

A Draft Convention to Prohibit Biological and Chemical Weapons Under International Criminal Law

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Any development, production, acquisition or use of biological or chemical weapons is the result of decisions and actions of individual persons, whether they are government officials, commercial suppliers, weapons experts or terrorists. The international conventions that prohibit these weapons, the Biological Weapons Convention of 1972 (BWC) and the Chemical Weapons Convention of 1993 (CWC), however, are directed primarily to the actions of states, and address the matter of individual responsibility to only a limited degree. Article IV of the BWC and

Article VII of the CWC require each state party to prohibit activities on its territory that are prohibited to a state party. The CWC explicitly requires each state party to enact penal legislation to this effect, applicable also to activities of its own nationals anywhere.

Nevertheless, the BWC and the CWC stop short of requiring a state party to establish criminal jurisdiction applicable to foreign nationals on its territory who commit biological or chemical weapons offences elsewhere -- and neither convention contains provisions dealing with extradition.

These deficiencies are not remedied by the provisions applicable to biological and chemical weapons in the Convention for the Suppression of Terrorist Bombings, opened for signature in January 1998, or in the Rome Statute of the International Criminal Court, which entered into force on 1 July 2002. The Bombing Convention does not apply to the activities of military forces in the exercise of their official duties or to internal state acts --such as the use of CBW weapons by a leader against a population within his own state. Nor does the scope of either of these agreements extend beyond the actual use of CBW weapons to include, as do the BWC and the CWC, their development, production, acquisition and stockpiling.

National criminal legislation, so far enacted by only a minority of states, is no substitute for international criminalization. Purely national statutes present daunting problems of harmonizing their various provisions regarding the definition of crimes, rights of the accused, dispute resolution, judicial assistance and other

important matters. Neither do national criminal statutes convey the universal condemnation implicit in international criminal law. Moreover, the national legislation of a state would generally have no applicability in the case of a non-citizen present in that state who has, for example, ordered or knowingly rendered substantial support to the production of biological weapons in the state of his or her nationality which, for one reason or another, fails to take action.

What is needed is a new treaty, one that defines specific acts involving biological or chemical weapons as international crimes, like piracy or aircraft hijacking, obliging states to establish jurisdiction over offenders who are present in their territory, regardless of their nationality and of where the offence was committed. Treaties defining international crimes are based on the concept that certain crimes are particularly dangerous or abhorrent to all and that all states therefore have the right and the responsibility to combat them. Certainly in this category, threatening to the community of nations and to present and future generations, are crimes involving the hostile use of disease or poison and the hostile exploitation of biotechnology.

THE HARVARD SUSSEX DRAFT CONVENTION

Starting in 1996 and at workshops in 1997 and 1998, the Harvard Sussex Program on CBW Armament and Arms Limitation, with advice from an international group of legal authorities, has developed a draft convention that would make it a crime under international law for any person knowingly to develop, produce, acquire, retain, transfer or use biological or chemical weapons or to order, direct or knowingly render substantial assistance to those activities or to threaten to use biological or chemical weapons. Under such a convention, any person who commits any of the prohibited acts anywhere would face the risk of apprehension, prosecution and punishment or of extradition should that person be found in the territory of a state that supports the proposed convention.

The proposed convention would oblige each state party: (i) to establish jurisdiction with respect to the specified crimes extending to all persons in its territory, regardless of the place where the offence is committed or the nationality of the alleged offender; (ii) to investigate, upon receiving information that a person alleged to have committed an offence may be present in its territory, and (iii) to prosecute or extradite any such alleged offender if satisfied that the facts so warrant. The same obligations, to establish jurisdiction and to extradite or adjudicate (*aut dedere aut judicare*), are included in international conventions now in force for the suppression and punishment of international crimes including aircraft hijacking and sabotage (1970 and 1971), crimes against internationally

protected persons (1973), hostage taking (1979), theft of nuclear materials (1980), torture (1984) and crimes against maritime navigation (1988). It was on the basis of the 1984 Torture Convention that Britain asserted jurisdiction in the case of Spain's request for extradition of former Chilean president Augusto Pinochet.

The Harvard Sussex draft convention defines biological and chemical weapons as they are defined in the BWC and the CWC, on the basis of a general purpose criterion worded so as to prohibit activities undertaken with hostile intent, while not prohibiting those intended for protective, prophylactic or other peaceful purposes. Thus, Article I of the BWC defines biological weapons as:

(1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes,

(2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Commission of a prohibited act is defined in the proposed convention as a crime only if committed "knowingly". It is an admissible defence that the accused person "reasonably believed" that the conduct in question was not prohibited. It is not a defence that a person acted in an official capacity or under orders of a superior.

The proposed convention includes provisions intended to guarantee due process and fair proceedings and requiring that any dispute between states concerning the interpretation or application of the convention be submitted at the request of one of them, to arbitration or to the International Court of Justice in The Hague. There are also provisions requiring states parties to cooperate in investigations and to provide legal assistance to one another in the adjudication of offences.

The definitions and prohibitions in the present draft closely follow those in the BWC and the CWC. Consideration could be given, however, to possible modifications of the text in order to facilitate practical implementation as an instrument of criminal law and to provide additional safeguards for legitimate activities.

STATUS OF THE PROPOSAL

The Harvard Sussex draft convention was presented by the Netherlands to the Public International Law Working Group (COJUR) of the Council of the

European Union at its meeting of 31 January 2002. COJUR agreed that delegations would submit the proposal to their governments for consideration, along with the positive comments made by a number of delegations during the meeting. Shortly thereafter, international criminalization was included as one of eleven measures proposed for consideration in the UK government's Biological Weapons Green Paper presented to Parliament on 29 April 2002 by the Secretary of State for Foreign and Commonwealth Affairs:

A new Convention on Criminalization of CBW: there are already proposals, developed initially in the academic community, for a new Convention that introduces criminal responsibility for any individual indicted/or violating the prohibitions of the Biological and Toxin Weapons Convention or the Chemical Weapons Convention. States would be obliged to prosecute or extradite indicted individuals. (Cm 5484)

A further statement from the UK government is contained in a memorandum of 18 November 2002 from the Foreign and Commonwealth Office to the Foreign Affairs Committee of the House of Commons:

The Harvard Sussex Program on CBW Armament and Arms Limitation has developed a draft Convention for the criminalization of CBW activities at the individual level. This draft builds on existing legal precedents and international agreements and has been considered by officials since it was first launched in the late 1990s. It was one of the measures especially identified in the Green Paper as a possible option and it remains one that the government would be ready to see taken forward as part of international efforts to counter the threat posed by CBW proliferation. (HC 150, Session 2002-03)

IMPLEMENTATION OF THE PROPOSAL

In conformity with the procedure by which other international criminalization conventions have come into being, a group of sponsoring states might submit the proposed convention or a similar draft in the form of a resolution for consideration by the UN General Assembly, seeking its referral to the UNGA Sixth (Legal) Committee for negotiation and preparation of an agreed text. This might be completed in a year, in time for the following General Assembly. Following a resolution of commendation by the Assembly, the agreed convention would be opened for signature. After ratification by a specified number of states, it would enter into force. Alternatively, a regional or other grouping of states might

convene a diplomatic conference with a view to producing an agreed text that could then be opened for signature and ratification by any state wishing to do so.

Adoption and widespread adherence to such a convention would create a new dimension of constraint against biological and chemical weapons by applying international criminal law to hold individual offenders responsible and punishable should they be found in the territory of any state that supports the convention. Such individuals would be regarded as *hostes humani generis*, enemies of all humanity. The norm against chemical and biological weapons would be strengthened, deterrence of potential offenders would be enhanced, and international cooperation in suppressing the prohibited activities would be facilitated. International criminalization would serve to place the problem of biological and chemical weapons and the potential for hostile exploitation of biotechnology in its proper context: not only a threat to the security of individual states but a menace, now and in the future, to all humanity.