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INTERNATIONAL CRIMINALIZATION OF BIOLOGICAL WEAPONS

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Abstract. A summary is given of three current initiatives to develop international criminal law as a new means for strengthening the global regime against biological weapons and the hostile exploitation of biotechnology.

- (i) The Preparatory Committee on the Establishment of an International Criminal Court, created by the UN General Assembly to prepare a text of a convention to create a permanent International Criminal Court, is developing a statute to define the crimes to be within the jurisdiction of the Court. The current rolling text of the statute includes a provision making it an international crime for any person, regardless of official position, to use "bacteriological (biological) agents or toxins for hostile purposes or in armed conflict" or to use chemical weapons. A diplomatic conference to finalize and adopt the text of the convention is to be held in Rome in mid-1998.
- (ii) A committee established by the UN General Assembly to elaborate an international convention for the suppression of terrorist bombings is considering a draft convention submitted by France on behalf of the Group of Seven Major Industrialized Countries and the Russian Federation. Included among the devices whose terrorist use would be made an international crime under the draft convention are those that release "biological agents or toxins".
- (iii) The Harvard Sussex Program on CBW Armament and Arms Limitation is endeavoring to promote the development and international consideration and adoption of a convention to make it a crime under international law for any person to order, direct, plan or knowingly participate in the development, production, acquisition, stockpiling, retention, transfer or use of biological weapons. The convention would make individual offenders, whether official or not, subject to indictment and prosecution by any State Party in which they may be found and by any international tribunal that may have appropriate jurisdiction.

Introduction. Every major new technology - metallurgy, explosives, aviation, electronics, nuclear energy - has come to be exploited not only for beneficial purposes but also for hostile ones. Will this be the case for biotechnology, surely destined to be a dominant technology of the 21st century?

Biological weapons that are already developed and tested provide a relatively simple and inexpensive means for the attack of people, animals and crops over large areas. A world in which the constraints against such weapons have broken down would be a world in which a multitude of states and non-state entities could acquire otherwise unattainable capabilities for overt and covert mass killing and destruction.

Over the longer term, a world in which biotechnology could be freely exploited for hostile purposes would be a world in which the very nature of conflict had radically changed. As our understanding of life-processes becomes increasingly profound and as biotechnology continues to advance, it will become possible not simply to destroy life, but to manipulate it, including the processes of cognition, development, inheritance and reproduction. Through such manipulation could lie terrible new opportunities for violence, coercion, repression or subjugation. Movement towards such a world would distort the accelerating revolution in biotechnology in ways that could vitiate its vast beneficial application, with inimical consequences for the future course of civilization.

Confronted with this menace, the international community faces a momentous challenge. Now that the Biological Weapons Convention (BWC) and the Chemical Weapons Convention (CWC) have singled out biological and chemical weapons for the only categorical prohibition of an entire class of weapons, it may be possible to achieve a worldwide system of disincentives, deterrents, sanctions, and norms sufficient to forestall the intensive exploitation of biotechnology for hostile purposes. Doing so would constitute a turning-point in the development of civilization, distinguishing the accelerating revolution in biotechnology from all previous major technologies.

The prohibitions embodied in the Biological Weapons Convention and the Chemical Weapons Convention (CWC) are directed to the actions of States, not individuals. Although the and, less explicitly, the BWC contain provisions obliging each State Party to prohibit persons under its jurisdiction from undertaking activities that are prohibited by these treaties, such provisions fail to deal with the situation in which an individual who orders, directs or knowingly commits an act prohibited by the BWC or the CWC enjoys official protection of the state, or is in a state that lacks jurisdiction to prosecute or fails to prosecute for any reason.

These gaps in the existing regime against biological and chemical weapons can, to a significant extent, be addressed by the creation of appropriate international criminal law that holds individual perpetrators responsible for prohibited activities. This is illustrated by two draft conventions currently under discussion under the auspices of the UN General Assembly, both directed against the use (but not the development production, acquisition, or transfer) of biological and chemical weapons. The first of these draft conventions would create an International Criminal Court (ICC), with jurisdiction over war crimes, including

the crime of using biological or chemical weapons by anyone, including leaders and officials of states. The second, known as the "Bombing Convention", would also prohibit the use of such weapons but would apply exclusively to terrorists. A third draft convention, also applicable to anyone, is being developed by the Harvard Sussex Program and would make it a crime under international law not only to use but also to develop, produce, acquire, stockpile, retain or transfer biological or chemical weapons.

Convention to Establish an International Criminal Court. In June 1998, a diplomatic conference of plenipotentiaries will meet in Rome to finalize and adopt a convention on the establishment of an International Criminal Court. This follows years of study and drafting of a statute for such a court by the International Law Commission, a body of experts appointed by the General Assembly to codify and develop international law -- followed by further study and drafting by an ad hoc committee and then a Preparatory Committee established by the General Assembly in December 1995.

The International Criminal Court would differ from the existing International Court of Justice in The Hague in that the latter advises or adjudicates disputes only between states, while the ICC would have jurisdiction over individual persons accused of certain specified crimes, including war crimes. The ICC would also differ from the ad hoc tribunals created by the Security Council to deal with crimes in the former Yugoslavia and in Rwanda in that the ICC would be permanent, would have jurisdiction over certain categories of crime wherever they occur, and would draw its authority not from the Security Council but rather from the large number of states that would be parties to the convention that creates the Court.

The present rolling draft text of the statute of the Court includes among the crimes proposed to be under its jurisdiction the crime of using "bacteriological (biological) agents or toxins for hostile purposes or in armed conflict" and of using "chemical weapons" as they are defined in the CWC. Regarding individual responsibility for crimes covered in the draft statute, the rolling text provides that "a person is criminally responsible if that person commits, orders, induces, or knowingly facilitates the commission of such a crime which in fact occurs or is attempted." Moreover, the statute is to be applicable to "all persons without any discrimination whatsoever". Further, "official capacity as Head of State or Government, or as a member of a Government or parliament or as an elected representative, or as a government official shall in no case exempt a person from his criminal responsibility under this Statute, nor shall it [*per se*] constitute a ground for reduction of the sentence."

The existence of an International Criminal Court operating under such a statute could have profound implications for the prohibition of biological and chemical weapons, extending beyond actual use to include attempted use and covering perpetrators and all who

order or knowingly aid them in the prohibited activity, regardless of official position. Faced with the possibility of indictment and, if brought before the court, conviction, sentencing and punishment, those contemplating biological or chemical weapons activities, from terrorists to heads of state, might well reconsider.

It is not appropriate here to attempt to address the many political and technical issues connected with the creation and operation of the ICC. But it should be noted that the knowledge and perspectives of those experienced in CBW arms control efforts will be needed in the further development of the ICC statute as it applies to CBW weapons if the applicable provisions are to be effectively worded.

Information and documents pertaining to the International Criminal Court may be found on the World Wide Web at amnesty.it and at igc.apc.org/icc.

Convention for the Suppression of Terrorist Bombings. UN General Assembly resolution 51/210 of 17 December 1996 established an Ad Hoc Committee to elaborate an international convention for the suppression of terrorist bombings. On 11 February 1997, France, on behalf of the Group of Seven Industrialized States and the Russian Federation, submitted to the General Assembly a draft convention on terrorist bombings which is now before the above-mentioned Ad Hoc Committee.

The draft Bombing Convention makes it an offence to deliver, place, or discharge any device that releases "biological agents or toxins" with the intent to cause death or serious bodily injury, or to attempt to do so, or to organize or direct others to do so. The draft convention includes similar provisions dealing with explosive, incendiary, and toxic chemical bombs and devices. The draft bombing convention applies only to acts committed by terrorists. Article 3 specifically states that it does not apply to acts by "military forces of a State in connection with their official duties."

The draft Bombing Convention would obligate a State Party in which an alleged offender is found, without exception and whether or not the offence was committed on its territory, either to extradite the person or to submit the case to its competent authorities for prosecution in accordance with the laws of that state.

Convention for the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons. This proposed convention seeks to create international criminal law that would hold individual perpetrators criminally responsible for activities that are prohibited by the biological and chemical conventions. It defines activities prohibited by the BWC or the CWC as criminal offenses and obliges each of its States Parties: (i) to establish jurisdiction

with respect to such crimes extending to all persons on its territory, regardless of the place where the offense was committed and the citizenship of the offender and (ii) to prosecute or extradite any such offender found on its territory. A person who, for example, orders, directs or knowingly participates in the development, production or use of biological weapons in a State "A" which, for any reason, fails to apprehend or prosecute the person would face the risk of apprehension, prosecution and punishment or of extradition should that person subsequently be found in a state "B" that supports the proposed convention.

The same obligations, to establish criminal jurisdiction and to extradite or adjudicate (*aut dedere aut judicare*), are included in international conventions now in force for the suppression and punishment of aircraft hijacking and sabotage (1970; 1971), crimes against internationally protected persons (1973), hostage taking (1979), theft of nuclear materials (1980), torture (1984) and crimes against maritime navigation (1988).

The proposed Convention also provides that jurisdiction with respect to the offenses it sets forth may be exercised by any international tribunal that may have jurisdiction in the matter. Such a tribunal would presumably have the authority to issue an indictment and an international arrest warrant even when the offender is beyond its reach at the time.

The proposed Convention includes provisions that oblige its States Parties to provide assistance to one another in the adjudication of offenses and that guarantee fair treatment and due process of law in all proceedings.

Adoption and widespread adherence to the proposed Convention would provide a new dimension of constraint against biological and chemical weapons by applying international criminal law to hold individual offenders responsible and punishable wherever they may be and regardless of whether they act under or outside of state authority. Such individuals would be regarded as *hostis humanis generis*, enemies of all humanity. The norm against chemical and biological weapons would be strengthened, deterrence of potential offenders, both official and unofficial, would be enhanced, and international cooperation in suppressing the prohibited activities would be facilitated.

A model treaty criminalizing biological and chemical weapons under international law has been drafted by the Harvard Sussex Program on CBW Armament and Arms Limitation and has been further developed with the advice of a committee of legal experts. It is attached as an appendix.