



CHEMICAL AND BIOLOGICAL WEAPONS USE IN THE ROME STATUTE: A CASE FOR CHANGE

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Good afternoon everyone. My name is Scott Spence. I am the Senior Legal Officer at VERTIC and lead the technical component of our National Implementation Measures Programme. We work closely with States to develop legislative frameworks for the biological, chemical and nuclear weapons treaty regimes and UN Security Council Resolution 1540. I'd like to thank the OPCW for providing civil society the opportunity to hold this event. We value our excellent relationship with the Organisation and welcome Director-General Üzümcü's commitment to greater involvement of civil society in the implementation of the Chemical Weapons Convention.

Many of you may be familiar with the Rome Statute, which is the international treaty that forms the basis for the International Criminal Court, based here in The Hague, and its operations. I'd like to speak to you briefly about that treaty and how it intersects with the Biological and Chemical Weapons Conventions. I would also encourage officials from governments who are party to the three agreements to consider supporting an amendment at the next Review Conference for the Rome Statute, which would explicitly designate the use of biological and chemical weapons as war crimes.

VERTIC's support for this proposal is developed in an article which I had a talented intern write during August to November; draft copies are available here in the Ypres Room by the exit.

According to Article 5 of the Rome Statute, the International Criminal Court has jurisdiction over genocide, crimes against humanity, war crimes and aggression. Article 8, paragraph 2 includes the war crimes of “employing poison or poisoned weapons...” and “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices...” This choice of language arose from the inability of delegates to the Rome Conference for the negotiation of the Statute to reach a consensus on whether nuclear weapons should be included: there was a view at the time that if nuclear weapons could not be included then chemical and biological weapons couldn’t be either. The compromise was the provisions we have today.

These provisions are ambiguous, however, particularly with regard to biological weapons. We also have some concern that there may be some confusion in how to interpret the provisions if a defendant were to actually be called before the court for using chemical or biological weapons in an international or non-international armed conflict. The potential for confusion may even be more acute since the Rome Statute opened for signature in 1998, in view of rapid technological developments in the chemical and biological fields. Could the nefarious use of synthetic biological agents in an international armed conflict possibly be considered to be the use of ‘poisons or poisoned weapons’?

Few doubt that any use of chemical or biological weapons, whether in an international or non-international armed conflict, is a serious war crime. And there is significant support for such crimes forming a part of customary international law. In our view, the problem with the Rome Statute in its current form is definitional. Some have argued that ‘poison’ or ‘poisoned weapons’ could reasonably be interpreted to cover biological weapons. However, strictly speaking, biological weapons are microorganisms with the ability to inflict damage or cause disease, which are not used for prophylactic, protective or other peaceful purposes. Toxins, on the other hand, are poisonous substances produced by a living being which can also be used to produce weapons, that is, toxin weapons. The Biological and Toxin Weapons Convention prohibits the misuse of ‘microbial or other biological agents, *or* toxins’ implying that these are distinct categories. Since microbial weapons are not toxins or chemicals, it is

very difficult to see how they can fall under the category of ‘poison’ or ‘poisoned weapon’.

Notably, the 1925 Geneva Protocol expanded upon the 1899 Hague Convention’s ban on ‘poisons’ and ‘poisoned weapons’ by clearly prohibiting ‘bacteriological methods of warfare’. The negotiators for the Rome Statute incorporated the Geneva Protocol’s ban on the use of ‘asphyxiating, poisonous or other gases’ but inexplicably did not include its ban on ‘bacteriological methods of warfare’. We’re therefore not convinced that the Rome Statute makes the use of biological weapons, that is weapons involving microbial or biological agents, a war crime.

The case is somewhat better for chemical weapons. The Rome Statute makes the use of ‘asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices’ a war crime. Nevertheless, wouldn’t it have been far more elegant and straightforward if the negotiators had simply including the following war crimes under the jurisdiction of the International Criminal Court:

- using the agents, toxins, weapons, equipment and means of delivery as defined in the Biological Weapons Convention; and
- using chemical weapons or engaging in any military preparations to use chemical weapons as defined by and in violation of the Chemical Weapons Convention.

This was the proposal put forth by the Belgian government for consideration by the Assembly of States Parties preceding the Review Conference. The Review Conference took place in Kampala earlier this year. The proposal was included with several other amendments, with support from 13 other States Parties. Ultimately, the Review Conference did adopt an amendment applying the prohibitions on poisons and poisonous gases to non-international armed conflicts. But the question still remains whether biological weapons are covered by the Rome Statute. This was not clarified. And the definition of ‘chemical weapon’ from Article 2, paragraph 1 of the Chemical Weapons Convention has still been left out of the Statute in favour of the older and more ambiguous language of ‘asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices’.

There was some opposition to the Belgian amendment on biological and chemical weapons, including a fear that there would not be enough time to fully explore the issues within all of the proposed amendments for the Review Conference, or that adopting the amendment would somehow have the effect of compulsory universalization of the Biological and Chemical Weapons Conventions. Additionally, the Review Conference was very focused on amendment of the Statute with a definition for the crime of aggression. The Belgian amendment may therefore not have had much of a chance this year anyway.

Nevertheless, there is enough time now to set the discourse for the next Review Conference and for reconsideration of Belgium's proposed amendment. VERTIC will share the results of our review of the matter, with the hope that it will become an input for the deliberations leading up to adoption of an amendment in future. We will continue to support and call for an amendment which draws upon the language of the Biological and Chemical Weapons Conventions, including their definitions for these weapons based on the general purpose criterion.

Thank you.