

EFFECTIVE LEGISLATIVE FRAMEWORKS FOR THE PREVENTION OF CHEMICALS WEAPONS PROLIFERATION

*SEMINAR ON THE OPCW'S CONTRIBUTION TO SECURITY AND THE NON-
PROLIFERATION OF CHEMICAL WEAPONS*

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Good afternoon. My name is Scott Spence. I am the Senior Legal Officer at VERTIC and co-ordinate the technical and policy components of our National Implementation Measures Programme with Angela Woodward. The Programme works closely with States to develop their legislative frameworks to implement the biological and chemical weapons treaty regimes and the related provisions of UN Security Council Resolution 1540. We are also engaged in a pilot project on the legislative response to illegal trafficking of nuclear and radiological materials in co-operation with the IAEA and UNODC.

INTRODUCTION

I will use my time to discuss the centrality of legislation – and by this I specifically mean laws and regulations – in national frameworks for the prohibition and prevention of illegal activities involving chemicals, including their proliferation for chemical weapons purposes. The active engagement of the chemicals industry is particularly important as the OPCW's *raison d'être* becomes increasingly less about monitoring Cold War chemical weapons stockpile destruction and more about monitoring chemicals, particularly scheduled ones, to ensure that they are safely managed and used for peaceful purposes and kept securely away from those with less worthy motives.

I will briefly discuss a recent incident, which took place right here in The Netherlands and which demonstrates why laws and regulations related to chemicals are indispensable, particularly in the 81 States Parties that have chemicals subject to

OPCW monitoring. Equally, the incident confirms that even though laws and regulations are good, they are only worth the paper they are printed on if they're not properly enforced.

CHEMICAL PLANT SAFETY AND SECURITY

In January earlier this year, Chemie-Pack, a chemical packaging plant in the south of the Netherlands, caught fire leading to an enormous cloud of potentially toxic smoke and 41.5 million Euros worth of damage. Fortunately, there were no casualties and the cloud turned out to be non-toxic, but many were understandably worried about the release of 23,500 litres of chemicals into the air and wondered how an accident of this scale could have happened.

This incident, which occurred just 65 kilometres from where we are now, highlights the importance of laws and regulations for chemical plant safety and security. Article VII of the CWC is quite specific in requiring State Parties to adopt necessary measures to prohibit certain activities in the Convention, such as using chemical weapons, and to prevent the misuse of scheduled chemicals including illicit transfers. Article VII also requires these provisions to be extended extraterritorially. When it comes to chemical plant safety and security, Article VII requires States Parties to "... assign the highest priority to ensuring the safety of people and to protecting the environment..." and to "... cooperate as appropriate with other States Parties in this regard". And in Part VI (B) (7) of the Verification Annex, States Parties producing Schedule 1 chemicals are required to ensure the safety of people and protect the environment. Nevertheless, each State Party can do so "...in accordance with its national standards for safety and emissions".

The Netherlands has many laws and regulations concerning chemical plant safety and security, but in the case of Chemie-Pack, inspections had revealed a number of non-compliance issues such as the lack of a risk analysis, insufficient fire prevention measures and the lack of personnel safety training. In 2008, the company received an administrative fine, which was not paid. It was issued a license in 2010 based on their most recent inspection in 2009. Now Dutch prosecutors believe Chemie-Pack was acting in violation of its license and have started a criminal investigation against the company.

The report on the OPCW table-top exercise on chemical terrorism, which was held in Warsaw, Poland in November last year, includes several interesting observations on the nexus between chemical plant safety and security and preventing chemical terrorism. The report stressed that “national measures to cope with industrial and transportation accidents or environmental catastrophes form an integral part of the national capacity to mitigate CBRN risks [and that] resources, technical means and procedures established to respond to industrial accidents can effectively be utilized to save lives after a terrorist release of a toxic chemical”. In view of this, I query: what if Chemie-Pack had been producing scheduled chemicals and safety and security failures led to their theft or release into the environment by a criminal or terrorist group?

PREVENTING ATTACKS AND PROLIFERATION

Plant safety and security does not complete the picture, however, for a legislative framework for the prevention and prohibition of activities involving chemical weapons. First, States must also have effective legislation in force to *prevent* criminal or terrorist activities involving chemical materials, or for that matter biological, nuclear and radiological materials. Governments will need to consider whether they are effectively enabled by law to investigate alleged attempts to stage a terrorist attack involving CBRN materials, to undertake electronic and physical surveillance of criminals or terrorists willing to use these materials, and to gather intelligence and analyze it, which would require a level of technical expertise that differs from illegal activities involving more conventional materials. For example, a government should be in a position to gather intelligence on any unusual shipments or spikes in production of scheduled or non-scheduled chemicals that could be weaponised and used as a chemical weapon.

Governments will need to consider whether they have legislation in place to promote internal co-operation among various intelligence and law enforcement agencies and legal co-operation and assistance with intelligence and law enforcement agencies in other countries. It may not be enough for a country to have bilateral agreements; they may also need authority for international co-operation and exchange with law enforcement officials in countries with which they do not have agreements, and this is

certainly true regarding customs and air and sea port authorities. In today's security environment, States that may not have a history of co-operation with one another may suddenly realise they need it.

Internal and international legal co-operation must also be expanded to include financial surveillance methods as criminal and terrorist groups, including those who may need significantly more money for CBRN-related attacks, will resort to money laundering and other forms of illicit financing for their activities. Many governments have set up Financial Intelligence Units for this purpose.

Governments will also need to consider whether they have adequate legislation in place to prevent unauthorised access to chemicals production or storage facilities, particularly those involving Schedules 1, 2 or 3 chemicals. Such measures should include physical protection measures as well as personnel background checks and personnel monitoring. This relates back to the chemical plant safety and security framework I discussed earlier.

Finally, States must ensure that they have comprehensive legislation for regulating legitimate uses of Schedules 1, 2 and 3 chemicals, including:

- threshold-triggered licensing and annual reporting requirements;
- mechanisms for routine inspections by national inspectors;
- procedures to facilitate OPCW industry inspections;
- export/import controls for scheduled chemicals, including a permitting system;
- protection of confidential information; and
- regulations governing the composition and functioning of a CWC National Authority.

RESPONDING TO ATTACKS AND PROLIFERATION

Governments will also need to consider whether they have proper legislation in place to *respond* to a criminal or terrorist act involving chemicals, or an illegal transfer of scheduled chemicals. In an attack, the first most important governmental response will be to handle the dead and treat the wounded, which may require a legislative basis for co-operation among law enforcement and public health officials and crisis

and media management. First response will be followed by investigation. In the case of incidents involving CBRN materials, investigative techniques, including collection of evidence and sampling, will necessarily be different from techniques in more conventional contexts. Most States will require regulations to facilitate these special investigations as well as training for the investigators. And, of course, governments will need to consider whether they have legislation in place to promote legal cooperation and assistance with other law enforcement agencies not only to *prevent* criminal and terrorist attacks or an illegal shipment involving chemicals, but also to *respond* to such incidents.

The investigation phase for an attack involving chemicals may lead to prosecutions if the perpetrators are caught. To facilitate this, governments will need to consider whether there are definitions for the terms ‘chemical weapon’, ‘toxic chemical’ and ‘purposes not prohibited under the Chemical Weapons Convention’ in their CWC laws, penal codes or counter-terrorism or other similar laws. When taken together, these definitions would characterize the intentional use of any chemical to kill or harm humans or animals as the use of a chemical weapon. It is irrelevant whether the chemicals are scheduled or not, it is the purpose for which they are used that is determinative.

In addition to definitions, a State Party’s legislation must include the CWC’s Article I prohibitions, including a complete ban on any use of chemical weapons. Without criminal provisions and stiff penalties, it may be harder to secure a satisfactory judgment. A government should also be able to exercise extraterritorial jurisdiction over any violations involving chemical weapons.

Finally, governments should consider whether they have measures in place to criminalize unauthorised activities involving Schedules 1, 2 and 3 chemicals, including certain international transfers. A company in the United Kingdom was fined last year for improperly transferring Cetaflam PDP, a flame retardant and Schedule 2 chemical, to Israel, a non-State Party. If the UK had not had such legislation in place, it may have been far more difficult, if not impossible, to punish the company for this irregularity.

VERTIC'S OFFER OF CO-OPERATION ON CBRN LEGISLATION

All States are required by Article VII of the CWC to implement the Convention through national laws and regulations. In the absence of an effective legislative framework, it will be difficult to prevent and respond to criminal or terrorist attacks involving chemicals. It will also be difficult to monitor legitimate activities involving scheduled chemicals including their production, use and transfer. This of course elevates the risk of chemicals proliferation. And I would add that, increasingly, attention is properly turning to chemical plant safety and security, which is also included in Article VII of the Convention, and which can not only prevent accidents such as the one in the Netherlands but also prevent the proliferation of chemicals for terrorist purposes.

VERTIC is in a position to work with governments, at no cost, to draft robust legislation to implement the Chemical Weapons Convention, in liaison with the OPCW. We are also in a position to work with governments on preparing legislation to implement the BWC, and we are moving closer towards working with States to develop laws and regulations to prevent and prohibit the illicit trafficking of nuclear and radiological materials. I'd be happy to speak with interested officials on how we can co-operate with you to strengthen your overall CBRN legislative framework.

Thank you.

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