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Strengthening the Chemical Weapons Convention

First CWC Review Conference Paper No 5

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April 2003

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THE IMPORTANCE OF NATIONAL IMPLEMENTING LEGISLATION FOR THE CHEMICAL WEAPONS CONVENTION

Nicholas A. Sims[†]

Introduction

1. Paragraph 22 of Article VIII of the Chemical Weapons Convention¹ states that:

*22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention ... **convene in special sessions to undertake reviews of the operation of this Convention.** Such reviews shall take into account any relevant scientific and technological developments. [Emphasis added]*

The first such special session, referred to in this paper as the First Review Conference, is scheduled to commence on 28 April 2003.

2. A central issue that needs to be addressed in any such *reviews of the operation* of the Convention is the extent to which States Parties have implemented their National Implementation Measures as such measures are fundamental to the health and effectiveness of the Chemical Weapons Convention regime.

3. Article VII *National Implementation Measures* of the Convention requires States Parties to do various things, of which the most far-reaching is the *General Undertaking* to

*"not permit in **any** place under its control **any** activity prohibited to a State Party under this Convention". (paragraph 1b) [Emphasis added]*

In other words, their national implementation must be sufficiently comprehensive to ensure that **all** CWC prohibitions are respected in every place under their control. To *"not permit"*, on this construction, requires States Parties to be active, not passive. This subparagraph (1b) should be regarded as being equivalent in stringency to the *prevention* criterion which is coupled with *prohibition* in Article IV of the Biological and Toxin Weapons Convention², which states that:

*Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures **to prohibit and prevent** the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the*

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¹United Nations, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, Corrected version in accordance with Depositary Notification C.N.246.1994.Treaties-5 and the corresponding Procès-Verbal of Rectification of the Original of the Convention, issued on 8 April 1994. Available at <http://www.opcw.org/cwc/cwc-eng.htm>

²United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, General Assembly resolution 2826 (XXVI), 16 December 1971. Available at <http://www.opbw.org>

territory of such State, under its jurisdiction or under its control anywhere. [Emphasis added]

Even though the word *prevent* is not used in the CWC language, the requirement in Article VII sets a very high standard of national implementation: necessarily so, in view of the gravity of the threat to humankind which the CWC, like the BTWC, has been designed to counter.

4. Part of the national implementation required of each State Party consists of designating or establishing a National Authority and putting into effect other provisions governing relations between the State Party and the OPCW (paragraphs 4-7 of Article VII). Another part consists of assigning the highest priority to ensuring the safety of people and to protecting the environment (paragraph 3).

5. This Review Conference Paper is confined to addressing the specifically **legislative** requirements of Article VII. These are to:

"prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity" (paragraph 1a);

"extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law" (paragraph 1c);

"cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1" (paragraph 2)

and to

"inform the Organization of the legislative and administrative measures taken to implement this Convention" (paragraph 5).

6. The Legal Adviser's Office of the OPCW Technical Secretariat has compiled reports³ on the fulfilment by States Parties of their legislative obligations under Article VII. For example, paragraph 3.6 of the *OPCW Annual Report for 2001* reported that

"As of 31 December 2001, 59 States Parties (41%) had fulfilled their obligation under Article VII, paragraph 5, of the Convention to inform the Organisation of their implementing measures. This reflects a three percent increase over last year's figure of 38%. Thus, for 59% of States Parties, the Organisation does not formally know

³See, for example, Office of the Legal Adviser, OPCW Secretariat, *Legislation Questionnaire: Preliminary Analysis of Responses to the Survey of National Measures to Regulate Scheduled Chemicals under the Chemical Weapons Convention*, S/249/2001 dated 22 May 2001. Available at http://www.opcw.org/html/global/s_series/2k2/s249_01.html and Office of the Legal Adviser, OPCW Secretariat, *National Implementation Measures: Legislation Questionnaire Further Analysis of Responses to the Survey of National Measures to Implement the Chemical Weapons Convention*, S/269/2001 dated 16 August 2001. Available at http://www.opcw.org/html/global/s_series/2k2/s269_01.html

what their legislative situation is with respect to the implementation of this important requirement of the Convention."

Since then, the number of States Parties making a submission in compliance with Article VII, paragraph 5, has increased by February 2003 to 82 (55% of States Parties), an increase of 7% over October 2002 and of 14% over December 2001⁴.

7. This increase is certainly to be welcomed. However, it still leaves 45% of all States Parties -- some 68 States Parties -- in non-compliance with this obligation. 45% is a very high percentage five years in to the life of the Convention especially given all the assistance and encouragement provided to States Parties by the Technical Secretariat and the Legal Adviser's Office.

8. Further analysis by the Legal Adviser's Office has also revealed that not all CWC prohibitions are adequately covered in every case, so the proportion of States Parties which have **adequate** legislation in place is significantly lower. There is, in other words, a question-mark over the **quality** of legislation as well as its **quantity**. Only 42 States Parties (28%) have legislation covering all key areas. For 108 States Parties there is either no legislation in place, or gaps in legislation, or an unknown legislative situation.

9. Examples of insufficiency have emerged from responses to OPCW legislation questionnaires. For example, only 57 of 86 States Parties responding replied that they were enforcing the end-user certificate requirement for transfers of Schedule 3 chemicals to states not party to the Convention, as required by the Verification Annex, Part VIII, paragraph 26. Even more unsatisfactorily, in view of the explicit requirement in Article VII for the enactment of penal legislation, 11 of the 86 responding States Parties (13%) reported having **no** legislation in place to enforce any of the obligations arising under Article I of the Convention.⁵

10. Taking stock five years on from entry into force, it has to be declared unequivocally that this state of affairs is unacceptable. It endangers the health and the effectiveness of the Convention. This Review Conference Paper sets out why it is important to put matters right, addressing three of the key purposes of national implementing legislation and why comprehensiveness of scope, in respect of chemicals and in respect of people, is vital before concluding with constructive proposals for this Review Conference.

Purposes of National Legislation

11. National legislation under Article VII serves several purposes of which three are of **key** importance.

12. First, it empowers the National Authority and the OPCW. It imposes obligations on people to cooperate with the National Authority and supply information to it for onward transmittal to the OPCW. It limits chemical transfers to those not prohibited by the Convention. It ensures, in advance, that all OPCW inspectors will be enabled to carry out

⁴Fiona Tregonning, *Developments in the Organization for the Prohibition of Chemical Weapons, Progress in The Hague, Quarterly Review no 41*, CBW Conventions Bulletin, Issue No. 59, March 2003

⁵Fiona Tregonning, *Developments in the Organization for the Prohibition of Chemical Weapons, Progress in The Hague, Quarterly Review no 41*, CBW Conventions Bulletin, Issue No. 59, March 2003

their various verification tasks under the Convention without delay or hindrance, and sets out their necessary privileges and immunities, in readiness for when they arrive.

13. Second, it provides for the detection, prosecution and punishment of offenders falling within the jurisdiction of each State Party and of offenders possessing its nationality. Here Article VII legislation not only extends the prohibitions in the CWC from the international level to the national level: it gives them explicit legal standing and provides the national framework for their enforcement. Prohibition without enforcement is not enough: it would fall short of the criterion of *prevention* which, as already noted, is implied by the *General Undertaking* in paragraph 1b.

14. In recent years, anxieties over toxic chemicals falling into terrorist hands have augmented the original motivation for the CWC, which had to do rather with the dangers emanating from chemical weapons in the possession of governments. It is important to recognize that national implementing legislation is directly relevant to the prosecution of suspected chemical terrorists. In the United Kingdom, for example, criminal charges have been brought under the *Chemical Weapons Act 1996* — which is the UK implementing legislation -- following the discovery of traces of ricin in premises in north London. So the legislation required under Article VII provides the framework and the means for defending society against chemical terrorism, in addition to its original function of ensuring that governments fulfil the national implementation of chemical disarmament. Both aspects are integral to the enforcement of the *General Undertaking*, incumbent on every State Party, to

"not permit in any place under its control any activity prohibited to a State Party under this Convention."

15. The third purpose is more nebulous than the first two. It depends upon a particular view of the value of treaties and of how expectations of compliance with treaty obligations are embedded in normative structures at national level. On this view, national legislation ties the CWC into national legal systems and contributes to the strengthening of compliance by expanding the constituency which has an institutional interest in the success of the Convention. It also builds the treaty regime flowing from the CWC into normative structures at the national level, in the form of rules and expectations and procedures for upholding them. These rules, expectations and procedures in their turn uphold their counterparts at the international level. They strengthen the international treaty regime. They help, even if only at the margins, to ensure its survival by constituting one more obstacle which would have to be overcome if the Convention were to come under attack.

16. There is a relationship of mutual reinforcement between the international treaty regime of the CWC and the national legal regime established by each State Party in accordance with Article VII. At their best, each reinforces the other.

17. Prescription and practice, too, should actively reinforce each other. Their relationship should be one of complementarity. If this sounds very abstract and idealistic, the grand sweep of the Convention needs to be recalled. It aims at nothing less than the worldwide abolition of chemical weapons, comprehensive, verified and sustained in perpetuity. That is the magnitude of the challenge to every State Party.

Comprehensiveness of Scope of Legislation

18. Prohibitions in national implementing legislation need to be formulated with great care, to be **co-extensive** with the prohibitions in the CWC. If that is not done, the obligations of Article VII are not wholly fulfilled. This in turn weakens the overall regime. States Parties may even, in effect, lay themselves open to charges of non-compliance, thereby inviting challenge.

Comprehensiveness of Legislation: Chemicals

19. The central provision of the Chemical Weapons Convention is the total prohibition in Article I that "*never under any circumstances*" shall a State Party "*develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;*" with chemical weapons being defined in Article II as including "*Toxic chemicals and their precursors, **except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.***" The phrase in bold embodies the comprehensive scope of the Convention and is generally referred to as the General Purpose Criterion (GPC) which ensures that past, present and future chemical weapons are all prohibited. The implementation of the General Purpose Criterion is placed by Article VI on each State Party which "*shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention.*" It needs to be emphasised that the General Purpose Criterion (GPC) must be applied to national legislation if the latter is to succeed in being co-extensive with the CWC prohibitions. Otherwise it is unlikely to be fully comprehensive in terms of the scope of its coverage of chemicals.

20. States Parties have to work out how they give effect to this in practice⁶, in accordance with their respective constitutional processes; but it does mean that they must be alert to the risk of criminal activity involving toxic chemicals which are not on any Schedule. It was never the case that the CWC would be confined to Scheduled chemicals. The Schedules were included for other reasons, notably the differentiated intensity of verification (of chemical weapons non-production) and the related information requirements. Because of the GPC, States Parties need to ensure that their national legislation enables them to detect, prosecute and punish **any** one of the prohibited activities with regard to **any** toxic chemical, as defined in Article II of the Convention, or precursor thereof unless the purpose of the activity is not prohibited under the Convention, and the types and quantities of the chemicals involved are consistent with that purpose.

Comprehensiveness of Legislation: People

21. There is another aspect to comprehensiveness of legislation, and that is its scope with regard not to chemicals but to people. It is important not just to have penal legislation in place but to ensure that it covers **every** person it should cover. National experience in the United Kingdom provides an example. There was an issue of scope in this sense when the UK Government started a public consultation over its proposed legislation in 1995. Vigorous debate ensued and one outcome was the addition of a clause to the Bill which is now Section

⁶Graham S. Pearson, *Implementation of the General Purpose Criterion of the Chemical Weapons Convention*, University of Bradford, Department of Peace Studies, First CWC Review Conference Paper No. 3, January 2003. Available at <http://www.brad.ac.uk/acad/scwc>

37 of the *Chemical Weapons Act 1996*.⁷ Proponents of Section 37 were concerned to make it explicit, beyond argument, that government service could never be invoked as an excuse for contravening the Act. They insisted that government officials, including defence scientists and members of the armed forces, as well as the politicians to whom they are answerable, should be bound by exactly the same obligations as the rest of the population. Section 37 gives effect to this aspiration. The vital words are in paragraph 3: "*the provisions made by or under this Act apply to persons in the public service of the Crown as they apply to other persons.*"

22. This is a principle of comprehensiveness which ought to apply globally, whatever the particular way in which the laws of different States Parties express it according to their constitutional processes and legal traditions. It is useful to recall that the relevant Australian legislation in 1994 and Canadian legislation in 1995 encouraged those of us in the United Kingdom who argued in favour of what is now Section 37 to insist that it could indeed be done. In Australia, Section 6 (1) of the Chemical Weapons (Prohibition) Act 1994⁸ provides that "*This Act binds the Crown in all its capacities*" and in Canada, Section 5 of the Chemical Weapons Convention Implementation Act 1995⁹ reads: "*This Act is binding on Her Majesty in right of Canada or a province.*" Yet constitutionally those three countries exhibit differences as well as similarities. In the end, a UK precedent (paragraph 4 of Section 42 of the *Radioactive Substances Act 1993*¹⁰) was used as the model for drafting the clause, but the experience of other States Parties sharing a common-law tradition was a distinct encouragement.

23. Whatever the constitutional position and whatever the legal tradition of a particular State Party, the important thing is that the scope of national legislation must be comprehensive in respect of people. Quality matters, as well as quantity of legislation. Laws which fall short of comprehensiveness fall short in quality.

The Way Ahead

24. Characteristically, the Final Declarations of Review Conferences for multilateral treaties contain exhortations, as States Parties encourage one another to implement the treaty in every aspect. It is urged that, in this hortatory mode, the Final Declaration of this, the first, Chemical Weapons Convention Review Conference will emphasise the importance of paragraphs 1, 2 and 5 of Article VII and state the Conference's understanding of what **all** States Parties need to do in order to implement them fully.

25. Specifically, it is recommended that the Final Declaration should include seven exhortations in this area:

- a. **First**, that States Parties encourage one another to legislate without delay, if they have not already done so.

⁷Her Majesty's Stationery Office, *The Chemical Weapons Act 1996*, 1996 Chapter 6. Available at <http://www.hmso.gov.uk/acts/acts1996/1996006.html>

⁸Attorney-General's Department, Government of Australia, *Chemical Weapons (Prohibition) Act 1994*. Available at <http://scaleplus.law.gov.au/cgi-bin/download.pl?scale/data/pasteact/2/1147>

⁹Department of Justice Canada, *Chemical Weapons Convention Implementation Act 1995*, 1995 c. 25. Available at <http://laws.justice.gc.ca/en/c-27.6/32353.html>

¹⁰Her Majesty's Stationery Office, *Radioactive Substances Act 1993*, 1993 c.12. Available at http://www.hmso.gov.uk/acts/acts1993/Ukpga_19930012_en_1.htm

b. **Second**, that every State Party should check its legislation for adequacy in the light of the qualitative analysis by the Legal Adviser's Office of the OPCW Technical Secretariat. This analysis demonstrated a worrying gap between the percentage of States Parties which have legislated and the percentage of States Parties whose legislation is adequate to cover **all** the requirements of the Convention.

c. **Third**, that States Parties should ensure that the scope of their legislation is sufficiently comprehensive, in respect of coverage of chemicals on an **all-embracing basis** to match up to the demands of the General Purpose Criterion of the Convention.

d. **Fourth**, that States Parties should ensure that the scope of their legislation is sufficiently comprehensive, in respect of coverage of people, to encompass government officials and scientists, armed forces personnel and the politicians who instruct them, in order to leave no doubt that they are **all** subject to its obligations and its penalties equally with the rest of the population.

e. **Fifth**, that States Parties should cooperate actively with one another to block any gaps between their respective jurisdictions which might, if left uncorrected, be exploited by those who take an unhealthy interest in chemical weapons out of terrorist or other motives: a danger of which we are even more acutely aware now than when the requirement to offer legal assistance was drafted in Article VII paragraph 2.

f. **Sixth**, that States Parties should keep the OPCW fully informed of the legislative and administrative measures they have taken to implement the CWC and of how these have been strengthened as necessary over time.

g. **Seventh**, that the Technical Secretariat should continue to provide analytical status reports to the States Parties on the qualitative as well as the quantitative fulfilment of Article VII for the consideration of the Conference in its regular sessions, and that the Conference should accord these reports thorough scrutiny with a view to achieving universal, effective implementation of the Convention within all States Parties.

26. As the extent to which States Parties have implemented their National Implementation Measures is **fundamental** to the health and effectiveness of the Chemical Weapons Convention regime, it is vital that the Review Conference in taking stock five years on from entry into force, unequivocally declares that the present state of affairs with regard to legislation is **unacceptable**. Adequacy of legislation, and in particular comprehensiveness of scope, in respect of **chemicals** and in respect of **people**, are essential to prevent States Parties from, in effect, laying themselves open to charges of non-compliance, thereby inviting challenge.