converted for non-prohibited purposes. A conversion request must be approved by the EC. The final destruction or conversion of all declared CW production facilities must be certified by the OPCW Director-General.<sup>58</sup>

Prior to ratification or accession, a state can request information from the OPCW describing the various legal and administrative steps required for it to implement the convention.<sup>59</sup> Such information is available from the TS in standardized information packages. The TS will also, on request, actively assist a prospective party in its preparations for joining the CWC as well as with the implementation of its obligations following ratification or accession.

## Inspections under the CWC

There are three types of inspection under the CWC: routine inspections, challenge inspections and investigations of alleged CW use. In addition, undeclared facilities may be subject to inspection through the CWC's GPC, which bans the use of toxic chemicals for non-peaceful purposes. Parties may also elect to place certain types of facility under the convention's routine verification regime using the GPC as the

<sup>57</sup> CWC, Article III, para. 1. This implies that the USA and UK, which control Iraq, must report any CW found in Iraq to the OPCW and failure to do so would be a material breach of the CWC. (This view is not universally shared by all those involved in implementing the CWC.) The CW destruction obligations for the occupying powers are even less clear. Detailed reporting and inspection requirements are outlined in Part IV(A) of the Verification Annex.

<sup>58</sup> CWC, Verification Annex, Part V, paras 56, 73–76 and 85.

<sup>59</sup> See appendix 2.

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basis for doing so.<sup>60</sup> Routine inspections serve to confirm the accuracy of the contents of a party's declaration and to build confidence in a state's compliance over a period of time by verifying that activities at the inspected site are consistent with CWC obligations. Challenge inspections and investigations of alleged CW use are designed to resolve specific compliance concerns.

### *Routine inspections*

Routine inspections consist of inspections of the chemical industry, of certain facilities producing Schedule 1 chemicals and of CW-related facilities. Routine inspections of the chemical industry are based on the quantities and types of chemicals produced, processed or consumed. Some inspections of the chemical industry are conducted approximately every year, while others are conducted at random, perhaps only once every 10 years or more.

Any national programme for protection against CW that a country might have must be declared and is subject to inspections.<sup>61</sup> The CWC regulates the activities that are permitted in a defensive programme by, for example, limiting the amounts of Schedule 1 chemicals that a party may possess or that may be produced.

If one or more parties have a question or concern regarding implementation of the convention by another party, provisions in Article IX of the CWC regarding consultation, clarification and fact-finding can be invoked.<sup>62</sup> This includes the possibility that parties may contact each other directly. In addition, a party may request the EC to assist in clarifying 'any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party'.<sup>63</sup> A party also has the right to request that the EC clarify any situation that 'has been considered ambiguous or has given rise to a concern about its possible non-compliance' with the CWC.<sup>64</sup>

### *Challenge inspections*

In order for a challenge inspection to occur, one or more parties must submit a request for such an inspection to the EC and simultaneously to the Director-General of the OPCW, who is then obliged to acknowledge having received the

<sup>60</sup> CWC, Article II, para. 1. The criterion may be implemented by the parties themselves, who decide to declare activities in their respective chemical industries or national defence establishments, or may be implemented through the consultation, cooperation and fact-finding provisions of Article IX up to and including a challenge inspection.

<sup>61</sup> National programmes for conducting defensive CW work may be supported by certain single small-scale facilities or other Schedule 1 facilities for protective purposes. The CWC requires that such facilities must be declared and subject to routine inspection. See CWC, Verification Annex, Part VI.

<sup>62</sup> CWC, Article IX.

<sup>63</sup> CWC, Article IX, para. 3.

<sup>64</sup> CWC, Article IX, para. 5

request within one hour and to confirm that the request meets the requirements of the CWC.<sup>65</sup> The Director-General must inform the challenged state party of the challenge inspection request at least 12 hours prior to the planned arrival of the inspection team, and ensure that the requesting state party has submitted the required information,<sup>66</sup> such as information obtained from a national intelligence agency.<sup>67</sup>

As part of its implementation of the CWC a state must provide the TS with one or more official points of entry for OPCW inspection teams—usually an airport. Points of entry are important for at least two reasons. First, the time period for carrying out activities related to ‘in-country inspections’, such as perimeter negotiations, begins from the moment the team arrives at the point of entry. Second, the point of entry must be one that enables the inspectors to reach any declared site within 12 hours of their arrival in the country.<sup>68</sup> The inspection team provides the inspected party with its inspection mandate upon its arrival at the point of entry.<sup>69</sup>

Transport of the OPCW inspection team to the perimeter of the inspection site must take place within 36 hours of the time of arrival of the inspection team at the point of entry.<sup>70</sup> Access to a site under a challenge inspection is not necessarily immediate. Once at the site, an inspection team will secure the perimeter and implement a variety of measures, including the inspection, on a managed access basis, of vehicles leaving the site (except for personnel vehicles).<sup>71</sup> Negotiations on determining a ‘final’ perimeter may continue for up to 72 hours, and access to the site may be delayed until 108 hours after the arrival at the point of entry.<sup>72</sup> The inspection itself may last no longer than 84 hours, unless extended by agreement with the inspected state party.<sup>73</sup> The 84-hour period begins once the inspection

<sup>65</sup> The TS Verification Division is staffed permanently for 24 hours every day of the year.

<sup>66</sup> In practice, the EC would probably be informed of the request simultaneously, either directly by the governments of the EC members or by the EC Chairman. In any case, the OPCW Director-General would immediately contact the EC Chairman and, perhaps, the delegations of the EC members. The EC is empowered to stop the challenge inspection if 75% of those members present and voting deem the request to be unsubstantiated or ‘frivolous’. This is known as the ‘red light’ procedure.

<sup>67</sup> The derivation and use of national technical means (NTM), including information derived from intelligence, have periodically been discussed in the OPCW. Little, if any, formal guidance appears to have been agreed. The terms ‘intelligence’ and ‘national technical means’ do not appear in the text of the CWC. The derivation and use of NTM in multilateral frameworks can be problematic, in part because different parties have differing levels of access to such information, in terms of both quality and quantity. Also, such information may not be convincing to all other parties, particularly since it would almost certainly be delivered in a modified form to protect intelligence sources and methods. Finally, intelligence information is rarely of a nature that would convict in a court of law and is often subject to multiple interpretations.

<sup>68</sup> CWC, Verification Annex, Part X, para. 14.

<sup>69</sup> CWC, Verification Annex, Part X, para. 12.

<sup>70</sup> CWC, Verification Annex, Part X, para. 14.

<sup>71</sup> See chapter 4.

<sup>72</sup> CWC, Verification Annex, Part X, para. 39.

<sup>73</sup> CWC, Verification Annex, Part X, para. 57.

team crosses the perimeter. The inspection team places members of the team at all entrances and exits to the site while negotiations on the final inspection perimeter continue and for the duration of the inspection itself.

The CWC allows observers to accompany the team.<sup>74</sup> Observers would probably be either from the country or countries requesting the challenge inspection or from their political allies. Observers are nominated by the requesting party. The inspected party must accept observers, but it may deny the observers access to the inspection areas. However, it must allow the observers to communicate with the inspection team during the inspection.<sup>75</sup>

The inspection team is to submit a preliminary inspection report summarizing ‘in a general way the activities conducted by the inspection team’ and the factual findings of the inspection team within 72 hours of its return to its ‘primary work location’, the OPCW headquarters in The Hague.<sup>76</sup> A draft final inspection report must be made available to the inspected state party within 20 days of the completion of the challenge inspection. The Director-General of the OPCW must then ‘promptly’ distribute this report to the EC, the inspected state party and the requesting state party.<sup>77</sup> The inspected party has the right to identify ‘any information and data not related to CW which should, in its view, because of its confidential character, not be circulated outside the Technical Secretariat’.<sup>78</sup> The TS shall then ‘consider proposals for changes to the draft final inspection report made by the inspected State Party and, using its own discretion, wherever possible, adopt them’.<sup>79</sup> The final inspection report must be submitted to the Director-General within 30 days of the completion of the challenge inspection ‘for further distribution and consideration’.<sup>80</sup>

### *Investigations of alleged use*

One or more parties may request that the OPCW Director-General initiate an investigation of the alleged use of CW on their territory or the territory of another party. Such a request can either take the form of a challenge inspection request or be part of a request for assistance in case of alleged use of CW against a party. If the request comes in the form of a challenge inspection request, the provisions of Article IX and Part X of the Verification Annex apply. In addition, in all such investigations, the following provisions apply. The Director-General must immediately acknowledge receipt of the request and dispatch an OPCW team ‘at the earli-

<sup>74</sup> CWC, Verification Annex, Part X, paras 53–56.

<sup>75</sup> CWC, Verification Annex, Part X, para. 54.

<sup>76</sup> CWC, Verification Annex, Part X, paras 59–60.

<sup>77</sup> CWC, Verification Annex, Part X, para. 60.

<sup>78</sup> CWC, Verification Annex, Part X, para. 61.

<sup>79</sup> CWC, Verification Annex, Part X, para. 61.

<sup>80</sup> CWC, Article IX, paragraphs 21–25. The article deals with preparation of the final inspection report and follow-on actions. See also CWC, Verification Annex, Part X, para. 61.

est opportunity, taking into account the safety of the team'.<sup>81</sup> If the inspection team has not been dispatched within 24 hours of receipt of the inspection request, the Director-General must inform the EC and the parties concerned of the reason for the delay.<sup>82</sup> The CWC does not specify any maximum or minimum period for the duration of the inspection. The inspection team must be granted access to 'any and all areas which could be affected' by the alleged use of CW.<sup>83</sup> The inspection team is required to send a situation report to the Director-General within 24 hours of its arrival on the territory of the state party to be inspected. The team is then to submit a preliminary report to the Director-General within 72 hours of its return to its 'primary work location'.<sup>84</sup> Inspection areas and the duration of the inspection may be extended by mutual agreement between the OPCW and the state receiving the visit. The inspection team has the right to interview and examine individuals who may have been affected by the alleged use of CW and interview eyewitnesses to the alleged use.<sup>85</sup> The CWC allows inspection teams to collect information in the course of an investigation that 'might serve to identify the origin of any chemical weapons used', including through the 'identification of any impurities or other substances during laboratory analysis of samples taken'.<sup>86</sup> It should be noted that the potential for disagreement between the inspection team and the inspected party is low in cases where the state itself has been the apparent victim of CW use.

Although practice challenge inspections and investigations of alleged use have been carried out periodically since the entry into force of the CWC, no challenge inspections or investigations of alleged CW use have taken place. Concern has been expressed by some commentators and observers that the effectiveness of the convention could be undermined because, although official government allegations of non-compliance with the CWC have been made, the challenge inspection mechanism has never been invoked.

<sup>81</sup> CWC, Verification Annex, Part XI, para. 11.

<sup>82</sup> CWC, Verification Annex, Part XI, para. 12.

<sup>83</sup> CWC, Verification Annex, Part XI, para. 15.

<sup>84</sup> CWC, Verification Annex, Part XI, para. 23.

<sup>85</sup> CWC, Verification Annex, Part XI, para. 21.

<sup>86</sup> CWC, Verification Annex, Part XI, para. 26.

## **4. Addressing Iraq's activities under the CWC in the light of the UNSCOM and UNMOVIC experiences**

The experiences of UNSCOM and UNMOVIC in Iraq over a period of 12 years provide a catalogue of situations similar to those in which OPCW inspectors might find themselves if they had to operate in a hostile, non-cooperative environment. This chapter outlines measures that were taken in Iraq by UNSCOM and UNMOVIC and presents those that might be taken to address such situations using the instruments provided by the CWC.<sup>87</sup> Under the CWC, persistent obstruction or other non-compliance would be assessed by the EC and the CSP and could be referred to the General Assembly and Security Council by either the EC or the CSP.<sup>88</sup> The OPCW itself is not authorized to impose sanctions, although it can recommend that states parties take such action on a voluntary basis or request that the UN take such action.<sup>89</sup>

Iraq's behaviour towards the UNSCOM inspection teams demonstrates several non-compliance scenarios. The two principal types of obstruction were incomplete or false declarations, and the denial of access to inspection teams. Under the CWC these two scenarios could occur in the context of routine verification and inspection activities, or in situations where a challenge inspection has been requested.

### **Incomplete or false declarations**

Iraq's policy of failing to provide sufficient and accurate information remained essentially unchanged during the UNSCOM and UNMOVIC inspection regimes. Iraq was not forthcoming with information either on its weapon programmes or on the destruction of weapons and the inspectors had to rely on intelligence information that was obtained from UN members and on the analysis of their own findings.

In its declarations Iraq repeatedly withheld information about both its BW and CW programmes. The existence of a small CW programme was confirmed in the first declaration, in April–May 1991, which was revised in subsequent years when

<sup>87</sup> It should be noted that, while the CWC includes formal requirements and procedures, individual country positions or outcomes of the decision-making bodies of the OPCW cannot be predicted with certainty.

<sup>88</sup> CWC, Article VIII, para. 36 (in cases of 'particular gravity and urgency'); and CWC, Article XII, para. 4 (in cases of 'particular gravity').

<sup>89</sup> CWC, Article XII, para. 4. There is a basis for more coercive measures based on a CWC provision which, in part, states that the EC shall, when reviewing the final OPCW inspection report on a challenge inspection, 'take the appropriate measures to redress' non-compliance in order to 'ensure compliance'. CWC, Article IX, para. 23.



Iraq admitted to having had more CW than initially declared.<sup>90</sup> However, Iraq then claimed that all its CW had been destroyed in the summer of 1991. A similar pattern was observable regarding BW declarations. In 1995 Iraq admitted to having had an offensive BW programme only after UNSCOM had confirmed its existence, on the basis of information supplied by Saddam Hussein's son-in-law, who had defected to Jordan, and another declaration was issued stating that its previous BW declaration was invalid.<sup>91</sup> UNSCOM was never able to confirm that Iraq had submitted an accurate FFC of its BW activities. Several declarations and other information were submitted during the UNSCOM period (1991–98) and gradually more information about Iraq's BW programme became available. When UNSCOM inspectors left Iraq in 1998 discrepancies remained and various questions were still unanswered. When UNMOVIC entered Iraq in 2002 the declaration submitted by Iraq in accordance with Resolution 1441 was again regarded as incomplete. However, there were different interpretations regarding the consequences of Iraq's declaration. The USA and the UK viewed the submission as a material breach of Resolution 1441—and sufficient justification for the authorization of military action. Most other countries regarded the declaration as a baseline document that needed to be verified and completed by the UNMOVIC inspection teams—more or less in the spirit of a multilateral disarmament treaty. Under this scenario, military action was justifiable only if Iraq seriously hampered or blocked the work of UNMOVIC and would, perhaps, require a second resolution.

Resolution 1441 contained provisions which enabled Iraqi scientists to be interviewed by inspectors inside or outside Iraq without Iraqi 'minders' present. The scientists could be offered asylum for themselves and their families in exchange for information.<sup>92</sup> Under the resolution Iraq was also obliged to submit a list of scientists who had been associated with prohibited weapon programmes. Although a list was provided, there was some question as to whether it was comprehensive. Despite Iraq's formal authorization of the interview process, few Iraqi scientists agreed to be interviewed alone, at least in part for fear of possible repercussions, regardless of whether they had materially cooperated with the inspectors.

In the context of routine verification (e.g., the collection and analysis of data submissions) and inspection activities under the CWC, a party might submit a declaration that is either substantially incomplete or judged to be deliberately incorrect by those processing it at the TS. If this were to occur, the matter would be taken up with the party at the level of the OPCW Director-General. If it could not be resolved, the Director-General would then inform the EC and request guidance. The EC could decide to take the issue to the CSP for consideration and action. The

<sup>90</sup> Iraq used CW extensively in the Iraq–Iran War and against its own Kurdish population. The declaration was therefore not credible.

<sup>91</sup> Henry L. Stimson Center, Chemical and Biological Weapons Non-Proliferation Project, 'Inspecting Iraq: a history of inspection: from UNSCOM to UNMOVIC', Mar. 2003 URL <<http://www.stimson.org/cbw/pdf/FSUNSCOM2.pdf>>.

<sup>92</sup> UN Security Council Resolution 1441 (note 4), paras 5 and 7.

Director-General can determine whether the TS should pursue bilateral contacts with the party in question or may be instructed or requested to do so by the parties (e.g., through an EC directive or a CSP decision). These procedures have not yet been tested because a situation similar to that in Iraq has never arisen.

All actions taken by the OPCW are informed by the general principles of the CWC, which specify the responsibilities of each of the organization's constituent bodies: the TS, the EC and the CSP. For example, as a matter of general principle, if there is suspicion of non-compliance with the convention the OPCW members have the right and responsibility to act either bilaterally (which may be in private or could eventually become a public affair), or formally through the EC and/or the CSP.<sup>93</sup> Because the TS exists only to implement the policies established by the parties, its actions must be undertaken in consultation with the other constituent bodies of the organization. The OPCW's procedures are also informed, in part, by implementation practice and by internal organizational guidelines and procedures.

The Director-General cannot attempt to coerce a party to rectify omissions or false information contained in its declaration. An attempt to do so would be viewed by the parties as beyond the authority and competence of the Director-General. On behalf of the TS, the Director-General is required to inform the EC of any problem that arises in the discharge of the functions of the TS, including 'doubts, ambiguities or uncertainties' about CWC compliance.<sup>94</sup> A special CSP may be convened if a Conference of the States Parties decides to do so or at the request of the EC or any party and if the request is supported by one-third of the parties.<sup>95</sup> The Director-General may communicate specific concerns or questions to the parties in order to argue informally for a special EC session, direct the TS to gather relevant background information, analyse further the contents of the relevant party's declarations and pursue clarification with the party through appropriate bilateral contacts.

The Director-General has some flexibility to modify the work programme of routine inspection teams. In 2003, for example, some inspections in regions affected by severe acute respiratory syndrome (SARS) were substituted or deferred in favour of carrying out inspections in less affected areas. The parties regarded the action favourably. In theory, it may also be possible to adjust the 'frequency of inspection' criteria to ensure that a given facility is inspected. In this case, an inspection request could be sent to the party and the inspection would proceed within three to seven days. However, the latter action could be viewed by the parties as contrary to OPCW procedure.<sup>96</sup> The inspected state party might therefore

<sup>93</sup> See CWC, Article IX.

<sup>94</sup> CWC, Article VIII, para. 40.

<sup>95</sup> CWC, Article VIII, paras 12 and 22.

<sup>96</sup> In the case of Schedule 3 and DOC/PSF plant sites, the choice of which facilities to inspect is largely based on the use of algorithms that either limit or exclude, depending on the type of facility and number of declared facilities in the country, the possibility for ensuring that a given declared facility will be inspected. There is no such option with regard to undeclared facilities because such facilities are not subject to frequency of inspection algorithms and the like. Undeclared facilities can

be within its rights under the CWC to refuse an inspection generated in this way. Alternatively, it could request a different inspection date, effectively postponing the inspection for days, perhaps weeks.

A compliance issue may be pursued further only if one or more states parties elect to take up the matter. The quickest mechanism for doing so in the framework of the CWC would be to convene a special session of the EC. A compliance matter may be considered by the EC in two ways: through established procedures for informal consultation and clarification,<sup>97</sup> or by a challenge inspection.

### **Denial of access to inspection teams**

Iraq also obstructed UNSCOM by interfering in the inspection process. Among other things, UNSCOM inspectors were barred from entering certain sites, on some occasions for weeks, only to discover that relevant items had been removed once they were allowed to enter. This occurred despite the fact that Resolution 687 required unconditional access to sites.<sup>98</sup> The fact that UNSCOM inspectors were repeatedly prevented from entering a site or were not given the requested access led to several UN resolutions and statements condemning Iraq's obstruction and requiring unconditional cooperation with UNSCOM.<sup>99</sup> Resolution 1441 gave UNMOVIC inspectors the authority to 'freeze' sites and block movement to and from inspected areas in order to avoid a repetition of such obstruction.<sup>100</sup> However, UNMOVIC did not experience any procedural obstructions during its inspections.

In the context of *routine verification* under the CWC, an OPCW inspection team might be refused access either to the country or to the inspection site. Such a blanket refusal would be viewed as a fundamental violation of the CWC and would require that a special session of the EC be convened immediately.

The inspection team must be able to communicate with the TS while in the country where the inspection is to take place.<sup>101</sup> This usually occurs via cellular telephone.<sup>102</sup> During non-challenge inspections, OPCW inspection teams have no right

be inspected through the challenge inspection mechanism. Consultations and clarification provisions under Article IX may be invoked leading to a visit.

<sup>97</sup> CWC, Article IX, paras 1–7.

<sup>98</sup> UN Security Council Resolution 687 (note 2), paras 9 (b) (i) and 13.

<sup>99</sup> Henry L. Stimson Center (note 91).

<sup>100</sup> UN Security Council Resolution 1441 (note 4), paras 5 and 7.

<sup>101</sup> 'Inspectors shall have the right throughout the in-country period to communicate with the TS headquarters. For this purpose they may use their own, duly certified, approved equipment and may request that the inspected state party or host state party provide them with access to other telecommunications. The inspection team shall have the right to use its own two-way system of radio communications between personnel patrolling the perimeter and other members of the inspection team'. CWC, Verification Annex, Part II, para. 44.

<sup>102</sup> In some cases, the inspection team is allowed to use its own telephones and to dial the number. In other cases, teams must use inspected state party phones or the inspected party ensures that the number dialled is one belonging to the TS. Some parties bar the use of cellular phones and global

to seal an inspection site but they are allowed to monitor the perimeter.<sup>103</sup> (It is unclear if this is a right and, if so, whether it is a right for all types of non-challenge inspections.) Under the CWC, there is no provision which guarantees inspectors an automatic right to search vehicles or persons leaving an inspected site. During challenge inspections, inspectors have the right to search vehicles exiting across the agreed perimeter, but only under ‘managed access’ provisions.<sup>104</sup> When managed access provisions are invoked, inspectors may be denied access to a given vehicle. However, the inspected party must provide an alternative means to demonstrate that the vehicle does not contain items relevant to or material prohibited by the CWC. Personnel, vehicles entering, and ‘personnel and personal passenger vehicles’ exiting the site are not subject to inspection.<sup>105</sup>

The OPCW Director-General would be immediately informed of attempts to obstruct an inspection. The next step would depend on whether the inspectors suspected that a fundamental violation was occurring and whether it was advisable to keep the inspection team on-site. The safety of the inspectors would be a major consideration in such a case. Retaining the team on-site might keep the representatives of the inspected party at the site occupied and might allow the team to observe and perhaps document activities in and around the site. The Director-General must inform the EC ‘without delay’ when access is denied.<sup>106</sup> The EC is responsible for further action to resolve the compliance issue, and it can decide to meet in special session or request that a special CSP be convened. However, during a developing crisis a challenge inspection may be the only option if the party concerned cannot be persuaded to permit the inspection.

The duration of a non-challenge inspection can be extended for an unspecified period with the consent of the inspected party.<sup>107</sup> However, the Director-General is not authorized to change the main parameters of a non-challenge inspection, including the inspection mandate. The procedure and requirements for initiating a challenge inspection do not allow a routine inspection team to be transformed into a challenge inspection team in order to deal with an emergency. The Director-General could request that the inspection team remain on-site for as long as pos-

positioning system equipment, even though these items appear on the list of approved OPCW inspection equipment.

<sup>103</sup> CWC, Verification Annex, Part II, para. 44.

<sup>104</sup> ‘Managed access’ is a concept whereby international inspector access is limited through, e.g., the shrouding of computer terminal screens and control panels. Inspectors are to be granted access that is sufficient to allow them to fulfil their inspection mandate only. The CWC facility agreements and the OPCW inspection manual contain guidelines and procedures on how managed access should be understood and implemented. Implementing managed access may involve negotiations whereby, e.g., the team may be allowed to enter a certain percentage of randomly selected buildings or rooms at the site. Many national practice inspections have been conducted since the time the CWC was negotiated in order to test the efficacy of managed access procedures. CWC, Verification Annex, Part X, paras 46–52.

<sup>105</sup> CWC, Verification Annex, Part X, paras 29–30.

<sup>106</sup> CWC, Verification Annex, Part II, para. 65.

<sup>107</sup> CWC, Verification Annex, Part II, para. 59.

sible even if the inspection period has been exceeded. (Routine inspections, excluding those of CW destruction facilities, generally last from one to three days.) However, if the inspection team leader felt that the safety of the inspection team was at risk, the team would be withdrawn on his or her authority.

The longer a routine inspection team remains on-site, the more likely it would be that activities which are not in compliance with the CWC could be observed and documented by the team. However, its ability to note or otherwise document convention violations would be directly dependent on the willingness of the inspected party to allow this. OPCW inspection teams may not make audio or video recordings unless specifically permitted to do so by the inspected party.<sup>108</sup> In addition, inspector notebooks must be shown to the inspected party upon request.

At the discretion of the host team, access may be granted to various parts of the facility or 'plant site',<sup>109</sup> and interviews may be conducted and plant records checked. Negotiations may be undertaken between the inspection team and the inspected state party on the basis of CWC requirements and, in some cases, a facility agreement previously concluded for the facility in question. Such agreements specify *inter alia* the rights and privileges of an inspection team. If access is completely denied the matter must be referred to the UN or taken up in bilateral discussion between states.<sup>110</sup>

The conduct of the OPCW inspectors during inspections is guided by the OPCW inspection manual. For this and other reasons, OPCW inspectors are prohibited from attempting to secretly collect documents, soil samples and the like.

There are no provisions in the CWC for invoking a military response. The possibility of the use of military force against Iraq, together with international sanctions, were two major factors that, in practice, assisted the UNSCOM and UNMOVIC inspectors in their work. These elements would be absent in the case of an unproductive OPCW inspection. The EC and the CSP may only recommend measures to ensure compliance, and a case of non-compliance would be referred to the Security Council and the General Assembly for further action.<sup>111</sup>

In a *challenge inspection* there would be high-level political interest in the conduct of the inspection from the time that a request for such an inspection was made until the matter was resolved. Unless the EC was already in session, a special meeting of the EC would be convened during an inspection conducted under the CWC. Challenge inspections under the CWC are viewed as discrete, time-limited events, not as ongoing verification activities similar to those carried out in Iraq by UNSCOM and UNMOVIC. In contrast to the inspections conducted by UNSCOM and UNMOVIC, the challenged state party would have the right to negotiate the

<sup>108</sup> OPCW inspection teams are not equipped to make such recordings.

<sup>109</sup> Under the CWC, a distinction is made between the 'facility' and the 'plant site'. The latter refers to Schedule 2 and 3 inspections, and inspections of sites that produce, by synthesis, DOC/PSFs.

<sup>110</sup> CWC, Article VIII, para. 36; CWC, Article VIII, para. 21(k); and CWC, Article XII, paras 1–4.

<sup>111</sup> CWC, Article VIII, paras 21(k) and 36; and CWC, Article XII, paras 1–4.

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perimeter of the inspection site.<sup>112</sup> The challenged party would also be able to invoke managed access provisions to protect confidential business information and other sensitive information.

The CWC does not clearly specify which body is responsible for removing information considered sensitive by the inspected party from the draft inspection report. While the TS has some responsibility in this area other bodies, especially the EC, may deem removal of information by the TS as inappropriate or irrelevant since the draft report would already have been provided to *inter alia* the requesting state party. The possible transfer of responsibility for an inspection from the OPCW to a UN body, such as UNMOVIC, would have to be made during the follow-on assessment period after the OPCW team had returned to headquarters.<sup>113</sup>

<sup>112</sup> CWC, Verification Annex, Part X, paras 16–21.

<sup>113</sup> For a further analysis of various non-compliance scenarios, see appendix 3.

## **5. Iraq's accession to the CWC**

In principle, a treaty is a contract agreed to by sovereign states. While Iraq retains its sovereign right to join the CWC it does not currently have a functioning autonomous government. Iraq was obliged to ratify the BTWC under the terms of Security Council Resolution 687. The Coalition Provisional Authority in Iraq does not have the authority to take such action regarding the CWC. Furthermore, given its past CW programme, Iraq's accession would have to be well prepared in advance by the Iraqi authorities as well as by the OPCW in order for Iraq to be able to meet the obligations and timetable of the CWC—not least the requirement to declare all CW production since 1 January 1946. Even so, special provisions may have to be developed because much of the information regarding Iraq's past CWC-relevant activities may now be located in UNSCOM and UNMOVIC files or in the capitals of the occupying powers. Many other documents may have been destroyed by the Ba'ath Party regime or by military action, making it difficult if not impossible for a future government of Iraq to produce a comprehensive account of past activities.

Iraq will remain a significant power in the region and the other states around the Gulf may need additional security guarantees in order to increase their confidence in Iraq's compliance with its international obligations. In any event, the rivalries and conflicts in the Middle East (including the Arab–Israeli conflict) and the ethnic and religious divisions inside the country will present many challenges to the 'new Iraq'. It cannot be discounted that a new Iraqi administration will perceive international or internal security benefits from pursuing non-conventional weapon programmes. In other words, if Iraq's accession to the CWC is to be meaningful, Iraq might first need to be incorporated into a broader strategy of regional stabilization.

This chapter presents three broad scenarios. The first scenario, Iraq's accession to the CWC without prior international consideration and preparation, could have serious consequences for the convention regime. The second and third scenarios, Iraq's integration into a regional security structure prior to accession and a joint UN Security Council–OPCW project to assist Iraq to become a party to the CWC, have certain advantages but also disadvantages.

### **Scenario 1: Iraq accedes to the CWC as a sovereign state**

Before the military action in Iraq in March 2003, Iraqi officials were known to be exploring whether accession to the convention could give them a diplomatic advantage in the dispute over inspector access. Iraq participated, for the first time, as an observer at the seventh CSP in October 2002. At the time of writing, the accession scenario is less likely because it will take some time before a new autonomous government exists in Iraq. The experience of some sub-Saharan countries may offer guidance. If Iraq follows their example, accession will not occur until internal and regional security and stability have been achieved.

Although Iraq would have the right to join the CWC at any time, doing this while the UNMOVIC mandate remains in operation would create overlapping CW disarmament regimes. Article 103 of the UN Charter asserts the primacy of the Charter in the event of a conflict with other treaties,<sup>114</sup> but it is apparent from interviews carried out for this study with a number of legal experts that there is no consensus regarding whether the UNMOVIC mandate would take precedence over CWC obligations or vice versa. In either case, an agreement would have to be reached between the UN and the OPCW to deal with numerous practical arrangements, such as decisions over access to documents and records held by UNSCOM and then UNMOVIC.

While it is evident that Iraq's accession to the CWC would not change the existing UNMOVIC inspection mandate with respect to CW (or other non-conventional weapons),<sup>115</sup> it is less clear whether Iraq's obligations under the CWC (e.g., those regarding declaration requirements, national legislation, and the establishment of a National Authority) would be suspended until the Security Council adopted a resolution considering Iraq's accession. As noted above, legal experts expressed uncertainty as to whether the Security Council mandate and the CWC would constitute concurrent legal regimes. This issue requires further clarification.

On a more operational level, Iraq's autonomous accession could create serious practical problems for the TS and the Iraqi government, both of which would have to make the necessary arrangements for implementing certain time-limited CWC obligations.<sup>116</sup> Unless the necessary preparations were made, this scenario could cause confusion during implementation of the convention, and seriously undermine confidence in the CWC if the many unanswered questions with regard to Iraq's CW programmes could not be unambiguously resolved in line with the declaration obligations and deadlines of the CWC.

In the case of autonomous accession, it cannot be excluded that Iraq would adopt national implementation legislation modelled on that of India and the USA (and to a lesser extent that of Russia). The US Senate, for instance, has granted the president the right to refuse a challenge inspection on national security grounds and has stipulated that chemical samples cannot be removed from the USA. The adoption by Iraq of similar conditions might blunt the effectiveness of the CWC verification regime, especially with regard to challenge inspections as an instrument of last resort. Nevertheless, observers have noted that the actual effect and scope of the

<sup>114</sup> 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. United Nations Charter (note 8), Chapter XVI, Article 103, URL <<http://www.un.org/aboutun/charter/chapt16.htm>>.

<sup>115</sup> Even before the Mar. 2003 war, accession to the CWC would not have affected the sanctions regime.

<sup>116</sup> See appendix 2 for an overview of the obligations and the respective timetables.



US legislation are unclear because the US reservations have never been fully exercised.

**Scenario 2: integration of Iraq into a regional security structure, followed by its accession to the CWC**

The basis for this scenario is the hypothesis that Iraq's motivation for acquiring non-conventional weapons is rooted in fundamental insecurities, which exist irrespective of the political regime in power. This situation is unlikely to change in the foreseeable future. Iraq is virtually a landlocked country and its neighbours, with the exception of Jordan and Kuwait, are as powerful or more powerful than Iraq. Israel, with its presumed non-conventional weapon capabilities, is also a factor in Iraq's security equation as are Iraq's internal divisions along ethnic lines (Arabs and Kurds) and religious lines (primarily Shi'ites and Sunnis). Because of the risk of the formation of alliances between the minority groups and foreign powers (as occurred between the Kurds and the Iranians during the Iraq–Iran War and as could occur between the Shi'ites and another state in a future war), the internal sources of instability are closely linked to the external threats from the Iraqi perspective. After the March–April 2003 operation in Iraq, concerns still remain that the country might split along ethnic and religious lines. It is thus impossible to predict how the emerging leadership might view non-conventional weapons.

Integration into a regional framework would help to overcome Iraq's fundamental sense of insecurity. This may require a new organization to be established because any framework would ideally include all of the countries bordering Iraq. This process of regional integration—not unlike Germany's integration after World War II into Western Europe through membership of the Western European Union (WEU)—would facilitate a decision by Iraq to abandon its non-conventional weapons.<sup>117</sup> The Gulf Cooperation Council (GCC) has already discussed proposals for economic union among its member states—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates. Care would have to be taken, however, to ensure that any new body that stretched from Jordan to Iran would not be seen as constituting new threats to states in the broader region. In this way, the international community would gain confidence in Iraq's compliance with the international norms against non-conventional weapons, which, in turn, would facilitate its integration into the CWC regime.

<sup>117</sup> Treaty of Economic, Social and Cultural Collaboration and Collective Self-defence among Western European States (Modified Brussels Treaty); Protocols to the 1948 Brussels Treaty (Paris Agreements) Signed at Paris on 23 October 1954. The 1948 Brussels Treaty was modified by four protocols which amended the original text to take account of political and military developments in Europe, allowing Germany and Italy to become parties in return for controls over German armaments and force levels. Germany's commitment not to acquire CBW was reconfirmed in the 1990 Treaty on the Final Settlement with Respect to Germany (Article 3), available at URL <<http://www.usembassy.de/usa/etexts/2plusfour8994e.htm>>, which settled the unification of Germany.

This scenario's greatest advantage is that it would enable the international community to change its perception of Iraq's behaviour as a state actor and increase confidence in its compliance with international treaties. While attractive from a regional security perspective, this process of regional integration would take many years, if not decades. This may be too lengthy a process given the current demand to verifiably disarm Iraq, and the effective conditionality between the latter and the prospects for Iraq's return to self-government.

In its present state of development,<sup>118</sup> this idea also fails to address the duration of the security regime for Iraq, which was established under Resolution 687 and subsequent resolutions, especially Resolutions 1284 and 1441. (None of the resolutions envisages an end date of their application. Nor do they address the broader purpose of the disarmament and verification regimes.) It is possible to envisage a linkage between the lifting of the Security Council-imposed obligations and Iraq's membership of a regional security arrangement, which would be founded on Iraq's unilateral renunciation of non-conventional weapons in a way similar to Germany's commitments under the 1954 Modified Brussels Treaty.<sup>119</sup> Representatives of the other members of the regional organization would then undertake the verification of these commitments. However, in the absence of a catalyst that stimulates regional integration (such as a common external threat and a promise of automatic mutual military assistance in the event of a military attack against any member of the regional organization), there can be no guarantee that the mere existence of a regional framework would do enough to alter an independent Iraq's current external threat perceptions, or a perceived need for non-conventional weapons, or increase its willingness to accept inspectors from neighbours which are also potential adversaries.

Modern European experience suggests that lasting changes in this area are easiest to achieve when security commitments and restraints are reciprocal. Thus a viable regional integration strategy would raise fundamental questions about security relations with Israel and Syria and their status as non-parties to the CWC.

### **Scenario 3: a joint UN Security Council–OPCW project to assist Iraq to become a party to the CWC**

The scenario of a joint UN Security Council–OPCW project to assist Iraq to become a party to the CWC could avoid the confusion that might arise after Iraq's autonomous accession, because the Security Council would have to decide on and clarify Iraq's obligations under the CWC and the other Security Council resolutions. Most importantly, the Security Council would have to consider the comple-

<sup>118</sup> A number of studies have analysed various aspects of Iraq's post-war reconstruction and related regional security issues. See e.g., Open Society Institute and UN Foundation, 'Reconstructing Iraq: a guide to the issues', 30 May 2003, URL <[http://www.soros.org/dc/reconstructing\\_iraq.pdf](http://www.soros.org/dc/reconstructing_iraq.pdf)>.

<sup>119</sup> Modified Brussels Treaty (note 117).

mentarity of the UNMOVIC and CWC verification regimes and how they could mutually reinforce each other.

This approach has the advantage that the inspection regime can be prepared in advance, both at the time of drafting the relevant Security Council resolution to authorize the arrangement and following Iraq's accession. During the first two months after accession (i.e., with regard to CWC-based timetables) the OPCW would have to engage in intensive negotiations with leading countries (in particular, the permanent members of the Security Council) and regional parties to the CWC in order to develop a specific approach to the disarmament of Iraq. The OPCW would also have to consult with Iraq to assist with the interpretation of the CWC and issues relating to national implementation legislation and a National Authority.

There is no legal objection to Iraq's joining the CWC as a CW possessor because the CWC contains provisions to deal with such an eventuality.<sup>120</sup> Nonetheless, on the basis of recent statements on the non-possession of non-conventional weapons, Iraq may declare itself to be a non-possessor. Its initial declarations might be based on its final submission to UNSCOM (previous submissions are known to contain discrepancies). In this regard, an important issue that would need to be resolved between the UN and the OPCW is whether the OPCW would be entitled to act on the information contained in the UNSCOM and UNMOVIC documents and records. In addition, as in the first and second scenarios, the OPCW might not be able in every circumstance to certify full compliance with the CWC provisions if future political authorities remain reluctant to cooperate fully with the international community. The idea of retaining the UNMOVIC inspection regime for Iraq for CW as an instrument of last resort may therefore be of value. (In any case, UNMOVIC would retain its mandate with regard to BW and ballistic missiles with a range of over 150 km.)

The CWC verification system could function as the reinforced OMV regime envisaged in Resolution 1284. A fundamental point here is whether the Security Council and the OPCW would be in an equivalent relationship to each other with regard to CW-relevant verification arrangements for Iraq. In any event, there would be an inherent tension between the functioning of the inspection regimes under UNMOVIC and the OPCW. As regards UNMOVIC, the Security Council must be satisfied that Iraq has disarmed, and long-term monitoring and verification of relevant activities must be conducted. Only then can the conditional ceasefire arrangement of Resolution 687 be replaced by a peace settlement and the limitations on Iraq's ability to function as a full member of the international community be lifted. In contrast, the OPCW's objectives are not time-limited. The OPCW would have to ensure that all parties to the CWC gain and retain confidence in Iraq's compliance with the CWC for the foreseeable future. Failure to do so would

<sup>120</sup> If a state ratifies or accedes to the CWC after the 10-year period allowed for destruction it must destroy its CW stockpiles 'as soon as possible'. The 'order of destruction' and procedures for 'stringent verification' shall be determined by the EC. CWC, Article IV, para. 8.

risk casting doubt on the effectiveness of the verification and inspection mechanisms of the CWC and, ultimately, undermine the entire regime. If the UNMOVIC and OPCW verification and inspection regimes were to coexist for any length of time, it would have to be understood that they each have different goals and that certain verification and inspection modalities may be complementary rather than functional substitutes.

It also follows that the results of the UNMOVIC verification and inspection activities cannot satisfy OPCW requirements. However, OPCW verification and inspection reports can, in principle, contribute to the assessments made by UNMOVIC. Institutional agreements would need to be arranged between the UN and the OPCW, similar to that concluded between the European Atomic Energy Community (EURATOM) and the IAEA for the implementation of IAEA Safeguards in EURATOM member states.<sup>121</sup> The issue of restrictive national implementation legislation discussed under the scenario of Iraq's autonomous accession to the CWC also applies here.

### **Related implications**

Some technical problems would have to be solved, in particular regarding the transfer of OPCW verification and inspection results to the Security Council. In addition, the Security Council would have to adopt criteria to assess the relevance of the information with regard to its resolutions on Iraq. UNMOVIC might also need to conduct some inspection activities in order to satisfy Security Council demands. If specific UN disarmament measures remained applicable after Iraq's accession to the CWC, the modalities of the information exchange between the OPCW and the UN might cause confusion or uncertainty. Information could be provided by either body if suspected or known cases of non-compliance with the CWC were referred by the OPCW to the UN and if UNMOVIC and OPCW inspectors were called on to perform work in Iraq at the same time. In the former situation, the Executive Council of the OPCW could refer a matter of 'particular gravity and urgency' to the General Assembly and Security Council simultaneously.<sup>122</sup> The OPCW's CSP might also bring compliance issues of particular gravity, including 'relevant information and conclusions', to the attention of the General Assembly and the Security Council.<sup>123</sup>

Any exchange of information between the OPCW and the UN would be informed by the 2001 Agreement Concerning the Relationship between the United

<sup>121</sup> IAEA, 'Safeguards agreement with the International Atomic Energy Agency (IAEA) and the European Atomic Energy Community (EURATOM)', INFCIRC/263, Oct. 1968 URL, <<http://www.iaea.org/worldatom/Documents/Infcircs/Others/infcirc263.pdf>>. See appendix 4 for a fuller explanation of this possible precedent.

<sup>122</sup> CWC, Article VIII, para. 36. The CSP may also refer a matter of 'particular gravity' to the UN. CWC, Article XII, para. 4.

<sup>123</sup> CWC, Article XII, para. 4.

Nations and the Organisation for the Prohibition of Chemical Weapons.<sup>124</sup> It states that the OPCW is to cooperate with the General Assembly (at the request of either side) and the Security Council by providing them with 'such information and assistance as may be required in the exercise of their respective responsibilities under the United Nations Charter'.<sup>125</sup> Certain types of information may be withheld by the OPCW if divulging them is not in accordance with the OPCW's Policy on Confidentiality.<sup>126</sup> The UN Secretary-General and the OPCW Director-General may also attend meetings of the other organization. The UN and the OPCW may also agree 'supplementary arrangements and develop such practical measures for the implementation' of the agreement 'as may be found desirable'.<sup>127</sup> The most sensitive issue connected with finalizing the 2001 agreement was the question of whether and how information would be transferred from the OPCW to the UN. A number of CWC parties stressed that the OPCW should not be required to transfer sensitive or confidential information, which would contravene the OPCW's confidentiality policy.

<sup>124</sup> OPCW, 'Relationship agreements', URL <[http://www.opcw.org/html/db/legal/rel\\_agree.html](http://www.opcw.org/html/db/legal/rel_agree.html)>.

<sup>125</sup> Agreement Concerning the Relationship between the United Nations and the Organisation for the Prohibition of Chemical Weapons, 7 Sep. 2001, Article II, para. 3, URL <[http://www.opcw.org/html/db/legal/rel\\_agree.html](http://www.opcw.org/html/db/legal/rel_agree.html)>.

<sup>126</sup> The OPCW Policy on Confidentiality is reproduced in Tabassi, L. S. (ed.), *OPCW: The Legal Texts* (TMC Asser Press: The Hague, 1999), pp. 209–51.

<sup>127</sup> Agreement between the UN and the OPCW (note 125), Article XIV.

## 6. Conclusions

In considering the possible future utility of the CWC for maintaining a CW-free Iraq it is important to recognize that the CWC is a classic disarmament agreement among consenting parties, not a coercive disarmament regime such as that of UNSCOM or UNMOVIC. It is unlikely that the current occupying powers would relinquish control of Iraq to a new government unless that government was committed to destroying any elements of programmes that had been prohibited under Resolution 687 that may come to light. Therefore, if Iraq were to join the CWC in the medium term it would be under a government that was motivated to cooperate with international inspection arrangements. Membership of the CWC would allow assistance to be given to Iraq to help it become compliant with the convention in all its aspects. The difficulties that any future government of Iraq may have in giving a full account of the country's past CW-related activities may be partially reduced through special cooperation measures with the OPCW. While greater knowledge of past activities strengthens confidence in compliance, it is future compliance that must be considered to be the most important issue. Membership of the CWC would not only bring greater stability to the region by bringing another level of transparency to Iraq's compliance with disarmament provisions, but would also bring Iraq security benefits through the assistance measures contained in the convention.

In the longer term a future Iraqi government might be less inclined to provide full cooperation and this would make the task of ensuring confidence in compliance with the CWC more difficult. Verification measures, including challenge inspections, are much less effective without the active cooperation of the inspected party. Serious unanswered questions would remain in such a case.

The political dynamics in the decision-making bodies of the OPCW differ fundamentally from those in the Security Council and may, in particular, be less adversarial. Both UNSCOM and UNMOVIC focused on collecting and analysing information related to a known problem of compliance with Security Council resolutions. Moreover, both commissions were constituted so that they could uncover the required data despite Iraq's obstruction, both passive and active. These factors would not apply to the OPCW. On the contrary, any attempt by the OPCW to devote major organizational resources to analysis of the compliance of a single party would require the support of at least the EC. Unless it was totally clear that a violation of the CWC had occurred such efforts would be questioned by some parties as violating the principle of equitable treatment of states that are in good standing (unless or until proven otherwise).<sup>128</sup>

<sup>128</sup> The parties would also consider how to limit the cost of verification-related OPCW activities in Iraq and to pay for such costs. UNMOVIC's operating costs were paid by the oil-for-food programme. The parties to the CWC would probably be reluctant to pay for significant extra costs of extended verification for a single party from their annual contributions. For this reason, for example, possessors of CW stockpiles are required to pay for the 'direct cost' of the verification of the destruction of such stockpiles. In this way, all the parties do not (effectively) subsidize the cost of verifica-

If Iraq were to ratify the CWC, its declarations would be of particular interest to the parties to the CWC. In principle, a number of special arrangements could be made by the OPCW in anticipation of incompleteness in declarations made by Iraq owing to a lack of available information. Such arrangements might include the establishment of an OPCW working group to deal with questions and concerns regarding implementation of the CWC by Iraq. These voluntary arrangements could also include the development of contingency plans, including administrative preparations for confidence-building consultation visits additional to the normal inspection rights, without inhibiting the right to carry out a challenge inspection. Such special arrangements could also include agreement between the UN and the OPCW on the procedures for the transfer of relevant information obtained by UNSCOM and UNMOVIC. Such information could be used by the OPCW to assist Iraq in implementing its convention obligations.

The above analysis suggests that if Iraq were to become a party to the CWC this would be a means for Iraq to achieve eventual 'normalization' as a member of the world community as well as having significant symbolic value. However, Iraq should join the CWC only after prior coordination with the international community. In current circumstances, this would best be combined with continued inspection activities by UNMOVIC and the prominent involvement of the UN in general which this implies. Unless Iraq is reintegrated into the world community, including through the signing and ratification of the CWC, it will continue to face strict export control licensing requirements. In addition, as a non-state party to the CWC Iraq is prohibited from receiving transfers of chemicals listed in the CWC's Annex on Chemicals, many of which have wide commercial applications. Finally, CWC ratification is unlikely to provide sufficient assurance of Iraq's long-term compliance, in the absence of a comprehensive and institutionally enshrined change in regional security relationships.

tion of destruction of CW in a limited number of states parties. It should also be noted that the question of whether possessors of old and/or abandoned CW should pay for the direct costs of verification of destruction incurred by the OPCW has not been fully resolved.

## Appendix 1. Key United Nations Security Council resolutions on Iraq

Resolution and date	Purpose
UN Security Council Resolution 660, 2 August 1990	Determines that there exists a breach of international peace and security regarding Iraq's invasion of Kuwait and demands immediate withdrawal of Iraqi troops
UN Security Council Resolution 661, 6 August 1990	Imposes a sanctions regime on Iraq; provides for limited amounts of oil to be sold under UN supervision to fund the purchase of food and medical supplies for humanitarian purposes
UN Security Council Resolution 678, 29 November 1990	Authorizes member states to use 'all necessary means' to uphold Resolution 660 and all relevant resolutions and to restore international peace and security, unless Iraq fully implements all relevant UN resolutions on or before 15 Jan. 1991
UN Security Council Resolution 687, 3 April 1991	Provides for <i>inter alia</i> the removal or destruction of Iraq's chemical, biological and nuclear weapons and ballistic missiles with a range of more than 150 km; creates UNSCOM
UN Security Council Resolution 707, 15 August 1991	Notes Iraq's failure to comply with UN Security Council Resolution 687 and states that Iraq is in material breach of its acceptance of Security Council Resolution 687; implies possibility of resumed military action
UN Security Council Resolution 715, 11 October 1991	Establishes plan for future ongoing monitoring and verification of Iraq's compliance with relevant parts of Section C of UN Security Council Resolution 687 <sup>a</sup>
UN Security Council Resolution 986, 14 April 1995	Modifies the sanctions regime under Security Council Resolution 661 authorizing permission to import petroleum and petroleum products originating in Iraq; a temporary measure to provide for humanitarian needs of the Iraqi people
Memorandum of Understanding (MOU) between the United Nations and the Republic of Iraq, 23 February 1998	Agreement limiting inspectors' full and unconditional access excluding the so-called presidential sites from inspections
UN Security Council Resolution 1284, 17 December 1999	Establishes UNMOVIC to operate a system of OMV and to replace UNSCOM and carry out UNSCOM's mandate to disarm Iraq



Resolution and date	Purpose
UN Security Council Resolution 1409, 14 May 2002	Adoption of Goods Review List; modification of export control system imposed on Iraq as a measure of non-compliance in 1990 (Security Council Resolution 661)
UN Security Council Resolution 1441, 8 November 2002	Affords UNMOVIC inspectors a more intrusive mandate giving Iraq a 'final opportunity' to comply with relevant UN Security Council resolutions

<sup>a</sup> The plan is outlined in United Nations, Report of the Secretary-General transmitting the plan, revised pursuant to the adoption of Security Council Resolution 707 (1991), for future monitoring and verification of Iraq's compliance with the destruction or removal of weapons specified in Security Council Resolution 687 (1991), UN Security Council Document S/22871/Rev.1, 2 Oct. 1991, para. 16.

*Source:* Compiled by Frida Kuhlau.

## Appendix 2. CWC timetable for certain activities and deadlines for states parties

Before the CWC enters into force for a state party, the state should obtain information from the OPCW on implementing the CWC, including information on the drafting of implementing legislation, the declaration handbook, the OPCW confidentiality policy and the OPCW inspection manual. The state should identify declarable activities and facilities, pass national implementing legislation, establish or designate a National Authority and make institutional and logistical arrangements for hosting inspections (e.g., conclude a diplomatic privileges and immunities agreement with the OPCW and provide standing diplomatic clearance for unscheduled flights and multi-year, multiple entry/exit visas for OPCW personnel). The state should also compile information for its initial declaration—which is due within 30 days after entry into force of the CWC for a state party. Finally, the state should make arrangements for diplomatic representation in The Hague.

**Table A2.1.** Activities a country should undertake following its accession to the Chemical Weapons Convention

CWC provision	Requirement
Article III	<p>Declaration of CW in any location under its jurisdiction and control</p> <p>Declaration of old and/or abandoned CW and of CW production facilities<sup>a</sup></p> <p>Declaration of CW buried at any time since 1 Jan. 1977, and of any CW dumped at sea after 1 Jan. 1985</p> <p>Declaration of ‘other’ facilities or establishments under its ownership or possession or located in any place under its jurisdiction and control that has been designed, constructed or used since 1 Jan. 1946 primarily for development of CW<sup>b</sup></p> <p>Declaration of riot control agents</p>
Article VI	<p>Chemical industry declarations must include information on:</p> <p>Schedule 1 chemicals and facilities (can be used as CW or are direct precursors to agents and have few uses for peaceful purposes)</p> <p>Schedule 2 chemicals and plant sites (chemicals that are precursors to CW and that generally have significant commercial uses)</p> <p>Schedule 3 chemicals and plant sites (can be used to produce CW and have widespread peaceful applications)</p> <p>Certain discrete organic chemicals including those that may contain the elements phosphorus, sulphur or fluorine. Sites that produce DOC/PSFs would include petrochemical, pharmaceutical and pesticide producers, only some of which are declarable<sup>c</sup></p>

**Table A2.1.** *contd*

CWC provision	Requirement
Verification Annex, Parts VI and VII	Declaration of transfer or receipt of certain scheduled chemicals Declaration of transfers of Schedule 3 chemicals to non-states parties require end user certificates Declaration of transfers of Schedule 2 chemicals to non-states parties is prohibited.

<sup>a</sup> The CWC defines a CW production facility as any facility that has produced CW at any time since 1 Jan. 1946. CWC, Article II, para. 8.

<sup>b</sup> CWC, Article III, para. 1(d).

<sup>c</sup> Plants that produce explosives or hydrocarbons need not be declared.

*Source:* Compiled by John Hart.

**Table A2.2.** Activities the Technical Secretariat should undertake

Category	Activity
Legal	Interaction between the UN Security Council and the OPCW
Logistical and procedural	Preparation for challenge inspections, particularly as regards logistical and other practical arrangements Preparation of contingency plans as regards the financial implications of the various types of inspections (e.g., procedural and other delays in state party reimbursements for 'direct costs of inspections' under Articles IV (CW facilities) and V (CW production facilities), which the inspected party is required to pay under OPCW procedures)

*Source:* Compiled by John Hart.

**Table A2.3.** Activities a country should undertake after becoming a party to the Chemical Weapons Convention

Activity	Description
Conclude facility agreements <sup>a</sup>	Facility agreements are generally finalized shortly after the initial inspection; if there are no serious concerns or objections, the Executive Council (EC) then recommends their approval by the Conference of the States Parties.
Access to confidential information procedures by Technical Secretariat staff <sup>b</sup>	The party indicates whether information it provides to the OPCW is confidential and, if so, the degree of classification. Not all information is made available to all parties (e.g., the identity of the declaring state may be withheld). Requests for clarification are generally undertaken by the EC. Sensitive information may be 'confidential business information' or politically sensitive.

Activity	Description
Notification of National Authority <sup>c</sup>	The party is required to notify the OPCW of its National Authority at the time the CWC enters into force for it.
Information on protective programmes <sup>d</sup>	The party is required to provide information annually on its defensive CW programmes.
Provision of assistance <sup>e</sup>	Each party undertakes to provide assistance through the OPCW and may undertake 1 or more of 3 measures: contribute to a voluntary assistance fund; conclude, if possible no later than 180 days after entry into force of the CWC for a state party (EIF CWC SP), agreements with the OPCW concerning procurement on demand of assistance; and declare no later than 180 days EIF CWC SP the assistance it might provide in response to a request by the OPCW.
National implementing legislation <sup>f</sup>	Such legislation must incorporate CWC prohibitions and put into place necessary measures.
Bilateral agreements	Privileges and immunities agreements are concluded between parties and the OPCW. <sup>g</sup>
National regulations and the trade in chemicals	The CWC restricts the trade in certain chemicals with non-parties and requires that certain transfers be declared to the OPCW. Parties may not maintain restrictions incompatible with the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes. <sup>h</sup>
Contribution to the OPCW budget	The OPCW informs new parties of the amount due for their contribution to the budget and to the Working Capital Fund. Assessment letters are sent to all parties annually. Payment is due within 30 days.

<sup>a</sup> Facility agreements are concluded for CW storage facilities, old and abandoned CW storage facilities, CW destruction facilities, Schedule 1 facilities, and Schedule 2 and 3 plant sites. Such agreements are not concluded for DOC/PSF plant sites because their inspections are random and infrequent.

<sup>b</sup> The basis for the OPCW's confidentiality policies is the CWC's Annex on the Protection of Confidential Information (Confidentiality Annex).

<sup>c</sup> CWC, Article VII, para. 4.

<sup>d</sup> CWC, Article X, para. 4.

<sup>e</sup> CWC, Article X, para. 7.

<sup>f</sup> The general obligations regarding national implementing legislation are contained in CWC, Article VII, para. 1. A checklist of prohibitions and implementing measures is available at URL <[http://www.opcw.org/html/db/natadv/impl\\_leg.html](http://www.opcw.org/html/db/natadv/impl_leg.html)>.

<sup>g</sup> A draft privileges and immunities agreement is available at URL <[http://www.opcw.org/html/db/natadv/bil\\_agree.html](http://www.opcw.org/html/db/natadv/bil_agree.html)>.

<sup>h</sup> CWC, Article XI, para. 2(c).

Source: Compiled by John Hart.

**Table A2.4.** Timetable of Chemical Weapons Convention-related activities

Responsible entity	Description
<i>Prior to entry into force of the CWC for a state party (EIF CWC SP)</i>	
Technical Secretariat (TS)	Provide information and assistance to future parties on implementation of the CWC as required and requested Process declarations and conduct initial and subsequent routine and random inspections Implement technological assistance and cooperation activities Maintain a data bank of freely available information concerning protection against CW and information provided by parties <sup>a</sup> Subject to available resources, provide, on request, expert advice and assist parties to identify how their programmes for the development and improvement of a protective capacity against CW could be implemented <sup>a</sup> Implement technological cooperation and assistance programmes Prepare letter indicating the amount of a party's contribution to the budget and to the Working Capital Fund. The assessed amount is pro-rated according to the number of months remaining in the year at the time the CWC entered into force for the party and according to the OPCW's scale of assessment as determined by the annual Conference of the States Parties (CSP). The money is due within 30 days after the party receives the assessment letter.
State party	Inform the OPCW of its National Authority Adopt necessary national implementing measures <sup>b</sup> Adopt necessary measures to regulate the chemical industry <sup>c</sup>
<i>At EIF CWC SP</i>	
Technical Secretariat	No particular action required
State party	Notify TS of legislative and administrative measures it is undertaking to implement CWC, of its National Authority, <sup>d</sup> official point(s) of entry and <sup>e</sup> standing diplomatic clearance number for non-scheduled flights <sup>f</sup>
<i>EIF CWC SP + days or weeks</i>	
Technical Secretariat	Conclude agreement on privileges and immunities with party <sup>g</sup> Send list of proposed inspection team members to party Formally request information regarding any special handling of information provided by a party to the OPCW <sup>h</sup> Determine assessed contribution for party and send assessment letter <sup>i</sup>
State party	Accreditation of state party representative Immediately acknowledge receiving list of proposed inspection team members and respond in writing accepting or rejecting proposal <sup>j</sup> Provide multiple entry/exit visas for inspection team members <sup>k</sup>

Responsible entity	Description
	<p>Inform TS of special handling of information provided to OPCW<sup>l</sup></p> <p>Conclude agreement on privileges and immunities with TS<sup>g</sup></p> <p>Pay assessment due within 30 days after receipt</p> <p>Designate representation to the OPCW</p>
<i>EIF CWC SP + 30 days</i>	
Technical Secretariat	No particular action required
State party	<p>Initial declaration due, including statement that the party has nothing to declare; declaration of CW, old and abandoned CW, CW production and other facilities, riot control agents, relevant chemicals and facilities (based on scheduled and non-scheduled chemicals)</p> <p>Submission of written lists of inspectors and inspection assistants for routine and challenge inspections<sup>m</sup></p> <p>Submission of general destruction plans (for CW production facilities, CW and old and abandoned CW stockpiles)—consideration by the EC and CSP approval required</p>
<i>EIF CWC SP + 180 days</i>	
Technical Secretariat	<p>Initial inspections</p> <p>Conclude facility agreements<sup>n</sup></p> <p>Conclude agreements on assistance measures provided by party (i.e., contribution to Voluntary Fund, bilateral agreements, declaration of types of assistance)<sup>o</sup></p>
State party	<p>Conclude, if possible no later than 180 days after EIF CWC SP, agreements with the OPCW concerning procurement, on demand, of assistance against CW<sup>p</sup></p> <p>Declare no later than 180 days after EIF CWC SP the kind of assistance a party might provide in response to an appeal by the OPCW<sup>q</sup></p> <p>Conclude agreements on assistance measures the party will provide (i.e., contribution to Voluntary Fund, bilateral agreements, declaration of types of assistance)<sup>o</sup></p>
<i>Annual requirements and activities</i>	
Technical Secretariat	Provide party with final inspection report within 30 days after completion of inspection
State party	<p>Submit annual destruction plan for old and abandoned CW, CW stockpiles and CW production facilities</p> <p>Submit annual declaration of activities related to civilian and other facilities</p> <p>Pay annual contribution, including reimbursement for direct costs of inspection under Article IV (CW facility) and Article V (CW production facilities)</p> <p>Submit detailed annual declaration on projected activities and anticipated production of single small-scale facility for coming calendar year<sup>r</sup></p>

**Table A2.4. contd**

Responsible entity	Description
	Submit detailed annual declaration on projected activities and anticipated production for all ‘other’ Schedule 1 facilities for coming calendar year <sup>a</sup>
	Declare anticipated activities in Schedule 2 plant sites <sup>d</sup>
	Declare anticipated activities in Schedule 3 plant sites <sup>d</sup>
	Declare following for previous calendar year: all transfers of Schedule 1 chemicals, activities at SSSF, and of any other Schedule 1 facility
	Declare annual aggregate national data for each Schedule 2 chemical and provide import/export information and information on plant site activities during previous calendar year
	Declare annual aggregate national data for each Schedule 3 chemical and provide import/export information and information on plant site activities during previous calendar year
	Annually update any changes to list of ‘other’ chemical production facilities producing unscheduled DOC/PSFs over specified thresholds
	Submit annual information on the party’s national protective purposes programme
<i>Periodic activities</i>	
Technical Secretariat	Provide party with final inspection report within 30 days after completion of inspection
State party	Report all transfers of Schedule 1 chemicals 30 days prior to the transfer
	Changes to national implementing legislation.
	Changes in treatment of information and data received in confidence from the OPCW
	Response to requests for clarification
	Notification of discovery of CW
	Changes regarding riot control agents shall be declared within 30 days after such changes become effective
	Planned changes to initial declaration of Schedule 1 facilities are to be declared 180 days prior to when the changes become effective
	Planned changes to annual declaration of anticipated activities at Schedule 2 and Schedule 3 sites

<sup>a</sup> CWC, Article X, para. 5.<sup>b</sup> CWC, Article VII, paras 1 and 2.<sup>c</sup> CWC, Verification Annex, Parts VI–VIII.<sup>d</sup> CWC, Article VII, para. 4.<sup>e</sup> CWC, Verification Annex, Part II, para. 16.

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<sup>f</sup> CWC, Verification Annex, Part II, para. 22.

<sup>g</sup> CWC, Article VIII, para. 50.

<sup>h</sup> CWC, Article VII, para. 6; and Confidentiality Annex, para. 4.

<sup>i</sup> CWC, Article VIII, para. 7.

<sup>j</sup> CWC, Verification Annex, Part II, para. 2.

<sup>k</sup> CWC, Verification Annex, Part II, para. 10.

<sup>l</sup> CWC, Article VII, para. 6; and Confidentiality Annex, para. 4.

<sup>m</sup> CWC, Verification Annex, Part II, para. 3. The party may object to any name from the list at anytime. The person objected to will be removed from the list 30 days after the TS receives the objection to that person in writing from the party. CWC, Verification Annex, Part II, para. 4.

<sup>n</sup> Conclusion of a Schedule 2 facility agreement is to be completed no later than 90 days after the initial inspection.

<sup>o</sup> CWC, Article X, para. 7.

<sup>p</sup> CWC, Article X, para. 7(b).

<sup>q</sup> CWC, Article X, para. 7(c).

<sup>r</sup> CWC, Verification Annex, Part VI, para. 16.

<sup>s</sup> CWC, Verification Annex, Part VI, para. 20.

<sup>t</sup> CWC, Verification Annex, Part VII, para. 4(c).

<sup>u</sup> CWC, Verification Annex, Part VIII, para. 4(c).

<sup>v</sup> CWC, Verification Annex, Part VI, para. 6.

<sup>w</sup> CWC, Verification Annex, Part VI, para. 15.

<sup>x</sup> CWC, Verification Annex, Part VI, para. 19.

<sup>y</sup> CWC, Article VII, paras. 1, 2(b), 4(b).

<sup>z</sup> CWC, Article VIII, paras. 1, 2(b), 4(b).

<sup>aa</sup> CWC, Verification Annex, Part IX, paras. 1, 3.

<sup>bb</sup> CWC, Article X, para. 4.

<sup>cc</sup> CWC, Verification Annex, Part VI, para. 5. Saxitoxin, however, may be declared at the time of the transfer.

<sup>dd</sup> CWC, Article VII, para. 5.

<sup>ee</sup> CWC, Article VII, para. 6 and Confidentiality Annex, para. 4.

<sup>ff</sup> CWC, Article IX.

<sup>gg</sup> CWC, Article IV, para. 9.

<sup>hh</sup> CWC, Article III, para. 1(e).

<sup>ii</sup> CWC, Verification Annex, Part VI, paras 14 and 18.

<sup>jj</sup> CWC, Verification Annex, Part VII, para. 4(c) and Part VIII, para. 4(c).

*Source:* Compiled by John Hart.



## Appendix 3. Non-compliance scenarios under the CWC

### Introduction

This appendix compares UNSCOM's non-compliance experiences with possible non-compliance scenarios under the Chemical Weapons Convention. It presents extreme circumstances in order to facilitate a clearer understanding of how the CWC might stand up against a determined violator. The hypotheses about responses by the Organisation for the Prohibition of Chemical Weapons do not in any way imply that the organization has acted or would act in a way contrary to its mandate and powers. However, inspections do not take place in a political vacuum and the progress of a given situation will largely depend on broader geopolitical circumstances.

#### *Scenario 1: serious omission of data or false data in national declaration to the OPCW*

Iraq periodically submitted revised full, final and complete disclosures (FFCD) to UNSCOM. However, these documents contained serious omissions, such as the failure to acknowledge prior to 1995 an offensive BW programme that had progressed beyond the basic research level. Iraq generally revised its declarations only after detailed discussions with UNSCOM officials, during which the burden of proof was, at times, effectively shifted to UNSCOM. This had the effect of revealing UNSCOM's information gathering and analytical capabilities and allowed Iraq to improve its concealment techniques. Even in cases where the information in Iraq's declarations was clearly inconsistent or inaccurate, Iraq's negotiators maintained positions that were not credible. Partly for this reason, sustained and unified pressure from the UN Security Council was necessary to compel Iraq to change its negotiating position. In the case of data submissions this meant submitting a revised FFCD. Iraq progressed towards greater compliance with Security Council resolutions as the result of a process of negotiation and the application of military, political and economic pressure. In some areas there was an incremental process of disarmament. However, the results were often mixed because further discrepancies were noted in every subsequent FFCD.

The CWC stipulates that declarations are to be submitted to the Technical Secretariat for collection and analysis. Such information is normally used as the basis for routine inspections. Missing information or information that gives rise to concern is flagged for the attention of the OPCW Director-General. The information contained in declarations is also reflected in Verification Implementation Reports (VIRs) that are periodically updated and submitted to the Executive Council, which meets four or five times per year. Annual reports are also submitted by the Technical Secretariat to each Conference of the States Parties.

A party suspected of submitting false data would become involved in clarification procedures initiated by the TS which, if unsuccessful, would be likely to lead to the OPCW Director-General informing the EC about the situation and the results of the attempt to clarify the matter. The EC could start detailed negotiations and this would be the object of EC and possibly CSP discussions (both formal and informal). This would result in a degree of diplomatic embarrassment, which could provide potential leverage. The party could choose either to attempt to engage the other parties in these discussions or to refuse to discuss the questions altogether. If the party elected to engage in negotiations and to justify the contents of its data submissions, this could lead to some clarification of the nature of the data omission and the acquisition of additional useful information. The process of negotiation is not, therefore, without benefit. Diplomatic pressure could ultimately cause the party to revise the contents of its declaration.

Resolving concerns related to the content of declarations would be a relatively long process.<sup>1</sup> A challenge inspection can be requested if one or more parties believe that data omission or submission of false information warrants one.<sup>2</sup> In the non-challenge inspections which have been conducted, successfully resolving such implementation concerns has been dependent on the manner in which the interested parties have sought clarification. If the process is public or confrontational, the state whose declaration causes concern might be less responsive.

Under the CWC, a serious data omission that was not addressed by the party in question could lead to a challenge inspection. In such circumstances, a challenge inspection that did not yield clear results would be more damaging to the credibility of the CWC than a case of a challenge inspection conducted against a state which had not clearly acted against convention requirements (e.g., in a situation in which a state was falsely accused).

The OPCW would not be able to exert the political, military and economic pressure that UNSCOM and UNMOVIC were able to because of their close relationship to the Security Council. Individual countries could exert such pressure outside the framework of the OPCW, either together or separately. UNSCOM and UNMOVIC were effective in those instances where the Security Council was united and when diplomatic and other pressure was exerted both in the multilateral forum of the UN and by UN member states working unilaterally, as occurred in 2002 and 2003.

<sup>1</sup> The USA has raised concerns regarding Iran's declarations since Iran submitted its first declaration in 1997. In addition, the USA formally accused Iran of violating the CWC in its plenary statement to the First Review Conference in 2003. USA, National Statement to the First Review Conference of the Chemical Weapons Convention by Assistant Secretary of State for Arms Control Stephen G. Rademaker, 28 Apr. 2003.

<sup>2</sup> See the discussion on challenge inspections in chapter 3.

*Scenario 2: denial of access to a Schedule 1 single small-scale facility during a routine inspection.*

In September 1991, an IAEA–UNSCOM inspection team experienced a four-day stand-off in the car park of the Iraqi Nuclear Design Centre. Inspection team members had been about to leave the building with paperwork related to the country's nuclear weapon programme. When Iraqi officials in charge of hosting the inspection team realized the nature of the documents, a decision was taken not to let the inspectors remove them. The head of the team refused to allow Iraqi officials to take the documents from the inspectors. After high-level political discussions in the UN and elsewhere, the inspectors were allowed to leave the car park with the documents. These documents conclusively proved the existence of Iraq's nuclear weapon programme.

Under the CWC, a similar situation could arise during the routine inspection of a single small-scale facility (SSSF)<sup>3</sup> to which an OPCW inspection team was refused access. The team leader would immediately communicate this fact to the OPCW headquarters together with any explanation for the denial of access given by the inspected state. The TS, including the Director-General, and the inspection team might choose to discuss the reasons for the denial of access with the party. The point of reference for these discussions would include CWC provisions and any facility agreement previously concluded between the OPCW and the party, which would specify the rights and obligations of each side as well as the boundaries of the facility to which access is to be provided. The results of prior or ongoing political discussions between the party and the OPCW would also be included.

If the inspected party is not willing to pursue such discussions in good faith, they would be of limited or no value. The inspection team may choose to document the non-compliant behaviour. However, any action by the inspection team that is not in accordance with the OPCW inspector manual would risk giving the inspected party a legitimate reason for expelling the inspection team from the country.

In the event of obstruction, the Director-General can inform EC members that a special EC meeting should be convened, which can occur within about two to three days.<sup>4</sup> The Director-General may direct the TS to gather relevant background information but cannot instruct the inspection team to act outside the established parameters of the inspection. An inspection of an SSSF facility normally lasts no

<sup>3</sup> A state party may declare an SSSF that produces up to 1 tonne of Schedule 1 chemicals for research, medical, pharmaceutical or protective purposes each year. The party may also declare 2 other types of facility (called 'other' facilities). One type of 'other' facility is allowed to produce up to 10 kg of Schedule 1 chemicals each year for protective purposes. The second type of 'other' facility' produces in excess of 100 grams of Schedule 1 chemicals per year for research, medical or pharmaceutical purposes. There is no limit to the number of this latter type of facility with the single condition that they may not together produce more than 10 kg of Schedule 1 chemicals per year. All facilities that meet the criteria for SSSF must be declared. CWC, Article VI, para. 3; and CWC, Verification Annex, Part VI.

<sup>4</sup> OPCW official, private communication with J. Hart, Aug. 2003.

more than one day and inspectors are usually at the facility only during working hours. The inspection team could attempt to remain near the site to observe traffic going in and out of the facility and other relevant activity. The team's ability to remain would be at the discretion of the inspected state. As noted in chapter 4, the Director-General cannot transform a routine inspection team into a challenge inspection team. In addition, only 'specially designated' inspectors may serve on challenge inspection teams.<sup>5</sup> Any inspector on a routine inspection not so designated would not be allowed to participate in a challenge inspection.

The special EC would evaluate the available information on the inspection and the specific CWC provisions that were violated and consider any other relevant information. The latter would include background information provided by the TS regarding the party's overall status of compliance with the CWC, and perhaps relevant intelligence information provided by other parties. The EC members would also consider whether and how the type and amount of information available could be used to support a challenge inspection and, consequently, how a challenge inspection mandate should be drafted.<sup>6</sup> The extent to which the inspection team could effectively implement additional verification activities would partly depend on the background information developed by the TS, the EC and the parties. A challenge inspection team would, at least, serve to demonstrate the principle that OPCW access should be allowed at the facility.

*Scenario 3: denial of access to challenge inspection team.*

UNSCOM was denied access to Iraq until its successor, UNMOVIC, was allowed into the country in November 2002. This was possible only after the broader geopolitical situation had changed.

In the case of the CWC, a challenge inspection cannot proceed unless it is requested by one or more states parties.<sup>7</sup> A number of factors may hinder the optimal implementation of a challenge inspection. (No challenge inspections have been conducted, but the routine inspections that have taken place provide insight into the factors that could hinder a challenge inspection.) For example, it is reasonable to suppose that the health and safety of the challenge inspection team might become the subject of discussion on-site. During routine inspections some parties prevented inspection teams from using various items of OPCW-approved inspection equipment. This was done for health and safety reasons in some

<sup>5</sup> Inspectors and inspection assistants are designated on the basis of a number of considerations, including their experience and expertise, and the need for redundancy in certain skills and knowledge. See also CWC, Verification Annex, Part X, paras 1–2.

<sup>6</sup> The Director-General is responsible for the drafting of the challenge inspection mandate.

<sup>7</sup> See the discussion on CWC provisions for challenge inspections in chapter 3.

instances<sup>8</sup> but, in other cases, there was no apparent reason for the denial and none was provided.<sup>9</sup> In addition, managed access provisions may be invoked by the inspected state party, either for legitimate reasons or as a means of obstruction. However, the inspected party must satisfy the specific compliance concern.<sup>10</sup> For example, denial of access must be justified to the inspection team and alternatives must be offered to the team so that it can implement its inspection mandate. A situation could arise in which the inspected party argues that it has provided sufficient access to allow the inspection team to fulfil its mandate but the inspection team disagrees. In such a case, the matter would be referred to the OPCW Director-General, who would have the option of taking the issue before the EC. The experience of UNSCOM has demonstrated that a state cannot pursue a policy of obstruction without this fact becoming clear to the inspection team and others involved in implementing the regime. Such a policy would also be evident in the case of a challenge inspection under the CWC.

The EC determines whether non-compliance has occurred, whether the inspection request falls under the scope of the CWC and whether the right to request a challenge inspection has been abused.<sup>11</sup> If a compliance matter was not clarified by the challenge inspection and the EC considers that the matter warrants consideration by a special CSP, such a CSP could be convened within about two weeks.<sup>12</sup> In cases of ‘particular gravity and urgency’ the EC may refer the matter to the Security Council and the General Assembly.<sup>13</sup> The CSP and the EC may also recommend measures (but without binding effect) to the Security Council and General Assembly.<sup>14</sup> The Security Council and the General Assembly can also take decisions with binding effect outside the framework of the OPCW. The matter would then be addressed at the highest political levels in the OPCW, at the UN, through bilateral government-to-government talks, or through a combination of all three. Technical and administrative measures, including a further detailed review of information relating to the party’s compliance with the CWC and how it might be used in support of the drafting of further inspection mandates, would be discussed.

<sup>8</sup> E.g., many chemical industry facilities do not allow the use of OPCW equipment because some equipment is not covered under local liability regulations designed to ensure the health and safety of plant personnel.

<sup>9</sup> OPCW official, private communication with J. Hart, July 2003.

<sup>10</sup> CWC, Verification Annex, Part X, paras 49–52.

<sup>11</sup> CWC, Article IX, para. 22.

<sup>12</sup> OPCW official, private communication with J. P. Zanders, July 2003.

<sup>13</sup> CWC, Article VIII, para. 36.

<sup>14</sup> CWC, Article VIII, paras 21(k) and 36; and CWC, Article XII, paras 1–4.

## **Appendix 4. The precedent of the IAEA and EURATOM and the negotiation of the Non-Proliferation Treaty**

There is no precedent for the type of relationship that may come into being between the Security Council and the Organisation for the Prohibition of Chemical Weapons for the disarmament of Iraq. However, the debate during the negotiation of the 1968 Non Proliferation Treaty on cooperative arrangements between two international organizations, the International Atomic Energy Agency<sup>1</sup> and the European Atomic Energy Community,<sup>2</sup> with similar but not identical goals, could provide guidance on issues which the Security Council and the OPCW might need to address.

The IAEA's Statutes entered into force in 1957 to promote the application of nuclear energy for peaceful uses throughout the world. Through a system of safeguards (established in 1961 and later updated) the IAEA seeks to generate international confidence that nuclear materials are not diverted for weapon purposes. EURATOM, which was created in 1957 to stimulate the development of the European nuclear industry, has operated a regional system of safeguards in all its member states since 1958. (Currently, all members of the European Union, including the two nuclear weapon states, France and the United Kingdom, are subject to EURATOM safeguards.) The safeguards operated by the IAEA and EURATOM differed considerably and complicated the negotiation of the NPT.

1. Unlike those foreseen in the IAEA Statute, EURATOM safeguards do not formally prohibit the military or non-peaceful use of safeguarded nuclear plant and material. They simply verify that the material is being used in conformity with the purpose stated by the user or with agreed supply conditions. However, since the ratification of the NPT by all EURATOM non-nuclear weapon states (NNWS) and the conclusion of the IAEA–EURATOM safeguards agreement, there has been no difference between the aims of the two safeguards systems in EURATOM NNWS.

2. EURATOM safeguards apply automatically to all nuclear material in the member states. They were thus the first full-scope safeguards. The IAEA's safeguards apply only to the extent specified in agreements with the states concerned (which are not necessarily IAEA members). In the case of NPT NNWS the IAEA's agreements are also 'full-scope'.

<sup>1</sup> A list of the members of the IAEA is available at URL <<http://www.iaea.org/worldatom/About/Profile/member.html>>.

<sup>2</sup> A complete amended version of the Treaty Establishing the European Atomic Energy Community is available at URL <[http://europa.eu.int/abc/obj/treaties/en/entr39a.htm#I\\_Text\\_of\\_the\\_Treaty](http://europa.eu.int/abc/obj/treaties/en/entr39a.htm#I_Text_of_the_Treaty)>.

3. EURATOM safeguards cover uranium ore, at least in principle. IAEA safeguards begin when nuclear materials have been further processed. In the case of non-NPT safeguards, uranium concentrates or yellowcake are subject to all safeguards procedures including inspection. NPT-type IAEA safeguards begin to apply fully even higher up the fuel cycle, with uranium metal or oxide or UF<sub>6</sub> (uranium hexafluoride, the gas which is fed into enrichment plants). However, NPT NNWS are required to inform the IAEA of shipments of nuclear material that have not reached this stage of the fuel cycle.

4. In certain cases, EURATOM permits its officials to serve as inspectors in the state of which they are nationals. The IAEA does not designate any national of a state to serve as inspector in his or her own country.

EURATOM insisted that it, rather than the IAEA, should verify the NPT obligations with regard to nuclear activities in its member states and that EURATOM member states should not be subject to the universal IAEA safeguards.<sup>3</sup> In other words, EURATOM resisted the uniform treatment for verification purposes of parties to the NPT. Many negotiating states—notably, the former Soviet Union and its allies (which feared the rearmament of Germany) and Japan, Sweden and Switzerland—viewed the EURATOM safeguards as a self-inspection system that could not provide sufficient guarantees to the global community about the non-diversion of nuclear materials for nuclear weapon purposes, but could serve as a tool that would give the EURATOM members a competitive economic advantage.<sup>4</sup>

Following the entry into force of the NPT in 1970, the IAEA and EURATOM negotiated a collaboration agreement<sup>5</sup> for the application of safeguards in the non-nuclear weapon member states of the EU. The collaboration agreement has been the subject of continuing complex negotiations. Currently, the IAEA safeguards are implemented through the Verification Agreement, which is concluded between the individual non-nuclear weapon EU member, EURATOM and the IAEA. The New Partnership Approach (NPA), agreed in April 1992, improved the collaboration between EURATOM and the IAEA in their joint execution of safeguard activities.<sup>6</sup>

Under the NPA the IAEA executes all the required tasks to meet the objectives of safeguards implementation under the NPT. Nonetheless, in its partnership with EURATOM, the IAEA seeks to optimize practical arrangements with regard to commonly agreed safeguard approaches and inspection planning, procedures, activities, instruments, methods and techniques. These include: (a) increasing the

<sup>3</sup> McKnight, A. D., *Nuclear Non-Proliferation: IAEA and EURATOM*, Occasional Paper no. 7 (Carnegie Endowment for International Peace: New York, June 1970).

<sup>4</sup> McKnight (note 3), pp. 31–32 and 33–34.

<sup>5</sup> IAEA, Information Circular 193, 14 Sep. 1973, URL: <[www.iaea.org/worldatom/Documents/Infcircs/Others/inf193.shtml](http://www.iaea.org/worldatom/Documents/Infcircs/Others/inf193.shtml)>.

<sup>6</sup> Thorstensen, S. and Chitumbo, K., ‘Safeguards in the European Union: the new partnership approach’, URL <<http://www.iaea.org/worldatom/Periodicals/Bulletin/Bull371/chitumbo.html>>; and World Nuclear Association, ‘Safeguards to prevent nuclear proliferation’, Mar. 2003, URL <<http://www.world-nuclear.org/info/inf12print.htm>>.

use of shared technologies to replace, to the extent possible, the physical presence of inspectors; (b) avoiding duplication of inspection activities, supplemented by quality control measures so that the IAEA and EURATOM can satisfy their respective obligations to reach independent conclusions and provide the required assurances;<sup>7</sup> (c) using commonly shared analytical capabilities in order to reduce the number of samples to be taken, transported and analysed; and (d) cooperating in R&D and the training of inspectors with the aim of reducing the costs for both organizations and developing common standards for products and procedures.<sup>8</sup>

<sup>7</sup> In order to avoid duplication of verification efforts and to reduce cost, the CWC allows for the possibility of reducing verification-related activities in cases where other agreements include comparable activities. CWC, Article IV, para. 13; and CWC, Article V, para. 16. The CWC provisions were included partly because of the existence of the 1990 US–Soviet Agreement on Destruction and Non-Production Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons (Bilateral Destruction Agreement, BDA). It is reproduced in *SIPRI Yearbook 1991: World Armaments and Disarmament* (Oxford University Press: Oxford, 1991), pp. 536–39. However, the BDA was never implemented.

<sup>8</sup> Thorstensen and Chitumbo (note 6).



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