

**NOTE BY THE TECHNICAL SECRETARIAT****CONFERENCE ON "THE CHEMICAL WEAPONS CONVENTION IN 2017: WHAT ARE THE BOUNDARIES TO ITS FUTURE EVOLUTION?"****BACKGROUND**

1. On 16 November 2017, the Technical Secretariat (hereinafter “the Secretariat”) convened a conference entitled “The Chemical Weapons Convention in 2017: What Are the Boundaries to its Future Evolution?” Distinguished panellists shared their views and engaged conference attendees in discussions on challenges facing the OPCW and States Parties as they work together to achieve the fullest possible implementation of the Chemical Weapons Convention (hereinafter “the Convention”).
2. The event attracted over 100 participants, including moderators, panellists, Secretariat staff, representatives from approximately 48 States Parties, legal practitioners, and researchers from academic institutions.
3. H.E. Ms Sabine Nölke, Permanent Representative of Canada to the OPCW, moderated the morning panel and raised important questions about recent developments and the Convention during interventions from the podium and the floor. Similarly, H.E. Mrs María Teresa Infante, Permanent Representative of Chile to the OPCW, guided the afternoon’s discussions through a variety of complex topics related to the future of the Convention.
4. The panellists possessed a broad variety of legal experience and were drawn from geographically diverse locations. They included Mr Masahiko Asada, former Legal Adviser to the Japanese Delegation to the Conference on Disarmament and professor of international law at Kyoto University; Mr Olufemi Elias, former Legal Adviser of the OPCW; Ms Mona Khalil, former Legal Adviser of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic and the OPCW-United Nations Joint Mission in Syria for the elimination of the Syrian chemical weapons programme; Mr Konstantin Kosorukov, Acting Head of the Division of General Legal Issues at the Legal Department of the Ministry of Foreign Affairs of the Russian Federation; Professor Eric Myjer, Professor Emeritus of Conflict and Security Law at Utrecht University and former Legal Adviser of the Delegation of the Netherlands to the OPCW; Mr Natalino Ronzitti, Professor Emeritus of International Law at Rome-based University LUISS Guido Carli and former legal adviser to the Italian Mission at the Conference on Disarmament in Geneva; Ms Donata Rugarabamu, former Deputy Legal Adviser of the OPCW; and Ms Mallory Stewart, non-resident fellow in the WMD, Non-Proliferation and Security



Program at the Stimson Center and former Deputy Assistant Secretary at the United States Department of State.

PANEL DISCUSSION: REFLECTIONS ON RECENT DEVELOPMENTS AND THE CONVENTION

5. This panel's discussion focused on the authority of the Executive Council (hereinafter "the Council") and/or the United Nations Security Council to authorise the cross-border transfer of Syrian chemical weapons and subsequently the removal of the remaining Category 2 Libyan chemical weapons outside of Libya, to ensure their elimination. Participants debated in particular whether these cases provided the basis for a new interpretation of the prohibition on transfers of chemical weapons contained in subparagraph (1)(a) of Article I of the Convention, which would help the OPCW to deal with similar cases in the future.

The role of United Nations Security Council resolutions

6. Participants discussed whether Security Council resolutions 2118 (2013) and 2298 (2016) were essential to provide the legal basis for removal operations in the Syrian Arab Republic and Libya, respectively. Different views were expressed about the necessity and function of resolution 2118 (2013). Some expressed concern that this type of resolution could be read as assigning a legislative or interpretive function to the Security Council in respect of matters falling under the Convention. However, other participants were of the view that resolution 2118 was necessary, both legally and politically, to respond to the parliaments of United Nations Member States providing assistance for removal operations and their domestic constituencies. Others stated that resolution 2118, by specifically authorising Member States to transfer Syrian chemical weapons, could be regarded as codifying the agreement of States Parties to the Convention that the transfer of chemical weapons outside of the Syrian Arab Republic—to ensure their elimination as quickly and safely as possible—was consistent with the object and purpose of the Convention. It was recalled that resolution 2118 was adopted under Chapter VII of the United Nations Charter, which could override other treaty obligations by virtue of Articles 25 and 103 of that Charter.
7. It was noted that the Security Council acts when there is a threat to international peace and security, and that consideration prompted its actions with regard to chemical weapons in the Syrian Arab Republic and Libya. It was discussed that if chemical weapons could be secured and destroyed by the possessor States in a manner that did not pose a threat to international peace and security, there would be less justification for the involvement of the Security Council, considering the Council's general authority to promote the effective implementation of the Convention under paragraph 31 of Article VIII of the Convention.

Treaty interpretation

8. Following an observation that subparagraph (1)(a) of Article I of the Convention categorically prohibits transfers of chemical weapons, the discussion turned to the importance that should be placed on the *travaux préparatoires* in interpreting the Convention. It was noted that the *travaux préparatoires* show that treaty negotiations included a discussion of an exception for certain types of transfers for purposes of destruction, but the final text excludes any exception to the transfer prohibition. This raised the question of whether the Council has the authority to direct any transfers of

chemical weapons, particularly in the absence of an endorsing resolution of the United Nations Security Council.

9. Following that observation, participants discussed the general rules of interpretation articulated in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), parts of which are generally accepted as a codification of customary international law. The VCLT refers to “good faith,” “ordinary meaning,” and the “object and the purpose” of a treaty. Some concluded, therefore, that if the aim is effective implementation of the treaty, the meaning assigned to the word “transfer” is open to interpretation. Some argued that too much creativity on this definitional point might not be sustainable in light of the *travaux préparatoires*. Others pointed out the importance of subsequent practice under the VCLT in the application of a treaty, and referred to examples of Council decisions authorising transfers for purposes of destruction.

Defining “transfer” for purposes of the Convention

10. Differing views were expressed regarding what constitutes a “transfer”, a term used in the Convention. Some participants supported the view that any movement across an international boundary is a transfer, even if the possessor State Party maintains control of the chemical weapons throughout their movement between locations in at least two different countries. Some participants questioned how the possessor State Party could plausibly be deemed to have complete control of chemical weapons after they have crossed into the territory of another sovereign State Party.
11. Bearing in mind the Convention’s ultimate goal to completely exclude the possibility of use of chemical weapons, the discussion then turned to how the interpretation of “transfer” under the Convention needs to be allowed to evolve in a reasonable way in order to remain relevant to respond to unforeseen events, such as the requests from Libya and the Syrian Arab Republic. While this was recognised as a need, it was noted that States’ concerns about loss of sovereignty when engaging with other States in the context of a treaty should also be taken into account. International organisations, it was noted, should not be pushed to modify a treaty text by way of interpretation through collective action, as that might create hesitation among States not Party that are contemplating joining such organisations. In these situations, the institutions and mechanisms established by the treaty should be utilised to clearly agree on modifications to the treaty. However, other participants noted that an amendment process would be difficult to achieve.

Precedent

12. Participants had their attention drawn to the disclaimers built into the Council decisions approving removal operations for destruction. These disclaimers expressly state the lack of precedential value of such decisions. Hence, participants considered whether the Council’s action itself was an indication of State practice, meaning that a precedent had de facto been set. Opposing views were expressed on this point. Some participants were of the view that such disclaimers must not be disregarded, no matter how often a similar action might be taken or a similar text might be included. However, others stated that taking similar actions on several occasions demonstrates adherence to precedent even if the associated documents disclaim their precedential value. They also noted that the more frequently a certain type of activity occurs, the more difficult it is to describe such an activity as “extraordinary” (as some Council decisions do) and to deny the development of State practice.

PANEL DISCUSSION: REFLECTIONS ON FUTURE CHALLENGES FOR THE CONVENTION

13. This panel's discussion focused on whether or not the Convention directly prohibits non-State actors from developing, producing, or using chemical weapons. The panel also discussed if the full and effective implementation of the Convention, particularly Article VII thereof, is sufficient to effectively counter chemical terrorism and prevent any types of possible criminal activities in relation to chemical weapons.

Non-State actors and the Convention

14. Participants regarded the extension of the application of the Convention to non-State actors as a significant development. Specific reference was made to paragraph 12 of the Council's decision entitled "Addressing the Threat Posed by the Use of Chemical Weapons by Non-State Actors" (EC-86/DEC.9, dated 13 October 2017), which provides that Article X of the Convention applies to non-State actors. There was consensus on the point that the scope of activity undertaken with regard to non-State actors is likely to be informed by the views of States Parties on the object and purpose of the Convention, as obligations under the Convention are placed only on States Parties. One such obligation, laid down in subparagraph (1)(a) of Article VII of the Convention, is the requirement for States Parties to enact in their domestic laws the prohibitions contained in paragraph 1 of Article I of the Convention.
15. The majority of participants expressed the view that the prohibitions under paragraph 1 of Article I are comprehensive and that, in addition to Article VII, other relevant provisions in the Convention, such as paragraph 2 of Article VI as well as Article X, have direct relevance to countering terrorism. Most participants noted that there are sufficient mechanisms in the Convention which could be explored or enhanced to limit the threat of chemical weapons use by non-State actors, or to hold such actors accountable for any such use. However, a few participants noted what they considered to be gaps in the text of the Convention, which may create the risk of not fully addressing the issue of accountability. In this regard, these participants drew comparisons with other international legal instruments on the prevention of terrorism.

Application of the Convention in international and non-international armed conflicts as well as in times of war and peace

16. Participants noted that based on customary international law, considerable practice, and the relevant rules of international law, it can be concluded that the prohibitions set out in Article I of the Convention apply both to international and non-international armed conflicts. The focus on chemical weapons thus generally suggests the wartime application of the Convention, and could imply that the treaty does not apply in peacetime. However, others were of the view that the wording "under any circumstances" in Article I, as well as the inclusion of provisions in the Convention regarding riot control agents, indicate that the treaty remains relevant in peacetime, although one participant noted that its application may be of limited scope.

Jurisdictional considerations

17. States Parties are obliged, pursuant to subparagraph (1)(c) of Article VII of the Convention, to extend their penal legislation enacted under subparagraph (1)(a) of Article VII to any prohibited activity undertaken anywhere by natural persons possessing their nationality, in conformity with international law. It was discussed

that following effective and complete implementation of this treaty requirement, the majority of States in the world could prosecute crimes involving chemical weapons. It was noted that although the treaty does not require States Parties to prosecute individuals for Convention-related crimes on the basis of universal jurisdiction, this type of jurisdiction can be voluntarily adopted by States Parties and could further limit impunity for crimes involving the use of a chemical weapon.

CONCLUSION

18. The conference provided an opportunity for substantive discussions on a wide range of issues that will remain central to the OPCW's operations for the foreseeable future. The robust exchange of views broadened the perspective of those present, and this will accrue to the benefit of the Organisation.

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